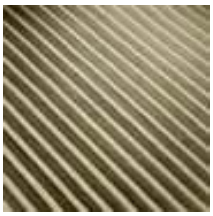

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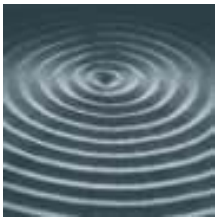

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COLD FEET? COLD COMFORT!

By William M. Pigott

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Guest Article

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COLD FEET? COLD COMFORT!

David J. Harvey Holdings Inc. v. Hercules Food Equipment Ltd.

The Regional Municipality of Niagara prepared bid documents for a new long-term care facility which included a kitchen. David J. Harvey Holdings Inc., operating as Merit Contractors Niagara (Merit), a general contractor, decided to bid for the work.

Hercules Food Equipment Ltd. was named in the bid documents as an approved kitchen supplier. In May 2002, Merit sent a memorandum to the estimator for Hercules asking for a quotation.

After receiving Merit's memorandum, Hercules contacted Niagara's consultant and obtained copies of the drawings and specifications.

The memorandum to Hercules stated that the closing time for the prime bid was 2:00 p.m., June 11, 2002. Just prior to closing, Hercules' estimator communicated its quotation to Merit by phone. The amount quoted was $385,444. On the same date, Hercules delivered a written but unsigned quotation to Merit for the same amount.

Hercules knew that Merit was submitting a competitive lump sum bid to Niagara — it had the bid documents. It also knew that it might be carried in that bid — it wanted to be. Hercules also knew that if it were carried and the prime bid were accepted, it would be obliged to supply the equipment for the price quoted. That's the whole idea.

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Shortly after closing, Merit called Hercules and told an official that Merit had carried Hercules in the prime bid. The next day, Merit called again. Even better news this time — Merit was the low bidder and the two companies would be working together. These communications occurred June 11, 2002 (you're carried) and June 12, 2002 (we are working together).

On July 23, 2002, Merit sent a purchase order to Hercules directing it to undertake the kitchen work for the amount quoted. The purchase order format included a line for the supplier (in this case, Hercules) to sign.

Hercules did not sign or respond to the purchase order until September 11, 2002. After responding, Hercules then contacted Merit and begged off because of other obligations. When Hercules could not be persuaded to honour its quotation, Merit obtained the equipment from another supplier for an additional $25,000. Then, Merit sued.

Merit argued that Hercules had made an offer to carry out the kitchen work when it communicated its quote orally and then confirmed it in writing, even though the writing was unsigned. Merit also argued that its June 12 communication to Hercules signalled acceptance of the offer which the purchase order later confirmed. While Merit acknowledged that the purchase order form had a line for Hercules to write its acceptance, that line was unnecessary because it was Merit doing the accepting, not Hercules. So, the line reading "accepted by" was irrelevant — the subcontract was already formed.

The trial judge saw the chicken and the egg in a different way. He found that neither the oral communication nor the purchase order was an acceptance by Merit creating a contract. Uncomfortable with lack of certainty, the trial judge decided: no contract! The uncertainty was the lack of a start and completion date for Hercules' work. The trial judge also refused to accept the notion that the "accepted by" line in the purchase order was irrelevant: no sign back, no deal! Tough luck, Merit.

Merit made an alternative argument asserting the existence of Contract A as established by *Ontario v. Ron Engineering & Construction (Eastern) Ltd.* On this front, the trial judge concluded that Merit misunderstood the embrace of *Ron Engineering*. After all, observed the judge, Contract A in *Ron Engineering* arose in circumstances where the bid in question was irrevocable and was backed with bid security — both elements missing from Hercules' quotation to Merit.

The trial judge was also troubled that a "quotation" must remain irrevocable for an indeterminate period of time. Hercules' written confirmation of its quotation said nothing about how long the offer was open for acceptance. He rejected Merit's argument that a "reasonable period of time" was the proper measure. With such a vague duration, His Honour believed that it would "cause chaos in the construction industry." No one would know how long their quotes had to remain open.

The trial judge was impressed by the statistics that contractors and subcontractors have a success rate of between ten per cent and 20 per cent when they submit bids or quotations. So, he reasoned, it was not sensible for a vast number of quotations to remain irrevocable for an indeterminate period of time.

Alternative claim also dismissed!

Missing from the Reasons of Justice Quinn is any reference to the case of *Naylor Group Inc.* v. *Ellis-Don Construction Ltd.* *Naylor* may have put a different complexion on the course and the outcome of this case.

In the Supreme Court of Canada, *Naylor* established the proposition that the Contract A/Contract B model, established by *Ron Engineering* applied to dealings between contractors and their proposed trades where the contractor is making a competitive lump sum bid to the owner. Naylor was aware that Ellis-Don was submitting such a bid for a hospital project. Naylor, like Hercules, had access to the bid documents and was well-aware of the prime bid process.

Naylor and several other trades submitted bids to the bid depository, any one of which Ellis-Don could have named ("carried") in its bid to the owner. It selected Naylor. Naylor's price was used by Ellis-Don in determining its bid, and Naylor was carried as its electrical sub-trade. The Supreme Court of Canada held that Contract A came into being between Naylor and Ellis-Don as a result of Naylor being "carried". Key to the holding that Contract A arose was the fact that Naylor had access to the bid documents and knew, or had the means of knowing, that Ellis-Don was submitting an irrevocable bid to the owner.

Before the owner had accepted Ellis-Don's low bid, Ellis-Don determined that, for labour relations reasons, it could not use Naylor. So, it found a replacement trade at Naylor's price. Naylor sued Ellis-Don claiming a breach of Contract A.

Factually, the Naylor/Ellis-Don saga was very interesting. But, for Merit, the key principles established by *Naylor* are that Hercules actually had the bid documents so that it knew or ought to have known that Merit was submitting an irrevocable bid. With that framework in place, Contract A arose when Merit "carried" Hercules.

Naylor established that Contract A, between a bidding contractor and each of the trades it carries, includes the following terms:

- If the contractor is successful, it must award a contract to the carried trades and so notify them.
- The carried trades must execute their work for the amount quoted.
- Bid shopping by the contractor is a breach of Contract A.
- The carried trades' quotes are open for the period of irrevocability of the prime bid, plus a reasonable period of time to account for a last minute award by the owner.

The Hercules telephone quotation to Merit — followed by a "lead letter" — is standard practice for trade bidding. Hercules knew this was a standard bid to a public owner and submitted its quotation in the hope that it would be carried and that the general contractor's bid would succeed.

When Merit sent a purchase order to Hercules, it confirmed what the parties already knew: Merit had been successful and Hercules was aboard. In the world of *Naylor*, Hercules' refusal to perform the sub-contract is a breach of Contract A for which it is liable in damages to Merit.

The circumstances of Hercules' quotation to Merit are typical. Bid closings with trades are usually last minute and oddly informal, given the importance of the commercial decisions being made. There is little talk of irrevocability. There is no need: everyone understands that the contractor is as much committed to the owner as the owner is to the contractor. Bid security from trades is the exception.

In the real world of trade/contractor bids, there was nothing unusual about the Merit/Hercules story — except the cold feet/cold comfort outcome.

The maxim in most bidding cases is "the preservation of the integrity of the bidding system." But, at its most essential, the "integrity of the bidding system" is undermined — not protected — where a trade provides a quote, encourages the prime bidder to rely on it, and then walks, leaving the contractor without a place to cook lunch.

If this case goes to the Court of Appeal, an encounter between *Naylor* and *Hercules* is likely to lead to a different decision — one which indeed protects the "integrity of the bidding system."