

Bait-and-Switch In Public Contracts

By Lloyd Rain

Introduction

The traditional bait-and-switch is a ploy used by grifters to sell you something of low value by touting a similar item of high value. The bait is the high-value item, say, a set of Solingen steel knives. After you get home, you find that your shiny package of knives are made in Bangladesh out of remanufactured tin cans.

It can happen in just about any product line — from land deals to insurance policies, from jewelry to aluminum siding, and from ships to software. You think you bought one thing, and when you get your hands on it, you find that you've purchased something entirely different.

Perhaps the most common bait-and-switch in American lore is the land deal which is closed on the basis of a lovely photo of wavy grassland with snow-capped, purple mountains in the background. The real estate, of course, turns out to be uninhabitable swampland.

Usually, by the time you discover the switch, the seller is long gone, never to be heard from again — and of course, you have no recourse other than the axiom, caveat⁽¹⁾ emptor. Even though you may be poorer for the experience, hopefully, you're also wiser.

But in the broad arena of public purchasing, it is rare that the seller disappears. The more likely problem in our domain, is that we, the buyers, don't even realize that the switch has occurred. And even if we do, we seem to think that the switch is quite acceptable and we pay no attention.

"Not me!" You say, indignantly.

"Wanna bet?" Say I.

Consider then, the case of the Rounis Group versus the Malaspina University Student Union in British Columbia.

The Setting

The trial took place in October, 2000 in Victoria, BC, before the Honorable Justice F. A. Melvin in the Supreme Court of British Columbia. The litigants were Ginnoula and William Rounis and Jake Kearsley, Plaintiffs (henceforth, the "**Rounis Group**") and The Malaspina Students' Union Society, Defendant (henceforth, the "**Student Union**").

The Claim

The Rounis Group alleged that the Student Union breached a contract for the provision

of food services in the Student Union Building on the campus of the Malaspina University-College at Nanaimo (pronounced nan-eye-mow) in the Province of British Columbia. The claim was based upon the fact that the Student Union had selected the Rounis Group as its contractor following a solicitation process and then declined to finalize the contract.

Background

In the summer of 1998 the Student Union issued a request for proposal for operation of the student food services function in the new Student Union Building. The solicitation specifically required that each respondent submit resumes of all key personnel, resumes of owners, full financial disclosure, and sources of operating funds. Two proposals were received, one from "Hogs Haven" and the other from "The Rounis Family". {Note: The "**Rounis Family**" includes only siblings William and Ginnoula Rounis — their parents did not play a role in this case, other than as references). The "**Rounis Group**" is the term I use to specify the plaintiffs, William and Ginnoula Rounis and Jake Kearsley.}

The Bait

The Rounis Family proposal was quite extensive. It outlined the history and background of the family, including its restaurant experience and its successful operation of restaurants in the Nanaimo area. It further stated that the day-to-day operations would be run by the youngest generation of the Rounis family, both of whom had attended Malaspina College at one time or another, Ginnoula and William Rounis — their lengthy resumes were included as the only proprietors. There was no mention in the proposal of any other personnel, specifically, the third party in the "Rounis Group," plaintiff Jake Kearsley.

The Intent To Award (so to speak)

At a meeting of the Student Union Executive Committee on August 5, 1998, it was resolved that the Rounis proposal be accepted.

The Student Union notified the Rounis Family accordingly.

The Hint of the Switch

A meeting of Rounis and Student Union occurred on November 5, 1998, the Rounis Family being represented by Ginnoula Rounis and Jake Kearsley, his first appearance. The primary topic was the lease required for the space in the new building. At this time, Jake Kearsley participated to a degree, but there was no disclosure to the Student Union that he might become involved in the operations. Oddly, no one paid any attention to the involvement of Jake Kearsley, the son of John Cleeve-Kearsley, the Student Union advisor!

The Switch Solidifies

Shortly after this meeting, a letter was sent to the Student Union from Jake Kearsley

and William Rounis. This letter enclosed the proposed lease, the only actual contractual document in the process. It obligated the Student Union to provide space for the food service operation at \$2,800 per month for five years. The parties to the lease were the Malaspina Students' Union Society on the one hand, and Jake Kearsley and William Rounis on the other. There was no mention of Ginnoula Rounis nor was there any satisfactory explanation as to why Jake Kearsley's name appeared in the lease. His own explanation in court, years later, was that he took a lease format which only allowed for the insertion of two names so he selected his name and that of William Rounis rather than William Rounis and Ginnoula Rounis.

The letter asked for a prompt decision on "signing and finalizing this lease."

The Switch Is Recognized

It didn't take long for the Student Union to realize that the entire process was contrived to get a contract for the son of the Food Services Advisor through devious means, essentially a nicely devised bait-and-switch operation.

On December 2, 1998, the Student Union advised the Rounis Group that it had reviewed the process for the provision of food service and that it had been unaware of the fact that Jake Kearsley would be managing the enterprise. The Student Union advised the Rounis Family that it had decided not to proceed with a contract for the provision of food services and the associated lease of space to the Rounis Group.

The Upshot

The result of the Student Union's rejection of the Rounis Family's proposal was that the Rounis Group (Rounis, Rounis and Kearsley) filed an action against the Student Union for breach of contract, Contract A, that is⁽²⁾.

{If you don't understand the preceding sentence, or, if you are an American, read Footnote 2 now.}

It has always been a source of amazement to me that the criminally wronged can continue their enterprises by digging even deeper holes in which to immerse themselves. And so, the plan having been discovered, the Rounis Group should have simply walked away never to be heard from again. But no. Instead, the Rounis Group had the audacity to sue the Student Union for breach of contract, Contract A, that is.

The Judge's Deliberations

The trial took place almost two years later, in October, 2000.

The judge opined that when the Student Union accepted the proposal made by the Rounis Family, it did so on the basis of the two individuals who were described therein, Ginnoula Rounis and William Rounis. "There was no indication that one Jake Kearsley was going to be part of the process. It would have been extremely important for the Student Union to know of the existence of Jake Kearsley as a potential contracting party (especially considering that his qualifications had never been reviewed and that he actually had no experience in the food service business!)."

It became obvious at the examination for discovery of William Rounis that Ginnoula did not intend to participate in the food services operation as originally proposed. She had enrolled as a full-time student at the University of Victoria, some 100 miles south of Nanaimo, during the very fall that the lease was to be signed and the program initiated.

“The subsequent actions of the Rounis Group, by the insertion of Jake Kearsley into the contractual process, and the removal of Ginnoula Rounis from the contractual process, are significant and fundamental changes. Jake Kearsley was not a party to the original contract; consequently, in my view, he is not entitled to the terms of that contract. What the Rounis Group proposed by submitting the lease in November of 1998 was a new contractual arrangement with a new party. Without the consent of the Student Union to that arrangement, the implied contractual obligations came to an end. The Student Union had relied upon the expertise, knowledge and experience of the Rounis Family in the restaurant field. The plaintiff Jake Kearsley had no such experience.

“The law is well established that where the skill or knowledge or some other personal quality of a party with whom a contract has been made is a material ingredient of the contract, the contract can be performed by the contracting party alone, and not by an assignee.” {bold print and underline mine}

“As the insertion of Jake Kearsley into the significant contracting process amounts to a new offer, the Student Union was entitled to terminate any association that previously existed.”

Ruling

The judgement was rendered on November 30, 2000 by Justice Melvin. The Rounis Group's action was dismissed and the Student Union was entitled to recover its costs from the plaintiffs, Rounis, Rounis and Kearsley!

Comments

So now I ask you again. Still wanna say, “Not me?”

Well tell me then, how many times have you retained legal services based upon the sparkling resumes of the principals only to find that virtually all the work is performed by junior employees and clerks? (“But of course,” you say.)

How about architects whose design and contract administration is performed by others while the real vocation of the principals you retained is getting out to cocktail parties and social engagements in order to drum up more work!

And how about PIs (principle investigators) performing research contracts who lay out the work then spend their lives writing grant app's while work-studys and grad students do all the work!

Do you still maintain that a bait-and-switch has never been pulled on you? Well then, when was the last time you actually read through a personal services contract and its preceding proposal to ascertain who is actually supposed to be performing the work? —

and then compared your findings to the day-to-day realities?

I would wager that you haven't done this with any service provider. So the truth is that you probably don't even know if some provider has perpetrated a switch on you.

You might be inclined to argue that all the foregoing examples are nothing but natural process — that's just the way things are done. I beg to differ.

As was well pointed out by Justice Melvin, when you retain a service provider, it's mandatory that you **know who** is actually performing the work — or you are being hoodwinked into spending your funds for less than you bargained for. The services of a law clerk cost a whole lot less than those of an attorney, a draftsman less than an architect, a grad student less than an engineer and a psychology major less than a certified counselor.

I'll grant you that, in my examples, there is some practical leeway on the issue of who is actually performing the work, especially when your contract is with the firm rather than the individual.

My point is that you need to know just how much of what is being done by whom (and you need to make a judgement on how closely that performance relates to the proposal, the contract and the invoices).

The lesson here is that if your contract award is based upon a proposal which commits the services of specific staffers, then the proposer must be held to that bargain, precisely as proposed, using the specific professionals who are put forth and named to do the work. If that doesn't happen, then the provider is in breach of contract and the contract either needs to be amended to reflect reality in both scope and cost, or voided.

An Example Close To Home

About seven years ago my institution retained one of the "big six" accounting firms (I guess there's only "big four" now) for over a million dollars worth of Business Process Redesign (BPR). Let's call the firm "Big Six, Inc." in order to protect the guilty. Within half a year every Big Six employee working on the project at our institution was new and had never even been mentioned in the Big Six proposal. These switches were waived off by the contractor with numerous excuses ranging from, "Oh, Bertha had a baby." and, "Oh, Fred has been transferred to Houston." and "Oh, Alice has been promoted and is now working in headquarters." and "Oh, Gary took special leave to play chess in the national championships!" All legitimate excuses. But did we review the resumes of the newcomers? No. Did we match their skills against those named in the original proposals? No. Did we issue contract amendments each time a new "consultant" slithered into the empty space created by yet another unannounced rotation? No.

And did the taxpayer get its money's worth? In my humble view, not even close. We put about \$1.2 mil into Phase One and when it came time for us to implement Phase Two, why Big Six was nowhere to be found — it had decided sometime during Phase One that it was getting out of the BPR business — a move that we could and should have foreseen if we had managed that contract with astute investigation of every staffer

switch! Big Six had been backfilling its top people with bottom-feeders just to fulfill its contract and walk away with the money! — and we were the chumps left standing in the swampland staring at a picture of wavy grass and purple mountains.

Of course, there are those who will deny all this. But the proof was in those presentations to the Business Officers and the Presidents Colloquiums and the Finance Groups — those glowing reports of the glorious outcome and the parturition of a new dawn. No one would ever admit to the costs. The whole process cost well over \$3 million but the costs were never disclosed in the presentations. In fact, I was the only person keeping track of the costs. Throughout, I had maintained that what was accomplished could have been done by a couple of counselors over a cup of coffee.

To my credit, I fought the whole process from day one. To my debit, I was consistently overruled by the lofty and powerful. And I can tell you that I made no friends in the process.

And what of the taxpayer? Yes, once again, the taxpayer unknowingly took it in the shorts.

One Final Observation

The bait-and-switch in public contracts is alive and well and we must be constantly vigilant when contracting for the services of professionals.

•—————• End —————•

Footnote 1: *Caveat emptor* is Latin for "let the buyer beware".

Footnote 2: For us Americans, one of the paragraphs above may sound a little awkward when it is implied that a contract existed between the owner and the proposer before the actual contract was signed. Canadian law, lending considerable clarity to the elusive period between proposal or bid submittal and contract signing, recognizes that two contracts are in process during this period. "Contract B" is the actual contract that results from the solicitation process and is what we would call "the only contract." "Contract A" represents the obligations that the owner and the proposer (or bidder) have to each other from the moment that the solicitation is issued to the moment that Contract B is signed. Viewing those interim obligations as an actual contract provides great clarity to the relationship between the owner and proposer. In this case, Contract A provided the means to litigation and a binding ruling by an objective party within the context of a well-developed legal system with recorded case law and definitive processes.

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