

# COURT OF APPEAL FOR ONTARIO

CITATION: 1634584 Ontario Inc. v. Canada (Attorney General), 2014 ONCA 465

DATE: 20140613

DOCKET: C58058

MacPherson, Simmons and Gillese JJ.A.

BETWEEN

1634584 Ontario Inc.

Plaintiff (Appellant)

and

Attorney General of Canada

Defendant (Respondent)

Glen W. Ackerley and Faren Bogach, for the appellant

Jacqueline Dais-Visca, for the respondent

Heard and released orally: June 12, 2014

On appeal from the judgment of Justice Stephen E. Firestone of the Superior Court of Justice, dated November 13, 2013.

## ENDORSEMENT

[1] The appellant 1634584 Ontario Inc. appeals from the judgment of Firestone J. of the Superior Court of Justice dated November 13, 2013. In that judgment, the motion judge granted summary judgment to the respondent Attorney General of Canada and dismissed the appellant's action against the respondent grounded in an allegation that the respondent, through the

Department of Public Works and Government Services Canada, conducted an unfair tender process relating to the lease of premises in Peterborough.

[2] There were four bidders in the first tender process. PWGSC decided that all four bids were non-compliant with the Invitation to Tender. The appellant's bid was the second highest. PWGSC ordered a second round of bidding. The appellant, for business reasons, chose not to participate and was not awarded the contract.

[3] The appellant appeals on two grounds.

[4] First, the appellant contends that this was not an appropriate case for summary judgment; a trial was required.

[5] We disagree. The standard of review with respect to a motion judge's exercise of fact finding powers under Rule 20 is palpable and overriding error: see *Hryniak v. Mauldin*, 2014 SCC 7. We see no basis for interfering with the motion judge's conclusion that, applying the new test in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7, this was an appropriate case to be dealt with by way of summary judgment. In particular, we agree with paragraphs 41 and 42 of the motion judge's reasons on this point.

[6] Second, the appellant submits that the motion judge erred in his fairness and good faith analysis.

[7] Again, we are not persuaded by this submission. On the basis of the record, it was entirely within PWGSC's discretion to determine that the first tender produced four non-compliant bids and to order a second tender process. Nor are we persuaded that, given the wording of the Invitation to Offer document, PWGSC had an obligation to seek clarification of possible weaknesses in the offers received from various bidders, including the appellant. In our view, the first process was fair and the appellant chose not to participate in the second process and cannot, therefore, complain about the ultimate result flowing from that process.

[8] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed at \$2,500, inclusive of disbursements and HST.

"J.C. MacPherson J.A."

"Janet Simmons J.A."

"E.E. Gillese J.A."