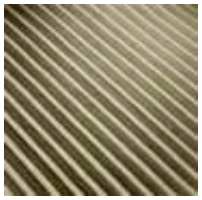

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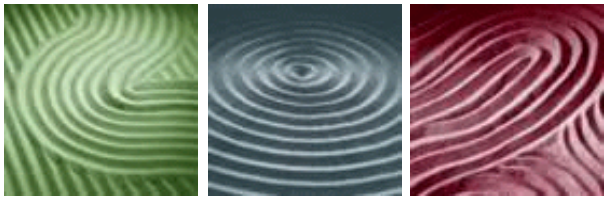

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Whatever Happened to Shades of Grey?

by William M. Pigott
2000

WHATEVER HAPPENED TO SHADES OF GREY?

Most English dictionaries define "nuance" more or less the same way. To pick one, "fine or subtle variation as in colour, tone or meaning." Two British Columbia cases, one of them from the Court of Appeal, give "nuance" an entirely different hue.

The Opening Act

Sound Contracting Ltd. ("Sound") bid on an upgrade to the water system of the Hood Point Improvement District ("Hood"). Sound submitted the low compliant bid. Capilano Highway Services Company ("Capilano") submitted the next compliant bid.

The bid documents included two important clauses. The first was the privilege clause ("the lowest or any tender, will not necessarily be accepted"). The second read:

> "The Corporation encourages the **use** of local labour, materials and equipment on this project. Consideration will be given to contractors who **utilize** local resources to the maximum extent possible." [emphasis added]

After bid analysis, Hood's engineer recommended either Sound or Capilano. They also stated:

> "Other municipalities have advised that Sound Contracting has been difficult to deal with on previous projects with respect to extra work claims and you may have to anticipate additional costs in this respect."

The engineers also reported that Capilano had an **adequate** resume of similar projects while Sound had an **extensive** resume of **significant** similar projects.

On May 5th, 1999, Hood awarded the contract to Capilano "based on their accessibility and their bid". Capilano refused the contract. Hood cancelled the project.

Sound sued Hood. On February 29th, 2000, Hood's application to dismiss Sound's claim as disclosing no triable issue was successful.

How can this be?

Sound claimed that Hood had breached Contract A by:

- accepting Capilano's bid;
- not accepting the lowest compliant bid;
- failing to recognize its duty to award only to Sound.

Master Horn applied the Supreme Court of Canada decision in *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd. [1999] 1 S.C.R. 619.* MJB held that bid documents with a similar privilege clause only obliged the owner **not to award to a non-compliant bid.** Adios!

Sound also claimed that Capilano's bid was non-compliant and that the cancellation of the project was improper. No go, said Master Horn.

Sound's final claim was that Hood used criteria not disclosed in the bid documents. Master Horn recognized the principle "...that an owner is obliged to treat all bidders fairly and in good faith and is in breach of contractual obligations if it awards the contract on the basis of considerations or criteria extraneous to those identified in the tender documents."

But, Master Horn turned to paragraphs 45 and 46 from *MJB* to dismiss the claim of undisclosed criteria. The two *MJB* paragraphs say that an owner is entitled to take "a more nuanced view of "cost" than the prices quoted in the tenders." The Master held that the privilege clause gave Hood the discretion to take this "nuanced view" and that it was not unfair of them to do so.

But a nuanced view of what?

When Hood chose Capilano, their reason was "...their accessibility and their bid". But, "accessibility" is not a criterion disclosed in the bid documents. The bid documents speak of "consideration" to contractors who "use" or "utilize" local resources. Nothing about local contractors: nothing about accessibility.

That leaves "their bid" and the "nuanced view of "costs"". The "nuance" is Sound's claim history. But, the passages from *MJB* spoke of nuance in terms of unrealistically low bids and contractor experience. Both involve an objective standard against which to judge. Whether a bid is too low or not, see the pre-bid estimate. For experience, there is a bricks and mortar track record. Future claims are another matter, more like speculation. Master Horn gives no objective basis for the conclusion that Sound had a poor claims history or how that should be factored into their bid. No owner is mentioned and no proof is tendered that the mystery owners complaint is valid.

Sound has appealed. But wait! This tune sounds familiar.

The Main Event

Master Horn's decision was delivered in Nanaimo, where in July 1997, Sound was successful at trial against the City of Nanaimo on a bid for the Hammond Bay project.

During the Hammond Bay bid evaluation, Nanaimo lost an arbitration to Sound on another project where Sound had claimed overhead and profit for deleted work. The Hammond Bay bids were over Nanaimo's budget and the same contract was to be used. So, Nanaimo calculated what it might pay to Sound for future deleted work and threw in the cost of an engineer to watch Sound. These costs were added to Sound's bid making it second. At trial, the Court held that Nanaimo breached Contract A by importing undisclosed criteria (the prior claim) and then evaluating Sound's bid differently than that of the second bidder. Oddly, Master Horn did not mention the *Hammond Bay* trial decision.

On May 17th, 2000, Nanaimo's appeal of the trial decision was successful and Sound's action dismissed.

The Court of Appeal decision turned on the "...nuanced view of "costs"...." described in *MJB.* But, the Court of Appeal had a different set of bid documents which included a garden variety privilege clause (Article 18). But attached to the privilege clause was the following sentence:

> "The City of Nanaimo reserves the right to waive informalities or to reject any or all tenders or accept the Tender deemed most favourable in the interests of the City of Nanaimo."

Then there was Article 19 which the Court of Appeal found, well, appealing:

> "Award shall be made on tenders that will give the greatest value based on quality, service and price."

At trial, Madam Justice Downs considered these provisions as well as the contract term permitting the deletion of work from the contract scope. She stated the following at paragraph 32:

> "...under the terms of the contract..., any contractor would be able to claim indirect costs and margin from an under run as Sound had done.... This is an apparent legal right flowing from the contract itself....I find the City was under a duty to evaluate HB's bid on the same basis as Sound's bid regarding the potential claim and a contract under run situation. It was improper for the City to conclude HB would forgo this contractual legal right... **This was certainly an application of an undisclosed criterion and also an inappropriate, uneven treatment of the bidders."** [emphasis added]

Madam Justice Downs found, that with an even-handed bid evaluation, Sound, was still low bidder, and "otherwise qualified to perform the work". Damages for loss of profit followed.

The Court of Appeal disagreed with Justice Downs and found that the "...more nuanced view of "costs"" - the claim history - absolved the owner from any breach of Contract "A". The trial Judge, they reasoned, "...gave little or no weight to Article 19 which expands the area of flexibility created by Article 18." (paragraph 16).

There is something gnawing about the Court of Appeal decision which Mr. Justice McEachern must have shared based upon paragraph 18 of his Reasons:

> "I confess that I find this somewhat worrisome as it creates an opportunity for arbitrariness in the operation of the bidding system..... The privative clause gives the owner discretion and that discretion must surely be exercised fairly and objectively."

Many things are "worrisome " indeed. Mr. Justice McEachern fingered part of it with his concern about "arbitrariness" and revenge in the bidding system. In this case, HB did not have a **past** history of pursuing its contractual remedies. Sound, on the other hand, did and (heaven help it) was successful. If Sound wasn't being punished and HB rewarded, then what was cooking?

The aroma of goose cooking comes from Madam Justice Downs' Judgment. In it, she dismissed another bid claim by Sound (there were two trials in one) where Nanaimo had refused to accept its low bid. There, the dispute was over a business license. Parallel to that, Nanaimo was in by-law proceedings against Sound over zoning. The Court of Appeal is silent on these other conflicts and condones the Hammond Bay gross up with the following statement from paragraph 19:

> "...it is not for us to substitute our own analysis for that of the owner in whom the discretion to award the contract ultimately resides and whose staff, in my view, have not been shown to have acted unfairly or other than in good faith in determining which tender provided the "greatest value based on quality, service and price" to the City. **Nor can it be said, in my view, that the consideration of past dealings between these parties constituted an undisclosed criterion...".** [emphasis added]

In her trial decision, Madam Justice Downs made no findings of good or bad faith on the part of City staff. Paragraph 54 of MJB suggests that good faith has nothing to do with it. The paragraph reads, in part, as follows:

> "...acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract".

Madam Justice Downs decided that claims history was an undisclosed criterion. The Court

of Appeal over-ruled. Madam Justice Downs thought that applying this criterion unevenly was unfair. The Court of Appeal demurred.

The industry should be concerned about this much enlarged "nuance". Several appellate level Courts had held unfairness is a breach of Contract "A". Those Courts had refused to let owners escape a breach by using the privilege clause like a plenary indulgence - unless it was worded like one. What now?

If you were Sound, you might reassess your appeal in the *Hood* case. To appeal the Court of Appeal decision, Sound needs leave to appeal to the Supreme Court of Canada and must demonstrate that there is a matter of public interest at stake to get it. Remembering that the damage award at trial was $85,000, Sound themselves may take a more "nuanced view of "costs"". That would be too bad.