IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Rhyno Demolition Inc. v. Nova Scotia (Attorney General), 2005 NSSC 40

Date: 20050221
Docket: S.H. 179668
Registry: Halifax

Between:

Rhyno Demolition Incorporated, a body corporate

Plaintiff

v.

The Attorney General of Nova Scotia representing Her Majesty The Queen in Right of the Province of Nova Scotia and The Department of Transportation and Public Works for the Province of Nova Scotia and Dineen Construction (Atlantic) Inc., a body corporate

Defendants

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: December 13, 14, 15, 16, 17, 20, 21, 2004
January 12, 2005, in Halifax, Nova Scotia

Counsel: David G. Coles and James D. MacNeil for the plaintiff
Michael T. Pugsley, for the defendant AGNS
John P. Merrick, Q.C. and William Leahey Mahody
for the defendant Dineen Construction (Atlantic) Inc.

By the Court:

BACKGROUND:

[1] The Province of Nova Scotia decided it was necessary to do extensive renovations to the interior of their building the J.W. Johnston Building in Halifax. The work on this project, divided in various phases, was let out via tenders. The majority of the tenders were processed through the Provincial Government's Public Tender's Office. A few of the tender packages, including the demolition packages, were tendered direct by Dineen who the Province contracted with to be the Project Manager.

[2] The demolition packages were broken into two phases, Phase A and Phase B. Rhyno was the successful low bidder for Demolition Phase A. Dineen put out tender calls for Demolition Phase B with a closing date of February 8, 2001, amended to February 9, 2001. On February 27, 2001 the tender was awarded to A. Snyder's Contracting Limited (Synder's) in the amount of $383,000. The ten percent (10%) security deposit was one of the requirements of the tender form. Snyder's paid this in two instalments to Dineen: one a certified cheque dated February 27, 2001 and the second payment March 20, 2001 in the amount of $18,300. which came from a progress advance for work done by Snyder's.

[3] Rhyno objects to the tender award to Snyder's maintaining that the failure to pay the security deposit in its entirety on February 27, 2001 should have invalidated Snyder's bid making Rhyno the compliant low bidder.

FINDINGS:

[4] (1) The Province of Nova Scotia is the owner of the J.W. Johnston Building, Granville Street, Halifax, Nova Scotia.

(2) The Department of Transportation and Public Works (DTPW) of Nova Scotia engaged Dineen Construction to provide all construction and management services required to construct renovations to their building as outlined in the preliminary plans and specifications.

(3) The construction management services contract included, but was not limited to, the management, scheduling, co-ordination, budgeting and supervision of all construction contracts and the execution of general condition items normally undertaken by a general contractor set out in the Construction Management Agreement.

(4) February 8, 2000 the Priorities and Planning Committee Secretariat for the Province of Nova Scotia concurred with the recommendation to approve of capital construction funding of approximately $12,636,000. to facilitate the retrofit of the Johnston Building.

(5) The architects on behalf of the Province of Nova Scotia sent out a request for proposals for a construction management services contract July 5, 2000 and on July 31, 2000 informed Dineen that their proposal with a fee of $464,000. for this project was accepted. DTPW advised Dineen that its project manager with whom Dineen should communicate would be Ray Levy. The letter of acceptance also set out certain requirements such as public liability and property damage insurance and builders' risk coverage for not less than 100% of the total value of the work performed and material delivered to the site. An important provision in the notice of acceptance was the reminder for Dineen to provide performance assurance requirements which were detailed according to the Instructions to the Bidders in the Architects' Call for Proposals. The Call for Proposals set out in paragraph 18 of the Call as follows:

> 18. PERFORMANCE BOND, LABOUR AND MATERIAL PAYMENT BOND

1. Each Proponent shall submit with his Technical Submission (Part B), a letter from a recognized Surety Company certifying that the Proponent if successful will provide the bonds called for in the Proposal Documents. This consent to provide a 50% Performance Bond and a 50% Labour and Material Payment Bonds shall be in the form provided.

2. Bonds shall be based on the full construction cost of the base building plus leasehold improvement work, not the value of the Construction Management contract.

3. Bonds when submitted must be on the forms provided by the Minister.

4. Note that the cost of bonding will be a reimbursable expense.

5. It is not necessary that a Bid Bond be submitted with the Proposal.

(6) There is no paper record of the rationale for the determination for direct tender by Dineen in areas such as demolition. However, there is evidence as to the basis for treating the demolition tender in a different fashion, including, with respect to the second Phase B a memorandum from Dineen to the DTPW from Bob Homans of Dineen, the first dated 15th of December 2000 recommending Dineen proceed with a tender call for the remaining demolition, excluding hazardous material and that this tender call not be through the Public Tender's Office but retain the requirement for a 10% certified cheque as security by the successful

tenderer. The second memorandum of the 18th of December followed a telephone conversation between Mr. Homans and Ray Levy of the DTPW and the body of the memorandum is as follows:

> Further to our telephone conversation, it is our recommendation that the remaining demolition excluding hazardous materials be tendered at this time. It is our opinion that this Trade Package should be called through Dineen Construction. Some of the Subcontractors who we hope would respond to this call are not very sophisticated and our feeling is that they are more comfortable with closing this package to the Construction Manager, rather than through the Public Tender Office.
>
> Other reasons for Dineen handling this Tender Call are; expedience, flexibility on informalities, and having the opportunity to discuss scope of work, scheduling etc. with the low tender prior to award.

(7) There is additional evidence in support of the desirability of treating the demolition tender as a direct tender rather than through the public tendering process. Demolition is a unique process that appears to require a measure of ingenuity because the problems one encounters can vary considerably. This is particularly so when the demolition involves an older building. Generally speaking, the evidence here indicated that although Dineen were not permitted to tender on the demolition contract they had a measure of experience in this area. They would be in a position to do some of the demolition work in the event of problems or difficulties with a successful demolition contractor.

(8) Ray Levy the Project Manager for DTPW described the role of a construction manager as indicated above. Levy's role was to work internally and administer the contract with Dineen. Use of a construction manager in relation to this job was on the recommendation of the architect who made that recommendation because the renovations and demolition related to an old building which generally would have a number of unknowns and contingencies are more likely to arise.

(9) Mr. MacRae has wide and extensive experience as a general contractor since his graduation in 1966 from Waterloo University to his present position since 1977 as President of Dineen Construction. The request for proposals of July 5, 2000 for construction management services did not require a Bid Bond but did require Performance Assurance. Dineen received the contract as construction manager even though it was not the low tender in response to the proposals. Dineen's tender, as accepted July 31, 2000, required them to secure a guarantee from a bonding company a Performance Bond in the amount of $10,000,000. This was a somewhat unique situation as Dineen was required to bond for all trade contractors. Mr. MacRae described bonding for all trade

contractors as not the normal situation and that it was an umbrella bond because the construction manager was responsible for the trade contractors.

The Construction Contract Guidelines provided:

> **GC20 GUARANTY BONDS**
>
> .1 The Construction Manager, within ten (10) days of the award of Contract shall provide a Performance Bond and a Payment Bond, each in the amount of fifty percent (50%) of cost of the Work, in the forms provided by and acceptable to the Minister, the cost to be included in the Bid Price.

Mr. MacRae stated, and I accept, that it was not uncommon for the performance bond to come in later than the ten (10) day requirement and that time frame was not met by Dineen. Strictly speaking, this should have been required before Dineen commenced work but in the industry securing such often takes some measure of time and Dineen commenced work before the performance bond was put in place. There is considerable evidence to support Mr. MacRae's views as to what occurs in the trade which I accept and I refer particularly to the extensive experience of John O'Connor, the Director of Engineering Design for DTPW and Ray Levy, the Province's manager, which is referred to in some detail further in my findings.

(10) Difficulties were likely to arise in the renovation and demolition of the Johnston Building because of its age and some unusual features. For example, the evidence established that there was only a very small crawl space to the roof which contained large water tanks that provided gravity feed for the sprinkler system. The contingencies of an old building were somewhat diminished in this case by the frequent number of view points, i.e., holes in the interior walls that permitted an examination of what was in existence in the particular area of the view hole. This was important in this case because of the fact the building apparently was built in stages. One of the features of demolition where there are renovations is the desirability on the one hand to maintain the elevator service for utilization in renovation and, on the other hand, the demolition contract required the removal of the existing older style elevators. Dineen wanted to make sure that a tender for the demolition appreciated all of these types of difficulties and a memo from Bob Homans February 12, 2001 indicated the need to meet with the apparent low tender to clarify issues and, in the evidence it was indicated that it was desirable to speak to the demolition tenderer who was successful to make sure they appreciated the magnitude and difficulties and insure they had the supervisory and

labour requirements and that they possessed or had access to what might be required by way of equipment.

(11) Phase A had a demolition tender form which included a bid bond security to be replaced by the successful bidder by performance security with an alternative of proceeding directly to a performance security by certified cheque. The precise wording in the tender form for Phase A is as follows:

> We have included as bid security (payable to Dineen Construction (Atlantic) Inc.) a Bid Bond for 10% of the Tender amount. The successful bidder shall replace the Bid Bond by an acceptable 50% Performance Bond and a 50% Labour and Material Payment Bond within ten (10) days of Contract Award.
>
> -or-
>
> In place of a Bid Bond, we have included as a deposit a Certified Cheque (payable to Dineen Construction (Atlantic) Inc.) for 10% of the Tender amount. It is understood that the deposit cheque will be returned to unsuccessful bidders after the award of the Trade Contract, but will be held as Trade Contract Security if we are awarded the Trade Contract and will be forfeited if the Trade Contractor fails to meet his contractual obligations.

(11) All of the demolition tenderers for Phase A used the above tender form but **none** of the three tenders advanced for demolition work on Phase A provided a bid bond. Rhyno stated, by correspondence November 8, 2000 and November 9, 2000, a willingness to submit a cheque in the amount of 10% of the

tender amount if they were awarded the contract. I find both of these letters wrongfully reference the subject matter as a bid bond when, in fact, they were dealing with the requirement of the successful tenderer providing performance security.

(12) Maritime Demolition Limited, one of the tenderers on Phase A demolition, a company actually controlled by Arthur Rhyno's brother, Ross Rhyno, similarly wrote November 9, 2000 indicating it would provide a certified cheque **if** they were the low tender.

(13) Dineen advised Rhyno on November 20, 2000, that they were the Phase A successful bidder and directed the deposit of a performance security in the amount of $32,000. Rhyno's actual bid was $320,800. and technically the cheque should have been for $32,080., however I conclude that Rhyno met exactly what was requested in the memorandum of November 20, 2000 and the nominal amount of $80. is not a material variance.

(14) Mr. Rhyno, in his evidence, acknowledged that his company's tender for Phase A was November 6, 2000 and it was not accompanied by a certified

cheque or any security as required. He further acknowledged his correspondence of November 9th was after he had tendered and that although the tender form was to go the architect he sent it directly to Dineen. When asked about the letters of November 9th indicating that Rhyno would send the security **if** successful said, "Homans seemed to be fine with that". And, asked, were you asking for a delay, he said, "Yes, I thought it was fine", and went on to indicate it was a short delay and not in his view significant and was something that occurred based on his experience. When it was put to Rhyno in cross-examination that what Snyder's did was to say in effect say to Dineen on its successful tender, "I need a little bit of time", and it was suggested that was exactly what Rhyno did. His answer did not address a time feature but merely suggested the difference was that his company had the money and he expressed doubts that Snyder's were in that position. I conclude Rhyno recognized the requirements and conditions of providing the follow-up performance security was in the trade not strictly adhered to.

(15) The Phase A Tender Form with respect to the mandatory requirement of the bid bond which no tenderer complied with and the requirement of performance security by the successful bidder was changed and the following replaced those provisions in the Tender Form for Demolition Phase B

> Prior to tender award, the successful tender will be required to provide a Certified Cheque (payable to Dineen Construction (Atlantic) Inc.) for 10% of the Tender amount. This cheque will be held as Trade Contract Security and will be forfeited if the Trade Contractor fails to meet his contractual obligations.

With respect to the intent of this provision, I readily accept the evidence of Mr. MacRae who was, in fact, the author of this terminology. Mr. MacRae gave evidence of the difference between a bid bond and performance security. The bid bond is required at the outset at the moment of award and is forfeited if the successful bidder fails to proceed. A performance guarantee, on the other hand, is to ensure the contractor performs the work undertaken. Ray Levy was asked his opinion based on his experience as to the Phase B security requirement and stated that it was his understanding that this was performance security and that when the contract has been awarded would not be a bid at that stage. He agreed that the bid security requirement was dropped for demolition tenders on Phase B and only the performance security was required.

(16) The Construction Management Agreement entered into between DTPW and Dineen contained the following article:

> ARTICLE A-12

> It is understood and agreed that this Agreement is a Contract for the supply of goods and the performance of services and that the supplier is engaged as an independent contractor and is not nor shall be deemed to be an employee, servant or agent of the Minister.

A statement in a contract as to status does not necessarily establish the status of a party to the contract. It does clearly represent the intention of the parties and I find in the evidence that Dineen, the successful but not the lowest bidder, became construction manager with the management, scheduling, coordination, budgeting and supervision or all construction contracts, had the responsibility for the execution of the general conditions normally undertaken by the general contractor. The Government, under the general conditions of the Contract GC39 retained the Minister's approval of the trade contractors selected. However, this did not change the status of Dineen from being an independent contractor. We have, therefore, a unique situation where Dineen had its overall responsibility which included the enforcement of direct contracts tendered through the Public Tender's Office and also direct and contractual responsibility with contractors in a certain number of the phases of the project including demolition, masonry, etc. Dineen was required to secure a guarantee from a bonding company for a performance bond which was an umbrella bond for all trade contractors it dealt

with. This, as I have found earlier, was a unique requirement because Dineen, as construction manager, was responsible for the trade contractors. The evidence supports, and I conclude, that Dineen throughout was, in fact, an independent contractor and not the servant and agent of DTPW or the Province of Nova Scotia. The relationship with Dineen to DTPW was governed by the Construction Management Agreement the July 31, 2000 and contractual documents relating thereto. The Province had the final say with respect to approval of all contracts, including those tendered direct by Dineen and owed a legal duty of fairness in relation to all tenderers of tenders handled through the Public Tender's Office. I conclude that the Province did not have a similar duty in relation to direct tender contracts between Dineen and subcontractors such as Rhyno and Snyder. It is clear in any event that DTPW and the Province of Nova Scotia were not a party to and were, in fact, unaware of any significant or insignificant bond compliance by subcontractors who tendered direct with Dineen. Further, as was seen later in my findings, I have concluded that within the practice in the trade and industry Snyder's demolition tender was a compliant bidder.

(17) In his evidence Mr. Rhyno acknowledges that he did not tender to the Government but to Dineen. He acknowledged that he had no discussions with any

members or representatives of the DTPW with respect to Phase B, “Not that I can recall”. He acknowledged that all tender cheques were payable to Dineen and with respect to Phase B, Dineen’s acknowledgement in relation to Snyder was direct to Synder. Mr. Rhyno did say that he assumed the Government, being the owners, were overseeing the job but, when asked, what conduct of the Government did he complain about, his response was, the Provincial Tender Package - the rules were not complied with, but acknowledged again that he had no conversation with a government official prior to the award and he elicited no information or source of information within Government and that all his information, his total source, came from Dineen, as did all of the documents. If he needed clarification he acknowledged he would go directly to Dineen. In cross-examination by Mr. Merrick he was asked about his relationship with the Government and all he could indicate was that the Johnston Building was owned by the Government and, in his view, Dineen was acting for the Government and when asked specifically, well who benefited, his response was along the lines, “I never really thought about it before”. I made a note in the margin of my notes of his evidence at this point that it was not credible, that he was simply reaching out and attempting to provide what he thought might be the most beneficial answer to him as, very clearly, his

contractual/dealings in relation to Phase A and Phase B were entirely with Dineen and he so understood and acted on that basis.

(18) John O'Connor, the Director of Engineering Design for DTPW outlined the budgetary process that the budgetary allotment of $12,636,000. was very significant, it included soft and hard costs. The problem with this project was that the building was built somewhere in 1929-1931 era, however, every effort was to be made to stay within the estimated budgetary allowances. He spoke of Dineen as being hired as being construction manager through the competitive process of tender calls and agreed that the Province on the job itself tendered most of the tender packages and then assigned the successful tenderers to Dineen. He referred to the call for proposals and that the Construction Management Agreement sets the relationship with Dineen being a construction manager and independent contractor. He recalls discussion with Dineen where they suggested tendering such items as demolition and noted that it was a relatively small scope of work. During the work itself more demolition work became apparent. The actual tender package for Phase B demolition was prepared by Dineen. His view was, the situation that arose was a private matter between Dineen and Snyder. This position has merit. When asked what would have happened if Snyder's bid was not accepted he indicated options

would have been explored. He noted how much higher the Rhyno bid was, in fact some $90,800. I take from his evidence that even if the Snyder bid was determined to be non-compliant, there is no certainty whatsoever that Rhyno as the next lowest bid that would have been accepted. When asked about the time delay with respect to posting performance security he indicated that in many cases it was certainly not instantaneous with the award or the ten day requirement and he has been familiar with a couple of hundred tenders a year and while he was unable to quote any particular project there was often an issue of trying to obtain the performance security document, a lot of back and forth and chasing. He acknowledged that Dineen probably started the work before it had filed the prerequisite performance security. He also indicated that change orders, after a tender was accepted were a common occurrence. He repeated that options available included negotiations, negotiate changes in the scope of the work, etc., and that the performance security here was for the benefit of Dineen if the Snyder bid was not acceptable DTPW would go to Dineen and any recommendation by Dineen would be very significant. He noted that it was an old building and it was likely to run into contingencies more than normal. Page 19 of Exhibit 4 is an example of chasing a contract. He explained, in his experience a bid bond or bid security was contemporaneous with the bid and was for the purpose of covering the costs if you had to go through a

new contract and bidding tendering process if the successful bidder decided not to proceed with the contract. Performance security, on the other hand, is something different and in this case was for the benefit of Dineen. Page 110 of Exhibit 4 confirmed that bid bond or bid security was not requested in Phase B. Substantial completion by Snyder's did not take place as projected for the August 1, 2001. I find that the evidence fails to support a finding on the balance of probabilities that Rhyno would have completed the work by the projected date of completion had Rhyno been awarded the contract. This has some significance in relation to the determination of damages. His authority with respect to matters was to work matters out within reason. As far as he was concerned there was no alternative procurement practices issue.

(19) With respect to Phase A, Mr. Rhyno acknowledges that Rhyno tendered November 6, 2000, followed by its correspondence undertaking stating its willingness to submit a cheque in the amount of 10% **if** it was the successful bidder.

(20) The tender form for Phase A provided that the alternative to a bid bond was "in place of a bid bond, we have included as a deposit a certified cheque

payable to Dineen Construction (Atlantic) Inc. (for 10% of the tender amount". This was to constitute performance security and the deposit cheque would be returned if the tenderer was not successful. In this case Rhyno did not accompany its bid with either a bid bond or the alternative and did not submit the 10% of the tender amount until eleven days after the bids were closed, namely by certified cheque November 20, 2000, the date Dineen confirmed to Rhyno that it was the successful bidder.

(21) Snyder, on being advised that its tender was accepted, provided a certified cheque February 27th in the amount of $20,000. Discussions took place between Dineen and Snyder's when Dineen pushed Snyder's for the balance of the performance security and Dineen concluded Snyder's would have difficulty providing the balance of $18,200. so Dineen initiated and put in place an advance payment to Snyder's in the amount of $18,200. which was paid March 20, 2001. I further find that when the advance was made at the initiative of Dineen, Snyder's had commenced work and done more than sufficient work to give rise to entitlement of an amount greater than the progress payment of $18,200. advanced by Dineen.

(22) Mr. Greg Lusk was the Executive Director of Government Services for the Province of Nova Scotia. His very first involvement was when Rhyno's solicitor wrote to him on March 20, 2001 to which he replied March 29, 2001 based upon information provided by Dineen. Mr. Lusk received copies of correspondence of George Murphy, the Director of Purchases, dated April 10 and April 30, 2001. Mr. Murphy's letter of April 30th was meant to and wrongfully conveyed the message that Snyder's two payments were received before awarding of the tender contract. Mr. Lusk was shown the copies of the two cheques from Snyder's of February 27, 2001 and March 20, 2001, long after Mr. Murphy's correspondence to Rhyno's solicitor and he had been led to believe that the cheques had been tendered prior to the award. He viewed the matter as one between Dineen and Snyder. Mr. Lusk interpreted the Phase B performance security requirement as a requirement the same as a bid bond requirement. His remarks as to his expectations, fairness and breach of the tender obligation are only valid if you interpret the Phase B requirement as a bid bond requirement that would have been mandatory to accompany each tender, whereas I have found the Phase B requirement was not a bid bond requirement but a performance security requirement to be provided only by the successful tenderer. Mr. Lusk is a senior

civil servant and he showed a lack of experience and understanding of what transpires within the trade.

(23) George Murphy, now retired, was involved with respect to purchases and procurement. He acknowledges correspondence and referred to his letter to Rhyno's solicitor of April 30, 2001 as a "get stuffed letter", as he felt that people were trying to interfere. His information came primarily from Levy and in his experience the Phase B tender requirement was not bid security but performance security.

(24) George Murphy was a Logistics Officer in the Canadian Armed Forces from 1963 to 1992 and started with the Province in procurement in August of 1992. He appears to be familiar generally with tender calls. When asked if the Phase B tender form required performance or bid security, he responded, "performance security", but then went on, after acknowledging his letter of April 30th to the then solicitor for Rhyno was misleading, to agree, in cross-examination, that the terminology in Phase B, although previously stated as performance security he agreed the wording to him was clear it was to be provided before the award. His evidence is not very helpful and he acknowledged memory and

recollection problems but it does add to an appreciation that the contractors were dealing with Dineen and the performance security was a matter between the contractor and Dineen. This information came primarily from Mr. Levy and his April 30, 2001 letter was, as he described, a “get stuffed letter”, as he did not want any interference. When he was asked if he saw the cheques he said words to the effect, his memory was not good, he doesn’t recall seeing these cheques, although his earlier evidence was that he was having difficulty getting information Dineen, and very clearly, like all the government officials dealing with the Phase B demolition contract, it was a matter between Dineen and Rhyno which is how I have found as a fact Rhyno treated the matter.

Position of Dineen - Snyder’s Bid - Phase B

(25) I readily conclude that what was required of those tendering on Phase B was performance security and not a bid bond security. Bid bond security, as I have stated, would be a prerequisite to having the tender opened. What I am clearly dealing with here is performance security which is entirely different. Very clearly there is a practice in the trade and industry of treating performance security in a far less technical manner than a bid bond security. To begin with, it is almost

impossible to comply that the performance security must be provided simultaneous with notification of award of the tender. There is a normal lapse of time determined by circumstances. As clearly indicated here, immediate payment was made by Snyder and Dineen chased them for the balance of the performance security by which time Snyder's had a legal entitlement to an amount in access of the advance initiated by Dineen. Dineen, it is worthwhile remembering, was responsible for and did secure an umbrella performance bond for all of the contractors. Based on my findings, I conclude that the Snyder's bid was compliant.

Additionally, when you are dealing with performance security, for that matter generally with the successful tenderer, particularly in an area such as demolition, there is a need for some degree of flexibility provided that it does not amount to any material change or benefit to the successful tenderer that would not otherwise have been provided to whomever was the successful tenderer.

CONCLUSIONS:

General

[5] I have made a number of findings in the preceding paragraphs and I do not propose reciting or in some cases even producing a quasi summary in stating my conclusions. Suffice to say that my findings are the foundation for my conclusions.

Impact of Evidence Relating to Phase A On Determination With Respect to Phase B

[6] The evidence as to what transpired in relation to Phase A is of little significance and weight with respect to my determinations on the issues arising from the Phase B demolition. While it is clear that none of the tenderers in relation to Phase A met the prerequisite of bid security which was capable of becoming performance security. In fact, Rhyno did not provide the performance security in this manner but separately some eleven days later. The issue of compliance by the tenderers in Phase A is not before me and of no consequence but I simply comment in passing that the requirement of bid security which must accompany each and every one of the tenderers' bids is normally a fundamental requirement of the tendering process. It is the entrance fee or ticket to have one's bid opened and considered. Such a tender lacking a fundamental requirement would, if challenged, render the tender invalid and one that cannot be rectified by

usage or practices in the industry *(Vachon Construction Ltd. v. Cariboo (Regional District)* B.C. Court of Appeal 1996, BCJ No. 1409).

[7] At best the evidence relating to Phase A gives the court a small measure of comfort that in addition to the strong evidence of the practice in the trade there existed here from the outset an environment less technical than when dealing with fundamentals and the prerequisites of the bid bond.

Position of the Province of Nova Scotia - Department of Transportation and Public Works

[8] The evidence led me to the findings which are substantially, but not entirely, set out in paragraphs 16 and 17 of my findings. Not only does Rhyno fail to establish any contractual or other liability on the part of the Attorney General of Nova Scotia, represented by the Department of Transportation and Public Works for the Province of Nova Scotia, the evidence establishes on a strong balance of probabilities the status of Dineen as an independent contractor and Dineen was not its servant or agent in law. The result therefore is that the action against the Attorney General of Nova Scotia stands dismissed.

Rhyo Claim Against Dineen

[9] Again, without reciting the numerous findings of facts already related, I readily conclude the Rhyno has failed to establish any cause of action against Dineen. The Snyder bid on Phase B was a compliant bid. It did not have a bid bond requirement removing the prerequisite of an entrance fee or ticket to have one's bid opened and considered. There is an overwhelming wealth of evidence to confirm that what was required on Phase B was performance security, the providing of which within a reasonable time frame and in a reasonable manner was permitted and practiced within the trade and industry. In the circumstances that existed here, the manner in which it is addressed did not render the Snyder bid non-compliant nor did it provide any basis for sustainable action by Rhyno against Dineen.

[10] In addition, I agree with Tidman, J. in *Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)*, [2000] N.S.J. No. 85 at para. 69, where after finding Aaurora was non-compliant to the defendant's invitation to tender that it was appropriate to go further. Paragraph 69:

> . . . That is whether either one separately or both together were material non-compliances to the extent that they should be considered as violating the bidders' contract. I pose this issue since it seems to be that the court should not interfere with the acceptance of a bid by the owner if the non-compliance is only minor or not based upon a material factor.

[11] I have already indicated that in a bid bond situation there must be strict compliance because it is the prerequisite entrance fee or ticket. Having said that, common sense also applies, and in the case of *Winbridge Construction Ltd. v. Defence Construction (1951) Ltd.* , [2004] N.S.J. 50, (2004 NSCA 26), the Nova Scotia Court of Appeal dealt with a case where Windbridge maintained the bid contract that required, "with references for future contact", required more than the name and location of former clients for whom testing had been performed during the previous five years and Boudreau, J. at trial concluded that Windbridge was trying to impose a technicality in the tendering documents which did not exist. Chipman, J.A. at para. 17 stated:

> I am of the opinion that Boudreau, J. did not err in his decision that Lafarge was a compliant bidder. Section 3.11.1.3 of Amendment No. 8 does not indicate the nature of the references required nor how many references were required. In my opinion Lafarge complied in substance with what was required by the words "with references for future contact". The narrow interpretation of the words urged by the appellant is not reasonable or justified, having regard to the general wording of the clause and its intended purpose, viz to ensure that the tenderer proposed a testing company with skill and experience demonstrated to DCL's satisfaction. . . .

[12] Mr. Coles, on behalf of Rhyno, would place a narrow interpretation on the bid performance requirement in Phase B to elevate it to a bid bond requirement and to so interpret would provide an interpretation totally

beyond the clear intention of all parties both specifically, in relation to the Phase B tender, and, generally, in the trade.

[13] The action of Rhyno against Dineen stands dismissed.

[14] I am not satisfied on the evidence that Rhyno has established on a balance of probabilities that had I found Snyder's bid to be non-compliant it would have received the demolition contract for Phase B. By this stage there were serious concerns with respect to the budget set for this project and, in particular, for the final demolition aspect. It is my determination that quite probably the tender advanced by Rhyno would not have been accepted in the form and content tendered. It was quite open to Dineen to call for further tenders and to consider the budgetary requirements and alter the scope and extent of the Phase B demolition tender process. While I think it is possible that Rhyno would or would not have received acceptance of its tender in a considerably altered scope and determination, such a conclusion falls short of Rhyno establishing, on a balance of probabilities, that it would have received the tender.

Damages

[15] The parties spent a great deal of time and effort on the issue of damages and therefore it is appropriate that I provide the court's determination in that regard. The court had the benefit of Price Waterhouse Coopers' report of February 23, 2004 and in providing that opinion PWC was requested by Rhyno to operate on the assumption that Rhyno would have been awarded the tender. While it does not specifically state such the report is on the assumption that Rhyno's actual tender as tendered would have been the successful contract. The methodology followed by PWC was a contribution margin analysis to arrive at their conclusion as to the business losses allegedly suffered by Rhyno. White Burgess Langille & Inman, Chartered Accountants, were engaged by Dineen and provided a limited critique of PWC's report. WBLI accepts that the loss quantification methodology used by PWC was appropriate. WBLI calls into question in certain areas the specific application of that approach to Rhyno's businesses.

[16] PWC made a number of other assumptions. For example, Rhyno would have been able to complete the demolition work within a 2.5 month period and we know as a fact that the completion of Phase B by Snyder's took a much longer period given the nature of the demolition work. As previously recited, I have no reservations in concluding that Rhyno would have

required a greater time period than its tender estimate of a 2.5 month period. The PWC report, of necessity, comes from Rhyno and makes the assumption that the information provided is accurate and complete. One of the fundamental differences of opinion arises from the selection by Rhyno of certain jobs considered by Rhyno to be comparable to Phase B. Rhyno advance four jobs in particular and one major job was excluded purely because Rhyno did not have accurate or sufficient records for analysis. There is a difference of opinion between PWC and WBLI as to what constitutes a large or major demolition job and it is clear that the analysis is based upon a relatively short time frame because Rhyno only got into the demolition business in 1999 and, as it turns out, primarily because of difficulties in obtaining supervisory staff and because more lucrative or interesting business options became available to Mr. Rhyno. I do not propose to go into a minute examination of the various reports, particularly the PWC report, suffice to say that I conclude that the basis of its report for specific jobs was far too narrow and selective. The historical record of Rhyno does not support the conclusion that it would have handled this Phase B major project and still have completed the projects accounted for in its financial statements. This Phase B would have spread in part over two

specific years and Rhyno had its own nucleus of staff, plus the ability to draw upon unionized labour, etc. Nevertheless, based on its historical records, I cannot be satisfied on a balance of probabilities that it would have been able to do the Phase B major job and maintain anywhere near the capacity to complete all other jobs during that same time frame.

[17] With respect to specific critique items raised by WBLI, some have a clear common sense application. The court does not have cost information to determine the contribution margin on a number of other large jobs that would have some degree of comparability to Phase B. To accept PWC's conclusions would provide Rhyno with profit results significantly better than that achieved before or after this tender award. Certain expense such as office supplies, wages and benefits, etc., would have been increased and I think the historical assessment with respect to waste removal would have been more appropriate. Some, however, such as telephone do not appear to be a incremental expense, certainly not one of any magnitude. Rhyno's treatment of the depreciation in relation to equipment seems to me to ignore that there is a measure of life to major pieces of construction equipment often measured by a number of hours of use and wear. The equipment that he did have was not utilized in what would have been his most major

contract. The useful life in major equipment was not properly taken into account by PWC or Rhyno.

[18] I have already noted that it would have required a greater time frame and Mr. Bradley, in his evidence on behalf of PWC, defended the estimated contribution margin percentage calculated at sixty-six percent but he did so with words to the effect that it could be that high. To accept that Rhyno's loss estimate at a sixty-six percent contribution margin would put Rhyno in a better position than it enjoyed either prior to or after the tender award.

[19] There is another major feature of the evidence and that is that Mr. Rhyno, who I found to be a hard-working, knowledgeable person in the demolition field, well after the event and the commencement of litigation, in fact, probably about two years after litigation had been under way, answered interrogatories as to the loss of profit and gave his answer at $220,000. He further acknowledged that if the job took longer it would likely reduce profit, further, that there would be unexpected contingencies that would have an impact on profit. He acknowledged that there was equipment that during demolition suffered wear and tear and if it did not get used it would extend the life of the equipment. He acknowledged that his estimate or claim was for the full amount and did not contain any estimate for contingencies or

wear and tear. The opinion expressed by PWC is that, using the sixty-six percent margin, loss was $349,000. The report provides additional scenarios but still maintains the loss of $332,000. to $349,000.

[20] The PWC report is an accounting exercised based upon information provided. However, a more realistic view of the loss Rhyno would have suffered is his own evidence of an estimate of $220,000. which, in itself, must be discounted for the various reasons noted.

[21] In the final analysis, I would assess Rhyno's loss, had it received the contract, without variation to be $185,000.

Costs

[22] Counsel are entitled to be heard on costs. It may be appropriate to give some consideration to Rhyno arising out of the less than candid responses to his lawyer's inquiries by Dineen. This probably had some influence on his determination to pursue this suit.

J.