

Date: 20150929
Docket: 14/11
Citation: *Cougar Engineering and Construction v. Newfoundland and
Labrador*, 2015 NLCA 45

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

COUGAR ENGINEERING AND CONSTRUCTION
APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR
FIRST RESPONDENT

AND:

MARINE CONTRACTORS LTD.
SECOND RESPONDENT

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G5959 (2014 NLTD(G) 21)

Appeal Heard: March 18, 2015
Judgment Rendered: September 29, 2015

Reasons for Judgment by Harrington J.A.
Concurred in by Welsh and Hoegg JJ.A.

Counsel for the Appellant: Peter A. O'Flaherty
Counsel for the First Respondent: Peter E. Ralph Q.C.
Counsel for the Second Respondent: No appearance

Harrington J.A.:

[1] This appeal arises from a declaration by an applications judge that a bid for construction work by the second respondent, Marine Contractors Limited (MCL), to Her Majesty in Right of Newfoundland and Labrador (Province) was substantially compliant and that as the lowest bidder, MCL was entitled to an award of a public works contract by the Province. The second lowest bidder, Cougar Engineering and Construction (Cougar) appeals the decision on the basis that MCL's bid was non-compliant. For reasons which follow the decision of the applications judge is affirmed and the appeal is dismissed.

BACKGROUND

[2] The Province issued a tender call to upgrade a municipal sewage collector system (Project) under the provincial procurement process. The Province retained a consulting firm (DMG) to administer the tendering process.

[3] The Province became aware that MCL's tender did not use a computer formatted revision of the schedule of quantities and prices (SQP) requested by DMG prior to the closing date. The Province sought a declaration from the Trial Division as to whether MCL's bid was compliant.

[4] The Province did not take a position before the applications judge and postponed the award of a contract pending a ruling by a justice of the Trial Division. The applications judge held that MCL's tender was substantially compliant. Cougar appealed. Before this Court, the Province accepted the decision of the applications judge.

[5] The applications judge concisely summarized the background as follows:

[4] Subsequent to the distribution of the Tender Specifications, there were five addenda to the Contract Documents. The first, Addendum No. 1, is relevant for the purposes of this application. It was issued on September 6, 2013. It appears to have arisen from concerns of Mr. Baird about possible confusion from the sequential numbering of some of the items contained in lists. The original appears to have listed several units as follows:

Item 02070

Removal of Culverts

1, 600 mm dia. [quantity]

2, 900 mm dia. [quantity]

3, 1050 mm dia. [quantity]

[5] Mr. Baird gave evidence by affidavit and viva voce testimony that he decided to re-issue this document after concerns were expressed about the numbering of some of the items contained therein. The sequential numbering of each listed item, with a comma following, was thought to be potentially confusing for a bidder. It was decided to reissue the form, deleting the numbering on the each of the lists. Apart from the deletion of the numbering, the new document set out identical specifications and quantities as the original. Addendum No. 1 was re-issued on September 6, 2013 and showed the same specifications for culverts as the original. There were several lists of culverts which were changed in this manner, but in each, the list remained the same. In the case noted, the new form contained the same listing of 600, 900 and 1050 millimetres. It was set out without the numbering. That example was changed so it would read:

Item 02070

Removal of Culverts

600 mm dia. [quantity]

900 mm dia. [quantity]

1050 mm dia. [quantity]

[6] The DMG project manager testified that the presence of a comma instead of a period could suggest that the three pipe diameters required for removal and replacement could be read as 1,600 mm, 2,900 mm and 3,1050 mm instead of 600mm, 900mm and 1050mm. He described his position in an affidavit which was before the applications judge as follows:

4. ... I decided to replace the SQP with a revised SQP following a discussion with a technician in our firm. The technician had spoken to a person who pointed out that the sequential numbering inserted in front of some of the items could possibly lead a contractor to make an error as to the diameter of the item required.
5. I revised the SQP by removing the sequential numbering and then issuing a revised SQP. I could have dealt with the issue by simply advising the

contractors to ignore the sequential numbering on the original SQP.
However, I decided to re-issue the SQP for greater certainty and clarity.

(Emphasis added.)

[7] The focus of this appeal is the assertion by Cougar, the second lowest bidder, that MCL's tender was not compliant because DMG's requested amended version of the SQP was not submitted by MCL and one other bidder of the six bidders in total. Cougar, before the applications judge and on appeal, submits that MCL's failure to replace all sheets of the SQP as requested by DMG caused its bid to be non-compliant. The applications judge found that the addendum requested by DMG was substantially the same as the original SQP form except for the deletion of DMG's clerical error in drafting the original SQP.

[8] Cougar submits on appeal that certain terms of the tender were subject to strict compliance, particularly with respect to the submission of a revised SQP requested by DMG which made it an integral part of the tender documents. The applications judge rejected Cougar's position. He found that the Province was entitled to accept MCL's tender as compliant since the original SQP as part of its tender was responsive to all aspects of the tender call. He held that the revised SQP was equivalent to the correction of an error that would have been obvious to the tender participants.

[9] The terms of the instructions to bidders, read as follows:

5. Unacceptable Tenders

- (a) Tenders not submitted on the Tender Form provided will not be considered. [The definition of "Tender Form" included an "addendum".]

...

- (d) Incomplete Tenders will be rejected.

...

- (f) Tenders containing qualification or additional clauses to the Tender Form will be rejected.

- (g) Incorrectly prepared tenders may be rejected.

ISSUES

[10] The issues on this appeal are:

- (i) Did the applications judge err by deciding that the requested addendum was tantamount to a mere deletion of a clerical error with respect to a numbering system in the SQP?
- (ii) Did the applications judge err by failing to apply a strict compliance test to the failure of MCL to submit the revised SQP as an addendum to the Tender Form?

STANDARD OF REVIEW

[11] The standard of review to be applied by this Court was discussed in *Marine Atlantic Inc. v. Topsail Shipping Company Limited*, 2014 NLCA 41, 357 Nfld. & P.E.I.R. 240:

[16] The standard of review for questions of law is correctness and for questions of fact and drawing factual inferences is palpable and overriding error. The standard of review for questions of mixed fact and law is correctness when the alleged error is an “extricable question of law”, but otherwise it is palpable and overriding error. (See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 5, 8-10, 23 and 25-37.)

DECISION UNDER APPEAL

[12] The Province postponed the award of the tender and sought directions from the Trial Division. Cougar argued before the applications judge that MCL’s bid was non-compliant as it failed to comply with the express terms of the tender call which required strict compliance.

[13] The applications judge held that:

- (a) The “Tender Form” included the SQP;
- (b) The first step is to determine whether bids are “materially compliant” on an objective standard to form Contract A;
- (c) “The new form did not change in any substantive way” (see paragraph 53 of the Reasons for Judgment);
- (d) While MCL did not replace the original SQP, there was no substantive change in the requested addendum, and the Tender

Form continued to be responsive to the tender call in the requested addendum;

- (e) The application of the *de minimis* maxim is applicable (see paragraph 57) – the difference between the forms was “cosmetic, unnoticeable, much like correcting a typographical error”;
- (f) There was no prejudice or unfairness to anyone from MCL’s omission of the addendum which was essentially a clerical correction of the SQP in the original Tender Form;
- (g) Failing to use the amended form in these circumstances amounted to a “mere irregularity”; and
- (h) “Turning down low bids for frivolous reasons would ... be harmful to the public tendering system”.

ANALYSIS

[14] Cougar relies primarily on clause 5(a) of the tendering instructions, which states that “[t]enders not submitted on the Tender Form provided will not be considered”. It emphasizes that the tendering documents did not allow the Province to waive that requirement, that there was no accepted industry practice to permit a waiver, and that the reasonable expectation would be that a bidder would submit the revised SQP and not rely on the original. Cougar submitted that the definition of Tender Form includes an addendum. The Appellant further submits that a “qualified bid” is defined at section 2 of the *Public Tender Act*, RSNL 1990, c. P-45 as “a bid that meets the specifications of the tender”.

[15] The Appellant also makes the following submissions:

- (a) The law as outlined in *Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 (Nfld. C.A.) has not changed which defines non-compliant bids as bids that are “not responsive to the specifications, or do not comply with other mandatory requirements of the tender call”;
- (b) The terms of Contract A are included in the tendering documents and may be implied; an implied term exists that the government will accept only compliant bids (see *M.J.B.*

Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619);

- (c) The test for compliance is strict compliance in accordance with the express language of the tender call, i.e. Contract A;
- (d) The trial judge confused “substantial” compliance with “substantive” compliance; this was the wrong test – strict compliance ought to have applied to the requirement for replacement of the original SQP with an amended SQP as an addendum;
- (e) The existence of Contract A depends on compliance with all of the material conditions of the tender call, including “procedural” conditions;
- (f) That MCL used the wrong Tender Form by submitting and retaining the original SQP and, as such, its bid was not compliant and should not have been accepted;
- (g) The government did not reserve a discretion to consider non-compliant bids;
- (h) The revised SQP was not “a mere irregularity”, “cosmetic” and “*de minimis*”.

[16] Cougar acknowledges the following in its factum:

[39] As the law of public tendering has consistently held, it is the owner – here the Department – that is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. Whether or not ... a tender call can be said to include both “substantive” and “procedural” requirements what is clear is that in this case the Department had the right to establish the requirement of the tender call and to make compliance with the requirements mandatory or permissive. The corollary of that right of course is that in order to protect the integrity of the system the courts have consistently required government to respect the rules which it establishes in the tender documents.

[17] The Appellant notes that clause 5(a) specifies that “[t]enders not submitted on the Tender Form provided will not be considered” and submits that this clause was a mandatory condition of the tender call. The definition of “Tender Form” includes an addendum.

[18] The Province submits that the tender conditions include clause 5(g), which states that “[i]ncorrectly prepared tenders may be rejected” (emphasis added). The argument was not raised before the applications judge or mentioned in his reasons.

[19] The Province disagrees with Cougar on the key point that strict compliance is the test with regard to the formation of Contract A. The Province submits the following:

- (a) The Province has a good faith duty to treat all compliant bidders – those with whom Contract A has formed – fairly and equally;
- (b) The government’s duty extends to only accepting compliant bids and rejecting non-compliant bids;
- (c) The test for compliance is substantial compliance;
- (d) Substantial compliance requires that all material conditions be strictly complied with except that mere irregularities are not to be treated as material.

[20] The applications judge reviewed the jurisprudence dealing with the formation of Contract A commencing with the Supreme Court of Canada’s decision in *R.(Ont.) v. Ron Engineering and Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 which defined the parameters of Contract A and Contract B in the law of tendering. The principle was established that a contractor who fails to submit a compliant bid would not be eligible for the award of Contract B having failed to meet the necessary conditions for the formation of Contract A. The Court in *Ron Engineering* also cited a decision from the Province of Ontario where a bidder had omitted one page of a tender inadvertently. However, the page contained a wage escalator clause which affected the price quoted. The Supreme Court recognized that this was the sort of deficiency that constituted an incomplete tender preventing the formation of Contract A.

[21] On the other hand, Justice Estey commented that it would be “anomalous indeed if the march forward to a construction contract could be halted by a simple omission” (at page 127) (see also *British Columbia v. SCI Engineers and Constructors Inc.* (1993), 22 B.C.A.C. 89 (BCCA)).

[22] As one commentator, Anne C. McNeely in *Canadian Law of Competitive Bidding and Procurement*, (Toronto: Carswell, 2010) at pages 168-169, has written, “[V]ery few bids are entirely free of error, and fairness requires that the materiality of a bid defect be considered”. McNeely comments that in *Ron Engineering* at page 278, the Supreme Court held that, a mere “omission” would not stop a Contract A from being formed. Likewise, the Supreme Court held that a similar result would be obtained if the case considered an “unchecked box” (see *Double N Earthmovers v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116 at para. 109).

[23] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 the Supreme Court emphasized the importance of the acceptance of only compliant bids in public procurement:

[68] This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35:

The owner -- in this case the government -- is in control of the tendering process and may define the [page101] parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner -- here the government -- sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

[24] In *Double N Earthmovers*, the majority saw a bid informality or irregularity as “[g]enerally ... something that did not materially affect the price or performance of Contract B” (at paragraph 41).

[25] In *M.J.B. Enterprises*, the low cost bidder had included in his tender document a handwritten note which appeared to qualify the proposed price. The Supreme Court held that this bid which was from the apparent lowest bidder should have been disqualified. Canadian courts have recognized that few tender calls are free from errors or omissions of one type or another and that a bid should not be declared defective unless the error or omission is material. This was clear from the *Ron Engineering* decision that a “simple omission” should not stop the formation of Contract A. In *Double N Earthmovers*, while dissenting on the main issue of whether the successful

bid should have been disqualified because of the bidder's intention to use non-compliant equipment, the four judge minority reaffirmed the test for "substantial compliance" as follows:

[109] The test for compliance in the tendering process is "substantial" rather than strict. Estey J.'s remark in *Ron Engineering* that it would be "anomalous indeed if the march forward to a construction contract could be halted by a simple omission" (p. 127) is often cited in support of the substantial compliance test: for example, see *British Columbia v. SCI Engineers & Constructors Inc.* (1993), 22 B.C.A.C. 89. Although Estey J. made this remark in reference to the Contract B stage of the tendering process, there is no reason to doubt that these same considerations apply to the Contract A stage as well. It would make tendering unworkable if an owner and bidder were prevented from entering into Contract B based on an unchecked box.

[110] Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with: *Silex Restorations Ltd. v. Strata Plan VR 2096* (2004), 35 B.C.L.R. (4th) 387, 2004 BCCA 376, at paras. 24 and 29; *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, 2004 BCCA 5, at para 15. A bid is substantially compliant if any departures from the tender call concern mere irregularities.

(Emphasis added.)

[26] On the issue of materiality, I agree with the finding of the applications judge that the requirement by the consultant, DMG, that the SQP be replaced was not material since the amended SQP clearly would not have affected the quantities or prices respecting the sewage piping to be removed and replaced. The evidence before the applications judge indicated that the list of diameters in millimeters of pipes that were being replaced were intended to be listed 1 to 3 for the three different diameters listed on the SQP. On the face of the documents, they were being replaced by pipes of the same diameter. The fact that a typographical error was made by DMG putting commas instead of periods beside the three numbers forming the list of pipe diameters constituted an obvious clerical mistake that could have been ignored. The error was not objectively misleading.

[27] From this perspective, all of the requisite information material to the Province and those submitting tenders regarding quantities and prices was set out properly in MCL's bid such that using the original SQP was not deficient or misleading and was substantially compliant. Having received a declaration from the applications judge in favor of the acceptance of MCL's bid, the Province was faced with the prospect of delaying matters further

since Cougar appealed. In this Court, the Province took the position that the applications judge did not err in concluding that MCL's bid was compliant and was eligible for acceptance.

[28] There is other jurisprudence that has set parameters regarding whether or not a bid is materially compliant. In *Steelman Ltd. v. Nova Scotia (Attorney General)*, 2007 NSSC 156, 61 C.L.R. (3d) 280, the Nova Scotia Supreme Court dealt with a situation where a bidder submitted a bid on a non-prescribed form. The court found that the bid was materially non-compliant because the prescribed form included written assurances, which were viewed as material to the tender call but were missing from the bidder's non-prescribed form.

[29] In *J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society*, 2002 BCCA 323, 16 C.L.R. (3d) 111 a bid was submitted with particular pages missing. The missing pages were found to be redundant and the court held that they did not contain anything of importance. As such, the tender form was not complete but this did not amount to material non-compliance (at paragraph 6).

[30] The applications judge did not err in finding that the requirement by the consultant, DMG, that the SQP be replaced with the amended version was not material and would not have affected the prices or quantities to be supplied. On the face of the documents, pipes were being removed and replaced by pipes of similar material, diameters and quantities.

[31] In *Eastern Regional Health Authority v. Kannegiessar Canada Inc.*, 2015 NLTD(G) 28, 363 Nfld. & P.E.I.R. 241 Butler J. considered an application for a declaration of bid compliance where the lowest bid included qualifications and incorrect specifications.

[32] Butler J. applied the reasoning in *Double N Earthmovers* and noted that the test is substantial compliance based upon whether a deficiency is material or amounts to a mere irregularity. She found that the issue was whether the bidder intended to supply equipment that met the tender requirements. She applied an objective standard and determined the specifications of the equipment were material, mandatory, and essential and the requirement could not be waived. Butler J. also found that the qualification to its bid by the unsuccessful bidder would affect the quality of the product sought by the health authority. The applications judge found that the qualification in question by the bidder was material and constituted a

counter-offer that was unfair to the other bidders. The bid was thus declared non-compliant.

[33] The applications judge here held that the use of the original, rather than the revised SQP with the numbering of the pipe diameters deleted from the schedule was not material with respect to compliance with the tender call. The requirement by DMG to use the amended SQP was in its own words requested “for greater certainty”.

[34] Cougar did not assert nor did it establish that information necessary for the completeness of the tender sought under the SQP was absent at the close of the tender call. The MCL bid was substantially compliant.

CONCLUSION

[35] I conclude that the applications judge:

- (i) did not err in concluding that the amended SQP required by DMG was tantamount to the correction of a clerical error on the SQP created by DMG’s error, the absence of which did not impair the validity of MCL’s tender; and
- (ii) did not err in his application of a substantial compliance test to the assessment of MCL’s tender.

[36] Accordingly, I would dismiss the appeal with no order as to costs.

M. F. Harrington J.A.

B. G. Welsh J.A.

L. R. Hoegg J.A.