Bidders Beware: Yukon Court of Appeal Dismisses Action on Basis of Exclusion Clause

Mega Reporting Inc. v. Yukon (Government of), 2018 YKCA 10

LUC #150 [2018]

Primary Topic:
XII Tendering
Jurisdiction:
Yukon
Author:
Jay Nathwani, Glaholt LLP

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YUKON

The Yukon Court of Appeal's decision in *Mega Reporting Inc. v. Yukon (Government of)*, 2018 YKCA 10, serves as a note of caution for bidders who would seek redress from a court for unfair conduct by an owner in a tendering process. The Court applied an exclusion clause to limit the government's liability in a case where the government had conducted itself in contravention of its own tendering policy, and had disqualified the bid of Mega Reporting Inc. ("Mega") based on criteria which were not disclosed in the tender.

While the Court conducts an extensive analysis of whether there are overriding reasons of public policy which would justify not enforcing the exclusion clause, its analysis fails to consider the effect on the integrity of public tenders of allowing an owner to apply undisclosed criteria to bid evaluation, only to then exclude its liability by contract.

Facts

In 2013, the Yukon government decided to transition its court reporting services from live transcription to digital recording with later transcription as needed. Yukon issued a Request for Proposals for an independent transcription service. The RFP directed that each proposal contain two sealed envelopes. The first was to contain information related to the bidder's experience and performance. The second was to contain the price bid. The RFP provided that the second envelope would be opened and price considered only if a certain minimum score was awarded in relation to the information in the first envelope. Yukon was not obliged to accept the lowest price.

The RFP explicitly provided that it was governed by both the Yukon *Contracting and Procurement Regulation* and the *Contracting and Procurement Directive*. Section 2 of the *Directive* included a number of principles, including:

> (a) Fairness: to observe procedural policies as expressly laid out in this Directive free of bias, personal interest and conflict of interest.
>
> (b) Openness and transparency: to create the maximum number of competitive procurement opportunities, and to be transparent in the way business is conducted.

The RFP also contained the following broad exclusion clause purporting to limit Yukon's liability to bidders:

> Except for a claim for costs of preparation of its Proposal or other costs awarded in a proceeding under the Bid Challenge Process as described in the Government of Yukon Contracting Regulations and Contracting and Procurement Directive, each

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> proponent, by submitting a Proposal, irrevocably waives any claim, action, or proceeding against the Government of Yukon including without limitation any judicial review or injunction application or against any of Government of Yukon's employees, advisors or representatives for damages, expenses or costs including costs of Proposal preparation, loss of profits, loss of opportunity or any consequential loss for any reason including: any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process; if the Government of Yukon does not award or execute a contract; or, if the Government of Yukon is subsequently determined to have accepted a noncompliant Proposal or otherwise breached or fundamentally breached the terms of this Instructions to Proponents.
>
> [Emphasis added in Court of Appeal's decision.]

Mega was one of two bidders. Yukon established an evaluation committee to evaluate the two bids. It met once. The committee did not create or preserve a bid scorecard of any kind. Neither did it make contemporaneous records of its discussions, nor record the reasons for its decisions.

Apparently on its own, the evaluation committee adopted a methodology whereby a bid would receive less than 50% of the total available points in a category if it did not meet the minimum requirements set out in the RFP. A bid would receive 50% of the total points if it met the minimum requirements exactly. And a bid would receive more than 50% of the total points only if it exceeded the minimum requirements.

The committee concluded that Mega's proposal did not meet the minimum technical requirements and did not open the envelope containing Mega's price. The committee therefore awarded a one-year contract, with option to renew for up to two additional years to the other bidder at a price of $191,347.25 per year. Mega's submitted price was $176,684.60 per year.

Several weeks later, Mega met with Yukon officials to discuss why it had not been awarded the contract. A member of the committee, Mark Daniels, prepared a document that ostensibly indicated the points that had been awarded to Mega's proposal. However, this document did not reflect the actual evaluation, and was merely based on Mr. Daniels' memory and his handwritten notes. On examination for discovery, Mr. Daniels could not recall the conversation among members of the committee that led to the scores given to Mega, nor could he recall what he meant in some of his notes. He interpreted one of his notes, "process not clear" as referring to the process in its entirety.

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One of the handwritten notes was "no letters of reference" indicating that Mega had not submitted letters of reference in its bid materials. The RFP did not require letters of reference and only stated that bidders must submit "three references for work similar in scope to that described in this RFP". Mega did submit names and contact information of three references; however, Mega apparently received a reduced score as a result of not submitting reference letters.

Mega commenced an action against Yukon alleging that Yukon breached its duty to fairly review the bids.

Trial Decision

Madam Justice M.A. Bielby of the Supreme Court of Yukon held (at 2017 YKSC 69) that Yukon failed to meet its duties of fairness, accountability, and transparency in the way it evaluated Mega's bid, both at common law and under the Directive. She concluded that the evaluation committee acted unfairly in marking Mega down for failing to provide letters of reference, and that the process for awarding points was not described in the RFP. She also found that the committee's failure to keep a record of its decision prevented Yukon from refuting concerns with the decision-making process. The court declined to draw the inference that Yukon fairly and properly evaluated the proposal from the fact that Yukon did evaluate the proposal, because Yukon was in total and sole control of the creation of the evidentiary record.

Justice Bielby went on to conclude that the exclusion clause in the RFP did not bar Mega's claim. She applied the test from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, and held that public policy reasons justified refusing to enforce the exclusion clause. The court relied on various cases which established that public policy generally prevented a government from avoiding duties owed under statutes for the public benefit. The fair procurement principles in the Directive established duties that could not be avoided by contracting out of them.

Justice Bielby held that the text of the waiver in the RFP spoke so directly to the principles in the Directive, that it was impossible to conclude that the exclusion clause was not intended at annulling the effect of the legislation. To give effect to the waiver would allow Yukon to represent to the public that it engages in fair procurement, without suffering any consequences for failing to do so.

While Justice Bielby's reasons hold that it was unfair of Yukon to mark down Mega's bid for failing to include letters of reference, her reasons do not comment on the jurisprudence following the Supreme Court's decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619,

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which held that it was appropriate to imply a term into Contract A that only disclosed criteria would be used in the evaluation of bids.

Appeal

On appeal, the Yukon Court of Appeal overturned Justice Bielby's judgment. Most notably, the Court of Appeal's reasons turned not on any finding that Yukon had acted properly in the procurement process, but rather that the exclusion clause barred any claim by Mega.

The Chief Justice Bauman, writing for a unanimous panel of the Court of Appeal, conducted an analysis of the factors identified by the Supreme Court of Canada in *Tercon* for determining whether a court will enforce an exclusion clause. *Tercon* identified three factors for a court to consider:

1. Whether as a matter of interpretation the exclusion clause applies to the circumstances based on the intention of the parties;
2. Whether the clause was unconscionable at the time the contract was made; and
3. Whether the Court should nevertheless refuse to enforce the valid clause because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts, the proof of which lies on the party seeking to avoid enforcement.

The Court of Appeal concluded that the exclusion clause did apply to the circumstances of the case. The clause applied to any proponent who submits a proposal, and waives damages for loss "for any reason", including any loss arising from "any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process", or if Yukon "otherwise breached" the terms of the Instructions to Proponents.

The Court of Appeal noted that Mega had not alleged unconscionability at the time of tender.

The Court of Appeal's reasons turned on the third branch of the test – whether the court ought to refuse to enforce an otherwise valid clause for public policy reasons.

On this point, the Court of Appeal noted the high threshold identified in the jurisprudence for overcoming the presumptive enforceability of a contractual bargain. The Court cited Justice Binnie's dissenting reasons in *Tercon* which discuss the threshold for declining enforcement for public policy reasons. (The majority's reasons turned on whether the clause applied to the

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circumstances of the case, and did not give detailed consideration to the issue of public policy.)

Justice Binnie had quoted Chief Justice Duff in the 1937 Supreme Court case of *Re Millar Estate*, in which he had held that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." The Court of Appeal took notice of the fact that the British Columbia Court of Appeal had approved of the "substantially incontestable" standard in the case of *Niedermeyer v. Charlton*, 2014 BCCA 165.

The Court of Appeal held that Justice Bielby erred in failing to consider "the high threshold necessary to establish that public policy outweighs the interests in enforcement." It was not enough to weigh whether "one policy interest outweighs the other", without considering the "substantially incontestable" test.

In conducting its own analysis, the Court of Appeal was of the view that "the obligations to conduct a bidding process fairly and transparently are as much for the benefit of those tendering, and the public at large, as they are for bidders like Mega." The court reasoned that tendering processes are designed to ensure "that parties can effectively bid and the process can be sufficiently competitive, ensuring that taxpayers receive value for their money."

The Court's comment is surely correct, but it seems to be precisely the point in this case that by disqualifying a bid based on criteria that were apparently invented by the bidding committee only after tenders were submitted, Yukon acted to the prejudice of a fair competitive process designed to ensure value for money. If bid-callers are able to make up the rules as they go along, and exclude all liability for so doing, how are bidders protected from owners exercising unfettered discretion on the basis of hidden preferences? If it is permissible to make up undisclosed criteria, keep no records of decision making, and face no consequences for disqualifying bidders who have complied with the disclosed criteria, what differentiates a modern tendering process from the sort of Wild West behaviour that occurred pre-*Ron Engineering*?

The Court of Appeal goes on to reason that because Yukon sees it as in its interest to exclude liability for a breach of the duty of fairness, surely it there cannot be substantially incontestable harm to the public interest:

> Yet the government, one of the parties whose interests the procurement principles are ostensibly supposed to advance, and who in fact adopted them in the first place, has come to the conclusion that the public policy interest motivating those

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YUKON

> principles should not override their ability to protect themselves from liability. Why should the Court step in now and tell that party that they misunderstand their interests or that they are improperly weighing the impact that enforcement of the exclusion clause will have on the competitiveness and efficiency of future RFPs?
>
> [Emphasis added.]

This is perhaps the most puzzling and circular passage of the decision. It suggests that the mere fact that an owner sees fit to limit its own liability is enough to defeat a public policy argument against the exclusion clause. On this reasoning, no exclusion of liability would ever be rendered unenforceable for policy reasons, because the owner must have had some reason for protecting itself from liability.

In one head-spinning passage, the Court of Appeal vindicates exclusion clauses *a priori* – if the government has concluded that the public policy does not override its interest in protecting itself from liability, then it cannot be said that public policy overrides the government's interest in protecting itself from liability.

The Court of Appeal's reasons bring to mind the episode of *Yes, Prime Minister* in which Sir Humphrey, responding to a minister's objection that the Cabinet meeting minutes are inaccurate, reminds him that "any decision which has been officially reached will have been officially recorded in the minutes by the officials and any decision which is not recorded in the minutes has not been officially reached even if one or more members believe they can recollect it, so in this particular case, if the decision had been officially reached it would have been officially recorded in the minutes by the officials, and it isn't so it wasn't."

Almost as baffling is the implication that giving effect to a public policy argument amounts to telling an owner that it misunderstands its own interests. But surely the public policy exception exists not because owners misunderstand their own interests, but precisely because owners do understand their own interests – namely, protecting themselves from litigation when they act unfairly – and draft exclusion clauses to protect those interests.

Indeed, by allowing the Yukon government to escape liability for a tender process which was essentially nothing more than an arbitrary decision-making process based on *ad-hoc* criteria, the Court of Appeal comes remarkably close to rendering moot the very concept of a duty of fairness. It is worth recollecting that in *M.J.B.*, the Supreme Court implied a contractual duty to use only disclosed criteria, based on the facts of the case before it. The Court of Appeal's decision suggests that owners are free to expressly

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contract out of any duty of fairness, and that courts will enforce such an exclusion.

Caught in the middle of all of this are bidders. For all of the Court of Appeal's rhapsodizing about "sophisticated commercial parties," the reality is that in many sectors of the economy, companies cannot afford to ignore opportunities for public-sector work, or other work let through tender processes. To say that bidders can simply decline to bid if they do not like the terms of the tender documents is to put blinders on to commercial reality. Governments are not going to stop receiving bids if courts enforce unfair exclusion clauses. But bidders will more likely to be treated unfairly, and prices are more likely to go up over time as a result. The Court of Appeal reasons that if the public does not like such a result, "they have recourse through the ballot box if they believe the territorial government is not getting value for money." It seems unlikely, to put it mildly, that the public would have the capacity to evaluate the effect of exclusion clauses on the price of public-sector contracts over the years; still more unlikely that it would become a serious enough political issue to constrain governments' desire to insulate themselves from lawsuits.

The law of bidding and tendering developed in part because courts saw it as their role to ensure that fairness was done between governments and bidders. With *Mega Reporting*, the Yukon Court of Appeal signals that courts are prepared to step back from that role and let bidders fend for themselves. *Caveat emptor*, and don't let the door hit you on the way out.

Mega has sought leave to appeal to the Supreme Court of Canada. A decision on leave is several months away.