Karl Mueller Construction et al v. *Enterprise Settlement Corp. et al*, 2007 NWTSC 43
Date: 2007 06 29
Docket: S-1 CV 2004000269

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KARL MUELLER CONSTRUCTION LTD. and KARL MUELLER
Plaintiffs

- and -

ENTERPRISE SETTLEMENT CORPORATION OF THE SETTLEMENT OF ENTERPRISE; GENEVIEVE CLARKE, WINNIE CADIEUX, CHAAL CADIEUX and AMY MERCREDI
Defendants

Judgment on trial of a claim for damages alleging unfairness in a tendering process.

Heard at Hay River, NT on April 11, 12 and 13, 2007.

Reasons filed: June 29, 2007

REASONS FOR JUDGMENT OF THE HONOURABLEJUSTICE V.A. SCHULER

Counsel for the Plaintiffs:	Allan A. Garber
Counsel for the Defendants:	Michael T. Coombs

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REASONS FOR JUDGMENT

[1] In February 2004, the community of Enterprise invited tenders for a three-year solid waste collection and disposal contract (the "garbage contract"). Karl Mueller Construction Ltd. ("KMC") submitted a bid, which was not accepted despite the fact that it was the lowest. KMC says that the tender process was unfair and that it should have been awarded the contract; it seeks damages in part for the profit it says it would have made. Enterprise says that the process was not unfair and that, in any event, KMC's bid did not comply with the tender specifications.

[2] Although the owner of KMC and the Council members and senior administrative officer at the relevant time of Enterprise were all named as parties to this action, counsel acknowledged at trial that the proper parties are really KMC and Enterprise.

[3] Counsel also agreed that the threshold issue is whether KMC's bid complied with the tender specifications so I will deal with that first.

Factual background

[4] The essential facts are not in dispute. The tender documents for the garbage contract provided that bids would be evaluated on a rated scale with price accounting for 50% of the evaluation, northern content for 10%, equipment to be used 25% and experience/performance record 15%. There was also a standardprivilege clause:"The lowest or any tender will not necessarily be accepted". The documents also contained requirements pertaining to the equipment to be used to perform the garbage contract, among them clause 10.1:

> The Contractor shall use for the solid waste removal and disposal a standard packer type garbage truck or a dump type vehicle, which has been modified and enclosed in a manner that is acceptable to Council and meets all health and safety standards.

[5] As part of its bid, the bidder had to complete section 11 "Statement of Equipment Available". Clause 11.1 of that section states, "The bidding firm confirms that it has in its control, or can acquire within 15 days of notificationof contractaward, a PRIMARY GARBAGE VEHICLE as follows ...", following which space was provided for the bidder to set out the make, model, year, size and tank capacity of the vehicle it proposed to use.

[6] KMC completed clause 11.1 as follows: Make: Ford; Model: F150; Year: 1983; Size: 1 / 2 Ton Big Box; Tank Capacity: 150 Litre.

[7] In his evidence at trial, Mr. Mueller, the owner of KMC, acknowledged that a Ford F150 in its standard configuration is a pickup truck without dump capability and that at the time of KMC's bid, its Ford F150 was in standard configuration. He also testified that he intended to convert the Ford F150 to a dump truck with a hoist and that he believed he could make this modification within 15 days of the contractaward. Mr. Mueller testified that he understood clauses 10.1 and 11.1 to mean that the bidder to whom the garbage contract was awarded would have 15 days after the award within which to say what equipment it would use and obtain Enterprise's approval.

[8] There was no reference in KMC's bid to an intention to convert the Ford F150 and it was only after the tender closing that Mr. Mueller told Enterpriseof his intention to convert it.

[9] Enterprise did not accept KMC's bid, but instead accepted a higher bid that proposed use of a garbage compactor.

[10] Enterprise's senior administrative officer at the time, Ms. Clarke, testified that her understanding of clauses 10.1 and 11.1 was that Enterprise would have 15 days after acceptance of a bid within which to inspect any modified vehicle and give direction as to anything further that must be done to it. She also testified that a bidder would have to state in its bid what modifications would be made so as to indicate what vehicle it would have within 15 days that would comply with clause 10.1.

[11] Ms. Cadieux, the mayor of Enterprise at the relevant time, also testified that the proposed vehicle and any modifications would have to be statedin the bid documentso that Enterprise would know whether to accept the bid.

Positions of the parties

[12] In argument at trial, KMC initially took the position that in completing clause 11.1, KMC was certifying that within 15 days of contract award, it would have a vehicle compliant with clause 10.1. Had the garbage contract been awarded to KMC, KMC would have had 15 days to make the modifications and have them approved by Enterprise. Later in argument KMC changedits positionand submittedthat under 11.1 the following sequence of events should ensue: the modifications would be done and submitted to Enterprise for approval; then the contract award would be made, then within 15 days the vehicle would be made available. Essentially, KMC says that the requirements of clauses 10.1 and 11.1 are unclear and in accordance with the *contra proferentem* rule, the ambiguity should be resolvedin KMC's favour and its bid should be considered substantially compliant with the tender specifications.

[13] Enterprise says that at the time of tender closing KMC's bid was not compliant and could not be accepted because the bid did not indicate that modificationswould be made to what, in standard configuration, is neither a packer type garbage truck nor a dump type vehicle.

The law

[14] In *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, the Supreme Court of Canada adopted the Contract A/Contract B analysis of the

tendering process. That analysis divides the tendering process into two stages. The first stage is where the owner issues a tender, in response to which bidderssubmit bids. This creates a Contract A between the owner and every compliant bidder, the terms of which are found in the tender documents. The second stage is where the owner accepts a bid, thus creating a Contract B between the owner and the successful bidder; this is the actual contract for the work to be done. In the recent case of *Double N Earthmovers v. Edmonton (City)*, [2007] S.C.J. No. 3, Charron J., dissenting in the result, described a bidder's bid as both an acceptance and an offer. It constitutes an acceptance of the owner's offer to receive and consider bids, and it simultaneously constitutes an offer to perform the tendered contract (at paragraph 105).

[15] Contract A also creates an implied duty on the part of the owner to accept only a compliant bid and to treat all bidders fairly and equally: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] S.C.J. No. 17; *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60.

[16] In *Ron Engineering*, it was said that the integrity of the bidding process is an objective to be protected. The duty to treat all bidders fairly achieves that protection. In *Double N Earthmovers*, the majority said that, "The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (paragraph 52). Thus, the crucial time is when the bids are opened; whatever is in the bid then determines whether it does or does not comply with the tender specifications: *Vachon Construction Ltd. v. Cariboo(Regional District)*, [1996] B.C.J. No. 1409 (C.A.); *Fullercon Ltd. v. Ottawa (City)*, [2002] O.J. No. 3713 (S.C.J.).

Analysis

[17] Clause 10.1 specified the type of vehicle that must be used for performance of the garbage contract: a standard packer type garbage truck or a dump type vehicle, which has been modified and enclosed in a manner that is acceptable to Council and meets all health and safety standards. According to Mr. Mueller's evidence, KMC's intention was to use a dump type vehicle, a converted or modified Ford F150. For KMC's bid to comply with the tender specifications, its bid had, at a minimum, to indicate on its face that KMC would use a dump type vehicle.

[18] The problem is that what KMC's bid actually proposed was not a dump type vehicle. Mr. Mueller acknowledged in his evidence that in standard configuration, a Ford F150 is not a dump type vehicle. Ms. Clarke said in her evidence that she understood that a Ford F150 is not a dump type vehicle. So on its face, the bid did not propose the type of vehicle called for by the tender specifications.

[19] Had KMC stated in its bid that the Ford F150 would be modified with a dump and hoist mechanism, that would likelyhave been sufficientto bring KMC's bid within the tender specifications so as to give rise to Contract A betweenit and Enterprise. But since KMC's bid contained no indication at all that it was proposing to modify its non-dump type vehicle, its bid did not comply with the tender specifications.

[20] KMC submits that clause 11.1 called only for the listed information (make, model, year, size and tank capacity)and nothing else. There was, however, ample space in that area of the form where KMC could have stated "modified with a dump and hoist" or words to that effect, for example on the same lines as the make and model of the vehicle were stated. Mr. Mueller testified that he had made himself aware of the tender requirements and knew that they called for a standard packer type garbagetruck or a dump type vehicle. He knew that his Ford F150 in standard configuration did not fall into either category of vehicle. In my view, it is simply not reasonable to take the position that there was no need to indicate in the bid that he intended to use a dump type vehicle by converting the Ford F150 into such a vehicle.

[21] The result of KMC's argument would be that a bidder could propose any type of non-dump type vehicle at all without stating that it intended to modify it to make it a dump type vehicle. Enterprise would have no way of knowing whether a bidder was intentionally proposing a vehicle that did not fit the tender specifications or was proposing to modify the vehicle. It would not know what was being proposed without making further inquiries before tenders were to close or, alternatively, taking the risk of accepting the bid and then finding out what the bidder intended. Neither approach would serve to protect the integrity of the tendering process. The integrity of the process is protected only if the party inviting tenders knows substantially what the bidder is proposing from the bid submitted before the tender is awarded.

[22] KMC acknowledged in argument that a bidder would not want to spend money on modification of a vehicle unless it knew that it had the garbage contract. From that point of view, the interpretation of clause 11.1 ultimately proposed by KMC, that

modifications be made and approved by Enterprise before the contract award, is not reasonable. What is reasonable is that the bidder say in its bid which of the specified types of vehicle it will use. If the proposed vehicle will have to be modified to make it fit the specifications, that too has to be stated in the bid. Under clause 11.1, the bidder is then certifying that he will, within 15 days, make modifications that will be acceptable to Enterprise and meet health and safety standards.

[23] The test for compliance in the tendering process is "substantial" rather than strict. A bid is substantially compliant if any departures from the tender call concern mere irregularities: *Ron Engineering*. In this case, KMC's bid cannot be consideredas substantially compliant because it gives no indication at all that a dump type vehicle is being proposed.

[24] What KMC's bid actually proposed was simply a standardconfiguration pickup truck, nothing more. The bid did not indicate any intention to make modifications to that vehicle. On the face of its bid, KMC was saying that it had, or could acquire within 15 days of the contract award, a non-dump type vehicle.

[25] KMC's position is not assisted by the *contra proferentem* rule. The rule applies only if there is ambiguity in a document, in which case it is to be construed contrary to the drafter. In this case, there is no ambiguity in the tender documents. They call for a standard packer type garbage truck or a dump type vehicle. KMC submitted that the timing of Enterprise's approval or acceptance of modifications is ambiguous and that clause 11.1 could be interpreted to mean that approval would be given before or after the contract award. In my view, as indicated earlier, the clause is not ambiguous. Even if it is ambiguous, however, the timing of approval of any modifications is a separate issue. What is not ambiguous is the type of vehicle required by the tender specifications.

[26] Mr. Mueller testified that a dump type vehicle was not actually needed for the garbage contract. Just as the contractor would have to pick up the bagged garbage by hand and put it in the truck, it could also take the garbage out of the truck and dump it by hand. Even if Mr. Mueller is correct about this, it is not relevant because the specifications clearly called for certain types of equipment and to comply, a bid had to propose use of the equipment called for.

[27] For the above reasons, I find that KMC's bid did not comply with the requirements of the tender documents. It follows that no Contract A arose between KMC and Enterprise. KMC's bid could not be accepted under the terms of the tender specifications and was, therefore, merely a counter-offer: *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, [2004] B.C.J. No. 5 (C.A.).

[28] KMC also submitted, however, that the requirement for a dump type vehicleis a "red herring" because there was evidence that Enterprise reallywanted a garbagetruck with a compactor. KMC submitted that Enterprise, in effect, re-wrote the tender specifications such that KMC's bid had no chance of success.

[29] The evidence relied on by KMC in this regard is, first of all, the testimony of Mr. Cadieux, who was a member of the Enterprise Settlement Council when the garbage contract was awarded. Mr. Cadieux testified that at the March 17, 2004 meeting at which Council discussed Ms. Clarke's recommendations about the garbage contract tender, there was discussion about wanting a garbage truck with a compactor on it and that nothing else would be acceptable. KMC also relies on evidence read in from the examination for discovery of Ms. Mercredi, another memberof Council. Her evidence read in was that she thought the garbage contract required a closed garbage truck and that she was not aware that a dump truck properly enclosed would have been satisfactory. Her evidence at trial was that the invitation to tender asked for a garbage dump truck type vehicle.

[30] Both witnesses acknowledged that they had before them at the time of the meeting a memorandum from the senior administrative officer in which she quoted from clause 10.1 of the tender documents the phrase "the Contractor shall use for the solid waste removal and disposal a standard packer type garbage truck or a dump type vehicle".

[31] Both of the witnesses had difficulty remembering anything specific about the discussions at the meeting; the contradiction in Ms. Mercredi's evidence has to be considered in that light. I do not take her or Mr. Cadieux's evidence to go so far as to mean that a decision was made or a consensus reached that only a garbage compactor truck was acceptable, just that there was some discussion about that. That evidence does not amount to the Council changing the terms of the tender. At most, it indicates that there may have been a preference for a garbagecompactor truck over a dump truck

in the context of discussing the relative merits of the bids received. Since KMC's bid proposed neither, its position is not helped by this evidence.

[32] Counsel for Enterprise acknowledged that all of the tenders received contained some deficiencies. I need not, however, go on to determine whether the tenders other than KMC's were also non-compliant because, if they were, they would all amount to counter-offers and Enterprise could accept any one of them. A duty of fairness does not arise in those circumstances, giving KMC no grounds for complaint: *Midwest Management (1987) Ltd. v. British Columbia Gas Utility Ltd.*, [2000] B.C.J. No. 2204 (C.A.).

[33] In light of my decision that KMC's bid did not comply with the tender requirements, I need not deal with the other arguments made about the fairness of the tendering process in this case.

[34] The action is accordingly dismissed. Costs usually follow the event, but if counsel wish to make submissions on that issue, they may contact the Registry within 30 days of the filing of these reasons to obtain a date for argument. Alternatively, they may file written submissions within 30 days.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
29th day of June 2007

Counsel for the Plaintiffs: Allan A. Garber
Counsel for the Defendants: Michael T. Coombs

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