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Halifax (Regional Municipality) v. Amber Contracting Ltd., 2009 NSCA 103

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Case Comment: *Halifax (Regional Municipality) v. Amber Contracting Ltd*.

In ***Halifax (Regional Municipality) v. Amber Contracting Ltd*., 2009 NSCA 103**, the Nova Scotia Court of Appeal in a 2:1 split overturned a Nova Scotia Supreme Court trial decision (see LUC#77) in favour of Amber Contracting which had ruled that the Halifax Regional Municipality ("HRM") breached its duty of fairness and engaged in bid shopping.

In July 2005, HRM issued a tender for construction and upgrade of a sanitary pumping station. There were three bids, all of which were substantially over HRM's budget for the work. Amber was low bidder, but an attempt by HRM to negotiate the Amber price down significantly was unsuccessful. The evidence indicated that HRM staff believed that the bids were high due to the tender being called during the summer season when contractors were busy, and they decided to cancel the tender process and retender during the fall when contractor pricing was expected to be better. The project was re-tendered with no scope changes. In the second round, the low bidder (who received the award) was a company which had not bid in the first round, with Amber a close second.

The trial judge found on the evidence that HRM's decision to cancel the tender and re-tender was intended simply to obtain a better price, and that the winning low bidder in the second round had a distinct advantage in being aware of the original bid prices which had been made public. She held that the conduct amounted to a breach of the duty of fairness, and that in the circumstances, HRM could not rely on the privilege clause.

The majority at the Court of Appeal level held that the trial judge had taken the wrong approach in determining the scope of the implied duty of fairness, noting that the trial judge concluded first that HRM had breached its duty of fairness to Amber and then had decided that the breach precluded HRM from relying on the privilege clause. The majority held that instead, citing among other cases *Martel Building v. Canada,* that in determining the nature and extent of the duty of fairness, due regard must be given to the contractual terms in the

particular tender call. The majority observed that the trial judge had conducted no analysis of the privilege clauses, nor any examination of the tender documents as a whole.

Having found that error, the majority reviewed the relevant terms in the tender documents. The relevant clauses were as follows:

> "17. Right to Accept or Reject any Tender
>
> .1 The Owner specifically reserves the right to reject all tenders if none is considered to be satisfactory and, in that event, at its option, to call for additional tenders.
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> …
>
> No term or condition shall be implied, based upon any industry or trade practice or custom, any practice or policy of the Owner or otherwise, which is inconsistent or conflicts with the provisions contained in these conditions.
>
> 18. Cancellation of Tender
>
> 1. The Owner reserves the right to cancel any request for tender at any time without recourse by the contractor. The Owner has the right to not award this work for any reason including choosing to complete the work with the Owners' [sic] own forces."

The form of these clauses might be fairly described as traditional. In the many cases which have developed the prohibition against bid shopping over the years, such clauses have not afforded any stalwart protection to owners. However, the majority of the Court of Appeal in *Amber* found that these privilege clauses were broadly worded and reserved the right of the owner to reject all tenders if none were considered satisfactory. Oland, J.A. noted that "…According to the privilege clauses, HRM was not only entitled to 'reject all tenders' but also, 'at its option, call for additional tenders'."

There is little in the majority decision to indicate that the trial judge's findings of fact and credibility as to the true purpose for the rejection of all tenders were afforded much credit. The Court stated at paragraph 37:

> "[37] Rejection of all bids in the original tender process because the bids were all too high, followed by a call for a second set of tenders is not "bid manipulation" or use of bids as a "negotiating tool". .."

One could not quarrel with the above statement on its face, but the key issue in the case at trial was the reason why the tender was cancelled, that is, to secure a better price on the exact same scope of work. This was the focus of the dissent. Justice Hamilton put the proposition bluntly:

> "[42] With respect, I disagree with my colleagues that this appeal should be allowed. I am satisfied a term should be implied in the tender documents that HRM would not terminate the first tender process and re-tender the identical project six months later to try to obtain a lower price."

Hamilton, J. cited the following additional language from Section 17 which was not referred to by the majority:

> "Without limiting the generality of any other provision hereof, the Owner reserves the right to reject any tender:
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> (a) that contains any irregularity or informality;
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> (b) that is not accompanied by the security documents required;
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> (c) that is not properly signed by or on behalf of the tenderer;
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> (d) that contains an alteration in the quoted price that is not initialled by or on behalf of the tenderer;
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> (e) that is incomplete or ambiguous; or
>
> (f) that does not strictly comply with the requirements contained in these instructions."

Hamilton, J.A. pointed out that the examples of grounds of rejection of tenders were not exclusive, they revealed the intent of the parties underlying the general right of rejection. She held that there was nothing in the language to suggest that the parties intended that HRM would have the right to in effect test the waters with an initial run, and then, with the tender prices revealed through the public opening process, take another shot at getting a lower price.

She further wrote:

> "[54] While I am satisfied there was an implied term in the tender documents preventing HRM from acting as it did, it is interesting to note that courts in other cases have found that bid shopping is prohibited in the face of a privilege clause and on the basis it breached the owner's duty of good faith. For example, in M.J.B., supra, Iacobucci, J, approved of the findings in lower courts that even with an express privilege clause the owner cannot bid shop or engage in procedures akin to bid shopping:
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> 50 Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping: see *Twin City Mechanical v Bradsil (1967) Ltd.* (1996), 31 CLR (2d) 210 (Ont HC), and *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)* (1997), 34 CLR (2d) 197 (Alta QB).
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> [55] Another example is the case of *R v. Crown Paving Ltd.,* 2007 NLTD 132 (CanLII), 2007 NLTD 132, [2007] N. J. No. 253, where the very circumstances that occurred in this appeal were categorized as a breach of the duty of good faith imposed on the owner:
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> > 78 The rationale is that if owners are permitted to use the first tender as a way of establishing the price of a project, cancel the tender, and then retender in order to get a better price, the integrity of the bidding system will be severely jeopardized. Given that retendering would have amounted to a bidding war between the only

> two contenders, it is clear that this option would have likely breached the duty of good faith imposed on the owner in the tendering process."

Amber Contracting sought leave to appeal to the Supreme Court of Canada which was denied on April 8, 2010. Nonetheless, it is worth noting that the four judges who heard this case were split on the result. It is submitted that one should be wary of concluding that in other circumstances, a re-tender purely to obtain a better price would be found protected by privilege clauses which were not directly expressed to reserve such a right. While leave was denied, it must be remembered that the national importance test governs at the leave stage, and it remains to be seen whether the majority decision in this case will serve owners well in similar circumstances.