

RON ENGINEERING & CONSTRUCTION (EASTERN) V ONTARIO (WATER RESOURCES COMMISSION) [1981] 1SCR 111

Supreme Court of Canada – 27 January 1981

FACTS

A tenderer had submitted a tender accompanied by a deposit of \$150,000.00. The request for tenders documentation included a document entitled “information for tenders” which stated that there was a guarantee on the part of the tenderer that if the tender was withdrawn before the tenders had been considered, the deposit might be retained by the Ontario Water Commission.

Before the tenders had been considered, the tenderer discovered an error in the tender documents and wished to withdraw. Ontario Water Commission claimed to be entitled to retain the deposit.

ISSUES

Was there any legal relationship between the parties which entitled Ontario Water Commission to retain the deposit?

FINDING

The court held that there was a contract between the parties in the circumstances of the particular case. When the tender was submitted by the tenderer there was a contract concerning the tender conditions, including the deposit.

The tender could be subject to the terms and conditions of the contract so as to invoke forfeiture of the deposit. The deposit was recoverable by the contractor under certain conditions, none of which was met, and also was subject to forfeiture under another term of the contract, the conditions of which had been met.

QUOTE

Estey J said:

“There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. This contract is brought into being automatically upon the submission of a tender”. – page 119 of [1981] 1 SCR 111 “I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible to do so. I further share the view expressed by that court that there may be circumstances where a tender may not be accepted as for example where in law it does not constitute a tender and hence the bid deposit may not be forfeited ...

The test (for contract validity), in my respectful view must be imposed at the time the tender is submitted and no at some later date after a demonstration by the tenderer of a calculation error. Contract A (being the

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contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender.

If the tenderer has committed an error in the calculation leading to the tender submitted with the tender deposit and at least in those circumstances where at that moment the tender is capable of acceptance in law, the rights of the parties under Contract A have thereupon crystallised. The tender deposit, designed to ensure the performance of the obligations of the tenderer under Contract A, must therefore stand exposed to the risk of forfeiture upon the breach of those obligations by the tenderer.” – page 121 of [1981] 1 SCR 111

IMPACT

A person submitting tenders should be aware of the possibility of their bid creating obligations to the party requesting tenders.

All documents requesting tenders should be read carefully and the conditions understood before submitting a tender.

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