

Update

Construction Law

March 15, 2007

Double N Earthmovers Ltd. v. Edmonton (City of) (S.C.C.)

In the recent case of *Double N Earthmovers Ltd. v. Edmonton (City of)*, the Supreme Court of Canada considered the scope of an owner's obligation to treat all bidders fairly during the tender process.

In this case, the City of Edmonton initiated a tender for a contract to supply equipment and operators to remove refuse from a city landfill. As part of the tender specifications, the City requested that the equipment must be 1980 or newer. The bidders were required to provide serial numbers and licence registration numbers for the equipment to be used.

When the tenders were opened, the City determined that Sureway Construction Ltd. ("Sureway") and the plaintiff, Double N Earthmovers Ltd. ("Double N") were the first and second lowest compliant tenders. Subsequently, the City engaged in discussions with both Sureway and Double N regarding their bids. The City ultimately awarded the contract to Sureway. After being awarded the contract, Sureway advised the City that it intended to use equipment that was older than 1980 (contrary to the tender specifications). Despite the City's initial objection, it ultimately acquiesced in respect of Sureway's proposed equipment.

Double N initiated a claim against the City on the basis that Sureway's bid was non-compliant and therefore the contract should not have been awarded to Sureway. Double N alleged that Sureway made representations in its bid that its equipment was made in 1980 (when it was in fact made in 1979) and/or that notwithstanding its bid, it planned to use equipment that was older than 1980. Double N also claimed that during the post-tender negotiation stage, the City failed to investigate Double N's allegations about Sureway's equipment and

thus implicitly allowed Sureway to supply older equipment contrary to the tender. By allowing Sureway to supply older equipment, the City breached the obligations it owed to Double N during the tender process.

The trial judge dismissed all of Double N's claims. The trial judge found that Sureway's bid was compliant and as such, the City was entitled to enter a contract with Sureway to perform the work. The trial judge also held that the City's obligation to treat the other bidders fairly ended once the City entered into a contract with Sureway to perform the work. The Court of Appeal agreed with the trial judge in finding that the City's obligations to Double N did not survive the formation of the City's contract with Sureway.

In a decision written by Justice Abella, the majority of the Supreme Court of Canada concurred with the lower courts' findings. The Court held that the specific wording of the tender documents excused the City from requiring strict compliance with the terms of tender. In accordance with the conditions of the tender, the City was entitled to waive an "informality" in the tender. The absence of accurate information regarding the equipment age was found by the majority of the Supreme Court to be an informality that did not materially affect the price and/or performance of Sureway's contract and as such, was capable of being waived.

It was further determined that as there was no collusion between Sureway and the City (the City was not aware of Sureway's deceit at the time of tender), the City was justified in entering into a contract with Sureway. Once a contract was formed between Sureway and the City, Sureway's failure to supply what was promised in its bid was, in effect, an issue between the City and Sureway.

The Court also held that the City's issuance of a Purchase Order in accordance with the tender specifications which included using equipment from 1980 or newer demonstrated the City's acceptance of a compliant bid. As such, the City was entitled to

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compel Sureway to supply the equipment as specified.

Although the conditions of tender stated that the City had a right to inspect the proposed equipment, the Court also held that the City's duty to treat all bidders fairly did not extend to a "duty to inspect" the equipment as claimed by Double N. The Court held that creating a duty to investigate bids would frustrate and delay the tender process, create uncertainties and possibly lead to unfair or unwarranted attacks by rival bidders.

Double N alleged that since Sureway was deceitful in its tender submissions and ultimately supplied older equipment, the City allowed Sureway to supply something different than requested in the tender and in so doing, the City breached its obligations to Double N.

However, the Court held that the City did not enter into a contract on terms other than set out in the tender and thus, did not violate its obligations to the other bidders.

Double N claimed that the City should have required Sureway to complete the contract as promised in its tender or cancel the contract and either re-tender the work or award the contract to Double N. However, the Court concluded that the City's obligations to the other bidders (which included an obligation to treat all bidders fairly) ended with the award of the contract to the successful bidder. As such, Double N was not in a position to require that the City cancel its contract with Sureway. The decision whether to proceed with the contract was within the parties' prerogative and the terms of the contract.

The minority of the Supreme Court disagreed with the above analysis. At the crux of the dissenting judges' opinion is the emphasis placed on the City's equipment age requirement. The minority held that "it is undisputed that a material requirement of the City's tender call was that all equipment bid be 1980 or newer." Thus, the City's waiver of the age requirement meant that a non-compliant bid was turned into a compliant bid and this was contrary to the City's obligation to treat all bidders fairly.

While the majority of the Supreme Court relied upon the specific language used in the tender to delineate the

parties' obligations in the tender process, the minority suggested that this case must be examined through the lens of the existing concepts in tendering law, namely the need for business efficacy and integrity in the tendering process.

Justice Charron held that the City's casual approach to Sureway's bid (and Double N's claim of non-compliance) was unfair to the other bidders. The City should have checked the equipment and/or the specifications on the equipment (at least against its own records) and had it done so, would likely have discovered Sureway's deceit. By failing to take these steps, Justice Charron held that the City breached its obligations to Double N.

This decision highlights the importance of the particular terms and conditions of the tender as well as the tender requirements in dispute.

For further information or if you wish to discuss this decision further, please contact a member of the Goodmans Construction Law Group listed below.

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