IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Force Construction Ltd. v. Queen Elizabeth II Health Sciences Centre, 2008 NSSC 214

Date: 20080911
Docket: SH 174143
Registry: Halifax

Between:

Force Construction Limited, a body corporate, and
Bell Electric Incorporated, a body corporate

Plaintiffs

v.

Queen Elizabeth II Health Sciences Centre, a body corporate

Defendant

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	April 28, 29 and 30, May 5 and 6, 2008, in Halifax, Nova Scotia
Written Decision:	September 11, 2008
Counsel:	Michael J. Wood, Q.C. and Cory J. Withrow, for the plaintiffs
	William L. Ryan, Q.C. and Maggie A. Stewart (articled clerk), for the defendant

Coughlan, J.:

[1] The Queen Elizabeth II Health Sciences Centre (Hospital) was vacating the old Halifax Infirmary building in Halifax, Nova Scotia. The ophthalmology unit was to be relocated. Tenders were called. Force Construction Limited submitted the lowest bid. The project was over budget. The Hospital discussed reductions to the scope of work with their consultants, WHW Architects. The tender form required bidders to set out a schedule of unit prices for various labour rates to apply when adjusting the tender price for additions or alterations to the scope of work during construction. Force Construction's labour unit prices were the highest of any bidder.

[2] In a previous tender with the Hospital, Force Construction submitted the lowest lump sum bid with high labour rates. When questioned, Force Construction submitted a revised labour rate schedule, reducing rates by as much as 25%. The Manager of Construction Service for the Hospital, Philip A. Jost, considered the practice of submitting high unit labour rates should be discouraged. Assuming a contingency overrun of 10% on the cost of the project, labour comprising 50% of the contingency cost and all bidders using equivalent man-hours, Mr. Jost calculated Force Construction's bid exceeded the second lowest bid by $1,187.00. The tender was awarded to the second lowest bidder, Avondale Construction Limited. Force Construction and Bell Electric Incorporated, the electrical subcontractor on the Force Construction bid, sued the Hospital.

[3] The issues for the Court are:

1) Did the Hospital have a contract with Force Construction and, if so, did the Hospital breach the contract?

2) If the Hospital breached its contract with Force Construction, to what damages is Force Construction entitled?

3) Did the Hospital owe a duty of care to Bell Electric and, if so, did the Hospital breach the duty?

4) If the Hospital breached its duty of care to Bell Electric, to what damages is Bell Electric entitled?

[4] The tender documents issued by the Hospital set out the terms and conditions governing the relationship between the parties. The invitation to tender constituted an offer to contract. It is clear from the instructions to bidders, it was the intention of the parties the submission of a bid in response to the notice of construction tender was to become a binding contract, the "Contract A" described by Estey, J., in giving the Court's judgment in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

[5] Paragraph 1.13.1 of the instruction to bidders provided:

> **1.13 AGREEMENT**
>
> .1 The successful Tenderer shall enter into an Agreement on the form attached.

[6] Sections 10.1.2 and 10.2.3 of the tender form provide:

> 10.0 DECLARATIONS
>
> .1 The undersigned hereby declares that:
>
> . . . .
>
> .2 No person, firm or corporation other than the undersigned has any interest in this Tender or in the proposed Contract for which this Tender is made.
>
> . . . .
>
> .2 The undersigned hereby agrees:
>
> . . . .
>
> .3 That unless and until a formal agreement is prepared and executed, this Tender together with the Owner's acceptance thereof shall constitute a binding contract with the Owner.

[7] Contract A is governed by the terms and conditions of the tender called.

[8] One of the terms of Contract A is the Hospital accept only a compliant bid. See *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. All parties agree both Force Construction and Avondale Construction were compliant bidders.

[9] The tender contained certain "privilege" clauses. Sections 1.6.3.1. and 1.6.3.5 of the instructions to bidders provide:

> **1.6 TENDER ACCEPTANCE/REJECTION**
>
> .3 Acceptance of Tender
>
> .1 It is emphasized that price will not be the only criteria for acceptance or rejection of a Tender. The lowest or any Tender need not necessarily be accepted and the Owner reserves the right to accept any Tender deemed most satisfactory to the Owner. All Tenders will be evaluated by the Owner relative to stipulated price, schedule, sub-contractors, qualifications and experience, and any other criteria which is relevant, in the opinion of the Owner to this project. Information provided with the Tender Form will be used as the basis of this evaluation.
>
> . . . .
>
> .5 The Owner reserves the right to accept or reject any or all bids.

[10] The Hospital does not have to accept the lowest compliant bid. The form signed by bidders contains the following provision:

> 10.0 DECLARATIONS
>
> . . . .
>
> .2 The undersigned hereby agrees:
>
> .7 That the Owner is not bound to accept the lowest or any Tender which may be received.

[11] In dealing with 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.

[12] The Hospital may take a "nuanced" view in determining which bid to accept, including factors such as labour unit prices, schedule, subcontractor qualifications and experience, and other criteria disclosed in the tender documents, which may affect the cost of the project.

[13] There is an implied term of Contract A that the Hospital must treat all bidders fairly. In giving the Court's judgment in *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860, Iacobucci and Major, J.J. stated 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".

[14] Was Force Construction treated fairly and equally by the Hospital?

[15] Tenders for the project closed November 28, 1997. All bids received were higher than the amount budgeted for the project. The Hospital and WHW Architects began working on reductions to the scope of work. A meeting was held December 4, 1997 with representatives of the Hospital and its consultants to discuss possible reductions in the scope of work.

[16] The Hospital requested WHW Architects review the bids. John Emmett, the partner of WHW Architects in charge of the project, reviewed the bids and responded by letter dated December 11, 1997. In dealing with the Force Construction bid, Mr. Emmett wrote:

> 2. ...
>
> .4 We consider the Unit Prices listed in Section 1.2 of the Tender Form to be high and this would impact costs of extra work. This factor may influence the least cost comparisons of the tenders.

[17] Mr. Jost made a handwritten note on his copy of the December 11, 1997 letter opposite item 2.4, “Agreed, PO recommendation reflects this issue” and initialled the note.

[18] In the letter Mr. Emmett stated:

> We recommend that a meeting be arranged with the lowest acceptable bidder to discuss various options to reduce the scope and thereby establish some contingency funding for construction. If this process is unable to generate sufficient funds for this purpose consideration would have to be given to re-tendering the Project to the three lowest bidders based on a modified scope.

[19] Mr. Jost made a handwritten note dated December 11, 1997 opposite the paragraph, “Agreed! Scope of deletions is in progress.” and initialled the note.

[20] WHW Architects did not make any recommendations to the Hospital as to which bid should be accepted.

[21] The Hospital commenced the project without a contingency allowance. In his December 11, 1997 letter, Mr. Emmett dealt with the absence of such an allowance as follows:

> As discussed the addition of scope to the project since establishing the budget in April, 1997 has resulted in projected Construction costs slightly in excess of the Budget. We understand you would be commencing the project without a Contingency allowance. In a project of this nature there are potentially many unknowns which may generate additional costs.

[22] Force Construction submitted the lowest bid, totalling $4,193,265.00. The following schedule of unit prices for labour costs for additions or alterations of the scope of work during the construction phase was included in the tender:

> .2 Schedule of Unit Prices. The Undersigned agrees that the following Schedule of Labour Costs shall apply to adjust the Tender Price for additions or alterations of the scope of Work during the Construction Phase.

Item	Description	Unit	Unit Price
1.	Pipe Fitter	$ per hour	$ 60.00
2.	Sheet Metal Worker	$ per hour	$ 60.00
3.	Carpenter	$ per hour	$ 45.00
4.	Electrician	$ per hour	$ 60.00
5.	Labourer	$ per hour	$ 35.00
6.	Supervisor	$ per hour	$ 55.00

[23] The bid set out Force Construction would complete the project within 192 working days, completing all work by August 30, 1997. There is no dispute the completion date should read August 30, 1998, not 1997.

[24] The bid submitted by Avondale Construction was in the amount of $4,235,170.00.

[25] It contained the following schedule of unit labour prices:

Item	Description	Unit	Unit Price
1.	Pipe Fitter	$ per hour	$ 50.00
2.	Sheet Metal Worker	$ per hour	$ 48.00
3.	Carpenter	$ per hour	$ 32.00
4.	Electrician	$ per hour	$ 46.00
5.	Labourer	$ per hour	$ 30.00
6.	Supervisor	$ per hour	$ 50.00

[26] The bid set out Avondale was to complete the work within 330 working days, completing all work by November 1, 1998.

[27] Mr. Jost reviewed all bids. He considered the unit labour rates in the Force Construction bid high. Mr. Jost had been involved with a previous project where Force Construction had submitted the low lump sum bid for the ENT Clinic project at the Hospital. That bid included high labour rates. When asked about the rates, Force Construction submitted a revised labour rate schedule, reducing rates by as much as 25%. Mr. Jost "flagged" the issue for future reference. He explained "flagged" meant he would keep his eyes open for high labour rates on other projects.

[28] In reviewing the bids, Mr. Jost prepared a calculation of the Force Construction and Avondale bids based on the "Force account" or schedule of unit labour prices. In making his comparison, Mr. Jost assumed 10% work over and above that included in the tender. He also assumed the cost of extra work was divided 50% labour and 50% materials, and both companies would complete the work in the same amount of time. Using the labour rates contained in the respective bids, he calculated the additional work would cost $37,564.00 more if performed by Force Construction than by Avondale. He added $37,564.00 to the Force Construction bid, resulting in the Avondale bid being $1,187.00 lower than the Force Construction bid. Mr. Jost testified if Force Construction's bid had been that amount lower, it would have received the contract.

[29] Mr. Jost testified in determining which bid to accept for this project, the factors he considered were the unit labour prices, change orders, additions and deletions to the scope of work, experience of the bidder, work schedule and price.

[30] The schedule of unit labour prices in the Force Construction bid was important as the prices were higher than other bidders. This was a high profile project on a tight budget. Mr. Jost testified there are always changes to every project and he considered Force Construction labour unit prices may result in higher cost.

[31] Mr. Jost stated Force Construction did not have a lot of experience working in the Hospital, whereas Avondale had more experience with the Hospital.

[32] On cross-examination, Mr. Jost agreed on this project the schedule was very important. The Hospital was vacating the old Halifax Infirmary site. The ophthalmology department was the only department remaining in the old Infirmary. Mr. Jost agreed the cost of operating the old Infirmary was substantial, including security, heat, lights and other utilities. In reviewing the bids, he did not consider the effect Force Construction's completion date of August 30, 1998 and Avondale's completion date of November 1, 1998 would have on cost as "he knew how long the job would take regardless of what the tender said".

[33] By letter dated December 11, 1997 to Nancy MacLeod, Acting Manager, Purchasing Services, of the Hospital, Mr. Jost recommended a purchase order for the project be awarded to Avondale, the lowest acceptable bidder. The basis of his recommendation was, with a project of this magnitude, typically, additional costs of 10% can be incurred and, taking into account Force Construction's higher unit labour rates when the additional work is considered, the Force Construction bid exceeded Avondale's bid by $1,187.00.

[34] On December 12, 1997, Mr. Jost wrote to Brian Jessop, Director Engineering Services of the Hospital as follows:

> Brian, I have enclosed the bid review documents and my recommendations. If these documents are acceptable, the tender award process **will be** as follows:
>
> 1. Purchasing creates the Purchase Order for the full tendered amount.

2. The Purchase Order will be held by my office until we have completed negotiations with the successful bidder regarding planned deletions from the contract and completion dates.

3. If negotiations are successful, the Purchase Order will be formally issued to the bidder, followed by a Change Order for the deletions.

Please contact me should you require further clarification. **[emphasis added]**

[35] Mr. Jost did not recall if the procedure set out in his letter was followed.

[36] On December 15, 1997, a purchase order for the project was issued by the Hospital to Avondale. The scope of work was reduced and post-tender addendum #1 dated December 16, 1997 was prepared.

[37] A meeting was held on December 16, 1997 attended by representatives of the Hospital, WHW Architects, Avondale and its subcontractors. The minutes of the meeting set out its purpose as "to discuss means to achieve a reduction in the contract value for the Phase 2 tender". The minutes of the meeting noted the following items as discussed:

1. Post Tender Addendum #1 dated Dec 16, 1997 was distributed to participants and items were reviewed in general.

2. Singh noted that item 10 for the change to coil construction also applies to the Heating & Cooling coils on the 2 new Air Handling Units.

3. Singh requested that items involving several trades be submitted with an appropriate level of back-up to permit east of review. Pierce requested that the tender form have prices completed as lump sum quotes (HST excluded) and the back-up be submitted as a separate attachment.

4. Avondale were asked to submit a list of additional items where cost reductions might be achieved for consideration by the Owner. Avondale requested a list of items in addition to those on the addendum which had already been considered by the Owner and rejected. Pierce to Provide.

5. Discussion took place with respect to Avondale's methodology to cut & cap the existing plumbing lines in the level 1 ceiling. Bremner's hadn't developed their plans for this work but anticipated doing it during shut-

downs, It was noted that there were somewhere in the order of 220 pipes to be capped and the contract permitted only 2 shut-downs. Avondale advised that Vern Banks had put together their bid and he had investigated this aspect of work. Avondale to review this matter and advise of alternate methods to do this work and potential savings.

6. The issue of Avondale's schedule was raised. **It was noted that they had the longest schedule of all bidders.** Avondale advised that they had presented calendar days not working days. They felt that 8-9 months was reasonable for the work but would consult with their subs to develop a more detailed and realistic schedule. It was noted that the contract required them to work extended hours to minimize the schedule as time was of the essence.

7. **Jost indicated that the clinics area was critical to the hospital in terms of schedule as they were currently housing this department in the old Infirmary. As they are now the sole occupants of this building the operating costs to the hospital are excessive.** Avondale to develop their schedule to permit earliest occupancy of the clinics area, with completion of the OR suite and level 3 following.

8. The issue of co-ordination drawings was discussed. Pierce emphasized that the complexity and size of services on this project make these drawings critical to the successful implementation of work. The requirements are detailed in the spec and they will be strictly enforced. The project team would be looking to Avondale to ensure no work proceeded without approved co-ordination drawings.

9. Avondale committed to the following timetable for response to this meeting:

.1	Costing of Post Tender Addendum 1 items	Monday	Dec 22
.2	List of additional items for consideration	Tuesday	Dec 23
.3	Detailed schedule	Wednesday	Dec 24

[emphasis added]

[38] William Gordon Garnett, President of Avondale, testified he remembered the meeting of December 16, 1997. He described it as a "start up meeting" for the project. Mr. Garnett said his company would have had the purchase order prior to

the meeting. When first asked when Avondale received the purchase order, he stated the purchase order was received the day it was issued, he believed. Mr. Garnett stated Avondale does not have any files concerning the project and he had not looked at any documents concerning the project for approximately ten years. He did not recall Mr. Jost telling Avondale Mr. Jost was concerned about the work schedule or discussion about the old Infirmary building and the need for shortening the work schedule.

[39] From the minutes of the December 16, 1997 meeting, it is clear Avondale's work schedule and the need of vacating the old Infirmary site as soon as possible were raised as important issues. I find Mr. Garnett did not have a clear recollection of the project, but testified as to what his usual practice was, not what occurred on this particular project.

[40] On cross-examination, Mr. Garnett was shown a letter on Avondale's letterhead dated January 6, 1998, purporting to be from Roger Plant, Avondale's Manager of Estimating and Construction, to Gary Pierce, as well as a memo purportedly from Gary Pierce to Roger Plant dated January 7, 1998. Neither of the items were subsequently proved and, therefore, I do not consider them in making my decision.

[41] After the December 16, 1997 meeting, Avondale prepared a revision to its bid based upon reductions to the scope of work as set out in post-tender addendum #1.

[42] Mr. Jost described a "pre-award" meeting as one which takes place prior to an award to a contractor. He could not explain a memo from Gary Pierce of WHW Architects to Roger Plant of Avondale dated January 9, 1998 concerning the project which stated:

> To confirm a pre-award meeting to be held Tuesday, January 13th/98 @ 9:30 a.m. Meeting to be held in Room 430 Bethune Building.

[43] Mr. Jost said the memo did not make sense as the Hospital met with Avondale and others in December, after the purchase order was issued.

[44] Mr. Emmett did not know when the tender was awarded to Avondale. He stated during the discussions with Avondale concerning post-tender memorandum

#1, the award was not made to Avondale. He agreed there are negotiations with a successful bidder after a tender is accepted.

[45] From all of the evidence, it is clear the procedure set out in Mr. Jost's December 12, 1997 letter to Brian Jessop was followed. The purchase order was created on December 15, 1997. Negotiations with Avondale took place and the tender was issued after the negotiations with Avondale were completed.

[46] The Hospital did not treat Force Construction fairly in the tendering process. Mr. Jost "flagged" Force Construction after the ENT Clinic project for having high unit labour prices. Mr. Jost considered it was a practice which should be discouraged and would not be tolerated. When asked how the practice could be discouraged, he answered "one obvious outcome is that they didn't get this tender". Mr. Jost did not consider the additional cost savings which might be realized because of the reduced scope of work, nor did he consider the cost savings resulting from Force Construction completing the work earlier than Avondale.

[47] Despite the reduction in the scope of work, Mr. Jost completed his calculations for additional work. The calculations were a justification for his decision not to award the tender to Force Construction.

[48] I find Mr. Jost decided Force Construction was not going to be awarded the tender to discourage the practice of high unit labour prices. The Hospital breached the term of Contract A to treat Force Construction fairly.

[49] To what damages is Force Construction entitled for the breach of Contract A?

[50] Force Construction has the burden, on the balance of probabilities, of proving the damages it suffered. In dealing with the assessment of damages for breach of Contract A, Oland, J.A. in giving the Court's judgment in *Borcherdt Concrete Product Ltd. v. Port Hawkesbury (Town)* (2008), 262 N.S.R. (2d) 163 stated at p. 180:

> The general measure of damages for breach of contract is expectation damages: *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at ¶ 55. In *Naylor Group Inc.*, supra, Binnie, J. for the Court stated:

> 73 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 (1967) 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 on Damages* (16th Ed. 1997), at para. 1154.

However, a breach of Contract A, as here, does not automatically lead to damages equivalent to the loss of profit. Damage awards in the tendering context can fall along a spectrum ranging from nominal damages, through the cost of bid preparation, to an award of lost profit.

The summary of the principles found in case law since *Ron Engineering*, supra, as set out in *Murphy*, supra, which was adopted by the Newfoundland Court of Appeal in *Health Care Developers Inc.*, supra, reads in part:

> ... upon contract A coming into being:
>
> . . . .
>
> h. where there is a breach of contract A, the measure of damages can include: (i) the cost of preparation of the bid; and (ii) upon the low bidder proving he would have obtained the contract, the estimated loss of profit on the work. [emphasis added]

The plaintiff bears the onus of proving that it suffered damages on a balance of probabilities. It is also the plaintiff that must substantiate the connection between the breach of Contract A and the loss of Contract B. In *M.J.B. Enterprises*, supra, at ¶ 57, Iacobucci, J., for the Court stated:

> Even if the evidence supports that, on a balance of probabilities, Contract B would have been awarded to the appellant, it still must be determined whether the loss of Contract B, although caused by breach of Contract A, is nonetheless too remote. The classical test regarding the remoteness of damages is that provided in *Hadley v. Baxendale* (1854), 9 Ex. 341; 156 E.R. 145, at p. 151, per Alderson, B.:
>
> > Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in

> respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

[51] And at p. 181:

> P. Sandori and W. M. Piggott in *Bidding and Tendering What is the Law?* 3rd Ed. (Markham, Ontario, 2004) Butterworths, explains at p. 276:
>
> > Where the breach of Contract A is judged to have resulted in the loss of Contract B, the contractor is usually awarded the profit it would have earned on the lost project. Because bidding and contracting is more art than science, the court takes the contractor's anticipated profit figure with a grain of salt. Typically, three discounts may be considered by the court:
> >
> > - The first is to give effect to the possibility/probability that Contract B would not have been awarded to the contractor (maybe the chances were good but not absolutely certain).
> >
> > - The second is to allow for other circumstances, such as unanticipated negative project conditions.
> >
> > - The third addresses whether the contractor took steps to reduce (mitigate) its losses by seeking replacement work.

[52] Although the Hospital breached Contract A, it is not certain Force Construction would have been awarded Contract B. WHW Architects prepared a pre-tender budget for the ophthalmology project of $2,898,855.00. The Hospital had a tight budget for the project. All bids received were over budget. The scope of the project was reduced. The Hospital negotiated a reduction in the scope of the project with Avondale. If Force Construction had been treated fairly, negotiations would have taken place, resulting in new bids from compliant bidders. Force Construction may not have been awarded Contract B. The successful bid would have been lower than the bids submitted, including that of Force Construction.

[53] Both Mr. Bellefontaine and Ian Spence, Force Construction's Estimator and Project Manager, testified Force Construction expected a profit of $162,169.00. Force Construction's loss of profit must be determined.

[54] In developing its bid, Force Construction used an estimate sheet program. The summary sheet of the program for the ophthalmology project was entered into evidence. It showed a cost breakdown of various aspects of the project which totalled $3,432,750.00, shown as $3,432,749.00 in the calculation of the bid. General conditions of the project was projected at $52,097.00. General conditions are items such as site supervisor, temporary power, security, etc., which are costs incurred in carrying out the project. The cost of performing the work and the general conditions totalled $3,484,846.00. Force then calculated its profit as $156,818.00 or 4.5% of $3,484,846.00, resulting in a total quote of $3,841,664.00. Harmonized sales tax (HST) was added, to bring the amount to $4,187,914.00. Then $5,351.00 was added to the amount of profit, to reach the project quote of $4,193,265.00.

[55] The process to determine the bid was very flexible, to say the least. For example, Bell Electric prepared a tender price of $818,673.00 for the electrical work. However, Force Construction showed $812,000.00 as the cost of the electrical work. Kelvin Bellefontaine, the president of Force Construction, was a substantial shareholder of Bell Electric.

[56] The estimate sheet program showed the cost of drywall and ceilings as $238,191.00. In its quote, Force Construction showed the cost of drywall and ceilings as $220,000.00 - a difference of $18,191.00. Kelvin Bellefontaine described the profit figure in a bid was determined by considering how much could be charged and still get the job. Items such as the drywall and ceilings and electrical may have cost more than set out in the bid, thereby reducing the profit. Other matters could arise during construction which would reduce the profit.

[57] 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. [see *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at p. 330] There is no evidence to show Force Construction failed to mitigate its damages.

[58] The process of arriving at a discount percentage to apply to assess damages includes a speculative aspect. [see *Borcherdt Concrete Products Ltd. v. Port*

Hawkesbury (Town), supra] The bid submitted by Force Construction provided for profit of $162,169.00. In this case, there is the possibility Contract B would not have been awarded to Force Construction, the possibility the costs of the project would be greater than set out in the bid and the possibility of other negative project conditions.

[59] In determining the damages to which Force Construction is entitled, I start with the profit figure of $162,169.00. From that figure I apply a 20% discount for the possibility Contract B would not have been awarded to Force Construction. I deduct $18,191.00, being the difference between the cost of the drywall and ceilings shown in the estimate sheet program $238,191.00 and the amount shown in its quote as the cost of drywall and ceilings $220,000.00. I deduct $6,673.00, the difference between Bell Electric's tender price of $818,673.00 and the amount shown in Force Construction's bid for electrical work $812,000.00. I also apply a 10% discount for other unknown circumstances which may reduce Force Construction's profit. The following is a summary of the above calculations of Force Construction's loss of profit:

-	Profit set out in bid	$ 162,169.00
-	Less 20% discount possibly not being awarded Contract B	(32,433.80)
-	Less drywall and ceilings differential	(18,191.00)
-	Less electrical work differential	(6,673.00)
-	Less 10% contingency discount	(16,216.90)
-	Total Loss of Profit	$88,654.30

[60] Force Construction is entitled to the sum of $88,654.30.

[61] Bell Electric was the electrical subcontractor named in the Force Construction tender. Bell Electric does not have privity of contract with the Hospital. As Bell Electric does not have a claim for breach of contract, it claims in tort for the economic loss it suffered. In *Design Services Limited v. Canada*, [2008] S.C.C. 22, the Supreme Court of Canada held an owner in a tendering process does not owe a duty of care in tort to subcontractors. The Hospital does not owe a duty of care to Bell Electric. There being no duty of care, Bell Electric's claim is dismissed.

[62] If the parties are unable to agree, I will hear them on the issues of prejudgment interest and costs.

Coughlan, J.