

SUPREME COURT OF YUKON

Citation: *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking et al.*, 2013 YKSC 105

Date: 20130927
Docket: S.C. No. 13-A0077
Registry: Whitehorse

BETWEEN:

**GOVERNMENT OF YUKON
(DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS)**

Petitioner

AND:

P.S. SIDHU TRUCKING LTD. & CMF CONSTRUCTION LTD.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Philippa Lawson

Eleanor Olszewski, Q.C.

Michael Preston

Counsel for the Petitioner

Counsel for the Respondent P.S. Sidhu
Trucking Ltd.

Counsel for the Respondent CMF
Construction Ltd.

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): The Yukon Government issued a public tender on July 10, 2013 for the replacement of the Tatchun Creek Bridge. The government has brought this application with P.S. Sidhu Trucking Ltd. (“Sidhu”) and CMF Construction Ltd. (“CMF”) to determine the precise closing time for the submission of bids and

whether the Sidhu bid was submitted on time. The CMF bid was submitted on time and is the lowest bid, unless the Sidhu bid was submitted on time, which would make the Sidhu bid the lowest bid. The parties are in agreement that the time stamp machine which stamped the times on the bids as they were received is the correct time for the purposes of this case.

BACKGROUND

[2] A document entitled “Contract Documents for the Tatchun Creek Bridge Replacement” was issued on July 10, 2013. It contained articles of agreement, Instructions to Bidders-A, and Tender Form # 1J, among other tender forms. The Instructions to Bidders-A contains s. 2.5, which states as follows:

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.

Section 1.5 states:

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.

I also point out that ss. 2.6 through 2.9 set out the terms for amending or revoking tenders.

[3] Tender Form # 1J states at s. 7:

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

[4] Addendum #1 dated August 5th 2013, changed the Tender Closing Date to August 13th 2013.

[5] Addendum #2 dated August 13th 2013, changed Tender Closing Date to August 15th, 2013.

[6] Both addendums refer to the closing time as 16:00 p.m. rather than 4:00 p.m. A notice of tender was published on the Government of Yukon Online Tender Management System (“TMS”) beginning at midnight on July 9, 2013. This notice was amended in accordance with addendum #1 and #2 so that the closing date moved from August 6 to August 13, and then to August 15, 2013. The online notice of tender cited the closing date as August 15, 2013 at 4:00 p.m. local time with the following wording in small print:

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

The attached TMS Terms and Conditions of Use have the following warning at s. 5:

You should rely on the Site as your only means of obtaining information about bid opportunities or updates to bid opportunities.

Section 15 states:

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.

Section 16 reads:

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.

[7] A public tender notice was placed in the *Whitehorse Star* newspaper on Wednesday July 10, 2013, stating, among other things:

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

[8] The following facts are taken from the affidavit of Ruben Bicudo, who was responsible for submitting the Sidhu 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 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 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 Government of Yukon, 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 P.S. Sidhu Trucking Ltd.
- Becky Mackenzie received the bid envelope and stamped it in the time stamp machine. The time stamp machine 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 of paper 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.

ANALYSIS

[10] In the leading case of *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, at p. 9, (“*Ron Engineering*”), Estey J. explained the meaning of what is called “Contract A”:

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.

[11] The first issue to determine is the precise closing time for the tender. In my view, 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 confusion 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*.

[12] I have considered the case of *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic School Board*, [1998] O.J. No. 2308, (Ont. Ct. Jus (Gen. Div.)) and on appeal, (1999), 42 O.R. (3d) 723 (C.A.) in which Laskin J.A. said this at paras. 6, 7, and 9:

[6] The legal and factual context in which this issue arises is important. The submission of a tender in compliance with tender instructions creates a unilateral contract between the general contractor and the owner. This unilateral contract imposes rights and obligations on the parties intended to protect and promote the integrity of the tender system. One obligation imposed on the owner is a duty of fairness to all tenderers. A duty of fairness is needed to prevent abuse and to ensure a level playing field. As Williams J.A. observed in *Vachon Construction Ltd. v. Cariboo (Regional District)*:

On the other side, the tendering process is, and must always be, a carefully controlled process, since the opportunity for abuse or distortion is ever present.

While that is not what happened in this case, the process must nonetheless be, and be seen to be fair to all bidders. For that reason, the process is often attacked for technical reasons and the law has accordingly applied strict rules for any alteration in the process by both bidder and owner.

A bid submitted after the tender deadline is invalid, and an owner that considers a late bid would breach its duty of fairness to the other tenderers.

- [7] Last minute jockeying for advantage that accompanies the tendering process is ripe for abuse. Counsel advised the court that tenders are typically submitted at the last moment because general contractors often receive price changes from their sub-contractors right up to the tender deadline. Usually tenders are not completed and handed in until minutes or seconds before the deadline. Representatives of the general contractors delivering their tenders often synchronize their watches with the owner's clock so they can monitor the deadline. The representatives of Bradscot and Bondfield monitored the School Board's clock, which had a minute hand but not a second hand. Bradscot submitted its tender just before 1:00 p.m. on May 8th. Bondfield submitted its tender after 1:00 p.m. but before the minute hand on the School Board's clock registered 1:01 p.m. The School Board decided that Bondfield's tender was not late. I accept that in making this decision the School Board was acting in good faith and was attempting to comply with its duty of fairness to all bidders.

...

- [9] To prevent abuse and ensure fairness in cases such as this one, what is required is a clear rule. In formulating a rule I do not rely on any distinction in the meaning of the words "only until", "at", and "not later than". In my opinion, these words are used interchangeably in the instructions to tenderers. Unfortunately, the evidence on the application shows that the industry itself does not have a clear rule.

- [13] The essence of the *Bradscot, supra*, decision at trial was succinctly stated by the trial judge at the last sentence in para. 17:

In the absence of some specification to the contrary, one thinks of 12:00 o'clock noon, or indeed any other hour of the day, as being that hour until such time as one minute after the hour has been recorded.

[14] In *Smith Brothers & Wilson (B.C.) Ltd. v. British Columbia Hydro and Power Authority* (1997), 30 B.C.L.R. (3d) 334 (S.C.) ("*Smith*"), at para. 33, Justice Shaw states:

... I do not agree with this analogy. In my opinion, 11:00 a.m. describes a precise point in time, not the time that exists between 11:00 a.m. and 11:01 a.m., whereas, when a date is stated, it is common knowledge and usage that that named day is a 24 hour period from midnight to midnight.

[15] Neither the *Smith, supra*, case, nor the *Bradscot, supra*, case are directly on point for the case before me because they did not have a precise wording of s. 2.5 in the Instructions to Bidders-A, "tenders must be received before the specified time." I prefer the analysis of Shaw J. in *Smith*, that 11:00 a.m. "describes a precise point in time" and a time stamp machine in hours and minutes is adequate.

[16] The second issue to be addressed is whether the Sidhu 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 Instruction to Bidders-A, which requires a written withdrawal letter in s. 1.5 before the tender will be returned, or the amendment procedure in s. 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 Instruction to Bidders-A and calls into question both the fairness and integrity of the bidding process. While Mr. Bicudo may have relied on the Yukon Government staff, it was he who interfered with the bidding process. The result was that the Sidhu bid was filed and date stamped 4:00 p.m., which is clearly not before 4:00 p.m.

[18] I declare that the Sidhu bid was not filed in time in accordance with the Instructions to Bidders-A which required a filing time before 4:00 p.m.

[DISCUSSION RE PAYMENT OF COSTS]

[19] THE COURT: The parties may address the Court in case management with respect to costs, if necessary.

VEALE J.