

**Date: 20060421**

**Docket: T-11-02**

**Citation: 2006 FC 511**

**Ottawa, Ontario, April 21, 2006**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**446203 BC LTD. carrying on business as  
ISLAND SKILL DEVELOPMENT CENTRE**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN in Right of the  
Government of Canada Represented by  
HUMAN RESOURCES DEVELOPMENT CANADA**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an action brought by Island Skill Development Centre (ISDC) against Human Resources Development of Canada (HRDC) pursuant to section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for breach of contract.

## **II. Issue**

[2] Were there any contractual obligations by HRDC beyond the terms of the May 1999 agreements (as amended) between the parties?

## **III. Background**

[3] ISDC is a company incorporated pursuant to the law of the Province of British Columbia. The president sole shareholder and director of the corporation and its guiding mind is Susanna Blackburn, a social worker who obtained her Master's degree in social work in Toronto in 1986.

[4] In May 1999, HRDC signed two contribution agreements with ISDC. Under one agreement, ISDC received funding for the provision of "front-end" employment assistance services to unemployed Canadians. Under the other agreement, ISDC received funding for the provision of "back-end" or "assisted employment assistance services to unemployed Canadians".

[5] These agreements were made pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 Part II, "Employment Benefits and National Employment Service" (sections 56-65.2), and the *Employment Insurance Act Regulations*, (SOR/96-332), sections 58 and 59.

[6] Before that, in a joint venture agreement with the Province of British Columbia (Province), HRDC issued a Request for Proposal (RFP) on December 11, 1998, to find providers of front-end services including independent job search services and employment assistance service. It was understood that HRDC and the Province would enter into independent contracts with the successful applicant.

[7] On January 15, 1999, HRDC issued an Invitation for Proposal (IFP) for the provisions of “assisted services” for employment insurance clients.

[8] ISDC was a successful bidder with respect to both the RFP and IFP. Each bid contained proposals for an administration fee of the contract price. Consequently, ISDC signed two contracts with HRDC (contract no. N44655-4 (front-end) and contract N45862-5 (back-end)) and with the Province (contract no. C2000/3713).

[9] The plaintiff alleges that the Proposal, if accepted, was to last for a term of three years to be renewed annually subject to any necessary adjustments and the following three conditions:

- project performance; and
- available funding;
- Labour Market Development Agreement (LMDA) outcomes.

[10] HRDC, the only one sued in this action, contends that the two agreements it signed was for a term of ten months extended to 13 months (to June 30, 2000) agreed to by amendments by both parties, with no obligation on its part to renew each agreement. Therefore, HRDC denies that the agreements required that it be renewed each year, on exactly the same terms if the above three conditions were met as ISDC submits.

[11] Prior to June 30, 2000, the parties entered into negotiations for the front-end services contribution agreements with HRDC and the Province for a period of 12 months commencing July 1, 2000.

[12] ISDC submitted to HRDC a proposal for a new front-end services contribution agreement which was accompanied with a formal application form.

[13] In the proposal, a budget claiming a profit component was included as it had been paid in the past. HRDC made an internal assessment and determined that some administrative fees, which were profit components, had to be removed. ISDC presented a revised budget. Finally, HRDC notified ISDC that the only budget item that HRDC was unable to accommodate was the budget line item "Project Suprv'n & Mgmt", which represented \$33,400 out of a budget of \$741,220.

[14] ISDC responded that it could not operate any project without an administration fee and ceased its operation at the end of June 2000.

[15] ISDC claims damages for breach of contract and alleges that HRDC had a contractual obligation that stems from the two agreements signed in May 1999 to pay an administration fee of 8% of the net amount of each agreement and an obligation to renew the agreements for a second and third year with ISDC.

#### **IV. Submission of the parties**

##### **A. *The Plaintiff***

[16] HRDC has an obligation to renew its contracts as agreed in May 1999. HRDC has no discretion as to whether or not to renew the contracts and HRDC is not free to stipulate new conditions to the renewal that it deemed desirable, as long as the following three conditions are met:

- project performance;
- available funding;
- Labour Market Development Agreement (LMDA) outcomes.

Since HRDC admitted that all three conditions had been met, it must enter into new contracts for further terms, to a maximum of 36 months in total. In other words, HRDC has the obligation to enter into two new one-year contracts with ISDC, one for the period of July 1, 2000 to June 30, 2001 and one for July 1, 2001 to June 30, 2002.

[17] Relying on the testimonies of Susanna Blackburn, Marsha Weaver, Peter Davey and a memo to file dated March 31, 2000 (exhibit P-3A, tab 42) from Mr. J.A. Brown, HRDC's director at that time, ISDC submits that the term of the contract was for a period of three years, making small necessary adjustments to each contract annually.

[18] The plaintiff alleges that the (front-end) contract does not include discretion in favour of the defendant to renew as it is stipulated in the RFP. Therefore, HRDC had the obligation to renew if the three conditions were met.

[19] ISDC urges that if the contract is ambiguous, it must be interpreted in favour of the plaintiff in accordance with the *contra proferentem* rule.

[20] During the existence of the 13 month contracts, HRDC paid the 8% administration fee without disputing it.

[21] During the year 2000 negotiations period, ISDC submitted eight budgets to fulfill HRDC's demands. Nevertheless, HRDC refused to pay an administration fee, which the plaintiff states HRDC was obligated to pay. All major changes to the proposed budgets were directed by an HRDC representative.

[22] ISDC claims \$1,000,000 from the defendant for loss of earnings, building occupancy costs, loss of capital investments, and other losses detailed in the Amended Amended Statement of Claim at paragraphs 32, 33 and 34. Details of some of the losses are found in Mr. Selman's written expert opinion and testimonial evidence.

[23] ISDC refers the Court to *The Law of Contract in Canada* by G.H.L. Fridman, Fourth Edition. The plaintiff also cites *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415.

#### B. *The Defendant*

[24] HRDC denies that there was a breach of contract. The contract documents are unambiguous and there is no obligation to renew.

[25] Under the agreements signed between the parties, HRDC agreed to pay a profit component in the form of an administration fee to ISDC. HRDC states that this was contrary to Treasury Board policy and the associated HRDC Terms and Conditions approved by Treasury Board. It also alleges that at the time, the policy was not strictly applied by HRDC.

[26] In January 2000, an audit report was made public finding problems with the management of grants and contributions at HRDC. It became apparent during the review of the agreements that allowing an 8% administration fee profit to ISDC was a mistake.

[27] The contracts with HRDC ended on June 30, 2000 and this was known to the plaintiff. During the negotiations for a new contract from July 2000 to June 2001, ISDC was made aware that no profit component would be paid by HRDC.

[28] HRDC objects to extrinsic evidence for the interpretation of the contracts signed by both parties because the terms of the contracts are unambiguous. The Court heard the extrinsic evidence under reserve and comments are found under the title Analysis. The defendant says that in the event that the contract documents are ambiguous, proper extrinsic evidence establishes that there is no obligation to renew.

[29] HRDC adds that if damages are to be awarded to the plaintiff, it should be limited to two months as stipulated in the termination clause in the contract. In a further alternative, if the Court does not find the termination clause applicable in this case, then damages must be limited to two years based on Mr. McKay's expert written opinion and testimony.

[30] HRDC files case law to support its submissions.

V. Analysis

**Were there any contractual obligations by HRDC beyond the terms of the May 1999 agreements (as amended) between the parties?**

A. *What is the period or duration of the agreements signed between the parties in May 1999?*

[31] HRDC entered into two contribution agreements with ISDC in May 1999. In both “front-end” and “back-end” agreements, the plaintiff received funding for employment assistance services to unemployed Canadians (exhibit P-3A, tabs 3 and 6).

[32] The “front-end” agreement with HRDC was funded in the proportion of 55/45 by HRDC and the Province respectively with a common budget. The Province signed a separate “front-end” agreement with ISDC (exhibit P-3A, tab 9).

[33] The “front-end” and “back-end” agreements between HRDC and ISDC had a ten month period ending March 31, 2000. The parties entered into two separate amended agreements to extend these agreements to June 30, 2000. There were also two separate amended agreements that did not concern the duration of the agreements.

[34] The defendant admits that under the two signed agreements (“front-end” and “back-end”), HRDC agreed to pay ISDC as part of the budget line item “project coordination fee”, a profit component (an administration fee of 8% of the net amount of the contract). It also agreed to pay ISDC under the budget line items “Equipment Fee” and “Computer Lab Fee” rental fees for the use



of ISDC's existing equipment. These fees were included in the “net amount of the contract” used to calculate the 8% administration fee.

[35] The duration of the “front-end” extended agreement can be seen at exhibit P-3A, tab 5, page 1 (box 100: file number N44655-4, boxes: 23 and 24 “from 1999-06-01 to 2000-06-30”). As to the “back-end” extended agreement, it can be found at exhibit P-3A, tab 8 (box 100: file number N45862-5, boxes 23 and 24 “from 1999-06-01 to 2000-06-30”).

[36] In the presence of such clear indication in the contract documents, the Court has no alternative but to determine that the duration of the contracts is as indicated in the previous paragraph and it ended on June 30, 2000.

B. *Are there any legal obligations by HRDC towards ISDC beyond the period of June 30, 2000?*

[37] To answer this question, the Court must examine the written agreements and the factual context in which they were written. What was the evidence of the background known to the parties at or before the date of the contract? (*Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343).

[38] At page 345 of the *Delisle* decision, Justice Ryan wrote at paragraph 2:

In examining the factual matrix the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract. *Viva voce* evidence as to what the parties intended is inadmissible in interpreting a written contract. [...]

[39] In the present case, HRDC and the Province issued a Request for Proposal (RFP) on December 11, 1998 (exhibit P-3A, tab 1), to find providers of front-end services. It was understood that they would enter into independent contracts with the successful applicant. On January 15, 1999, HRDC issued an Invitation for Proposal (IFP) for the provision of “assistance services” or “back-end contract”. ISDC was a successful bidder with respect to both RFP and IFP. Three contracts were signed afterwards (see [8] above).

[40] The plaintiff submits that the May 1999 agreements included an obligation for HRDC to renew each agreement for further terms up to 36 months in total – in other words, two future one-year contracts: one for a second year and one for a third year, a contractual obligation therefore going beyond the agreement ending June 30, 2000.

[41] This contention is inconsistent with the knowledge that the plaintiff admitted to have known at the time of the May 1999 agreements and the terms of the contracts.

[42] The evidence shows that the plaintiff knew that HRDC’s policy provided that it could enter into employment assistance services contracts for no more than 52 weeks (Marsha Weaver’s testimony on direct examination).

[43] As to the terms of the “front-end” contract (exhibit P-3A, tabs 3 and 5), not only is the duration set to the end on June 30, 2000, but in Schedule A - Attachment, which forms part of the contract, under the title II PROPOSAL INTEGRAL TO THE AGREEMENT/ REFERENCES ON FILE, paragraph B also provides as follows:

B. All references presented in this Schedule A and the Schedule D making up part of this agreement include the following documents are available on the file of the agreement:

- R2 REQUEST FOR PROPOSALS – FRONT END SERVICES [...]

Under the title III TRANSITIONAL MODEL – LABOR MARKET DEVELOPMENT AGREEMENT (LMDA), paragraph C reads:

C. AGREEMENT IN PRINCIPLE

As stated in the RFP (R2) HRDC agrees in principle to fund this project up to three years, however, agreements are only signed for one year at a time and renewal is subject to project performance, available funding, and LMDA outcomes. [emphasis added]

[44] The Court understands that this document refers to the RFP (exhibit P-3A, tab 1, page 3, EXECUTIVE SUMMARY). The last paragraph of 1. SUMMARY OF THE REQUIREMENT stipulates:

The expected terms of the Contracts will be for one year with an anticipated start no later than June 1, 1999. At its sole discretion, the Province may offer renewal of its Contract for further terms, to a maximum of 36 months in total, subject to sufficient appropriation and satisfactory performance of the Contractor. At its sole discretion, the Commission may offer renewal of its Contract for further terms, to a maximum of 36 months in total, subject to sufficient appropriation in satisfactory performance of the Coordinator. [in this case, "Commission" refers to HRDC] [emphasis added]

[45] With such clear and convincing evidence in the contract and in the RFP, the Court is convinced that HRDC had no contractual obligations towards ISDC beyond June 30, 2000. The words "at its sole discretion" is in contradiction with the plaintiff's submission that HRDC was bound to renew for further terms up to 36 months. Similar clauses as mentioned above are also found in the "back-end" contract.

[46] Therefore, the Court has no alternative and must sustain the defendant's objection to the extrinsic evidence adduced by the plaintiff by way of Mrs. Blackburn's and Mrs. Weaver's testimony on the interpretation of the contract documents.

[47] In the event that the Court is wrong on this and even if it had to consider such extrinsic evidence, the Court is of the opinion that the extrinsic evidence does not support the plaintiff's interpretation that the May 1999 contract documents give rise to an obligation on the part of HRDC towards ISDC beyond June 30, 2000.

[48] The Court has to mention that it appreciated the straightforwardness and frankness of Mrs. Blackburn and Mrs. Weaver. Mrs. Blackburn testified that at the mandatory proponents meeting following the issuance of the RFP, someone said that it was a three-year contract. She was not sure who made that statement but she believed it was Mr. Davey. Mrs. Weaver also heard the same thing from an HRDC's representative but was unable to remember who it was.

[49] The Court read and reread the transcript of Mr. Davey's testimony and does not agree with ISDC's representative that Mr. Davey corroborated the statements of Mrs. Blackburn and Mrs. Weaver on this point.

[50] As well, the Court cannot infer from the "Note to File" dated March 31, 2000, by J.A. Brown (exhibit P-3A, tab 42) that HRDC had a three-year obligation towards ISDC. The second paragraph explains the context in which this memo was written:

Since January 21, 2000 this office has faced an unprecedented workload brought on by the need to review and attested (sic) to all active files. De facto this took staff away from the task of making adjustments to future year contracts as they instead dedicated their time to reviewing and “cleaning up” current contracts.

It is obvious that the memo was written in the context of an amendment to extend the front-end contract with ISDC by three months to June 30, 2000. The words in the first paragraph “... and a 3 year approach” and “... This extensive contracting process is to be repeated every 3rd year” are consistent with the words in the AGREEMENT IN PRINCIPLE (see [43] above) “... HRDC agrees in principle to fund this project up to three years” and the words in the SUMMARY OF THE REQUIREMENT (see [44] above) “to a maximum of 36 months in total”. It is not a confirmation of a three-year contract as the plaintiff contends.

[51] Therefore, the Court considers that the contract documents are clear and unambiguous. HRDC's contractual obligations ended June 30, 2000.

[52] Assuming that during the negotiations between HRDC and ISDC before the end of June 2000, one of HRDC's representative directed ISDC to hide an administration fee or a profit component in certain lines of the proposed budgets, this cannot in itself impose an obligation on HRDC to renew the contract that ended on June 30, 2000.

[53] HRDC submitted alternatively that if the Court did not agree with its interpretation of the contract, ISDC could not be paid more than the two months mentioned in the Termination Clause inserted in the contract documents. The Court does not agree as no such notice was given to ISDC.

[54] In view of the Court's conclusion on the interpretation of the contract documents, the plaintiff is not entitled to damages. On the other hand, if the Court had accepted the interpretation submitted by ISDC's representative, it would have granted damages at \$362,446 and would have followed Mr. McKay's written expert opinion (exhibit D-3, Schedule 3, amended at trial). The Court found the defendant's expert more reliable. His explanations were more credible than ISDC's expert.

**JUDGMENT**

**THE COURT ORDERS** that the action is dismissed, with costs to the defendant.

“Michel Beaudry”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-11-02

**STYLE OF CAUSE:** **446203 BC LTD. carrying on business as  
ISLAND SKILL DEVELOPMENT CENTRE  
and  
HER MAJESTY THE QUEEN in Right of the  
Government of Canada Represented by  
HUMAN RESOURCES DEVELOPMENT CANADA**

**PLACE OF HEARING:** Vancouver, British Columbia

**DATES OF HEARING:** January 25, 26, 27, 28, 2005  
February 1, 2005  
September 19, 20, 21, 22, 23, 2005  
February 13 and 14, 2006

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BEAUDRY J.

**DATED:** April 21, 2006

**APPEARANCES:**

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Steven C. Postman FOR DEFENDANTS

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