1997 S.H. No. 140040C

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

WESTERN PLUMBING AND HEATING LIMITED

Plaintiffs

- and -

INDUSTRIAL BOILER-TECH INC.

Defendant

DECISION

HEARD BEFORE: The Honourable Justice David W. Gruchy at Halifax, Nova Scotia

DATE(S) HEARD: August 26, 1999

DECISION DATE: September 24, 1999

COUNSEL: John Kulik and Robert Blackie, articled clerk, for the Plaintiff

Colin Bryson for the Defendant

GRUCHY, J.:

Factual Overview

In late 1996 and early 1997 the plaintiff, Western Plumbing and Heating Limited ("Western"), prepared a tender as a result of a call by a prime contractor, Roscoe Construction Limited, ("Roscoe") for construction of an addition to a research laboratory in Kentville, Nova Scotia. In the process of preparing its tender, Western inquired orally of the defendant, Industrial Boiler-Tech Inc. ("Industrial") whether it could supply two certain boilers. Industrial was not privy to and had no knowledge of the details of Roscoe's tender call or any of the terms and conditions thereof. The tender call to the prime contractors was to close on January 15, 1997 which date was later extended to January 17, 1997.

One of the terms of the tender call to prime contractors was that bids were to remain open for acceptance and be irrevocable for a period of 30 days after the closing date. Industrial had no knowledge of that term.

After Western inquired whether Industrial could supply the boilers, Industrial faxed on January 6, 1997, a reply and asked for specifications or a description of the equipment requested. When Industrial received the specifications it obtained a price for the boilers from Bryan Boilers, a US manufacturer. Industrial then prepared a bid or offer for four separate items including (as one of the four items) two Bryan boilers. That offer was neither signed nor under seal. It was submitted by fax to Western at 7:32 p.m. on January 16, 1997. The closing date for the subcontractors' bids to Roscoe was the following day at 3:30 p.m. The offer with respect to both boilers was for a total price of $52,161.00.

On January 17, 1997 at 11:26 a.m., Industrial revised its quote as follows:

> If stop/check valves are to be supplied rather than regular stop steam values an additional $8,000 (total for two) must be ADDED to our boiler pricing. If regular stop steam valves are sufficient, the price of $52,161.00 remains the same.

The tendering process was not through the Nova Scotia bid depository system.

Industrial's offer contained no reference to revocability.

Western received three bids for the boilers, the lowest of which was Industrial's and which was carried through by it in its bid to Roscoe. The other two bids were for $74,529 and $94,958 respectively, or 42% and 82% higher than Industrial's.

Notwithstanding the date specified for the awarding of the principal contract there was a delay. On February 28, 1997 Roscoe awarded the subcontract to Western.

On March 4, 1997, Western contacted Industrial. There are varying versions of that oral contact. Having heard the witnesses who participated in those telephone conversations - Joseph Hill, the purchaser for Western, Shelley Godin, the general manager of Industrial and Jacques Godin, the president of Industrial - I have reached certain conclusions. In so doing I have decided that where the testimony of Mr. Hill differs from that of Mr. and Mrs. Godin, I accept the latter.

I find that Mr. Hill did not accept Industrial's offer or quote. Instead, Mr. Hill told Mrs. Godin that the price for the boilers was high and he wanted it revised. Mrs. Godin asked him where he wanted the price to be and he replied $50,000.00 - and if that was the price Industrial could have the order. She inquired further about the reason for this request and Mr. Hill told her that there was another bid of $50,000.00 for Cleaver-Brookes Boilers. As Mrs. Godin was not familiar with the quote she said that she would discuss the matter with her husband.

Mr. Hill does not dispute that he offered $50,000.00, but does deny that he mentioned another offered price. I conclude that Mrs. Godin's version is correct. Mr. Hill

explained in court that his job was to obtain better prices than those quoted and he had looked at the price of $52,000 and "figured" that asking a price drop of $2,000.00 would not be too much.

Mrs. Godin discussed the matter with her husband who then reviewed the quotation he had given. He realized then he had made two serious mistakes in his calculations: he had failed to multiply the price of the boiler by two - for two boilers - and had failed to convert the US dollars to Canadian dollars. He had seriously underbid and his quotation ought to have been $74,561.

Mr. Godin then contacted Ross Marshall, the estimator for Western with whom he had dealt and told him the boilers could not be supplied for the price quoted. He said that the price was so low (in comparison with other quotes) Western should have recognized an error had been made. Marshall told him that Industrial could not raise the price.

I accept Mr. Godin's version of that conversation and that Marshall told him he knew he had a "hot price" and if Godin had "screwed up" he would have to pay for it. He said Western had previous experience with a similar error by another subcontractor or supplier and had made that subcontractor pay the difference.

On March 4, 1997 Industrial faxed Western and revised the price for the boilers to $74,561 and said that it "would not honor [sic] the original price of $52,161". It also said its quote on January 17, 1997 had been "...the industry standard 30 days, unless otherwise noted". It went on to suggest that as Industrial understood Western could buy the boilers elsewhere for $50,000 it should do so before that price increased.

On the following day Industrial faxed a further revised quote to Western in which the March 4 price for the boilers was repeated and prices for other items were changed as a result of further discussions or bargaining between Industrial and Mr. Hill of Western.

On March 7, 1997 Western sent a purchase order to Industrial for the boilers for $52,161. Industrial refused to deliver the boilers and Western purchased them from the next lowest bidder for $66,408. It has claimed against Industrial for the difference between its offer and the price paid: $14,247.00.

Issues

Various factual and legal issues arise in this matter. They are:

1. The effect of Industrial's mistake.
2. Period of non-revocability.
3 (a) Was there a valid revocation?
   (b) Was there a valid acceptance.
4. Bid shopping.
5. Negligent misrepresentation.

1. The effect of Industrial's mistake

The facts which I find and which are relevant to this subject are now set out.

(a) Industrial made a mistake in the preparation of its bid.

(b) The arithmetic basis for the bid was not set forth in the quotation.

(c) Industrial's quotation was substantially lower than the two competing bids: $22,368 and $42,397 respectively.

(d) Western's estimator, Ross Marshall, noticed the wide difference. In testimony at trial Mr. Marshall said he was not surprised the Industrial quote was so low in relation to the other two but was reminded that on discovery he had said when he looked at the others he was surprised and agreed that the bid was "substantially" low. I accept the discovery version, as Mr. Marshall did as well when reminded of it.

(e) Mr. Godin of Industrial did not recognize his errors until Mr. Hill asked that the price be revised.

(f) Western had carried Industrial's quote forward in its bid to Roscoe apparently at $60,161.00 although in its tender package Western shows an unexplained reduction of $5,000.00 for the mechanical component of its bid. None of the witnesses was able to explain that reduction and I do not conclude that it is related to the boiler price.

(g) Industrial's quotation was not signed, it was not under seal and it was not presented pursuant to the rules of a bid depository or under the terms and conditions of either the owner's call for tenders or Roscoe's call for bids to subcontractors or suppliers.

The defendant has submitted that where a subcontractor knew that a supplier had made a mistake in a tender he could not accept such a mistaken tender and enforce it. The defendant has referred to the following cases in arguing its position: *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Limited* (1978), 87 D.L.R. (3d) 761; *Ontario v. Ron Engineering and Construction (Eastern) Limited* (1981), 119 D.L.R. (3d) 267; *Custom Iron and Machinery Limited v. Colorific Construction Limited* (1990), 39 C.L.R. 276; *Municipal Enterprises Limited v. Defence Construction (1951) Limited* (1985), 71 N.S.R. (2d) 59.

I am unable to conclude that any of these cases stand for the proposition that a contractor is under a legal obligation to inquire into or question the validity of a price on the mere suspicion that it appears to be low.

Miller, J. in *Northern Construction Company Limited v. Gloge Heating & Plumbing Limited*, [1984] 6 D.L.R. (4th) 450 at pages 458-459 explained in plain terms the practical considerations in the vast majority of cases in relieving a subcontractor of its bid because of a mistake.

> The general contractor does not do all of the work with its own forces and, typically, subcontracts out much of the required supply of materials and labour to firms who specialize in different areas of construction. The general contractor knows it cannot complete the work without hiring various subcontractors and the subcontractors cannot deal directly with the owner as the latter wants to deal

> only with the general contractor who supplies one overall price that the owner can rely upon. The general contractor, in making up its tender, has to rely upon the prices quoted to it by the various subcontractors for it is upon their bids that the general contractor bases the price he guarantees to the owner. All of these intertwined relationships have given rise to a fairly complete set of what one might call 'rules' developed through common usage and understanding in the industry. Sometimes these rules which become established in different industries, are compatible with the ordinary principles of contract law applicable to all contracts but occasionally they deviate from these principles. According to the expert's testimony the tendering process in the construction industry in Alberta has certainly developed some rules through extensive usage in the industry. One of the peculiar arrangements testified to by the two expert witnesses, Fowler and Crerar, was that when a general contractor invites bids from subcontractors it wants to hold those bids open for acceptance until it knows whether its tender has been accepted by the owner. In simple terms, the general contractor asks the subcontractor to give it a price that it can hold the latter to for X days but the general contractor is under no legal obligation to sign a contract with the subcontractor unless the general tender is accepted within the time period by the owner. Thus, in its simplest form, it may be observed that one party, namely the subcontractor, is bound to perform for the other, but until the owner accepts the contractors' tender, there is no obligation upon the contractor to perform. Viewed in this light, the usual arrangements between a contractor and a subcontractor are akin to an option contract with the subcontractor playing a role similar to an optionor and the contractor acting like an optionee. There are some obvious difficulties in carrying this analogy too far but it may be useful in examining the issues raised by this case.
>
> Before looking at the various authorities cited by both counsel, I must observe that many of them deal with a direct confrontation between the owner and the general contractor where the mistake is made by the general contractor in submitting its tender to the owner. Usually the mistake is found out immediately and reported to the owner before the owner has had time to accept the tender. Many of those cases seem to turn upon the law of mistake and the equitable principles which flow therefrom rather than questions of acceptance or withdrawal. In the case at bar the mistake is created by the subcontractor and the bid supplied was relied upon by the general contractor who committed itself to the owner. To my mind there is a great difference between these two situations for, in the first instance, it is the author of the mistake who suffers if it is held to the contract. In the second instance, if the general contractor is held to its contract with the owner but the subcontractor, who made the mistake, is relieved of its commitment, then it will be an innocent party who will suffer for the mistake while the perpetrator of the error escapes any liability.

Miller, J. then analysed the various cases cited before him including for the most part those now cited to me. That decision was upheld by the Alberta Court of Appeal,

(1986) 27 D.L.R. (4th) 264. In the trial decision Miller, J. examined the decision in *Belle River* and that of Estey, J. of the Supreme Court of Canada in *Ron Engineering*. In the former a subcontractor was not held liable for the consequences of a tender which contained a mistake which was drawn to the attention of the contractor before acceptance. In the latter the owner was entitled to retain a deposit submitted with a tender pursuant to the terms of the tender call and which tender contained a mistake and which was drawn to the attention of the contractor prior to the award.

It seems to me that *Belle River and Ron Engineering* are not inconsistent with each other. Each of these cases turns on the question of whether the recipient of the bid had actual knowledge of the error before the bid had been accepted. As Miller, J. remarked in *Gloge* with respect to *Belle River* (page 461):

> It would seem that the *Belle River* decision is based more on the question of inequity of trying to accept an offer once being apprised of a mistake made by the offeror, rather than any question of whether the offer was legally withdrawn prior to acceptance.

He remarked with respect to *Ron Engineering*: (p. 463)

> It seems clear that Estey, J. felt that it was unnecessary to even consider the law of mistake if, at the time contract A came into existence when tenders were opened, the recipient of the mistaken bid did not know of the mistake. Having come to this conclusion, Estey, J. felt that the Ontario Court of Appeal had erred in applying law of mistake as it had in the Belle River decision (*supra*), and restored the judgment of the learned trial judge who had found for the owner.

I respectfully agree Miller, J.'s succinct analysis of these two decisions.

In the case before me, I am unable to conclude that Western had actual knowledge of the error. Marshall had reason to be suspicious but he did not act upon that suspicion. With respect to the differences in the bids he said he had not been surprised as "prices can change overnight". Elsewhere he remarked that there is always time for one more phone call. (In the context of my considerations below, these remarks are significant.)

I do not elevate Marshall's suspicions to the level of actual knowledge nor do I conclude that Marshall's suspicion should have led to an imputation that he ought to have realized that there was an error. Rather, the outcome of this case will turn on other factors.

2. Period of Non-revocability

The facts which I find and which are relevant to this subject are now set out:

(a) Industrial's bid contained no time limit for acceptance and made no reference to a period of non-revocability.

(b) The owner's "instructions to bidders" specified that "bids shall remain open to acceptance and shall be irrevocable for a period of thirty (30) days after the bid closing date.

(c) Western was aware of that period of irrevocability.

(d) Industrial was not aware of the context of the tender call or of the instructions to bidders.

(e) Industrial was not aware of any extensions of the closing date.

(f) Industrial was not aware of any further delays in the awarding of the contract.

(g) The other two bidders on the boilers specified periods of non-revocability: 30 days and 60 days respectively.

(h) As a result of economic conditions in the construction business it has not been unusual (according to one witness, George Himmelman,. whose testimony I will explore more fully below) for subtrades to hold their bids open for periods much longer than 30 days. According to Mr. Himmelman, however, his practice in such cases was to go back to the subtrades to see if the bid is still open.

(I) Industrial had bid on boilers manufactured in the United States and accordingly, was vulnerable to the extra uncertainties of changes in currency exchange rates and potential problems of delivery dates.

As mentioned earlier, as soon as Industrial realized its mistake, and on Western's request to revise its price, it faxed Westem and said "our prices are the industry standard 30 days unless otherwise noted." On cross-examination, Mr. Godin said in effect he would have felt bound by an acceptance of the offer by Western within 30 days.

As there was no express term of irrevocability in the documents between Industrial and Westem, and the matter had not been discussed or expressly agreed upon, evidence concerning the practice of the trade would have been helpful. I have no evidence before me of the general practice of the trade. Mr. Himmelman is the president and chief executive of Himmelman Contractors and has been in that business since 1956. He has personally been involved in the tendering process for forty years. He spoke of his practice but no attempt was made have him qualified as an expert and he did not assert any opinion as an expert. Any opinions he did assert were clearly related to his personal experience only. It was also agreed by counsel prior to trial that Mr. Himmelman's evidence would not be put forth as an expert's opinion and would represent only his personal experience and practice.

Clearly, a bid by a subcontractor in a tendering situation should be open for acceptance for a reasonable period of time. I accept that the 30 days for acceptance of a prime contract is reasonable and the period for acceptance of subcontracts obviously must be within a reasonable period after that closing date. In this case, Industrial could reasonably have concluded that 30 days would be the time for acceptance of the prime contract and its bid would have to be open for acceptance for a reasonable time thereafter so as to allow Westem an opportunity to make its acceptance known. But 16 days elapsed with no attempt by Western to follow Mr. Himmelman's practice. I conclude that the period of 16 days is unreasonable. It was therefore open for Industrial to revoke its offer which, as I find below, was what it did.

I reach this conclusion keeping in mind Mr. Ross Marshall's remark that prices can change daily. That was presumably more so with Industrial's offer as it was subject to the uncertainties as I have set forth above. In the circumstances, it would be unreasonable to assume that Industrial would hold its bid open for acceptance indefinitely.

It is obvious that irrevocability of a tender is an essential requirement for the efficacy of a formal tendering process. In that process the "General Conditions" or "Information for Tenderers" would ordinarily set out the precise terms of that requirement. That was precisely the subject considered by Estey, J. in *Ron Engineering* (p. 122-23). But Iacobucci, J. (at paragraph 17) pointed out in *Defence Construction* that the analysis of Estey, J. was "... rooted in the terms and conditions of the tender call...". In the case before me it cannot be argued that Industrial was involved in the formation of Contract A (to use the short hand phrase coined by Estey, J.) and accordingly, cannot be bound by the terms and conditions of the tender call.

It is appropriate, however, to find an implied term of Industrial's offer to Westem and I have concluded above that irrevocability for thirty days plus a reasonable period for the

subcontractor to exercise its right of acceptance to suppliers is appropriate. Western did not accept Industrial's offer within that period.

3 (a) Was there a valid acceptance?

With respect to the matter of acceptance, I have set forth my findings of fact above and it is unnecessary to repeat them. Mr. Hill of Western did not accept Industrial's bid. Rather, he called Industrial and asked that the price be revised and on no apparent rationale, asked that the price be dropped by $2,000. Industrial responded to the request for revision only and revised the price upwards. That upwards revision was complete before Mr. Hill purportedly accepted the original offer.

3 (b) Was there a valid revocation?

I conclude that by revising its offer at Western's invitation, Industrial revoked the original bid and reoffered the boilers at the higher price, which offer was not accepted.

Industrial's letter of March 4, 1997 was express: it would not honour the original January 17, 1997 price.

Western's purchase order of March 7, 1997 was ineffective. It was forwarded to Industrial subsequent to revocation.

I therefore conclude that there was no valid acceptance of the January 17, 1997 bid by Industrial and that bid was validly revoked prior to purported acceptance by Western.

4. Bid Shopping

In view of the findings I have expressed above it is likely unnecessary to address this subject. Nonetheless, as the parties have made submissions on this matter I feel some compulsion to express my views and conclusions on it.

All the witnesses who spoke on the matter of bid shopping agreed that a practice of bargaining after close of tenders has developed in the informal tendering process. I find that the practice as described to me by the parties and the various witnesses is unacceptable.

Mr. Himmelman explained that in his experience subcontractors are requested routinely to lower their bids after the prime contract has been awarded. He and the other witnesses testified that is how contractors make extra money. The contractor obtains bids from subcontractors who in turn obtains bids from suppliers or other subcontractors and those bids are taken into consideration in its bids to the prime contractor. The prime contractor then presents a tender formally to the owner. If the tender is accepted the contractor and the subcontractors then set about to negotiate with the subcontractors and suppliers to lower their bids. Mr. Himmelman said that he bases his tenders on the assumption that he would obtain lower bids from suppliers and as a result an anticipated but uncertain reduction of cost is passed on to the owner. But there is no certainty the savings effected by the contractors are passed on to the owner; they are profit to the contractors. Mr. Himmelman said that in his experience it was unusual for the contractor not to attempt to bargain. In return, the subcontractors and suppliers almost never refuse to bargain and they accept that practice.

Various witnesses said bid shopping is not ethical but the practice described above, according to them, is not bid shopping. The witnesses said that bid shopping is when a contractor obtains a price from a subcontractor and then uses that price as a bargaining chip to bargain with other suppliers or subcontrators. The witnesses distinguish that practice from a subcontractor going back to a supplier and asking for a price revision.

It is my conclusion, in the circumstances as described to me by the various witnesses, that the contractors and subcontractors have turned the tendering process into a sham. The assertion that the practice described to me is not bid shopping appears to

be sophistry and hypocritical. The practice encourages subcontractors and suppliers to put in inflated bids, keeping in mind that ultimately the contractor will attempt to force them to lower their prices. The lowered prices will result in a profit to the contractor, but with no saving passed on to the owner. This practice will ultimately defeat (and arguably has done so) the value of a bona fide tendering process. In effect, Western has by this action requested the court to validate the bargaining process as I have described it. I will not do that.

The value of the integrity of the bidding system was addressed in *R. v. Ron Engineering and Construction Limited*, by Estey, J. of the Supreme Court of Canada when he said:

> I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do.

I must agree with that view. The companion view is that an attack on the integrity of the bidding system should not be protected, where possible.

The process of bid shopping is destructive of the tendering system. In my view the process followed by Western amounted to bid shopping and as described to me borders on deceit.

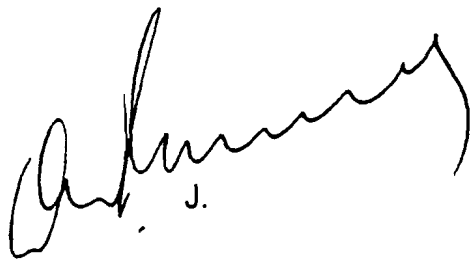
5. Negligent misrepresentation

Western has pleaded that Industrial has committed the tort of negligent misrepresentation by advising it that it would supply the boilers at the price quoted and failed to do so. This aspect of Western's claim must also fail. Industrial had indeed made a negligent misrepresentation to Western and Western had the opportunity in reliance upon the misrepresentation either to accept the bid within a reasonable period of time or ask that it be extended but failed to do so. By its own action it created its own difficulties.

Further, with respect to the subject of misrepresentation, it is clear upon my findings that while Industrial had negligently misrepresented the cost of the boilers, its negligent offer had expired and then Western in attempting to bargain with Industrial misrepresented that it could purchase the boilers for $50,000.00. Industrial relied upon that deliberate misrepresentation when it revised its price as requested and suggested to Western that it proceed to purchase the boiler at the price quoted.

Conclusion

This action will be dismissed with costs. If necessary I will hear the parties as to costs.



J.