NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Amber Contracting Ltd.*, 2009 NSCA 103

Date: 20091016
Docket: CA 299314
Registry: Halifax

Between:

The Halifax Regional Municipality,
a municipal corporation duly incorporated pursuant to
the laws of the Province of Nova Scotia

Appellant

v.

Amber Contracting Limited

Respondent

Revised judgment: In ¶ 1 the date in the second sentence has been changed to read “June 30, 2008" instead of “June 30, 2009". This decision replaces the previously distributed decision.

Judges: Oland, Hamilton and Fichaud, JJ.A.

Appeal Heard: June 5, 2009, in Halifax, Nova Scotia

Held: Appeal is allowed with costs per reasons for judgment of Oland, J.A.; Fichaud, J.A. concurring; Hamilton, J.A. dissenting.

Counsel: Randolph Kinghorne and Kishan R. Persaud
for the appellant
George W. MacDonald, Q.C. and Christopher Wilson
for the respondent

Reasons for judgment:

[1] The issues raised on this appeal concern the tendering process and bid shopping. In a decision dated June 30, 2008 and reported as 2008 NSSC 208, Justice M. Heather Robertson found that, pursuant to its call for tenders, Halifax Regional Municipality ("HRM") had breached its duty of fairness to Amber Contracting Limited and had engaged in bid shopping. She awarded Amber damages for loss of profit of $147,560. HRM appeals her order dated July 28, 2008.

[2] For the reasons which follow, I would allow the appeal.

Background

[3] The trial judge summarized the facts as follows:

> [2] HRM issued a call for tenders on contract number 05-222 for construction and upgrade of the Plymouth Road sanitary pumping station located in Dartmouth, Nova Scotia. HRM had earlier retained consulting engineers Terrain Groups Inc., to design and estimate the cost of the pumping station. Their estimate for construction was $158,240. The HRM Council approved an expenditure of $249,000 for this project, which included consulting fees.
>
> [3] As a usual term of the tender document, one of the conditions was that the tenders submitted would be opened in public and the results also be published. The tender document also reserved the right to reject all tenders not considered to be satisfactory and also the right to cancel any request for tender at any time without recourse by the contractor. The document also provided as an express provision in the tender document that no term or condition shall be implied which is inconsistent with or conflicts with its provisions.
>
> [4] Prior to the stipulated deadline of July 12, 2005, three contractors bid on tender number 05-222. The tenders were opened publicly on July 12, 2005 and subsequently published on the HRM website and also by the Construction Association of Nova Scotia with the result that anyone in the construction industry, who chose to do so, was aware of the amounts bid to perform the work. The tenders were are [*sic*] follows:
>
> Whebby Contracting $773,950.00

> Amber Contracting $570,612.75
>
> ACL Contracting $621,000.00
>
> [5] All of these tenders were in excess of the available budget of $249,000 as set out in the capital projects supplementary report of HRM. HRM made the decision to cancel the tender on September 15, 2005 and contacted each of the bidders by letter. Despite the cancellation of the tender, HRM conducted some negotiations after this date with the lowest bidder Amber Contracting in an attempt to negotiate a price which was acceptable to HRM.
>
> [6] In April 2006, HRM issued another tender for the construction of this project as a tender number 06-247. The plans and specifications for this tender were substantially identical to those for tender number 05-222.
>
> [7] Following this tender, four contractors including the plaintiff submitted bids before the stipulated deadline of April 28, 2006. The results of that tender is follows:
>
> Amber Contracting $589,917.80
>
> Whebby Contracting $613,350.00
>
> ACL Contracting $621,000.00
>
> Eisener Contracting $579,282.83
>
> [8] HRM awarded the contract for tender number 06-247 to the lowest bidder Eisener Contracting.

[4] Based on the Terrain Group cost projections in 2005, HRM Council had approved $249,000 for the Plymouth Road sanitary pumping station with construction anticipated in 2006/07. As indicated in the trial judge's factual recounting, the project was originally tendered in June 2005. In accordance with the contractual terms of the tender, HRM opened the bids in public and published the total tender price of each bid. None of the detailed calculations underlying those total prices were revealed. All of the bids were substantially higher than the budgeted estimate. Amber's bid was the lowest and, in negotiations that company initiated with HRM, was reduced further. HRM decided to cancel the tender, which it did that fall. It re-tendered the project in April 2006.

[5] In the re-tender, the scope of the work and the design of the station were identical to those in the original tender. The three companies which had bid on the original tender bid again. They were joined by a fourth bidder, who underbid all of them and to whom HRM awarded the tender. Amber's bid was a close second, within $10,000 of the lowest bid. The successful bid on the re-tender was higher than Amber's bid on the original tender, and over $100,000 more than the reduced offer Amber made to HRM before HRM re-tendered.

[6] In her decision, the judge characterized the issue thus:

> [98] Ultimately, the question for the Court to resolve is whether the HRM was more interested in trying to secure a better price by re-tendering than following the usual practise of working with the low bidder to effect cost savings, thus breaching its duty of fairness.

[7] During the two-day trial, Harry Poole, the owner of Amber, testified that his company had been in business some 30 years. In the past when it submitted bids to HRM that were over budget, HRM would sometimes ask for an extension of the acceptance deadline to secure additional funding or would negotiate changes to the project to reduce the cost. He was not asked, before the tender was cancelled, to do either. After learning that the bids were over budget, he found ways to reduce its bid of over $570,000 to $457,000 for winter construction. Following negotiations with Mr. Poole, HRM decided to re-tender. Mr. Poole had never before heard of HRM re-tendering.

[8] For HRM, the witnesses were Debbie Andrews, the contract administrator who looked after the tender and the re-tender of the Plymouth Pumping Station contract; Gregory Rice, an employee of the Halifax Regional Water Commission; Ian Guppy, a civil engineer then with the environmental engineering services of HRM; John Sheppard, then manager of environmental services for HRM; and Peter Ross, then manager of procurement at HRM. Ms. Andrews testified that it was common for tenders to come in way over the estimated budget. According to Mr. Rice, it was quite unbelievable and he was shocked when the bids in response to the original 2005 tender came in at approximately two and a half times the estimated budget. He could not recall when a tender was not awarded to the low bidder in construction contracts. Mr. Guppy testified that for the years 2004, 2005 and 2006, there was an average of 91 construction tenders per year. He was

employed by the HRM in 2004 and previously with the consulting engineering firm CBCL for some ten years. Mr. Guppy had never had a similar experience where a bid was received, considered too high, and re-tendered some six or seven months later. Nor could Mr. Sheppard recall any such case prior to the time around this re-tender.

[9] The evidence before the trial judge included numerous e-mails among HRM staff, after the bids to the original tender were opened, on how to proceed and whether HRM might be able to get a better price by re-tendering in the winter or early 2006. There was also testimony from HRM witnesses as to whether or not funding could be available for the project before the spring of 2006.

[10] The trial judge stated:

> [100] I am not left in any doubt that this project was due to proceed in 2006.
>
> [101] There is in fact an issue of credibility with all of the HRM witnesses except for Ms. Andrews. I sensed throughout that the HRM witnesses wanted to emphasize the funding issue to explain away their most obvious intention to price shop by re-tendering.
>
> [102] Their ostensible reliance on budget constraints belies their true conduct which in my view was classic bid shopping "If we retender we'll get a better price."
>
> [103] Although the circumstances of the case may be distinguished Gruchy J. in *Western Plumbing and Heating Limited v. Industrial Boiler Tech- Inc. (2000)*, 180 N.S.R. (2d) 41 (S.C.), referenced in *Dolyn Developments*, *supra*, at para. 48 captured the essence of "bid shopping." He noted it involved:
>
> > ... conduct **where a tendering authority uses the bids** submitted to it as a negotiating tool, **whether expressly or in a more clandestine** way, before the construction contract has been awarded, with a view **to obtain a better price or other contractual advantage** from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol. [emphasis added]

> [104] Whether HRM staff understood or not, the implication of their conduct, amounted to classic "bid shopping" to the detriment of the plaintiff and the integrity of the construction industry, who go to considerable expense in submitting tenders and expect fairness in their dealings with entities such as HRM.
>
> [105] HRM's tendering protocol was a written policy and long established practice. They worked with low bidders in the situation where bids exceeded their original estimates.
>
> [106] This was their practice without apparent exception.

[11] She determined that by (1) trying to obtain a better price through re-tendering and (2) not following its practice of negotiating with the lowest bidder, HRM breached its duty of fairness:

> [107] HRM has breached its duty of fairness to Amber by the conduct I have described. In these circumstances, it cannot rely on the privilege clause in the tender document to suggest that Amber has waived its right to make a claim.

The trial judge stated that the measure of damages was Amber's loss of profit and, in awarding $147,560, accepted the calculation provided by Mr. Poole.

Issues

[12] I would reframe the issues on the appeal as follows:

(1) Do the privilege clauses contained in HRM's tender affect the implied duty of fairness which the trial judge found HRM owed to Amber?

(2) Did HRM breach the implied duty of fairness?

(3) If it did, should the trial judge's award of damages to Amber be altered?

Standard of Review

[13] In *Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd.*, 2008 NSCA 17, this court set out the standard of review as described in an earlier decision:

> [20] In *Ulnooweg Development Group Inc. v. Wilmot*, 2007 NSCA 49, Saunders, J.A. provided a succinct summary on the standard of review:
>
> > [24] Deciding the appropriate standard of review depends on how one characterizes the particular question that is under scrutiny.
> >
> > [25] An appeal is not a second trial. Our powers at the appellate level are constrained. On questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error. See for example **Housen v. Nikolaisen et al**, [2002] 2 S.C.R. 235; **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24; **Campbell-MacIsaac v. Deveaux and Lombard**, [2004] N.S.J. No. 250, 2004 NSCA 87; **McPhee v. Gwynne-Timothy** [2005] N.S.J. No. 170, 2005 NSCA 80; **Flynn v. Halifax (Regional Municipality)** [2005] N.S.J. No. 175, 2005 NSCA 81; and **Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company**, [2006] N.S.J. No. 266, 2006 NSCA 82.

[14] Whether the privilege clauses affect the implied duty of fairness in a tender situation is a question of law, for which the standard of review is correctness. Whether HRM breached the implied duty of fairness or engaged in bid shopping raises a question of mixed fact and law, for which the standard of review is palpable and overriding error.

[15] Unless it can be demonstrated that the judge applied a wrong principle of law or has set an amount so inordinately high or low as to be a wholly erroneous

estimate, this court will not disturb a trial judge's award of damages: *2703203 Manitoba Inc. v. Parks*, 2007 NSCA 36.

Analysis

[16] The trial judge found that HRM had breached its duty of fairness to Amber and stated that it could not rely on the privilege clauses in the original tender document to suggest that Amber had waived its right to make a claim. That document included provisions reserving certain privileges to the tendering authority when it is considering the bids in response to its tender:

17.	Right to Accept or Reject any Tender	.1	The Owner specifically reserves the right to reject all tenders if none is considered to be satisfactory and, in that event, at its option, to call for additional tenders. ... No term or condition shall be implied, based upon any industry or trade practice or custom, any practice or policy of the Owner or otherwise, which is inconsistent or conflicts with the provisions contained in these conditions.
18.	Cancellation of Tender	.1	The Owner reserves the right to cancel any request for tender at any time without recourse by the contractor. The Owner has the right to not award this work for any reason including choosing to complete the work with the Owners' [sic] own forces.

[17] It is well established in the law of tendering that the owner is under an obligation to treat all bidders fairly and equally. The courts have recognized the value of the bidding process and the work and money bidders expend in responding to tenders. In *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Iacobucci, J. for the Court, considered whether a certain privilege clause allows the owner to disregard the lowest bid in favour of any other bid, including one which was non-compliant. He stated:

> 41 The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd.*, *supra*, at p. 30, with respect to a similar tendering process, this procedure is "heavily weighted in favour of the invitor". It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. Therefore I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted.

[18] The implied duty of fairness has been repeatedly linked to the integrity of the bidding process. In *Martel Building v. Canada*, 2000 SCC 60, Iacobucci and Major, JJ. for the Court stated:

> **88** . . . Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate would be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

See also *Double N Earthmovers Limited v. Edmonton (City)*, 2007 SCC 3.

[19] HRM accepts that the trial judge could imply a duty of fairness in the tender relationship. However, it argues that the parameters of such an implied term can be subject to the express terms of the tender document, and that the trial judge failed to take this into account.

[20] In *Martel*, *supra*, the call for tenders contained a privilege clause stating that the Department of Public Works did not have to accept the lowest or any bid. The Department did not award the project to *Martel*, which had submitted the lowest compliant bid. Iacobucci and Major, JJ. for the Court determined that, in the particular circumstances of that case, it was appropriate to imply a term to treat all bidders fairly. They stated:

> **89** A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority has "the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents" (Colautti Brothers [*Marble Tile & Carpet (1985) Inc. v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 258 (Ont. Ct. Gen. Div.)], at para. 6). [Emphasis added.]

See also *Martel* ¶ 79-85 and authorities therein cited.

[21] In *Port Hawkesbury, supra* this court considered tendering documents which included a privilege clause reserving the right to refuse any and all tenders not in the interests of the Town. It noted that the inclusion of a privilege clause in tender documents is not a rare occurrence and such provisions have been examined in several decisions. The decision referred to several authorities including *Martel, supra*, and *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*, 2006 BCCA 246 (C.A.), and continued:

> [38] The case law pertaining to privilege clauses establishes that a tendering authority may include in its tender documents clauses reserving privileges to it. A clause reserving the right to reject any and all bids permits the authority not to proceed in certain circumstances. These include economic unfeasibility, such as when the bids are above budget or the project is no longer viable, and reliance on pre-published policy: *George Wimpey Canada Ltd.* [*v. Hamilton-Wentworth (Regional Municipality)*], [1997] O.J. 3644 aff'd. Ontario Court of Appeal [1999] O.J. No. 3273]. The express terms of the tender determine the extent of the obligation of fair and equal treatment, and a privilege clause reserving the right not to accept the lowest or any bids does not exclude that obligation: *Martel*, supra. Such a clause does not authorize awarding a contract based on undisclosed criteria or awarding something other than Contract B to another person or bidder: *Murphy* [*v. Alberton (Town*) (1993), 114 Nfld. & P.E.I.R. 34, 356 A.P.R. 34 (P.E.I.T.D.)]

[22] The duty of fairness requires owners to treat all bidders fairly and equally, and not to place any bidder at a disadvantage in relation to its competitors during the tendering process. However, that duty does not exist in a vacuum. According to

Martel, in determining the nature and extent of the duty of fairness, due regard must be given to the contractual terms in the particular tender call.

[23] Although the trial judge set out paragraphs 17 and 18 of the Information to Tenderers section of the tender document, her decision provided no analysis of those privilege clauses. She did not conduct any examination of the tender documents as a whole, nor of the privilege clauses themselves, in order to give effect to the intentions and reasonable expectations of the parties in determining the scope of the duty of fairness in the circumstances. Instead, without any reference to the privilege clauses, the trial judge first concluded that HRM breached its duty of fairness to Amber. She then decided that the breach of duty precluded HRM from relying on the privilege clauses. For convenience, I repeat ¶107 of her decision:

> [107] HRM has breached its duty of fairness to Amber by the conduct I have described. In these circumstances, it cannot rely on the privilege clause in the tender document to suggest that Amber has waived its right to make a claim.

[24] The trial judge did not use the proper approach in ascertaining the scope of the duty of fairness. Privilege clauses are to be examined in the context of the entirety of the tender documents in order to determine the duty of fairness in a particular case. The trial judge failed to address the relationship between the privilege clauses, the tender documents and the duty of fairness.

[25] The wording of privilege clauses is limited only by the creativity and requirements of the owner. Consequently, they can vary enormously in extent and detail. They can be simple, such as the one which reserves the right to not necessarily award the bid to the lowest bidder. They can also be quite explicit. For example, a privilege clause can expand on the criteria that the owner can use in exercising its discretion in evaluation and selection: See, for example, that in *Cherubini Metal Works Ltd. v. New Brunswick Power Corp.*, 2008 NBCA 89.

[26] Consideration of the effect of a privilege clause on the duty of fairness will include a review of its express terms. Cases where the wording and issues are very different from those being examined cannot be relied upon. For example, in *Tercon Contractors Ltd. v. British Columbia*, 2007 BCCA 592 [appeal heard and reserved by the Supreme Court of Canada on March 23, 2009], the exclusion clause provided:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.

That provision which specifically excludes "any compensation of any kind whatsoever" bears no resemblance to the privilege clauses here.

[27] The privilege clauses in this case are broadly worded. They reserve to the owner the right to reject all tenders if none is considered to be satisfactory and the right to cancel the tender and not to award the work for any reason. In *Stanco, supra*, the British Columbia Court of Appeal considered a privilege clause stating that the owner reserves the right to reject any bids and would not necessarily award the bid to the lowest bidder. It stated:

> 52 The privilege clause in question here has been referred to in other cases as a "bare bones" privilege clause. In ***Martel***, *supra*, Justices Iacobucci and Major noted, at para. 89 that, "[a] privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly". The tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment.

[28] I do not accept that, as suggested, this extract from *Stanco, supra* establishes that an expansive privilege clause makes a consideration of the tender document unnecessary. The decision of the British Columbia Court of Appeal observed that there had been post-closing negotiations between the province and the bidders, that one bidder was permitted to undercut Stanco's prices in the rebid, and that there was nothing in the tendering documents which permitted the province to engage in such negotiations or to treat bidders unequally or unfairly: see ¶ 53. *Stanco, supra* followed the approach of examining the privilege clauses and the tendering documents in assessing the scope of the duty of fairness.

[29] HRM's tender document consisted of a supplement to be read in conjunction with the Standard Specifications for Municipal Services. The privilege clauses were found in the Information to Tenders section which also contained the provision stipulating a public opening of the bids. The remainder of the document contains general conditions, specifications and the form of tender. The tender

contains no provisions, other than the privilege clauses and the public opening requirement, which would affect the duty of fairness.

[30] According to *Martel*, the words of the privilege clauses "must be examined closely to determine the full extent of the obligation of fair and reasonable treatment." In my respectful view, the trial judge erred in law by failing to conduct this examination.

[31] The trial judge emphasized that HRM wanted a lower price. That alone does not breach the duty of fairness. Because all the bids to the original tender were substantially higher than the estimated budget, HRM could have rejected all of them. The privilege clause 17 expressly reserved the right to the owner "to reject all tenders if none is considered satisfactory." While clause 17.1 gave examples of circumstances when rejection could result, it expressly did not limit the generality of privilege clause 17.

[32] HRM did not simply cancel the original tender. It proceeded to re-tender the same pumping station project a few months later. According to the evidence, re-tendering of construction contracts was a rare, if not previously unknown, procedure for HRM in the years leading up to the re-tender for this project.

[33] Re-tendering has been held to be appropriate in certain situations. See for example, *Caldwell & Ross v. New Brunswick (Minister of Transportation)*, 2002 NBQB 153, aff'd by 2003 NBCA 7; *Dunphy's Transport Ltd. v. Avalon West School Board* (2004), 242 Nfld. & P.E.I.R. 34 (NLTD) cited in *R. v. Crown Paving Ltd.*, 2009 NLCA 5 at ¶ 46; and *Power Agencies Co. v. Newfoundland Hospital and Nursing Home Assoc.*, [1991] N.J. No. 158; 1991 CarswellNfld 155 (S.C., Trial Div.).

[34] According to *Martel* at ¶ 89, a tendering authority has "the right . . . to reserve privileges to itself in the tender documents." Here, the tender document expressly authorized HRM to re-tender. According to the privilege clauses, HRM was not only entitled to "reject all tenders" but also, "at its option, call for additional tenders". In *R. v. Crown Paving Ltd.*, 20007 NLTD 132 where the plaintiff claimed that the Province had breached its obligations when, as low bidder, it was not awarded a road maintenance contract, the privilege clause in the

tender provided only that the owner will not necessarily accept the lowest or any tender. It neither addressed nor authorized re-tenders.

[35] Moreover, the privilege clauses state that “no term . . . shall be implied, based on any practice or policy of the Owner or otherwise.” As a result, HRM’s decision to re-tender and its conduct in not following its usual practice of negotiating with or awarding to the lowest bidder were permitted by the express contractual terms of the tender. The privilege clauses excluded, as bases for HRM’s implied duty, the very factors the trial judge relied upon to establish HRM’s breach of its implied duty of fairness. HRM’s right to act as it did was set out before all bidders in the tender documents. That it chose to proceed as contemplated and permitted by those contractual terms cannot amount to an attack on the integrity of the bidding process.

[36] The trial judge quoted the following authority to define "bid shopping":

> [103] Although the circumstances of the case may be distinguished Gruchy J. in Western Plumbing and Heating Limited v. Industrial Boiler Tech- Inc. (2000), 180 N.S.R. (2d) 41 (S.C.), referenced in Dolyn Developments, supra, at para. 48 captured the essence of “bid shopping.” He noted it involved:
>
> > ... conduct **where a tendering authority uses the bids** submitted to it as a negotiating tool, **whether expressly or in a more clandestine** way, before the construction contract has been awarded, with a view **to obtain a better price or other contractual advantage** from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol. [Trial judge’s emphasis]

[37] Rejection of all bids in the original tender process because the bids were all too high, followed by a call for a second set of tenders is not "bid manipulation" or use of bids as a "negotiating tool". The trial judge said that, instead of recalling the tenders, HRM should have negotiated with Amber to obtain a reduction to Amber’s bid price. If, during those hypothetical negotiations, HRM had threatened to reject Amber's low bid for the next highest bid unless Amber reduced its

tendered price, that process might connote bid shopping. But that is precisely what did not happen.

[38] As counsel for Amber points out, the bids in response to the original tender were made public. So Eisener could use its knowledge of Amber's initial bid to calculate Eisener's bid in the second tender process. This may have given an advantage to Eisener over Amber who had no preview of Eisener's potential bid. But that circumstance inevitably resulted from the public opening of the first set of tenders. Clause 3.1 of the Information to Tenderers expressly directed that "[O]pening will be public". So the Information to Tenderers expressly allowed HRM to follow a public tender opening with a rejection of all tenders and a new call for tenders. Those facts alone cannot establish a breach of the implied duty of fairness, if the extent of HRM's duty is defined consistently with the tender documents according to *Martel*.

[39] The circumstances relied on by the trial judge are either (1) expressly authorized by the Information to Tenderers (public opening, rejection of all tenders because of unsatisfactorily high bids, option to recall tenders) or (2) expressly excluded by the Information to Tenderers as the term of an implied HRM duty (HRM past practice or policy to negotiate instead of recalling tenders). According to *Martel*, HRM's duty of fairness "must be defined with due consideration to the express contractual terms of the tender". The trial judge did the opposite, using the implied duty to trump the express terms of the tender documents.

[40] In these circumstances, the trial judge's finding that HRM breached its duty of fairness to Amber was erroneous. I would allow the appeal. There is no need to address the issue concerning the quantum of Amber's damages.

Disposition

[41] I would allow the appeal and order Amber to return the costs (if paid) awarded it at trial. Amber shall also pay HRM trial costs of $24,500 plus disbursements as taxed or agreed, and costs on the appeal of $5,000 plus disbursements as taxed or agreed.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Dissenting Reasons for Judgment: (Hamilton, J.A.)

[42] With respect, I disagree with my colleagues that this appeal should be allowed. I am satisfied a term should be implied in the tender documents that HRM would not terminate the first tender process and re-tender the identical project six months later to try to obtain a lower price.

[43] As stated by Estey, J., in the seminal tendering case of **Ontario v. Ron Engineering & Construction (Eastern) Ltd.,** [1981] 1 S.C.R. 111, at p.121, it is important to protect the integrity of the tendering system if it is possible to do so under contract law:

> "I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do."

[44] A majority of courts have since followed this principle. In his article, **The Supreme Court of Canada Defines the Privilege Clause in the Tendering Process,** 44 C.L.R (2d) 207, W. Donald Goodfellow, Q.C., C.Arb., refers to many cases supporting this principle at pp. 209 and 221.

[45] The reason it is important to protect the integrity of the tendering system is referred to in ¶ 41 of **M.J.B.**, *supra*, quoted in ¶ 17 above. The tendering system replaces negotiation with competition. It is heavily weighted in favour of owners with risks for contractors. It will only work if contractors are willing to continue to compete by submitting bids which take time and money to prepare. In the present appeal the contractor was required to investigate the site, to manage its work schedule over a period of more than two months to ensure it could perform the construction contract within the specified time (16 weeks from the start date) if it was awarded the construction contract and to bear the cost of preparing the tender and providing the tender security.

[46] As set out in ¶16 above, the Information to Tenderers expressly provides in clause 17.1 that HRM can reject all tenders if none are satisfactory and re-tender. Clause 18.1 expressly provides that HRM may cancel a tender without recourse by the contractor and not award the work for any reason. Clause 17.1 also sets out examples of when HRM may reject a tender:

> Without limiting the generality of any other provision hereof, the Owner reserves the right to reject any tender:
>
> (a) that contains any irregularity or informality;
>
> (b) that is not accompanied by the security documents required;
>
> (c) that is not properly signed by or on behalf of the tenderer;
>
> (d) that contains an alteration in the quoted price that is not initialled by or on behalf of the tenderer;
>
> (e) that is incomplete or ambiguous; or
>
> (f) that does not strictly comply with the requirements contained in these instructions.

[47] While these are only examples, their nature suggests the parties did not intend that clause 17.1 would apply to the situation anywhere close to the situation the trial judge found to be the case here, that HRM terminated the first tender process and re-tendered the identical project six months later in an attempt to get a lower price, i.e. bid shopping.

[48] As a finding of mixed fact and law, the trial judge's determination that HRM was bid shopping is entitled to considerable deference. As set out in ¶ 14 above, we are not to overturn her finding unless she made a palpable and overriding error. I am satisfied she made no such error here. There was evidence, referred to in ¶ 9 above, supporting her finding.

[49] I am also satisfied the provisions of clause 18 were not intended by the parties to cover the situation that occurred here given the evidence that unanimously indicated it had not occurred before. Mr. Poole on behalf of the appellant testified he had never heard of HRM re-tendering. Messrs. Rice, Guppy and Sheppard on behalf of HRM all gave evidence that they had never heard of a situation where a bid was received, considered to be too high and was re-tendered.

[50] The Supreme Court of Canada outlines in **M.J.B.**, *supra*, when a term may be implied in a contract:

> 27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.

[51] Considering the evidence and the whole of the tender documents in the context of the tendering system, I find it difficult to accept that the appellant, or any of the other contractors for that matter, would have taken the time and gone to the expense of submitting a tender unless it was understood by all involved that HRM would not terminate this tender and re-tender the identical job six months later to obtain a lower price.

[52] Thus I am satisfied, based on the presumed intentions of the parties, that it is appropriate to find an implied term of the tender documents to the effect that HRM would not act as it did.

[53] Such an implied term accords with preserving the integrity of the tendering process, which **Ron Engineering** instructs us to do if it complies with contract law. Without such an implied term, competition would wane with resulting higher costs to taxpayers where the owner is a public body such as here, **Kencor Holdings Ltd. v. Saskatchewan**, [1991] 6 W.W.R 717 (Sask QB).

[54] While I am satisfied there was an implied term in the tender documents preventing HRM from acting as it did, it is interesting to note that courts in other cases have found that bid shopping is prohibited in the face of a privilege clause and on the basis it breached the owner’s duty of good faith. For example, in **M.J.B**., *supra*, Iacobucci, J, approved of the findings in lower courts that even with an express privilege clause the owner cannot bid shop or engage in procedures akin to bid shopping:

> 50 ...Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping: see *Twin City Mechanical v Bradsil (1967) Ltd.* (1996), 31 CLR (2d) 210 (Ont HC), and *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)* (1997), 34 CLR (2d) 197 (Alta QB).

[55] Another example is the case of **R v. Crown Paving Ltd.**, 2007 NLTD 132, [2007] N. J. No. 253, where the very circumstances that occurred in this appeal were categorized as a breach of the duty of good faith imposed on the owner:

> 78 The rationale is that if owners are permitted to use the first tender as a way of establishing the price of a project, cancel the tender, and then re-tender in order to get a better price, the integrity of the bidding system will be severely jeopardized. Given that re-tendering would have amounted to a bidding war between the only two contenders, it is clear that this option would have likely breached the duty of good faith imposed on the owner in the tendering process.

[56] Just as I am satisfied the trial judge did not err in finding HRM liable for bid shopping, I am satisfied she did not err in her award of damages.

[57] The trial judge awarded Amber damages of $147,560 based on the loss of profit as though Amber had performed the contract for an agreed price. HRM raises two issues in regard to damages. First, it submits that any bid shopping by it did not cause Amber's damages. In this regard, HRM argues that the trial judge never made a finding of causation or that Amber would have been awarded the contract. Second, HRM submits that the judge erred by failing to examine Amber's claim carefully and to reduce it for mitigation.

[58] The principles to be considered in awarding damages for breach of the duty of fairness were set out in **Port Hawkesbury**, *supra*:

> [64] Where it was satisfied that there had been a breach of the duty of fairness but also determined that the bidder would not have been awarded Contract B in any event, a court may decline to award any damages for the breach. See, for example, Martel, *supra*.
>
> [65] Where satisfied that, but for the owner's breach of contract, the plaintiff would have been awarded Contract B. the courts have awarded the full profit that the plaintiff would have earned, had it been awarded Contract B. See, for example, *M. J. B. Enterprises*, *supra* at ¶ 55-56; *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)*, [1997] A. J. No. 822 (Q. B.).

[59] I reject HRM's arguments that its bid shopping did not cause Amber's losses. It is apparent from the evidence that this sanitary pumping station project was of sufficient importance that it garnered a high level of priority. Had HRM followed its established, and recognized, practice following the original tender, Amber would have been awarded the contract. On the re-tender, it was underbid by only a few thousand dollars by a contractor who had not bid on the original tender. While HRM submits that Amber was the second lowest bid on the re-tender because it had increased its profit margin, the trial judge found that the increase in its bid was substantially related to a supply issue with one of the major components, a storage tank, for which two types had been available at the time of the original tender but only one at the re-tender.

[60] In my view, HRM's submission that the trial judge erred by failing to impose upon Amber the burden to establish damages, including the value of the mitigation received, cannot succeed. Mr. Poole testified as to the amount of his damages. HRM's argument focuses on the mitigation aspect and suggests that Amber was responsible for demonstrating that it had mitigated its loss.

[61] In contract law, the plaintiff must make reasonable efforts in good faith to mitigate its losses upon breach of contract. In relation to bidding and tendering law specifically, a judge may discount an award of damages in a tendering case in several ways, including by considering whether the contractor took steps to reduce or mitigate its losses by seeking replacement work: see P. Sandori and W.M. Pigott, *Bidding and Tendering, What is the Law?*, 3rd ed. (Toronto: LexisNexis Butterworths, 2004) at p. 276, cited in **Port Hawkesbury**, *supra*, at ¶ 68.

[62] However, contract law does not impose on the plaintiff the evidentiary burden to show that it mitigated its losses. Rather, the burden to show that the plaintiff failed to mitigate its losses and is trying to recover for losses that were avoidable, rests upon the defendant. In **Evans v. Teamsters Local Union No. 31,** 2008 SCC 20, [2008] 1 S.C.R. 661, Bastarache J. writing for the majority stated:

> [99] In *Red Deer College* [v. Michaels, [1976] 2 S.C.R. 324] at p. 322, the Court held that the burden of proving that an employee has failed to mitigate his or her damages lies with the employer. Laskin C.J. cited Cheshire and Fifoot's *The Law of Contract* (8th ed. 1972), to explain the nature of the burden:

> ... the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame. [p. 599]
>
> As this passage suggests, the burden of proof is onerous. This is consistent with the approach to mitigation as a principle in damages more generally. As Waddams observed: "In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong" (¶ 15.140).

[63] HRM adduced no evidence that Amber had failed to mitigate its losses. In the circumstances, I cannot accept its argument that the judge applied a wrong principle of law or set the damages so inordinately high or low as to be a wholly erroneous estimate.

[64] I would dismiss the appeal.

Hamilton, J. A.