SUPREME COURT OF YUKON

Citation: *City of Whitehorse* v. *Ketza Construction Corp. et al.*, 2009 YKSC 51

Date: 20090709
S.C. No. 09-A0038
Registry: Whitehorse

Between:

CITY OF WHITEHORSE

Petitioner

And

KETZA CONSTRUCTION CORP. and
TSL CONTRACTORS LTD.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Geoffrey Bowman	Counsel for the petitioner
Scott B. Twining	Counsel for the respondent TSL Contractors Ltd.
Murray J. Leitch	Counsel for the respondent Ketza Construction Corp.

REASONS FOR JUDGMENT

INTRODUCTION

[1] The City of Whitehorse (the "City") petitions the Court for a declaration that the bid of Ketza Construction Corp. ("Ketza") on a groundwater well project (the "Project") is uncertain as to price and that the City does not have the right to correct an apparent mathematical error in Ketza's Goods and Services Tax ("GST") calculation. TSL Construction Ltd. ("TSL"), the only other bidder, supports the City's application. Ketza opposes the application and applies to have its bid declared the low bid.

THE FACTS

[2] The City has plans to develop a number of groundwater wells as a new source to meet the City's water needs.

[3] The City prepared tender documents to solicit competitive bids from contractors willing to undertake the Project work. An Invitation to Tender was published in the Whitehorse Star on April 17, 2009, advising interested bidders that Tender Documents would be available at City Hall on Monday, April 20, 2009.

[4] The City received two bids in response to the Invitation to Tender by the May 13, 2009 closing date: one from Ketza (the "Ketza bid") and one from TSL (the "TSL bid").

[5] On May 13, 2009, the bids were opened publicly at City Hall. The bidders were identified and the Total Tender Price presented in the bids was announced and recorded. TSL's Total Tender Price was $907,410.00; Ketza's Total Tender Price was $915,205.65.

[6] The Engineering Projects Officer stated at the bid opening that the next step would be to check the bids for inconsistencies and mathematical errors.

[7] Schedule T5 of the TSL bid form shows the following:

TOTAL ALL ITEMS (FOR BONDING and CONTRACT AWARD PURPOSES) $ 864,200.00
GST @ 5% $ 43210.00
TOTAL TENDER PRICE (FOR ISSUING PURCHASE ORDER) $ 907410.00
TOTAL TENDER PRICE (in words)
— nine hundred and seven Thousand four hundred and Ten ——— Dollars
and — zero ——— Cents.

[8] Schedule T5 of the Ketza bid form shows the following:

TOTAL ALL ITEMS (FOR BONDING and CONTRACT AWARD PURPOSES) $ 863053
GST @ 5% $ 5215265
TOTAL TENDER PRICE (FOR ISSUING PURCHASE ORDER) $ 91520565
TOTAL TENDER PRICE (in words)
nine hundred and fifteen thousand
two hundred and five Dollars
and sixty-five Cents.

[9] On May 14, 2009, the City reviewed the bids. During the review, The City's Engineering Projects Officer noted an apparent mathematical error in the GST calculation in the Ketza bid. If corrected, Ketza's bid had a Total Tender Price of $906,205.65.

[10] The Engineering Projects Officer believed it to be appropriate to correct an obvious mathematical error in the GST calculation and amended the Total Tender Price in the Ketza bid correspondingly. He informed Ketza who agreed there was a mistake in calculating the GST and confirmed that Ketza would do the Project for a $906,205.65 Total Tender Price.

[11] The City then evaluated the bids. Price was evaluated without including GST and on the basis of the Total All Items amount. Both bids were scored equally on all evaluation points except price. The Ketza bid was identified as the low bid.

[12] I also find the following facts based upon the evidence of the City's Engineering Projects Officer and the Director of Operations:

1. there was only one mathematical error in the Ketza bid form;
2. the mathematical error in the GST calculation is apparent and obvious on the face of the Ketza bid;

3. the “Total All Items” for Ketza in the amount of $863,053.00 did not change, and the corresponding figure for TSL is $864,200.00;
4. there was no evidence of mischief on the part of Ketza;
5. the City’s Engineering Projects Officer found that the only difference between the Ketza and the TSL bids was their bid price which he recorded in the Evaluation Summary;
6. in the Evaluation Summary, the City’s Engineering Projects Officer recommended that Ketza receive the contract as low bidder;
7. in the Evaluation Summary, the City’s Engineering Projects Officer used the Total All Items figures to compare the bids as this had been the normal practice at the City for approximately the last three years because the City was able to recoup all GST payments it made on capital projects;
8. a draft Administrative Report, prepared under the direction of the City’s Engineering Projects Officer, included a reference to Ketza’s apparent GST calculation error;
9. the City’s Director of Operations asked that the reference to the GST error be removed from the Administration Report as he considered the discussion of the GST calculation to be irrelevant, and the practice at the City was not to include GST;
10. the usual practice of the City is to award contracts to the lowest compliant bidder.

[13] On May 20, 2009, TSL contacted the City to object to the recommendation to award the Project work to Ketza. TSL was advised that the Total Tender Price read out at the bid opening had been amended to correct an apparent error in the GST

calculation in the Ketza bid. TSL expressed its objection in writing by letter dated May 21, 2009.

[14] The City considered TSL's objections in the context of the Tender Documents and determined that it was obligated to evaluate the bids on the Total Tender Price as presented in the bids.

[15] If the bids were evaluated on the basis of the Total Tender Price as presented in the bids, the TSL bid is the low bid.

[16] By letter dated June 8, 2009, the City advised the bidders it intended to evaluate the bids on that basis.

[17] On June 8, 2009, Ketza contacted the City to object to the bids being evaluated on the basis of the Total Tender Price. Ketza expressed its objection in writing by letter dated June 12, 2009.

[18] Each of the bidders claims that the City is obligated to award the Project work to it as the low bidder. The City seeks a declaration to clarify which is the low bid according to the terms in the Contract Documents issued for the Project.

CONTRACT DOCUMENTS

[19] The Contract Documents include, among other items, the Instructions to Tenderers and the Tender.

[20] The relevant provisions of the Instructions to Tenderers are:

> ***Instructions to Tenderers***
>
> ***1. Tendering Conditions***
>
> ***Section 1.4****: Tenders must be submitted on the blank forms provided by the City and must be free of any and all escalation clauses, qualifications or other additions or deletions.*

***Section 1.7**: All Tenders must have all spaces, blanks and declarations completed. Any item missed or any special conditions added to the Tender may be cause for its rejection by the City's sole discretion.*

Acceptance of Tenders

***Section 1.13**: Bidders acknowledge and accept, by way of bidding, that the City's evaluation of tender pricing shall be based on the "**TOTAL TENDER PRICE"**, as presented in Schedule T-5, including any and all Provisional Items. During the assembly of Contract Documents the City may, at its sole and absolute discretion, include any or all Provisional cost items in the total contract price. Furthermore, all bidders acknowledge that the subsequent performance of any or all of the awarded provisional items, which have been included in any executed contract, shall be realized **ONLY** upon the written request of the Engineer and that such authorization remains at their sole and absolute discretion. (emphasis in original)*

***Section 1.14**: The City will not necessarily accept the lowest or any Tender and reserves the right to accept or reject any or all Tenders, or to accept the Tender which the City deems to be in its own best interest.*

***Section 1.15**: Without limiting the generality of the foregoing, any Tender may be rejected for:*

- *a) incomplete Tender;*
- *b) conditional Tender;*
- *c) obscured/irregular erasures or corrections in Schedule of Quantities and Prices;*
- *d) prices omitted;*
- *e) unbalanced bid;*
- *f) insufficient or irregular Tender Security;*
- *g) evidence of inadequate experience or of inadequate capacity to perform the Work;*
- *h) evidence of previous failure to perform adequately on similar work;*
- *i) evidence of alterations to the pre-printed Tender Form.*

10. Goods and Services Tax (G.S.T.)

***Section 10.1**: G.S.T. is not to be included in the unit prices or lump sums of the Schedule of Prices. G.S.T. is to be calculated at the applicable rate as a separate line item based on the total of all items. The calculated G.S.T. is then added to determine the Total Tender Price.*

[21] The relevant provisions in the Tender are:

Tender

T- 4 Basics of Tender

Section 4.1*: The Contractor has carefully examined the instructions to tenderers and the Contract Documents for the construction of the Work.*

Section 4.2*: The Contract Documents are an integral part of this Tender.*

Section 4.3*: The terms and definitions set out in the General Conditions, GC-1 Definitions, apply to the Tender.*

Section 4.10*: The prices in the Schedule of Quantities and Prices are firm, but the other Schedules in this Tender are subject to review by the City, and the City may require these Schedules to be changed for good cause prior to acceptance of this Tender, which, without limiting the generality of the foregoing, shall include:*

a) unacceptable construction superintendent; subcontractors or materials suppliers;
b) unacceptable Force Account Rates;
c) unacceptable work schedule;
d) unacceptable work load in the current year; or
e) other factors.

Section 4.12*: The quantities of work are approximate only and are subject to increase or decrease. Where the quantities are increased or decreased, the unit prices stated in the Schedule of Quantities and Prices shall apply, and the Contract Price shall be adjusted accordingly.*

Section 4.13*: If a discrepancy is found between Unit Price and a total amount, the Unit Price shall be considered as representing the intention of the Contractor, and the City shall recalculate that amount. The amount will be corrected and the corrected tender amount and Contract Price shall be established.*

Section 4.14*: If a discrepancy is found between a Lump Sum Price and any corresponding breakdown of prices, then the Lump Sum Price shall be considered as representing the intention of the Contractor.*

Section 4.16*: The lowest, or any tender, may not necessarily be accepted and the City reserves the right to reject or accept any bid. This tender may be cancelled at any time prior to notification of award of the Contract. The city need not award any contract. Nothwithstanding section 4.18, if the City rejects all tenders, the City will not be liable to any bidder for any claims, whether for costs*

> *or damages incurred in preparing the tender, loss of anticipated profits or for any other matter whatsoever.*
>
> ***Section 4.17:*** *Any significant items omitted from the tender or any additions, alterations, conditions or qualifications added to the tender or failure to properly sign the tender may cause the bid to be rejected. A tender may be rejected where there is substantial evidence that the bidder would be unable to carry out the work required. The determination of whether or not to reject any tender or to remove any tender from the evaluation process will be made in the sole and absolute discretion of the City.*

[22] In these reasons, I will refer to Sections 1.14 of the Instructions to Tenderers and 4.16 of the Tender as the privilege clauses which permit the City not to accept the lowest or any tender, or to accept any tender it deems to be in its own best interest.

[23] I will refer to Sections 1.15 and 4.17 as the discretion clauses which permit the City to determine whether or not any tender should be removed from the evaluation process.

[24] There does not appear to be a discretion clause that expressly permits the City to waive informalities or irregularities.

ISSUES

[25] The issues to be determined in this application are:

1. Do the terms of these tender documents require perfection or substantial compliance?
2. If the test is substantial compliance, is the Ketza bid uncertain as to price?
3. If the City is permitted to accept the Ketza bid, is it legally obligated to do so?

General Tendering Law

[26] The leading case in contract tendering law is *Ontario* v. *Ron Engineering & Construction (Eastern) Ltd.,* [1981] 1 S.C.R. 111. An invitation to tender is treated as an

offer by the owner to enter into a preliminary contract, called Contract A, with each bidder who submits a bid in compliance with the terms and conditions of the invitation to tender.

[27] The purpose of Contract A is to protect the integrity of the bidding process and to ensure certainty and fairness in the competitive tender process.

[28] The terms of Contract A are found in the contract documents which in this case include, among other things, the Invitation, the Instructions to Tenderers, the Tender and forms, the Specifications, and the form of contract for the winning bidder, which is referred to as Contract B. I am not persuaded by counsel for Ketza that the terms of Contract A are limited to the Tender.

[29] In addition to the express terms of Contract A, a court may imply a term of Contract A as set out in *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27:

> … (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed. (citations omitted)

[30] In para. 29 of *M.J.B.*, the Court cautions that it is the intention of the actual parties, not reasonable parties, that must be determined so that there is “a certain degree of obviousness” to an implied term.

[31] The Court concluded in *M.J.B.* at para. 41 that, because of the time and expenses involved in the tendering process, it is reasonable to imply a term that only a compliant bid will be accepted.

[32] Courts have also consistently implied a term that the owner be fair and consistent in the assessment of tender bids. The duty of fairness is discussed extensively in *Martel Building Ltd.* v. *Canada*, 2000 SCC 60 where the Court stated at para. 88 that:

> … Implying an obligation to treat all bidders fairly and equally is consistent with the good of protecting and promoting the integrity of the bidding process, and benefits all participants involved…

Strict or Substantial Compliance

[33] Counsel for the City and TSL have advocated to some extent for a strict test for compliance. In my view, on the facts of this case, the test must be substantial compliance.

[34] In *Double N Earthmovers Ltd.* v. *Edmonton (City)*, 2007 SCC 3, at para. 109, Abella and Rothstein JJ. stated “the test for compliance in the tendering process is ‘substantial’ rather than strict.”

[35] At para. 110, in a four member dissenting judgment, Charron J. stated that substantial compliance requires “that all material conditions of a tender, determined on an objective standard, be complied with” and concluded that “a bid is substantially compliant if any departure from the tender call concern mere irregularities.”

[36] It is noteworthy that in the *Double N* case (paras. 38 and 39), the substantial compliance test applied even though the tender documents contained the wording that the instructions to bidders “must be strictly complied with”. However, a discretion clause was included which indicated that not every failure to comply with the tender requirements, usually referred to as an “informality” or an “irregularity”, would invalidate a bid. At para. 41 in *Double N*, Abella and Rothstein stated “generally, an informality

would be something that did not materially affect the price or performance of Contract B."

[37] In the context of the duty of fairness, the same justices stated at para. 52:

> … 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.

Is the Ketza bid substantially compliant?

[38] In order to be substantially compliant, a bid must be certain with respect to price. Counsel for the City and TSL submitted that the Ketza bid is uncertain as to price because of the mathematical error in the GST calculation and that it is therefore materially non-compliant. While acknowledging that there is no evidence of mischief, they also raise the issue of potential for mischief, on the basis that, in a hypothetical case, a party could put in the low bid with a similar mathematical error and then, if circumstances changed, refuse to sign Contract B because they 'mistakenly' bid too low.

[39] In my view, the principles to be applied are not in great dispute. It is the facts that ultimately determine the outcome in these cases.

[40] The case of *Vachon Ltd.* v. *Cariboo (Regional District)* (1996), 24 B.C.L.R. (3d) 379 (C.A.) is instructive. The successful bidder, Can-form, had expressed its price as 'four hundred and eighty eight thousand four hundred and fifty dollars' in words and $492,450.00 in numerals. The owner permitted Can-form to choose which figure was correct and the bidder indicated the lower bid. Vachon was the next lowest bidder and challenged the owner's acceptance of Can-form's bid. The British Columbia Court of Appeal found that the Can-form bid was not capable of acceptance as its price was

uncertain. Thus, the initial Contract A was not formed. The discretion clause in the Instructions to Bidders does not permit the owner to "render valid after opening a bid that was invalid as submitted" (para. 17).

[41] As to the privilege clause, Finch J.A., as he then was, stated at para. 25:

> Although the privilege clause says that an owner does not have to accept the lowest or any offer, the owner still owes a duty of fairness to bidders…

[42] He concluded at para. 34:

> In my view, the defendant was in breach of its duty of fairness to other bidders in allowing Can-form to amend its bid after the close of tenders. The plaintiff was entitled under the tendering documents not to have its bid rejected in favour of one that was not legally capable of acceptance. The plaintiff submitted its bid in the expectation that all bids would be considered according to the rules laid down in the Instructions to Bidders. It would be unfair to allow the defendant to act in breach of those rules and then claim to rely on the privilege clause.

[43] Counsel for the City and TSL rely upon the test for material non-compliance set out in *Graham Industrial Services Ltd.* v. *Greater Vancouver Water District*, 2004 BCCA 5, at para. 34:

> According to these definitions, in the context of the present case, material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

[44] Thus the test is two fold. It must be an "important or essential requirement" and "likely significant" in the deliberations of the owner.

[45] In the facts of *Graham Industrial Services*, Graham was the low bid by $5,000,000 but immediately advised the owner that it had made a $2,000,000 mathematical error and sought to withdraw the bid. Graham subsequently took the position that their bid was not in substantial compliance based on other defects, and this

was also argued in court. The trial judge found that Graham's written responses to two sections of the Tender Form were "so patently deficient they could not on an objective reading be said to conform in all material respects to the Invitation to Tender", and that their bid was materially non-compliant.

[46] The case before the Court of Appeal turned on whether the discretion clause could be used to deem compliant a bid that was objectively materially non-compliant. Finch C.J.B.C. stated that the owner could not use a discretion or privilege clause to accept a materially non-compliant bid.

[47] Counsel for the City also relies upon *British Columbia* v. *SCI Engineers & Constructors Inc.* (B.C.C.A.) (1993), 22 B.C.A.C. 89. In that case, the bidder was required to "check all extension and totals to ensure mathematical accuracy." SCI had submitted a revision which was required to include the amount by which tenders increased or decreased and the increase or decrease to each unit price affected. SCI stated the actual amount of the new unit prices but failed to state the amount by which four items were being adjusted, and thus did not strictly comply with the tender requirements. SCI was the low tender and the Crown wished to accept it, however the trial judge rejected the SCI revision.

[48] In the British Columbia Court of Appeal, McEachern C.J.B.C. directed that the Crown was entitled, if it wished, to accept the SCI tender. He stated at para. 12:

> Making the prices of both the SCI and Kiewit tenders known only required the adjustment of the final price. After that, a Crown employee would have to check the unit price extensions to make sure that, collectively, they conformed to the adjusted tender price and, in the case of SCI's revisions, it was necessary to make one further calculation with respect to each varied unit price in order to confirm that the adjustment was neither a reduction nor an increase, but rather a new unit price.

[49] The Chief Justice concluded at para. 20 “It would be otherwise, of course, if a material fact were omitted from the tender, or if the meaning of the tender was unclear, but that is not the case…”

[50] In the case of *Bradscot (MCL) Ltd.* v. *Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723, the Ontario Court of Appeal considered two discrepancies, but I will only refer to the one that dealt with a GST calculation. Here, the School Board had accepted a tender that was alleged to be uncertain. In that case, the tender required a statement of ‘Basic Stipulated Sum’ which was followed by a ‘Tender Amount Summary and GST’. The Basic Stipulated Sum was recorded as ‘Seventeen Million Seven Hundred Twenty Thousand’ followed by the numbers $17,720,000. However in the Tender Amount Summary it was repeated as $17,200,000. The GST was added as 7% (or $1,240,000) to the lower number, for an overall Stipulated Sum Tender Amount of $18,460,400. The bidder phoned and faxed shortly after the tender closing to advise that the amount written in words was correct i.e. the base number for the GST calculation should have been $17,720,000. Notably, the GST calculated was not 7% of either the higher or lower number, and the addition of the GST figure to the base number was incorrect as well.

[51] Despite these inaccuracies, the School Board in *Bradscot* did not amend the tender but simply considered the written figure to be the operative figure and the Summary and GST portion to be a clerical error.

[52] When Bradscot challenged the School Board’s contract award, the trial judge concluded that the calculation paragraph was superfluous and not considered to be the operative part of the tender. The Court of Appeal agreed in para. 17, that the Tender

Amount Summary and GST was subordinate, if not superfluous, and did not make the tender price uncertain. No amendment was required.

[53] I have also reviewed a subsequent Ontario case called *Maystar General Contractors Inc.* v. *Newmarket (Town)*, [2008] O.J. No. 1793 (S.C.), where, despite similar facts, Patillo J. distinguished *Bradscot* and found that Maystar's bid price was uncertain. In that case, the bid form contained two errors such that it was not possible for the judge to determine which of the two numbers was intended to be the 'Stipulated Price', i.e. the basic contract price without a GST calculation. The trial judge also concluded that the provision for GST and Total Price were not superfluous but an important component of the tender (paras. 26-36). In Maystar, however, there was no separate summary section or paragraph representing the stipulated price as was the case in the Bradscot documents.

DISPOSITION

[54] Counsel for the City advises that this is an urgent matter as the City wishes to proceed with the Project. Accordingly, I will not address every case that counsel have submitted, particularly as the facts and the terms of the tender documents vary considerably between them. However, I have set out the basic principles that will inform my decision.

[55] In my view, the City is entitled, but not obligated, to accept the Ketza bid. The Ketza bid is substantially compliant for the following reasons:

1. The Total All Items is certain. It is, unlike in *Maystar*, clearly stated.
2. The GST calculation is superfluous and not the operative part of the tender for "Contract Award Purposes."

3. There is no evidence of mischief.

[56] I find that the Ketza bid is not materially non-compliant in applying the test in *Graham Industrial Services* for the following reasons. The GST calculation is not an essential requirement for contract award purposes and it was treated as an apparent and obvious error that had no affect on the City's evaluation of the two bids. It was appropriate for the City's Engineering Projects Officer and the Director of Operations to follow the practice of evaluating the Total All Items amount from each bidder.

[57] The City has a privilege clause which permits them to accept a compliant (but less-than-perfect) bid. While the City does not have a clause that permits it to waive informalities and irregularities, Section 1.14 and 4.16 permits it to accept or reject any or all tenders and "to accept the Tender which the City deems to be in its own best interest." In my view, the fact that the terms of the tender documents do not set out the specific rejection criteria is not fatal to the City so long as they have a substantially or materially compliant bid.

[58] The City must be fair to all bidders. The City's policy has been to correct patent mathematical errors, as it is obviously in its best interest to do so to ensure that it can proceed with the lowest price, assuming the bids are otherwise equally matched. It is a policy that it applies to all bidders so it cannot be said to be unfair. In the hypothetical case where both TSL and Ketza had made mathematical errors in calculations of the GST, it would not make sense to require the City to reject both bids thereby causing further delay for the Project and time and expense for the bidders to tender once again.

[59] While I conclude that the City is entitled to accept the Ketza bid, it is not obligated to do so. To obligate the City to accept the burden of being responsible for finding mathematical errors is not a term of the tender documents.

[60] I declare that the Ketza bid is certain as to price and capable of being accepted by the City. From the brief submissions as to costs, I am inclined to make no order as to costs. However, the parties have to right to speak to costs upon reviewing these reasons, if necessary.

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VEALE J.