SUPREME COURT OF YUKON

Citation: *Mega Reporting Inc. v. Yukon (Government of),* 2017 YKSC 69

Date: 20171116
S.C. No. 14-A0059
Registry: Whitehorse

BETWEEN

MEGA REPORTING INC.

PLAINTIFF

AND

GOVERNMENT OF YUKON

DEFENDANT

Before Madam Justice M.A. Bielby

Appearances:
Mark Wallace — Counsel for the Plaintiff
Kimberly Sova — Counsel for the Defendant

REASONS FOR JUDGMENT

OVERVIEW

[1] In January 2013, the Government of Yukon (Yukon) issued a Request for Proposals (RFP) inviting interested parties to bid on providing court transcription services for Yukon. Mega Reporting Inc. (Mega) now seeks damages, interest and costs against Yukon arising from Yukon's rejection of its bid made in response to that RFP.

[2] This summary trial was held pursuant to a Consent Order granted in January 2017. Having heard the evidence and arguments, I agree that the issues that have been raised in it are suitable for disposition under the provisions of the Summary Trial Rule: Yukon, *Rules of Court*, *Y*OIC 2009/65, r 19. It would not be unjust to decide the issues on this application and I am able, on the whole of the evidence led, to make the findings of fact necessary to decide the relevant issues of fact and law so as to give judgment in this matter. The facts are not substantially in issue.

SUMMARY OF FACTS:

[3] In 2013, to reduce costs, Yukon decided to change the way it conducted court reporting and transcription in the territory. Specifically, Yukon decided to replace live court reporters with a digital recording system in both the court and the registry. Independent transcription services would then be used to transcribe those recordings as required.

[4] To choose an independent transcription service, Yukon posted the RFP, dated January 20, 2013, inviting interested parties to submit a tender for the transcription of these digital recordings. 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. The RFP purported to impose a waiver on behalf of all bidders for all damages, expenses or costs arising from, among other things, any actual or alleged unfairness on the part of Yukon at any stage of the RFP process. It also provided that Yukon was not obliged to accept the lowest price or any bid.

[5] Two bidders submitted proposals, one of which was Mega. Yukon established an evaluation committee to evaluate the two bids. It met once. After concluding that Mega's proposal did not score the required minimum on the experience and performance criteria, the committee did not open or consider Mega's sealed price envelope containing its bid price. The committee then proceeded to consider the remaining proposal. Yukon ultimately awarded the contract to this other bidder, eventually extending that contract from one year to three years in duration. Mega had bid a lower price than the ultimately successful bidder.

[6] The evaluation committee did not make contemporaneous records of its discussions while evaluating Mega's proposal. Nor did it record the reasons for its decisions in relation to any component of the evaluation process. One member of the evaluation committee, Mark Daniels, Yukon's Manager of Court Administration for the Department of Justice, made some handwritten notes of the committee's deliberations directly on the proposal documents contained in Mega's first envelope. However, those notes do not reveal how Mega was scored or even what ultimate score was awarded to its proposal. The committee did not create or preserve a bid scorecard of any kind.

[7] Weeks later, Mr. Daniels and others prepared a typed document that purported to record the scores given to Mega's proposal by the evaluation committee. This explanatory document was prepared, based on the handwritten notes made by Mr. Daniels and his memory, with a view to provide Mega with information on how the evaluation committee arrived at its evaluation and how Mega could improve future proposals rather than as an attempt to recreate the actual evaluation of the Mega proposal.

[8] Mega claims the process followed by the evaluation committee violates Yukon's admitted obligation to conduct a fair, accountable, and transparent bidding process. In support of this claim, Mega tendered expert evidence in the form of an expert report from Michael Asner. It sought to have Mr. Asner qualified to give opinion evidence in the area of government procurement. While Yukon originally challenged the admission of his expert report, its counsel ultimately agreed that a redacted version of it, containing some opinion, be admitted into evidence.

[9] The claim is allowed and damages awarded to Mega in the sum of $335,844.93. The parties may approach me within 30 days of the filing date of this judgment to set the amount of interest and costs payable, if necessary.

ISSUES:

a. Did Yukon fulfill its obligations to evaluate Mega's bid within a fair, accountable, and transparent bidding process?

b. If so, does the exclusion clause in the RFP bar Mega's claim?

c. If Mega has a right of recovery, has it proven and quantified damages?

ANALYSIS:

Did Yukon fulfill its obligations to evaluate Mega's bid within a fair, accountable, and transparent bidding process?

[10] The tendering process was subject to the *Contracting and Procurement Regulation*, YOIC 2013/19 (the *Regulation*), and the Yukon Ministry of Highways and Public Works *Contracting and Procurement Directive* (the *Directive*), which imposed duties on Yukon in relation to fairness, openness and transparency, and accountability in the tendering process. The *Regulation* was issued pursuant to the provisions of the *Financial Administration Act*, RSY 2002, c 87 (the *Act*), and the *Directive* was issued by the management board, a committee of the Executive Council of Yukon pursuant to s 4(3) of the *Act*.

[11] The *Directive* and *Regulation* were both submitted in evidence as attachments to an undated letter, apparently intended for public distribution, from Mike Johnson, Deputy Minister, Highways and Public Works. In this letter, Mr. Johnson states that the principles that apply to procurement by Yukon, as established by the *Regulation* include:

> **Fairness** – to observe procedural policies free of bias, personal interest and conflict of interest.

> **Openness and transparency** – to create the maximum number of competitive procurement opportunities, and to be transparent in the way business is conducted.
>
> **...**
>
> **Accountability** – to be willing and able to account for the way contracting and procurement activities have been conducted.

That statement echoes the provisions of s 2 of the *Directive*.

[12] While these principles are found in the *Directive*, not the *Regulation*, and while the *Directive* is not itself a regulation, it was issued pursuant to powers created by statute. As Mr. Johnson's letter states, these principles apply to procurement by Yukon "as established in the Regulation": Further, by distributing the *Directive* as attached to the *Regulation*, in a single consolidated document, Yukon represented these duties as being statutory. I will interpret them in that light. I am reinforced in this finding by the fact that the RFP itself provided that "[t]his procurement is subject to the Government of Yukon Contract Regulations and *Contracting and Procurement Directive*".

[13] Indeed, Yukon does not dispute that it had a duty to fairly evaluate the bids submitted in response to the RFP both pursuant to the operation of the *Regulation* and the *Directive*, and at common law; see ***Martel Building Ltd. v. Canada*** [2000] 2 SCR 860.

[14] We must thus examine whether its evaluation of Mega's proposal met those standards. The instructions contained in the RFP provided that bidding was a two-step process. First, each proposal would be evaluated against certain "technical" criteria. Second, only those proposals that met or exceeded the minimum acceptable scores in that technical evaluation would have their price envelopes opened and considered. The instructions indicated that only those bidders who scored at least 50% on the evaluation of each of the components that made up the technical score, and who received at least 700 out of a total of 900 available technical points would have their price envelopes opened and considered.

[15] The RFP, however, did not describe the method that would be used to award these points, nor disclose how extra points could be awarded. It did require three references "for work similar in scope to that described in this RFP and performed within the last 5 years" but did not require supporting letters from those references.

[16] After receiving the two proposals, Yukon established an evaluation committee which met on one occasion to evaluate both. No evidence was led showing that any of the members of the evaluation committee had training in relation to conducting such evaluations. No evidence was led about the method applied by it to award points. No evidence was tendered as to the method used in evaluating the competing, ultimately

successful proposal, nor as to the scores awarded to it. No contemporaneous or complete record was kept showing how it proceeded through the evaluation.

[17] While a rough note of the points awarded was made by Mr. Daniels at the time, that note was not retained or produced by Yukon. The only surviving record made was contained in handwritten notes made by him on Mega's bid proposal.

[18] Several weeks after the other bidder was awarded the contract, Mega requested a meeting with Mr. Daniels and other Yukon officials to inquire why it had not been the successful bidder. In preparation for that meeting, Mr. Daniels produced a typed document that purported to disclose the points that had been awarded to Mega. That document stated that the evaluation committee gave Mega a score of 150/300 for Qualifications and Experience, and a score of 215/500 for Approach/Methodology—the main two components of the technical criteria. Mega was said to have scored below 50% on Approach/Methodology because of its failure to provide satisfactory responses in relation to several subcomponents of that category including: Security and Transportation, Quality Control, Technological Resources and Business Continuity Plan. As a result of failing to meet the minimum technical score, the evaluation committee stopped evaluating Mega's proposal and did not open Mega's price envelope.

[19] When examined for Discovery, however, Mr. Daniels testified that this typed document did not reflect what actually occurred during the evaluation of Mega's bid. The document was prepared to assist Mega to bid on future contracts, and the information contained in it was based on Mr. Daniels' memory, augmented by his handwritten notes made on Mega's bid document during the evaluation. On examination, 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.

[20] One of Mr. Daniels' handwritten notations was "no letters of reference". The RFP required that proponents submit "three references for work similar in scope to that described in this RFP" but did not require supporting letters from those references. Though Mega submitted the names and contact information of references as required by the RFP, it apparently received a reduced score as a result of not submitting reference letters. I note that, unlike the RFP in this case, the updated, current format of requests for proposals used by Yukon does specifically require letters of reference to be submitted with bids.

[21] Mr. Daniels stated that under the evaluation process used, a proposal that did not meet the minimum requirement set out in the RFP for a given criterion would receive less than 50% of available points in that category while one that met the requirement precisely would get 50% of the points and one that exceeded the minimum requirement could receive more. That process was not described in the RFP. The process description provided in that document may be interpreted to indicate that full points are earned in each category for a bidder who meets the criteria given for that category.

[22] In summary, Mr. Daniels' notes are minimal and do not provide either the points Mega was awarded on each criteria, or the reason why those points were awarded. Yukon has provided no original documents or records which recorded the analysis that led to the awarding of these scores. Mr. Daniels was unable to recall the specifics of the process used to evaluate bids but did recall that the evaluation committee did not award full points in any category where the bidder met the stated requirements for that category. His notes indicate that Mega's score was reduced for failing to provide letters of reference even though none were required by the RFP. No formal score card was contemporaneously created during the committee meeting, and no true formal evaluation report was prepared. At the end of this evaluation process, Yukon awarded a one-year contract, with a right to renew for up to two additional years, to the other bidder.

[23] Michael Asner, qualified by consent to give opinion evidence in the area of government procurement, opined that the RFP itself was flawed in that it provided insufficient or incorrect information to bidders. The RFP failed to explain the method by which the actual evaluation scores would be reached, or the fact that bidders could receive extra points for surpassing the minimum requirements. He also criticized the method by which the evaluation took place to the extent that was known. Specifically, he criticized Yukon for reducing Mega's score for its failing to provide letters of reference from its referees when letters of reference were not identified as a requirement in the RFP.

[24] Mr. Asner further stated that he could not conclude whether Mega's bid proposal met the evaluation criteria set out in the RFP because of the lack of a formal evaluation process and lack of documentation provided. He finally opined that the process that was followed was not fair and transparent because transparency requires that an entity to be able to show via documents generated contemporaneously that the process it used and the decisions it made were fair. Transparency provides the proof of fairness. He observed that a reconstruction of events several months after the conclusion of a bid process is not transparent. Transparency requires generation of minutes or reasonably thorough notes during the evaluation meeting.

[25] Yukon argues, however, that it met its obligations to conduct a fair, transparent and accountable bidding process through the creation and provision of evaluation criteria to bidders. It invites the Court to draw the inference that applied those criteria through assessment of the evidence that does exist, including Mr. Daniels' evidence at discovery, his handwritten notes made during the evaluation of Mega's bid, and the typewritten memoranda prepared several months post-evaluation.

[26] In ***Almon Equipment Ltd v. Canada*** *(Department of Public Works and Government Services)*, [2011] CITT No 18 at paras 27-33, the Canadian International Trade Tribunal usefully commented on a similar circumstance, as follows:

27 Indeed, the evaluators' imperfect recollection of events in this case underscores the importance of proper record keeping to the integrity and efficiency of the competitive procurement system. In this regard, and as examined in greater detail below, faulty record keeping fails both purchasers and suppliers, and poses serious challenges to the Tribunal's procurement review mandate. In short, it fails the public procurement system as a whole.

28 The credibility and integrity of the competitive procurement system rest, in large part, not only on bids being properly assessed against the prescribed evaluation criteria in actual fact but also on the supplier community's perception that bid evaluations have been conducted in a fair and transparent manner. In this regard, adequate record keeping by procurement authorities is integral to the ability of a potential supplier to assess whether its bid has been fairly evaluated against the rated criteria contained in a solicitation and to identify and assess potential grounds of complaint.

29 Proper record keeping allows the procurement authority to justify its decisions and the reviewing body to determine precisely what has transpired. In addition, it is conducive to fulfillment by a procurement authority of its duty of fairness to all potential suppliers. Finally, proper record keeping contributes to the Tribunal's ability to fully assess the validity of procurement complaints brought before it. It is therefore incumbent upon procurement authorities to keep proper records.

30 Having reviewed the typewritten and handwritten consensus scoring sheets, the Tribunal considers that the explanatory comments that support the specific scores were at times deficient, illegible, unintelligible or even non-existent. With respect to the comments that those documents did contain…, the Tribunal is of the view that they did not reflect the totality of the factors that were taken into account in determining the specific scores for Almon's bid. The failure to fully identify the factors upon which the scoring was based renders it difficult for the Tribunal to assess whether Almon's bid has been fairly evaluated against the rated criteria prescribed in the RFP.

...

33 In the circumstances of the present case, the Tribunal's view is that the failure of the evaluators to set out, in the contemporaneous record, all the factors that were considered in the scoring of Almon's technical bid constituted a fundamental deficiency in the evaluation process itself. It is the Tribunal's further view that such a deficiency could not be "cured" after the fact by information contained in subsequent evidence and information [footnotes omitted].

[27] Similarly, I decline to draw the inference that Yukon fairly and properly evaluated Mega's proposal from the simple fact that it did in fact evaluate that proposal. That inference is not the only inference reasonably available on the evidence. Not only does the available evidence suggest that Yukon did not fairly and properly evaluate Mega's proposal, for example by penalizing Mega for not submitting reference letters, but the limited available evidence itself demonstrates Yukon's failure to meet its obligations. The evidence is inadequate to demonstrate how the bid was evaluated, yet Yukon had total and sole control over the creation of this record. That is even more significant here than in Almon where the bid process was found to be unfair despite the evaluation tribunal having created and produced score sheets.

[28] Yukon cites ***Elite Bailiff Services Ltd v. British Columbia***, 2003 BCCA 102 at paras 27-28, 223 DLR (4th) 39 for the proposition that the duty of fairness does not require disclosure of the exact weight or number of points the evaluation committee allocated to constituent parts of a proposal. However, the situation in *Elite* is different from this case. In *Elite*, the request for proposal was evaluated using a detailed "Rating Guide" which "specified the maximum points that could be assigned to each criterion specified": *Elite* at para 14. The evaluation committee in *Elite* created contemporaneous scores using the Rating Guide. In this case, there is no detailed Rating Guide or scorecard comparable to *Elite*, and no contemporaneous record of how points were actually allocated was made.

[29] Rather than supporting the argument that no contemporaneous record need be kept when evaluating proposals submitted in response to a request for proposals, *Elite* demonstrates that record-keeping alone, even when undertaken, does not insulate against claims arising from an arbitrary process.

[30] Also, the *Directive* imposes duties upon Yukon beyond the general common law duties at play in *Elite*. For example, the *Directive* provides that Yukon had to be able to account for the way contracting and procurement activities have been conducted. Not only was Yukon unable to show the basis upon which each criterion was evaluated, the limited evidence provided demonstrates that the process used by the evaluation committee was not adequately described in the RFP. This is not a situation where Mega is inviting the Court to substitute its own evaluation of the required criteria for that conducted by the evaluation committee as addressed in ***Continental Steel Ltd v. Mierau Contractors Ltd***, 2007 BCCA 292 at para 28, 283 DLR (4th) 422. Rather, this is a case where the manner and substance of the evaluation of those criteria by the evaluation committee is largely unknown.

[31] Even without consideration of Mr. Asner's expert evidence, I would have concluded that the evaluation Yukon conducted of Mega's bid failed to meet its duties of fairness, accountability, and transparency. From the limited evidence that does exist, largely being Mr. Daniels' handwritten notes, we know that the evaluation committee acted unfairly in marking Mega down for failing to provide letters of reference. We also know that the process used by the evaluation committee to decide the value of points

assigned for meeting the basic criteria was not described in the RFP. In the face of this, the evaluation committee's failure to keep a record of its full route to decision prevents Yukon from refuting the concerns raised about a lack of fairness, transparency, and accountability in the evaluation of Mega's bid.

Does the exclusion clause in the RFP bar Mega's claim?

[32] Yukon argues that Mega's claim is barred by a waiver contained in clause 25 of the RFP which provides:

> 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 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].

[33] Not every waiver is effective to bar proposed claims. To assess whether a particular waive is effective, Justice Binnie in ***Teracon Contractors Ltd. v. British Columbia (Transportation and Highways*)** [2010] 1 SCR 69, paras 62, 121-123 dissenting on other issues, sets out a three pronged analysis that has been widely followed since. Each prong of that analysis must be found to exist for a waiver to operate. It is not necessary for me to consider the first two prongs here, i.e., to determine that the waiver was intended to apply to these circumstances through an interpretation of the RFP or to examine whether it was unconscionable at the time the contract was made, arising from the unequal bargaining power of the parties. That is because of my conclusion, as follows, in application of the third prong of the test, that public policy reasons exist which should lead the Court to refuse to enforce the waiver and that those reasons outweigh the very strong public interest in the enforcement of contracts.

[34] Generally, public policy will prevent a government from using a waiver clause to restrict access to benefits created by its own legislation. In ***Health Care Developers v. Newfoundland*** (1996), 141 Nfld & PEIR 34 at para 63, 136 DLR (4th) 609 (CA), Cameron JA concluded that:

> If there is a conflict between provisions of the tender documents and those implied in contract A by virtue of legislation, the terms implied by the legislation must prevail. Unless the legislation permits the parties to contract out of the provisions, they cannot do so. The policies of the [relevant legislation] would be completely undermined if the Government could, by a term of contract A, avoid the very thing the Legislature intended to accomplish.

No provision in the *Act*, *Regulation* or *Directive* permits Yukon to contract out of its duties of fairness, accountability, and openness and transparency in the procurement process.

[35] Similarly, as the Supreme Court noted in ***Ontario (Human Rights Commission) v. Etobicoke (Borough)***, [1982] 1 SCR 202 at 214, 132 DLR (3d) 14, where legislation has been enacted "for the benefit of the community at large and of its individual members", it "falls within that category of enactment which may not be waived or varied by private contract". This is so even when the legislation does not contain an express provision restricting individuals' ability to contract out of it: *Etobicoke* at 213. More recently, in ***Niedermeyer v. Charlton***, 2014 BCCA 165 at para 114, 374 DLR (4th) 79, the BC Court of Appeal held that, where a legislative regime is intended as a benefit to the public interest, "[i]t would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime".

[36] Government procurement involves the expenditure of large amounts of public funds. As observed in *Almon* at para 28, "[t]he credibility and integrity of the competitive procurement system rest, in large part, not only on bids being properly assessed against the prescribed evaluation criteria in actual fact but also on the supplier community's perception that bid evaluations have been conducted in a fair and transparent manner." The public, therefore, has an overriding interest in making sure that its funds are being expended in such a manner as to ensure the competent provision of adequate goods and services at a reasonable price. The legislation that directs this to occur in the Yukon, being the *Regulation* and the *Directive*, thus falls within the category of enactment which may not be waived by private contract.

[37] Yukon argues that public policy concerns should be offset by the fact that the RFP granted Mega the right, which it did not use, to challenge the contract award through the "Bid Challenge Process". However, while the right to challenge a bid was indeed provided in the RFP, the deadline for launching such a challenge was not disclosed in the RFP. By the time Mega in fact contacted Yukon for an explanation of its decision to award the contract to another bidder, that deadline, 60 days following the closing of the tender process or 15 days following the award of the contract, had already passed.

[38] In any event, the Bid Challenge Process would not have provided the remedies sought in this litigation. As admitted by Yukon's counsel, the only remedy available under the RFP arising from an unfair tendering process was potential recovery of the unsuccessful bidder's costs for preparing its bid and attending the bid challenge hearing. It would not have provided recovery for the damages sought in this litigation.

[39] The wording of the waiver contained in the RFP speaks so directly to the promises contained in the Directive that it is not possible to conclude that it was not aimed directly at annulling the effect of the legislation. Public policy concerns are particularly evident where a government passes legislation designed to ensure the public of the existence of a certain set of protections, then attempts to privately contract out of the provision of those protections.

[40] To give effect to the waiver would permit Yukon to continue to represent to the public that it engages only in fair, accountable, open and transparent procurement processes without suffering any consequences for failing to do so. In other words, it would allow Yukon to say one thing and then to do the opposite with impunity. Though the public has a strong interest in maintaining the right to contract freely, in this case, this interest is offset by a similar public interest in ensuring a fair, accountable, open and transparent bid process. This is particularly so in circumstances where large amounts of public funds are on the line.

[41] I have therefore concluded that to allow the waiver contained in the RFP to bar Mega's claim would be contrary to public policy.

Has Mega proven and quantified damages?

[42] Following the evaluation process, Yukon awarded a one-year contract, with a right to renew for up to two additional years, to the other bidder, at a price of $191,347.25. Mega had tendered a lower cost bid at $176,684.60. Those figures do not reflect what Yukon was to pay either bidder, but rather the amount each bidder would earn based on the number of transcript pages Yukon estimated would be required in each of a number of different categories over the life of the contract. That figure turned on the price per page each bidder quoted. The total earned would include pages ordered by Yukon but also by third parties such as lawyers.

[43] The measure for damages of breach of a tender contract is the loss of the profit that would have been earned had the breach not occurred: see ***Cobalt Construction Inc v. Kluane First Nation***, [2014] YKSC 40 at para 46, 245 ACWS (3d) 588; ***Naylor Group Inc v. Ellis-Don Construction Ltd***, 2001 SCC 58 at para 73, [2001] 2 SCR 943.

[44] Mega claims that it would have earned profit in the sum of $516,684.50 had it been awarded the contract, based on the assumption that the one-year contract would have been renewed for a further two years.

[45] The RFP contemplated that the successful bidder would earn income through selling transcripts both to it and to members of the public. The RFP listed the expected number of pages that would be required through the life of the contract, for each of various types of transcripts, called the "estimated multiplier". Joyce Bachli, president of Mega, provided a breakdown of her claim for each type of transcript starting with her bid price per page. From this number, she deducted: the cost of the typist who prepared the transcript, costs for copying and binding, costs for delivery, and her "business" or overhead costs. She then multiplied the remaining figure against the adjusted multiplier for that type of transcript to come up with a net profit. She then added together the net profit figures for each type of transcript to produce a total of $129,865.50 profit for one year. Multiplied by three, the total is $389,596.50.

[46] To this figure, she added an estimated $101,088.00 profit earned on appeal transcripts for which no multiplier was provided in the RFP, and $26,000.00 in estimated "extras" for an overall loss of $516,684.50. Ms. Bachli provided a very general description of the facts used to estimate the $101,088.00 and $26,000.00 sums, relying on inferred experience from her many years of court reporting in the territory. Yukon did not cross-examine her on these estimates, nor challenge them in argument other than to suggest that her assumption for overhead costs seemed low and to argue that the $26,000 claimed for "extras" provided to a third party was unsupported by evidence other than Ms. Bachli's recollections. It did not lead contrary evidence including any evidence as to what it paid the successful bidder.

[47] Instead, Yukon argues that any damages should be discounted overall for the risk that Mega might not have been the successful bidder even had the bid process been conducted in proper manner. I accept that adjustments to damages may be required to reflect this possibility. Stated another way, the task of the trial judge is to make an estimate of what the chances were that the contract would have gone to Mega but for the unfairness in the bid process, and to reflect those chances in the award of damages: see ***Thompson Bros (Const) Ltd v. Wetaskiwin (City)***, 53 Alta LR (3d) 369 at para 66, 205 AR 185 (Alta QB), citing ***Northeast Marine Services Ltd v. Atlantic Pilotage Authority***, 179 NR 17 at 33, [1995] 2 FCR 132 (CA).

[48] Directly relevant to this assessment is that Yukon's failings now make it impossible to determine the likelihood that Mega would have gotten the contract in any event. It is impossible for the Court to make that assessment in the absence of adequate evidence of the evaluation that was conducted. Yukon argues that I should infer that Mega would not have been the successful bidder in any event under a fair process because it was not the successful bidder under an unfair process. In other words, it asks me to assume that fairness and transparency would have had no effect had they been present. I reject this argument in the strongest possible terms.

[49] Alternatively, Yukon argues that Mega's damages be discounted by 50% to offset the chance that it might not have been the successful bidder under a fair process because that balances the chances equally between the two parties who submitted bids. Because the failure to maintain evidence that would allow a more accurate

evaluation of this component lies at Yukon's feet, it would be unjust to treat the parties in this equal fashion. Indeed, the fact that Mega was the lowest bidder suggests that it well might have been the successful bidder had its bid been fairly evaluated. While Yukon was not obliged to accept the lowest bidder, Mega's bid price would have been very relevant had its experience and performance history received sufficient scoring points to allow the price envelope to be opened and price considered.

[50] Rather, as a reflection of the possibility that Mega's bid might not have been successful in any event, and in the absence of any reliable evidence upon which to assess that possibility, I reduce its damages by 25%.

[51] Yukon originally argued that Mega's damages claim should also be discounted overall for the risk that, even had Mega been the successful bidder, it might not have had its contract renewed for the two additional years. However, Yukon's counsel very fairly conceded that, as it had not led evidence to show why the contract with the other party was renewed, I should infer that occurred because things were going well and Yukon wanted to avoid the cost of going through another RFP process. She conceded that had Mega been the successful bidder, unless it did not perform as expected, it would also very likely have seen its contract extended for two additional years. Given Mega's experience in the field of court reporting in Yukon, as disclosed by its bid documents and the fact that it continues to provide services in this field, I discount its damages only nominally by an additional 10% overall to reflect this further contingency.

[52] Finally, I turn to the issue of whether Mega's claim should be further reduced on account of any failure to mitigate damages. The onus of proof of failure to mitigate lies on Yukon and is onerous because although in breach, it is demanding positive action from the innocent party: Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed (New York: Oxford University Press, 2007) at 780. Yukon has not discharged that burden. Mega already services many of the opportunities that exist to provide transcription of court proceedings in the territory, and Yukon has not proven the existence of other opportunities that were not pursued by Mega.

CONCLUSION:

[53] Mega's claim is therefore allowed and damages awarded in the sum of $335,844.93 plus interest. I calculate this number beginning with Mega's calculated lost profits of $516,684.50, and discounting this number by 35%. Of that percentage, 25% reflects the risk that Mega would not have been awarded the contract even if the bidding process was conducted in a fair and transparent manner and an additional 10% to reflect the risk that even if Mega had been the successful bidder, it may not have had its contract renewed for an additional two years.

[54] I heard no argument as to entitlement to and the calculation of the amount of prejudgement interest to which Mega is entitled on these damages. As a result, I decline to take up the option of imposing interest at the prescribed rate from July 26, 2016, the mid-point in the three-year contract ultimately awarded to the successful bidder, to the

date of payment at this time. Instead, I direct that the parties may approach me to set the amount of interest contained in the judgment and/or the amount of costs payable if necessary within 30 days of the filing date of this judgment.

_____
BIELBY J.