Edmonton case splits Supreme Court

by Paul M. Lalonde

Double N Earthmovers Ltd. v. Edmonton (City) is the Supreme Court's (SC) latest perplexing addition to the law of tendering. In the decision, the fundamental principles of tendering, the so-called Contract A/Contract B analysis, remain unchanged, however, these principles were interpreted in a way that rewarded a bidder who deliberately made false statements in a bid.

The original dispute in *Double N* arose from a call for tenders by the City of Edmonton in 1986 for waste removal services. One of the mandatory requirements was that this service be performed using equipment that was 1980 or newer. The city considered two seemingly compliant bids: Double N and Sureway. Sureway's bid offered the lowest price but listed one piece of equipment as 1980 and the other as "1977 or 1980." In fact, both pieces of equipment were older than 1980. Suspecting that Sureway's equipment was not compliant, Double N suggested that the city should verify.

The city chose to do nothing, instead assuming that if Sureway bid compliant equipment, then the city could insist that compliant equipment be provided. Ten days after Sureway won the bid, it informed the city that its bulldozers were manufactured in 1979 and 1977. The city demanded compliance with the bid. Sureway agreed. A week later Sureway informed the city that it had "explored all avenues" and could not provide compliant equipment. The city decided to accept the situation so that the matter could, in the words of a city official, "lie peacefully." Twenty years and three court decisions later, this "cautionary tale of a tendering process gone badly wrong" (as Justice Charron described it) has done anything but lie peacefully.

In a contentious five-four decision, the majority found that:

- the owner's obligation to treat bidders fairly and equally ends once the winning bid is accepted; and
- owners are entitled to assume that a bidder will comply with the terms of its bid. Owners can limit their evaluation of a tender to its face, so that there is no duty to investigate whether a bid is compliant.

Perhaps the majority set these limits because it subscribed to the view that tendering law has expanded suppliers' rights too far, opening the litigation floodgates to disgruntled unsuccessful bidders. In reality, tendering litigation remains a rare occurrence, and suppliers do not commonly receive generous damage awards.

It is difficult to reconcile the majority's decision with the fundamental principles that have emerged from 25 years of Supreme Court jurisprudence in tendering law. Ever since the SC's 1981 decision in *Ron Engineering & Construction (Eastern) Ltd. v. Ontario*, courts have split the bidding process into two distinct contracts: "Contract A/Contract B." The owner's call for tenders is considered an offer to enter into Contract A. Compliant bids simultaneously constitute acceptance of Contract A and an offer in Contract B. The owner's acceptance of the winning bid completes Contract B.

Courts elaborated on the Contract A/Contract B analysis in subsequent years. For example, in *Best Cleaners and Contractors Ltd. v. R.* the Federal Court of Appeal held that an owner cannot award a Contract B substantially different from that contemplated in Contract A. The Supreme Court subsequently adopted this reasoning in 1999 in *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.* A unanimous court found that owners have an implied obligation under Contract A to treat all bidders fairly and equally and to only accept compliant bids.

It is not clear how the majority's recent decision in *Double N* can be reconciled with the owner's duty of fairness or with the *Best Cleaners* line of cases. By allowing the city to acquiesce to a non-compliant bid, the majority is essentially allowing the owner and supplier to set contract terms that are not the same as those in Contract A. In fact, some observers conclude that *Double N* provides owners the comfort of knowing they can freely amend Contract B without repercussions. If this is correct, then the Contract A/Contract B analysis has been severely undermined and collusion between owners and preferred bidders has been made easier.

The effect for suppliers is very troubling: the honest bidder can lose to the duplicitous bidder. Had the city made a simple phone call before accepting Sureway's bid, it would have owed a duty to Double N to reject Sureway's bid as non-compliant. The minority comments that the majority's decision allows Sureway to "reap the profits of its deceit," while allowing the city "to escape entirely from its implied obligations. Far from preserving the integrity of the tendering process, this result seriously undermines it." Chief Justice Beverly McLachlin, one of Canada's most experienced justices in construction and tendering law, shares this minority conclusion.

The majority argues that the integrity of the tendering process will be protected because the standard remedies available in contract law provide sufficient disincentive to discourage deceitful bids. But experience suggests otherwise. As *Double N* confirms, an owner will often choose to "let the matter lie peacefully" rather than initiate a claim for breach of contract. Supporters of the decision applaud the increased flexibility and protection from lawsuits that this ruling provides to owners. While these objectives may be laudable, they should not be achieved by sacrificing long-established, fundamental values of fairness.

This case may not have the far-reaching effects that some procurement specialists believe. The timing of events in *Double N* was fairly unique. In most cases the owner will discover the non-compliance before Contract B is formed, so that the principles of fairness in *MJB* and *Best Cleaners* would continue to apply. As well, given the strong dissent in this case (including by the Chief Justice), it is likely that the SC will be called upon to re-examine these important issues before long. In the interim, prudent purchasers should continue to refrain from cavalier bidding practices and take non-compliance very seriously. Remember, the city won in the end, but it took a costly 20-year legal battle to settle the matter.

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Editor's Note: See also *Summit* April/May 2007, "In our opinion."