

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Santec Construction Managers Ltd. v. Windsor (Town) , 2005NSSC132

Date: 20050624
Docket: S.H. 173161
Registry: Halifax

Between:

Santec Construction Managers Limited,
a body corporate

Plaintiff

and

Town of Windsor

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: October 18, 19, 20, 21 and 25, 2004, January 4, 5, 6 and
21, 2005 and February 4, 2005, at Halifax, Nova Scotia

**Final Written
Submissions:** February 14, 18 and 25, 2005

Decision: June 24, 2005

Counsel: George W. MacDonald, Q.C. and Andrew J. R. Inch, for
the Plaintiff
Barry J. Alexander and Richard M. Hartlen, for the
Defendant

Coughlan, J.:

- [1] The Town of Windsor decided to build a water treatment plant. It retained CBCL Limited as its consultant on the project. A plant was designed and tenders called. The Town sought bids on two different options - one with the plant having a large clearwell, and the other with a smaller clearwell. A number of contractors submitted bids, including Santec Construction Managers Limited. Santec submitted the lowest bid on the large clearwell option. Another contractor, Winbridge Construction Limited, submitted the second lowest bid on the large clearwell option and the lowest bid on the smaller clearwell option. The Town chose to proceed with the large clearwell.
- [2] CBCL had previously been involved with Santec in projects in West Royalty, Prince Edward Island and Mahone Bay, Nova Scotia. CBCL considered its experience with Santec on those projects as unfavourable. CBCL reviewed the bids submitted and reported to the Town. The Town awarded the contract to Winbridge despite the fact Santec was the lowest compliant bidder. Santec sued the Town.
- [3] The issues for the Court are:
 1. Did the Town have a contract with Santec and, if so, did the Town breach the contract?
 2. If the Town breached its contract to Santec, to what damages is Santec entitled?
- [4] The tender documents issued by CBCL on behalf of the Town set out the terms and conditions governing the relationship between the parties. The Invitation to Tender constituted an offer to contract. Santec submitted a compliant bid. It is clear from the Information to Tenderers it was the intention of the parties the submission of a bid in response to the Invitation to Tender was to become a binding contract, the “contract A” described by Estey, J. in giving the decision of the Supreme Court of Canada in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. Paragraph 16 of the Information to Tenderers provided:
 16. On the written acceptance by the Owner of a Tender, that Tender becomes the Contract and the Tenderer who has submitted it becomes the Contractor. The Contractor will be required to enter into a formal

agreement with the Owner following receipt of a written letter of acceptance from the Owner.

- [5] Contract "A" is governed by the terms and conditions of the Tender called.
- [6] One of the terms of Contract "A" is the Town may only accept a compliant bid. See: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, [1999] 1 S.C.R. 619. The Town takes the position both Santec and Winbridge were compliant bidders. The issue arises whether Winbridge was a complaint bidder.
- [7] Documents provided to companies that wished to bid on the Windsor Water Treatment Plant included the following terms. Section 2 of the Information to Tenderers provided:

2. A Tender is comprised of the following:
 - a) Section 00330 - Tender Form - Unit Price and Section 00400 - Supplementary Tender Information in its entirety, with all pages and spaces for entry of information by Tenderers filled in as instructed and with all pages initialled by the Tenderer except those requiring signatures.

and at para. 15(g):

15. Each Tenderer shall submit with the tender on the forms provided:

....

- g) A list of Sub-Contractors.

[8] Section 7 of the Supplementary Tender Information provided:

7. List of Sub-Contractors to be used:

The Tenderer's attention is drawn to the General Conditions of the Unit Price Contract - GC 26 ASSIGNMENT. The Tenderer shall enter the name and address of each Sub-Contractor used in making up the tender. Only one Sub-contractor shall be named for each part of the work to be sublet.

After the tender has been accepted by the Owner, the Contractor shall not be allowed to substitute other sub-contractors in place of those named in the tender without written approval from the Consultant.

- [9] Section GC26 of the General Conditions of the Unit Price Contract provided:

GC26 ASSIGNMENT AND SUB-CONTRACTING

- 26.1 The Contractor shall not assign the Contract or any part thereof or any benefit or interest therein without the written consent of the Consultant.
- 26.2 The Contractor shall not sub-contract the whole of the Works and shall not sub-contract any part of the Works without the written consent of the Consultant, and such consent shall not relieve the Contractor from any liability or obligation under the Contract nor shall any such consent imply any responsibility of the Owner to any sub-contractor.
- 26.3 Notwithstanding the provision of the foregoing, the Contractor shall employ sub-contractors for the execution of those parts of the Works requiring specialist skills. In such cases, the Contractor shall be entirely responsible for binding and shall so bind sub-contractors in a like manner to that in which the Contractor is bound by the Contract to the Owner, and the Contractor shall on all respects accept full responsibility as with the Owner for the execution of each and every part of the Works in complete conformity with the Contract. Every sub-contracting by the Contractor shall provide that the subcontractor shall comply with all terms and conditions of this Contract which can reasonably be applied to the undertaking.
- [10] It is a requirement of the Tender the tenderer provide in the tender particulars of the subcontractors it intends to use. Also the tenderer is not permitted to subcontract the whole or part of the works without the written consent of the consultant. William Donald Legge, Project Engineer of CBCL on the Windsor Water Treatment Project, testified the list of subcontractors has a number of purposes. CBCL wanted the names of subcontractors to determine if the subcontractor had the necessary experience to perform the particular aspect of the project for which it was subcontracted; and if the contractor was doing the work itself, CBCL could determine whether the tenderer had the necessary experience. Mr. Legge stated CBCL did not want a contractor to list a subcontractor and then change subcontractors, as the change may affect the quality of the job. Andrew Gates, Project Manager for CBCL on the Project, testified the main purpose for the list of subcontractors is to ensure the contractor is carrying

subcontractors that have the experience to perform the particular part of the job for which they have been subcontracted.

- [11] The Tender requires tenderers provide the consultant with names of subcontractors it intends to use, and to identify any parts of the works it intends to perform itself. If a contractor failed to provide the required information, the bid would not be compliant.
- [12] Was Winbridge's bid compliant? William Legge testified during the tender review process his understanding was Winbridge was going to do the site civil work, formwork and concrete finishes itself. He stated he would want to know Winbridge had the qualification and experience to do the concrete work. When, in the tender documents, Winbridge used the expression "own estimate" in the "List of Subcontractors to be Used" in the column headed "Contractor Name and Address" in the Supplementary Tender Information, he understood it meant Winbridge intended to do the work itself. It was not until after the award he learned Winbridge used subcontractors for the civil site work, formwork and concrete finishes. This view is supported by the report CBCL prepared for the Town of Windsor dated July 19, 2001, addressed to Mr. Don Beatty, Director of Public Works, which stated in part:

In the event the Town decides to award the contract to the second low tenderer, we offer the following comments regarding Winbridge Construction.

Winbridge Construction plans to complete the site civil and concrete work with their own forces.

- [13] However, Mr. Beatty testified on July 18, 2001 he had a telephone conversation with Vic Sears of Winbridge, during which Mr. Sears informed Mr. Beatty he had spoken to Three C's, a contractor, about the possibility of that company doing the formwork and concrete work on the Windsor Project, and that Mr. Sears had initial discussions with Howard Little Excavation about doing the site civil work, but nothing had been confirmed. Mr. Beatty stated he believed "own estimate" meant the contractor prepared the estimate, but was going to have a subcontractor do the work. From his previous experience with Winbridge, Mr. Beatty knew the company always contracts out the main portions of its work. In fact, Winbridge did employ subcontractors to do the site civil work, formwork and concrete work.
- [14] Upon receipt of the report from CBCL dated July 19, 2001, Mr. Beatty prepared his own recommendation to the Windsor Town Council, recommending the Tender be awarded to Winbridge. Although he knew

Winbridge intended to subcontract the site civil work, formwork and concrete work, Mr. Beatty did not comment on the statement in CBCL's report that Winbridge planned to complete the site civil work and concrete work with its own forces.

- [15] Andrew Gates testified it was his understanding the words "own estimate" in the Winbridge Supplementary Tender Information meant Winbridge prepared the estimate and would decide later on a subcontractor to perform the work. He testified he was not concerned about the point. Although the CBCL report to Mr. Beatty dated July 19, 2001 signed by Mr. Gates stated Winbridge planned to complete the site civil work and concrete work with its own forces, Mr. Gates testified he did not draw his attention to the statement which was in error.
- [16] At the time the report of July 19, 2001 was prepared, CBCL knew the Tender may not be awarded to the lowest compliant bidder and would therefore be careful in preparing its report to the Town. Considering that fact, together with Mr. Legge's understanding Winbridge would be using its own forces for the site civil work, formwork and concrete finishes, and the statement in the report that Winbridge would be using its own forces, I do not accept Mr. Gates' evidence that he thought the term "own estimate" meant Winbridge prepared the estimate and would chose a subcontractor later.
- [17] From the evidence, it is clear Mr. Beatty knew Winbridge did not intend to perform the site civil work, formwork and concrete finishes itself, but planned to use subcontractors. I find Winbridge had not provided the information concerning subcontractors required by the tender documents and was not a compliant bidder. In awarding the contract to Winbridge, the Town breached the Contract "A" it had with Santec by awarding the contract to a non-compliant bidder.
- [18] If I erred in determining Winbridge's bid was not compliant, I will assume Winbridge's bid was compliant and continue with the analysis.
- [19] The Tender contained certain "privilege" clauses, and, in particular, clauses 22 and 23 of the Information to Tenderers provided:
22. The Owner reserves the right to reject any or all tenders received and to accept any tender that may be considered to be in the best interest of the Town of Windsor.

23. The Owner may allocate preference when, in the opinion of the Owner, expressed by resolution, it is in the interest of the Owner to do so.

[20] Although the Town may only accept compliant bids, it does not have to accept the lowest compliant bid. The tender form the tenderers signed contains the following provision:

The undersigned Tenderer:

....

10. Understands and agrees that you are not bound to accept the lowest or any tender which you may receive.

[21] In dealing with the effect of a “privilege” clause, Iacobucci, J., in giving the Court’s judgment in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., supra*, stated at p. 643:

Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of “cost” than the prices quoted in the tenders. In this respect, I agree with the result in *Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308 (Ont. C.A.). In that case, Contract B was awarded to the second lowest bidder because it would complete the project in a shorter period than the lowest bid, resulting in a large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost. However, needing to consider “cost” in this manner does not require or indicate that there needs to be a discretion to accept a non-compliant bid.

[22] The Town may consider the broader aspects of the “cost” of a Project in determining which contractor is awarded the contract, including, as in this case, factors such as completion date, the experience of the contractor, and any additional costs which may be incurred by the Town in supervision and administration of the Project occasioned by the inexperience of a particular contractor. Clause 9 of the Information to Tenderers provided:

9. The Tenderer shall fill in the completion time and is notified that the completion date based on this will be taken into account in considering the tenders.

- [23] While the Town did not have to accept the lowest compliant tender, there is an implied term of Contract A that the Town must treat all bidders fairly. Iacobucci and Major, J.J. stated in giving the Court's judgment in *Martell Building Ltd. v. R.*, [2000] 2 S.C.R. 860 at p. 895:

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, supra*, at para. 6).

- [24] The Town's consultant, CBCL, opened and reviewed the bids for the Project. Mr. William Legge testified the specifications and tender documents for the Project were prepared by CBCL, with Mr. Legge as lead on the Project. The tender form requested information as to the time the tenderer required to complete the Project. Santec's completion time was 60 weeks, Winbridge's was 52 weeks. When the difference in completion time was considered, the price differential in the Santec and Winbridge bids was greatly reduced, but Santec was still the lowest tenderer.
- [25] CBCL did not say Santec was not qualified to perform the Windsor Treatment Plant contract. Santec had never been involved in the construction of a water treatment plant. CBCL considered the price differential between Santec and Winbridge would be more than offset by the additional site inspection and contract administration service required if the contract was awarded to Santec. As stated in Mr. Gates' report to Mr. Don Beatty dated July 19, 2001:

... In our opinion, based on our past project experience and a review of project references, we believe Santec Construction may require an increased level of contract administration and site inspection compared to Winbridge Construction.

- [26] Howard Brown, a Senior Project Engineer with SNC-Lavalin Inc. in Montreal, Quebec, was qualified as a professional engineer, able to give opinion evidence on the planning, design and construction of a water treatment plant, as well as the mechanical work required in water treatment plants, as opposed to other construction projects. Mr. Brown prepared a report dated July 7, 2004. He testified the mechanical works of the Windsor Water Treatment Plant were fairly complex, but even though mechanical

works are complex, they do not cause problems. The resumes of Santec's key personnel did not demonstrate experience related to water treatment plants. He said a contractor with less experience is a reason to believe the mechanical works may take longer and may increase the cost of the project. In his report, Mr. Brown stated:

Perhaps stating the obvious, it is clear that the Town would have preferred to mandate a contractor with significantly more mechanical and process experience. Articles 22 and 23 of the Information to Tenderers mention that the Owner can do what is in his best interest regarding the preference for a tenderer. However, I have not found an article in the specifications that defines specific qualifications for the acceptance or rejection of a tenderer, such as the type, size and value of projects already carried out or in progress.

While the details were not provided to me, it can be assumed that the referenced projects included some mechanical works similar in nature to those required for the water treatment plant, such as process equipment installation as well as pumping and piping systems. Assuming this to be so and that these works were generally carried out by or under the direct supervision of Santec's own forces, even though the works were surely less complex than those required at the water treatment plant, it cannot be said that Santec did not have the ability to complete the required works. It is however likely that the mechanic works at the water treatment plant would be carried out less efficiently by Santec compared to a more experienced contractor who would be familiar with the "tricks" of the trade. As inferred by CBCL, this would likely result in longer installation times which would adversely affect other trades as well as engineering supervision and management. This infers higher costs to the Town.

[27] Did the Town of Windsor fulfil its obligation to treat Santec fairly?

[28] Mr. Legge testified all Supplementary Tender Information provided by tenderers was important and considered by the Town. The Supplementary Tender Information required tenderers to provide certain information. As Mr. Legge explained, the matters dealt with in the Supplementary Tender Information affects the overall cost of the project to the owner and was used by CBCL in the tender analysis. The "Particulars of Tenderers' Recent Contracts" gives information of the relevant experience of the contractors and gives CBCL the ability to follow up on the performance of the contractor. The "List of Subcontractors to be Used" allows CBCL to determine if the subcontractor has the necessary experience to perform the particular aspect of the job for which it is subcontracted. If a contractor is performing a portion of the project themselves, CBCL could determine if the

contractor has the necessary experience. For the purposes of quality control, CBCL did not want the contractor to list one subcontractor and then switch subcontractor, as such a switch may affect the quality of the work. CBCL wants to know how the contractor valued each portion of the project to determine whether the valuation is too low or too high. This allows the consultant to determine if the contractor understands the complexity of the work. The "Project Personnel" information is requested in order to determine the experience of the tenderer to do the work. Information is also requested as to the contractor's banker, bonding company, insurance broker, equipment to be used on the job, as well as the tenderer's safety data. All of this information is required as it could impact the cost of the project.

- [29] Mr. Legge testified the tenders were opened at 3:00 p.m. on July 5, 2001. CBCL was represented at the opening by Mr. Legge and Andrew Gates. Santec was the low compliant bidder for the large clearwell option. Mr. Legge did not have any prior knowledge of Santec.
- [30] On July 6, 2001 Mr. Legge spoke to Des Fitzgerald, a CBCL employee, to discuss the performance of Santec on a sewer project in Mahone Bay, Nova Scotia. He regarded Mr. Fitzgerald's comments as unfavourable to Santec. On the same day, Mr. Legge contacted Norm McLaughlin, of CBCL's Prince Edward Island office to discuss Santec's performance on a project in West Royalty, Prince Edward Island. Mr. Legge was informed that project went over the completion date and Santec was required to pay liquidated damages. There was a dispute which went to arbitration. Santec won the arbitration and the liquidated damages were returned. Mr. Legge testified he considered it unfavourable to Santec that it took the matter to arbitration. Also Mr. Fitzgerald had concern Santec did not own a lot of equipment and had no long term employees, which Mr. Legge took as a negative comment.
- [31] On the morning of July 6, 2001, Mr. Legge had a telephone conference with Don Beatty, and at 1:59 p.m. on July 6, 2001 Mr. Legge e-mailed Mr. Beatty a list of lawyers who dealt with "these type of contract law issues". At 4:01 p.m. on July 6, Mr. Legge sent an e-mail to Mr. Beatty which provided, in part:

3. An increased level of inspection and administration time, both on the part of CBCL and the town, could be required if the contractor awarded the work does not have alot of experience in this field. It is difficult to quantify the costs associated with this item, although they could be considerable depending on the contractor in question.

....

We will continue our evaluation of tender results for both of the low tenderers. We will wait to hear from the Town before we proceed with the interview phase of the two low bidders. As well, I will forward some recently obtained literature on Construction law issues for information purposes.

- [32] At the time the e-mail memorandum was sent to Mr. Beatty at 4:01 p.m., the only people Mr. Legge had spoken to concerning Santec were Messrs. Fitzgerald and McLaughlin of CBCL.
- [33] Mr. Legge testified the prices were very close and the three lowest tenderers had complete information, and all the bids appeared compliant.
- [34] Mr. Legge testified CBCL does not normally contact tenderers after close of tenders to ask their bid be changed in any way. That would not be fair to the tendering process and other tenderers, as it gave the tenderer another kick at the can.
- [35] Mr. Legge stated he reviewed the bids of Santec and Winbridge the same. He understood Winbridge would perform its own civil site work, formwork and concrete finishes. Concrete was an important part of the work to be performed. He would want to know Winbridge had the necessary experience to carry out the concrete work. Mr. Legge did not know if Winbridge was qualified to do the concrete work and did not make inquiries of Winbridge's experience in dealing with concrete.
- [36] In reviewing Winbridge's bid, Mr. Legge did not consider the information contained in the Supplementary Tender Information that in the previous year Winbridge had only worked 4,000 employee hours and 2,000 supervisory hours. He agreed the number of hours could be interpreted that Winbridge did not do much work the year before the bid was made. He also agreed Winbridge did not have prior experience working on water treatment plants.
- [37] Santec gave detailed information of the equipment it intended to use on the job on the Supplementary Tender Information, whereas Winbridge gave limited information of the equipment it intended to use. Mr. Legge acknowledged he did not make inquiries of the equipment to be used by Winbridge.
- [38] Mr. Legge checked on the qualifications of the electrical subcontractor named by Winbridge. He acknowledge the price quoted in the

Supplementary Tender Information for electrical work in Winbridge's bid was low, but did not recall being concerned.

- [39] Although Mr. Fitzgerald expressed concern Santec had no long term employees, Mr. Legge did not focus on the number of project personnel in the Winbridge bid. In its bid, Winbridge only identified two people in the listing of project personnel in the Supplementary Tender Information. Mr. Legge stated he wanted to identify personnel who would perform key work and he knew of Victor Sears, who was listed as Project Manager in the Winbridge bid.
- [40] Mr. Legge always assumed Santec would be using its own forces to do the mechanical work. Mr. Gates asked that he confirm with Santec it was doing the mechanical work itself. On July 11, 2001, Mr. Legge called Michelle Thibodeau, now Michelle Moreau. The July 11 call to Ms. Moreau was the only call Mr. Legge made to anyone at Santec prior to the award of the tender. However, on a couple of other occasions, Ms. Moreau called and spoke to Mr. Legge, inquiring as to the status of the tender award.
- [41] The notes concerning the July 11 call set out Mr. Legge contacted Ms. Moreau to obtain contact names for project references, and the names and contact information concerning job references. There is no mention of any inquiry in the notes about who would be doing the mechanical work.
- [42] Mr. Legge was concerned, as it appeared from the references supplied by Santec the company had not done mechanical work as complex as the Windsor Water Treatment Plant. It was his understanding Santec had employed a mechanical subcontractor on the Stewiacke Sewage Treatment Plant, a project Santec had given as a reference. In fact, Santec had performed the mechanical work itself. Mr. Legge testified if he had known Santec had done the mechanical work itself, it would have been a relevant factor.
- [43] Mr. Gates stated from his limited knowledge of Santec, he did not think Santec could do the mechanical work. He testified CBCL did not consider Santec not qualified to do the work, but considered Santec would require increased supervision. It is clear from the actions of CBCL, including the faxing of lawyers' names to Mr. Beatty at 12:01 p.m. the day after the tenders were open, CBCL had concerns about awarding the contract to Santec, even before Santec's references were checked. As neither Mr. Legge nor Mr. Gates had knowledge of Santec at the time, the concern arose from CBCL's past experience with Santec on the Mahone Bay and West Royalty projects.

- [44] Mr. Gates did not discuss the West Royalty project with Mr. McLaughlin, his knowledge of the project was received from Mr. Legge. On cross-examination, he admitted he was not aware the arbitrator concluded any delay in the project was not Santec's fault. He acknowledged no attempt was made to followup on Messrs. Fitzgerald's and McLaughlin's comments about the Mahone Bay and West Royalty projects. His concern with the West Royalty project was that it went to arbitration. He stated, as the Mahone Bay and West Royalty projects were not references supplied by Santec, CBCL did not place any particular attention on these projects. I do not accept that assertion, as the only people contacted about Santec before there was discussion of lawyers who dealt with "these types of contract law issues" were Messrs. Fitzgerald and McLaughlin.
- [45] Mr. Legge stated, at Mr. Gates' direction, he called Santec and spoke to Michelle Moreau to confirm Santec intended to do the mechanical work on the Project with its own forces. Mr. Legge always assumed the mechanical work would be done by Santec's own forces. He said he spoke to Ms. Moreau two or three times when she called him to inquire as to the status of the tender review process. He made one call to her to get the names of contact people for contracts referenced by Santec and to confirm Santec intended to do its own mechanical work. Mr. Legge kept a record of his telephone call to Ms. Moreau of July 11, 2001, as follows:

Contacted Michelle Thibodeau to obtain contact names for project references.

Indian Brook Sewage Lagoon - Glen Ross, Horner & Associates

PWGSC - BIO/Dartmouth Salt Water Supply System - Fred Rayhee 426-6298/Wilf Lush 426-2053 (Public Works)

- [46] There is no reference in his notes to any inquiry about the mechanical work on the Project. On discovery, Mr. Legge was asked about his telephone conversations with Ms. Moreau and he made no mention of asking her to confirm Santec would be doing the mechanical work itself. Ms. Moreau testified Mr. Legge did not ask her to confirm Santec would be doing the mechanical work itself. I find Mr. Legge did not ask Ms. Moreau to confirm Santec would be doing the mechanical work on the Windsor Project itself.
- [47] Mr. Donald Beatty confirmed he was the only employee of the Town involved in the evaluation of tenders in this case, and that CBCL was acting for the Town. Mr. Beatty believes he received copies of the actual bids on

July 6, 2001, the day after the tenders were opened. He testified he reviewed the two low bids received on both the large clearwell and smaller clearwell options, then had a telephone discussion with Mr. Legge and Mr. Gates, receiving their initial opinion on the bids. Mr. Beatty stated he wanted to review the tenderers' experience and list of subcontractors, and the other information set out in the bids.

- [48] Mr. Beatty testified he was concerned Santec would be doing the mechanical work itself. He did not know the Santec people. His concerns were based on what he was told by CBCL. Mr. Beatty stated he was interested in determining the subcontractors involved in the Project. He testified that very early on there was an anticipated problem with awarding the contract to Santec because of CBCL's experience with Santec. Even before Mr. Beatty received copies of the tender documents, he had been informed by CBCL Santec was going to do the mechanical work itself; and he and CBCL anticipated a problem at that stage.
- [49] I find Santec was not treated fairly in the tendering process. Before the bids were analyzed, CBCL was giving Mr. Beatty the names of lawyers "who dealt with these type of contract issues". At that time, the only people CBCL, through Mr. Legge, had contacted were Messrs. Fitzgerald and McLaughlin. The fact the West Royalty Project went to arbitration was considered a negative factor, although the evidence was Santec was successful at the arbitration.
- [50] By July 6, 2001, the day after the Tenders were opened, it is clear CBCL had concerns about awarding the contract to Santec. The manner in which the Santec and Winbridge bids were subsequently reviewed makes it clear the contract was not going to be awarded to Santec. Any shortcoming or lack of information in the Winbridge bid was excused or not a concern to CBCL. Even before Santec's references were reviewed, it is clear the contract was not going to be awarded to Santec.
- [51] The Town Council acted on the information given to it by CBCL and Mr. Beatty. However, CBCL did not treat Santec fairly in the review of its bid. CBCL was the consultant hired by the Town to deal with the water treatment plant. Santec was not treated fairly and equally. I find the Town of Windsor breached the term of Contract "A" it had with Santec to treat it fairly.
- [52] The Town takes the position that considering the increased completion time provided for by Santec in its bid, the increased costs of supervision occasioned by Santec doing the mechanical work itself, and the increased level of supervision by CBCL which would be required if the contract was

awarded to Santec, it would cost the Town more if the contract was awarded to Santec and, therefore, it was appropriate to award the contract to Winbridge. The Town is entitled to take a more “nuanced view of costs” as set out in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, *supra*, but in reviewing the respective bids, all bidders must be treated fairly and equally. That did not happen in this case.

- [53] What amount of damages is the plaintiff entitled to for the breach of contract A? In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, Binnie, J., in giving the Court’s decision, stated at p. 976:

The well-accepted principle is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost to the respondent of executing or completing the work, i.e., the loss of profit: *M.J.B. Enterprises Ltd.*, *supra*, at p. 650; *Twin City Mechanical v. Bradsil (1976) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), at pp. 225-26; S.M. Waddams, *The Law of Damages*, (3rd ed. 1997), at para. 5.890; McGregor, *McGregor on Damages* (16th ed. 1997), para. 1154.

- [54] The plaintiff’s loss of profit must be determined.
- [55] The total tendered price by Santec was \$3,920,861.00. The tender form contained contingencies which all bidders were required to add to their tendered price. These totalled \$150,000.00, made up as follows:

General contingency allowance	\$ 100,000.00
Three phase power service contingency allowance	\$ 45,000.00
Environment protection contingency allowance	\$ 5,000.00

- [56] After deducting the contingencies, Santec’s tendered price was \$3,770,861.00. Evidence was tendered that Santec’s cost to perform the contract would have been \$3,277,052.00, resulting in a net profit of \$493,809.00.
- [57] The Town of Windsor questions the evidence of cost presented on behalf of Santec. John Alexander (Sandy) Herrick, President and General Manager of Santec, testified there were cost summary sheets prepared at the time of the tender submission, but the sheets could not be found. The cost summary sheets produced at trial were prepared in the course of the litigation. The Town questions the accuracy of the plaintiff’s claim as the backup material was produced, but not the original cost summary sheets. I must make a decision on the basis of the evidence at trial.

- [58] Brian Christopher Lane, Manager of General Engineering for SNC-Lavalin Inc., Halifax, Nova Scotia, was qualified as a professional engineer, entitled to give opinion evidence concerning construction costs generally, and as they relate to water treatment plants. Mr. Lane was asked to review and analyze the backup material provided by Santec. He prepared a report dated August 30, 2004. His conclusion was the backup material supplied by Santec was not sufficient to warrant approval for payment. He stated if he was administering the contract, he would seek further clarification from the contractor before making payment. He said the net profit may be overstated as net profit could not be determined until he received detailed costs of the Project and backup for them. Mr. Lane acknowledged the bidding on the Project was as “good as you get” and Santec’s price was not unreasonable, but the backup material Santec provided was not reasonable.
- [59] Mr. Lane pointed out deficiencies in the material presented by Santec to support its claim; however, in his analysis he used historical data which is published to provide unit prices for various types of construction. The Windsor Water Treatment Plant was a lump sum contract, not a unit price contract. In a unit price contract, the unit price includes cost of equipment, labour and material, as well as an amount for profit and overhead. Mr. Lane did not break down the unit price to its component costs. A difficulty in analyzing Santec’s bid by comparing it to a published unit price is that it is not possible to take into consideration differences which may be present in the cost factors that go into determining the unit price. For example: the cost of labour, which may be different if a unionized or a non-unionized workforce is used.
- [60] Mr. Lane pointed out deficiencies in the material presented by Santec to support its claim. For example: in determining its costs, Santec included the sum of \$38,686.00 for roofing being the amount of the quote Santec received from Bradshaw Roofing Contractors Inc., whereas in the Tender Santec used a quote it received from McCarthy’s Roofing Limited of \$41,550.00. Having named McCarthy’s Roofing Limited as the roofing subcontractor, Santec cannot unilaterally substitute Bradshaw Roofing Contractors’ lower bid as the cost of roofing. The roofing cost has to be increased by the difference between the two bids, being \$2,864.00.
- [61] I have concern regarding Mr. Lane’s analysis of this particular project, in that he used generic cost figures which may not apply. The evidence was Santec had a site trailer which was to be used as separate offices for the consultant and contractor at a cost of \$9,350.00; whereas Mr. Lane assumed

- the cost for standalone site offices for the consultant and contractor to be approximately \$22,500.00 each, totalling approximately \$45,000.00.
- [62] Shortly before the close of tenders, Santec received an unsolicited quote from Black & McDonald for the mechanical and electrical work on the project. Mr. Herrick testified when he saw the quote he amended Santec's tender by using Black & McDonald's bid of \$312,500.00 for the treatment plant plumbing and HVAC mechanical, as he considered the Black & McDonald bid was probably more accurate than the price prepared by Santec.
- [63] In its costing, Santec allowed \$240,000.00 for mechanical labour. In cross-examination, Mr. Herrick was directed to Black & McDonald's bid of \$451,270.00 to perform the treatment plant, process pipe and equipment installation. Deducting the cost of equipment, which was accounted for elsewhere in Santec's costing, Black & McDonald's price for the mechanical labour was \$300,179.00.
- [64] Mr. Herrick stated the \$240,000.00 Santec allowed for mechanical labour included overhead and contingencies, as well as the work, less equipment costs, which was the same as the work for which Black & McDonald's quoted the price of \$300,179.00. If allowance is made for a ten percent profit and overhead, that leaves \$270,161.00 as Black & McDonald's cost of mechanical labour. The difference between Black & McDonald's cost and Santec's figure of \$240,000.00 is \$30,161.00. In addition, Santec included overhead items in the \$240,000.00 figure, including the salary of site superintendent, Steven Densmore, approximately \$52,800.00, insurance \$5,000.00, cost of site trailers for consultant and contractor \$9,350.00, contract coordinator \$35,000.00, telephone \$1,000.00, power to office \$4,000.00 and portable toilets \$2,000.00. There were also overhead items, such as the cost of the surveyor, heat for curing concrete and necessary safety programs, the cost of which were not quantified. The quantified overhead items total \$109,150.00. If these amounts are deducted from the \$240,000.00, the balance left is \$130,850.00. Mr. Herrick stated the \$240,000.00 may contain a small amount for contingencies, probably \$20,000.00, which, if deducted, would reduce the amount for mechanical labour in Santec's bid to no more than \$120,850.00. I find Santec underestimated the cost of the treatment plant, plumbing and HVAC mechanical and accept the cost as \$270,161.00, being the Black & McDonald bid, less a ten percent allowance for profit and overhead.

- [65] The issue of overhead related to the contract must be considered. The site overhead would have been incurred by Santec in performing the contract. While Mr. Herrick testified that items of overhead were included in the \$240,000.00, shown as mechanical labour, I have determined the amount shown for mechanical labour was inadequate and, therefore, items of overhead are to be deducted from the amount Santec is claiming as its net profit. The evidence is items of overhead which Santec did not include in calculating the cost of the project include: insurance \$5,000.00, site trailers for consultant and contractor \$9,350.00, site superintendent \$52,800.00, contract coordinator \$35,000.00, telephone \$1,000.00, power to office \$4,000.00 and portable toilets \$2,000.00. In addition, there are overhead items, the cost of which have not been given in evidence including: safety programs, heat for curing concrete and cost of surveyor. I therefore deduct from the amount of Santec's profit the sum of \$10,000.00 for unquantified overhead items.
- [66] In costing the Project, Santec says the cost of the concrete work was \$198,200.00. Mr. Lane stated the concrete work was of medium complexity, as some of it had to be watertight. The concrete work, he said, was a significant portion of the work. He considered, for the volume of concrete in the Project, the cost claimed by Santec was too low. While accepting Santec's formwork and concrete volumes, his conclusion was the cost for the concrete work should be \$320,426.00. Mr. Lane considered the cost of the formwork for the concrete should be increased from \$58,000.00 to \$154,350.00 based on the unit price he used. He explained when costing concrete work, the cost of the formwork is at least the same as the cost of the concrete, as most of the labour in concrete work is in the formwork. However, given the facts of this case, including Mr. Lane did not take into consideration Santec reuses some of its formwork material and his use of unit prices that did not take into consideration the differences in cost factors, such as cost of labour, I find Mr. Lane's cost of concrete is too high; however, Santec's cost of formwork of \$58,000.00 is low. For the purpose of calculating Santec's loss of profit, I find the cost of the formwork to be \$108,000.00 or \$50,000.00 more than Santec stated in its documentation.
- [67] In his evidence, Mr. Herrick stated there should be an allowance for contingencies, which is in addition to the contingency allowances provided in the Tender. He considered an appropriate amount to be \$20,000.00. Considering the facts of this case, I find an appropriate amount for such

contingencies to be \$50,000.00. Therefore, the amount of \$50,000.00 is to be deducted from Santec's profit.

- [68] When Winbridge performed the contract, it encountered unforeseen contaminated soil conditions which required extra work of approximately \$13,000.00 to \$15,000.00. I value the additional work at \$14,000.00. Santec says the amount of the extra work is to be added to the value of the project. In its tender bid, Santec was to do its own site civil work. The Tender provides when the contractor performs such additional work itself, it is to receive its cost, plus fifteen percent for overhead and profit. Fifteen percent of \$14,000.00 is \$2,100.00. For the purpose of calculating Santec's loss of profit on the additional work, I am assuming the overhead to be seven and one half percent for the additional work, which results in a loss of profit for Santec on the additional work of seven and one half percent or \$1,050.00. The damages awarded to Santec are to be increased by \$1,050.00 as the profit for the additional work.
- [69] Santec is to receive the harmonized sales tax (HST) on the amount of its loss of profit.
- [70] The Town of Windsor says Santec mitigated the damages it suffered by obtaining another contract, the Ward Road Reconstruction Project, which was carried out during the time frame Santec would have been working on the Windsor Water Treatment Plant Project, and the profit Santec made on the Ward Road Project should be estimated on the same basis as the loss of profit is estimated on the Windsor Water Treatment Plant Project and deducted from the damages awarded to Santec.
- [71] A plaintiff is under a duty to take all reasonable steps to mitigate its damages. The onus of proving failure to mitigate is on the defendant. These principles were described by Laskin, C.J.C. in giving the majority opinion in *Red Deer College v. Michaels et al.*, [1976] 2 S.C.R. 324 at p. 330 as follows:

... It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary role in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In *Payzu Ltd. v. Saunders*, at 589, Scrutton L.J. explained the matter in this way:

Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same.

... If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences. ...

....

Cheshire and Fifoot, *supra*, expressed the position more tersely as follows:

But 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.

[72] Mr. Herrick testified Santec generally only undertakes one job in excess of one million dollars in value at any one time, but sometimes the company does have two projects valued in excess of one million dollars at the same time, in which case Santec hires additional staff. Steven Densmore, whom Santec planned to employ as site superintendent on the Windsor Water Treatment Plant Project, testified during the time period Santec would have been working on the Windsor Water Treatment Plant Project, July, 2001 to July, 2002, he spent some time working for Santec on the Ward Road Project at C.F.B. Greenwood. The Ward Road Project started in the late summer of 2001 and was halted subsequent to the terrorist attack in New York City on September 11, 2001. It was his recollection the work recommenced probably in the month of May, 2002 and was completed in mid-summer 2002.

[73] Michelle Moreau testified the Ward Road Project was awarded September 10, 2001 and had a value of approximately 2.5 million dollars. Some time

after September 11, 2001, work stopped on the Project. It was completed in the latter part of the summer of 2002.

- [74] The onus is on the Town of Windsor to prove Santec failed to mitigate its damages, and the Town has not met that burden. There is no evidence to show the cost of the Ward Road Project to Santec, to allow a calculation of any profit made by Santec. In any event, the evidence is Santec does, on occasion, work on more than one project with a value over one million dollars at the same time. There is no evidence to show the Ward Road Project reduced the loss of profit suffered by Santec as a result of the Town's breach of contract.
- [75] The following is a summary of the above calculations of Santec's loss of profit:

Price tendered by Santec		\$ 3,920,861.00
Less:		
General contingency allowance in Tender	\$ 100,000.00	
Three phase power service contingency allowance	45,000.00	
Environment protection contingency allowance	5,000.00	
Santec's stated cost to perform contract	3,277,052.00	
Subtotal		493,809.00
Less:		
Roofing cost differential	2,864.00	
Increase in cost of Treatment Plant, plumbing and HVAC mechanical	30,161.00	
Insurance	5,000.00	
Site trailer for consultant and contractor	9,350.00	
Site superintendent	52,800.00	
Contract coordinator	35,000.00	
Telephone	1,000.00	
Power to office	4,000.00	
Portable toilets	2,000.00	
Unquantified overhead items	10,000.00	
Increase in cost of formwork	50,000.00	
Allowance for contingencies	50,000.00	
Subtotal		241,634.00
Plus:		
Loss of profit on additional work re contaminated soil	1,050.00	
TOTAL LOSS OF PROFIT		\$ 242,684.00

[76] Santec is entitled to the sum of \$242,684.00, together with HST on the said sum.

[77] If unable to agree, I will hear counsel on the issues of prejudgment interest and costs.

Coughlan, J.