

NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Amber Contracting Ltd.*,
2009 NSCA 103

Date: 20091016

Docket: CA 299314

Registry: Halifax

Between:

The Halifax Regional Municipality,
a municipal corporation duly incorporated pursuant to
the laws of the Province of Nova Scotia

Appellant

v.

Amber Contracting Limited

Respondent

Judge: Justice Oland
Justice Hamilton dissenting by separate reasons

Appeal Heard: June 5, 2009

Subject: Construction Law - Tendering - Duty of Good Faith

Summary: Halifax Regional Municipality (HRM) issued a call for tenders on a construction contract. In accordance with the tender document, the tenders were opened publicly and the results published. All the tenders substantially exceeded the construction estimate. The appellant's tender was the lowest bid. Contrary to its usual practice of negotiating with and awarding to the lowest bidder, HRM cancelled the tender and, several months later, re-tendered the same contract. A company which had not bid on the original tender won the contract. The trial judge found that by re-tendering to obtain a better price and not following its practice of negotiating with the lowest bidder, HRM breached its duty of fairness to the appellant. It could not then rely on the privilege clauses in the tender document to suggest that the appellant had waived its right to make a claim.

Issue: (1) Do the privilege clauses contained in HRM's tender affect the implied duty of fairness which the trial judge found HRM owed to Amber?

(2) Did HRM breach the implied duty of fairness?

(3) If it did, should the trial judge's award of damages to Amber be altered?

Result: Appeal allowed. A tendering authority has the right to reserve privileges to itself in the tender documents. In determining the nature and extent of the duty of fairness, the trial judge erred in law by failing to give due regard to the contractual terms in the particular tender call. Here the tender documents reserved to the owner the right to reject all tenders if none is considered satisfactory and, at its option, to call for additional tenders, and excluded any implied term based on any practice of the owner. HRM's decision to re-tender and not to follow its usual practice were expressly permitted by the contractual terms of the tender.

(Dissent) I would dismiss the appeal. Given the wording of the tender documents, the evidence as a whole and the importance of protecting the integrity of the tendering system, a term should be implied in the tender documents that HRM would not terminate the first tender process and re-tender the identical project six months later to try to obtain a lower price. The judge did not err in the amount of damages she awarded.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.