

SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. England Paving & Contracting Ltd.,
2009 NSSC 224

Date: 20090716

Docket: Hfx. No. 312485

Registry: Halifax

BETWEEN

The Halifax Regional Municipality

Applicant

- and -

England Paving & Contracting Limited

Respondent

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: July 9, 2009 in Halifax, Nova Scotia

Written Decision: July 16, 2009

Counsel: Randolph Kinghorne and David Greener, for the Applicant
John Kulik, Q.C., for the Respondent

Notice of Contest:

Colin D. Piercey (Dexter Construction Company)

James D. MacNeil (Ocean Contractors Limited)

Alan G. Hayman, Q.C., and R. Paul Thorne (Basin Contracting
Limited)

By the Court:

BACKGROUND:

[1] On or about May 16, 2009, Halifax Regional Municipality (“HRM”) issued Tender 09-250 “Thin Overlays - Phase 2 - Various Locations” (the “Tender”) for the purpose of obtaining bid responses from construction contractors with the objective of awarding a contract for road work intended to be completed in the summer or fall of 2009.

[2] The Tender was originally scheduled to close on Thursday, May 28, 2009 at 2:00 p.m.; however, this was changed by “Tender for 09-250 Addendum #1” (“Addendum #1”), which was issued on Thursday, May 28, 2009. Addendum #1 extended the closing date to Friday, May 29, 2009 at 2:00 p.m. and contained items to be incorporated into the Tender including a new Schedule of Quantities and Unit Prices (the “Schedule”) page to be inserted into the Tender document in replacement of the Schedule page as originally issued.

[3] By the closing of the Tender at 2:00 p.m. on Friday, May 29, 2009, HRM had received four bid responses to the Tender. As is customary, the bid prices as

contained on the bid summary page of the four responses were read aloud at the opening. The lowest bid price was received from England at \$1,194,333.16 and the second lowest from Dexter Construction Company Limited at \$1,529,082.10.

[4] Almost immediately after the opening of the four bid responses, the documents were reviewed for responsiveness in a preliminary manner. At this point it was noticed that the England bid consisted of the Tender document book and some loose pages. The Total Tender Price figure had been amended with the use of liquid white-out, but the change had not been initialled. At that time it was not noticed whether or not the Schedule page was present. It was subsequently discovered by HRM staff that the loose papers contained in England's bid response consisted of the majority of the Addendum #1 document except the Schedule page was not included. The directions with Addendum #1 were for the bidder to incorporate these pages into the Tender document before submission. The bid response of all bidders except England contained the Schedule incorporated into the Tender document.

[5] HRM informed England of the missing Schedule and were confronted by England's absolute belief that the Schedule had been submitted. HRM staff conducted a thorough search for England's Schedule page but were unable to find it. The

conclusion of HRM is that England inadvertently failed to enclose the Schedule with its bid response. The position of England is that the Schedule was provided in its bid response and therefore its bid is compliant in that respect.

DEFICIENCIES:

[6] There appears to be agreement that the following are the deficiencies in the England bid:

- (1) Schedule of Quantities and Unit Prices (Addendum #1) not enclosed;
- (2) Addendum #1 not incorporated by bidder into tender document; and
- (3) Alteration to originally written Total Tender Price bid not initialled.

TENDER FORM AND HRM PROCUREMENT POLICY:

3. TENDERER AGREES:

- .1 To enter into a contract to supply all labour, material and equipment and to do all work necessary to construct the Work as described and specified herein for the unit prices stated in the Schedule of Quantities and Unit Prices.
- .2 That the Total Tender Price shall be the sum of the products of the tendered unit prices times the estimated quantities in the Schedule of Quantities and Unit Prices plus the Harmonized Sales Tax.
- .3 That the unit prices shall be the basis for the Total Tender Price, and if the amount tendered for an item does not agree with the extension of the estimated quantity and the unit price for that item, then the amount tendered for that item and the Total Tender Price shall be corrected accordingly.
- .4 That the Owner reserves the right to make any changes, additions or deletions to the quantities.

[7] Clause 3.6 of the Form of Tender provides as follows:

- 3.6 That measurement and payment for items listed in Schedule of Quantities and Unit Prices shall be in accordance with corresponding items in Section 01150 - Measurement and Payment and Section 00900 - Supplementary Specifications.

[8] Clause 10 of the Tender documents, Section 00530, is as follows:

10. It is agreed that the quantities shown in the Form of Tender, Schedule of Quantities and Unit Prices are estimated quantities of the Work only and they are not to be taken as the final and correct quantities of the Work to be executed by the Contract and that payment will be made on the basis of the unit prices and lump sums tendered applied to the measured quantities of work finally carried out and further that these unit prices cover all the Contractor's obligations and liabilities under the Contract.

[9] Clause 17 of the Information to Tenderers, Section 00100 of the Tender sets out conditions in which the Owner may reject a tender, as follows:

- (a) that contains any irregularity or informality;
- (b) that is not accompanied by the security documents required;
- (c) that is not properly signed by or on behalf of the tenderer;
- (d) that contains an alteration in the quoted price that is not initialled by or on behalf of the tenderer;
- (e) that is incomplete or ambiguous; or
- (f) that does not strictly comply with the requirements contained in these instructions.

Halifax Regional Municipality relies on a privilege clause found in Clause 17 of the Information to Tenderers, Section 00100 of the Tender, which states:

Notwithstanding the foregoing, the Owner shall be entitled, in its sole discretion, to waive any irregularity, informality, or non-conformance with these instructions in any tender received by the Owner.

...

[10] The Procurement Policy of Halifax Regional Municipality includes the following provisions:

2. The following principles will guide the procurement practices of the Halifax Regional Municipality:

...

(c) The procurement policy is to be open, fair, and consistent.

(d) The total cost of acquisition is to be considered. (Costs such as repair cost, staff training, operation cost, and disposal are to be considered rather than just the lowest invoice price.)

The Procurement Policy further states:

- 7.(3) Tenders: An invitation to tender solicits competitive bids. It is used when detailed specifications are available that permit the evaluation of tenders against clearly stated criteria and specifications. A request for tenders is a formal, competitive, sealed-bidding process. It is normally used for the procurement of goods, services, equipment, and construction. Normally Bid Deposits and performance security are required. The bids and prices are provided without condition or reservation and where an award can be made without negotiation. Submissions are compared to the specifications and requirements contained in the tender documents. The award is normally to the lowest total cost bid received from a responsible bidder meeting the requirements of the tender.

OBJECTION:

[11] England's pre-trial brief expressed the view that the issue of compliance relating to whether or not a complete tender was filed by England is an issue solely between HRM and England. Mr. Kulik says the issue is properly raised by its Notice of Contest submitting that the bid was compliant. Counsel for Dexter, Ocean and Basin took a contrary view and maintain that the issue was not before the Court because, in their view, England had not filed a proper Counter Notice of Claim. I was asked to take on this application due to the need for an early decision as the work would employ a number of people as soon as a contract is finalized. Rather than delay the matter, I indicated to all counsel I would, in fact, allow cross-examination by all parties of the affidavits filed and further that if I were to find that factually England was compliant in relation to the question of filing a completed tender, then I would

give all parties an opportunity to argue the technical position advanced, namely, whether or not it required a specific Notice of Counter or Cross Contest. In view of my finding of fact based on the evidence, cross-examination and overall credibility, this will not be necessary.

[12] Before dealing with the three acknowledged deficiencies, I will address the question of whether or not England has established, on a balance of probabilities, that it did, in fact, file a completed response to the call for tenders by including Addendum No. 1 “Schedule of Quantities and Unit Prices”.

[13] England cross-examined Karen Blonde, contract administrator, for HRM on her affidavit sworn the 10th of June, 2009. Cross-examination, I find, did not diminish the factual foundation advanced by Ms. Blonde. The bids were opened publicly, transmittal envelopes checked to ensure there was nothing remaining and the Tender document to Summary Sheet setting out the Total Tender Price publicly stated. Subsequently Tracey MacIsaac of HRM returned to Ms. Blonde’s office to check the total responsiveness of the bids. Ms. MacIsaac photocopied copies of all the documents. This took place on Friday, May 29th, 2009 and the bids were put back in the Tender file and taken to procurement where they are filed in chronological order.

On Monday, June 1st, 2009, the Construction Coordinator advised that there was no Schedule for England's bid and there followed a thorough and complete search and Blonde telephoned England and advised him that England's Schedule was not received by HRM. England responded that he was sure he had included the Schedule and suggested that HRM had lost it. Blonde undertook to check yet again and a further thorough search was conducted and England was advised that HRM did not receive the Schedule.

[14] Ken Thomas, a professional engineer employed by Dexter Construction with vast experience in the tender process to the extent of 500 tenders filed annually by Dexter, he was personally involved in 150-200 of those tenders. Thomas expresses the view that in the absence of unit prices stated in the Schedule of Quantities and Unit Prices, a contract cannot be entered into as there is no basis upon which to make payment. He acknowledged that England's tender had a Total Tender Price of \$1,194,333.16 but expresses the view that the unit price information necessary to back up that Total Tender Price would be absent if the Schedule was not provided. Mr. Thomas was not cross-examined on his affidavit. Without any advance notice at the hearing, HRM asked the Court to strike paragraphs in Thomas' affidavit. I declined the late motion and, in any event, the weighing of the evidence and my conclusion was

arrived at without the necessity of attaching any weight to Thomas' professional opinions.

[15] It was noted that Brian England swore an affidavit on the 25th of June, 2009 and was cross-examined on his affidavit. On cross-examination by HRM, he acknowledged that he only photocopied the one sheet, the Schedule. The only reason he made a copy of that was that the unit prices "determine if I make money". He is insistent (believes) that he put everything all together and with respect to inserting it in the booklet, he pointed out that he did not have binder to open and rebind the booklet and he put the Schedule inside the binder. He acknowledged that he was aware that he did not initial the change made by whiting out the Total Tender Price on one page and went on to assert that he checked and double-checked on four occasions to make sure everything required and he says he is 100 percent confident that he filed with HRM everything that was required. He stated, "I like to be thorough because I understand the consequences". When asked by counsel what the consequences might be, he said, "you can very often get disqualified".

[16] Mr. England supports his belief that he filed a complete response as required to the bid by reciting his 20 years experience in the construction industry and having

personally prepared over 200 bids in response to construction tenders. He spells out an example that occurred very early in his career as reinforcement of his approach of double-checking everything several times (4). This is contained in paragraphs 5 and 6 of his affidavit as follows:

5. Approximately ten years ago I submitted a bid in response to a Tender issued by the Department of Transportation for the Province of Nova Scotia. During the preparation of this bid, an initial that was required on one of the bid documents was inadvertently left off causing me considerable inconvenience in the submission of the bid.
6. The difficulty caused to me by this event has lead me to be extremely careful in the submission of my bids in response to tenders and I always check my bid documents several times before I submit them to ensure that everything is properly completed.

[17] Under cross-examination, he referred to the incident in paragraph 5 of his sworn affidavit and stated that it was an early tender job in Antigonish and that there was a page that required his signature and he didn't see this requirement. He confirmed that it was a signature required and states that the reference to an initial in paragraph 5 of his affidavit is in error and, in fact, described it as an "oversight" on his part. He does refer to photocopying the one page in his evidence and in his affidavit of inserting the photocopy of the Schedules and Quantities in Unit Prices into the Tender package. However, it is interesting that when he refers to the four occasions that he double-

checked everything, he talks in terms of double-checking that everything was there and that his bid was complete. He does not, at any time, specifically indicate that he saw and ensured that the missing page he had photocopied was, in fact, in the Tender package. Under cross-examination, he reiterated that his past experience led him to be extremely careful in the submission of bids and yet he readily acknowledges that in addition to his error (oversight) in paragraph 5 of his sworn affidavit he whited out the Total Tender Price on one page and forgot to initial it.

[18] Filed on behalf of HRM was the affidavit of Tracey MacIsaac. Without repeating various paragraphs in her affidavit, it clearly indicates that she took care not to confuse the files and after photocopying each tender file, made sure that she had not left any papers in the photocopy room. The following Monday, along with Karen Blonde, she returned to the file room, searched all the Tender files to ensure England's price page had not been put in the incorrect tender file and concluded, as did Karen Blonde, that HRM did not receive England's Schedule of Quantities and Unit Prices. Ms. MacIsaac was not cross-examined on her affidavit.

[19] Mr. Kulik, on behalf of England, in a very forceful argument, suggests that in his view very clearly England on a balance of probabilities has established that with

respect to the Schedule of Quantities and Unit Prices, it was included in England's tender.

[20] I had the opportunity to observe Ms. Blonde and, more particularly, Mr. England while giving evidence. I make no suggestion of any dishonesty or lack of honesty on the part of Mr. England, however, from my observations, the weighing of the affidavits and cross-examination, I have no difficulty in concluding that England is less than the careful, detailed, and attention person that he attempts to project. I prefer the evidence of Ms. Blonde and Ms. MacIsaac and have no difficulty in concluding that England has failed on a balance of probabilities to establish that the Schedule was, in fact, included in England's tender. To be clear, the view is often advanced that a balance of probabilities represents a 51% determination and on the totality of the evidence before me, I have no difficulty in concluding that the weight to be given to the evidence on behalf of England falls short and I would assess it at no more than 40%. My finding of fact is that England neglected to include the Schedule in England's tender resulting in this particular deficiency.

DEFICIENCY # 2:

(2) Addendum #1 not incorporated by bidder into tender document

[21] It is advanced that such rendered the bid non-complaint. I find no merit in this argument. England xeroxed the one-page Schedule and his office did not have a binder capacity. To hold that “inserted” required it to be physically bound within the binder would be applying a far too technical requirement. The intent is that it be inserted and it is sufficient if it’s inserted in the material but not necessarily bound into the binder.

DEFICIENCY # 3:

(3) Alteration to originally written Total Tender Price bid not initialled

[22] Clearly the Tender documents required any change to be initialled and in many circumstances the bid price, being of such fundamental importance , would if the only advancement of the Tender price was the whited out version would raise the question of whether or not the Tender had any binding effect. In the factual situation before me, the same amount is contained elsewhere in the Tender documents and I have no doubt that England would have been bound by the amount of its tender and the failure to initial only one reference to the identical amount of the Tender is not fatal and does not, I find in these circumstances, render the Tender non-compliant. This deficiency

falls clearly within Clause 17 of the Information to Tenderers and within Section 00100 of the Tender Conditions.

DEFICIENCY # 1:

(1) Schedule of Quantities and Unit Prices (Addendum #1) not enclosed

[23] HRM takes the position that the lack of the Schedule constitutes an “irregularity, informality, or non-conformance” with the Tender instructions. Further, HRM advances that absent the Schedule of Quantities and Unit Prices, England’s bid is still in substantial compliance with the issued tender.

[24] This is a unit price contract as opposed to a fixed price contract and, as such, payment to the contractor is determined based on the number of units of material supplied or the price per unit of material. The initial volumes are merely estimated. The determination of substantial compliance is to be based upon an objective standard. As stated in *Double N Earthmovers v. Edmonton (City)* [2007] S.C.J. No. 3, generally an informality would be something that did not materially affect the price or performance on Contract B. The majority stated as follows at paragraphs 40 and 41:

40 In our view, the absence of licence and serial numbers for the rental unit are precisely the sort of informality Condition 7 was designed to address.

41 Generally, an informality would be something that did not materially affect the price or performance of Contract B. The absence of serial numbers and the licence registration numbers cannot be said to affect materially the price or performance of Contract B. In this case, it would have been obvious to bidders that the provision of licence and registration numbers was not an essential term of the tender documents, and were therefore capable of being waived by the City. This is because it would have been impossible for any bidder to supply a City of Edmonton licence registration number for Item 4, as the City had never previously registered that type of equipment in the past. Indeed, the evidence shows that City officials did not view the provision of licence and serial numbers as a material condition of the tender. A City official testified that the request for equipment particulars was included solely to enable him more conveniently to access information about the equipment and to proceed with registration, after a bid was accepted.

[25] The failure of England to submit unit prices cannot be considered other than a material non-compliance as HRM would have no way of binding England to payment of a specified tendered amount in the event the actual quantities deviate from the estimated quantities.

[26] The determination of price in a unit price contract is a fundamental feature of the Tender. When a fundamental feature has not been complied with, such non-

compliance cannot be considered substantial compliance. The case law supports this conclusion as follows:

1. In *J. Oviatt Contracting v. Kitimat General Hospital Society* (2002) BCCA 323 (CanLII) the failure to include the price for a temporary road as required in the Tender documents made the bid non-compliant.
2. In *Keops Construction Inc. v. R.* (1987), 28 C.L.R. 1, (Fed. T.D.), the plaintiff submitted a bid for a unit price construction contract. The government noticed mathematical errors in the plaintiff's bid which, after corrected, made the plaintiff's bid the second lowest bid. The Court found that there was an industry custom to treat unit prices submitted as firm prices. To do otherwise would be unfair to the other bidders.
3. In *Sound Contracting Ltd. v. Campbell River (District)*, 2001 BSCS 109, the owner awarded a contract to a bidder whose

overall price was higher than the lowest bid, but whose unit prices were more favourable to the owner.

4. In *St. Lawrence Cement Inc. v. Ontario (Minister of Transportation)* (1991), 3 O.R. (3d) 30, in a tender for highway construction, the contractor submitted two different unit prices for the same item in different parts of the application making it ambiguous as to what the unit price was intended by the bid. The Minister was obliged to reject this bid for non-compliance.

5. In *Johnston's Construction Ltd. v. Newfoundland*, 2000 CarswellNfld 19, a tender was non-compliant because it did not provide a unit price for a "thaw cable".

[27] The distinguishing feature for a unit price contract is the specification that if the quantity changes the contractor will be paid based on the unit prices bid even if this alters the total price to the owner. As stated in *Double N Earthmovers*, if something materially affects the price of Contract B then it is not an informality, but rather a substantial non-compliance.

[28] In **Martel Building Ltd. v. Canada**, [2000] S.C.J. No. 60, the Supreme Court of Canada reviewed the general principles of the law of tenders and discussed the issue of implying terms into the Tender relationship:

79 Any discussion of the duties or obligations arising from the tender process must begin with reference to *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. This case established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid in response to the call for tenders, may become a binding contract. Estey J. explained that this contract, which he labelled “Contract A”, imposed certain obligations upon the contractor who had submitted a tender. He differentiated this contract from “Contract B”, the ultimate construction contract resulting from the award of one of the tenders.

[29] HRM also maintains that its privilege clause goes far enough to permit HRM to accept any bid, even one that is non-compliant for failure in relation to a fundamental term. The wording relied upon by HRM is substantially the same as the wording that has been utilized in tenders, particularly construction tenders, for decades and the parties intent very clearly has been that a non-compliant bid that relates to a fundamental term can't be accepted otherwise the integrity and benefit of the tender process disappear. In order to effect such a dramatic change I would expect a requirement that amounts to a departure from the tender process entirely to one of requesting an expression of interest and such would not constitute in any

circumstances Contract A unless the party calling for tenders exercised its sole discretion.

RESULT:

[30] I conclude that England failed by a considerable margin to establish on a balance of probabilities that it filed the Schedule of Quantities of Unit Prices as mandated by the Tender process. Further, that the absence of the Schedule of Quantities and Unit Prices presents non-compliance of a fundamental feature of the unit price contract setting costs. The application by HRM is dismissed.

[31] Counsel are entitled to be heard on the issue of costs and disbursements if they are unable to reach agreement.

J.