SUPREME COURT OF YUKON

Citation: *Cobalt Construction Inc v Parsons Inc*, 2021 YKSC 31

Date: 20210611
S.C. No. 19-A0078
Registry: Whitehorse

BETWEEN:

COBALT CONSTRUCTION INC.

PLAINTIFF

AND

PARSONS INC.

DEFENDANT

Before Chief Justice S.M. Duncan

Julie Facchin	Counsel for the Plaintiff
Scott Pollock	Counsel for the Defendant
Emily Snow	Counsel for Morgan Construction and Environmental Ltd.
Murray J. Leitch	Counsel for Pelly Construction Ltd.

REASONS FOR DECISION

Introduction

[1] This is a preliminary application by the plaintiff Cobalt Construction Inc. (“Cobalt”) for production of documents from the defendant Parsons Inc. (“Parsons”) in an action arising from a tendering dispute. Cobalt was one of two unsuccessful bidders on a construction job at the Faro Mine Complex. Cobalt alleges that Parsons, the construction manager who conducted the tendering process, breached the contract

established through the tendering process by not evaluating all bids fairly and equally, among other things.

[2] Parsons has listed documents relating to the bids in its affidavits of documents. Approximately 100 documents listed and sought by Cobalt have not been produced, because they originated from the other two bidders who have objected to their unredacted production – Morgan Construction and Environmental Ltd. (“Morgan”), the other unsuccessful bidder, and Pelly Construction Ltd. (“Pelly”), the successful bidder.

[3] Morgan and Pelly are not parties to the action. They provided written and oral representations in this application because of the impact on them of any decision by Parsons or order of the Court to produce the documents at issue without redactions. Both Morgan and Pelly are seeking redactions of parts of the bid documents and restrictions on who can access them because of their commercially sensitive and confidential nature. The positions of each of Morgan and Pelly on the scope of the redactions are different.

Background

[4] Three companies, Cobalt, Morgan, and Pelly, submitted bids in April 2019 to Parsons on a request for proposal for construction in relation to the North Fork of Rose Creek Realignment project, part of the remediation of the abandoned Faro Mine site. The purpose of the project was to prevent the Rose Creek water from coming into contact with contaminated waters from the Faro Mine site. It included construction of a new 1.9 kilometre water channel, road construction, water management and other related work.

[5] Parsons evaluated the three bids based on the following criteria as set out in the request for proposal documents:

a. Indigenous Opportunity Credits (20 points): maximizing Indigenous employment, subcontracting and training;

b. Technical Evaluation (40 points): experience of company in projects of similar size, scope and nature and experience of key personnel; and

c. Price Evaluation (40 points): lowest cost for all labour, supervision, materials, equipment and services required to complete the work; points awarded relative to other bidders' bid price.

[6] On May 16, 2019, Parsons advised Cobalt that its bid was not selected for the work. A debrief phone call was provided to Cobalt by Parsons on May 23, 2019, during which Parsons explained why Cobalt did not achieve the highest score. Unsubstantiated opportunities for Indigenous workers were not awarded points, and a failure of Cobalt to achieve 30 points on the technical evaluation resulted in a score of zero for that criterion.

[7] Cobalt filed its statement of claim on August 1, 2019. It alleges that Parsons breached the contract established as a result of their response to the request for proposal. Cobalt alleges Parsons evaluated the bids contrary to the terms of the request for proposal and did not treat the bids fairly and equally, including basing their decision on new information received after bid closing time; considering evaluation criteria not disclosed in request for proposal documents; awarding higher scores to other bidders for technical merit based on similar or inferior experience; changing the evaluation scores of Cobalt and others in order to follow a pre-determined outcome; and allowing other entities to influence the evaluation of the bids. Cobalt claims that its proposed price was approximately $10 million less than that of the successful bidder, Pelly.

[8] Parsons filed its statement of defence on September 27, 2019. It denies that a contract was established between it and Cobalt as a result of the tendering process. In any event, Parsons says it evaluated the bids in accordance with the tender documents in a fair and consistent manner.

[9] After Parsons reviewed its documents to be produced, it told Cobalt that the documents contained bid information from Morgan and Pelly. Parsons considered this bid information to be confidential; bidders have the expectation that such information would not be disclosed to their competitors. Cobalt disagreed and filed a notice of application on December 18, 2019, to compel production of Morgan's and Pelly's bid documents. Parsons wrote to Morgan and Pelly in December 2019 to advise them of the application.

[10] Morgan and Pelly responded that they were opposed to some of the documents being produced to Cobalt because they contained confidential and commercially sensitive information. Through discussions with counsel, a form of consent order was agreed to by Cobalt, Morgan, Pelly and Parsons, but not signed. That consent order would allow for redactions from the bid documents of unit prices, equipment rates, names and contact information for employees. The consent order also contained provisions about restriction of access and custody of the bid information to counsel, and an opportunity to request a sealing order if any of it were proposed to be entered into evidence in court.

[11] Before the consent order was signed, Morgan advised Parsons, who in turn advised Cobalt, of additional proposed redactions of information in certain documents to be produced. Specifically, Morgan sought additional redactions over:

a. Morgan's equipment hourly minimums and production rates;

b. Morgan's employee training and mentorship program, including its safety program, such as:

   i. the number of training hours Indigenous peoples from the region would receive;

   ii. specific details surrounding how Morgan's safety training program is facilitated;

   iii. number of hours devoted to training of employees depending on the employee's particular role/position;

   iv. the vacant positions that Morgan had available at the time the bid was submitted;

   v. the number of individuals that Morgan's subcontractor employs that are from Kaska, Kwanlin Dün First Nation, and Faro;

c. Morgan's recruitment program, including the names of individuals that Morgan works with to recruit Kaska residents as employees;

d. Morgan's Construction Execution Plan, such as:

   i. equipment models;

   ii. proposed quantity of each type of equipment;

   iii. proposed work schedule/cycle;

   iv. proposed methodology and plan for the clearing of the site;

   v. the length of time Morgan anticipated it would take to complete each stage of the project (length of entire project is unredacted);

   vi. diagrams outlining Morgan's quality control process and non-compliance correction process;

e. information regarding Morgan's WCB – Alberta costs and claims; and

f. the dollar value of previous projects completed by Morgan.

[12] Further discussions ensued between counsel for Morgan and counsel for Cobalt, but no agreement was reached. As a result, the proposed consent order was withdrawn by Cobalt and replaced with this application.

[13] In the meantime, Pelly was not part of the discussions about Morgan's additional redactions. Pelly became aware at some point of Cobalt's withdrawal of the consent order. Although Pelly, in its outline on this application, set out additional information contained in its bid documents that it says would cause harm to them if produced, their lawyer confirmed on three occasions at the hearing that Pelly remained willing to sign and be bound by the consent order as originally drafted. Cobalt had been willing to sign the consent order until Morgan attempted to broaden its scope. Thus, the main dispute in this application is between Cobalt and Morgan.

Issue

[14] The question raised in this application is whether Cobalt is entitled to receive unredacted bid documents from non-party competitors in order to pursue its claim of unfair bidding practices against the defendant. This requires a balancing of the competing interests – the harm that may result to the non-party competitors from unredacted production, as against the prejudice to the plaintiff of potentially not receiving complete production.

Analysis

[15] The focus of this analysis will be on the concerns of Morgan. I will address below Pelly's position and the withdrawn consent order.

Legal authority and test for scope of production order

[16] Rule 25 of the *Rules of Court* of the Supreme Court of Yukon governs document production. Generally, it requires all documents relating to a matter in issue in the action that are or have been in the possession, control or power of a party to the action to be disclosed whether or not privilege is claimed, and produced for inspection on request subject to any privilege claim, assuming they are still in the possession, power or control of the party.

[17] Rule 25(14) allows a court at any time on the application of a party to order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

[18] Relevance in the context of disclosure and production of documents has been broadly defined. Generally, courts still accept the common law explanation set out in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882), 11 QBD 55 (CA): Every document which directly or indirectly may enable a party to advance his own case or destroy that of his adversary, or which may fairly lead to a train of enquiry or disclose evidence which may have either of those consequences, must be disclosed.

[19] However, modern realities have placed some limits on the *Peruvian Guano* definition of relevance. For example, in cases where there were hundreds of thousands of documents in question but of only possible or marginal relevance, courts have refused to order production *(British Columbia (Milk Marketing Board) v Aquilini* (1996), 63 ACWS (3d) 1246 (BCSC)). It is accepted that a court has a general discretion to excuse compliance with the rule, as long as that discretion is exercised justly, balancing the interests in question fairly.

[20] This concept of relief from the strict application of the *Rules of Court* on disclosure and production has been codified in Rule 25(16). It permits a court on application to order that a party be excused from compliance with Rule 25, either generally or in respect of one or more documents or classes of documents.

[21] Other examples in which the courts have granted relief from document production are where they have been asked to weigh the relative marginal relevance of the documents against competing interests of confidentiality or practical difficulties in producing large quantities of documents (*BC Bottle Depot Assn v Encorp Pacific (Canada)*, 2009 BCSC 403 at para. 59).

[22] The Supreme Court of Canada has confirmed the inherent jurisdiction of the court to oversee and control the evidentiary process, including disclosure and production of documents, and the need to balance competing interests. In *Imperial Oil v Jacques*, 2014 SCC 66, the Supreme Court of Canada wrote at paras. 82-84:

> [82] … These include the power to control the process of disclosing evidence and to set conditions for and limits on disclosure … Judges have great discretion in exercising this power at the exploratory stage … .
>
> [83] A judge laying down conditions for the disclosure of private documents must consider and weigh the various interests involved. On the one hand, the judge must limit the potential for invasion of privacy and, on the other, he or she must avoid unduly limiting access to relevant documents so as to ensure that the proceedings remain fair, the search for truth is not obstructed and the proceedings are not unjustifiably delayed (see *Frenette*, at p. 685-86). … .
>
> [84] … If necessary, judges have the powers they need to impose other conditions (*Glegg*, at para. 30). For example, a judge can limit the number of persons authorized to consult the requested documents and specify in what capacity and for how long they may do so. The judge can also establish the circumstances of this access by, for example, ordering

> that disclosure be made in a specific manner and, if necessary, at a specific time and place. … .

[23] As noted by the court in *McCaw's Drilling & Blasting Ltd v Greenfield Construction Ltd*, 2019 BCSC 2244, there is no specific provision in the rules for redaction or withholding parts of documents. However, in *North American Trust Co v Mercer International Inc* (1999), 71 BCLR (3d) 72, ("*North American Trust Co*") considered the leading case in this area, the court held at para. 15 that an otherwise relevant document may be redacted where:

a. the redacted material is irrelevant; and

b. there is good reason why it should not be disclosed.

[24] The court in *Este v Blackburn*, 2016 BCCA 496 at para. 21, wrote: "The onus – not a heavy one – is on the person seeking to *limit* the disclosure, to adduce *evidence* that satisfies the court that the document in question is likely to be irrelevant to the proof of a material fact." That party must also establish a good reason for favouring redaction.

[25] The balancing test to be applied by courts was summarized in *North American Trust Co* at para. 13:

> Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

Contextual factors and harmful impact

[26] There is a significant distinction between this application and the cases cited by counsel in support of the applicable legal principles. In almost all of the cases cited, the entity seeking redaction is a party to the litigation. In this case, Morgan and Pelly are not parties.

[27] The court in an application in *Orr v Sojitz Tungsten Resources Inc*, 2009 BCSC 1635, noted that the applicant, Global Tungsten, was not a party. This was a contextual factual element in favour of the court's decision to grant in part the application by Global Tungsten for a sealing order over an affidavit and exhibits containing some of its confidential information. "… [I]t cannot be said that they have chosen to be parties to litigation and thereby have their affairs dealt with in a public forum" (para. 21).

[28] As a direct competitor of Cobalt, Morgan's unredacted bid information is likely to provide Cobalt with an unfair competitive advantage, whether or not the information is relevant to this litigation. As a non-party, Morgan is at the mercy of the parties' pleadings, over which it has no control. If a court were to order unredacted production by Parsons to Cobalt of Morgan's bid information, Morgan has limited recourse. This is unlike a party to the proceeding, who, for example, could discuss forms of resolution of the underlying action or parts thereof in order to prevent what they may perceive as a highly prejudicial outcome created by unredacted production. As a result, more weight should be accorded to the harm aspect of the test for production of Morgan's documents in this context.

[29] Counsel for Cobalt argued that Morgan's assertion of harm was a bald one, without sufficient evidentiary detail to support their position. I do not agree. Extensive detail is not required to find a *prima facie* case of harm in the sense of a competitive

disadvantage resulting from unredacted production of bid information. It is clear that Cobalt and Morgan are direct competitors as they bid on the same project. It is clear that Morgan's bid contained information they considered to be confidential and proprietary. In his affidavit, Jason Sauve, Vice President of Construction at Morgan, attested at para. 20, "[t]he additional information identified and redacted by Morgan Construction relates to specific business practices that Morgan Construction has developed over time that provides Morgan with an advantage over its competitors." He further attested at para. 23, that the submission of its records to Parsons was done on the understanding they would be kept confidential. If Morgan had known they may be required to disclose the information to one or more of their competitors, they would have reconsidered whether to participate in the request for proposal process.

[30] The argument of Parsons at para. 4 of its outline, referencing Jason Sauve's affidavit, confirmed that the bids were provided in confidence, with the expectation that they not be disclosed to competitors.

[31] These statements, interpreted in all of the circumstances, are sufficient to demonstrate harm to Morgan at a general level. The absence of specifics in the documents at issue will be addressed below.

[32] A further contextual consideration is the fact that Morgan was also an unsuccessful bidder. The bids were not compared one against the other by Parsons except in the pricing category. Although counsel for Cobalt argued that the absence of Morgan's unredacted bid information would significantly compromise its ability to prosecute the action, this is not entirely clear. This factor is analyzed below in more detail.

Relevance of Morgan documents

[33] This Court was not provided with any of the documents at issue, except for a short excerpt in an exhibit to one of the affidavits, showing full pages of redactions. In particular, the Court has not seen any redacted or unredacted copies of the documents sought by Cobalt that are of concern to Morgan. In most of the cases cited by counsel, the courts were provided with the documents to assist in making their decisions. The Court has also not seen the Parsons request for proposal documents to be able to assess the concerns expressed by Cobalt in the statement of claim against the material provided in the tender documents. While it is not necessary for the purpose of this application to probe too far into the merits of the claim, viewing the information that was provided to each of the bidders about the evaluation process may have some effect on an assessment of relevance of specifics of the unsuccessful bidder's information.

[34] There were no direct submissions by the parties or by Morgan on the specific documents or parts of the documents sought to be protected. It is therefore not possible for the Court, in the absence of the evidentiary material and argument, to make specific determinations of relevance or harm on each document or part thereof sought to be redacted. However, the Court can make a general conclusion on relevance based on the pleadings and context of this case.

[35] For Cobalt to make its case against Parsons, it is not clear that production of Parsons' evaluation of Morgan's bid is necessary. Disclosure of Parsons' evaluation of Cobalt's bid is relevant. Disclosure of Parsons' evaluation of the successful bidder, Pelly, is also relevant to the assessment of whether the evaluation was done evenly and fairly, in comparison to the evaluation of Cobalt. The damages claimed by Cobalt are loss of profits because Pelly was awarded the contract, not Cobalt. It is not obvious that

Parsons' evaluation of the bid of Morgan, an unsuccessful bidder, is useful in determining why Cobalt did not get the contract, and Pelly did. It is certainly of less relevance in the circumstances than the evaluations of Cobalt and Pelly.

[36] Further, the evaluation criteria at issue here – Indigenous opportunity credits and technical evaluation – were not assessed comparatively against the other bidders. In other words, each bid was assessed independently against the Parsons criteria, and not in relation to the other bids. This is unlike the pricing criterion, in which the bidders were assessed against one another. This factor decreases the relevance of the unsuccessful bidder's documents.

[37] Counsel for Cobalt argued that Parsons conceded relevance by listing the documents at issue in their affidavits of documents. I note however, that Rule 25(20) provides that the disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility. Thus, Parsons' decision to disclose the documents at issue is not conclusive of their relevance.

Conclusion on Morgan documents

[38] At this stage, on the basis of the contextual factors and allegations in the claim, without access to more specifics, I am of the view that Morgan has met its onus of showing that the Morgan bid information sought to be redacted is of marginal relevance, and is outweighed by the harm created to Morgan, a non-party direct competitor of Cobalt, from production of their bid information to Cobalt. The harm analysis is set out above at paras. 28-31.

Analysis and Conclusion on Pelly documents

[39] Pelly agreed to the terms of the consent order originally provided but later withdrawn by Cobalt. Cobalt did not communicate this clearly to Pelly, until before this

application was pursued. In the circumstances, especially considering the fact that Pelly was the successful bidder, the evaluation by Parsons of its bid is relevant to Cobalt's claim. Pelly has not expressed concern to the same degree of harm or loss of competitive advantage if its bid documents were disclosed. However, Pelly seeks acknowledgement that their bid information is confidential and commercially sensitive, and as well seeks protection of certain parts of that information, as set out in the withdrawn consent order.

[40] As with the Morgan documents, there is a contextual factor to consider here. Pelly is also a non-party to the action and a direct competitor of Cobalt. It has no control over the pleadings or the progress of the litigation. While Cobalt has withdrawn its offer to enter a consent order, the withdrawal was a result of the position taken by Morgan, not Pelly. Pelly was not given an opportunity to enter into the consent order with Cobalt in any event.

[41] Applying the balancing test, the proposed terms of the consent order are reasonable and appropriate for the Pelly documents. The pricing information is commercially sensitive and of marginal relevance, given that Cobalt already knows its overall pricing was $10 million lower than Pelly's. Cobalt was advised it lost points in the technical evaluation and Indigenous opportunity credit categories, not pricing. The names and contact information of the employees are irrelevant and would be an invasion of privacy interests if produced. The term of the consent order allowing notice to be provided if any evidence is to be introduced at trial to allow the non-parties an opportunity at that time to seek a sealing order to prevent public access, is appropriate, because Pelly (as well as Morgan) as a non-party may have legitimate confidentiality concerns about the proposed evidence.

Further terms of order applicable to Morgan and Pelly documents

[42] Cobalt has also requested that the documents be produced in "native electronic format". Parsons made no submissions on this point and I interpret this to mean they have no objection. I will therefore include this in the order.

Further application

[43] If after production of the documents as ordered, and/or after examinations for discovery, it appears to Cobalt that there are relevant documents that have not been produced by Parsons, Cobalt is not precluded from bringing another application, given the necessarily general conclusions made at this stage. Any further application material must contain specific information about the documents at issue related to relevance and harm, including copies of the unredacted documents for the Court to review, to enable the Court to apply the balancing test.

Summary of Order

[44] To summarize, I will grant the following order:

1. Any bids or proposals or other responses prepared by Cobalt Construction Inc. ("Cobalt") or by Morgan Construction and Environmental Ltd. ("Morgan") or by Pelly Construction Ltd. ("Pelly") in connection with the Request for Proposal issued by the defendant Parsons Inc. ("Parsons") for Package #13 North Fork of Rose Creek Realignment Project contains confidential and commercially sensitive information, in whole or in part, including as reproduced in other documents by reference, summary, repetition or otherwise (the "Confidential Bid Information").
2. The Confidential Bid Information of Morgan and Pelly may only be disclosed by Parsons to Cobalt by delivery to Cobalt's counsel, Julie

Facchin of Dentons Canada LLP in these proceedings on Cobalt's counsel's undertaking to the Court to:

a. maintain custody of the Confidential Bid Information at her firm's offices;

b. only permit Cobalt access under her supervision or the supervision of another lawyer or articled student from the firm (but Cobalt may not copy or reproduce any Confidential Bid Information);

c. if counsel ceases to be counsel of record or for any other reason can no longer comply with the foregoing, return the Confidential Bid Information to counsel for Parsons or maintain custody of the Confidential Bid Information until further direction of the Court.

3. Parsons shall produce its documents relating to Morgan's bid with the following redactions:

a. Morgan's equipment hourly minimums and production rates;

b. Morgan's employee training and mentorship program, including its safety program, specifically:

i. the number of training hours Indigenous peoples from the region would receive;

ii. details of how Morgan's safety training program is facilitated;

iii. number of hours devoted to training of employees depending on the employee's particular role/position;

iv. vacant positions Morgan had available at the time the bid was submitted;

v. the number of individuals employed by Morgan's subcontractor who identify as Kaska, are Kwanlin Dün First Nation citizens, or residents of Faro;

c. Morgan's recruitment program, including the names of individuals that Morgan works with to recruit those who identify as Kaska as employees;

d. Morgan's Construction Execution Plan, including:

i. equipment models;

ii. proposed quantity of each type of equipment;

iii. proposed work schedule/cycle;

iv. proposed methodology and plan for the clearing of the site;

v. the length of time Morgan anticipated it would take to complete each stage of the project (for clarification, length of entire project is unredacted);

vi. diagrams outlining Morgan's quality control process and non-compliance correction process;

e. information about Morgan's WCB – Alberta costs and claims; and

f. the dollar value of previous projects completed by Morgan.

4. Parsons shall produce its documents relating to Pelly's bid with the following redactions:

a. unit prices;

b. equipment prices; and

c. names and contact information for employees.

5. Any party seeking to put any Confidential Bid Information into evidence by way of affidavit or otherwise shall provide a reasonable opportunity for anyone who may be affected by the public disclosure of the evidence to ask the Court to seal that evidence and provide at least two weeks' advance notice in writing as follows:
    a. if Cobalt's Confidential Bid Information, to Julie Facchin at Dentons Canada LLP;
    b. if Morgan's Confidential Bid Information, to Emily Snow at DLA Piper (Canada) LLP; and
    c. if Pelly's Confidential Bid Information, to Murray J. Leitch, in-house counsel for Pelly Construction.
6. Cobalt expressly agrees and acknowledges that its use of any or all of Morgan's or Pelly's Confidential Bid Information is limited to these proceedings, and Cobalt agrees not to use any of Morgan's or Pelly's Confidential Bid Information for any other purpose.
7. At the conclusion of these proceedings, Cobalt will cause its counsel to destroy or to return to Parsons all of Morgan's Confidential Bid Information and confirm in writing to counsel for Morgan that such destruction or return has occurred.
8. At the conclusion of these proceedings, Cobalt will cause its counsel to destroy or to return to Parsons all of Pelly's Confidential Bid Information and confirm in writing to counsel for Pelly that such destruction or return has occurred.

9. The parties shall be at liberty to apply to any Justice of the Supreme Court of Yukon for further directions in respect of this Order or to modify or vacate this Order. If a further application is brought, unredacted copies of documents at issue shall be provided to the Court.

10. Parsons shall deliver all documents listed in their affidavits of documents to Cobalt in their entirety, subject to the redactions set out in this order, including all versions, in native electronic format.

[45] Costs may be spoken to in case management if the parties are unable to agree.

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DUNCAN C.J.