SUPREME COURT OF NOVA SCOTIA

Citation: Guysborough(Municipality) v. Resource Recovery Fund Board Inc., 2011 NSSC 15

Date: 20110113
Docket: Hfx.No. 327143
Registry: Halifax

Between:

The Municipality of the District of Guysborough

Plaintiff

- and -

The Resource Recovery Fund Board, Incorporated

Defendant

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: November 24, 2010, in Halifax, Nova Scotia

Decision: January 13, 2011

Counsel: David A. Graves, QC, for the plaintiff
Michael J. Wood, QC, for the defendant

By the Court:

BACKGROUND:

[1] This is an application for summary judgment brought by the defendant (RRFB) in relation to claims advanced by the plaintiff (The Municipality).

[2] This action arises from a request for proposals (RFP) issued by the RRFB on March 27, 2009 in relation to the processing and recycling of scrap tires in Nova Scotia. The Municipality submitted a proposal but was not the successful proponent. It is undisputed that the Municipality submitted one of the two short-listed proposals. The Municipality has pleaded that, but for a number of errors made by the RRFB in evaluating its proposal, it should have been awarded the contract.

[3] In its Statement of Claim the Municipality seeks a declaration that the award of the contract to Halifax C & D Recycling Ltd. is null and void and seeks damages against RRFB. The Municipality alleges that a contract was formed between the parties upon the submission of the proposal, and that as a result of the creation of

this contract the RRFB was subject to “various express and implied contractual obligations.”

[4] The RRFB’s position is that the issuance of the RFP and the receipt of a proposal did not create any contractual obligations. RRFB further argues that the purpose of the RFP was to issue a non-binding invitation to enter into further negotiations for the processing and recycling of scrap tires.

[5] The Municipality has also alleged that the RRFB was negligent in its failure to evaluate their proposal in a fair and equitable manner. The Municipality has further alleged that even if no contract was formed as a result of the RFP, the RRFB still owed the Municipality a free standing non-contractual duty of fairness in carrying out its evaluation of the proposal.

[6] In response to the negligence claim, the RRFB calls this a “novel claim” which can only succeed “if the Municipality is able to establish a new exception to the rule that tort damages cannot be awarded for pure economic loss.” The RRFB submits that no further exceptions exist in the circumstances of this case.

THE LAW OF SUMMARY JUDGMENT IN NOVA SCOTIA:

[7] *Civil Procedure Rule* 13 governs summary judgment proceedings. *Rule* 13.01 provides as follows:

> (1) This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.

[8] *Civil Procedure Rule* 13.04 specifies that:

> 13.04(1) A judge who is satisfied that evidence or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross examination, or other means permitted by a judge.

[9] The purpose of a summary judgment motion is to allow a party to apply to the court for a determination that a trial is not required in order to dispose of some or all of the issues between the parties. The new rule (2009) advances different language but has not altered the test for summary judgment. *Ristow v. National Bank Financial Ltd.*, 2010 NSCA 79.

[10] In order to succeed the RRFB must first establish that there are no arguable issues of material fact that require a trial. In the event they establish that point, the onus then shifts to the Municipality to prove that its claim has a real chance of success based on the undisputed material facts.

[11] The leading case that outlines the analysis is *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 in which the Supreme Court of Canada set out the test at paragraph 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success."

[12] The Supreme Court of Canada also addressed the test in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2. S.C.R. 165 at paragraph 15:

> The question to be decided on a Rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the Rule, establish his claim as being one with a real chance of success.

[13] This test was accepted by this Court in *Binder v. Royal Bank of Canada*, 2003 NSSC 174 at paragraph 7:

> ... The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (*Hercules*, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (*Guarantee Co. of North America*, para.27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence.

[14] The Nova Scotia Court of Appeal reviewed the test in *Milbury v. Nova Scotia (Attorney General)* 2007 NSCA 52 at paragraphs 17-19:

> [17] In *Orlandello v. AGNS*, [2005] N.S.J. No.249, 2005 NSCA 98, Justice Fichaud explained the two stage test on a summary judgment application:

> [12] Rule 13.01 permits a defendant to apply for summary judgment on the ground that the claim raises no arguable issue. Rule 17.04(2)(a) allows a third party to invoke Rule 13.01 to challenge a plaintiffs claim. In *Eikelenboom*, after reviewing the authorities, this court stated the test:
>
> > [25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, [the defendant] had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon [the plaintiffs] were then required to establish their claim as being one with a real chance of success.
>
> [18] As stated in *Selig v. Cooks Oil Company Ltd.*, [2005] N.S.J. No. 69, 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:
>
> > [10] First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.
>
> [19] If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed.

[15] In *Papachase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372 the Supreme Court of Canada said the following regarding summary judgment at paragraph 11:

> ... Each side must ‘put its best foot forward’ with respect to the existence or non-existence of material issues to be tried ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts ...

THE ISSUE OF CONTRACT:

[16] The Municipality’s claim is first grounded upon an allegation that the RRFB owed the Municipality a duty of fairness arising out of a contract that resulted from the submission of the Municipality’s proposal. RRFB takes the position that there was no such contract, and as a result, there was no such duty. If a contract is found, then this application for Summary Judgment must fail. If no contract is found, then this application will succeed on this ground.

[17] There are two concepts at play when determining whether a submission creates a contractual relationship; a tender and a request for proposals. The use of either word to describe the submission is not always determinative. However, it is well established that each of these two procurement processes have their own purpose and are distinguishable in a number of different ways.

[18] The first case in which the Supreme Court of Canada distinguished between these procurement processes was *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The court stated at page 122:

> The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn." No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent had done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

[19] In the text, *Bidding and Tendering; What is the Law?* 4th Ed (Markham: LexisNexis Canada, 2009) authors Sandori & Pigott provided the following analysis at page 293:

> An owner seeking submissions from interested parties but not wishing to create Contract A, may choose to issue an RFP. Properly drawn, an RFP asks parties for expressions of interest, and sets out the owner's intention to consider those

> expressions of interest, and then to undertake negotiations with one or more parties whose proposal(s) appeal to the owner. Properly structured, a RFP can create just as much competition as a bid process. However, the owner is exposed to the risk that the proponent which looks so willing today may change its mind tomorrow - when the execution of a contract is at hand - and there is little the owner can do to prevent it.
>
> The RFP process will not create contractual obligations but may create obligations of another kind.
>
> For example, if the RFP promises that the owner will select the proponent from those that signify interest and will proceed with the project, it may face misrepresentation claims if it does not proceed, or if it hires someone from outside the RFP process after proponents have spent money making proposals. This result can usually be avoided by disclaimer language which (for example) allows the owner to cancel the process at any time, and which obliges proponents to acknowledge that they are undertaking expenditures entirely at their own risk. Disclaimer language will probably not protect an owner which launches an RFP for the purpose of gathering market information and/or technical know-how when the owner has no intention of proceeding through the process no matter how favourable the proposals submitted.

[20] The Supreme Court of Canada revisited the area in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. The court at paragraphs 19-22 discussed how a Court must determine whether a "contract A" arises from the submission of a proposal in response to a tender call.

> 19. What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

> 20. I note that the jurisprudence in other common law jurisdictions supports the approach that, depending upon the intentions of the parties, an invitation to tender can give rise to contractual obligations upon the submission of a bid ...
>
> 21. So this brings us to ask whether Contract A arose in this case and, if so, what were its terms?
>
> 22. Both parties in the present appeal agree with the Contract A/Contract B analysis outlined in *Ron Engineering & Construction (Eastern) Ltd.* and that the terms of Contract A, if any, are to be determined through an examination of the terms and conditions of the tender call ...

[21] The issue as to whether the submission of a proposal gives rise to an actionable contractual relationship was considered in *Powder Mountain Resorts Ltd. v. British Columbia* (1999), 47 C.L.R. (2d) 32 (BCSC). That court stated at paragraph 112:

> It is unlikely, in my view, that the parties intended to initiate contractual relations by the submission of a proposal by PMR. The Lands Ministry simply invited the submission of proposals and stated that it may grant development rights in accordance with the Alpine Ski Policy. The terms of a proposed contract were not specified in the invitation. The submission of a proposal did not obligate the proponent to develop the Powder Mountain area or obligate the Province to allow the development of the area. The invitation for proposals appears to have been an invitation to negotiate or, in other words, an invitation to treat. It appears unlikely that the intention of the parties was that a submission of a proposal would initiate contractual relations between the parties. It appears more likely that the intention was to initiate negotiations which, if mutually satisfactory, would lead to contractual relations.

[22] The trial decision was upheld by the British Columbia Court of Appeal (2001 BCCA 619) for the reason set out in paragraph 72:

> I also agree with Tysoe J. that the plaintiff's claim based on this cause of action must fail, generally for the reasons given by him. The invitation for expressions of interest and the plaintiff's response in June 1985 did not give rise to a contract of the sort referred to as "Contract A" in *Ron Engineering, supra*. There was nothing approaching an invitation to tender, or a tender for work or materials of a certain scope, that could have given rise to a contract. In the absence of a contract, no free-standing enforceable duty of fairness arises.

[23] The Manitoba Court of Appeal in *Mellco Developments Ltd. v. Portage La Prairie*, 2002 MBCA 125 upheld the trial court's finding that a Contract A was not formed between the parties. That court stated at paragraph 73:

> 73. When these principles are applied to the facts before us, I have no difficulty in concluding that the RFP was not intended to create a binding contractual relationship between the city and the "winning bidder". A simple examination of para.4.2 of the RFP (see para.6 of these reasons) provides many examples of the city's intention to negotiate rather than to enter into a binding agreement with the successful proponent. This case is akin to the decisions in *Powder Mountain Resorts Ltd. v. British Columbia, Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic Separate School Board, and Silver Lake Farms Inv. v. Saskatchewan* (2001), 46 R.P.R. (3d) 66, 2001 SKQB 515 (Sask. Q.B.). The fact that the proposal reads in para.4.2-1 that "[T]his is an invitation for proposals and not a tender call" is not a statement made in isolation. It is but one of the many factors militating against the applicability of *Ron Engineering & Construction (Eastern) Ltd.* on the facts before us.
>
> 74. As we have seen, where the final terms of the contract are contained in the bid (i.e. there is no need for negotiation), courts will readily find a valid tender and not a mere invitation to treat. See, for example *R. v. Canamerican Auto*

> *Lease & Rental Ltd.* (1987), 37 D.L.R. (4th) 591 (Fed. C.A.). But these are not the facts before us. It is not possible to identify the terms of any Contract B. As set forth in the RFP, subsequent discussions and negotiations were required respecting fundamental detail. Cases such as this do not fall to be decided under the law of tenders as articulated in *Ron Engineering & Construction (Eastern) Ltd.*

[24] The criteria that must be used in assessing whether a Contract A was struck can be found at paragraph 81 of *Tercon Contractors Limited v. British Columbia*, 2006 BCSC 499 (B.C.S.C.):

> 81. Whether Contract A is formed depends on the precise language and intention of the tender call. The court will only look to the substance of the transaction in the context of the procurement documents in order to determine whether the parties intended to enter into contractual relations (authorities cited). The courts have recognized several factors or terms indicative of an intent to form Contract A. The irrevocability of the bid is one such factor (authorities cited). Other factors include the formality of the procurement process, whether tenders are solicited from selected parties, whether there was anonymity of tenders, whether there is a deadline for submissions and for the performance of the work, whether there is a requirement for security deposit, whether evaluation criteria are specified, whether there was a right to reject proposals, whether there was a statement that this was not a tender call, whether there was a commitment to build, whether compliance with specifications was a condition of the tender bid, whether there is a duty to award Contract B and whether Contract B had specific conditions not open to negotiation.

[25] The RRFB submits that an intention to contract must be found in the RFP and any related documents. The Municipality argues that this is too narrow a view and that a court must consider any extraneous evidence that applies to the RFP.

The Municipality argues that context is relevant and rejects the suggestion that a court never go any further than the RFP.

[26] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, *supra*, Iacobucci J. commented at paragraph 16:

> Estey J., for the Court held that a contract arose upon the contractor's submission of the tender. This contract, which Estey J. termed "Contract A", was to be distinguished from the construction contract to be entered into upon the acceptance of one of the tenders, which Estey J. termed "Contract B". The terms of Contract A were governed by the terms and conditions of the tender call, which included that the contractor submit a deposit that could only be recovered under certain conditions.

[27] And further at paragraph 22:

> Both parties in the present appeal agree with the Contract A/Contract B analysis outlined in *Ron Engineering* and that the terms of Contract A.,if any, are to be determined through an examination of the terms and conditions of the tender call. In particular, they agree that Contract A arose, but disagree as to its terms. However, this agreement is influenced by an interpretation of *Ron Engineering* that I have rejected. Because of this, it is important to discuss whether Contract A arose in this case.

[28] The Municipality urges this court to consider several extraneous factors when determining whether a Contract A existed. These include a February 20, 2009 "knowledge session," a March 12, 2009 "Draft RFP Release Briefing," three

addendums to the RFP issued between April 9 and May, 2009, and a June 8, 2009 response to questions raised by the Municipality. The Municipality relies on *Knock v. Fouillard and Duckworth*, 2004 N.S.C.A. 70 to support their position. The Appeal Court cited a quote from the trial judge who relied on the following passage from *Laurie v. Bowen*, [1953] 1 S.C.R. 49:

> ... Obviously the question of the scope of the right of way expressed in a grant or reservation is prima facie a question of construction of the words used. If those words are susceptible of being cut down by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut down. . . .

[29] The Court of Appeal commented at paragraph 7 as follows:

> [7] Justice Stewart ruled that, based on *Laurie v. Brown*, the circumstances at the time of the deed may be relevant to construe the meaning of the words in the grant, including whether the right-of-way was intended to be limited to pedestrian traffic. Therefore the respondents in their defence had raised a fairly arguable issue for trial.

[30] The decision of the trial judge allowed consideration of "surrounding circumstances" which were very much in dispute. The result was a denial of summary judgment.

[31] *Knock v. Fouillard* and *Duckworth, supra,* was a case involving the interpretation of a right of way reserved by deed. I am not persuaded that this analogy can apply. The law respecting bidding and tendering enjoys its own jurisprudence and has been reinforced by several Supreme Court of Canada rulings. That court has stated on a number of occasions that the terms of a Contract A are to be determined through an examination of the terms and conditions of the tender call. I will follow that direction.

[32] The RRFP argues that the following clauses in the RFP support their view that no Contract A came into existence:

> • 1.1 - Intention of Parties - the proponent understands and acknowledges that by submitting a proposal that no contractual relationship has been created between the proponent and RRFB. This is a request for proposals and not a tender call.
>
> • 2.2 - Contracting Approach - the contract negotiated with the successful proponent will be for a term of five years, with potential for annual renewal options for up to five more years.
>
> • 2.5 - Requirements:
>
> a) The required services will include the following:
>
> I. Processing of scrap tires into Tire Derived Aggregate as outlined in ASTM Specification D6270.
>
> ii. Disposal of unmarketable residue or by-products.

iii. Marketing and sale of marketable products.

b) The Proponent's facilities and operations shall be in full compliance with any and all applicable regulatory standards for the storage of scrap tires.

Note: Proponents should not rely on any information provided at the February 20th information session and should perform their own due diligence in determining the regulatory standards that are applicable to their proposed operation.

c) The Proponent must (M) agree to provide proof of all necessary approvals and permits for the operation of the proposed facility and for the disposal of any residual waste.

• 3.1(e) - Evaluation and Selection Process

(e) All proposals shall be examined in detail in accordance with the published evaluation criteria and following the process outlined in this section. The RRFB reserves the right to either award a contract or contracts to the most effective Proponent(s) as determined by the evaluation criteria or not to make an award if none of the proposals received represents an acceptable level of value and risk in the opinion of the Proposal Evaluation Team.

• 3.2 - Selection Process

The successful Proponent-proposal will be the one achieving the highest Overall Weighted Average Evaluation score following the entire evaluation process, including negotiations that might, at the sole discretion of RRFB occur after the closing.

• 4.5 - Proposal Costs

Proponents are advised that all responsibilities, costs, risks and expenses arising from or in relation to the contemplation, participation, preparation and submission of a Proposal, or in the provision of further information in connection with this RFP by it or any other party shall be borne entirely and solely by the Proponent. RRFB and its employees, officers and directors shall neither have nor incur any liability towards any party, which incurs any costs, liabilities or damages in the consideration of, or in the making of a submission pursuant to the RFP. RRFB retains the right not to proceed further following the release of the RFP or to cancel the process at anytime thereafter.

• 4.6 - Relationship

The Proponent agrees that the submission of the Proposal does not create any relationship between the Proponent and RRFB that is actionable at law. The Proponent agrees that by submitting a Proposal, the Proponent may not make any claim for any damages against RRFB, its directors, officers, agents or employees.

[33] There are several clauses (5.8, 5.8.2) that give proponents a carte blanche in designing their proposal. Clause 6.2 allows for negotiations of any future adjustments.

[34] The Municipality argues that there are clauses that speak of the development of Contract A.

• 4.4.1 - Mandatory Requirements

This RFP contains two types of mandatory requirements. They are defined as follows:

1. Clauses that contain the terms ‘must(M)’ or ‘shall’ refer to mandatory deliverables, commitments and capabilities that will not be evaluated. The Proponent is required to certify that they agree to meet such requirements at the present or future time. These clauses are characterized as follows:

• No substantiation or response is required;

• No evaluation is conducted;

• Embodies the commitments that Proponents must make upon acceptance of Proposal by RRFB;

• Covered by a signed certification of compliance described in Section 5.2; and

2. If the Proponent is required to (must M) "represent and warrant" a capability or other fact, subsequent conclusive evidence that the fact or capability was misrepresented would constitute sufficient reason for contract termination for cause.

3. Clauses that contain the term must (P/F) refer to mandatory delivery/capability requirements which will be evaluated on a Pass/Fail basis only. The Proponent is required to provide evidence or substantiation as specified in the requirement and that evidence will be evaluated on a Pass/Fail basis only. Failure to meet a Pass/Fail requirement will result in disqualification of the Proposal.

• 4.7 - Adherence to Instructions

All response instructions relating to the information to be provided and its format are Proposal requirements that must be substantially adhered to in order for the Proposal to receive consideration. Failure to do so may result in disqualification of the Proposal without further evaluation. The Evaluation Team may seek clarification if requested information is ambiguous or missing and if the provision of such clarification will not offer the Proponent an opportunity to improve the competitive position of its response.

• 5.4 - Financial Stability

The successful Proponent may be required to demonstrate financial stability. The successful Proponent must (M) represent and warrant that they are assuming full financial and legal responsibility for the contractual delivery and performance obligations related to the proposed services.

• 6.1 - Performance Security

> The successful Proponent may be required, at the discretion of the RRFB, to provide a bond guaranteeing the performance of the contract from an underwriter with a current rating of A - or better as determined by the A.M. Best Company at http://www3.ambest.com/ratings/advanced.asp. The bond, in the amount of up to $1,000,000 is to name the RRFB as beneficiary and must be acceptable to the RRFB in both format and substance. If exercised, the cost of the bond will be borne by RRFB.

[35] The Municipality cites an excerpt from the article titled "Legal Principles of Bidding and Tendering" by Hersen & Panacci (unpublished) at page 21 of their brief:

> In recent years it has become more difficult to distinguish between RFPs and tenders. This is so as "Hybrid" RFP's have begun to be used, which incorporate terms which would more typically be found as part of the tender process. Just because a particular process is called an RFP will not make it one if the terms of the process make it appear otherwise. In a litigation context, the Court will analyze the specific terms of the process and decide on the particular facts if an RFP, or bidding process, is being used, and on the duties and obligations that arise as a result.

[36] The following appears in the same article at page 17:

> The intention of the parties in an RFP is not to create contractual relations or obligations until a legally binding contract is entered into for the performance of the work. An owner has more latitude under the RFP process than under the bidding and tendering process. While the ultimate objective may be to finalize a contract between the parties regarding the work, such a contract does not arise until both parties agree upon the terms. In this sense, an RFP is a negotiation whereas a tender is a competition. This is the key distinction between RFPs and

> tenders. Having said this, the main disadvantage to an owner of the RFP process is that it affords the party invited to submit the RFP with the latitude to remove itself from the negotiations for the project. This provides the owner with less assurance that the contract will in fact be carried out than if the owner had proceeded under the bidding and tendering process.
>
> A "true" RFP process involves these key in ingredients:
>
> 1. A non-binding selection process;
> 2. The award criteria which will be used is not easily ascertained;
> 3. No form of construction contract is attached to the RFP and no security for the proposal submission is required;
> 4. Non-compliance concepts are not necessarily applicable;
> 5. Some element of negotiation is likely to be required relating to the price and scope for the contract terms and conditions;
> 6. The scope of work itself may not be well defined and the process may permit a proponent to define parts of the scope or deliverables in their proposal; and
> 7. There is no intention to create contractual relations at the time of proposal submission.

[37] I have come to the conclusion that these parties did not create a Contract A as defined in *Ontario v. Ron Engineering*, *supra*. I find that the RFP language makes it clear to all proponents that this is anything but a tender call. It is not obliged to accept any of the proposals and it has clearly reserved to itself the right to reject all proposals. I accept the RFL does provide that the Proponents are to provide details in their submission as well as proof of financial stability. I find that

the RFP provides only very general guidance. The details are left to the Proponents. I do not find that the provision of some detail by RRFB changes this from a proposal call to a tender. As stated in *Buttcon Limited v. Toronto Electric Commissioners* cite at paragraph 48:

> [48] Established timelines and deposit requirements are common to both requests for proposal and formal tender situations. They alone do not establish whether a particular situation is or is not a formal tender situation. Deposits were required in *Mellco, supra*, yet the court there held the request for proposal to be a mere invitation to treat and not a formal call for tenders.

[38] I am satisfied that the RFP represented an invitation to propose and nothing more. The benefit at the end of the exercise was the opportunity to negotiate a contract to recycle used tires. There was no intention by the issuance of the RFP to create contractual relations with the Municipality. Consequently the Municipality has no case for a breach of a contract, and as such, this aspect of the application must succeed. The RRFB has satisfied me there is no genuine contractual issue for trial.

FREE STANDING DUTY OF FAIRNESS ISSUE:

[39] The Municipality takes the position that if a Contract A does not come into existence, there remains an actionable duty of fairness. The following is advanced at paragraph 40 of the Municipality's brief:

> The Plaintiff alleges that it was entitled to be treated fairly in the procurement process by the terms of the RFP itself, and the fact that an RFP, rather than a call for tenders, is issued does not per se preclude the obligation of an owner to treat proponents fairly and in good faith.

[40] The Municipality relies on Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways) 2006 BCSC 499 as support for their position (paragraph 83):

> An offer to negotiate is generally not considered to give rise to contractual relations. This is because a bare agreement to negotiate has no legal content. (*Walford and Others v. Miles and Another*, [1992] 2 A.C. 128 at 138, [1992] 1 All E.R. 453 (H.L. (Eng.)). In *M.J.B.* at para.38, it was important that no negotiation over either contract A or B had been invited. However, new breeds of procurement model, called 'hybrids', have both an element of negotiation and competition (see *Brindle, supra*). This was recognized by Tysoe J. in *Powder Mountain SC* at para. 107 when he said that a tender giving rise to contract A may allow for a limited form of negotiation, but the final form of contract must be substantially non-negotiable in the form specified in the tender. There, no terms of contract B were specified in the procurement documents. ...

[41] I am unable to conclude that the present RFP amounts to one of those "hybrid" situations. It is all about negotiation and is clear that it was not the intention of the parties to create one of those in - between relationships.

[42] The Municipality further relies on the Manitoba Court of Appeal decision in *Mellco Developments Ltd. v. Portage La Prairie (City)*, 2002 MBCA 125 in support of its position. The Municipality argues that the Court found the RFP was not intended to create contractual relations yet concluded that an obligation upon a party to conduct itself fairly lies within a continuum.

[43] While *Mellco* suggests a possible duty of fairness outside an RFP situation, Scott C.J. stated at paragraph 60:

> While agreeing that the Courts may in certain circumstances infer an obligation to bargain in good faith, Canadian Courts have consistently adopted the position that the law will not enforce a contract to enter into a contract of an agreement to negotiate.

[44] Chief Justice Scott quoted the language of Lord Ackner in *Walford and Others v. Miles and Another*, [1992] 2 A.C. 128 at page 138:

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. .... How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith." However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. .... - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement"? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. .... Accordingly a bare agreement to negotiate has no legal content.

[45] While I do not disagree with the "continuum" argument, I do not find that the Municipality stands on the spot warranting fairness as a non contractual obligation. This was all about negotiation.

[46] In *Her Majesty the Queen v. The Martel Building Ltd.* 2000 SCC 60 the Court offered the following definitive comment at paragraph 73:

> As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law. These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.

[47] This is consistent with Court of Appeal comments at paragraph 72 of *Powder Mountain Resorts Ltd. v. British Columbia*; *supra*,

> In the absence of a contract, no free standing enforceable duty of fairness arises.

[48] In the circumstances of this case I am unable to accept the Municipalities view and I conclude that no free standing duty of fairness exists at law. Consequently the Municipality cannot succeed on this aspect of their claim and, as such, the RRFB has satisfied the first step in the test for summary judgment.

THE NEGLIGENCE ISSUE:

[49] The Municipality advances the following claim at paragraph 17 of their Statement of Claim:

> 17. The Plaintiff further says that the Defendant was negligent in its failure to constitute a Proposal Evaluation Team in accordance with the terms of the RFP, which contemplated the inclusion of subject matter experts capable of adequately considering environmental and fire issues and attendant risks, its failure to discharge its obligation to evaluate all Proponents and their proposals in good faith, fairly, and by equal measure according to the criteria established by the RFP, and its failure to carry out site visits in the context of its comparative evaluation of two Proposals.

[50] The RRFB argues that this is a novel claim which can only succeed if the Municipality is able to establish a new exception to the rule that tort damages

cannot be awarded for pure economic loss. The Municipality's response is that their claim is not novel and that there is no prescriptive rule barring recovery of economic loss.

[51] The Supreme Court of Canada considered a similar situation in *Design Services Ltd. v. R.*, 2008 SCC 22. That case involved a construction tender process which gave rise to a contract A. The Government accepted a non-compliant bid in breach of contract A. The Plaintiff was a subcontractor and was therefore not a party to contract A. It was necessary to bring their action in negligence.

[52] The Supreme Court stated that there were five categories of claims for which a duty of care had been found respecting economic loss. Rothstein J. stated at paragraph 30 and 31:

> [30] The appellants' costs and lost opportunity for profit were solely financial in nature. They were not causally connected to physical injury to their persons or physical damage to their property. As such, they qualify as pure economic losses (*D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at para.13; *Martel*, at para.34; *Linden and Feldthusen*, at pp. 441-43).
>
> [31] In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049, La Forest J. recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures;
5. Relational Economic Loss.

[53] The Court indicated that the reason for the five broader categories is merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. The Court described these five categories as "analytical tools."

[54] The following conclusions at paragraphs 32-34 of *Design Services Ltd. v. R.*, supra, are of assistance in this case.

> [32] The appellants' economic losses do not fall within the first four categories. This case obviously does not involve a negligent misrepresentation, a negligent performance of services or a negligent supply of shoddy goods or structures. Neither is this a case of independent liability of statutory public authorities, which deals with the government's "unique public power to convey certain discretionary benefits, such as the power to enforce by-laws, or to inspect homes or roadways" (Feldthusen, at p.358). Here, the government is not inspecting, granting, issuing or enforcing something mandated by law. Instead, the present situation is akin to commercial dealings between private parties, not the exercise of unique government power.

> [33] This leaves relational economic loss as the only preexisting duty of care category within which the appellants' claims could possibly fall. *Linden and Feldthusen*, at p. 477, define relational economic loss as a situation in which "the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property."
>
> [34] The appellants do not fit within the relational economic loss category because no property of Olympic was actually damaged in this case. From its origin, relational economic loss has always stemmed from injury or property damage to a third party.

[55] These conclusions apply equally to the case at bar. This brings me to the issue as to whether the facts of this case fall within a new category. This requires the analysis mandated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as discussed in *Design Services Ltd. v. R, supra*:

> In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p.742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C. R. 2, at pp. 10-11, and recast as follows:
>
> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise.

[56] The Supreme Court of Canada at paragraph 48 of *Design Services Ltd. v. R.*, *supra*, discussed the first stage of the *Anns* test:

> [48] The analytical process for the appellants to establish that there is a close and direct relationship between the parties and thus that there is a *prima facie* duty of care is explained by McLachlin C.J. and Major J. at para.30 of *Cooper*:
>
> > At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of what word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises.

[57] The Court also indicated that when assessing proximity in the context of pure economic loss it may be relevant whether the proponent had the opportunity to protect itself by contract from the risk of economic loss.

[58] In this case the Municipality participated in a procurement process that did not give rise to contract A. It was never intended that the RFP would create any closer a relationship than that of a proponent. There was no forseeability of pure

economic loss. Given the well established jurisprudence in this area, I see no policy reasons to support the Municipality. This point is moot having found no *prima facie* duty of care at the first stage of the *Anns* test.

[59] I conclude that the parties in this case are not caught by the five established categories and this case does not warrant the establishment of another category. The result of these conclusions is that the Municipality was not owed a duty of care or fairness in tort. Consequently the RRFB has established that there is no arguable issue of negligence and therefore their application on this ground succeeds.

PUBLIC PROCUREMENT POLICY ISSUE:

[60] The Municipality argues that the RRFB is not a "private entity, free of public responsibility" and as a result should be caught by the Provincial Procurement Policy. It points out that the RRFB was established by the Government of Nova Scotia and is accountable to the Minister of Environment and Labour.

[61] I take the view that where no contract is envisaged by the RFP that it is not caught by the Provincial Procurement Policy. Further, it is not well settled that the RRFB is required to honour the policy.

[62] The RRFB is not mandated by the RFP to proceed with the project. I see it as a request to proponents to make submissions in a number of areas that are both non-financial and financial. In other words the RFL is asking if there are any organizations interested in making a proposal that may be of interest to the RRFB.

[63] I can envisage the Provincial Procurement Policy applying to the contract B should the RRFB select a successful proponent.

THE DECISION IN *GILBERT v. GIFFIN*: (2010 NSCA 95)

[64] I was provided with notification of this appellate decision after the hearing in this matter. The position advanced by the appellants was that complex legal questions should not be decided on summary judgment. Farrar J.A. responded at paragraph 19 and 22 as follows:

> [19] If there are no material facts in dispute, as is the case here, a judge in chambers must apply the law to the undisputed facts before him. The judge must

> decide issues of law, regardless of how complex they may be. There is no useful purpose in sending a matter to trial where the only question to be decided is one of law.
>
> [22] Neither complexity, novelty, controversy nor contentiousness will exclude a case from a summary judgment motion where there are no material facts in dispute.

[65] There is nothing in this decision that changes my views stated herein. In fact, I find the above comments supportive of my conclusions.

CONCLUSION:

[66] Summary Judgment is granted to the RRFB. The result requires me to dismiss the Municipalitys action in all respects. I will hear counsel on costs should they be unable to agree.

J.