SUPREME COURT OF YUKON

Citation: *Cobalt Construction Inc. v. Kluane First Nation*, 2014 YKSC 40

Date: 20140710
S.C. No. 13-A0078
Registry: Whitehorse

Between:

COBALT CONSTRUCTION INC.

Plaintiff

And

KLUANE FIRST NATION

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Meagan Lang and Karen Martin — Counsel for the Plaintiff
Gary W. Whittle — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff, Cobalt Construction Inc. ("Cobalt"), for a determination by way of a summary trial that the defendant, Kluane First Nation ("KFN") breached a tender contract with Cobalt on July 3, 2013. Cobalt seeks: (a) a declaration that KFN breached the tender contract; (b) judgment in its favour; (c) damages in its favour in the amount of $318,251, plus pre and post-judgment interest; and (d) costs.

[2] Although KFN initially opposed proceeding by way of a summary trial in its response to Cobalt's notice of application, it did not take that position in its written

argument or in the submissions of its counsel at the hearing. Pursuant to Rule 19(12)(a) of the *Rules of Court*, I am satisfied that I am able, on the whole of the evidence before me, including the extensive discovery evidence, to find the necessary facts to decide the issues in this case. Indeed, few, if any, of the facts are in dispute and the matter is not particularly complex. Credibility is not at issue. Thus, resolving this matter by way of a summary trial would be an efficient disposition of the litigation. I also rely, in this regard, on the principles relating to summary trials, as expressed in *Norcope Enterprises Ltd. v. Government of Yukon*, 2012 YKSC 25.

[3] In June 2013, KFN issued a public invitation to tender (the "tender") for the construction of road upgrades in Burwash Landing (the "project"). The tender required the bidders to submit bid security with their bids. Three contractors bid on the tender, Castle Rock Enterprises, Cobalt and 19145 Yukon Inc. (otherwise known as "Kluane Corp."), which is KFN's development corporation. Cobalt submitted the lowest bid and included bid security. Kluane Corp. submitted the second lowest bid and did not include bid security. KFN ranked Cobalt's bid in second place and Kluane Corp.'s bid in first place. KFN awarded the contract to complete the project to Kluane Corp., which performed the work in the summer and fall of 2013.

[4] Cobalt commenced this action on September 16, 2013. KFN filed its original statement of defence on October 9, 2013, an amended statement of defence on March 13, 2014, and an amended amended statement of defence on March 14, 2014. The summary trial application was heard on April 11, 2014. Prior to the hearing, the parties exchanged affidavits of documents and notices to admit. Cobalt's Operations Manager, Jon Rudolph, was examined for discovery on January 22, 2014. As a result of this pre-

trial discovery, numerous documents relating to the tender and the project were filed by both parties on the application.

[5] In its amended amended statement of defence of March 14, 2014, KFN asserted, for the first time, that Cobalt's bid was non-compliant with the tender, because it failed to include a full list of subcontractors and falsely certified that it had made best efforts to invite subcontract bids from businesses in Burwash Landing.

[6] On this application, KFN has not denied Cobalt's claim that Kluane Corp.'s bid was non-compliant with the tender because it failed to include bid security. Therefore, I am accepting that fact as having been proven on a balance of probabilities. Rather, KFN's counsel appeared to argue that, notwithstanding that KFN accepted, reviewed and ranked Cobalt's bid on or about July 3, 2013, because the bid was materially non-compliant, KFN was "incapable at law" of accepting it. Thus, the argument seems to be that, even if Kluane Corp.'s bid should not have been accepted, KFN acted properly in declining to award the project contract to Cobalt. The obvious problem with this argument is that there is no evidence whatsoever that KFN actually concluded that Cobalt's bid was non-compliant, at any time or on any basis. Rather, KFN is attempting to justify its actions after the fact.

ISSUES

[7] The issues can be briefly stated as follows:

1) Was Kluane Corp.'s bid materially non-compliant?
2) Was Cobalt's bid materially compliant?
3) If Cobalt's bid was materially compliant, what are its damages?

ANALYSIS

1. Was Kluane Corp.'s bid materially non-compliant?

[8] Although I have already found as a fact Kluane Corp.'s bid was materially non-compliant, this is perhaps a good opportunity to set out some of the factual background, the law and the detail giving rise to this finding.

[9] Cobalt is a construction company which provides a variety of construction services in the Yukon, including road construction and mining infrastructure construction. Jon Rudolph is the Operations Manager. Mr. Rudolph was previously an owner and manager of a separate corporate entity, Golden Hill Ventures Ltd., which performed similar work. He has over 30 years of experience in the bidding for and management of construction projects in the north. His experience includes bidding on and managing the construction of over 300 km of Yukon highways, largely through submitting bids in response to invitations to tender issued by the Government of Yukon and other tendering authorities.

[10] KFN is a self-governing First Nation with offices in Burwash Landing. Roberta Martell is KFN's Executive Director and Math'ieya Alatini is the Chief.

[11] Kluane Corp. was originally incorporated as 19145 Yukon Inc., and is KFN's development corporation. Geordon Clark is the Executive Director of Kluane Corp. At para. 15 of her affidavit, Chief Alatini described the relationship between Kluane Corp. and KFN as follows:

> "One of our socio-economic goals is to develop a presence in the construction industry and Yukon and our vehicle for this is 19145 Yukon Inc. which is a corporate body incorporated pursuant to the laws of Yukon. It has a board composed of five persons. KFN considers all of its Citizens to be shareholders. KFN has invested a great deal of time,

> effort and money in preparing the corporation to help KFN achieve our the [as written] socio-economic goals."

[12] The project involved engineering and road upgrades for KFN, including modification of existing roads, and the installation of culverts and ditches. KFN was expecting to receive funding from the Government of Yukon for the project. Originally, KFN was hoping to use its own citizens as labourers and heavy equipment operators, viewing the project as an opportunity for training and capacity building. However, in March 2013, the Government of Yukon informed KFN that if it wished to access the funding, KFN must go through a public, open and competitive tendering process, in compliance with Yukon Government regulations in that regard. KFN agreed.

[13] On June 19, 2013, KFN issued the tender for the project. Section 3.1 of the Instructions to Bidders, included in the tender, provided:

> "3 BID SECURITY
>
> 3.1 The Bidder shall submit bid security with the bid...in the form of a bid bond in the amount of 10% of the bid price with a "Consent of Surety"..."

[14] Further, s. 2 of the "Tender and Acceptance Form" (included in the various documents comprising the tender), entitled "GENERAL AGREEMENT" provided:

> "The undersigned understands and agrees that:
>
> …
>
> 2.3. bid security, as detailed in the Instructions to Bidders must accompany the bid;
>
> …
>
> 2.10. this bid may not be withdrawn after the bid closing time and is irrevocable for a period of 30 days following the bid closing time;

> 2.11. if this bid is accepted and the Bidder fails to commence the Work within 7 days of receiving notification of acceptance of the bid by the Owner then: the Bidder's bid security may be forfeited at the discretion of the Owner…" (my emphasis)

[15] Further, both the Yukon Government's Contracting and Procurement Regulations and Contracting and Procurement Directive, which KFN agreed to follow to obtain funding, contemplate the provision of bid security as mandatory and as a ground for a determination of bid non-compliance. Section 6(1)(a) of the Contracting and Procurement Regulations provides:

> "If a procurement authority requires a person who is a bidder or a contractor to provide security in respect of the bid or the contract, the person must provide the security in the amount specified by the procurement authority;.." (my emphasis)

Section 59(1)(d) of the Contracting and Procurement Directive, provides:

> "The procurement authority will only reject a bid or proposal which has been received prior to the closing time where… the required bid security in the required form is not provided (if it is a requirement of the procurement);…" (my emphasis)

[16] Kluane Corp.'s bid was submitted to KFN before the bid closing time, which was 4:30 PM, July 3, 2013. However, it did not include a bid bond or other form of bid security. After closing time, KFN asked for and permitted Kluane Corp. to submit bid security, which it did on July 5, 2013. None of this is contested by KFN.

[17] The law of tenders and bids is not in dispute. A good summary of the law is found in *Cambridge Plumbing Systems Ltd. v. Strata Plan VR 1632*, 2009 BCSC 605, at paras. 14 to 32. When contractors submit bids in response to an invitation to tender, a contract arises between the owner and every contractor that submits a bid that is materially

compliant with the terms of the tender (“Contract A”). It is an implied term of Contract A that an owner may only award the contract to complete the project (“Contract B”) to a materially compliant bidder. If an owner awards Contract B to a non-compliant bidder, it breaches the obligations it owes to the compliant bidders pursuant to Contract A. Further, the breach of Contract A entitles the compliant bidder, who would have otherwise been awarded Contract B, to damages consisting of the loss of profits it would have received, had it been awarded Contract B.

[18] In *Cambridge*, at paras. 60 and 61, the court described the purpose of bid security, as well as the difference between a bid bond, said to be “critical during the tendering process”, and a consent of surety:

> “60 The bid bond is critical during the tendering process because it provides for damages in the event that any contractor refuses to enter into the construction contract or fails to perform under that contract. That is, in addition to providing assurance to the owners regarding performance under Contract B, the bid bond is material to the tendering process because it guarantees Contract A's irrevocability, which is a principal term of Contract A.
>
> 61 The consent of surety, on the other hand, is the guarantee from a reputable surety company that it will provide the requisite security for future obligations that might arise under Contract B, should it be awarded. This is critical security, of course, but it is material to the performance of the construction contract, not to the tendering process. This is a temporal distinction that differentiates the two forms of security within the Contract A/ Contract B analysis.”

[19] Further, the court stated, at para. 32, that if the omission or defect is essential, especially if it undermines the fairness of the competition, the bid at issue will be materially non-compliant:

> "If the omission or defect is essential, the materiality of that defect to the owner's decision-making process is measured objectively. In assessing the consequences of the defect, take into consideration the objectives underlying the tendering process as a whole and the reasonable expectations of the parties, particularly the other bidders in that process. If the defect undermines fairness of the competition or the process of tendering… (*Maple Reinders,* 2004 BCSC 1775, [2004] B.C.J. No. 2856 ("*Reinders*"), *Silex, Graham*), impacts the cost of the bid or the performance of contract B (*Double N*, *Silex, Graham*), or creates a risk of action by other (compliant) bidders (*Silex, Graham*), the bid at issue will be materially non-compliant."

[20] In *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, 2004 BCCA 5, at para. 34, the British Columbia Court of Appeal summarized when a bid will be considered materially non-compliant:

> "34 … material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select."

[21] In the case at bar, KFN's actions, in contacting Kluane Corp. after the bid closing time and providing it with an opportunity to provide bid security, confirms that the inclusion of bid security was significant to KFN and also that Kluane Corp.'s non-compliance was material.

[22] In *St. Lawrence College of Applied Arts and Technology v. Canada*, 2009 FC 545, at para. 11, the Federal Court confirmed that in a tender situation, the owner owes a duty of fairness to all the bidders engaged: (1) to not accept a non-compliant bid; (2) to not allow a bidder to rectify a defective bid; and (3) to not waive a material tender requirement for any bidder:

> "11 It can be seen from these general principles of tendering law that in responding to an invitation to tender a bidder must, as a rule, submit an offer which precisely conforms to the terms of the tender. Any variation from those terms -- at least with respect to a material item -- will disqualify the bid notwithstanding the offeree's [owner's] wish to consider it. The rationale for this is that the offeree [owner] owes a duty of fairness to all the bidders engaged in the tendering process -- a duty it breaches by considering a bid which is non-compliant with the terms of the tender. This is also the rationale for not allowing a bidder to carry out an *ex post facto* repair to its bid or, alternatively, for not allowing the offeree [owner] to waive a material tender requirement for one bidder before the award of Contract B [the construction contract]."

[23] In this case, KFN breached the duty of fairness it owed to the other bidders: (1) by accepting Kluane Corp.'s non-compliant bid; and (2) by permitting Kluane Corp. to submit bid security after bids closed.

[24] In the result, I find on this issue in favour of Cobalt.

2. Was Cobalt's bid materially compliant?

[25] Section 1.6 of KFN's Instructions to Bidders is critical to these reasons. Therefore, I have included the section in its entirety, as follows:

> "The List of Subcontractors on page 4 of the Tender and Acceptance form shall be submitted with the bid. Bidders must list <u>all</u> subcontractors proposed for the Work, including the use of Own Forces for the trades, if any. Only those subcontractors listed, may be used and may not be changed without the written consent of the Owner, including the use of Own Forces. The Owner may require the Bidder to submit evidence of the competence of subcontractors prior to acceptance of the Bid. If the Bidder states "own forces" for any work which requires licensing, the Owner may require proof of such licensing. Failure to comply with this request may be cause for rejection of the bid.

> Bidder must make best efforts to invite Yukon businesses (or local businesses, where the work site is located in a rural community) to bid on subcontracts related to the work of the contract. The Owner may require the Bidder to provide evidence of best efforts taken.
>
> A "Yukon Business" shall mean *"A business that meets two or more of the following criteria; the business employs Yukon resident(s); the business owns, for purposes directly related to the operation of the business, real property in the Yukon; the business operates a permanently staffed office, year-round in the Yukon; the business is owned, or is a corporation that is owned, 50% or more by Yukon residents."*
>
> A "Yukon Resident" shall mean: *"A person who has resided full-time in the Yukon for a minimum of the immediately preceding three months.*["] (emphasis already added)

[26] Further, in the "Tender and Acceptance" form, again under the heading "General Agreement", s. 2.4 provides:

> "The undersigned understands and agrees that:
>
> …
>
> 2.4. the Bidder must submit the List of Subcontractors including the names of <u>all</u> Subcontractors proposed for the Work, including the use of own forces for the trades, if any. Only those Subcontractors listed may be used and may not be changed without the written consent of the Owner. The Owner may require the Bidder to submit evidence of the competence of the Subcontractors prior to acceptance of the bid. If the Bidder states "own forces" for any work which requires licensing, the Owner may require proof of such licensing;" (emphasis already added)

[27] The argument of KFN's counsel here is based on the two mandatory requirements in s.1.6 of the "Instructions to Bidders". First, he submits that Cobalt failed to include a full list of its subcontractors; and second, he says that Cobalt falsely certified that it made best efforts to invite subcontract bids from local businesses in Burwash Landing. Further,

counsel submits that both of these requirements were essential to KFN, and therefore Cobalt's alleged breaches constitute material noncompliance. Accordingly, Cobalt's bid was non-compliant from the beginning and KFN was incapable at law of accepting it.

Failure to include a full list of subcontractors

[28] There is no evidence that Cobalt had subcontracted with any other Yukon business besides Yukon Engineering Services ("YES"), which it listed in the "List of Subcontractors" referred to in s. 1.6 of the "Instructions to Bidders".

[29] Therefore, as I understood him, KFN counsel's only remaining argument here turns on his interpretation of the phrase in s. 1.6 requiring the bidder to include in the List of Subcontractors any "Own Forces for the trades" which it intended to use on the project. Counsel submitted that the word "trades" is broad enough to include skilled workers who operate road construction machinery. The argument relies on some rather dated case law, beginning with *Capaniuk v. Sluchinski*, a decision of the Alberta District Court, [1963] 44 W.W.R. 455. *Capaniuk* was a case dealing with the definition of "trade" under *The Exemptions Act* of Alberta. According to the *Act*, certain tools and equipment were exempt from seizure by an execution creditor if they were necessary in the practice of a "trade". The judgment debtor in the case claimed to be exempt because he was a "sawmill operator". Therefore, the court had to address the definition of "operator" and ultimately concluded that it was wide enough to embrace "a mechanic, craftsman or artisan within the meaning of the definition of tradesmen" (para. 9).

[30] This led KFN's counsel to explore how the term "mechanic" has been interpreted. For example, he relies on *Re Toronto Star Ltd. v. Printing & Graphics Communications*

Union, Local N-1, (1976), L.A.C. (2d) 397 which is an arbitration decision. The case involved a dispute about a collective agreement and the filling of certain vacancies resulting from the death, retirement or disability of former employees. At para. 17, the arbitrator referred to the definition of "mechanic" from the *Oxford Universal Dictionary* (3d) as including "one who uses machinery", and from *Webster's Third New International Dictionary*, as "a man skilled in the…operation of machines".

[31] The court in *Hutchinson v. Shearer*, a 1918 decision of the Alberta Supreme Court [Appellate Division], cited at 1918 CarswellAlta 33, was dealing with the definition of "mechanic" in a section of the *Motor Vehicle Act*. The court, at para. 9, referred to Webster's Dictionary, which defined the term as including "…one skilled or employed in shaping and uniting materials…into any kind of structure…"

[32] KFN's counsel appears to have concluded from all this that any of Cobalt's employees (i.e. "own forces") who would be working on the project by operating road construction machinery or by "shaping and uniting…road construction materials into a road structure" would fall within the definition of "trades", and therefore ought to have been included in the List of Subcontractors.

[33] The fundamental flaw in this argument is that it ignores the fact that s. 1.6 of the Instructions to Bidders is dealing with subcontractors and not employees. The distinction between the two is trite and fundamental. Section 1.6 states:

> "Bidders must list <u>all</u> subcontractors proposed for the Work, including the use of Own Forces for the trades, if any."

The use of the word "including" tells me that Cobalt would only be required to list any employees working in a trade, if those employees were also acting as subcontractors.

However, there is no evidence to that effect. Therefore, regardless of the interpretation of the term “trades”, KFN’s argument here must fail.

[34] Further, the argument of KFN’s counsel that Cobalt’s equipment operators should be considered “trades” is inconsistent with the terms of the tender. As the project was for road construction and related improvements, the successful bidder would necessarily have to employ a number of equipment operators. If those necessary operators were considered “trades”, the Instructions to Bidders would not have directed bidders to list the “Own Forces for the trades, if any.” The words “if any” anticipate that a bidder may not have to use any trades at all to complete the project. However, this reasonable interpretation could not stand if all of the bidder’s employees acting as equipment operators, which the bidder would necessarily have to use on such a project, were included within the definition of “trades”. Thus, the wording of the tender itself acknowledges that equipment operators do not fall within, and cannot be considered as, “trades”.

[35] In any event, I find that the interpretation of “trades” by KFN’s counsel is far too broad and is based on questionable and rather dated authorities. *Capaniuk* is arguably distinguishable on its facts, as the judgment debtor had identified himself as a “sawmill operator”. The word “operator” does not arise at all in the case at bar. Further, *Toronto Star* was an arbitration case and not of much precedential authority. Finally, *Hutchinson* was from much earlier era (1918) and is arguably distinguishable from the context of our technical modern times.

[36] “Trade” is defined in *The Concise Oxford Dictionary* (eighth edition) as “… a skilled handicraft esp. requiring an apprenticeship (*learnt a trade; his trade is plumbing*)…”.

Further, the word “trade” is very general and must be considered in context. In *R. v. Minor*, (1920), 52 D.L.R. 158, at para. 23, the Nova Scotia Court of Appeal referred with approval to *27 Halsbury’s Laws of England*, at p. 509, which stated:

> “The word [trade]…is one of very general application, and must always be considered with the context with which it is used.”

[37] In this regard, the only evidence about the *context* within which “trades” should be interpreted in this case is in Mr. Rudolph’s second affidavit, at para. 7, where he deposed:

> “Cobalt did not bid the Project as including any trades work. The word “trades” in the construction industry refers to skilled, manual workers who obtain tickets through apprenticeship and journeyman programs such as electricians and plumbers.”

This evidence is un-contradicted and unchallenged, and I prefer this interpretation to that put forward by KFN’s counsel.

[38] Accordingly, since Cobalt was not planning to use any of its own forces as trades on the project, there was no need for it to include any of its own forces in the List of Subcontractors. Thus, the absence of any of Cobalt’s own forces from the List did not render the bid non-compliant.

Failure to invite subcontract bids from local businesses

[39] The argument of KFN’s counsel here appears to turn on evidence obtained from Mr. Rudolph at his examination for discovery on January 22, 2014. At p.136 - 137, after a brief discussion about a document which referred to KFN’s desire to create an opportunity for youth, unemployed and underemployed Burwash Landing residents to

gain experience in jobs and trades that would support their future employment in the mining and construction industries, the following question and answer appear:

> "[Q] Is it fair to say that when you deposed earlier about the relationship you have with the First Nation, your knowledge of the people and those people who worked and had been trained by Golden Hill, did you take any steps before filing the bid to determine who underemployed [as written] and unemployed people were?
>
> [A] No, but we worked in the area quite a bit, and we know that there are a very limited amount of people to work, just by the sheer size of town."

[40] The argument continues that when Mr. Rudolph certified that Cobalt had made "best efforts… to invite subcontract bids from… local businesses" (in this case, from Burwash Landing), he was being untruthful and dishonest. However, the argument is based on the false premise that Cobalt had some type of an obligation, pursuant to the tender, to seek out potential subcontractors from Burwash Landing before submitting its bid. That is simply not the case.

[41] Section 1.6 of the Instructions to Bidders requires bidders to list all subcontractors proposed for the project "if any". These words presuppose that some bidders may have no need of <u>any</u> subcontractors. Further, s. 1.6 only requires bidders to:

> "…make best efforts to invite Yukon businesses (or local businesses, where the work site is located in a rural community) to bid on <u>subcontracts related to the work</u> of the contract." (my emphasis)

Thus, if the bidder has <u>no</u> subcontracts related to the work, then there is no obligation to make best efforts.

[42] Indeed, there is no evidence that Cobalt had any need to subcontract with the businesses in Burwash Landing, at the time it submitted its bid. The only evidence on point, again uncontradicted and unchallenged, is from Mr. Rudolph in his second affidavit, where he deposed, at paras. 6 and 12:

> "6. Cobalt had not contracted or committed to contract with any other persons [besides YES] for the purposes of completing the Project. Cobalt had sufficient employees and owned sufficient equipment to complete the Project without entering into any such contracts.
>
> …
>
> 12. In my experience, subcontracts only arise in the road construction industry when a general contractor requires specialized services to complete a specific part of a Project, usually for a fixed price that is agreed-to in advance. For example, Cobalt required the specialized services of YES to complete the engineering portion of the Project. Through the subcontract, YES assumes full responsibility for completing that portion of the work. It also assumes full responsibility for any associated contractual risk, such as under-bidding the Project or causing delays on the Project."

[43] Mr. Rudolph also provided the following testimony at p. 51 of his examination for discovery:

> "[Q] You had all the equipment that you needed for this job?
> [A] Correct.
> [Q] And you had all the operators that you needed for this job?
> [A] Correct.
> [Q] So, you had no need for any other subcontractor, other than YES and its subcontractors?
> [A] We had no need for them."

[44] Thus, since Cobalt had no need of any subcontractors from Burwash Landing, then there were none to include in the List of Subcontractors. Further, the only

subcontractor which Cobalt did engage with for the project was Yukon Engineering Services, which is a Yukon business located in Whitehorse. Finally, since Mr. Rudolph properly listed Yukon Engineering Services on the List of Subcontractors, he was being truthful when he certified that he had made "best efforts…to invite subcontract bids from Yukon… businesses."

[45] Before leaving this issue, it is worth remembering that this is not a situation where Cobalt had no intention of engaging with KFN members in the performance of this project. Indeed, the covering letter of Mr. Rudolph, submitted to KFN along with the bid, dated July 3, 2013 expressly states Cobalt's intention to hire and train as many KFN citizens as possible. The letter provides:

> "…We have worked with and trained many Kluane First Nation (KFN) members in the past. We propose to hire as many KFN citizens that we can. As well, we are prepared to train as many as possible in all aspects of road construction. We will also be able to hire some local owner/operators that are suitable for this project. We will ensure that we work closely with the KFN project manager and residents. Cobalt will always maintain access to local residents."

Further, of the seven bid evaluation criteria (in s. 10 of the Instructions to Bidders), one was entitled "Inclusion of Kluane First Nation members, including but not limited to employment, sub-contracting and training". I will refer to this as the "local hire" criteria. The KFN panel which reviewed the bids assigned each of these seven criteria a variable number of points, with all seven totalling 1000 points as a potential perfect score. The panel assigned 250 points to the local hire criteria and scored Cobalt as having achieved 150 out of a possible 250 points, i.e. 60%, or a passing grade. And to be clear, at no time did the panel inform Cobalt that its bid was materially non-compliant on the basis of

the local hire issue, or indeed on any issue. Finally, I repeat that after weighing all seven criteria, Cobalt was the second-ranked compliant bid.

3. If Cobalt's bid was compliant, what are its damages?

[46] The measure of damages for breach of a tender contract is the loss of profit. This was confirmed by Binnie J. in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, at para. 73:

> "73 The well-accepted principle is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost to the respondent of executing or completing the work, i.e., the loss of profit: *M.J.B. Enterprises Ltd*., *supra*, at p. 650; *Twin City Mechanical v. Bradsil* (1967) Ltd. (1996) 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), at pp. 225-26; S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at para. 5.890; H. McGregor, *McGregor on Damages* (16th ed. 1997), at para. 1154."

[47] As Cobalt submitted the highest-ranked, materially compliant bid, it should have been awarded the construction contract for the project (Contract B), assuming KFN had properly fulfilled its obligations under Contract A and rejected Kluane Corp.'s bid for failing to include bid security.

[48] Accordingly, Cobalt is entitled to damages to put it in the place it would have been had KFN not breached Contract A. The measure of Cobalt's damages is its anticipated loss of profit.

[49] In his first affidavit, Mr. Rudolph deposed, at paras. 11 through 17, about how he prepared the pricing for Cobalt's bid and the rationale for the anticipated profit of

$318,251. He also attached as an exhibit an estimate sheet with details as to the various anticipated expenses for labour and equipment, as well as the anticipated profit.

[50] In response to this affidavit, Geordon Clark, Kluane Corp.'s Executive Director, swore a brief seven paragraph affidavit with some details about Kluane Corp.'s anticipated profit in comparison to some of their actual expenses in having performed the work. Notably, Mr. Clark deposed that Kluane Corp.'s ultimate profit on the project was $77,465. Although KFN's counsel made few if any written or oral submissions on the topic of damages, this affidavit was presumably tendered to challenge the reasonableness of Cobalt's anticipated profit of $318,251.

[51] Mr. Rudolph's second affidavit was submitted partially in response to Mr. Clark's. In this second affidavit, Mr. Rudolph makes a number of points in an effort to explain the difference between the anticipated profits of the two companies:

- Kluane Corp. incurred a cost of $419,070.90 for equipment rental. However, since Cobalt owned all its own equipment, its internal equipment cost, including fuel and mobilization would have only been $265,770.
- Kluane Corp. paid $189,005.90 for professional services, project management and engineering, whereas Cobalt would have obtained the same services from YES for only $107,000.
- Kluane Corp. scheduled three months to complete the project, whereas Cobalt intended to complete the project in just under two months.
- Kluane Corp.'s bid price for the project was $929,500. However, its recorded revenue from the project was only $902,723.11. There is no explanation from Kluane Corp. why it made over $26,000 less than it bargained for on the project.

- Other differences between the estimates of profit would arise from: differences in the experience of the two companies in the construction industry; differences in their material suppliers; and differences in the efficiencies of the equipment employed.

[52] It is also significant here that Mr. Rudolph has over 30 years of experience in bidding on construction contracts in the Yukon. Once again, that evidence was unchallenged and uncontradicted.

[53] In the result, I am satisfied that Cobalt's estimate of lost profit of $318,251 is a reasonable number, and I award that sum as damages.

CONCLUSION

[54] In summay, I have concluded that:

1) this was an appropriate case to proceed by way of summary trial;
2) KFN breached Contract A, i.e. the tender contract, by accepting a materially non-compliant bid from Kluane Corp.:
3) the bid submitted by Cobalt was materially compliant and ranked in second-place after Kluane Corp.'s bid;
4) accordingly, Contract B, i.e. the project contract, ought to have been awarded to Cobalt; and
5) Cobalt is awarded damages in the amount of $318,251.

[55] Further, Cobalt is entitled to pre-judgment interest and post-judgment interest on the award of $318,251 pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128.

[56] I only heard briefly from the parties on costs. The usual rule is that costs follow the event, meaning here that Cobalt, as the successful litigant, is entitled to its party and party costs at scale B: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal refused, 2002 BCCA 454.

[57] However, in her written argument filed April 10, 2014, Cobalt's counsel made a submission for special costs on the basis that KFN had alleged that Cobalt had acted dishonestly in submitting its bid and that this would have an adverse impact on the company's reputation. Counsel referred to *Silver Peak Resources Ltd. (Trustee of) v. Golden Arch Resources Ltd.*, 2012 BCSC 346, in support of this position.

[58] The court in *Silver Peak* discussed the general principles on special costs in this context at para. 7:

> "7 A failed allegation of fraud, deceit, dishonesty and similar corrupt conduct in a civil law suit will more readily justify an award of special costs against the maker than will other types of unproven allegations: *Stenner v. ScotiaMcLeod*, 2009 BCSC 1348, 2009 CarswellBC 2640 (S.C.). However, the one does not automatically follow the other. The purpose of special costs is to chastise a spectrum of misconduct that the court considers to be reprehensible or otherwise deserving of judicial rebuke: *Mayer v. Osborne Contracting Ltd*. 2011 BCSC 914. Whether unfounded accusations of fraud are sufficiently reprehensible or otherwise warrant the court's condemnation through costs depends on the particular circumstances: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161."

[59] In this case, I decline to exercise my jurisdiction to award special costs. I bear in mind here that Cobalt's bid was initially accepted, reviewed and scored by the KFN panel as a compliant bid. It was not until March 14, 2014 that KFN alleged Cobalt's bid was materially non-compliant, through its amended amended statement of defence. Indeed, I

also have regard here for my review of KFN's pleadings in this matter, as well as the written argument of KFN's counsel on this application, which I found to be rather prolix and based on a fundamental misunderstanding of s. 1.6 of the Instructions to Bidders. I have not referred to much of the written argument in these reasons, as I did not find it to be relevant to the issues. This all leads me to suspect that the decision to attack the veracity of Cobalt's certification of its List of Subcontractors was more likely based on legal advice received, rather than initiating instructions from the client. Thus, I do not view this as a case where a party's reprehensible conduct is deserving of sanction.

_____

Gower J.