SUPREME COURT OF NOVA SCOTIA

Citation: *Winbridge Construction Ltd. v. Halifax Regional Water Commission*, 2015 NSSC 275

Date: 2015-09-30
Docket: Ken No. 333366
Registry: Kentville

Between:

Winbridge Construction Ltd.

Plaintiff

v.

Halifax Regional Water Commission

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	May 19 to 22, 2015, in Kentville, Nova Scotia
Counsel:	Doug Lutz, for the Plaintiff
	Randolph Kinghorne, for the Defendant

By the Court:

The Claim

[1] This case raises issues respecting the law of tendering – when a bid is non-compliant, what constitutes the owner's duty of fairness, and, if breached by the owner, what is the basis upon which damages are available to an unsuccessful bidder.

[2] In March 2010, the Halifax Regional Water Commission ("HWC") issued a call for tenders to upgrade secondary clarifiers at its Mill Cove waste water treatment facility ("Project"). Three contractors submitted bids: L&R Construction Limited ("L&R"), $1,787,150.00; Winbridge Construction Limited ("Winbridge"), $2,235,708.85; and, Amber Contracting Limited ("Amber"), $2,690,850.00.

[3] HWC accepted the low bid from L&R. The work was completed by L&R in accordance with its bid.

[4] Winbridge sues HWC for accepting a non-compliant bid and for breaching its duty of fairness to Winbridge. Winbridge claims that, but for accepting the non-compliant bid, its bid would have been accepted. It claims damages of $884,000.00, calculated as the sum of L&R's gross profit ($415,921.00) plus the amount that the tender exceeded L&Rs ($468,000.00). Alternately, it claims damages equal to its calculation of L&R's profit (23.5%) on its bid ($524,000.00).

[5] HWC denies that L&R's bid was non-compliant or that it breached its duty of fairness to Winbridge. It also submits that the exclusion clauses in the Tender Documents preclude Winbridge's claim. Alternatively, it submits that Winbridge's bid significantly exceeded HWC's budget for the project and that the tender (as called) would not have been awarded to Winbridge, even if the L&R bid was non-compliant or HWC breached Contract A with Winbridge. Said differently, any breach by HWC of its Contract A with Winbridge did not cause Winbridge any loss or damages.

The Facts

[6] There are few factual disputes. The issues primarily involve interpretation of the Tender Documents, the application of the fairness principle and whether the contract would have been awarded to Winbridge if L&R's bid is non-compliant.

[7] The President of Winbridge, Victor Sears, was the plaintiff's only witness. Seven witnesses testified for the defendant:

i. Derek Avery, then supervisor of the Mill Cove facility (now HWC's bio-solids coordinator);

ii. Tonya Knopp, the professional engineer at HWC in charge of the project (now employed in Newfoundland);

iii. Valerie Williams, Ms. Knopp's supervisor;

iv. Aaron Baillie, a manager at CBCL Limited, and the design engineer and consultant to HWC on the Project (he prepared the Tender Documents);

v. Leo Rovers, the principal of L&R;

vi. Jamie Hannum, the Director of Engineering and Information Services for HWC and its predecessor since 1994, and the supervisor of Ms. Williams and Ms. Knopp; and

vii. Carl Yates, General Manager of HWC and its predecessor since 1994.

[8] In early March tender documents exceeding 400 pages, prepared by CBCL Limited, were issued for the Project ("Tender Documents"). They included the following terms relevant to this proceeding:

1 Tender Submission

…

Closing up to 3:00 p.m., local time, on, Thursday, April 1, 2010

…

6 Tenderers to investigate

.1 Tenderers will be deemed to have familiarized themselves with existing site and working conditions and all other conditions which may affect performance of the Contract. No plea of ignorance of such condition as a result of failure to make all necessary examinations will be accepted as a basis for any claims for extra compensation or an extension of time.

7 Site Meeting

.1 A mandatory site meeting will be held at 10:00 a.m., local time, on Thursday, March 25, 2010, at the Mill Cover STP.

8 Clarification of Addenda

.1 Notify Engineer not less than 2 working days before Tender Closing of omissions, errors, or ambiguities found in Contract Documents. If Engineer considers that correction, explanation or interpretation is

necessary, a written addendum will be issued. All addenda will form part of Contract Documents.

…

17 Informal or Unbalanced Tenders

.1 Tenders which in the opinion of the Owner are considered to be informal or unbalanced may be rejected.

18 Right to Accept or Reject any Tender

.1 Owner reserves right to accept or reject any or all Tenders, including without limitation the lowest Tender, and to award the Contract to whomever OWNER in its sole and absolute discretion deems appropriate notwithstanding any custom of the trade nor anything contained in the Contract Document or herein. OWNER shall not, under any circumstances, be responsible for any costs incurred by the Tenderer in preparing of its Tender.

.2 Without limiting the generality of the foregoing, the OWNER reserves the right, in its sole and absolute discretion, to accept or reject any Tender which in the view of the OWNER is incomplete, obscure, or irregular, which has erasures or corrections in the documents, which contains exceptions and variations, which omits one or more prices, which contains prices the OWNER consider unbalanced, or which is accompanied by a Bid Bond or Consent or Surety issued by a surety not acceptable to the OWNER.

.3 Criteria which may be used by the OWNER in evaluating tenders and awarding the Contract are in the OWNER's sole and absolute discretion and, without limiting the generality of the foregoing, may include one or more of: price, total cost to OWNER; the amount of Nova Scotia content; the amount of Canadian content; reputation; claims history of Tenderer; qualification and experience of the Tenderer and its personnel; quality of services and personnel proposed by the Tenderer ability of the Tenderer to ensure continuous availability of qualified and experienced personnel; the Construction Schedule and Plan; the proposed Labour and Equipment; and the proposed Supervisory Staff.

.4 Should the OWNER not receive any tender satisfactory to the OWNER in its sole and absolute discretion, the OWNER reserves the right to re-tender the Project, or negotiate a contract for the whole or any part of the Project

> with anyone or more persons whatsoever, including one or more of the Tenderers.

[9] The tender was advertised by publication in the Halifax Chronicle Herald on March 17 and March 20, 2010. The first of the seven paragraphs read as follows:

> Sealed Tenders plainly marked on the envelope "Tender for Mill Cove STP Upgrade-South Side Secondary Clarifiers", will be received by the undersigned until 3:00 p.m., local time, April 1, 2010.

[10] The public tender notice stated that the Tender Documents were available for viewing at the Construction Association of Nova Scotia and may be obtained on payment of a fee at HWC's office. In error, the public tender notice did not give notice of the mandatory site meeting of March 25th, eight days after the first public notice and seven days before the deadline for obtaining and submitting a tender.

[11] The mandatory site meeting was held on March 25, 2010. Representatives from Winbridge and Amber as well as some subcontractors attended. L&R did not attend.

[12] After March 25, 2010, when L&R first attended at HWC's office to purchase the Tender Documents, L&R was advised of the mandatory meeting held on March 25th. L&R asked Ms. Knopp for a site meeting. Ms. Knopp asked Mr. Hannum, who authorized a site visit for L&R. It occurred on March 30th. Based on the evidence of Derek Avery (who attended both site meetings) and Leo Rovers, both of whose evidence I accept as credible and reliable, I find that L&R did not receive any information at the site meeting that was not provided by HWC to those who attended the mandatory site meeting on March 25th.

[13] Several addendums to the Tender Documents were issued. The first, on March 19th, is not relevant to this proceeding. The second resulted from questions and inquiries made by those who attended the March 25th site meeting. It clarified some of the specifications. It was released on March 26th and a related drawing was issued on March 29th. The primary purpose of the third addendum was to extend the tender closing to 3:00 p.m. on April 8th; it was issued on March 30th as a result of an inquiry by a subcontractor. The fourth addendum answered questions submitted for clarification by a contractor; it was issued on April 1st. The fifth addendum made a change to a note on a drawing; it was issued on April 6th.

[14] Mr. Sears, the principal of Winbridge, believed that the extension of the tender closing date from April 1st to April 8th was made to facilitate L&R, whose principal was apparently away until after the March 25th mandatory meeting. He had no evidence to support this belief. Based on all of the evidence and cross-examination of witnesses, and e-mails produced, I am satisfied beyond any doubt that the extension of the closing date was in relation to issues raised by a subcontractor, and was not in any way related to the proposed tender by L&R nor for the purpose of benefitting L&R.

[15] HWC did not issue an addendum providing for an alternative site meeting to the mandatory site meeting of March 25th when it agreed to L&R's request for a site meeting, nor did it give notice to any of those who had purchased the Tender Documents and attended the March 25th mandatory site meeting that another site meeting had been arranged for L&R.

[16] Mr. Rovers of L&R asked HWC for the identity of those who had purchased the Tender Documents, both contractors and subcontractors. While he acknowledged that knowing who one's competitors are would be helpful to bidders, he stated that his purpose was to the obtain the identity of the subcontractors who could be used in connection with L&R's bid.

[17] Winbridge did not ask for, nor was it advised of, the identity of those who took out the Tender Documents. It assumed that all potential competitors had attended the March 25th mandatory site meeting. Winbridge says that it was a breach of the duty of fairness owed to it, for HWC to provide the information requested by L&R. Based on all of the evidence, I am satisfied that it is the custom in the industry and of HWC in relation to all its tenders, that if any contractor or subcontractor who purchased the Tender Documents asks HWC for the names of others who purchased the Tender Documents, that information (and no other information) is provided.

The Issues

1. Did L&R's failure to attend the March 25th mandatory site meeting make its bid non-compliant?

2. Did HWC breach its duty of fairness to the plaintiff?

3. If yes to the first or second question, did the plaintiff lose a reasonable expectation of receiving contract B, and if so what are the plaintiff's damages?

Overview of tender law

[18] The Supreme Court of Canada has provided guidance respecting the law of tendering in several decisions, including five relevant to this case: *Ontario v Ron Engineering*, [1981] 1 SCR 111 (*"Ron Engineering"*); *MJB v Defence Construction*, [1999] 1 SCR 619 (*"MJB"*); *Martel Building v Canada*, 2000 SCC 60 (*"Martel"*); *Double N Earth Movers v Edmonton*, 2007 SCC 3 (*"Double N"*); and, *Tercon Contractors v British Columbia*, 2010 SCC 4 (*"Tercon*").

[19] Further enlightenment is found in two texts: **Paul Emanuelli**, *Government Procurement*, 3rd Edition (Markham: LexisNexis, 2012), and **Paul Sandori & William M. Piggott**, *Bidding and Tendering: What is the law?*, 5th Edition (Markham: LexisNexis, 2015).

[20] In *Martel*, the Supreme Court summarized the law up to that date as follows:

(b) The Tendering Process

(i) General Principles of the Law of Tenders

79 Any discussion of the duties or obligations arising from the tender process must begin with reference to *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd*. This case established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid in response to the call for tenders, may become a binding contract. Estey J. explained that this contract, which he labelled "Contract A", imposed certain obligations upon the contractor who had submitted a tender. He differentiated this contract from "Contract B", the ultimate construction contract resulting from the award of one of the tenders.

80 In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, this Court confirmed that Contract A also imposes obligations on the owner. It further explained that *Ron Engineering* does not stand for the proposition that Contract A will always be formed, nor that the irrevocability of the tender will always be a term of such contract. Whether the tendering process creates a preliminary contract is dependent upon the terms and conditions of the tender call. This Court stated as follows, at para. 19:

> What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

81 The Court also held that, while the terms stipulated in tender documents created express obligations in the context of Contract A, this contract, like all contracts, could also include implied obligations. The inclusion of implied terms may be based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intention of the parties where it is necessary to give a contract business efficacy or where it meets the "officious bystander" test: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*; *M.J.B. Enterprises*, supra, at para. 27.

82 The tender documents involved in *M.J.B. Enterprises* included, as in the case at bar, a privilege clause stating that the lowest or any tender would not necessarily be accepted. The Court noted that in determining the intention of the parties, attention must be paid to the express terms of the contract. In light of the privilege clause, the Court rejected the proposition that the party who had instigated the tender call was required to accept the lowest compliant tender. The express language of the tender documents, which manifested a contrary intention,

governed. However, an obligation to accept only compliant bids could be implied based on the presumed intention of the parties. This obligation was not incompatible with the privilege clause.

83 It is now well established that parties to a tender process may have reciprocal obligations arising from Contract A either expressly or impliedly. In the case at bar, Desjardins J.A. held that the appellant owed the respondent a duty of care in tort to treat all bidders fairly and equally. However, she explained that such duty arose out of a coextensive implied contractual obligation.

84 Various appellate courts have found the need to imply a contractual term into Contract A to treat all bidders fairly and equally. *Best Cleaners and Contractors Ltd. v. The Queen*, is often referred to as one of the earlier cases suggesting such a duty. Also, in *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)*, the British Columbia Court of Appeal unanimously held at p. 248 that the party calling for tenders was under a duty to "treat all bidders fairly and not to give any of them an unfair advantage over the others". Legg J.A., speaking for the Court, concluded that the owner had breached this implied contractual obligation by adopting a policy of preferring local contractors whose bids were within 10 percent of the lowest bid in awarding the contract, when that preference was not revealed by, nor stated in, the tender documents. The tenderers were not notified of this policy to avoid alerting local contractors to the fact that they were afforded a preference. It was held that the privilege clause did not give the owner the right to attach an undisclosed condition to its offer.

…

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, supra*, at para. 6).

…

92 While the Lease tender document affords the Department wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify this duty. As explained above, such an implied contractual duty is necessary to promote and protect the integrity of the tender system.

[The court deleted the citations]

[21] In *Martel*, the court found that the tender documents gave the defendant significant latitude to determine "fit-up costs" in evaluating bids for leases to the defendant government, but not to evaluate the bids on the basis of criteria not disclosed in the tender documents. In *Martel*, the undisclosed criteria included a criteria applied only against *Martel*'s bid. This constituted a breach of the defendant's implied duty of fairness.

[22] More recently, in 2010, Supreme Court of Canada in *Tercon*, by a narrow majority, reemphasized the supremacy of the integrity of the tendering process as against a broad interpretation of exclusion or privilege clauses. This was despite accepting the principles advanced by Justice Binnie for the minority in (1) rejecting the concept of fundamental breach as a rule of law, to which exclusion of liability clauses had no application, (2) not adopting the interpretive doctrine of a rebuttable presumption of intent, or of unconscionability, and (3) applying the normal rules for interpretation of contracts to interpretation of exclusion clauses "unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties" (*Tercon*, para 82). For helpful analysis of these decisions, see **Sonya Morgan**, "Exclusion Clauses Post-Tercon" 2013 Annual Review of Civil Litigation 305, beginning at p. 320, and **Geoff R. Hall**, "Canadian Contractual Interpretation Law", 2nd Edition (Markham: LexisNexis, 2012), ch. 8.9 and 8.11.

[23] In *Tercon*, the trial judge found that the winning bidder was non-compliant. In particular, bidders were limited to those who had qualified and, in this case, the winning bidder had entered into a joint venture with a partner who had not been part of the original tender process. Joint ventures were specifically prohibited in the RFP.

[24] A broad exclusion clause, providing that "no proponent shall have any claim for any compensation of any kind whatsoever", was found by the trial judge to be too ambiguous to overcome the acceptance of a non-compliant bid. The Court of Appeal found the exclusion clause to be "so clear and unambiguous that it is inescapable that the parties intended to cover all defaults, including fundamental breaches" and the Court of Appeal overturned the trial decision.

[25] The Supreme Court of Canada unanimously approved a three-part test for determining the applicability of an exclusion clause to a particular factual matrix but, by a five to four majority, held that the exclusion clause in this case was not a defence. Such a defence would jeopardize the integrity of the tendering system. The court cited the point made in *MJB* to the effect that an owner who expressly limited bidders to eligible bidders cannot reserve the right to accept ineligible bids, where the RFP expressly did the opposite (para 77).

Issue #1 Did L&R's failure to attend the March 25th mandatory site meeting make its bid non-compliant?

[26] The plaintiff submits that the clear language of the Tender Documents made attendance at the site meeting on March 25th mandatory. HWC could not ignore the clear language and accept a tender from someone who did not attend.

[27] It is irrelevant that the public tender notice did not advise potential bidders that they had to attend this meeting, and that potential tenderers who obtained the tender package after March 25th would automatically be non-compliant. Attendance at the mandatory site meeting told all potential bidders (contractors and sub-contractors) who their competitors would be and this information was relevant in a bidder's determination of whether and what it would bid.

[28] The plaintiff notes that HWC drew to the attention of those who purchased the Tender Documents the requirement to attend the March 25th site meeting, and even sent a notice to the three persons who had picked up the Tender Documents before HWC noticed its error in failing to include in the public notice that attendance at the site meeting was mandatory.

[29] HWC submits that failure to attend the March 25th site meeting was simply an irregularity. The purpose of the site meeting was to require all bidders to familiarize themselves with the site and working conditions for the project. This purpose was fulfilled by attending at a site meeting. Furthermore, the privilege clause in this Tender Document differed from the clauses considered in those court decisions that enforced attendance at mandatory meetings as a requisite to a complaint bid.

[30] In reply, the plaintiff submits that s. 6.1 of the Tender Documents already deemed that bidders had familiarized themselves with existing site and working conditions. Section 7.1 - which required attendance at the mandatory site meeting, was an additional requirement.

[31] The issue of the mandatory site meeting is also relevant to the plaintiff's second issue – HWC's implied duty of fairness. I deal with the duty of fairness argument in the second issue.

[32] On this issue, the plaintiff basically makes seven points:

i. Only a compliant tender can be accepted by an owner (*Ron Engineering, MJB)*.

ii. The tender process must be characterized by good faith and integrity (*MJB*) with all bidders being treated fairly and equally (*Martel*, para 88)

iii. The owner is obliged to reject a non-compliant tender (*Martel*)

iv. By failing to attend the mandatory site meeting, L&R failed to satisfy the threshold to participate in establishing a Contract A with HWC.

v. This case is similar to the matrix in *Tercon*, where failure of the successful bidder to participate in a mandatory pre-bid process made its bid non-compliant.

vi. In *Olympic Construction v Eastern Integrated Health Authority*, 2014 NLCA 20 ("*Olympic*"), at para 36, a case about a mandatory site meeting, the court held that the duty of fairness required the owner in control of the tender process and who defined the parameters of a compliant bid, to play by the rules it established when assessing bids and awarding the contract. This court notes that in *Olympic* the owner issued an addendum to provide for another site meeting when only one contractor showed up for the "mandatory" site meeting.

vii. In the text *Government Procurement*, **Emanuelli** observes that where compliance with a condition is declared to be mandatory, there appears to be no discretion to waive compliance with that condition. The plaintiff also refers to s. 6.5 of the *Canadian Construction Reference Manual*, which provides that where attendance at a site visit is mandatory, there should be a process for verification of attendance and any bidder who fails to attend should have their bid rejected.

[33] In reply, HWC makes seven submissions:

i. Whether L&R's bid was compliant must be determined in the context of the Tender Documents as a whole, as stated by the Supreme Court of Canada in *Double N* and *Tercon*.

ii. Section 18.1 of the Tender Documents in this case reserve to HWC the right in very broad language to "accept or reject any or all Tenders, including without limitation the lowest Tender, and to award the Contract to whomever OWNER in its sole and absolute discretion deems appropriate notwithstanding any custom of the trade nor anything contained in the Contract Document or herein. …"

iii. As a result of L&R's attendance at a substitute site meeting, L&R was rendered substantially compliant. Looking at the Tender Documents as a whole, attendance at a site meeting was material and failure to participate in a site meeting would have been a material breach; however, failure to attend at a specified time was not material. Any non-compliance with the Tender Documents was procedural and not material. At paragraph 41 in *Double N*, an "informality" that did not materially affect the price or performance of the contract was found not to be material.

iv. *MJB*, at para 37, states that the goal is compliance with the plans and specifications. L&R was compliant in that sense.

v. HWC distinguishes the analysis and decision in *Admiral Roofing v Prince George School District No. 57*, 2010 BCSC 1394 ("*Admiral Roofing*"). In *Admiral Roofing*, the court dismissed the claim of the low bidder, whose bid was rejected by the owner because the bidder arrived late for and missed part of a mandatory site meeting, on two basis relating to the Tender Documents:

> 1. The clause regarding the mandatory site meeting expressly provided "failure to attend and register will lead to the non-acceptance of the tender by the owner". In this case, no similar provision was inserted in the mandatory site meeting clause.
>
> 2. In *Admiral Roofing*, the privilege clauses dealt with price and "informalities and irregularities of a minor or technological nature". These are much narrower than the broad provisions in ss. 18.1 and 18.2 of the Tender Documents in this case.

vi. HWC refers to the *Olympic* decision as supportive of the proposition that attendance at a second non-mandatory site meeting, where the same information was received, constituted substantial compliance with the intended purpose of the meeting. As a result, there was no basis to exclude L&R's bid for the failure to attend the mandatory site meeting.

vii. HWC cites *Jonah Developments v North End Community Health Association*, 2014 NSCA 92 (*"Jonah"*), for the proposition that procedural defects could be overcome without a formal change to the rules if the tendering procedure, taken as a whole, is fair and in substantial compliance.

Analysis

[34] **Emanuelli**, in *Government Procurement*, at ch. 6, synthesizes thoroughly the governing principles respecting the duty to reject non-compliant tenders. He states:

> As the Supreme Court of Canada noted in its November 2000 decision in *Martel Building Ltd. v Canada*, the implied duty to reject non-compliant tenders is one of the cornerstones of a formal bidding process:
>
> …
>
> The law is clear. In a formal binding bidding process, a purchaser is under a duty to reject non-compliant tenders.
>
> Under the common law tendering regime, if a tender is non-compliant, the bidder is deemed to have failed to meet the basic requirements necessary to "accept" the purchaser's Contract A offer. Under this analysis, Contract A is never formed. The purchaser owes compliant bidders a duty to reject the non-compliant tender.
>
> … While this duty may be simple to state in principle, it can be complicated to apply in practice.

[35] The chapter analyzes the duty, and organizes the governing principles into eight categories, four of which are relevant to this analysis.

[36] First principle is that in a formal binding bidding process, the owner owes compliant bidders a duty to reject all non-compliant bidders.

[37] The second governing principle deals with the key issue of the standard by which compliance is assessed. **Emanuelli** states that the two possibilities are strict compliance and substantial compliance. Both standards are fairly strict, but the substantial compliance standard allows the owner a limited discretion to waive minor non-material irregularities in a tender. As set out by the British Columbia Court of Appeal in *British Columbia v SCI Engineers and*

Constructors Inc., [1992] BCJ No. 248, the substantial compliance standard contains three elements:

i. A tender can contain simple omissions or irregularities, but remain capable of acceptance if it substantially complies with the tender call requirements.

ii. A tender may not meet the substantial compliance standard if a material fact has been omitted or if the meaning of the tender is unclear.

iii. In relying on a substantial compliance standard, mischief should be avoided and the integrity of the bidding process should be preserved.

[38] This governing principle was applied in *Maritime Excavators (1994) Ltd. v Nova Scotia*, [2000] NSJ No. 85, where the court held that the non-compliance in question must be material in order to constitute a non-compliant tender incapable of acceptance. The court held that non-compliance alone was insufficient. The non-compliance had to be material. The onus of establishing that non-compliance was not material was on the owner.

[39] Relevant to this case is the analysis in *Kinetic Construction Ltd. v Comox-Strathcona*, 2004 BCCA 485 ("*Kinetic*"). The Court of Appeal upheld a trial court decision that found the owner was within its rights when it bypassed a plaintiff's low bid in favor of a higher, non-compliant tender. The decision turned on the existence of a privilege clause that expressly reserved the right in the tender documents to accept a non-compliant bid.

[40] The reservation in the tender documents in *Kinetic* of the right to waive minor errors or immaterial non-compliance did not suffice to justify acceptance of a materially non-compliant bid. The decision emphasized the importance set out in several Supreme Court of Canada decisions that any privilege clause, or interpretation of whether non-compliance was material, depends upon the interpretation of the privilege or exclusion clauses in the context of the tender documents as a whole.

[41] In *Double N*, the Supreme Court of Canada upheld, in a split decision, a determination by the British Columbia Court of Appeal that a duty to reject a substantially non-compliant tender does not survive the expiry of a Contract A. The significant but unique contractual circumstance in that case was that the non-compliance was latent (the age of the equipment proposed to be used by the successful bidder), ergo, the owner could not determine the non-compliance from the bid documents. I infer that the conclusion in *Double N* would not likely have been the same if the material non-compliance had been patent.

[42] In *Halifax v England Paving and Contracting Limited*, 2009 NSSC 224, the court applied the substantial compliance standard. It held that a low bidder's failure to submit a pricing schedule, when the tender documents called for a unit price contract, constituted a material non-compliance, and obliged the owner not to consider the bid.

[43] There are many types of non-compliance. As **Emanuelli** writes, they can be as varied as the compliance standards established by an owner in its tender documents. **Emanuelli** identifies

three categories of non-compliance, which he emphasizes are simply useful reference points and are not water-tight compartments or exhaustive.

[44] One type is contractual or formal non-compliance. This non-compliance arises most frequently where a bidder qualifies the bid, or effectively makes a counteroffer in response to a tender call. Where a bidder imposes conditions on a tender which effectively constitute a counter-offer, there is no meeting of the minds and no Contract A can be formed.

[45] Similarly, where the contents of a bid contain ambiguities such that the final bid price cannot be determined, then the bid is not capable of creating a Contract A. A Nova Scotia decision representative of this type of non-compliance is *Steelmac Ltd. v Nova Scotia*, 2007 NSSC 156, where the court upheld the owner's decision to reject a low bidder's tender for non-compliance because the tender call prescribed the use of a particular form and the bidder submitted its bid on the wrong form. The bid did not contain the bidder's declaration in a way that would create a contract between the bidder and the owner.

[46] In *Tercon*, the tender documents clearly prohibited award of the contract to a joint venture. The successful low bidder constructed their bid in a manner that it did not appear, but was in reality, a joint venture. The bid was therefore non-compliant in a material way and the defendant government could not accept the non-compliant bid.

[47] A second category of non-compliance is procedural non-compliance. This involves consideration of the bidder's adherence to the procedural rules in the particular tender call. Procedural matters usually attract a strict compliance standard. Owners are required to disqualify bidders who do not follow the rules. The need for strict procedural standards has been held by the Supreme Court of Canada to be necessary to protect the integrity of the tendering system.

[48] An example of procedural non-compliance is the *Admiral Roofing* decision. The court rejected the bidder who was late for a mandatory pre-bid site visit. One aspect of the tender documents in the *Admiral Roofing* case that distinguishes those documents from the Tender Documents in this case is that, in *Admiral Roofing*, the clause containing the mandatory site meeting expressly specified that failure to attend and register would lead to the non-acceptance by the owner. That clause does not exist in this case.

[49] A third category of non-compliance is technical non-compliance. This usually deals with the technical merits of the tender or the bidder's qualifications. This category is not relevant to the case at bar.

[50] I conclude that the failure of L&R to attend the mandatory site meeting of March 25th made its bid procedurally non-compliant. The tender package described the March 25th site meeting as mandatory. Failure to attend the mandatory site meeting of March 25th made L&R's bid materially non-compliant.

[51] Starting with the plain words in the Tender Documents, s. 7 described the site meeting as mandatory. "Mandatory" has meaning that is not ambiguous. The fact that s. 6 of the Tender Documents required tenderers to familiarize themselves with existing site, working conditions

and all conditions which may affect performance of a contract, underscores that the purpose of a mandatory site meeting was something more than a requirement that bidders familiarize themselves with the site and the work conditions.

[52] HWC's submission that it was not important that the site meeting occur on March 25th for all tenderers is not correct. The circumstances of this case are not dissimilar to those in *Olympic*. In *Olympic*, the Health Authority solved their problem by issuing an addendum to all potential bidders giving notice of a second site meeting. The addendum legitimated the Health Authority's second mandatory site meeting. It ensured that all potential bidders would be aware of it and could attend. It remedied what would have otherwise been a procedurally non-complaint bid.

[53] I conclude that the purpose of the mandatory site meeting in this instance was not solely to ensure that all tenderers had familiarized themselves with the site, but also to permit all potential bidders to make a decision as to whether to bid and, if so, what to bid, based upon who their competition might be.

[54] What is the effect of the privilege or exclusion clauses in HWC's Tender Documents? The analysis does not turn on, or require a determination of whether HWC's acceptance of a bid from a bidder who did not attend the mandatory site meeting on March 25th was a fundamental breach of the Tender Documents, nor on application of the interpretative principle of a rebuttable presumption of intent.

[55] The privilege or exclusion clauses in the Tender Documents (s. 18) do not contain an express waiver by bidders of the right of an owner to accept a non-compliant bid. The closest that s. 18 comes to constituting an express waiver by bidders of a non-compliant bid is with respect to bids that are "incomplete, obscure or irregular". They do not provide a defence to the defendant's claim that it was entitled to accept L&R's non-complaint bid.

[56] Section 7.1 of the Tender Documents clearly mandates attendance at a site meeting on March 25th. No addendum was ever issued to change that provision. Failure to attend at that meeting was a material procedural failure. It did not constitute substantial compliance.

[57] Equally clearly, when read on its own, s. 18.1 provides that the owner may accept any tender "notwithstanding any custom of the trade nor anything contained in the Contract Document or herein".

[58] In interpreting contracts, words are read in the context of the entire document, so that meaning is given to all the words. This normal interpretive process is modified, in respect of the privilege or exclusion clauses, by the three part analysis outlined by Justice Binnie in *Tercon*, at paras 121 to 123, accepted by the majority at para 62.

[59] The first part of the analysis is whether, as a matter of interpretation, the privilege or exclusion clauses apply to the relevant issue - in this case whether L&R's bid was compliant, by reason of L&R's failure to comply with s. 7.1. Clearly, ss. 18.2, 18.3 and 18.4 do not apply. Section 18.2 relates to bids that are "incomplete, obscure, or irregular"; I have already determined that attendance at the March 25th site meeting was mandatory. Section 18.3 relates to

the evaluation of compliant bids. Section 18.4 relates to a circumstance when the owner receives no satisfactory bid; in this case, there is no evidence that the owner evaluated the Winbridge and Amber bids, then found them unsatisfactory. On its face, s. 18.1 appears to apply.

[60] The second part of the analysis is whether the privilege or exclusion clauses were unconscionable at the time the contract was made. This does not appear to have been addressed in *Tercon*. The matrix in this case is not of unsophisticated, unequal parties.

[61] The third part of the analysis is whether an applicable privilege or exclusion clauses should not be enforced because of an overriding public policy – a high threshold or onus being placed on the party seeking to avoid enforcement of the exclusion clauses. Several statements in the majority decision in *Tercon* suggest that exclusion clauses that strike at the very heart of the tendering process are not intended to override the clear precondition of a compliant bidder. These statements are found in paras 6, 63, 76, and 78.

[62] To allow a procedurally non-compliant bid to be considered, especially when the owner has the ability to correct its error in the public notice of the tender, such as in this case by the issuance of an addendum (as in *Olympic*), negates the integrity and business efficacy of the tender process. This constitutes an overriding public policy to enforcement of the privilege/exclusion clauses, whose provisions do not clearly apply at the Contract A stage.

ISSUE #2 Did HWC breach its duty of fairness to Winbridge?

[63] The issue of the defendant's duty of fairness may arise at two stages of the bidding process – Contract A and Contract B.

[64] The plaintiff submits that all bidders must be treated fairly and equally in the bidding process (*Martel*, para 88). **Emanuelli** adds: "and to avoid any preferential or unfavorable treatment of any competing bidders." **Emanuelli** identifies six ways in which a breach of the duty may arise. The one relevant to this case is the duty to ensure the integrity of the competition by avoiding conflicts of interest, unfair advantage or bias.

[65] The plaintiff advances three ways in which it claims HWC shows favoritism to L&R at the Contract A stage. First, the closing time was extended by eight days to give L&R time to bid. Second, Mr. Hannum, despite the views of Ms. Knopp, the project manager, agreed that L&R should be permitted a site meeting and allowed to submit a bid. Third, the names of those contractors and subcontractors who had paid for bid documents was provided to L&R at its request, and not provided to the plaintiff. These claims are assessed in the context of the provisions in the Tender Documents, including ss. 18.1 and 18.2, that impose and limit the duty of fairness.

[66] With respect to the first claim, Ms. Knopp was cross-examined as to whether Addendum #3, issued on March 30th, that extended the closing date from April 1st to April 8th, was because L&R (Leo Rovers) showed up at HWC's office to purchase bid documents on March 30th. She

was clear that that was not so, and that she had decided to issue Addendum #3, which included several changes to the specifications as well as extending the closing date, before Leo Rovers showed up to purchase the bid documents.

[67] I found Ms. Knopp to be credible and believe her on this point.

[68] Her evidence is corroborated.

[69] Exhibit 23 was an e-mail exchange between Ms. Knopp and Mr. DeMings of Black & MacDonald, a corporation which had purchased the bid documents. Mr. DeMings had, on the morning of March 29th, formally requested a one-week extension. Ms. Knopp replied asking why. She assumed he was a subcontractor and that none of the general contractors had requested an extension. Mr. DeMings advised that Black & MacDonald was planning to act as a general contractor and by reason of other commitments needed the extra time. Ms. Knopp replied that she would issue an addendum extending the closing date.

[70] This all occurred before Leo Rovers of L&R appeared on the scene. Ms. Knopp's evidence is further supported by Addendum #3, which included a long list of changes to the specifications, as well as the extension.

[71] This was further confirmed by the evidence of Leo Rovers, who testified that when he attended at HWC's office to purchase the Tender Documents on March 30th, he already knew (from what he described as a supplier) that the closing was going to be extended.

[72] There is no evidence to suggest that the extension of the closing date was related in any way to L&R or for the purpose of giving it an unfair advantage, or as a sign of bias, partiality or favoritism towards L&R or against any of the other potential bidders.

[73] The second unfairness claim related to HWC's granting of a site meeting to L&R after the March 25th mandatory site meeting.

[74] Ms. Knopp testified on cross-examination that when Leo Rovers arrived at HWC's office, the receptionist did not know whether to give the bid documents to him. Ms. Knopp stated at the time that anyone could buy the bid documents, but she did advise Mr. Rovers at that time that he had missed the mandatory site meeting. Mr. Rover said he wanted a site meeting and asked for his own site meeting. Ms. Knopp said she would discuss it with her director. After Mr. Rovers left the office, she discussed it with Mr. Hannum. Mr. Hannum told her to organize a site meeting for L&R, which she did.

[75] When asked on cross-examination if she agreed with the director's decision, she said no, "but he was the boss". She was not overly concerned that Mr. Rovers showed up on March 30th. She understood he had been on vacation and she had already decided to extend the closing date.

[76] Leo Rovers testified that he asked for a site visit and one was arranged. At that meeting, he, and the three others who accompanied him, looked at the site and talked amongst themselves.

Only Mr. Avery was present for HWC. The only question he asked Mr. Avery was to show him the location of a corridor. He received no other information from Avery.

[77] Mr. Hannum confirmed that he gave directions to Ms. Knopp to schedule a site meeting for L&R. He stated that he had looked up prior precedents relating to site meetings and had obtained legal advice. He decided to grant the site meeting on the basis that, in his view, the purpose or intent of the mandatory site meeting was to ensure that bidders were familiar with the work site. He understood that he had some flexibility in achieving that purpose. He concluded that the L&R site visit met the intent of the bid documents; the fact that it was on a different date than the one set out in the bid documents was an irregularity that would not invalidate L&R's bid.

[78] I have already decided that HWC did not have the right to grant a second site meeting in the manner that they did; that is, HWC granted a second site meeting without issuing an addendum, resulting in a second site meeting that was not disclosed to those who had taken out the Tender Documents. The matrix in this case differed from that in *Olympic*, where the health authority issued an addendum authorizing a second site meeting.

[79] Granting L&R a site visit without an addendum did not make the process unfair; however, it was a breach of HWC's Contract A with the plaintiff, and it did not make the L&R bid compliant.

[80] The third unfairness claim related to L&R's request to determine who had taken out bid documents and the fact that Ms. Knopp provided that information to L&R.

[81] Mr. Sears testified that he did not ask for a list of who took out plans. He did not ask because he did not need to. He knew who had attended the mandatory site meeting and assumed that his competition included only those who attended the mandatory site meeting. Mr. Sears testified that he was aware that, if he had asked for the list of those who took out the Tender Documents, he would have received it.

[82] Ms. Knopp was shown an April 5th e-mail from Mr. Baillie, the CBCL consultant, outlining items to be included in an addendum. The e-mail concluding by advising that he (Baillie) had a request for the list of those who had attended the mandatory site meeting; he asked whether a list was going to be issued. Ms. Knopp replied that she was not going to issue a list of those who had attended the mandatory site meeting. She gave her reason as her belief that it was not relevant to the tender.

[83] However, Ms. Knopp testified that if anyone asked for a list of those who had purchased the bid documents, she would provide it to them. This would have included Mr. Sears if he had asked. Mr. Rovers asked her by an email dated April 5th and she provided it to him.

[84] On cross-examination, she repeated that she decided to give L&R the list of those who obtained the Tender Documents as she had done with others who had asked, including Atlantic Purification. Her evidence was that she only gave the list to those who asked. The plaintiff had not asked.

[85] Leo Rovers testified that he normally asked for the list of persons who had taken out the plans. He did so for two reasons. His first and most important reason was to learn which subcontractors he might use if he was awarded the contract. In this case, the list included TJ Electric, whom he eventually used for the electrical work. The second reason was to know who was bidding against him.

[86] The evidence does not establish that giving the list to those who had taken out bid documents was unfair. It was a practice and not an unusual or special dispensation or favor to L&R or any other bidder. Mr. Sears was aware that he could have asked for the list, but decided not to do so because he assumed that only those who attended the mandatory site meeting of March 25th could bid. There is no basis for finding a breach of the duty of fairness in providing the list to L&R. It did not cause mischief or detract from the integrity of the tendering process.

Issue #3 Did the plaintiff lose a reasonable expectation of receiving Contract B, and if so what are the plaintiff's damages?

[87] Because the plaintiff's bid was compliant (and presumably Amber's bid was also compliant), the defendant was obliged to evaluate the compliant bids to determine whether either merited an award of Contract B. Being party to Contract A does not establish an entitlement to an award of Contract B. Rather the evaluation and award of Contract B depended upon the interpretation of the Tender Documents and the application of the facts to that interpretation.

[88] It is a fundamental precept that contractual interpretation requires interpretation of a contract as a whole, with meaning given to all its provisions. **Geoff R. Hall**, ch. 2.2.

[89] Interpretation of the Tender Documents in this case includes ss. 18.3 and 18.4 of the Tender Documents.

[90] Subsections 18.3 and 18.4 are, on their face, very broadly worded privilege or exclusion clauses. Section 18.3 purports to give the defendant "sole and absolute discretion" in the criteria it may use in evaluating tenders and awarding Contract B. Section 8.14 is a clear provision. If the defendant does not receive any tender satisfactory to itself "in its sole and absolute discretion", it reserves the right to retender the Project or negotiate a contract for all or part of the project with any one or more persons whatsoever.

[91] As previously noted, useful and articulate guidance on the approach to interpretation of discretionary contractual provisions and privilege or exclusion clauses in the tender matrix is found in **Sonya Morgan**'s article and **Geoff R. Hall**'s text.

[92] The test of whether privilege or exclusion clauses in the Tender Documents are enforceable depends on the answers to three questions:

1. Do the exclusion clauses apply to the circumstances established in the evidence?

2. If yes, was the exclusion clause unconscionable at the time the contract was made (not when breached)?

3. If no, whether the court should refuse to enforce the exclusion clause because of an overriding public policy concern which outweighs the strong public interest in the enforcement of contracts?

[93] Question #1: Unlike the process for determining whether bids were compliant, in which this court held that the exclusion clauses were not intended to apply, the plain meaning of ss. 18.3 and 18.4, ss. 18.3 and 18.4, show a clear intent that ss. 18.3 and 18.4 apply to the evaluation of compliant bids and the award of Contract B.

[94] Question #2: **Sonya Morgan** relates, at pp. 325 to 329, what courts since *Tercon* have interpreted 'unconscionability at the time of the formation of the contract' to mean. Unconscionability connotes a grossly improvident bargain based on a defendant knowingly taking advantage of a vulnerable plaintiff. It does not connote assessment of the reasonableness or fairness of an exclusion clause.

[95] The plaintiff and the other bidders in this case were sophisticated contractors with experience dealing with the defendant and tenders containing exclusion/privilege/discretionary clauses such as ss. 18.3 and 18.4. The clauses relied upon by the defendant were not, on the evidence in this case, unconscionable at the time of the making of the contract.

[96] Question #3: In *Tercon*, the Supreme Court emphasized that the public policy exception to enforcement of exclusion clauses should be narrowly defined and rarely applied. It should not be applied to deal with unfairness. Certainty and stability of contractual relations and the upholding of freedom of contract are important public policies.

[97] The plaintiff's bid of $2,235,708.85 was about $586,000.00 or 35% over the amount allocated for the contractor and about $450,000.00 over the amount that included the defendant's contingency allocation.

[98] Mr. Yates and Mr. Hannum explained in detail the budget process and the approval process for capital projects. By statute, all projects over $250,000.00 required the approval of the defendant's board and Nova Scotia's UARB. The defendant was required to justify to the UARB any capital projects in terms of their financial viability and their effect on wastewater tax rates. The defendant could not proceed with a capital project without the prior approval by the UARB of the project and of the budget. Even including a contingency allowance of about 10%, the plaintiff's bid was 25% or over $400,000.00 more than what had been approved for this project by the UARB.

[99] Mr. Yates explained that if a bid was within 5% of the budget, the defendant would proceed with a project and obtain the necessary extra money. If a bid was within 10% of the budget, the defendant could proceed. An overage of 25%, as in this case, was a significant amount for a bid to exceed the budget and approved funding.

[100] When the low compliant bid is so significantly over the budget, as in this case, the defendant does not award the tender. Rather, it conducts an internal review of the project to assess if there is a value on a business case basis for the project in the amount bid. If there is merit on a business case basis, the defendant may defer the project for a year or so to obtain funding approval and then retender. Alternatively, it may re-scope the project, get funding approval and then retender. In neither scenario does it award the contract to the original bidder.

[101] In every scenario, the defendant must wait until it has obtained funding approval from the UARB. With the approval of the $150,000.00 for the pre-engineering for this project in 2008 and the $2,151,000.00 approved for the 2010 / 2011 and 2011 / 2012 fiscal years, the Mill Cove Project had approved funding for $2,301,000.00. It was completed for $24,000.00 less than this approved funding.

[102] Mr. Yates acknowledged that if he had surplus monies available in the global capital funding budget for wastewater projects, he could move up to $250,000.00 from that surplus to the Mill Cove Project without having to obtain a new approval from the UARB. A decision to do this is made only after the defendant has conducted an assessment of whether the project is worth the amount of the bid.

[103] The court notes that, even if there was a surplus in the global capital funding budget in April 2010, the possibility of transferring $250,000.00 of that money for this project, if the defendant determined it was worth it, would not have closed the gap between the plaintiff's bid and the budget or approved funding for the Project.

[104] Mr. Hannum explained in some detail that if all compliant bids are over the approved funding, there is no automatic award of the tender, as there is no approved funding available.

[105] In the event that all bids are over the approved funding amount (including the contingency), he has five options.

[106] The first involves an assessment of whether the project, as bid, had merit on a business basis; if so, HWC would seek extra funding approval. This would involve a delay.

[107] As a second option, it might try to reduce the scope of the project to get some of it done within the approved funding. The decision on whether to do this, and whether to retender the re-scoped project or to negotiate with the lowest bidder, depended upon the extent by which the lowest bidder's bid exceeded the budget or approved funding. If the lowest bid required a significant change in the project, the project would be retendered if re-scoped. Mr. Hannum described the plaintiff's bid as significantly over the budget and approved funding.

[108] As a third option, the defendant may keep the project as planned, but defer the project to a later time and add the approved funding for the project to a future year's capital budget. In this event, it would be retendered.

[109] A fourth option was to extend the project timeline and negotiate a tender with a bidder.

[110] A fifth option was to cancel the project and reconsider it a future date.

[111] The March 31, 2012, Capital Project Spending Summary showed that all waste water/storm water capital projects had come in globally under budget by about $766,000.00. Mr. Yates stated that up to $250,000.00 could be transferred within the global budget and allocated to a project, such as this Project, without UARB approval (if the defendant decided that the project had merit on a business basis).

[112] Hannum said that the Capital Project Spending Summary prepared for the UARB as of March 31, 2012, only related to projects that required UARB approval and were completed or "closed out" by March 31, 2012. The Summary did not include the many projects carried on by the defendant that were each under $250,000.00 and therefore did not need UARB approval. In addition, the fact that there was a surplus calculated as of March 31, 2012, in respect of the 2011 / 2012 capital budget, would not have been known in April 2010, when the bids for this project were being evaluated.

[113] As noted, the defendant could exercise discretion with respect to the criteria to be used in evaluating tenders and awarding contracts. That discretion specifically included, but was not limited, to price. I conclude that the plaintiff's bid was so significantly above the amount budgeted for the Project, and for which it had approved funding, that the gap between the plaintiff's bid and the funds available would not have been closed, even if the defendant in the exercise of its absolute discretion had decided that the Project as bid had sufficient value on a business-case analysis, and had considered the approved funding, the likely contingency allocation, and the right of the defendant to transfer surplus funds from other capital projects up to the sum of $250,000.00.

[114] There was no evidence before the court that, if the defendant had conducted an internal review as a result of the significant amount by which the plaintiff's tender exceeded the budget, the defendant would have or would likely have determined that the plaintiff's tender for the Project on a reassessment would have merit on a business basis.

[115] Section 18.4 clearly provided that, if the owner did not receive any tenders satisfactory to itself, in its sole and absolute discretion, it reserved the right to retender or negotiate all or part of the bid with anyone. This provision clearly provides that the owner owed no duty to the lowest bidder, whose bid is significantly above its budget, to make a deal with it.

[116] The plaintiff submits that the defendant would have awarded Contract B to it anyway because:

(a) the upgrade had been identified in a 2003 study, which was costed and planned for in 2008. The upgrade was long overdue. Counsel suggested that further delay in the project might cause safety issues;

(b) the budget for the process was stale and unrealistically low. It had not been updated; and,

(c) the defendant had several capital projects ongoing. It could have delayed any one of the other projects and used the funds to carry out this project, which was acknowledged to be an important project.

[117] With regards to the first submission, the defendant acknowledges that the project was an important project, had been identified for a long period of time, and was a significant capital project. However, all of the defendant's witnesses testified that the defendant had flexibility as to whether to proceed with the project in 2010 or to defer it.

[118] Ms. Knopp denied that there were safety issues that mandated that the Project proceed in 2010. Mr. Hannum stated that the project was a priority asset renewal project, because of the plant's age and structural condition, but that it was not urgent, did not pose safety issues, and did not require that the clarifier be taken out of service until the work was done.

[119] Mr. Yates testified that he understood that the defendant had flexibility on whether to proceed with the tender at that time or to defer it to a later date.

[120] Ms. Williams testified that 2010 was not a "cut off" date for the project to be done.

[121] On cross-examination Ms. Knopp outlined a practice that, when all bids exceeded the budget or approved funding, the defendant would first conduct an internal review of the business case for the project and outline its various options. She recalled at least one occasion when all bids were over budget and the project was not awarded. It was re-scoped and retendered with different specifications. She repeated that it was not imperative that the project proceed in 2010. There were no safety concerns.

[122] On the all evidence, I conclude that there is no merit to the submission that the Project had to proceed in 2010, or would likely have proceeded as tendered. By reason of the significant amount by which the plaintiff's tender exceeded the budget and approved funding, the court is satisfied that the project would not have been awarded to the defendant as bid. Because of the significant amount by which the bid exceeded the approved funding, I conclude that the defendant would not have negotiated with the plaintiff. If the Project had been re-scoped (that is, reduced in scale), I conclude that it would not have been awarded to the plaintiff, but would rather have been retendered, because of the significant amount by which the plaintiff's tender exceeded the approved funding.

[123] Based on the evidence of all of the defence witnesses, I am satisfied that even if the defendant could have applied to the UARB for additional funding to award the plaintiff the contract in accordance with its bid, it would not have done so. There is no evidence whatsoever that the plaintiff's bid merited award of the contract on a business case analysis.

[124] The plaintiff's second suggestion was that the defendant's two million dollar budget was based on a 2008 cost estimate by CBCL Engineering and that, because it was two years old, it was an unreasonable basis upon which to establish a budget, obtain funding approval, or evaluate the plaintiff's bid on its merits. There was no evidence before the court of any substantial change in the cost of this kind of construction in the two-year interval between the time of the estimate

and the time of the tender call. With the benefit of hindsight, we know that the project was in fact completed for $24,000.00 under budget. There is no basis upon which the court could infer or conclude that the budget prepared by the defendant and for which it received approved funding from the UARB was unreasonable.

[125] The plaintiff's third submission was that this project was one of the more important projects of the defendant and that it could and may have taken money from other projects for which capital funding was budgeted and approved to award Contract B to the plaintiff.

[126] The only evidence before the court is that, if the defendant determined that the Project as bid had sufficient merit, it could decide to redirect up to $250,000.00 to the Project from any surplus that might exist at the time without being required, by statute, to obtain UARB's prior approval. The plaintiff's bid exceeded the approved funding by more than that amount. More important, there is no evidence before the court that in April 2010 there was a surplus known to exist, or projected, from which monies could or may have been diverted to this Project.

[127] **Geoff R. Hall** describes that discretionary contractual provisions can be interpreted either on a subjective or an objective basis. The wording in this case suggests a subjective basis. Whether the appropriate basis was subjective or objective, I am satisfied that, if the defendant had, on an objective basis, determined to exercise its discretion with respect to the fact that the plaintiff's bid was so significantly over the budget and approved funding for the project, it would not have awarded the contract to the plaintiff. The proper interpretation of ss. 18.3 and 18.4 would have been sufficient authority to make that determination.

[128] The exclusion clauses clearly apply to the evaluation and award of Contract B. The exclusion clauses were not unconscionable at the time the contract was made. There is no overriding public policy concern which outweighs the very strong public interest in the enforcement of the contract, that should cause the court to decline to enforce the clear words of the exclusion clauses in this case.

[129] The facts in *Amber Contracting v Halifax*, 2009 NSCA 103, involve a matrix very similar to this case. It upheld privilege clauses in circumstances similar to this case. The Court of Appeal wrote at paras 31, 32 and 35 as follows:

> [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.

> [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.

[130] In *Olympic*, damages were awarded because, on the evidence, the court concluded that the plaintiff would have been awarded the contract. The court said at para 40:

> [40] The trial judge decided that Olympic would have been awarded the tender contract because it was the lowest compliant bidder. Eastern does not challenge the trial judge's decision in this respect, indeed it could not, for that was the evidence of its own representatives. Rather, Eastern challenges the amount of damages the trial judge awarded, arguing that he erred in awarding damages based on Olympic's anticipated 13 percent profit margin for the project. Eastern submits that the 13 percent was based on the significant risk associated with the project, and because Olympic did not actually assume that risk (because it was not awarded Contract B), the 13 percent should be discounted for negative contingencies. Eastern cites the six percent profit margin on the Caribou Pavilion Project (a project the subject of trial but not of appeal) as indicative of a more reasonable award.

[131] This court agrees with the defendant that, in the event the L&R bid was eliminated as being non-compliant, there was no evidence that the plaintiff had a reasonable expectation of receiving an award of the tender. It is at best conjecture.

[132] The test for the plaintiff's damage entitlement is whether the defendant's breach of the parties' Contract A caused the plaintiff to lose a reasonable expectation of receiving Contract B. The plaintiff did not lose a reasonable expectation of receiving Contract B, because its bid so significantly exceeded the budget and approved funding for the Project, and the privilege or exclusion clauses with broad discretion reserved to the defendant clearly entitled it to not award contract B to the lowest compliant bidder.

[133] The court accepts the evidence that if a review of the business case for the Project had been conducted, the defendant would not have awarded the contract to the plaintiff or negotiated with the plaintiff. In the circumstances, the defendant would have deferred or retendered the project.

[134] The plaintiff's claim is dismissed. The court will hear the parties on costs by written submission within 30 days if they are unable to agree.

Warner J.