

IN THE SUPREME COURT OF NEW ZEALAND

SC 145/2013  
[2014] NZSC 18

BETWEEN ROADING AND ASPHALT LIMITED  
Applicant

AND SOUTH WAIKATO DISTRICT  
COUNCIL  
Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: J L Land for Applicant  
K E Sullivan for Respondent

Judgment: 10 March 2014

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JUDGMENT OF THE COURT

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**A The application for leave to appeal is dismissed.**

**B The applicant must pay the respondent costs of \$2,500.**

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REASONS

[1] The applicant had operated a solid waste landfill at Tokoroa and a waste transfer station at Putaruru under contract with the respondent since 2002. In mid-2010, the respondent invited tenders for a new contract for two years, with the possibility of an extension for a third year. The applicant tendered but was unsuccessful. It issued proceedings against the respondent alleging that the respondent had breached the terms of the tender in awarding the contract to another tenderer and had also breached the Fair Trading Act 1986. The High Court found in the applicant's favour<sup>1</sup> but its decision was overturned on appeal.<sup>2</sup>

[2] The applicant now seeks leave to appeal to this Court on two questions:

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<sup>1</sup> *Roading & Asphalt Ltd v South Waikato District Council* [2012] NZHC 1284.

<sup>2</sup> *South Waikato District Council v Roding & Asphalt Ltd* [2013] NZCA 566.

- (a) Whether in tender contracts the commonly used lowest price conforming method of tender evaluation requires the tendering authority, if it does decide to award the principal contract at all, to award the principal contract to the lowest conforming tender, notwithstanding the presence of a clause in the tender contract stating “the lowest or any tender will not necessarily be accepted”;
- (b) Whether there is an implied obligation in tender contracts to treat tenderers fairly and equally, and if so whether that obligation is breached by the tendering authority not strictly following the tender process stipulated and/or by the tendering authority making assumptions on a basis that is inconsistent and discriminatory as between tenderers.

[3] In relation to the first proposed question, the applicant argues that the Court of Appeal was wrong to hold that the respondent did not breach the tender documents when it awarded the contract to another tenderer rather than to the applicant. However, the applicant’s criticisms of the Court of Appeal’s judgment go to its assessment of the effect of the terms of the particular tender documents rather than to any broader issue, reflecting the fact that the High Court and Court of Appeal simply took different views as to the interpretation of the tender documents. We do not see this as raising any wider issue of general or public, or indeed commercial, importance.

[4] In relation to the second issue, in light of its interpretation of the tender documents and its assessment of the facts, the Court of Appeal found that there was no breach of any implied obligation of fairness. It left open the question whether such an implied obligation is an “invariable obligation assumed by any party that calls for tenders”.<sup>3</sup> While we accept that the general question of obligations to be implied into tender processes is an important one, we do not consider that this case is an appropriate one to consider it. The Court of Appeal’s analysis proceeded on the assumption that an implied obligation argument was available. It rejected the contention that the applicant had been treated unfairly on the facts.

[5] Nor do we consider that there is any risk of a substantial miscarriage of justice. The Court of Appeal said that the respondent had a rational basis for selecting the other tender over that of the applicant in terms of the tenders’ overall economic benefit, that this was consistent with the tender documents and that its

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<sup>3</sup> At [49].

importance was known to the applicant. We see no obvious error in the Court of Appeal's analysis.

[6] Accordingly, we are not satisfied that it is necessary in the interests of justice for this Court to hear and determine the appeal. The application for leave to appeal is dismissed. The applicant must pay the respondent costs of \$2,500.

Solicitors:  
Kensington Swan, Auckland for Applicant  
Tompkins Wake, Hamilton for Respondent