Federal Court  Cour fédérale

Date: 20090601

Docket: T-643-09

Citation: 2009 FC 545

Ottawa, Ontario, June 1, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE ST. LAWRENCE COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On this application for judicial review, the St. Lawrence College of Applied Arts and Technology (the College) challenges a decision by Public Works and Government Services Canada (Public Works) to disqualify the College's bid to supply leased space in Cornwall, Ontario, in response to a Public Works Invitation to Tender. The College seeks a declaration that its bid was compliant with the tender requirements and an order compelling Public Works to consider its bid.

The hearing of this application was expedited by Order of Prothonotary Kevin Aalto because the finalization of the tendering process is set for June 15, 2009.

I. Background

[2] In early 2009 Public Works invited bids for the provision of 3085 square metres of office space in Cornwall, Ontario, for a lease term of ten years. That process was initiated through an Invitation to Offer which set out detailed tender requirements. Also included was a form of Offer and a Specimen Lease. The Invitation to Offer contained typical tender provisions including the following dealing with the evaluation and acceptance of offers:

> 10. EVALUATION
>
> 1. The evaluation of Offers received is an on-going process and the Lessee reserves the right to terminate any further consideration of any Offer at any time during the Acceptance Period for any reason whatsoever without any notice thereof.
>
> 2. The Offeror shall permit the Lessee's employees, servants, agents and contractors reasonable access to the Leased Premises and Building, or Lands on which the Leased Premises are located, for the purpose of making assessments with respect to the Premises offered including Building systems and environmental assessments which the Lessee deems appropriate. Such assessments shall not constitute a taking of possession by the Lessee.
>
> 3. An Offer may not be subject to further evaluation if, in the sole opinion of the Lessee, the Offer fails to meet or comply with the provisions, requirements or standards as set forth in this Lease Tender Documentation Package.
>
> 4. An Offer will not be subject to further evaluation if, in the sole opinion of the Lessee, the Offer is conditional or qualified in any matter.

[…]

> 6. Notwithstanding the above, the Lessee reserves the unqualified right to carry out a comparative evaluation of all or any of the Offers and evaluate them based on considerations which in the sole opinion of the Lessee would yield to the Lessee the best value. This evaluation may be on such matters as, but not limited to, the quality of Leased Premises, the efficiency of the Leased Premises offered, building design and access, the degree to which the requirements are already met, or the time within which all requirements will be met.
>
> 11. ACCEPTANCE
>
> 1. The Lessee may accept any Offer whether it is the lowest or not, or may reject any or all Offers.

[3] Because the College is exempt from municipal taxation it was concerned that the tax clause in the Specimen Lease did not apply. It brought that concern to the attention of Public Works and an addendum to the Specimen Lease was then issued to take account of the College's special tax circumstances.

[4] The College submitted its Offer to Public Works on February 5, 2009, with an accompanying cover letter signed by its Purchasing Manager, Carey McCartney. Mr. McCartney's letter stated:

> St. Lawrence College is pleased to have the opportunity to submit our proposal for your review. The information provided herein is our response to your Request for Proposal for leased accommodation. The attached submission should not be expressed as a final contract agreement. As stated in your RFP (page 52), the Lessor's offer, the Lessee's acceptance and the Lease agreement will constitute the

> entire agreement. Both the Lessor and the Lessee will reserve the right to negotiate a final written contract. It is this agreement, that will result in the final expression of contract. Failure to reach a contract agreement will not be binding on either party or result in any damage claims.
>
> It is our sincere belief that our state of the art facility, coupled with its numerous amenities, warm and friendly atmosphere and picturesque location will lead to a long, successful partnership.
>
> Please contact me if you have any questions or require any clarification with regards to our proposal or any of the supporting documentation.

[5] Notwithstanding the addendum to the Specimen Lease, the College's Offer also included the following notation concerning municipal taxes:

> Note: The Lessee will be responsible for all taxes payable (i.e., property, municipal water, school, local improvements, and any other applicable taxes) on that portion of the rentable taxable area occupied by the Lessee. The tax rate will be subject to annual review and adjustment based upon changes to the assessed value of the property, the tax rate, local improvements or any other changes attributed to the Leased Premises. The rental rate will be subject to any increases or decreases in the taxes payable as of the commencement date of the lease and each subsequent year until termination of the lease.

[6] On February 24, 2009, Public Works wrote to the College advising that its Offer was non-compliant and would, therefore, not be considered. The basis for that decision was that the Offer was inappropriately qualified by a right to negotiate the terms of the lease and by a modification to the tax clauses of the Specimen Lease. It is from this decision that this application for judicial review arises.

II. Issues

[7] (a) What is the applicable standard of review?

(b) Did Public Works commit a reviewable error by disqualifying the College's Offer?

III. Analysis

[8] The parties are in general agreement about the legal principles that apply in this proceeding. Their disagreement arises in the application of those principles to the facts. This is an issue of mixed fact and law for which the standard of review is reasonableness: see *H B Lynch Investments Inc. v. Canada (Minister of Public Works and Government Services)*, 2005 FCA 237, [2005] F.C.J. No. 1091, at para 6.

[9] A helpful summary of the law in this area can be found in the decision of Baynton, J. in *Derby Holdings Limited v. Wright Construction Western Inc.* 2002 SKQB 247, [2002] 9 W.W.R. 126 at para 32:

> 32 The law of contract that applies to the tendering process has been stated and re-stated in these cases by the Supreme Court and need not be repeated here. For the purposes of determining the issues in the case before me, the following general principles can be distilled from the cases cited above:
>
> > 1. An invitation to tender by an owner may be characterized as an offer to consider a tender offer from a contractor (Contract A) to enter into a contract (Contract B) to perform the work in accordance with the terms specified by the owner in the invitation to tender and at the price specified by the contractor in the tender. The submission of a tender that complies with the terms of the invitation to tender constitutes the acceptance of the offer in the invitation to tender and creates Contract A. There is accordingly good

> consideration for the contractor's promise to enter into Contract B if the tender is accepted by the owner.
>
> 2. Provided the parties intended to initiate contractual relations, Contract A arises upon the submission of the tender. Its terms are those set out in the invitation to tender and the tender submitted in compliance with these terms. Usually, when parties resort to the tendering process as the means to select a contractor and determine the cost of completing the project, they intend to create contractual relations.
>
> 3. The terms of Contract A are case specific. They are comprised of the express provisions of the invitation to tender and of the tender itself and any other terms that may be implied by the court. Usually, the express terms provide that the tender is irrevocable for a period of time and if accepted, the tenderer is obligated to enter into a construction contract with the owner to perform the work. As well, the court usually implies a term that the owner will treat all tenderers fairly and that only compliant tenders will be considered and accepted.

[10] Justice Baynton's decision in *Derby* dealt with the problem of a non-compliant bid and whether it could be rectified after the opening of the tenders. He held that it could not for the following reasons:

> 43 The plaintiff considers the telephone acknowledgement of Clifford Wright as a rectification of the non-compliant aspect of the defendant's bid. But the case law suggests that an otherwise non-compliant bid (for example one that is uncertain as to the price) cannot be made compliant by addressing the deficiencies after the tenders are opened. To permit this amendment of bids after they are opened would create intractable problems and jeopardize the integrity of the tendering process. *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 136 D.L.R. (4th) 307 (B.C.C.A.). In the context of the unfortunate case before me, the failure of the defendant to acknowledge the addenda in its tender is not merely an irregularity. A crafty tenderer might decline to acknowledge an

> addendum with the objective of getting a further chance to fine tune its bid once the other bids were known. It could then elect whether to verbally acknowledge or refute the addendum depending on the economic consequences of the election.
>
> […]
>
> 47 But there is no valid reason why the application of this legal principle should depend upon the source of the challenge. The legal rationale for requiring owners to reject non-compliant bids from consideration is that those bids are not capable of acceptance by the owner within the context of the tendering process. The case law has established that a bid is non-compliant if it is uncertain or is at odds with the terms of the invitation to tender. The issue of whether a bid is compliant is not determined by the source of the challenge. It is determined by its own terms and those of the invitation to tender package. The integrity of the tendering process would be undermined by the disparate application of this legal principle. The modern case law clearly hold that the submission of a bid or the acceptance of it does not always result in the formation of Contract A. The owner, not the contractor, is the one in control of the tendering process and the one who is able to define what constitutes a compliant bid. There is no justification for a rule of law that permits an owner to hold a tenderer to a bid that the owner itself has pre-determined to be non-compliant.

[11] It can be seen from these general principles of tendering law that in responding to an invitation to tender a bidder must, as a rule, submit an offer which precisely conforms to the terms of the tender. Any variation from those terms – at least with respect to a material item – will disqualify the bid notwithstanding the offeree's wish to consider it. The rationale for this is that the offeree owes a duty of fairness to all the bidders engaged in the tendering process – a duty it breaches by considering a bid which is non-compliant with the terms of the tender. This is also the rationale for not allowing a bidder to carry out an *ex post facto* repair to its bid or, alternatively, for

not allowing the offeree to waive a material tender requirement for one bidder before the award of Contract B.

[12] The tender documents in this case make it quite clear that the contractual intention of the parties was to require that offers conform to the terms of the Invitation to Offer. Considerable care was taken to ensure that no room was left for further negotiation over the terms of the tender. The question that remains is whether the College's letter of February 5, 2009, which accompanied its Offer and Mr. McCartney's notation concerning municipal taxes constitute material qualifications or conditions which justify Public Works' decision to reject it as non-compliant.

[13] The Offer from the College was disqualified by Public Works on two grounds:

a. The Offer contained a reservation in the accompanying cover letter providing for a right to negotiate the final terms of the lease; and

b. The Offer included a notation which purportedly modified the tax clauses of the lease.

[14] The College asserts that, viewed objectively, its Offer substantially complied with the Invitation to Offer and should not have been disqualified. On the other hand it acknowledges that the requirement for certainty is the underlying principle that determines whether substantial compliance with tender requirements has been achieved. The College argues more specifically that Mr. McCartney's letter did not form part of its Offer and, even if it did, it merely added clarity. In addition, it says that although Mr. McCartney was tasked with the primary responsibility to

prepare the Offer he was not an authorized signing officer for the College. The College also says that Mr. McCartney's letter should be read down on the strength of his evidence that his intention was merely to restate the wording of the tender package and not to qualify the College's bid.

[15] There can be no question that Mr. McCartney's cover letter contained a significant qualification to the Invitation to Offer. The letter purported to vitiate the binding nature of the Offer by subjecting the terms of the Specimen Lease to further negotiation and by stating unequivocally that a "failure to reach a contract agreement will not be binding on either party or result in any damage claim." Taken at face value this letter would prevent the formation of contract B which ordinarily would arise upon the Crown's acceptance of the Offer. This would defeat the clear intent of the invitation by Public Works to tender which was premised on a bidder presenting an irrevocable offer to enter into a lease in the form proposed which would legally bind the parties upon acceptance by Public Works. This was not an inconsequential matter and it went well beyond a point of simple clarification.

[16] The problem with Mr. McCartney's evidence is that extrinsic evidence of the parties' intentions is not relevant to interpreting a contract where, when viewed objectively, the language of the agreement is sufficiently clear: see *Gilchrist v. Western Star Trucks Inc*., 2000 BCCA 70, [2000] 73 B.C.L.R. (3d) 102 at 108 (C.A.). Whatever his intentions may have been, Mr. McCartney's letter contains an unmistakable qualification going to the root of the contractual relationship and there is no basis for interpreting it inconsistently with its clear expression.

[17] The College has provided no authority for its argument that Mr. McCartney's lack of authority to qualify the Offer should somehow avoid the ostensible legal significance of his covering letter. It has also provided no legal basis for its contention that a cover letter containing a contractual qualifier should be taken not to be legally part of a contractual offer. Indeed the decision in *J. Oviatt Ltd. v. Kitimat General Hospital Society*, 2000 BCSC 911, [2000] BCJ No. 1196 stands for the opposite proposition.

[18] In my view it was well within Public Works' discretion under Article 10.4 of its Invitation to Offer to disqualify any bid which it reasonably considered to contain a condition or qualification. Public Works was under no obligation to investigate Mr. McCartney's authority to bind the College or to reconsider the Offer on the basis of subsequently discovered information: see *Double N Earthmovers Ltd. v. Edmonton*, 2007 SCC 3, [2007] 1 S.C.R. 116 at paras 49 and 52. Furthermore, it is not open to the College to assert that Mr. McCartney's letter carried no legal effect and should simply have been ignored by Public Works. Public Works had no obligation to accept the legal uncertainties that went with Mr. McCartney's letter. That letter was an open invitation to controversy and disagreement not only with the College but also with other parties involved in the tendering process. Public Works was entitled to the clarity and certainty of an unqualified offer and it was fully entitled to respond as it did. The right of the offeree to disqualify a bid for non-compliance because it might trigger a dispute was confirmed in *H B Lynch Investments*, above, where Justice Robert Décary stated at para. 7:

> 7 This is not a matter of mere formality, as alleged by counsel for the plaintiff. The issue of capacity to contract is fundamental in contract law. The Minister took great pains to draft a clear, precise

> and comprehensive clause dealing with the formalities of execution so as to avoid any dispute as to the tenderer's capacity to contract.

[19] The College points out that Public Works could easily have asked it to clarify its intentions. While that may be true, there was no obligation on Public Works to approach the College to clarify its Offer and to do so with a view to repairing the College's bid would potentially create a new set of problems with those whose bids were compliant. In the absence of a right in an Invitation to Offer to waive certain non-compliant lapses, there is no room to cure a non-compliant bid after the fact: see Robert C. Worthington, *The Public Purchasing Law Handbook* (Markham: Butterworths, 2004) at p. 344 and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1 [1999] S.C.R. 619, 170 D.L.R. (4th) 577 at para 41.

[20] It is not strictly necessary to address the problem created by the addition of a so-called clarifying note to the College's Offer concerning taxes payable. It is enough to say that the interpretive difficulties created by that added condition cannot be reasonably characterized as immaterial or inconsequential: see *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, 2004 BCCA 5, 25 B.C.L.R. (4th) 214 at paras 31-34. An indication of the difficulties that notation could create can be found in the letter from the College's legal counsel to the Department of Justice dated March 11, 2009, setting out a fairly complicated interpretive argument in support of the College's position. Notwithstanding the College's good intentions, it did not have the right to impose a new condition in its Offer which allowed any room for ambiguity, uncertainty or doubt. According to Mr. McCartney this note was intended only to explain the College's unique tax situation, but that rationale for adding the notation is not apparent since issue had already been dealt

with by an agreed addendum. The ultimate effect of the notation was to introduce a degree of uncertainty into the offer that the Crown was not required to accept.

[21] In conclusion, I do not find the Applicant's argument to be persuasive and the application is dismissed. The parties asked for the opportunity to address the issue of costs in writing. If they cannot agree on costs, I will receive further submissions in writing not to exceed 5-pages in length. The Respondent will have 7 days to make its submission and the Applicant will then have 7 days to respond.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed with the issue of costs reserved pending submissions from the parties.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-643-09
STYLE OF CAUSE:	THE ST. LAWRENCE COLLEGE OF APPLIED ARTS AND TECHNOLOGY v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 20, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	June 1, 2009

APPEARANCES:

Mr. Anthony Ball 613.544.0211	FOR THE APPLICANT
Ms. Liz Tinker 416.954.5303	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cunningham, Swan, Carty, Little & Bonham LLP Kingston, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT