

May 2007

## **FORKED TONGUE (final)**

Again, we have a tendering case making its way up to the Supreme Court of Canada: Double N Earthmovers Ltd. v. City of Edmonton. We discussed the Alberta Court of Appeal decision in our July 2005 newsletter.

### **Surprise**

The City placed a tender call for pieces of heavy equipment to move refuse. The call for tenders stipulated that the equipment had to be 1980 models or newer. The tenders of Contractor 1 ("C1") and Contractor 2 ("C2") were each compliant on their face and C1 was low.

C1 described the 1<sup>st</sup> unit as a 1980 unit. In accordance with the call for tenders, C1 set out the unit's serial number. C1 described the 2<sup>nd</sup> unit as a 1977 unit or a 1980 unit to be rented.

After the tenders closed, C2 smelled a rat, called the City, and alleged that C1 was probably using pre-1980 equipment. The City ignored the complaint. Since C1 was low, the City awarded it the contract.

After the City awarded the contract to C1, the City required C1 to register the equipment with it to create a billing record. In the process, the City checked the serial numbers and determined that C1's proposed 1980 machine was a 1979 non-compliant model.

The City attempted to compel C1 to use compliant equipment, but ultimately rented.

C2 discovered this, was not happy, and sued the City.

The City third partied C1. C2 was unsuccessful against the City at trial and in the Court of Appeal. Accordingly, the City had no damages against which to claim against C1 and the third party action was dismissed. The Supreme Court of Canada dismissed the appeal, but split 5 to 4 on all issues.

### **Non-Compliant Bid – 1<sup>st</sup> Unit**

#### Majority

Although the City had the right to investigate the equipment, it did not have the duty to do so. The majority refused to imply such a duty because they felt that the tenderers would not have expected, at the time of tender, that the owner would investigate whether any given tender would comply. Whether a bidder is capable of performing as promised is irrelevant in light of the bidder's legal obligation to perform in accordance with its bid. The majority felt that the duty of fairness dealt with the integrity of the bidding process, not the bidder.

Further, the majority felt that allegations of non-compliance that rival bidders make should not compel owners to investigate otherwise compliant bids.

#### Minority

The minority noted that the test for compliance is substantial compliance on an objective basis, not strict compliance. The City had been very concerned that its equipment be 1980 or newer because it had had bad experiences with older machines breaking down. Consequently, a failure to bid a machine that was 1980 or newer would result in a bid that was substan-

tially non-compliant. Once C1 listed its new machine as 1980, but attached the serial number, the City had a duty to check its records to determine whether it was a 1980 machine. The City failed to do so, even after C2 had warned it that the tendered machine was not 1980. Even worse, C2 had requested, after the bids had been opened, to be allowed to use older machines to reduce its price and the City flatly refused; 1980 or newer was inviolable.

The minority agreed that an owner does not have to launch an investigation to satisfy itself that the bidder will do what it says it will do, nor does an owner, in its evaluation of bids, have to search for additional information or take action beyond what it is empowered to do under the tender documents. However, an owner has an obligation to take reasonable steps to evaluate the bids to ensure that they conform. Since the age of the equipment was integral to the tender, C1 had provided the requested serial number, and the City reserved a right to inspect the equipment, then the City ought to have taken steps to inspect the equipment and check the serial numbers.

The minority felt that the City, by failing to take these reasonable steps, particularly in light of C2's warning, treated C2 unfairly and was therefore liable for breach of tendering contract A.

### **Non-Compliant Bid – 2<sup>nd</sup> Unit**

C1's tender stated, for a 2<sup>nd</sup> unit, that C1 would provide a 1977 rental unit or a 1980 rental unit. Since it had not yet rented the unit, it could not provide the serial number. When the City

accepted C1's tender, it explicitly stated that the acceptance was subject to the terms of the tender documents (i.e. 1980 or newer).

The majority held that the City chose the 1980 option over the non-compliant 1977 option. Further, the majority held that the obligation to provide serial numbers for the equipment was not a serious obligation that was integral to the tender. Therefore, the irregularity regarding the rental was minor and the City could, as stated in the tender documents, waive it as an informality.

The minority disagreed. They held that C1's tender, when it gave an option, was ambiguous. Further, the absence of information about the rental equipment concerned a material condition of the tender and was not a mere informality that the City could waive.

## Waiver of Condition

### Majority

The trial judge had held that C1 had always intended on using pre-1980 equipment and was simply deceitful in its tender. However, the City did not know of this duplicity. Accordingly, the majority held that since there was no collusion between the City and C1 when the City accepted C1's tender, then the City did not enter into contract B on terms other than in tender contract A.

Further, as soon as the City and C1 entered into contract B, the contracts A with the various tenderers were fully performed. As a policy reason, the majority felt that it would be bad for the construction process for contract B to be the subject of constant surveillance of other bidders, thus adding an element of uncertainty to contract B.

In this case, the City had its rights against C1 for providing 1979 and older equipment, but the City decided to waive

those rights. The majority felt that once C1 and the City entered into contract B, C2 no longer had a right to complain that the City waived the 1980 or newer condition.

### Minority

The minority did not like what they felt was the following circular argument: we can waive non-compliance in the tender by insisting on compliance when we accept the tender; then, after the tender is accepted, we can waive our right to insist on compliance.

The minority stated that the right to insist on compliance cannot turn a non-compliant bid into a compliant one. To allow this means that a bidder can unfairly rid itself of competition and is then allowed to hash out the non-compliance with the owner after its bid has been accepted. This encourages the duplicity seen in the facts of this case.

Accordingly, the mi-

nority held that when the City failed to insist on compliance with an essential term of the tender (i.e. 1980 or newer) in contract B, it breached its duty under contract A to treat all bidders fairly and equally. They further stated that, "*the City cannot escape this fundamental obligation by postponing the fulfillment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end.*"

## Costs

Although C1 seemed to have emerged unscathed, it did not.

The trial judge refused to award costs to it. The Alberta Court of Appeal made no mention of costs in its judgment. The Supreme Court of Canada refused to award any costs to C1. The legal fees and disbursements that C1 paid far exceeded any profit that it obtained on the contract.

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