



## Taking a “Nuanced View of Costs”: Another Lesson for Tendering Authorities, Bidders and Lawyers

### *Continental Steel Ltd. v. Mierau Contractors Ltd.*

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On May 23, 2007, the British Columbia Court of Appeal unanimously overturned the trial decision in *Continental Steel Ltd. v. Mierau Contractors Ltd.* Mierau, a general contractor, was bidding on a new school and the construction schedule was tight. In putting together its bid, Mierau invited bids from subcontractors, including steel erectors. One of the steel erectors invited by Mierau to submit a bid through the Bid Depository was Continental. Continental submitted a compliant bid of \$233,771. Another bidder invited by Mierau, PMC, submitted a compliant bid through the Bid Depository of \$239,000, exactly \$5,229 more than Continental’s bid.

The invitation sent by Mierau to Continental, as well as the Bid Depository Rules, clearly indicated that Mierau was not obligated to accept the lowest bid.

Mierau decided to carry PMC’s bid and nominated PMC as Mierau’s steel erector. Mierau made the decision based on three past experiences with Continental:

- a) Ten years earlier, Mierau encountered problems with a subtrade steel erector supplied by Continental. In attempting to resolve the problems, Mierau dealt with both Continental and the subtrade. As a result of those dealings, Mierau (rightly or wrongly) drew the conclusion that Continental had been helping the subtrade orchestrate illegitimate claims for extra work.
- b) On a subsequent project, Mierau received two bids from steel subcontractors. One was Continental. Mierau had concerns with both and called a trusted subtrade for a reference on Continental. The reference advised Mierau that Continental could get the job done, but that Mierau should be very careful to “dot its i’s and cross its t’s”. Mierau carried Continental’s bid, but raised its price to cover the perceived risk. On that project, Mierau was not the successful general contractor.
- c) On one last occasion, Continental (a supplier to a subcontractor) filed a lien on a Mierau project without first contacting Mierau. In dealing with Continental to remove the lien, Mierau (rightly or wrongly) got the impression that Continental filed liens on all its projects to secure payment.

Given its history with Continental, Mierau felt it would be worth an extra \$5,229 to avoid the additional risk of disputes, delays and liens which might be associated with using Continental. Mierau decided to pay the extra \$5,229 even though it was well aware that increasing its bid to the owner in that amount might result in Mierau not being the successful general contractor. Happily, Mierau was awarded the general contract.

When Continental heard that Mierau had been successful, it contacted Mierau and was advised that it would not be getting the steel subcontract. Continental advised Mierau that Mierau had to accept Continental's low bid, and that Mierau would be hearing from Continental's lawyer.

Mierau then decided to take another look at the situation. Mierau had a discussion with PMC and obtained PMC's consent to award the steel subcontract to Continental in the event Mierau ultimately decided it had done the wrong thing. Mierau knew the owner would agree to the change if asked.

Mierau then had a discussion with Continental. During the discussion, in which some of Mierau's concerns about Continental were raised by Mierau, Continental again said that Mierau would be hearing from Continental's lawyer. After the conversation, Mierau telephoned four general contractors for references regarding Continental. The references were mixed. Mierau, based on the original concerns, the threats about the lawyer and the fresh mixed references, decided that its original misgivings were justified and stayed with PMC.

Continental sued Mierau, essentially saying that Mierau treated Continental unfairly because there were no valid reasons for preferring PMC over Mierau. Mierau defended on the basis that it had the right to accept the bid which represented the best overall value to Mierau (not necessarily the lowest number), that Mierau thought PMC's bid represented the best value, and that accordingly it had not treated Continental unfairly.

At trial, Continental primarily attacked the validity of Mierau's original concerns. For example, there was extensive evidence about whether Continental really was orchestrating claims for extras all those years ago. There was evidence about whether Continental really did file liens regularly to secure payment. There was evidence given by Continental that it really was a very good company and that Mierau should not have had any concerns with it. Mierau simply gave evidence of the reasons, as set out above, that it selected PMC. It did not attempt to call further evidence to show that its concerns with Continental were justified. It did not call as witnesses any of the parties who provided references concerning Continental. Mierau is of the view that such references are extremely important and are only available in the industry because of the obvious presumption that they will remain confidential.

### ***The Decision at Trial***

The trial judge concluded that Mierau had treated Continental unfairly because Mierau's concerns were, in the opinion of the trial judge, unjustified. The trial judge, having the benefit of a week

long trial and extensive cross-examination, thought Mierau drew the wrong conclusion ten years earlier about whether Continental had been orchestrating claims for extras. As well, the trial judge found that Continental did not always file liens to secure payment, and that Mierau should have investigated this more thoroughly before penalizing Continental for it. The trial judge said he did not know what “dot your i’s and cross your t’s” should have been understood by Mierau to mean. The trial judge was implicitly critical of Mierau for not calling as witnesses those parties who had given Mierau negative references about Continental. The trial judge deemed irrelevant the mixed references (from the four general contractors) obtained by Mierau after Continental complained that Mierau had not carried Continental’s bid.

The trial judge awarded Continental judgment in the amount of the profit Continental would have made if it had been awarded the steel contract, plus legal costs.

Mierau appealed to the British Columbia Court of Appeal

### ***The Decision of the Court of Appeal***

The Court of Appeal found that the evidence as a whole did not support the conclusion of the trial judge, and that the trial judge did not apply the proper test in determining whether it had been proven that Mierau did not act fairly. The Court of Appeal accepted that in the circumstances, the law as expressed in ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577 and ***Sound Contracting Ltd. v. Nanaimo (City)***, [2000] B.C.J. No. 992, 2000 BCCA 312 entitled Mierau to take a “nuanced view of costs”. The Court found that Mierau “was not obligated to blindly accept the lowest bid”, and “was entitled to act in its own best financial interests so long as its decision was not unfair to any bidder”.

The Court of Appeal noted that the trial judge had been critical of Mierau for not calling as witnesses the parties who had provided references concerning Continental. The Court of Appeal said Mierau was not required to show that Continental had a bad reputation. Mierau only had to show, pursuant to the law as expressed in ***Martel Building Ltd. v. Canada***, [2000] 2 S.C.R. 860, 190 D.L.R. (4th), that it acted fairly towards Continental in the circumstances. The Court suggested that due to Mierau’s negative experiences with Continental, it was prudent to contact others to either allay or confirm the concerns. The Court of Appeal concluded that the evidence about the post tender inquiries made by Mierau (the mixed references from the four general contractors) should have been considered together with the evidence of Mierau’s previous experiences with Continental.

The Court of Appeal noted that the trial judge only appeared to consider Mierau's concerns about Continental on an individual basis. The Court of Appeal took a more holistic approach. The Court concluded that the trial judge was wrong in failing to look at the evidence of Mierau's concerns cumulatively and in failing to look at things from Mierau's point of view. The Court of Appeal further found that the trial judge's analysis was incomplete, and that he was wrong in finding that some of the evidence was "scant" and "not relevant". The Court concluded that on the whole of the evidence, there was sufficient reason to choose the second lowest bid. The Court of Appeal explicitly stated that Mierau acted in a "business-like way in contacting others in the industry" and that Mierau's decision to go with PMC rather than Continental was "a reasonable exercise of business judgment".

The Court of Appeal speculated that in reaching his conclusion, the trial judge "lost sight of the effect of the privilege clause" (which stated that the lowest or any tender need not necessarily be accepted). The Court of Appeal found that the privilege clause allowed Mierau to award the subcontract to other than the lowest bidder "if there were valid, objective reasons for concluding that better value might be obtained by accepting a higher bid." Very importantly, the Court of Appeal found that Mierau had demonstrated such reasons, however that "the trial judge had incorrectly substituted his own analysis for that of [Mierau] in whom the discretion vested and who, in [the Court of Appeal's] opinion, fairly and objectively exercised that discretion..."

This case confirms that courts should not lightly interfere with the business judgments regularly made by tendering authorities in taking a "nuanced view of costs". It also appears to confirm that, absent bad faith or arbitrariness, a tendering authority does not have to be right (about any concerns it may have with a bidder) to be fair.