C.A. No. 02934

NOVA SCOTIA COURT OF APPEAL

Cite as: Woodlawn Construction Ltd. v. Bedford Waterfront Development Corp. Ltd., 1994 NSCA 116

Hallett; Matthews and Pugsley, JJ.A.

BETWEEN:

WOODLAWN CONSTRUCTION LTD. Appellant - and - BEDFORD WATERFRONT DEVELOPMENT CORP. LIMITED Respondent	George W. MacDonald, Q.C. for the Appellant Dennis A. Ashworth for the Respondent Appeal Heard: May 31, 1994 Judgment Delivered: August 3, 1994

THE COURT: Appeal dismissed with costs as per reasons for judgment of Pugsley, J.A.; Hallett and Matthews, JJ.A. concurring.

PUGSLEY, J.A.:

The low tender of $1.3 million by Woodlawn Construction Limited (Woodlawn) to develop sewer systems and roads, was accepted by the Bedford Waterfront Development Corporation (Bedford) in May, 1991.

Woodlawn did not factor G.S.T. in its tender price and sued Bedford when Bedford refused to pay the G.S.T. which Woodlawn added to the contract invoice instalments.

The trial judge dismissed Woodlawn's action, accepting Bedford's submission that the terms of the contact were clear that all taxes, including G.S.T., were to be included in the tender price.

Woodlawn appeals to this Court, seeking from Bedford the $91,000 in G.S.T Woodlawn has paid, together with interest.

EVIDENCE:

In June of 1990, after receiving an estimate of $2.5 million, from its consulting engineer, Peter Klynstra, as the cost to develop new sewer systems and roads, Bedford made a call for tenders.

The low bid of $1.5 million was entered by Dexter Construction. Bedford, however, was unable to award the contract because of a problem with the financial participation of the Federal government.

Effective December 31, 1990, the former Federal sales tax was eliminated.

The Goods and Services Tax became effective as of January 1, 1991.

Bedford made a call for tenders in April, 1991, for virtually the same work except for the landscaping component, as contemplated in the 1990 call.

The Instructions for Tenderers provided in part:

"10 Price

.3 Unit prices or lump sum prices entered against each item shall include only the true costs, overheads, and anticipated profit for each item. Unbalancing of bid prices in any manner is not acceptable and shall not be recognized in connection with any changes in the quantities or subsequent claims and may result in the disqualification of the tender.

. . .

.6 Federal and Provincial taxes are to be included in the prices quoted in the Schedule of contract Unit Prices.

General Condition 15 under the heading "Taxes and Duties" provided in part:

15.1 Unless otherwise stated in Supplementary Conditions the contractor shall pay the government sales taxes, customs duties and excise taxes with respect to the contract.

. . .

15.4 The contractor will be required to provide evidences of all Goods and Services Tax amounts paid in respect to the Work."

Kerry Humphries, Woodlawn's estimator and superintendent, in the course of preparing take-offs and costing to arrive at a tender price, included G.S.T. on the labour portion. When he presented his estimates to Woodlawn's president, Harry Poole, Humphries was instructed to delete the G.S.T.

Mr. Poole in support of his conclusion that G.S.T. should not be included in the tender price relied on the first sentence in s. 10.3 in the Instructions to Bidders. He testified that G.S.T. was "not a cost to us... any G.S.T. we were required to pay we were reimbursed. So that didn't constitute a cost."

Walter Muise, Woodlawn's comptroller for the past 20 years, testified that G.S.T. had no effect on "the costing or profitability" of the company's business, since the company served only as a bank or a collection agency.

He stated:

> "...if we make up a bill to a customer, we charge him G.S.T., he pays it, and we send it off to the government. If we buy something and we pay G.S.T., we pay the supplier, and then we get it back from the government. So no G.S.T. dollars ever stay with us."

With respect to the reference to Federal taxes contained in s.10.6, Mr. Poole testified it meant "virtually nothing", that Bedford had recycled tender documents produced for a 1990 bid call (when Federal sales tax did exist and G.S.T. had not yet come into effect), and had simply neglected to delete the reference to "Federal taxes".

Mr. Poole's interpretation was supported by the evidence of Mr. Muise, as well as Kenneth Muir, a former director of operations for Woodlawn with 35 years in the construction business.

Mr. Muir testified that s.10.6 was a holdover from contracts that existed in the former Federal sales tax and it was "terminology that was included in all tenders for years and years".

Acknowledging that there was a bit of a "grey area" as to whether G.S.T. should be included, Mr. Muir suggested to Mr. Poole that a note could be added "at the bottom of the tender that G.S.T. is not included in the price."

This suggestion was rejected when they both agreed that such a note would disqualify the tender in view of s. 5.2 of the Instructions to Tenderers, which read:

> "Conditional Tenders not in accordance with the Tender Documents will not be considered."

In January of 1991, after the introduction of the G.S.T., Mr. Klynstra had prepared a new estimate of the cost of the Work, which aggregated 1.5 million dollars.This estimate was approximately the same as the low tender from Dexter Construction for the 1990 invitation.

Klynstra testified that his 1991 estimate included G.S.T., but since prices had fallen in the ten months since his 1990 estimate had been prepared, and Federal sales tax was eliminated, his 1991 estimates were roughly equivalent to the bid prices tendered by Dexter.

Woodlawn was the low bidder with a price of $1,376,945.50.

The contract was awarded to Woodlawn effective June 3, 1991 and work commenced a few days earlier.

Mr. Klynstra acknowledged that even if Woodlawn had added G.S.T. to its tender, its 1991 tender price would have been the low tender.

When Woodlawn submitted its first application for payment on July 3, 1991, it added G.S.T. to the amount being claimed as due for payment.

Bedford deducted an amount equal to the G.S.T. and remitted the balance by a letter dated July 12, 1991, pointing out that "all unit prices were to include all Federal and Provincial taxes which also includes the G.S.T. as of January 1, 1991."

Mr. Muir, after checking with Mr. Poole, responded on July 24, 1991, as follows:

> "There is no argument that the documents read 'Federal and Provincial Taxes are to be included in prices quoted'. However, G.S.T. is not 'Federal Tax'."
>
> By definition, G.S.T. is a tax on non-commercial domestic consumption of goods and services, and although administered by the government of Canada, is not, in anyway referred to as 'Federal Tax'.
>
> In addition, we understand that the successful bidder on the landscaping contract at the same location 'qualified' his bid as not including G.S.T. and subsequently his prices were adjusted to include it.
>
> Furthermore, in the new tender call for contract 1050-03, we note that you have clarified the tax situation to explicitly not include G.S.T. but to include 'federal and provincial taxes'.

> At the time of quoting on this project, and not desiring to 'qualify' the tender with added notes, our understanding was that the G.S.T. was an non indemnity in that, we pay it to our suppliers, get rebate for it, collect it from the owner, remit it to the government and the owner applies for rebate of amount paid.
>
> With this in mind, and as with all other unit price contracts, we 'do not include G.S.T. in our tender prices'."

On June 12, '91, some weeks before submitting its first Application for Payment, Woodlawn forwarded to Bedford an offer for adjusted unit prices arising out of a design change. After quoting fixed prices, the letter signed by Mr. Muir, provided:

> "These prices, of course, are exclusive of G.S.T."

All subsequent change orders issued through the course of the contract contained a similar provision. Bedford paid G.S.T. in each instance.

Woodlawn paid to the Federal government the G.S.T. calculated on the original contract price. Bedford was eligible to receive a rebate from the Federal government on all G.S.T. paid by Woodlawn, and Bedford subsequently recovered the G.S.T. amount in full.

FINDINGS OF THE TRIAL JUDGE:

The trial judge concluded that:

1. The G.S.T. is a federal tax;

2. The reference to "Federal and Provincial taxes" in s. 10.6 in the Instructions to Tenderers was meant to include the G.S.T., and did include the G.S.T.;

3. There was no industry practice to exclude the G.S.T. in unit prices quoted;

4. There was no ambiguity as to whether the G.S.T. was to be included in the unit prices tendered;

5. If Woodlawn was uncertain as to any aspect of the tender, it was under an obligation to seek clarification from Bedford or its consultants;

6. Had the phrase "including G.S.T. or excluding G.S.T." been added to the unit prices, this would not have made the tender, into a conditional tender under Article 5.2 of the Instructions to Tenderers, and resulted in the tenders being disqualified under Article 10.3 of the Instructions to Tenderers.

ISSUES:

Woodlawn raised the following issues on this appeal:

I. The trial judge erred in finding that Woodlawn was obliged to include G.S.T. in the unit prices bid on the contract;

2. The trial judge erred in concluding that the addition of the phrase "excluding G.S.T." would not have violated the Instructions to Tenderers;

3. The trial judge erred in determining Bedford included G.S.T. in its 1991 pre-tender estimate;

4. The trial judge erred in finding there was no industry practice to exclude G.S.T. on the prices quoted in the unit price contracts.

Issue One

Woodlawn submits that the trial judge erred in finding that Woodlawn was obliged to include G.S.T. in the unit prices bid on the contract.

Woodlawn's submissions on this first issue are three fold:

a) G.S.T. is not a tax in the normal sense of the word;

b) G.S.T. is not a true cost, as that term is referred to in Article 10.3 of the Instructions to Tenderers, because it is not a cost that is intended to be ultimately incurred by Woodlawn but passed on to an owner;

c) the reference to Federal taxes in the 1991 tender was simply an inadvertent failure by Bedford to delete the provision which related to the Federal sales tax, which was repealed as of December 31, 1990.

With respect to each of these submissions:

a) Mr. Muir testified that he did not consider the G.S.T. "a tax in the normal sense of the word" but rather a "service charge" or an "added value assessment".

Kerry Humphries, Woodlawn's general superintendent and estimator, admitted in cross-examination, however, that the G.S.T. was a Federal tax and the only Federal tax that he knew about.

The comments of Lamer, C.J.C. in **The Attorney General of Canada** v. **The Attorney General of Alberta et al** (1992), GSTC2, as noted by the trial judge, are apposite:

> "In my view, the answer to the first question is quite simple. The **GST Act** has no purpose other than to raise revenue for the federal government, and it does in fact raise revenue at the point of consumption of taxable supplies. As such it would be

> hard to dispute that the Act itself is properly characterized as being in relation to a mode or system of taxation in the meaning of s. 91(3) of the **Constitution Act**, 1867".

In the course of determining that the G.S.T. is a Federal tax, the trial judge stated:

> " The T in the name would indicate that the drafters may have considered it a tax. Otherwise, they may have called it by some other name... The Act defines 'tax' as 'tax payable under this part.' It defines taxation year and makes reference to appeals to the Tax Court of Canada."

I agree entirely with the conclusion reached by the trial judge.

b) Woodlawn points out that Federal sales tax is not a true cost of construction because the owner who pays it to a contractor does not obtain a refund.

Woodlawn argues that the first sentence of Article 10.3 (unit prices are lump sum prices entered against each item, shall include only the true cost, overheads and anticipated profit for each item) supports its position that the G.S.T. is not a "true cost".

This submission, in my opinion, ignores the context in which the first sentence of Article 10.3 appears. The Article is designed to prevent tenderers from quoting other than true costs, to prevent "the unbalancing of bid prices".

The evidence reveals that this technique may be employed in unit price contracts to permit a contractor to manipulate cash flow and inflate profit at the expense of the owner, unless wording is included, similar to that contained in s. 10.3.

The second sentence of Article 10.3 lends support to this interpretation.

c) Woodlawn argues that Articles 10.3 and 10.6 contained the same wording in both the 1990 and 1991 Instructions to Tenderers, that the reference to Federal

> taxes in the 1991 edition was simply an inadvertent failure by Bedford to delete an obsolete provision.

The reference in Article 10.6 is, however, to Federal taxes, not Federal sale taxes.

In considering Woodlawn's argument, it is significant that Mr. Poole testified that Woodlawn did not obtain a copy of the 1990 tender documents, did not tender on the 1990 contract, nor was he aware that when Woodlawn prepared its tender in the Spring of 1991, that Woodlawn was tendering on a project similar to that tendered in 1990.

There are two further matters that indicate that Woodlawn's stated position that there was no obligation to include G.S.T. in the unit prices on the contract was tenuous.

- On June 12, 1991, Woodlawn forwarded a proposal to Bedford dealing with change orders to the contract. It apparently was the first written communication relating to prices after the finalization of the contract. The letter provides in part:

  "These prices, of course, are exclusive of G.S.T."

  If it was patently obvious, that G.S.T. was not included in the original quotation, submitted by Woodlawn, why did Woodlawn consider it necessary to insert such a provision in the letter of June 12th? It is reasonable to infer that Woodlawn was unsure of its position.

  The letter of June 12th lends support to the inference taken by the trial judge who commented:

  > "In failing to include the G.S.T. in the unit price tender and in not contacting the defendant or its consultants for clarification, I draw the inference that the plaintiff decided to submit the tender for

> the lower price, ie., excluding the seven percent (7%) G.S.T. in an effort to gain the contract. Once awarded the contract, perhaps the defendant would be persuaded by its arguments for not including the G.S.T. I consider probably getting the contract was the paramount consideration, then deal with the G.S.T. later."

- Humphries included G.S.T. on the labour component when he prepared his original take-off.

Section 10.6 is clear. It obliges a tenderer to include Federal and Provincial taxes when quoting unit prices. There is, in my opinion, no ambiguity in the terms of the contract.

I conclude that the trial judge was correct when he determined that Woodlawn was obliged to include G.S.T. in its bid.

Issue Two:

> The trial judge erred in concluding that the addition of the phrase "excluding G.S.T." would not have violated the Instructions to Tenderers.

Article 5.2 of the Instructions to Tenderers provides:

> "Conditional Tenderers not in accordance with the Tender Document will not be considered."

The short answer to Woodlawn's submission is that G.S.T. could have been added to the unit prices or a note that "G.S.T. not included".

Such precaution would not have rendered the bid conditional.

In response to the trial judge's determination that if Woodlawn was uncertain as to any aspect of the tender, "it is under an obligation to seek clarification "from Bedford", Woodlawn submits that Poole did not seek clarification because he was not

confused. The evidence however does illustrate confusion and uncertainty on the part of Mr. Poole.

In response to the question "Now did you give any consideration, prior to putting your tender in, to whether or not G.S.T. should be included in your units?".

Mr. Poole responded:

> "It certainly wasn't a clear tender form. There was some discussion on it, and I assume we did consider and see no way you could include them because it was not the intent of the people that we had talked to include anything...And there was confusion as to whether we should and we certainly made the decision that there should never be. There was no requirement to have G.S.T. included in any portion."

Mr. Poole was also troubled by the provisions of General Condition 15.4 which provided:

> "The contractor would be required to provide evidences of all Goods and Services Tax amounts paid in respect to the Work."

He testified:

> "Well I wasn't quite clear on what it meant...I don't understand it yet...I don't know what the reasoning is for this."

A telephone call prior to responding to the tender call would have cleared up any confusion on Woodlawn's part.

I further agree with the conclusion of the trial judge that the addition of the words "excluding G.S.T." would not render a tender conditional and offended Article 5.2.

Issue Three

> The trial judge erred in determining Bedford included G.S.T. in its 1991 pre-tender estimate.

Woodlawn argues that Bedford did not require or expect any tenderer to add G.S.T. to the unit prices that were bid, and this is demonstrated, it is submitted, by comparing Klynstra's 1990 pre-tender estimate ($2,475,415.00) with his 1991 pre-tender estimate ($1,556,053.00).

Klynstra testified at trial that in preparing the 1990 estimate as well as the 1991 estimate he included all costs to Bedford including labour, materials, overhead, profit and taxes, and in 1991, G.S.T.

A comparison of the unit prices contained in Dexter's 1990 bid, with Klynstra's 1991 estimated unit prices, reveals 18 identical prices.

Woodlawn argues that this indicates that Klynstra did not include G.S.T. in his 1991 estimate but simply lifted prices from Dexter's 1990 bid and used them as the basis for the 1991 estimate without G.S.T. being added.

A review of all price items, however, illustrates that there were many items that were not identical.

Klynstra testified at trial, that in addition to adding on G.S.T., he deducted Federal sales tax, and:

> "...prices had been going down and we felt that the tenders would be lower, and they were. And it was - it's not a simple mathematical exercise. I had to make an evaluation of what the price would be and I felt that the reasonable, slightly conservative estimate would be to use Dexter's prices in large measure and that that price would include G.S.T."

While one is struck by the 18 items that possessed identical prices, the trial judge had an opportunity of observing Klynstra's demeanour and after doing so commented on his evidence as follows:

> " Klynstra was cross-examined at some length about the estimate he prepared for the use of the defendant in considering the tenders when submitted. He said that he took the 1990 work of Dexter Construction and checked those figures. He said costs had depressed from 1990 to 1991. Generally some work was added from the 1990

> tender and some deleted. He said he discussed the prices and the G.S.T. with various other members of the consulting team while preparing his estimate. He added the G.S.T. to his estimated price.
>
> Klynstra said there may be some F.S.T. features still in force and he cited the rental of machinery owned by non-resident companies."

The trial judge made no adverse finding of credibility against Klynstra, and presumably accepted Klynstra's explanation that costs "had depressed" in the period 1990 to 1991 when the trial judge determined that "in 1991 in the construction industry may not have been the worst of times but the evidence of Klynstra was that it was worse than 1990."

The conclusion of the trial judge that considering all of the documentation relevant to the tendering process for the contract, that Woodlawn "was obliged to include the G.S.T. in the units prices re costs tendered" is an implied acceptance of Klynstra's evidence that Klynstra added the G.S.T. when he prepared his 1991 estimates.

I would dismiss this ground of appeal.

Issue Four

> The trial judge erred in finding there was no industry practice to exclude G.S.T. from prices quoted in unit price contracts.

Woodlawn's tender was a joint effort in which Humphries and Muir participated.

Humphries' initial instinct was to include G.S.T. in the labour component of the unit prices, and Muir acknowledged that there was a bit of a "grey area" as to whether G.S.T. should be included. This evidence is not consistent with Woodlawn's submission that industry practice was uniform.

Woodlawn also submitted that the provisions of the Nova Scotia Standard Specifications for Municipal Services, (January 1991 edition) were incorporated into the tender documents.

Articles 9.1 and 9.2, in those standards provided:

> "9 .1 Include all taxes except Goods and Services Tax in tender prices.
>
> .2 The contractor will indicate on each application for payment, as a separate amount, the appropriate Goods and Services Tax the Owner is legally obligated to pay. This amount will be paid to the contractor in addition to the amount certified for payment under the contract and will therefore not affect the contract Price."

Woodlawn might have an argument if these particular provisions were incorporated into the contract it negotiated with Bedford.

The trial judge has found however, and the evidence supports the finding, that the contract in issue did not incorporate Articles 9.1 and 9.2 of the Nova Scotia Standard Specifications.

Accordingly, in my opinion, Woodlawn has failed to establish an industry practice to exclude G.S.T. from prices quoted in unit price contracts.

CONCLUSION

I would dismiss the appeal with costs in the amount of $2,500.00, plus disbursements.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.