

Featured Article, May 2007

Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC 3.
Jurisdiction: Alberta (Supreme Court of Canada)
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FACTS: The City of Edmonton put out a call for tenders, a condition of which was that the equipment used for the job be manufactured in 1980 or later. Sureway submitted a tender, an item of which listed the equipment as manufactured in 1980, but the serial number revealed 1979, and another which contemplated the use of one of two rental units from 1979 and 1980. Double N submitted a tender, and was the next lowest bidder, but Sureway's was selected. Some of the work performed under Contract B made use of the pre-1980 equipment, a condition the City purported to have waived. Double N had informed the City that Sureway did not own any post 1980 equipment prior to the acceptance of the tender. Double N sued the City for breach of contract and for the profits it would have realized had it been awarded the Contract. Double N claimed the city had accepted a non-compliant bid, had breached their duty to investigate Sureway's bid, engaged in bid shopping, awarded the contract to Sureway on terms other than those set out in the tender documents, and breached Contract A with Double N by allowing Sureway to use pre-1980 equipment in performing Contract B.

MAJORITY ANALYSIS: (LeBel, Deschamps, Fish, Abella and Rothstein) The City did not accept a non-compliant bid. While Sureway's tender suggested a 1979 rental unit, the make and model and cost per hour listed by them with respect to that item in the bid applied to the 1980 rental unit. The City did not have a duty to investigate Sureway's bid; the City had the right to inspect the bid but no duty to do so. The City was not obligated to investigate the claims made by Double N because that would encourage attacks by rival bidders, frustrating the integrity of the bidding process. In addition, there was no reason for parties to expect the owner to investigate whether a bidder will comply, when each bidder is legally obliged to comply in the event their bid is accepted. The City did not engage in "bid shopping" as a result of its pre-award negotiations with both Double N and Sureway, since some measure of negotiation was anticipated by this particular call for tenders (contrary to the situation in *MJB Enterprises*). The contract was not awarded on terms other than those contemplated by the tender documents, because at the time the City accepted Sureway's bid, 1980 equipment was what Sureway was obliged to supply. Even though the trial judge found that Sureway had been deceitful, it was Sureway's intention at the time the bid was accepted (to bid 1980 equipment and subsequently convince the City to allow them to use 1979) that was relevant. Also, the City was unaware of Sureway's deceit until after the acceptance, evidencing the absence of collusion between the City and Sureway to disregard the tender terms. The City did not breach Contract A with Double N (through the waiver of the pre-1980 equipment requirement in Sureway's performance of the contract) because the waiver was conduct which occurred after the award of Contract B. Contract B is a distinct contract to which the unsuccessful bidders are not privy, and thus obligations owed to unsuccessful bidders are discharged by the time this contract (B) has been formed. For policy reasons, parties to contract B should not be subject to constant surveillance and scrutiny from the unsuccessful bidders, as it would introduce an element of uncertainty to Contract B.

DISSENT: (McLachlin, Bastarache, Binnie and Charron) The trial judge concluded the age of the equipment was an essential term of Contract A. Sureway's bid was non-compliant. The City had an obligation to accept only compliant bids and to treat all bidders fairly and equally, which was breached by accepting Sureway's non-compliant bid. Owners have an obligation to take reasonable steps to evaluate the terms of the bid to ensure that they conform to the tender call. This obligation requires that steps be taken to evaluate the bid for compliance before acceptance. The City's casual approach to Sureway's bid in light of the warning it had received from Double N was unfair to other bidders. The bid purporting to supply either 1977 or 1980 equipment was ambiguous at best and therefore could not be considered compliant. The right to insist on compliance cannot turn what is on its face a non-compliant bid into a compliant one. Also, the integrity of the process was not upheld by allowing a bidder to get rid of the competition unfairly and then "hash it out" with the owner after it has been awarded the contract. If what turned Sureway's prima facie non compliant bid into a compliant one was the City's right to insist on compliance, then the City was duty bound to do that, at which they failed.