COURT OF APPEAL OF YUKON

Citation: *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking* 2015 YKCA 5

Date: 20150206
Whitehorse Docket: 13-YU730

Between:

Government of Yukon (Department of Highways and Public Works)

Respondent (Petitioner)

And

P.S. Sidhu Trucking Ltd.

Appellant (Respondent)

And

CMF Construction Ltd.

Respondent (Respondent)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Schuler
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of Yukon, dated September 27, 2013 (*Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking et al*., 2013 YKSC 105, Whitehorse Docket 13-A0077).

Counsel for the Appellant:	E. Olszewski, Q.C.
Counsel for the Respondent Government of Yukon:	P. Lawson
Counsel for the Respondent CMF Construction Ltd.:	M. Preston
Place and Date of Hearing:	Whitehorse, Yukon November 18, 2014
Place and Date of Judgment:	Whitehorse, Yukon February 6, 2015

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Schuler
The Honourable Mr. Justice Goepel

Summary:

The respondent Yukon Government ("Yukon") issued tenders for the construction of a bridge replacement. The Tender Form listed the closing time as 4:00 p.m. The appellant's agent submitted a bid at 3:59 p.m., but asked for it back if there was time. After being told he had up to 4:01 p.m., he took the bid back, made a change, and re-submitted it at 4:00 p.m. The appellant's bid was the lowest. The respondent CMF Construction Ltd. ("CMF") questioned the timeliness of the bid. Yukon asked the Court for a declaration whether the bid was submitted in time. The judge declared that the appellant's bid was not submitted in time. The contract was awarded to CMF. The appellant appealed. It also brought an action against Yukon for damages for breach of contract or, alternatively, negligent misrepresentation. Held: appeal is dismissed. Because the respondent awarded the contract to CMF, the direct issue before this Court is moot. Although the timeliness of the bid remains relevant to the appellant's claim for breach of contract in its action, this Court will not exercise its discretion to determine the issue. To do so risks a result akin to judicial embarrassment, in which Yukon has the potential to face damages for following an order of the court. The advisory opinion should not have been provided. Courts are reluctant to provide advisory opinions, absent a clear lis and practical benefits for doing so. In the current case, the practical benefits of an advisory opinion were suspect because further litigation was likely regardless of the outcome and there was a clear potential for judicial embarrassment.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal raises issues of mootness and consideration of the appropriateness of providing declaratory legal opinions.

Background

[2] The respondent issued tenders for the construction of the replacement of a bridge. The tender package included Instructions to Bidders-A, which included sections 1.5 and 2.5:

> 1.5 The bidder who wishes to withdraw a tender from consideration may do so by submitting a written withdrawal letter to the same address to which the tender was submitted, prior to tender closing time and the tender will be returned to the bidder intact.
>
> 2.5 In order to be considered, tenders must be received before the specified time. Tenders received after this time will not be considered

> regardless of the reason for their being late, and will be returned to the bidder unopened.

[3] The Tender Form stated at s. 7:

> **TENDER CLOSING DATE:** (emphasis from original)
>
> 4:00 p.m., Local Time, 6th August 2013.

The closing date was changed by addendums to August 15, 2013. They referred to the closing time as "16:00 p.m. rather than 4:00 p.m."

[4] A notice of tender was published on the respondent's "Online Tender Management System ('TMS')". It reflected the change in date and specified the time for closing as "4:00 p.m. local time" and included the following:

> Submissions clearly marked with the above project title, will be received up to and including 4:00 p.m. local time, August 15, 2013, at Contract Services…

[5] The TMS Terms and Conditions of Use included a warning at s. 5:

> You should not rely on the Site as your only means of obtaining information about bid opportunities or updates to bid opportunities.

Sections 15 and 16 stated:

> The service provided through the Site is provided "As Is" without guarantee, warranty, or representation, of any kind, including any warranty, guarantee, or representation as to its fitness for any particular purpose.
>
> Government of Yukon does not warrant, guarantee or represent that the Site is complete or that the information found on it is accurate, or that it will function without error, failure or interruption.

[6] A public tender notice was published in a local newspaper stating:

> Submissions clearly marked with the above project title, will be received up to and including 4:00 PM local time, August 06, 2013…

[7] The chambers judge set out relevant facts:

> [8] The following facts are taken from the affidavit of Ruben Bicudo, who was responsible for submitting the [appellant's] tender. I am going to read paras. 8 through 14:

8. My son and I arrived at the Procurement Support Centre at approximately 3:55 p.m. At this point in time, the only item to complete on the Tender was to total the projected prices and insert the total into the bottom line on page 4 of the Tender.

9. I went up the stairs to the counter in the Procurement Support Centre. Using a small scientific calculator, I started to calculate the total of the Tender. As I reached item number 26 of page 3 of the Tender, the calculator went into exponential notation and then blanked out. I had 3 items [left] to add to complete the final total of the Tender. I asked the counter staff if they had a calculator. Becky MacKenzie advised that they did not have a calculator, but then stated that as long as the unit prices were all complete, along with the extensions, that they could calculate the final total.

10. I left the final amount blank on page 4 of the Tender, placed the Tender into the envelope, sealed it, and then handed the envelope to Becky MacKenzie, who was still behind the counter. She received and time stamped the Tender at 3:59 [p.m.] on August 15, 2013.

11. As I started to walk away, I thought I might have made an error in one of my calculations so I asked Becky MacKenzie if I could have the Tender back. She looked at me uncertainly but Pauline Stonehouse, who has worked at the Procurement Support Centre for at least 20 years, interjected and said that I could have the Tender back. I asked if I had time to do so. Pauline Stonehouse inserted a piece of paper into the Machine to get the time and then indicated that I did have time to take the Tender back.

12. Upon the confirmation of Pauline Stonehouse, and relying on her advice and experience, I took back the Tender on the assumption that it would be accepted if it was time stamped 4:00 pm. I was not looking at any clocks, including the YG Clock which was not visible from my viewpoint. I was relying on the reading of the Machine and the information and advice given to me by Pauline Stonehouse. I did not notice the YG Clock until later on, when I passed it on my way to the conference room for the actual tender opening.

13. Either Becky MacKenzie or Pauline Stonehouse handed me back the Tender envelope and I quickly opened it, looked at it, and darkened a zero on item number 1 of the unit price table. Having ascertained that the Tender was correct, I put the Tender back into the envelope.

14. I then handed the envelope containing the Tender to the counter staff at the Procurement Support Centre to seal with tape, which they did. They then time stamped the Tender. The stamp on the Tender read 4:00 pm on August 15, 2013.

> [9] The affidavit of Pauline Stonehouse, the Contract Coordinator for the [respondent], states the following at paras. 12, 13, and 14:
>
> > 12. I overheard, am informed and do verily believe that:
> >
> > - as the 4:00 pm deadline approached, Ruben Bicudo attended the counter at the Procurement Support Centre, and submitted a bid on behalf of [the appellant].
> > - Becky Mackenzie received the bid envelope and stamped it in the time stamp machine. The time [stamp] on the bid read 3:59 p.m.
> > - Mr. Bicudo started to leave the counter, but then turned around and asked for his bid back.
> >
> > 13. As I was coming out of my office, I noticed that Becky did not know what to do in response to Ruben's request for his bid back. Normally, we require requests for bids to be returned to be submitted in writing. Realizing that there was no time to follow that process, I checked the time on the time stamp machine to see if the bid deadline had passed. The time stamp machine [read]: 4:00 pm. Mr. Bicudo asked if he had time to review and resubmit his bid. I indicated to Mr. Bicudo that he had until the clock ticked 4:01 pm. I discarded the print-out from the time stamp machine.
>
> 14. One of us (Becky or I; I cannot recall) returned the bid envelope to Mr. Bicudo, who immediately tore it open. I did not notice what he did, if anything, to the document. Within a matter of seconds, Mr. Bicudo resubmitted the envelope. I received the envelope from him, taped it shut and then time-stamped a separate piece of paper which I then attached to the bid envelope. I used a new slip to show the date received rather than stamping the envelope [directly], as the envelope had been previously date stamped and I did not want to cause confusion. The new time stamp read 4:00 pm.

[8] The appellant's bid was the lowest. A few days after the close of bidding, the second lowest bidder, CMF Construction Ltd. ("CMF"), questioned the timeliness of the appellant's bid.

[9] In September 2013, the respondent brought an application seeking the following declarations:

> A. confirming the precise closing time for the Tender for the Tatchun Creek Bridge Replacement; and
>
> B. that the bid submitted on the Tatchun Creek Bridge Replacement Tender by [the appellant] was [or was not] submitted on time in accordance with the Tender.

[10] CMF and the appellant consented to the respondent so proceeding because construction of the replacement bridge had to begin. In a section entitled "Facts Related to Outcome of this Petition", the respondent stated:

> 15. On September 9, 2013, both [CMF] and [the appellant] agreed to extend the acceptance period for the Tender to up to and including the third business day after the court delivers its ruling on the [respondent's] request for a court declaration and any appeal thereof.
>
> 16. The [respondent] needs to make a decision on the Tender by mid-October in order to have the work done in a timely way.

[11] In its response, the appellant sought a declaration that its bid was timely and compliant. CMF pleaded that the appellant's bid was out of time and not compliant.

[12] On September 27, 2013, the judge ruled that the appellant's bid was not filed in time. The respondent awarded the contract to CMF.

[13] On October 25, 2013, the appellant brought this appeal. It subsequently sued the respondent for breach of contract or, alternatively, negligent misrepresentation related to the conduct of the respondent's staff at the time of closing. CMF did not participate in the appeal to this Court.

Trial decision

[14] The judge began his analysis with *Ontario v. Ron Engineering & Construction (Eastern) Ltd*., [1981] 1 S.C.R. 111, and the formation of what is referred to as "Contract A" in the context of the tendering process. He quoted (at para. 10):

> The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide.

[15] The judge then stated that the first issue to be determined was "the precise closing time for the tender". He reasoned that:

> [11] … the Instructions to Bidders-A is clear in s. 2.5, where it states: "tenders must be received before the specified time." That time is clearly stated in the contract documents to be 4:00 p.m. To make it clear, s. 2.5 goes on to say, "Tenders received after this time will not be considered, regardless of the reason...". This means that tenders must be received by 3:59 p.m., and tenders received after 3:59 p.m. will not be considered. The wording, "regardless of the reason", in my view, is intended to refer to errors, misunderstandings, or [confusions] that occur, as it did here, where someone asked for a sealed, time-stamped bid to be returned, opens it, and writes something. I do not find the small print on the TMS notice of tender using the words, "up to and including 4:00 p.m." to be part of the contract documents. The TMS is an online document for convenience of bidders that was explicitly not warranted, guaranteed, or represented to be complete or accurate. The notice of tender in the *Whitehorse Star* newspaper is not a part of the contract. The contract documents are set out in s. 1.1 of the *Articles of Agreement*.

[16] The judge then considered whether an irrevocable contract was formed when the appellant first submitted its bid:

> [16] The second issue to be addressed is whether the [appellant's] bid, filed at 3:59 p.m. forms the Contract A and becomes irrevocable. That, perhaps, would have been the case if that was the end of the story. Unfortunately, Mr. Bicudo requested that the bid be returned, which is a clear breach of the [Instructions] to Bidders-A, which requires a written withdrawal letter in s. 1.5 before the tender will be returned, or the amendment procedure in [ss.] 2.6 to 2.9, which was not followed. In any event, the sealed bid was returned to Mr. Bicudo, torn open, and he "darkened a zero on item number 1".
>
> [17] While this may have been a perfectly innocent event, it is a clear breach of the [Instructions] to Bidders-A and calls into question both the fairness and integrity of the bidding process. While Mr. Bicudo may have relied on [the respondent's] staff, it was he who interfered with the bidding process. The result was that the [appellant's] bid was filed and date stamped 4:00 p.m., which is clearly not before 4:00 p.m.

[17] The judge concluded that the appellant's bid was not filed in time according to the Instructions to Bidders-A "which required a filing time before 4:00 p.m."

Positions of the parties

[18] In its factum, the appellant expressed the alleged errors of the judge as follows:

> 11. The learned Trial Judge made the following errors in finding that the Tender Opportunity closed at 3:59:59 pm:
>
> a. The learned Trial Judge erred in law in excluding or ignoring iterations of the Tender closing deadline which expressly stated that the Tender deadline was "up to and including 4:00 pm".
>
> b. The learned Trial Judge erred in fact and in law in determining that the Tender closing deadline was described with precise wording.
>
> c. The learned Trial Judge erred in fact and in law in excluding or ignoring jurisprudence confirming that when there is ambiguity regarding the closing of a tender deadline, the courts should give effect to the later deadline.
>
> d. The learned Trial Judge erred in fact and in law in excluding or ignoring:
>
> i. the [respondent's] own evidence that its practice would be to accept tenders submitted between 3:59:59 pm and 4:00:59 pm; and
>
> ii. that the [respondent's] conduct in respect of the Tender closing deadline was consistent with the evidence of its practice of accepting tenders submitted between 3:59:59 pm and 4:00:59 pm.
>
> 12. Alternatively, if the Tender Opportunity closed at 3:59:59 pm, the learned Trial Judge erred in fact and in law in determining that the Appellant's conduct after the Tender Opportunity closed constituted a breach of contract that rendered the Tender non-compliant.

[19] At the hearing of this appeal, the appellant referred this Court to the recent decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, and discussed the standard of care that should apply in this case to the construction of the tender documents.

[20] The respondent stated its position as follows:

> 8. The following issues are raised in this appeal:
>
> a. Did the learned Trial Judge err in finding that the Tender Opportunity closed at precisely 4:00:00 p.m. such that bids

received once the time stamp clock registered "4:00 p.m." were late?

b. If the answer to the first question is "no", then did the learned Trial Judge err in finding that the Appellant's original bid could not be considered a valid bid for the purpose of the Tender Opportunity once it had been withdrawn and revised by the Appellant?

9. The Respondent takes no position on the first issue.

10. On the second, alternative issue, the Respondent submits that the learned Trial Judge made no error.

Discussion

[21] At the hearing of this appeal, the Court raised the issue of mootness and questioned whether the trial court should have given an opinion. The appeal is moot because the contract was awarded and the work undertaken, but the parties note that the appellant's action against the respondent is pending. Insofar as it alleges breach of contract, a determination of whether the appellant's bid was timely is significant. This raises another concern.

[22] Rule 10 of Yukon's Supreme Court *Rules of Court*, Y.O.I.C. 2009/65, authorizes the filing of a petition where "the sole or principal question at issue is alleged to be one of interpretation of [a] … contract …", but generally, courts are reluctant to give merely advisory opinions. Parties are expected to rely on their legal advisers, not the court, when deciding how to exercise rights. Usually, the court will require an active or imminent *lis* before providing an advisory opinion.

[23] This was addressed by Mr. Justice Hall in *Tr'ondëk Hwëch'in v. Canada*, 2004 YKCA 2:

> [11] I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document … However … it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined *lis*.

[24] In the present case, although there was a potential *lis* in that CMF and the appellant both contended they were entitled to an award of the contract, the *lis* before the court, whether the appellant's bid was timely, became moot once the contract was awarded to CMF. In a separate action, the issue is pending awaiting a determination by this Court whether the judge in the present case was correct. In that sense it is contended that the appeal is not moot. This raises a different concern.

[25] As Chief Justice McEachern observed in his concurring opinion in *Horton Bay Holdings Ltd. v. Wilks* (1991), 3 C.P.C. (3d) 112 at p. 120:

> I think mischief could easily result from actions just for declarations. I would expect no declaration would be made unless the Court is satisfied that the declaration will have some practical value.

[26] In the present case, the practical value was to obviate the need for the respondent to decide whether the appellant's bid was filed on time, but whatever the court's opinion on the application for the declaration, the potential for litigation was unlikely to disappear. The probability was that whichever contractor did not get the job would sue. The practical value of the declaration was suspect. More importantly it raised the possibility, which has occurred, that the respondent would be exposed to a claim in contract based on following the court's advice. In my view, this raised circumstances akin to judicial embarrassment and militates against the appropriateness of the court providing a declaratory opinion in the circumstances of this case.

[27] Judicial embarrassment arises when judicial proceedings lead to inconsistent findings: *Garcia v. Drinnan*, 2013 BCCA 53 at para. 7; *Bygo Inc. v. MacDonald, Dettwiler & Associates Ltd.*, 2001 BCCA 327 at para. 17. In the present case, a judge held that the appellant's tender was late. In the pending action, the appellant asserts that its tender was not late. It can sustain that position only if this Court holds that the tender was delivered on time. That could lead to the respondent

being condemned in damages for proceeding in accordance with an order of the Court.

[28] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Court laid down the basic framework for considering mootness. The appellant quotes from the case stating:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.
>
> …
>
> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[29] In my view, the "tangible and concrete dispute" in the present case has disappeared, but I am prepared to take into account the appellant's position that the judge's opinion is incorrect and that it was entitled to an award of the contract which it did not get.

[30] The appellant refers to the three criteria stated in *Borowski* that guide a court's exercise of discretion whether to address a moot issue: whether there is an adversarial context; concern for judicial economy; whether the court is exercising its proper law-making function.

[31] The adversarial context in this case is indirect, but Sopinka J. in *Borowski* accepted that collateral consequences could satisfy the first criterion. As to the second criterion, Sopinka J. observed at p. 360:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.

Arguably, this approach is apt in the present case.

[32] In *Borowski*, the focus of the third criterion was on the relationship between the judiciary and the legislature and concern with the risk of the court improperly intruding into the domain of law makers. This is not directly relevant in the present case.

[33] The factors stated in *Borowski* provide guidance for a court's exercise of discretion on whether to address a moot issue. I do not consider them to be exhaustive in that they are directed to the implications of a court doing so: will it resolve a dispute; will it respect judicial economy; will it extend beyond the court's proper law making function.

[34] In the present case, a determination by this Court on whether the judge erred clearly has the potential to expose the respondent to a claim for damages because it followed the opinion of the Court. In this case, the issue is moot and there is a significant concern militating against the exercise of this Court's discretion to address the issue. To apply the collateral consequences approach risks a legally embarrassing result.

[35] In my view, the legal opinion requested in the respondent's petition should not have been given, but all parties sought it. The appellant now seeks damages against the respondent for acting in accordance with that opinion. On this appeal, it seeks to establish the legal basis for doing so. On this appeal, that issue is *prima facie* moot. I would not lend the assistance of this Court to the appellant's attempt to cast off the results of legal proceedings it supported.

Conclusion

[36] This appeal results from the well-intentioned efforts of the parties to obtain legal guidance to facilitate the construction of a time-sensitive public works' project. The Court acted to assist that effort. While understandable, the process was fraught with peril from the outset. Had the respondent obtained and acted on legal advice, it would have been in the same position in which it presently finds itself, but without the risk of judicial embarrassment. The appellant's contention that its tender was

delivered in time would have been resolved in an appropriate *lis* together with the appellant's other contentions.

[37] The appellant, which accepted the process, is not without recourse. It asserts that employees of the respondent acted improperly to its detriment and pursues damages accordingly. That controversy will be addressed in light of the judge's finding that the appellant's tender was late.

[38] I would dismiss this appeal as moot.

_____
The Honourable Mr. Justice Chiasson

I agree:

_____
The Honourable Madam Justice Schuler

I agree:

_____
The Honourable Mr. Justice Goepel