Federal Court  Cour fédérale

Date: 20131224

Docket: T-1494-12

Citation: 2013 FC 1287

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 24, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ASPHALTE ABC RIVE-NORD INC.

Applicant

and

ATTORNEY GENERAL OF CANADA
and
ROBERT & GILLES DEMERS INC.
and
PAUL MIHALCEAN

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The dispute that this Court is being asked to adjudicate is really between Asphalte ABC Rive-Nord Inc. and Robert & Gilles Demers Inc. The other two respondents, Paul Mihalcean and

the Attorney General of Canada have a secondary role. Mr. Mihalcean is the real estate agent whose services were retained by Public Works and Government Services Canada to sell three parcels of land. The applicant and the principal respondent are disputing the ownership of these parcels of land, which was the subject of a form of call for tenders to purchase on the part of the respondent, the Attorney General of Canada, with the assistance of Mr. Mihalcean.

[2] The applicant Asphalte ABC Rive-Nord Inc. [Asphalte ABC] is challenging the decision of Public Works and Government Services Canada [PWGSC] dated July 18, 2012, in which it accepted an improved promise to purchase the three parcels of land on the part of the respondent Robert et Gilles Demers Inc. [Demers Inc.].

[3] Ultimately, the entire debate in this case relates to when Demers Inc. submitted its improved promise to purchase. As we will see, the 10% deposit was not presented at the same time as the documents required for Demers Inc.'s improved promise to purchase. A certified cheque for $30,000, which completed the deposit of $205,000 that had already been paid, arrived a few minutes after 2 p.m. on July 12, 2012. The issue is whether the time limit for submitting improved bids was so imperative that the delay of a few minutes invalidated Demers Inc.'s improved bid.

Facts

[4] On June 2, 2012, PWGSC entered into a brokerage contract with Mr. Mihalcean to list three parcels of land for sale that could be operated as a sandpit. Interested parties were to submit a promise to purchase and pay a deposit equivalent to 10% of the price offered.

[5] A period of 30 days was allocated to permit interested parties to submit promises to purchase. Three promises to purchase were recorded. The applicant submitted one for $900,000, which was the minimum required under the terms of the listing. Demers Inc. submitted a promise to purchase for $2,050,000. A third business submitted a promise to purchase, but its involvement was negligible, and it is not involved in this dispute. Both the applicant and Demers Inc. deposited the required deposits, i.e. $90,000 and $205,000. It is not disputed that these promises to purchase complied with the purchase conditions established by PWGSC.

[6] On or about July 4 , 2012 (letters were sent on July 3 and 4, but there is no argument about that), PWGSC put in place a process for improving bids that was aimed at the three companies that had submitted promises to purchase.

[7] There was not much documentation used to establish the selected process. It consisted of a letter sent to the three initial bidders. The letter stated that other bids for the listed property had been received and that bidders were being given the opportunity to improve their bids. The letter amended the wording of the promise to purchase, which was standard wording, to make some additions that are not germane to this application.

[8] The important paragraph for our purposes reads as follows:

> [TRANSLATION]
>
> If you wish to do so, please send your new proposal before 2 p.m. on July 12, 2012, to the attention of Paul Mihalcean whose coordinates are listed below. The new proposal must be submitted in a letter signed by the acquirer. In accordance with the "PRICE" provisions of the promise to purchase, a new certified cheque or bank money order payable to the Receiver General of Canada must be attached to

> comply with the deposit of 10% of the purchase price. The purpose of this initiative is solely to increase your bid and does not negate your promise to purchase.

[9] As a result of this offer [TRANSLATION] "to improve", Asphalte ABC and Demers Inc. opted to enhance their bids. Asphalte ABC increased its promise to pay from $900,000 to $2,260,000. It therefore attached to its improved bid a cheque for $136,000. As for Demers Inc., it improved its bid by $300,000, to $2,350,000. A cheque for $30,000 was also prepared.

[10] Asphalte ABC made an appointment with Mr. Mihalcean for July 12 at 1 p.m. It was Mr. Mihalcean who went to Asphalte ABC's office and who received the improved bid to purchase. An appointment had also been made with Demers Inc. for 1:30 p.m. the same day. However, that appointment was to take place in an office that Mr. Mihalcean had access to, in Saint-Jérôme, a few kilometres from Asphalte ABC's offices. The Saint-Jérôme office was also some distance from the premises occupied by Demers Inc.

[11] It appears that the first meeting at 1 p.m. took some time because Mr. Mihalcean, accompanied by his son, had to rush to his Saint-Jérôme office in order to arrive before 2 p.m.. He waited there for Eric Demers, one of Demers Inc.'s representatives, who was in possession of two documents: the amended promise to purchase for $2,350,000 and a corporate resolution authorizing it. However, the cheque required to improve Demers Inc.'s bid, which constituted a deposit on it, did not arrive until a few minutes after 2 p.m.. For reasons that were explained with difficulty, Robert Demers, another representative of Demers Inc., had a cheque for $30,000 certified at 12:45 p.m. on July 12 but chose to have a quick lunch before driving to Saint-Jérôme. Traffic problems were the explanation for why he was not present at 2 p.m.

[12] There is no dispute that Mr. Mihalcean sent the improved bids to purchase submitted by Asphalte ABC and Demers Inc. later in the afternoon of July 12. Indeed, it appears that the facsimile transmission took place around 4 p.m. PWGSC was not told that Demers Inc.'s cheque had been delivered after 2 p.m.. PWGSC accepted Demers Inc.'s bid, the one that had the highest purchase price, with a difference of $90,000.

Remedy

[13] The applicant is disputing PWGSC's decision to accept Demers Inc.'s bid. It chose the remedy of an application for judicial review under paragraphs 18.1(4)(*b*) and (*e*) of the *Federal Courts Act*, RSC 1985, c. F-7 (the Act). They read as follows:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1** (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

[14] From the outset, the applicant's theory of the case included allegations of misconduct between the respondent Demers Inc. and the respondent Paul Mihalcean. In its notice of application, the applicant alleged the following at paragraph 17:

> [TRANSLATION]
>
> 17. In addition, ABC has reasonable grounds to believe that the Agent or his son could have told Sablière (i.e. Demers Inc.) the amount of the improved promise.

[15] Moreover, the case was conducted by the applicant to attempt to prove this allegation. The cross-examinations on affidavit largely dealt with this alleged possibility.

[16] Not only did the cross-examinations on affidavit not advance this part of the theory of the case, but the applicant was not able to counter the evidence in the record that the certified cheque for $30,000, which completed Demers Inc.'s deposit of $235,000, was issued at 12:45 p.m. on July 12, 2012. Mr. Mihalcean did not become aware of the applicant's improved bid to purchase until between 1 p.m. and 1:40 p.m., well after the cheque had been issued. Coordination between Mr. Mihalcean and Demers Inc. would have been necessary to adjust the bid to purchase and to prepare a certified cheque after 1 p.m.. This was not the case since the cheque was issued before.

[17] The applicant was unable to explain how there was any fraud or perjured evidence in this case. We are faced with unproven allegations that, *prima facie*, are directly contradicted by the essential piece of evidence, the certified cheque, which shows the time of its issuance well before the meeting that would have enabled, in the applicant's own words, the vital information to be given to Demers Inc.

[18] The time of issuance, if it is false, would certainly be evidence of fraud. But it was not disputed. There is no evidence before this Court of perjured evidence. The allegations of fraud were

not proven, far from it. It follows that the entire theory of the case implicating misconduct between 1 p.m. and 1:45 p.m. must be completely set aside.

[19] The other argument based on paragraph 18.1(4)(*b*) of the Act remains. The issue to be determined is whether the process chosen by PWGSC was such that any deviation, no matter how minimal, at the time the improved bids to purchase were received, set for 2:00 on July 12, 2012, disqualified the improved bid, leaving in place only the initial promise to purchase.

[20] In my view, that is the only question the Court must answer. The allegations that the applicant tried to keep the real estate agent as long as possible between 1 p.m. and 2 p.m. are of no importance. His (and his son's) excessive speed to get to their meeting are also of no use to the debate. The reasons why the person who brought the cheque, Robert Demers, was late are also not helpful in resolving the debate.

[21] What matters is that the parties agree that the certified cheque, which completed Demers Inc.'s improved offer to purchase, did not arrive until about 2:05 or 2:10 p.m. Does this defect disqualify Demers Inc.'s improved bid?

Arguments

[22] The applicant makes a simple argument. It submits that the process put in place by PWGSC, which is similar to, or is, a call for tenders, means that the procedure created thereby required it to accept the promise to purchase that complied with the mandatory terms. There can be no deviation.

Here, the $30,000 cheque, which was an essential part of the improved bid, was submitted late. That, says the applicant, is fatal.

[23] The applicant gave a detailed presentation, submitting that

(a) this was really a call for tenders because the process selected met the conditions in *M.J.B. Entreprises Ltd. v Defence Construction (1951)*, [1999] 1 SCR 619 [*MJB Entreprises*];

(b) the jurisprudence of the Supreme Court of Canada has established the existence of two contracts (contract A and contract B) in calls for tenders, with the result that an offer that complies with the call for tender may give rise to legal obligations. As was said in *The Queen (Ont.) v Ron Engineering*, [1981] 1 SCR 111, "The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender";

(c) this theory of contracts A and B was received in Quebec to the extent of its compatibility with Quebec civil law (*Mercier c Raby*, 2008 QCCA 1830 [*Mercier*]). It may be a convenient framework for examining the legal acts that constitute a call for tenders;

(d) the applicant submits that, in any event, even without the theory of contracts A and B, the same result is reached using only the offer and acceptance rules in civil law;

[24] Applying the theory of contracts A and B, the applicant correctly points out the decision-maker's implied obligation to treat all bidders fairly (*Martel Building Ltd. v Canada*, 2000 SCC 60; [2000] 2 SCR 860 [*Martel Building*]). It follows that only compliant bids may be considered.

[25] In the applicant's view, the obligation to treat all bidders fairly, which implies that only compliant bids may be considered, becomes an obligation to reject a bid where one of the components was not filed prior to the exact time set out in the offer to improve made by PWGSC in its letter of July 4, 2012.

[26] The applicant also relies on the administrative law theory of legitimate expectations. This argument seems to me to be the first cousin of the preceding argument. The theory is that when the federal government decides on a formal process it must follow that process, and the parties will have a legitimate expectation that this will be the case. Discretion is limited by the process the decision-maker used.

[27] The principal respondent, Demers Inc., agrees that the theory of contracts A and B applies in this case. The less formal nature of the procedure that was adopted does not change the intrinsic quality of the mechanism: there was a call for tenders to which Demers Inc. responded.

[28] But the irregularity at issue here, a delay of barely a few minutes in depositing a component of the improved bid, where the intention to improve was clear long before, cannot be fatal. For Demers Inc., the obligation to treat all bidders fairly and on an equal footing does not prevent the receipt of a cheque improving an offer that does not adversely affect the adjudication process.

[29] In addition, the principal respondent relies on authorities, in particular, *R.P.M. Tech inc. c Gaspé (Ville)*, J.E. 2004-1072, REJB 2004-60675 (CA) [*RPM Tech inc.*], that support its contention that not all non-compliance is fatal.

[30] Since the irregularity, a delay of five to ten minutes, did not adversely affect the other bidders or the process, there is no need to intervene, says Demers Inc.

[31] As for the other respondents, their involvement was minimal. The respondent Paul Milhacean, although he admits not informing PWGSC that the deposit cheque had arrived a few minutes late, submits that his role was minor and that he was not a decision-maker. PWGSC is not siding with anyone. The Attorney General refuses to say whether his decision to finalize the sale with Demers Inc. would have been different if PWGSC had known that the cheque had arrived late. Finally, the Attorney General does not maintain that the process selected, which was somewhat unusual, was not a call for tenders; rather, he submits that it could be a call for tenders, but it does not have the thoroughness we are used to. That is what is meant by paragraph 18 of his memorandum of fact and law where the promise to purchase process is characterized as not being [TRANSLATION] "a formal call for tenders".

Issue

[32] On balance, the issue to be determined is related to the delay in submitting the second deposit cheque. Demers Inc. had made an irrevocable offer of $2,050,000 for the three parcels of land that were initially listed at $900,000. The deposit of $205,000 was acquired. The improved offer of $300,000, which included the $30,000 deposit cheque, was not completed until a few minutes after 2 p.m. on July 12, 2012. Is this irregularity minor?

[33] If it is minor, PWGSC's decision to choose the bidder that offered the best price is unassailable. The highest promise to purchase was chosen, and there would be no irregularity warranting a change in the decision.

[34] If this irregularity is not minor, the problem is determining the appropriate remedy. Under subsection 18.1(3) of the Act, the matter may be referred back to the decision-maker, PWGSC, so that it can choose. However, the parties are unanimous that they would prefer that this court provide parameters to guide the decision-maker in order to avoid recommencing the same dispute on the basis that, having not been informed that the second deposit cheque had arrived late, a new decision must be made. Accordingly, if the irregularity is fatal, the only comparison would be between Demers Inc.'s initial promise to purchase and Asphalte ABC's improved promise, a difference of $210,000 in favour of Asphalte ABC. Since the only difference between the promises would be the time of purchase, presumably Asphalte ABC would have been named the winner.

Standard of review

[35] The parties disagree on the standard of review that should be applied in this case. It is not surprising that the applicant favours the correctness standard. The principal respondent believes, on the other hand, that the reasonableness standard applies.

[36] In my opinion, this is a red herring. Since I have already dealt with the argument under paragraph 18.1(4)(*e*) of the Act (acting by reason of fraud or perjured evidence), there is only one remaining issue, as I described at paragraphs 20 and 21. If the irregularity in question is not minor and it is established that PWGSC was not informed of the irregularity, it is difficult to see how the decision that was made could be reasonable. The deference inherent to the reasonableness standard that Demers Inc. relies on would not help the principal respondent's case. What matters is determining the seriousness of the irregularity. If the law is that a minor irregularity may be ignored, PWGSC's decision must be upheld.

[37] That is why it does not seem to me to be helpful to answer the question of the standard of review here. Whether the standard is correctness or reasonableness, the result is the same. I add that the recent decision in *McLean v British Columbia Securities Commission*, 2013 SCC 67, tends to reinforce the preference generally given to the reasonableness standard.

[38] Whether one invokes the theory of A and B contracts, which is much more involved with contract law, or administrative law's reasonable expectations, in either case the minor error cannot taint the decision that was made. If it is true that the issue must be considered from an administrative law perspective given the remedy chosen, both approaches lead, in my view, to the same result.

Jurisdiction

[39] The issue of this Court's jurisdiction to dispose of this matter should be asked at the outset. The parties agree that jurisdiction exists under section 18.1 of the Act. But, as we know, jurisdiction cannot be conferred by consent.

[40] In my opinion, it is sufficient for our purposes to refer to the Federal Court of Appeal decision in *Gestion Complexe Cousineau (1989) Inc. v Canada (Minister of Public Works and Government Services)*, [1995] 2 FC 694, [*Gestion Complexe Cousineau*] to be satisfied that this matter can be heard.

Analysis

[41] The irregularity at issue is minor. As such, PWGSC's decision to award the contract to Demers Inc. was not unreasonable. Nor was it incorrect because the minor irregularity does not trigger an automatic rejection in a case like ours where the process was intended to be informal, was informal and was accepted as such by the participants. A minor irregularity does not prevent a bid from being considered, and it certainly does not contravene reasonable expectations. The application for judicial review will therefore be dismissed.

[42] It is useful to come back to the salient facts of this case in order to establish the context:

- the process chosen by PWGSC was informal even though it is common ground that the process had some characteristics of a call for tenders;

- the promises to purchase in response to the invitation were irrevocable. Of the three bids, Asphalte ABC made a bid at the floor price of $900,000 (deposit of $90,000) while Demers Inc.'s promise to purchase was for $2,050,000 (deposit of $205,000);
- Asphalte ABC improved its offer by $1.36 million, bringing its promise to purchase to $2.26 million; Demers Inc. added $300,000 to have a promise to purchase of $2.35 million;
- the applicant's certified cheque was received by the real estate agent before 2 p.m. on July 12, 2012, because he went to Asphalte ABC's place of business to get it. Demers Inc.'s intention to improve its offer prior to 2 p.m. is quite clear. One of its representatives was at the meeting to submit its promise to purchase. However, the deposit cheque, although intended for prior to 1 p.m., arrived in the agent's hands a little after 2 p.m.
- the promises to purchase were sent by the real estate agent to the PWGSC representative later on July 12, around 4 p.m. PWGSC was not told that the cheque had been presented late and chose the highest promise to purchase, that of Demers Inc.;
- because no evidence of misconduct was established and the applicant's submissions on paragraph 18.1(4)(*e*) of the Act are not accepted, must the mere delay in completing the deposit be considered fatal?

[43] In my opinion, both the process followed in this case and the jurisprudence, which relaxes the bidding rules when irregularities are minor, favour a negative response to the question.

[44] First, PWGSC concedes at the outset that its process was not formal, as it can be for public works concessions. In this case, three parcels of land were being sold with not many details about them, without any guarantee and certainly nothing resembling plans and specifications, with sealed

bids that have to be opened at a set date and time or be rejected. Ultimately, the only thing that differentiates the offers to purchase is the price.

[45] Clearly, the applicant had suspicions about the possibility that a competitor knew the amount of its offer and could manoeuvre to obtain the land for a slightly higher price. These allegations, which were never withdrawn, coloured the discussion somewhat. But no evidence was provided to support these suspicions. On the contrary, the uncontradicted evidence is that Demers Inc.'s cheque was certified before 1 p.m., which is when the applicant met with the real estate agent. It follows that Asphalte ABC suffered no prejudice because of the short delay in depositing Demers Inc.'s cheque.

[46] What about the timeline? Was the deadline of 2 p.m. so strict that there could not be any variance?

[47] The process established by the vendor was clearly a process to give a particular property to the bidders. But, unlike traditional invitations to tender where the state is purchasing goods and services, the process here was not strict. The Attorney General agrees.

[48] In my view, even if we are dealing with a contractual matter, there is a public element to the decision to award a contract that permits judicial review rather than another type of remedy. In our case, did the process chosen by the vendor create an expectation such that the applicant can validly complain about the delay in depositing the certified cheque that was to complete the permitted improvement? Was there an obligation to contract with Asphalte ABC because an irregularity

disqualified a competitor's improved offer? The subject of the judicial review is whether the decision to accept Demers Inc.'s promise to purchase was lawful. Was the language used so specific that PWGSC was absolutely bound by it, to paraphrase Décary J.A. in *Gestion Complexe Cousineau*?

[49] I cannot bring myself to see in the promise to purchase and the improved promise to purchase of July 4, 2012, the strictness that Asphalte ABC would like to give to them. The process was informal, the government was looking to maximize the sale proceeds for the benefit of taxpayers, and Demers Inc.'s intention to improve its offer to purchase was evident and was never withdrawn. The arrival of the cheque a little after 2 p.m., but almost two hours before the promises to purchase were sent to PWGSC, does not seem to me to be the type of irregularity that renders the decision to accept that promise to purchase unlawful. Asphalte ABC suffered no prejudice. It only presented a promise to purchase that was $90,000 lower than that of Demers Inc.

[50] We do not have before us the type of strict conditions, expressed as such, in the case of very narrow invitations to tender. The bids were not time-stamped as some processes require. There are, for example, documents that provide that "[r]ules relating to the conformity of tenders shall state the cases that will be automatically rejected, in particular where (5) the place and deadline for receiving tenders have not been complied with" (RSQ, c A-6, r 5.001 and c A-6.01, r 0.03, as cited in *Construction DJL inc. c PGQ*, 2006 QCCS 5290, 2006 RJQ 2753. Regulation respecting supply contracts, construction contracts and service contracts of government departments and public bodies). That was not the case here.

[51] We must not lose sight of the fundamental principle in this type of case. What matters is that the contractors are treated equally, that one is not disadvantaged as compared to another. Major irregularities cannot be ignored.

[52] Quebec jurisprudence and authorities determine whether an irregularity is minor or major based on the breach of the principle of equality of bidders. In *RPM Tech inc.*, below, the Court of Appeal of Québec wrote as follows:

> [TRANSLATION]
>
> [27] Certainly, the City enjoys some latitude in analyzing whether tenders are compliant. Accordingly, we must avoid requiring it to adopt a formalism that would defeat the advantages of public tenders. On the other hand, this latitude does not authorize it to accept a tender containing a major irregularity that undermines the rules set out previously and that the legislator has adopted. In other words, the City's recognized ability to accept tenders containing minor irregularities does not extend to major irregularities, regarding which the City has no discretion; they must be rejected on pain of nullity:
>
> The municipality must have the necessary latitude to award the contract based on the best interests of the taxpayers. As the courts have already noted, "This is a duty which is not owed to the lowest tenderer, no however, but to the public treasury which should never be called upon to pay a higher price than is necessary without good reason." If a doubt arises about the compliance of a tender, the offer containing the best price for the municipality must be preferred. But in pursuing this objective, the municipality must not interfere with the principles of calls for tender by showing favouritism and breaching equality among tenderers. In other words, a municipality may show some flexibility in reviewing the specifications and tenders but not to the extent of causing harm to some tenderers. This is why the jurisprudence distinguishes between minor irregularities that do not breach the objectives of calls for tender and irregularities that affect the fundamental objectives of the procurement process via tenders. Municipal discretion may be exercised only for the first category of irregularities.

> Where there is a major irregularity that involves the principles that underlie the procurement process of municipal contracts through soliciting tenders, the municipality cannot permit any correction and must refuse the tender as non-compliant. In short, a municipality cannot disregard an essential requirement of a call for tenders. (References deliberately omitted)
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> [The underlining is in the Court of Appeal judgment, and this is an excerpt from Jean Hétu, Yvon Duplessis and Dennis Pakenham, *Droit municipal, Principes généraux et contentieux*, (Longueuil: Hébert Denault, 1998) p. 870-871.]
>
> [28] To characterize an irregularity as minor or major, the determining factor is the equality of tenderers. The irregularity must not have an effect on the price of the tender; it must not have upset the balance among the tenderers, one of the guiding principles in awarding contracts by public tender;
>
> The concern about ensuring equality among tenderers and not unfairly preferring one of them is often the determining factor in characterizing an irregularity as secondary or incidental or dealing with an essential element: the omission or error must not have affected the price of the tender or a fundamental requirement in the call for tenders. (References deliberately omitted)
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> [From André Langlois, *L'adjudication des contrats municipaux par voie de soumissions*, (Cowansville: Éditions Yvon Blais inc., 1989), p. 90.]

[53] This is a helpful guide, in my view. Not only do taxpayers see their interests favoured by the fact that the highest promise to purchase has to be accepted, but the irregularity is minor because it does not breach the principle of equality of "bidders", in this case, those who made an improved promise to purchase that was sent around 4 p.m. on July 12, 2012. There was no effect on the price offered because the wording of the promise to purchase was unequivocal: the total amount offered as a promise to purchase was $2,350,000, and it was in the agent's hands before 2 p.m.

[54] The applicant made much of the obligation to treat bidders fairly and therefore to accept only compliant offers. Apart from the *Martel Building* decision, above, which the applicant claims deals with facts that are quite different from the facts in this case, there can be no doubt that these principles of fairness apply. But the bidders were treated fairly.

[55] The applicant agrees that a minor irregularity can be ignored. But it contends that the irregularity here is major. In support of its theory, it offers the following paragraph from *Mercier*, above, written by the dissenting judge:

> [TRANSLATION]
>
> [57] There is a multitude of possibilities for this type of inadvertence: for example, forgetting to have the cheque for the tender guaranty certified, making the cheque out for $1,000 instead of $10,000 or even submitting a tender bond on which the signature is missing. I cannot be persuaded that it is possible to permit one of the tenderers, unbeknownst to the others, to remedy this type of inadvertence after the time fixed for the opening of tenders without breaching the principle of equality among all tenderers, on the sole ground that it was impossible to know at that time what prices would be submitted in the other tenders not yet opened.
>
> (References omitted)

Not only is the dissent being cited to us, but the passage is commenting on inadvertences that a tenderer wants to remedy after the time fixed for opening the tenders. There is nothing comparable in the situation under review. As for me, I am reassured by the majority decision in that case, which stated that the fact the tender had not been signed was minor, the result of an imbroglio. The majority could not see how the other tenderers had been prejudiced, despite the requirement created in the invitations to tender that tenders be signed.

[56] Next, the applicant relies on a passage from the *Canadian Law of Competitive Bidding and Procurement* by Anne C. McNeely, (Aurora: Canada Law Book, 2010). The paragraph states:

> Under Contract "A", there are no exceptions to a rule that a late bid is a materially non-compliant bid which cannot be accepted by a bid calling party. Allowing a material correction or amendment to a bid after bid closing, an indirect way of allowing a late bid, or indirectly allowing one by allowing bid repair, derives from two things. First, to allow a late bid is to unfairly allow the bidder involved more time to finalize a bid than was provided to other bidders. Second, and this goes to a core concern about the bidding process itself, to allow a late bid or bid repair is to allow a change to be made in a bid at a time when the bids of others are known or at risk of becoming known.

I fail to see how this paragraph advances the applicant's case. Not only was the bid, in our case, not corrected or amended, but our facts do not correspond to the two principles relied on. Demers Inc. had completed its promise to purchase prior to 2 p.m. and therefore did not benefit from any advantage. The arrival of the cheque did not in any way change the bid in light of the promises of the other bidders.

[57] The jurisprudence set out in *Terrassement St-Louis inc. c Municipalité de St-Honoré*, 2009 QCCQ 13798, convinces me even more that the irregularity in question here is minor. Equality among the bidders was not breached.

[58] Since the lawfulness of the acceptance of Demers Inc.'s promise to purchase has been reviewed, I find that PWGSC was entitled to accept it. It follows that the application for judicial review cannot be allowed.

JUDGMENT

The application for judicial review is dismissed, with costs to Robert & Gilles Demers Inc. only. There is no award of costs in the case of the two other respondents, the Attorney General of Canada and Paul Mihalcean.

"Yvan Roy"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1494-12
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