CONSTRUCTION LAW UPDATE - MAY 2001 Word Count: 1,235

THE CHICKEN/EGG ISSUE: WHAT COMES FIRST, BID COMPLIANCE OR CONTRACT A?

J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society, 2000 BCSC 45 exemplifies the title of this article.

The Problem

Oviatt submitted the low bid for site work for Kitimat. The second bidder, Boden, bid $596,000, some $13,000 higher than Oviatt.

Oviatt's bid document was incomplete. Four of eight required pages were omitted. In the balance of the bid, several blanks were left - well - blank. The bid was accompanied by a letter stating that a necessary temporary road was not included.

Boden's bid was complete. But, Boden included a statement that its price could be $15,000 lower if the completion date was extended.

After closing, the consultant sought clarification from both Oviatt and Boden.

Oviatt confirmed that the temporary road was needed but not bid.

Boden was non-committal when asked if its unit price for granular fill covered increased quantities.

The consultant and a government agency both recommended an award to Boden. Both found Oviatt's bid defective due to the omissions and the road "qualification". Kitimat awarded the contract to Boden.

Oviatt sued Kitimat for breach of the bidding contract, Contract A, first identified in *R. v. Ron Engineering & Construction (Eastern) Ltd.* [1981] 1 SCR 111.

Chicken Or Egg?

In his Reasons, Mr. Justice Hunter first considered whether "Contract A" arose when Oviatt submitted its bid. He cited (no surprise) *Ron* and *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619. Putting those two authorities together, Mr. Justice Hunter stated:

> "I have concluded that Contract A did arise between Oviatt and the Hospital based on the Hospital having invited tenders through the tendering process it offered to consider bids for Contract B and that Oviatt, (although referring to a temporary road) submitted a tender which did not reject any of the

> Hospital's terms and the price quoted was based on the requirements set forth in the tender documents."

Mr. Justice Hunter deferred addressing whether Oviatt's tender was "compliant" within the meaning of *MJB*.

Next, Mr. Justice Hunter assumed that Oviatt was the lowest compliant bidder. He then asked if Kitimat breached Contract A (with Oviatt) by awarding Contract B (the job) to Boden. He considered the bid documents including the privilege clause which read "The lowest or any tender will not necessarily be accepted." Mr. Justice Hunter then stated his understanding of one of the central findings in *MJB*:

> "There cannot be an implied term that the lowest bidder would be awarded Contract B as this would contradict an express term of the contract, namely, the privilege clause. Therefore the result is that the Hospital could have awarded Contract B to any of the compliant bidders provided that its decision was made in good faith."

To determine if Oviatt's bid was compliant, Mr. Justice Hunter looked at the bid omissions against two British Columbia decisions dealing with "substantial compliance" of a bid. (See *British Columbia v. SCI Engineers & Contractors Inc. et al* (1993) 22 BCAC 89 (BCCA) and *Foundation Building West Inc. v. Vancouver (City) (1995)*, 22 CLR (2d) 1994 (BCSC)). He concluded that the omission of four pages and the non-completion of blanks did not constitute non-compliance. The omitted information appeared elsewhere.

The temporary road was different. Mr. Justice Hunter found it was a qualification which rendered Oviatt's bid non-compliant. But, Oviatt's non-compliance didn't matter. Mr. Justice Hunter had already found that the privilege clause and Kitimat's good faith permitted the award to Boden.

Mr. Justice Hunter considered Oviatt's claim that Boden's bid was non-compliant because it offered a reduced price for an extended completion date. He also considered whether Kitimat acted in bad faith by considering increased quantities of granular fill and Boden's lower unit price. Oviatt failed even though Mr. Justice Hunter suspected that the unit price had come into Kitimat's thinking.

Mr. Justice Hunter's dismissal of the Oviatt claim is the right result. But, he may have dissected the whole chicken when a glimpse of the egg would have sufficed.

Shouldn't The Egg Come First?

MJB involved two contractors; one was suing (MJB); the other was not (Sorochan). MJB

sued because Defence Construction awarded the contract to Sorochan, a non-compliant bidder.

In *MJB*, the Court determined whether Contract A arose between MJB and Defence Construction - it did.

The Court also considered whether Contract A arose between Sorochan and Defence Construction - it didn't. The following excerpt from the *MJB* Judgment is instructive:

> "However, the Instructions To Tenderers and the Tender Form are the crucial documents for determining the terms and conditions of Contract A. The salient features of the parties' agreement revealed by an examination of these documents are two-fold; **the contractor must submit a compliant bid** and the contractor cannot negotiate over the terms of the Tender Documents."[emphasis added]

So What?

So, the pre-condition for Contract A is whether the Contractor's bid is compliant.

Mr. Justice Hunter held that Oviatt's bid was non-compliant. Within the rationale of *MJB,* that means no Contract A. If there is no Contract A, there are no contractual duties such as fairness or the pallet of other rights under the bid documents. Oviatt is just a guy who submitted an offer - actually a counteroffer.

Mr. Justice Hunter quoted *MJB* to support Contract A between Oviatt and Kitimat as follows:

> "At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant accepted this offer."

If the owner's invitation to submit a bid is an offer, then the bidder, to form a contract, must accept **that offer**. At common law, a counteroffer rejects the original offer.

Oviatt's answer to Kitimat's offer was, **"yes, but"**: not **"yes"**. "Yes" is a compliant bid (the egg); "yes" forms Contract A (the chicken).

Does Good Faith Help?

Mr. Justice Hunter's finding that good faith and the privilege clause would have protected

Kitimat had Oviatt's bid been compliant is troubling. It does not follow one of the principles enunciated in *MJB:*

> "The respondent's argument of good faith in considering the Sorochan bid to be compliant is no defence to a claim for breach of contract; it amounts to an argument that because it thought it had interpreted the contract properly it cannot be in breach. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract."

In the *MJB* decision, Mr. Justice Iacobucci synthesizes the holding of several earlier privilege clause cases as follows:

> "For example, a number of lower court decisions have held that an owner cannot rely on a privilege clause when it has not made express all the operative terms of the invitation to tender;...".

These last two statements from *MJB* warn owners that a good faith belief, supported by a privilege clause, will not excuse a breach of Contract A.

So if Contract A had existed between Kitimat and Oviatt. **And if** Kitimat's consideration of Boden's unit price was not contemplated by Contract A. **Then**, good faith or not, Kitimat would have breached Contract A.

Oviatt filed an appeal in July of 2000. As of May 1st, 2001, the appeal books had not been filed. If the appeal proceeds, it is unlikely that the result will change. But, the reasons might.

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