A retreat in the law of tender?


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IN A RECENT DECISION – *Double N Earthmovers Ltd. v. Edmonton* [2007] S.C.J. No. 3 – the Supreme Court of Canada suggested a scaling back in the circumstances where unsuccessful bidders may challenge the award of a contract by tender. In 1999, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, the Court held that a purchaser is under an implied duty to reject non-compliant tenders. This opened the door to a cascade of litigation relating to alleged unfairness in the tender process.

In Double N, the City of Edmonton required that all equipment in the bid be made no earlier than 1980. One bidder (Sureway) submitted an apparently compliant bid, listing a 1980 unit in one part of its bid, but elsewhere it referred to a 1977 or 1980 rental unit. The plaintiff, a competing bidder, advised city officials that Sureway was "probably" bidding including pre-1980 equipment, but no investigation by the city was made into this allegation. On being advised that its bid was too high, the plaintiff requested permission to bid based on older equipment, but was refused. After Edmonton awarded the contract to Sureway, it discovered that Sureway's equipment was manufactured in 1977 and 1979. The city attempted to compel it to use newer machines, but later permitted it to use the older machines. Although Sureway eventually replaced the units, some of the work was performed by pre-1980 equipment during the 30-month contract.

The plaintiff claimed against the City of Edmonton. At trial, it was held that the condition regarding the age of equipment was essential and that the third party had deceptively misstated the age of the equipment. However, as soon as the service supply contract was awarded, all duties under the law of tender were terminated. The duty of fairness to all bidders under contract "A" ceased upon the award of the service supply contract.

The Supreme Court divided 5-4 on the case. The majority held that Edmonton had not accepted a non-compliant bid.

Under the tender, Sureway was obliged to supply a 1980 unit and it had promised to do so, and that was the offer that the city accepted when it issued its purchase order. The bid was complicated by the fact that Sureway had not supplied (as required) the serial numbers and City of Edmonton licence registration numbers for the equipment that it was bidding. However, the terms of the tender permitted the city to waive any informality in a bid. The majority concluded that this was precisely the type of oversight that such a reserved right was intended to address. Thus the tender documents did not prevent the city from accepting a promise to provide rental equipment or equipment not previously registered with the city. The city did not breach any duties owed to the appellant by failing to investigate Sureway's bid. As each bidder was legally obliged to comply if its bid was accepted, there was no reason why bidders would expect an owner to investigate whether a bidder would comply. Further, there was neither an express nor implied obligation in the tender documents to investigate the equipment bid prior to acceptance.

In contrast, the minority would have upheld the unsuccessful supplier's complaint.

In our opinion, the Double N case departs significantly from at least some recent case law handed down by lower courts, particularly at the trial level, with respect to non-compliant bids. In numerous cases, it has been held that the acceptance of any "non-compliant" bid breaches a duty to accord fair treatment to compliant bidders, where one of them would have won the tender if the non-compliant bid had not been accepted. Although some courts have been prepared to excuse an award to a bidder whose bid departed from the rules of the tender in some trivial respect, other courts have imposed a highly exacting standard. Other governments have felt it necessary to exclude bidders due to trivial errors in their bids – all in the name of ensuring that the "integrity" of the tender process is maintained. Such an approach disregards the fact that competitive bidding is intended not so much as a view towards ensuring fairness to suppliers, but to see that the government obtains a fair market price.

In the view of many observers, an overly exacting standard diverts government contracting authorities from what ought to be their primary responsibilities – securing the best deal possible for the government and ensuring that the specifications fully meet the government's requirements – and encourages them to act as ersatz referees in some kind of formalistic game. The unrealistic demands that some courts hearing tender cases have imposed have encouraged frivolous litigation – a problem worsened by generous damage awards. For instance, in one recent case, the court awarded the plaintiff 16 percent of its bid price as its lost profit on the contract. The legal costs incurred defending tender cases has drained the ability of many purchasing departments to finance other critical aspects of the purchasing process.

It will be interesting to observe over the coming months how the courts interpret the effect of the Double N decision.

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