

FEB 25 2011

No S-111286  
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

AVION-MULTIPLEX CONSTRUCTION INC.

PLAINTIFF

AND

VILLAGE OF ANMORE

DEFENDANTS

NOTICE OF CIVIL CLAIM

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

**This action has been started by the plaintiff(s) for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL** to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## CLAIM OF THE PLAINTIFF(S)

### Part 1: STATEMENT OF FACTS

1. AVION-MULTIPLEX CONSTRUCTION INC. ("Avion") is a company duly incorporated under the laws of British Columbia with its address for service in these proceedings located at 418-933 Seymour Street, Vancouver, BC V6B 6L6.
2. The VILLAGE OF ANMORE ("Anmore") is a municipal corporation whose address for service is located at 2697 Sunnyside Road, Anmore, BC V3H 4Y6.
3. In, or about, 2008, Anmore entered into an agreement with the government of British Columbia pursuant to which the Government of British Columbia agreed to provide Anmore with approximately \$500,000.00 for the construction of a day care center in Anmore (the "Funding Agreement").
4. Pursuant to the Funding Agreement, the government of British Columbia provided Anmore with approximately \$500,000.00.
5. In, or about, July 2010, Anmore issued a Request for Proposals (the "RFP") for the design and building of the Anmore Day Care Centre (the "Day Care Centre").
6. The RFP states, among other things, that:
  - (a) "The Village of Anmore received a Capital Funding Grant from the Ministry of Children and Families together with contributions from a private developer to construct a Day Care Facility to accommodate 45 children.... "
  - (b) "The project has a total maximum budget of \$600,000."
  - (c) "... The total budget, including all site and building design, engineering and construction, along with all required permitting is \$600,000.00, including the

25 % provincial component of the HST and excluding the GST component of the HST....”

- (d) “Submissions with costs higher than [the \$600,000.00] budgeted will not be considered.”
- (e) "The Proposals must be accompanied by a 10% Bid Bond and Consent of Surety."
- (f) “The Proposal will be irrevocable and open for acceptance by the Village of Anmore for a period of 60 calendar days from the day following the Proposal Closing Date and Time.”
- (g) “The purpose of this Design-Build RFP is to identify the most qualified Design-Build contractor for this project through a structured, open and competitive process. The contractor will be chosen based on, in no particular order of priority, professional qualifications, construction experience, project management skills, site and building design, site and building costs and the ability to work within a team approach with the Village of Anmore, its staff, volunteers, and designated agencies.”
- (h) “... a final contract will be negotiated with the successful Proponent...”
- (i) “If the Village of Anmore selects a Proponent, then it will enter into discussions with the Proponent to clarify any outstanding issues and attempt to finalize the terms of a Contract including financial terms. If discussions are successful, the Village of Anmore and the selected Proponent will finalize a contract. If at any time the Village of Anmore reasonably forms the opinion that a mutually acceptable agreement is not likely to be reached within a reasonable time then the Village of Anmore may give the selected Proponent written notice to terminate discussions, in which event the Village of Anmore

may then either open discussions with another Proponent or terminate this RFP... “

7. In reliance on the RFP, and the representations contained therein, Avion:
  - (a) retained the services of three architectural firms to develop schematic designs for the Day Care Centre,
  - (b) obtained a bid bond from The Guarantee Company of North America,
  - (c) attended the proposed site for the construction of the Day Care Centre,
  - (d) participated in multiple meetings with representatives of Anmore,
  - (e) prepared proposal(s) for the construction of the Day Care Centre, and
  - (f) provided Anmore with a written proposal for the Day Care Centre (the "Avion Proposal").
8. The Avion Proposal met all the requirements of the RFP, including the budgeting requirements.
9. Britco Structures was the only other company to provide Anmore with a proposal for the Day Care Center (the “Britco Proposal”).
10. The Britco Proposal was in excess of the budget stated in the RFP.
11. Avion was the successful Proponent.
12. Anmore entered into negotiations with Avion in which Anmore requested that Avion make modifications to the Avion Proposal and it provided certain cost savings.

13. In accordance with the requests of Anmore, Avion made the requested modifications to the Avion Proposal with the associated cost savings.

14. Despite the fact that:

- (a) the RFP specifically states that "Submissions with cost higher than [the \$600,000.00] budgeted will not be considered",
- (b) the Britco Proposal was well in excess of the \$600,000.00 budget set by Anmore in the RFP,
- (c) Avion was selected as the successful proponent,
- (d) Anmore entered into negotiations with Avion,
- (e) The RFP requires Anmore to provide written notice that Anmore is terminating negotiations with the successful proponent before Anmore may enter into negotiations with another proponent, and
- (f) Anmore did not provide Avion with written notice that Anmore was terminating negotiations with Avion

Anmore entered into negotiations with Britco for the construction of the Day Care Centre.

15. By email dated September 7, 2009, Britco provided Mayor Anderson with a revised proposal. The email to Mayor Anderson stated the following:

Hi Heather, further to your request we have reviewed our day care proposal and have revised our pricing and building size to try to get closer to your budget.

16. By email dated September 9, 2010, Mayor Anderson sent an email to Anmore council members entitled "Revised Proposal from Britco". The email included the following:

I received this... proposal from Britco for just the Building costs. I spoke to Jim Spence yesterday and he ball-parked the site services at around \$75,000. (Well below Britco's estimate of \$165,000).

So the revised Britco proposal is now approximately \$543,000.

The information will be considered at the council meeting. But again the figures cannot be publicized.

17. When Avion became aware of the improper negotiations between Anmore and Britco, Avion informed Amore that Avion had become aware of the negotiations and that the negotiations were contrary to the FRP.

18. Anmore subsequently informed Avion that it would not be proceeding with the construction of the Day Care Centre because it did not have the necessary funds.

## **Part 2: RELIEF SOUGHT**

1. a declaration that Anmore breached the FRP,
2. general damages;
3. costs;
4. interest pursuant to the *Court Order Interest Act*, R.S.B.C., 1996, c. 79;  
and
5. such further and other relief as to this Honourable Court may seem just.

## **Part 3: LEGAL BASIS**

1. Avion says that the issuance of an RFP by Anmore and the provision of a Proposal by Avion created a contract between Anmore and Avion ("Contract A").

2. Explicit terms of Contract A included the following:

- (a) Proposals would be irrevocable and open for acceptance by Anmore for a period of 60 calendar days from the day following the Proposal Closing Date and Time,
- (b) Proposals must be accompanied by a 10% Bid Bond and Consent of Surety,
- (c) Anmore would not consider any proposals with costs over \$600,000.00,
- (d) Anmore would use a structured, open and competitive process to identify the most qualified Design-Build contractor for the Day Care Centre.
- (e) Anmore would enter into negotiations for a final contract with the successful proponent,
- (f) Anmore would not enter into negotiations with anyone other than the successful proponent until:
  - (i) Anmore reasonably formed the opinion that a mutually acceptable agreement was not likely to be reached with the successful proponent, and
  - (ii) Anmore gave the successful proponent written notice to terminate discussions.

(the "Explicit Terms").

3. Avion says Anmore breached the following Explicit Terms of Contract A by entering into negotiations with Britco.

- (a) Anmore breached the Explicit Term of Contract A that Anmore would not consider any proposals with costs over \$600,000.00 when it entered into negotiations with Britco despite the fact that Britco was an unqualified bidder whose proposal was well in excess of \$600,000.00.
  - (b) Anmore breached the Explicit Term of Contract A that Anmore would use a structured, open and competitive process to identify the most qualified Design-Build contractor for the Day Care Centre by entering into secret negotiations with Britco outside the process created by the RFP.
  - (c) Anmore breached the Explicit Term of Contract A that it would only enter negotiations with the successful proponent by entering into negotiations with both Avion and Britco.
  - (d) By not providing Avion with written notice that Anmore was terminating negotiations with Avion before Anmore engaged in negotiations with Britco, Anmore breached the Explicit Term of Contract A that Anmore would not enter into negotiations with anyone other than the successful proponent until Anmore gave the successful proponent written notice to terminate discussions.
4. Avion seeks damages for breach of the Explicit Terms of Contract A.
5. Implicit terms of the RFP included an agreement that:
- (a) Anmore would not consider non-compliant proposals,
  - (b) Anmore would conduct its review of all compliant proposals in a manner consistent with fairness, and
  - (c) Anmore would consider all compliant proposals in good faith, and not engage in a bad faith review of the proposals
- (the "Implied Terms").

6. Anmore breached the Implied Terms of the RFP.

7. Avion seeks damages for breach of the Implied Terms of the RFP.

8. The Plaintiff further claims that the following quotes from the RFP constitute a representation that Anmore had \$600,000.00 in funding for the construction of the Day Care Centre and that the awarding of the contract to the successful proponent was not contingent on obtaining the \$600,000.00 in funding:

(a) “The Village of Anmore received a Capital Funding Grant from the Ministry of Children and Families together with contributions from a private developer to construct a Day Care Facility to accommodate 45 children.... ”

(b) “The project has a total maximum budget of \$600,000.”

(c) “... The total budget, including all site and building design, engineering and construction, along with all required permitting is \$600,000.00, including the 25 % provincial component of the HST and excluding the GST component of the HST....”

(the “Representations”).

9. Avion reasonably relied on the Representations by spending a significant amount of time preparing the Avion Proposal and making clarifications and modifications to the Avion Proposal at the request of Anmore.

10. The Plaintiff says that if Anmore did not proceed with the construction of the Day Care Centre because Anmore did not have adequate funds for the construction of the Day Care Centre, as it subsequently claimed, then Anmore’s Representations constituted negligent misrepresentations.

11. Avion seeks damages against Anmore for negligent misrepresentations.

Plaintiff's address for service: Ashif Pabani, Barrister and Solicitor, 418-933 Seymour Street, Vancouver, BC V6B 6L6

Fax number address for service (if any): 604 685 5278


E-mail address for service (if any): n/a

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street, Vancouver, BC

V6Z 2E1

Date: 25 Feb 2011

  
Signature of plaintiff's lawyer  
Ashif Pabani, Barrister and Solicitor

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

## APPENDIX

### Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Plaintiff seeks damages arising from misrepresentation and a breach of a tendering contract.

### Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

Breach of Contract

### Part 3: THIS CLAIM INVOLVES:

None of the above

### Part 4:

n/a

