

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SOCANAV INC.



Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE MINISTER OF TRANSPORTATION FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES, THE MINISTER OF GOVERNMENT SERVICES AND PUBLIC WORKS FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES and PETROLES NORCAN INC.

Respondents

Application for a declaration that a contract award is invalid due to illegality. Dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Reasons heard at Yellowknife, Northwest Territories on August 5, 1993.

Reasons filed: August 9, 1993.

Counsel for the Applicant: V. Schuler, Q.C.

Counsel for the Respondent,
Government of the
Northwest Territories: C. McGee

Counsel for the Respondent,
Petroles Norcan Inc.: G. Wiest

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CV-04780

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN
SOCIOMAX INC.

and

THE
COMMISSIONER OF THE NORTHWEST TERRITORIES

FOR DAMAGES

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE MINISTER OF TRANS-
PORTATION FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES, THE
MINISTER OF GOVERNMENT SERVICES AND PUBLIC WORKS FOR THE
GOVERNMENT OF THE NORTHWEST TERRITORIES and PETROLEUM CORPORATION

vs.

Respondents

Application for a declaration that a contract is void due to illegality. Dismissed.

REASONS FOR JUDGMENT BY THE HONOURABLE MR. JUSTICE J.S. VERTEZ

Reasons heard at Yellowknife, Northwest Territories
on August 5, 1993.

Reasons filed August 8, 1993.

Counsel for the Applicant: V. Schuler, O.C.

Counsel for the Respondent:
Government of the
Northwest Territories:

C. McGee

Counsel for the Respondent:

G. West

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE MINISTER OF TRANSPORTATION FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES, THE MINISTER OF GOVERNMENT SERVICES AND PUBLIC WORKS FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES and PETROLES NORCAN INC.

Respondents

REASONS FOR JUDGMENT

INTRODUCTION

The applicant seeks a declaration that a contract awarded by the Government of the Northwest Territories (the "government") to Petroles Norcan Inc. ("Norcan") is invalid due to illegality on the part of the government in the award process.

I had, in earlier reasons (released on July 27, 1993), ruled that the applicant had standing to bring these proceedings but that relief in the nature of *certiorari* was not available against the government. It seems to me that a declaration that the contract in question was invalid would be tantamount to an order in the nature of *certiorari* quashing the contract. That I have already said I cannot do. But, I am able to issue a declaration

as to whether there was illegality on the part of the government. If such a declaration issues then the parties will have to consider what action to take in the knowledge that they must act according to law.

3 The illegality alleged by the applicant is a failure by the government to follow the dictates of its own Government Contract Regulations in that it did not apply the proper criteria but did apply undisclosed criteria in the contract award process.

FACTS

4 The contract in question is for the annual fuel re-supply of eleven communities in the eastern Arctic part of the Northwest Territories. These communities are accessible only by sea and only for a limited time each year.

5 The government has had for many years the responsibility to arrange the annual re-supply. Up until this year it has done so in two components. The government would contract by tender for the purchase of refined petroleum products in eastern Canada. At the same time, the Department of Transport of the Government of Canada, through the federal Coast Guard, would issue a call for tenders for various transportation projects in the Arctic including the delivery of these petroleum products.

6 Historically the fuel was purchased from Canadian suppliers and loaded on to

Canadian vessels at the port of Montreal. The applicant, which is the owner-operator of a fleet of Canadian-registered tanker vessels, has often obtained long-term transportation contracts for the servicing of Arctic communities and had the fuel re-supply contract for the three-year period ending in 1992.

In late 1992 the government reviewed the fuel re-supply program with a view to reducing costs. As a result it decided to issue a "Request for Proposals" ("RFP"), pursuant to the Government Contract Regulations, for a combined purchase and supply contract for the 1993-94-95 period. I will discuss the legal nature of the RFP later in these reasons.

The proposals sought by the RFP were for the supply and delivery of refined petroleum products at the specified communities based on a total price made up of (a) a fixed price tied to the Montreal "rack" price for the product for the three delivery seasons, with prices F.O.B. eastern Canada product price, together with either (b) a fixed transportation cost, or (c) a variable transportation cost. The RFP was sent to seven specific companies on December 16, 1992, with a closing date of February 4, 1993. The applicant was not one of these seven companies (all of whom were petroleum supply companies).

The RFP contained a "waiver" reserving the right to the government to award the fuel purchase portion of the contract only "should transportation cost prove excessive".

It also contained a "privilege" clause:

The lowest or any Proposal will not necessarily be accepted. The GNWT reserves the right to cancel this Proposal in it's entirety and award the Contract to no-one, to re-tender for any reason or to award a Contract based upon it's sole determination of what Proposal will provide the best value for the GNWT.

10 On February 23, 1993, the federal Department of Transport issued a tender call, as it had done previously, for the transportation portion of the Arctic re-supply for the same three year period. The applicant, having received the invitation to bid for this contract, submitted its bid on March 9, 1993.

11 In the meantime, in January of 1993, the applicant had been requested by various petroleum companies to submit its transportation rates to them so they could respond to the RFP. The applicant, at the end of January, supplied its rates to two of them and at least one of them (Shell Canada) used those rates as part of its proposal to the government's RFP. So, at best, the applicant was a potential subcontractor on this project.

12 On April 5, 1993, the government informed the Department of Transport that it would not require that department's services for the transportation contract. The government had, however, received from the Department of Transport the results of the tender call and was able to use the cost quotes from those bids to compare the transportation costs quoted in the proposals received in response to the RFP. On

April 14, 1993, the Department of Transport cancelled its call for tenders.

On the RFP closing date of February 4, 1993, the government had received five bids. Of those five, Norcan was the lowest; Shell Canada was the second highest. The difference was some \$600,000 on a contract worth well in excess of \$8 million per year. The government then evaluated all of the proposals, in conjunction with the information received from the Department of Transport tender call, and concluded that Norcan's proposal was the best value because it had quoted a fixed transportation cost over the three year period. The government's evaluation estimated that Norcan's proposal, over the life of the contract, would cost \$3.9 million less than the second best proposal and approximately \$3 million less than the best Montreal fuel price combined with the best federal Department of Transport shipping bid.

4 On March 16, 1993, government representatives met with Norcan officials to confirm their capability to carry out the contract. At the meeting Norcan's officials outlined various options for performing the contract including the purchase of the petroleum products in Canada and off-shore as well as the transportation of products by Canadian-flagged or foreign-flagged vessels or a combination of both. By the end of March the formal contract was entered into by the government and Norcan.

5 After the contract was executed, the government was informed that Norcan had decided to purchase all of the petroleum products off-shore, load them in a foreign port,

and deliver by use of foreign-flagged vessels. This now brings us to the issue in this case: Did the RFP call for the supply of Canadian product, loaded in a Canadian port, and delivered by Canadian vessels?

THE GOVERNMENT CONTRACT REGULATIONS

16 The Government Contract Regulations, enacted pursuant to the Financial Administration Act, R.S.N.W.T. 1988, c. F-3, set out procedures for contracting by the government. I referred to them, in my earlier ruling in this case, as "indoor management rules" applicable to government administration. See also The Queen v. Transworld Shipping Ltd., [1976] 1 F.C. 159 (C.A.).

17 The Regulations stipulate that the government may enter into a contract only after issuing an invitation to tender or a request for proposals. The distinction between the two is not clearly set out and choosing which one to go with is left to the discretion of the government.

18 In the case of an invitation to tender, the Regulations provide:

13.(1) A contract authority may refuse all tenders and award the contract to no one.

(2) Subject to section 10, a contract authority shall only award a contract as a result of an invitation to tender to the tenderer who is responsive, responsible and has submitted a tender lower than that submitted by any other responsive and responsible tenderer.

In the case of a request for proposals, the Regulations say:

15.(1) Every request for proposals shall be issued so as to promote the submission of competitive proposals.

(2) Every request for proposals shall express the criteria to be used in evaluating the proposal and no criteria shall be used in evaluating the proposal that are not expressed in the request for proposals or these regulations

16. Where a contract is to be awarded as a result of a request for proposals, it shall be awarded to the proposer who is responsible and whose proposal potentially will provide the best value for the Government.

The government, in this case, says it issued a request for proposals. I have referred to it as the "RFP". The actual document, however, is printed on a form headed "Invitation to Tender". The text says that the government is requesting "proposals". It, however, required that "all submitted offers be irrevocable until February 28, 1993". This suggests to me an invitation to tender.

If there is a distinction between the two forms of soliciting offers, it may be this. When the government knows what it wants done and how it should be done (such as a construction project), it will already have its plans and specifications and is looking simply for the best price. On the other hand, when the government knows what it wants done, but not how to go about doing it, it seeks proposals on methods, ability, and price. Then it can negotiate on the best method to achieve the best value.

22 In this case I would conclude, if I have to, that the document in question was a request for proposals. But I do not think, for purposes of this case, that there is any legal effect of the distinction.

23 The applicant says that one of the criteria for the request was Canadian content. That is mandated by the wording of the document and by its natural interpretation having regard to historical practice. If that is a criterion, then the award of the contract to Norcan, with the knowledge that there would be non-Canadian content, is the application of undisclosed or different criteria. As such, whether this is an invitation to tender or a request for proposals, the government acted illegally. So goes the applicant's argument.

ARGUMENTS

24 I have summarized the applicant's argument above. To fully appreciate it, however, it is necessary to do a detailed examination of the RFP wording.

25 Applicant's counsel points to a number of specific passages in the RFP that indicate a requirement for Canadian content (and by that I mean product purchased in Canada, loaded in a Canadian port, and delivered by Canadian vessels). She cites the following:

1. This Proposal will be evaluated as follows:

1. Price of Refined Petroleum Fuels F.O.B. Eastern Canada
 2. Fixed Transportation Costs
 3. Variable Transportation Costs
 4. Estimated schedules compared to GNWT Historical Travel Estimates (See Appendix "B" attached showing previous Three (3) year schedule
-

2. Cost to indicate F.O.B. Eastern Canada Product Price for each Product as per formula contained herein and cost of Transportation for each supply period.
-

3. LETTER OF ADVISE TO QUEBEC GOVERNMENT

In the event that product is shipped from the Province of Quebec, the successful Vendor will prepare a written letter addressed to:

...

Advising the Government of Quebec that they are the successful bidder, the quantities and the product is being sold to the G.N.W.T. for Northern Communities and should be exempt of Quebec taxes.

4. (a) Actual prices for product shipped during the 1993 resupply season shall reflect the net changes in average rack prices for unbranded accounts at Montreal as published in the last published Oil Buyers Guide of January 1993 and the last published Oil Buyers Guide of July 1993.
-

5. For purposes of determining the adjustment in unit prices referred to in this section the average change in the Canadian rack prices for the following products shall be used ...
-

6. LOADING

As product required must be delivered to the Northern community during the 1993, 1994 and 1995 sailing seasons, historically, vessels were loaded at the Montreal Port during the first weeks of August.

7. Specific Terms and Conditions

In the event that the GNWT should enter into a Contract as a result of this proposal FOB contracted carrier in Montreal or alternative port, the following words would apply.

1. All product to be supplied and loaded into Government contracted vessels in Montreal, Quebec or alternative point of loading.
2. While the Port of Montreal is our prime loading point, we will consider alternate ports with approved discharge facilities and ready access to a Product Testing Laboratory, Any contract to supply from such alternate port shall be at the sole option of the Government. Proposals should include prices from both the prime and alternate ports where practical and applicable. The resulting contract however, will be awarded for one Loading Point only for all Products.

As the Port of Montreal is the Prime Loading Point for Contracted Carriers, the costs of moving vessels to alternate loading point shall form part of the Tender Evaluation.

These are all extracts taken from different parts of a 29-page document.

26 Applicant's counsel submits that all of these references to the price of fuels "F.O.B. Eastern Canada", the rack prices in Montreal, the Canadian rack price, the requirement to load in Montreal or an alternate point, and the references to the historic transportation patterns, clearly indicate a requirement for Canadian content. This, she says, is further emphasized by the fact that all of the other proponents, except for Norcan, indicated that they intended to use Canadian vessels to ship Canadian product. Only one other proponent suggested supplying foreign product with foreign vessels and that suggestion came only as an alternative to the formal proposal submitted by it. Applicant's counsel argues that the approach taken by the other proponents is indicative

that the only reasonable way to interpret the RFP is with a requirement for Canadian content.

Applicant's counsel also points to the Department of Transport tender call which had been the vehicle in the past used to contract for the transportation services. That tender call, both in the past and the one issued early this year, had a specific requirement that vessels be Canadian owned and registered and that the vessels be based at Montreal or another Canadian port. Since the government used the bids received in response to the federal tender call to help evaluate the proposals, so she argues, then the government must have contemplated the use of Canadian vessels.

If that is the case, and the government entered into a contract with Norcan knowing that there would be foreign content, then, it is argued, the government applied different criteria to Norcan than it did to the other proponents and therefore breached the stipulations of the Regulations.

The government's counsel points to the same specific passages in the RFP and says that these are merely reference points. The reference to "F.O.B. Eastern Canada" is merely a request for prices on a constant and consistent basis. The reference to Montreal rack prices is to supply a common reference point as to how the price of fuel is to be determined. These are merely references, he says, so as to provide a stable pricing formula.

30 It is argued, on behalf of the government, that, not only is there no specific requirement for Canadian content, but that the RFP contemplates the use of alternative ports and how that would affect the pricing formula. He also refers to the Department of Transport tender call and says that the absence of explicit Canadian requirements in the RFP, as opposed to the federal document, shows that there was no obvious or even implied Canadian content requirement in the RFP.

31 Norcan's counsel supports the government position as may be expected. He did make an interesting point about the distinction between the RFP and the federal tender call with reference to the explicit Canadian content requirement in the federal document. He submitted that Canadian content requirements would be more important to the federal government as a "national" economic interest than it would be to the territorial government which has the simple interest of obtaining the best value. This is a good point although one that may cause some concern. After all, by going off-shore, the territorial government may save in excess of \$3 million over the next 3 years while over \$24 million is taken out of the Canadian economy. This, however, is an economic issue not a legal one.

DISCUSSION

32 All counsel agree that this case involves simply the interpretation of a document, that being the RFP. If I conclude that there is a requirement for Canadian content, then

I think it is a fairly simple next step to conclude that the government did not apply the same criteria in evaluating the proposals.

The whole area of contract tendering has been the subject of much litigation in the past few years. The courts have recognized, in the words of Estey J. in The Queen v. Ron Engineering & Construction (Eastern) Ltd., [1981], S.C.R. 111 (at page 121), that "the integrity of the bidding system must be protected where under the law of contracts it is possible so to do." This, generally speaking, has been interpreted to mean simply that all bidders must be treated fairly, on an equal footing, and without reference to undisclosed criteria. See, for example, Best Cleaners and Contractors Ltd. v. The Queen, [1985] 2 F.C. 293 (C.A.), and Chinook Aggregates Ltd. v. Abbotsford (1989), 35 Constr. L.R. 241 (B.C.C.A.).

This limited doctrine of fairness or good faith in contract tendering is what is expressed in s.15(2) of the Government Contract Regulations where it states that all requests for proposals "shall express the criteria to be used in evaluating the proposal and no criteria shall be used in evaluating the proposal that are not expressed in the request for proposals or these regulations."

In reviewing the contents of the RFP, there is no explicit requirement for Canadian content. Obviously, if that had been the government's intent, then it could have been more careful and said so. But then again if it had been more careful it would not have

made such a simple mistake as using an "Invitation to Tender" form.

36 My interpretation of the RFP in its entirety accords with that of the government's counsel. The references to "F.O.B. Eastern Canada" and to "Montreal rack prices" are obvious reference points to provide a consistent price formula by which to evaluate the proposals. There are references to the use of alternative ports to that of Montreal and the effect that would have on the pricing formula. The overall concerns evidenced by the RFP are consistency of quality, security of supply, and, of course, the overall price. Where the product comes from or who is to carry it are not concerns expressed in the document.

37 The fact that the federal Department of Transport tender call sets out express Canadian content requirements reinforces my opinion that, in their absence, such requirements cannot be read in to the terms of the RFP.

38 Can it be said that the historical practice of using Canadian vessels to ship Canadian product forms part of the terms of this request for proposals? I think not.

39 I recognize that it is possible for trade custom or trade usage to form part of the terms of a contract, although not expressly incorporated in the written document: see Hudson's Building and Engineering Contracts (10th edition), pages 52-54. To be a valid trade usage, capable of forming a part of a contractual relationship, a usage must satisfy

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

IN RE: [Illegible]

[Illegible]

THE COURT REPORTERS OF THE NORTHWEST
TERRITORIES, INC. (INCORPORATED)
APPEALS FROM THE JUDICIAL
COMMISSIONERS OF THE NORTHWEST
TERRITORIES AND THE
ATTORNEYS GENERAL OF THE NORTHWEST
TERRITORIES AND PETROBRAS
INTERNATIONAL INC.

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- and -

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OF THE NORTHWEST TERRITORIES, MINISTER
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REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE J.Z. VERTES



four conditions: notoriety, certainty, reasonableness, and legality.

Is the practice of Canadian content notorious, that is to say, so well known in the trade that persons who make these kinds of contracts must be taken to have intended that such a requirement would form part of the contract? There is no evidence directly on point, but the fact that this is a matter of dispute tells me that it is not so notorious as to be accepted in the trade. Also, the fact that the federal government sees a need to put in explicit references to Canadian content in its tender calls suggests to me a lack of acceptance or notoriety.

Is the practice certain? Again, the fact of this dispute, the fact that Norcan's possible use of foreign content did not cross the minds of the government officials as a matter of concern, and the practice employed by the federal government in its tender calls, lead me to the conclusion that it is far from certain.

The issues of reasonableness and legality are not significant. From the government's perspective, the most reasonable practice is probably the one that gets the best price. And, while a Canadian content requirement is not illegal, there are no legal obligations on the territorial government to require Canadian content in its contracts.

Finally, the Regulations militate against any implied conditions. Section 15(2) says that no criteria shall be used "that are not expressed in the request for proposals."

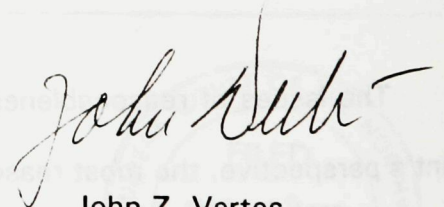
44 For the foregoing reasons I have concluded that there are no Canadian content requirements in the request for proposals. It is not for me to judge the merits of the government's decision; it is simply enough that I find no illegality in the decision-making.

CONCLUSION

45 The application for a declaration is dismissed.

46 Ordinarily costs follow the event. If counsel cannot agree on costs, they are at liberty to make written submissions to me. Such submissions should be filed and exchanged within 30 days of the date of these reasons.

47 I compliment all counsel on their preparation and able submissions.



John Z. Vertes
J.S.C.

Counsel for the Applicant: V. Schuler, Q.C.

Counsel for the Respondent,
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