

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Continental Steel Ltd. v. Mierau Contractors Ltd.,***
2007 BCCA 292

Date: 20070523

Docket: CA034088

Between:

Continental Steel Ltd.

Respondent
(Plaintiff)

And

Mierau Contractors Ltd.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Thackray
The Honourable Madam Justice Kirkpatrick

D.A. Brindle, Q.C. and A. Wallace

Counsel for the Appellant

A. Pabani

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
22 January 2007

Place and Date of Judgment:

Vancouver, British Columbia
23 May 2007

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Mr. Justice Thackray
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] This is an appeal of a damage award of \$60,000 against the appellant for acting unfairly in not awarding a steel-erection sub-contract to the respondent on a school construction project in Coquitlam for which the appellant became the head contractor. The respondent was the lowest bidder on the sub-contract. There is no appeal of the amount of damages assessed by the trial judge.

[2] The respondent commenced this action against the appellant alleging breach of an implied contractual term that the appellant would "act in good faith and with objective fairness" in selecting the successful bidder for the steel-erection sub-contract. This pleading apparently was intended to incorporate the law as explained in ***Sound Contracting Ltd. v. Nanaimo (City)***, [2000] B.C.J. No. 992, 2000 BCCA 312.

[3] The law requires fairness on the part of an owner or a general contractor in choosing which bid to accept among bids made in response to a tender invitation on a construction project. This is so despite, as was the case here, a privilege clause in the tender invitation that the lowest bid would not necessarily be accepted. The privilege clause reserved to the appellant “the right to reject the lowest, or any tender, or all tenders, for any reason at [its] sole discretion”.

[4] The appellant raises seven grounds of appeal but I think they can be reduced to two – that the evidence as a whole did not support the conclusion of the trial judge that the appellant breached its contractual duty to act fairly; and that the trial judge did not apply the proper test in determining whether it had been proven that the appellant did not act fairly.

[5] In **Ontario v. Ron Engineering & Construction (Eastern) Ltd.**, [1981] 1 S.C.R. 111, 119 D.L.R. (3d) 267 the court recognized two contracts arising from the bidding process often used in construction projects and other commercial transactions. Contract A may be formed between the party soliciting bids and an individual bidder once a bid is delivered. Contract B is the contract formed between the owner or general contractor and the successful bidder.

[6] In **M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.**, [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577 the court explained the contractual rights and duties of the parties in more detail. Among other things, the court stated that the lowest bid might not represent the best value to the recipient of the bid, who could take a “more ‘nuanced’ view of cost” than previously suggested in the cases. This is important to a proper view of this case and I will return to it later in these reasons.

[7] In **Martel Building Ltd. v. Canada**, [2000] 2 S.C.R. 860, 190 D.L.R. (4th) 1 the court, at paras. 84 and 85, referred to a number of cases in which “courts have found a need to imply a contractual term into Contract A to treat all bidders fairly and equally”. The court then stated the law as follows:

[88] In the circumstances of this case, we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process. As discussed above, this Court agreed to imply a term in *M.J.B. Enterprises* that only compliant bids would be accepted since it believed that it would make little sense to expose oneself to the risks associated with the tendering process if the tender calling authority was “allowed, in effect, to circumscribe this process and accept a non-compliant bid” (para. 41). Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. This implication has a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed. Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

[89] A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority has “the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents” (*Colautti Brothers*, supra, at para. 6).

[8] It appears from the above that unequal treatment of different bidders might be a term of Contract A if the tender documents so state or imply. An example that comes to mind is that the tender documents might state that the party inviting bids will give preference to local bidders. However, the parties agree that in the present case there was an implied term that the appellant had to treat all bidders fairly and equally. As the trial judge stated at para. 102 of his reasons for judgment “there [are] no criteria spelled out in the defendant’s invitation to bid that would entitle the defendant to prefer one bidder over the other, for reasons other than the tender price, save the privilege clause itself”.

[9] It is also common ground that the two lowest steel-erection bids complied fully with the terms required by the tender documents. Apart from the bid amounts, there was nothing to choose between the bids themselves. What is at issue is whether the appellant, in assessing the bidders and the small amount of the price differential between their bids, breached the implied term of fairness in Contract A that had been formed with the respondent.

[10] The appellant sought to persuade the trial court that it had sound reasons for not accepting the bid of the respondent in the amount of \$233,771 over that of the next lowest bidder in the amount of \$239,000. The trial judge introduced the appellant’s position as follows:

[13] The main evidence of why the plaintiff’s lowest bid was not accepted by the defendant came from the defendant’s senior estimator, Mr. Margison. There was no dispute that the plaintiff had the necessary qualifications and experience to perform the steel sub-contract and met all the requirements for its qualification as a bidder, including a bid bond, but Mr. Margison gave reasons to do with reputation and prior experience with the plaintiff, for rejecting its bid.

[11] Following an analysis of the evidence, the judge stated his conclusion thus:

[144] After considering all the reasons given by the defendant for denying the plaintiff’s bid it is my conclusion that the defendant breached its duties of fair and good faith consideration of the plaintiff’s bid. The defendant is liable to the plaintiff for provable damages.

[12] The school district for which the school was to be built sought tenders on 17 October 2002. The invitation required sealed bids for certain sub-contracts, including steel work, to be filed with the British Columbia Bid Depository by 8 November 2002 with the bids from general contractors to be filed five days later. In other words, the appellant had five days in which to assess the bids on the sub-contracts and to complete preparation of its own bid for construction of the school with inclusion of those sub-contract bids it preferred.

[13] The appellant sent out bid invitations to various sub-contractors, including the respondent. For the steel work, the respondent’s bid was the lowest of five or six bidders. PMC Builders and Developers Ltd. was the second lowest bidder by, as noted above, just over \$5,000. The appellant was the successful bidder on the school construction project at just under \$3M. It had chosen the bid of PMC as its component for the steel-erection work instead of that of the lowest bidder, the respondent. The appellant contracted with the school district and completed the project, with PMC doing the steel work.

[14] The appellant’s senior estimator, Mr. Margison, was aware that his employer was not required to accept the lowest bid for the steel work but that it also had to treat the bidders fairly and equally. He took into account a required completion date for construction of the school that was about 7 1/2 months away, a tight schedule. He considered all the bids for the steel work and determined that the bid of PMC would provide the best value to the appellant. Because of certain knowledge he had of the respondent and a past dealing with that company, he thought that a contractual relationship with the respondent might well become disputatious and potentially cause delay in completion of the project. If

his concern became a reality during the course of execution of a sub-contract with the respondent for the steel work, he believed the actual cost to the appellant likely would have been higher than the cost of PMC's bid. It is this conclusion that the respondent alleged was unfair to it and rendered the treatment of the two lowest bidders unequal and therefore a breach of contract A.

[15] The trial judge described Mr. Margison's elaboration of his concerns with the respondent's bid as follows:

[22] He explained further that he was concerned that by accepting the plaintiff's bid the defendant risked liens being filed by the plaintiff and that made the extra \$5,

[36] For these reasons Mr. Margison considered that the risk factor in using the plaintiff was far greater than the \$5,229 difference between its bid and the bid of PMC. It was a matter of what he considered to be the degree 229 worthwhile. He agreed that the defendant generally wanted to accept the lowest bid unless there was a good reason not to do so, but in this case he was satisfied that there was a good reason not to do so.

[23] He gave evidence that in considering the plaintiff's bid he remembered that years earlier around 1995 on a project for the TDL distribution centre, the defendant had been the general contractor and had to deal with another steel sub-contractor who was being difficult. Mr. Mierau, the principal of the defendant, had come back from a meeting with that steel sub-contractor and had told him that the sub-contractor and the plaintiff were trades that should be avoided in the future. He said that Mr. Mierau was extremely animated and it was a conversation he never forgot.

[24] He said that Mr. Mierau had told him there was a lot of finger pointing and behind the scenes the plaintiff was orchestrating change orders for this other steel sub-contractor that he considered unfair. Mr. Margison assumed that the plaintiff was at the meeting with Mr. Mierau and this other sub-contractor as well.

[25] Later in the year 2000 the defendant tendered on another project in Richmond where the plaintiff had the second lowest sub-contract bid. He was concerned about both the plaintiff and the lowest bidder and he telephoned another contact of his in the industry who told him that the plaintiff would get the job done but the defendant had to be very careful to dot its i's and cross its t's. There was no question that the plaintiff had the qualifications and financial backing however.

[26] Mr. Margison explained that he seldom telephoned others for references during the tender process because there was generally insufficient time to do so when he had to consider so many bids on all aspects of the project, but he did so in that case.

[27] He said that after his conversation with his contact the defendant accepted the plaintiff's bid on that project but raised its own price to the owner to cover a risk that he saw by choosing the plaintiff, although in the end the defendant was not awarded the contract by the owner.

[28] He said that after this incident in the year 2000 there was another project on Walnut Grove School where the defendant was the general contractor on the project and discovered that the plaintiff as a sub-contractor had placed a lien on title without speaking to the defendant first. He did not consider that there was any reason for the plaintiff to place the lien without a discussion with the defendant first, and he did not consider it a practise in the industry that was fair or right.

[29] He did understand, however, that the plaintiff was a supplier to another steel contractor on that project and not directly to the defendant and he assumed that the plaintiff was supplying steel joists.

[30] On that occasion one of the defendant's employees, Ms Bergen, came to him quite upset and told him that the plaintiff had placed a lien and that she had telephoned Ms Hill, at the plaintiff's offices, to ask why the lien had been filed. Ms Bergen informed

him that Ms Hill's response was that the plaintiff placed liens on all of their projects to secure payment, as a matter of standard policy.

[31] Mr. Margison said that he concluded from this conversation with Ms Bergen that the plaintiff had a standard policy of placing liens and he considered this policy would delay any project and end up costing money as all payments would stop once an owner found out about the lien, until the lien was removed. That would affect all trades and the entire project would stop when the trades could not be paid.

[32] Ms Bergen gave evidence of her telephone call, and she recalled that she telephoned Ms Hill and was told that the plaintiff placed liens on all projects. She could not recall anything else. She said that she was angry that the plaintiff had placed a lien without telephoning the defendant first because in her view liens are rarely placed without telephoning them first. She was surprised by Ms Hill's answer.

[33] She knew that the consequence would be that the owner would not make a further progress draw to the defendant until the lien was removed.

[34] She recognised, however, that the plaintiff had a contract with ABC Erectors on that project who in turn had a contract with Ramsey Machine Works who had a contract with the defendant, so for the plaintiff to phone the defendant directly would have been to bypass two contractors in between.

[35] She did think it was strange when Ms Hill told her of the plaintiff's policy but she did not question her further to ensure that she had heard her right of risk. In his view if the plaintiff's bid had been \$15,000 less than PMC's bid, he would have taken the risk with the plaintiff.

[16] Before the appellant finalized contract B with the school board, Mr. Bichel, the respondent's estimator, telephoned Mr. Margison to enquire about the respondent's bid and was told that, although the respondent had submitted the lowest bid, the appellant had chosen PMC as the steel sub-contractor. Despite being advised by Mr. Bichel that the appellant would be hearing from the respondent's counsel, Mr. Margison said he would review the prices. He was prepared to consider whether he had made a mistake.

[17] Mr. Margison reported to Mr. Mierau, the principal of his employer, on his decision and the response from Mr. Bichel. The next day they telephoned Mr. Bichel on a conference call and Mr. Mierau told Mr. Bichel of the appellant's concerns with respect to the TDL project and the Walnut Grove lien. Mr. Bichel said that the appellant had to accept the lowest bid and if it did not the appellant, as the trial judge recorded it, "would hear from the plaintiff's lawyers". Mr. Mierau then decided that he could not work with the respondent.

[18] Mr. Mierau testified that he had speculative concerns about the respondent in connection with the TDL project in Langley but, contrary to Mr. Margison's evidence, he had not told anyone that the respondent was a sub-trade he would not use.

[19] With respect to the Walnut Grove project, Mr. Mierau remembered that the respondent had filed a lien for a relatively small amount that affected three monthly draws and necessitated the appellant obtaining a lien bond. He learned from Ms Bergen that an employee of the respondent had told her that the respondent filed liens routinely.

[20] Mr. Mireau testified that on the same day as the conference call with Mr. Bichel he made telephone enquiries of representatives of four other construction companies. One of them said that his company had no difficulty at all dealing with the respondent. The second said his company was currently doing work with the respondent and he was not comfortable giving an opinion. The third said his company would not work again with the respondent but did not give details. The fourth said his company was then in litigation with the respondent, that it was not pleasant to deal with the respondent

and that it would not do so again. Mr. Mierau treated this information as further confirmation of his company's decision to prefer the bid of PMC over that of the respondent.

[21] At para. 118 of his reasons the trial judge noted that the two contractors who had negative things to say about the respondent were not called as defence witnesses. However, he did not say that he disbelieved Mr. Mierau's evidence as to what he had been told by them. The judge wrote at para. 119 that this was "scant evidence" that was not relevant "to the issue of the plaintiff's rights to be chosen as the low bidder" and that "this evidence was completely insufficient to form any fair, good faith basis for rejecting the plaintiff's bid". He then turned to the balance of the evidence as to previous dealings between the parties.

[22] With respect, I think this approach was in error. In my opinion, Mr. Mierau acted in a business-like way in contacting others in the industry to further determine whether the concerns he and Mr. Margison entertained were justified. From his perspective, those concerns were confirmed rather than allayed. It is implicit in the judge's reasons that he accepted as truthful Mr. Mierau's evidence about the responses he received to the enquiries he made. The judge's comment on this evidence was that the two critics of the respondent were not called to give particulars. That is not the point. To meet the respondent's case, the appellant only had to show that it acted fairly toward the respondent. It did not have to prove that the respondent had a bad reputation in the industry. The evidence as to the enquiries made by Mr. Mierau should have been considered together with the balance of the evidence as to the appellant's previous experiences with the respondent that led to those enquiries.

[23] The trial judge concluded that Mr. Margison was merely suspicious of the respondent's tactics after the TDL incident and that was insufficient to satisfy the appellant's duty "to treat the plaintiff fairly and in good faith in the consideration of its bid". He did not consider "this reason to be even reasonable or relevant". He thought that the warning in 2000 by another contractor to "dot i's and cross t's" was "so vague and uncertain as to its exact meaning or its effect that it also does not constitute fair and good faith treatment of the plaintiff's bid". Finally, the judge accepted the evidence of the president of the respondent that the respondent filed about five liens per year out of 250 to 300 annual jobs, including crane rentals. The judge concluded that Ms Bergen misunderstood Ms Hill as to the respondent's lien-filing policy and said the misunderstanding could not be laid at the feet of the respondent. He considered this to not be "a fair and good faith treatment of the plaintiff's bid".

[24] The *Martel* case was concerned with the tendering process for the supply of office space. The Supreme Court of Canada found that the adjustment of all the bids except the plaintiff's bid to account for a security card system amounted to a breach of the contractual duty of fairness. In *Elite Bailiff Services Ltd. v. British Columbia*, [2003] B.C.J. No. 376, 2003 BCCA 102 a points rating system employed by the bid receiver was found to be unfair because "it failed to assess the actual experience of proponents who had not been court bailiffs". In *Santec Construction Managers Ltd. v. Windsor (Town)*, [2005] N.S.J. No. 267, 2004 NSSC 132 the owner treated lack of experience on the part of the plaintiff, the lowest bidder, as a factor while ignoring the lack of experience of the successful bidder. In none of these cases was the owner able to support its decision as being a fair and equal choice between two competing bids.

[25] In *Sound Contracting*, a construction contract case, this court noted at para. 9 that the defendant municipality "concluded that the second lowest bid was the most favourable to the City, and the one which would result in the best overall value". The court relied upon the following passage from *M.J.B. Enterprises*:

Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of "cost" than the prices quoted in the tenders. . . .

On facts similar to those in the present case, the court held in **Sound Contracting** that the trial judge erred in finding that the municipality was in breach because it chose between the two bidders on the basis of an undisclosed criterion. The court stated that the owner has a discretion that was to be exercised “fairly and objectively” (para. 18).

[26] In the present case, the appellant did not choose between the two lowest bids on the basis of an undisclosed criterion. From the tender documents each bidder knew what it had to know in order to make an informed bid. There was no hidden formula for preference of one bid over another. Once the bids were in the appellant had to make a business decision and in so doing it had to be fair to all bidders. On the one hand, it could not be arbitrary. But, on the other hand, the appellant was not obligated to blindly accept the lowest bid. It was entitled to act in its own best financial interests so long as its decision was not unfair to any bidder.

[27] In my opinion, the trial judge erred in failing to consider the information acquired by Mr. Margison and Mr. Mierau cumulatively as well as from the appellant’s point of view. His analysis was incomplete. He erred in finding that some of the evidence was “scant” and “not relevant”. Mr. Margison and Mr. Mierau based their decision on the bids under consideration on several things: (1) the small price differential between the two lowest bids; (2) the relatively short construction timetable (7 1/2 months); (3) past experiences with the respondent; (4) Mr. Mierau’s calls to other contractors and the information he received from them; and (5) Mr. Bichel’s litigious posture on two occasions. They concluded that the small differential between the two bids would likely be more than eaten up by additional cost and perhaps construction delay if the appellant awarded the sub-contract to the respondent. On the facts found by the trial judge, I think that decision was a reasonable exercise of business judgment.

[28] It seems to me that the trial judge in his final conclusion lost sight of the legal effect of the privilege clause. That clause relieved the appellant from any obligation to award the sub-contract to the respondent “if there [were] valid, objective reasons for concluding that better value may be obtained by accepting a higher bid”: **Sound Contracting** at para. 17. As I have stated above, it is my opinion that the appellant demonstrated such reasons. To refer again to **Sound Contracting** (at para. 19), I think the trial judge incorrectly substituted his own analysis for that of the appellant in whom the discretion vested and who, in my opinion, fairly and objectively exercised that discretion based on the cumulative factors I have identified above.

[29] In reaching the above conclusion, I asked this question: what if the bids of the appellant and of PMC had been for exactly the same amount? In that situation (absent a clause in the tender documents designed to address such a situation) I see no reason why the appellant could not have chosen the bid of PMC over that of the appellant for the reasons it gave at trial. It follows that it was not unfair of the appellant to choose the bid of PMC on the basis of an honest business assessment that, given the small differential between the two bids and the short construction term, the bid of PMC was likely to result in a lower ultimate cost to the appellant.

[30] We received further written submissions from counsel on the decision in **Double N Earthmovers Ltd. v. City of Edmonton et al**, [2007] S.C.J. No. 3, 2007 SCC 3. That decision came down after we had heard oral submissions. That case is quite different on the facts because it was an attack on the acceptance by the owner of the lowest bid, said by the plaintiff to be non-compliant. But the majority makes it clear that there is no obligation on the owner to investigate the bids “to see if the bidders will really do what they promised in their tender” (para. 50). The court adopted the comment by Russell J. A. of the Alberta Court of Appeal that such a duty “would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties”. Although it is not necessary in order to allow this appeal, I think **Double N** suggests that the trial judge was in error when he said at para. 131 that Mr. Margison should have contacted the respondent about the respondent’s lien-filing policy.

[31] As noted in para. 2 above, the pleading in this case was that the appellant did not “act in good faith and with objective fairness” in preferring the bid of PMC. That wording comes from **Sound**

Contracting and found its way more than once into the reasons of the trial judge in stating the law and in applying it. The implied duty (when it arises), as stated later the same year in **Martel**, is to treat all bids “fairly and equally”. This statement of the duty is confirmed in **Double N**. I think the trial judge erred in stating the duty with reference to good faith. Of course, the absence of good faith would be manifestly unfair. But absence of good faith means bad faith, and bad faith, in a commercial context, generally means or implies lack of honesty, ill will, improper motive or fraud. I do not understand the trial judge to have found that the appellant acted in this manner in his finding that its staff did not act in good faith. In any event, the evidence does not support such a finding. Although he did not cite **Martel**, I understand the trial judge essentially to have found that the appellant did not treat all the bids fairly and equally, a conclusion with which, for the reasons explained above, I disagree.

[32] I would allow the appeal and dismiss the action.

“The Honourable Mr. Justice Low”

I agree:

“The Honourable Mr. Justice Thackray”

I agree:

“The Honourable Madam Justice Kirkpatrick”