

CITATION: Finn Way General Contractor Inc. v. Superior Masonry Ltd., 2023 ONSC 1582
COURT FILE NO.: CV-21-0101-00
DATE: 2023-03-08

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)
)
Finn Way General Contractor Inc.) *M. Marrie and S. Zucchi*, for the Plaintiff
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Plaintiff)
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- and -)
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Superior Masonry (Thunder Bay) Ltd.) *R. Larson, for the Defendant*
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Defendant)
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) **HEARD:** October 24, 25, 2022,
) at Thunder Bay, Ontario

Mr. Justice W. D. Newton

Reasons for Judgment

Overview

[1] Finn Way General Contractor Inc. (“Finn Way”) sues Superior Masonry (Thunder Bay) Ltd. (“Superior”) for damages for breach of contract.

[2] For the reasons that follow, Finn Way will have judgement as set out herein.

The Facts

[3] For the most part, the facts are not disputed.

[4] Finn Way is a general contractor who put together a tender bid for construction of a school in Atikokan. Superior submitted a bid to Finn Way for the supply and installation of brick and related materials as Finn Way's masonry subcontractor.

[5] In dispute is the amount of Superior's bid: \$1,478,800 as Superior submits or \$1,398,800 as Finn Way suggests.

[6] The factual issues were compounded because Superior discovered an error in its estimation of the number of blocks required to complete the job and subsequently withdrew its bid after the call for tenders closed.

[7] Finn Way contracted with another masonry subcontractor to perform the work that Superior had bid on at a total contract price of \$1,585,000.

Superior's Bid

[8] This was a large job for Superior, so Mr. Gazzola, the principal of Superior, reached out to Michael Karimi, Finn Way's project manager, to see if he had anyone who could help with preparing the bid. Mr. Karimi suggested a few different people, and Mr. Gazzola hired Jay Monsma, a Finn Way employee to assist with the estimate of materials. Mr. Monsma did the

“take off” and Mr. Gazzola paid him for that work. It is not disputed that Mr. Monsma was working for Superior and not Finn Way when he assisted Superior with the estimate.

[9] Superior’s bid for \$1,478,800 plus HST was submitted to Michael Karimi at Finn Way by email at 9:52 a.m. on October 20, 2020.

[10] David Karimi, the president of Finn Way and father of Michael, testified that he habitually reached out to subcontractors before a project bid closed “to give us certain advantage to win the bid.” He said that he spoke to Mr. Gazzola regarding the Superior bid on October 19, but then said the conversation was just before closing on the 20th. He said he made handwritten notes on a copy of Superior’s bid which he says confirmed his conversation with Mr. Gazzola.

According to David Karimi he told Mr. Gazzola that:

...somebody out of town has offered 160 but would prefer the local to do it. He says he might be able to do 100, but just give me 10 minutes, or 15 minutes, then he called back and said he can’t do more than 80, and I said fine. And that’s basically the conversation between me and Mr. Gazzola.

[11] What Mr. Karimi recorded in his handwriting on the Superior bid was: “1478,800 - 80,000 as per conversation Oct 19/2020”.

[12] His handwritten note also contains a note¹ of a bid of \$160,000 that he used to induce Superior to reduce its bid by \$80,000. Mr. Karimi testified that there was no such lower bidder, and that this was “purely a negotiation tactic”.

[13] In cross-examination, David Karimi said that this conversation occurred “close to 1 hour or 45 minutes prior to closing”. He could not remember how many other subcontractors he was

¹ Other copies of the Superior bid have the reference to the fictional lower bid “whited out”.

negotiating with at that time, but it included electrical, HVAC, mechanical, “the major ones”. He denied that the conversation with Mr. Gazzola occurred on October 19th as his notes suggests and was certain that the conversation was on the day of closing, October 20th.

[14] Mr. Gazzola and his wife have a different version of the conversation with David Karimi.

[15] Mr. Gazzola denied that he had any conversations with anyone from Finn Way on October 20th and that the conversation with David Karimi occurred on the afternoon of the 19th as Mr. Karimi recorded on the bid. Mr. Gazzola testified:

He called me, if I was sending in a price for the K-12 school, and he asked me what my price was, and I said, “1,478.” And he asked me if I could do better than that. He said he had a southern Ontario company that was \$160,000 cheaper and if I could do it for that, and I said no. He asked me if I could do it for \$80,000 cheaper, I said no. And that was the end of it, and I sent him my price the next day at 1,478.

[16] Mr. Gazzola’s wife, Lillian Gazzola, testified confirming Mr. Gazzola’s rejection of David Karimi’s attempt to have Superior lower its bid. She is a director and shareholder of Superior and does the administrative and office work for the company. She testified that her husband took David Karimi’s call on speaker phone and that she was present and heard both sides of the conversation.

[17] Mr. Gazzola traded text messages with Michael Karimi between October 21 and October 30 discussing aspects of the Atikokan project. Nothing was discussed about the Superior bid.

[18] By email dated November 5, 2020, Finn Way sent its Purchase Order to Mr. Gazzola. Mr. Gazzola testified that he received the email at 1:52 AM on November 6. The purchase order set out the contract price at 1,398,800+ HST noting that it was based on a \$80,000 reduction “as per conversation with David Karimi on October 19, 2020”. A copy of the Superior bid with Mr.

Karimi's handwritten note with the notations regarding the "ruse" lower bid "whited out" was attached. The purchase order was signed by David Karimi on behalf of Finn Way. Above the signature lines there were contract provisions including the following:

*Please return one **signed** copy of this purchase order to our office. If we do not receive a signed copy of this purchase order within [5] five working days from receipt, we will consider this document to be accepted, as written.*

Superior Discovers Error in Bid

[19] Mr. Gazzola testified that if he made a mistake in his bid that he would be bound to honour his bid.

[20] He did find a mistake in his bid. Mr. Monsma had underestimated the amount of material required. The Superior bid was about \$230,000 too low. Mr. Gazzola testified that, upon discovering this mistake, he attempted to call Michael Karimi. Mr. Gazzola left Michael Karimi a message about the error and tried to text him also. A screen shot confirms a text message from Mr. Gazzola to Michael Karimi on November 5, 2020, at 10:38 a.m. which reads; "Hey Michael do you want me to send a revised bid."

[21] Michael Karimi did not recall a message from Mr. Gazzola and testified that he did not respond to the text message because a bid cannot be revised after tender closing.

[22] On November 9, 2020, Mr. Gazzola sent via email a letter to Finn Way which stated:

I am sending you this letter to withdraw our bid from Atikokan High School K-12. An unexpected error occurred in the amount of 7500 blocks at the cost of \$230,000. I tried to contact Michael Karimi on November 5, 2020, at 10:30 am to discuss this matter. He was supposed to get back to me to discuss but I have not received a call back. I also texted him on November 5, 2020 at 10:38 am with no response.

I have no alternative but to withdraw my bid from this job. I apologize for any inconvenience and hope that we can work together in the future.

[23] Mr. Gazzola testified that he sent this letter because he had received the purchase order and “it wasn’t my number”. He said he had five days to respond, and he was in a “panic situation”.

[24] Mr. Gazzola confirmed that Superior’s bid amount of \$1,478,800 was binding on Superior even if there was an error.

[25] Less than two hours after Mr. Gazzola’s letter was sent, Michael Karimi wrote back to Mr. Gazzola advising:

Since you are withdrawing your bid we will have to find someone else to complete this scope, if the costs are higher than your quote Superior Masonry may be held liable for any costs above your quoted value.

Finn Way Finds another Masonry Subcontractor

[26] Finn Way contracted with another masonry subcontractor, DBL Masonry Ltd. (“DBL”), to replace Superior. DBL’s bid was \$1,585,000 plus HST, \$106,200 higher than Superior’s initial bid or \$186,200 above what Finn Way says the revised Superior bid was.

[27] Finn Way therefore claims as damages \$186,200 plus HST. David Karimi testified that it took 80 hours for he and other staff to secure the replacement subcontractor and claims \$150 for each of those hours or \$12,000 as mitigation costs. Finn Way also claims its lost markup of 8% on the increased costs.

Positions of the Parties

[28] Counsel agree that the issues are not complex.

[29] Finn Way argues that there was a contract for \$1,398,800 plus HST and that, since Superior withdrew its bid, Superior must compensate Finn Way for its increased costs, lost profits, and mitigation costs.

[30] Superior argues that there is no contract formed between it and Finn Way since there is no agreement as to the bid price. Alternatively, Superior argues that, if I find that there was a contract, the contract was based on a bid of \$1,478,800.

Analysis and Disposition

[31] Mr. Gazzola was forthright in his testimony that Superior is bound by his bid, even if he erred in calculating Superior's bid price.

[32] I conclude that the Superior's bid was \$1,478,800 and not \$1,398,800 as claimed by Finn Way. Finn Way, as plaintiff, bears the onus of proof on a balance of probabilities.

[33] I am unable to conclude on a balance of probabilities that Mr. Gazzola agreed to an \$80,000 reduction in his bid.

[34] When in conflict with the evidence of David Karimi, I prefer the evidence of Mr. Gazzola and Mrs. Gazzola on some points. When David Karimi was dealing with "negotiating" the Superior bid he was also negotiating with other subcontractors and, as a result, his recollection may not be reliable. I am satisfied that the conversation between Mr. Karimi and Mr. Gazzola occurred on October 19, as recorded by Mr. Karimi, and not on the October 20. I am satisfied that Mr. Karimi may be, at least, mistaken as to the outcome of his negotiations with Mr.

Gazzola. I come to these conclusions noting that Mr. Gazzola did not dispute the price after receipt of the purchase order from Finn Way or in his letter to Finn Way withdrawing his bid due to his error. Nevertheless, Finn Way has not satisfied me that there was an agreement to reduce the bid by \$80,000.

[35] I do not accept Superior's argument that Finn Way breached the contract by listing the wrong price – namely, \$1,398,800 – on the purchase order. Mr. Gazzola did not challenge the price listed in the purchase order, either in the text message he sent Michael Karimi on November 5th, 2020 or in the email he sent Michael Karimi on November 9th, 2020. I find that the breach of contract is Superior's alone: Mr. Gazzola unilaterally withdrew from the contract upon discovering that his bid underestimated the materials required for the job.

[36] Therefore, Finn Way will have judgement for \$106,200 plus HST, the difference between the DBL and Superior bids. Finn Way is also entitled to its 8% markup. As to mitigation costs there is little evidence confirming Mr. Karimi's estimate of 80 hours at \$150 per hour other than several emails to other subcontractors. I recognize that there are some mitigation costs which I fix at \$5000 rather than \$12,000.

[37] Finn Way is entitled to its costs of the action subject to any offers. Finn Way shall submit its costs submissions in writing limited to three pages plus costs outline plus any supporting material within 30 days of the release of this decision. Thereafter, Superior will have 20 days to file its written costs submissions, subject to the same limitations. If no costs submissions are received within 30 days, then costs will be deemed settled.

“Original signed by”
The Hon. Mr. Justice W.D. Newton

Released: March 8, 2023

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Plaintiff

- and -

Superior Masonry (Thunder Bay) Ltd.

Defendant

REASONS FOR JUDGMENT

Newton J.

Released: March 8, 2023