IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Amber Contracting Ltd. v. Halifax (Regional Municipality),* 2008 NSSC 208

Date: 20080630
Docket: SH No. 272869
Registry: Halifax

Between:

Amber Contracting Limited

Plaintiff

and

The Halifax Regional Municipality

Defendant

Judge:	Justice M. Heather Robertson
Heard:	January 7, 8, and 9, 2008, in Halifax, Nova Scotia
Written Decision:	June 30, 2008
Counsel:	George W. MacDonald, Q. C. and Christopher Wilson, for the plaintiff Randolph Kinghorne, for the defendant

Robertson, J.:

[1] The plaintiff seeks redress from the Halifax Regional Municipality ("HRM") as the low bidder on a storm sewer contract, in circumstances where the tender was cancelled and re-tendered. The plaintiff asserts the re-tender was not due to funding considerations but for the purpose of "bid shopping."

BACKGROUND

[2] HRM issued a call for tenders on contract number 05-222 for construction and upgrade of the Plymouth Road sanitary pumping station located in Dartmouth, Nova Scotia. HRM had earlier retained consulting engineers Terrain Groups Inc., to design and estimate the cost of the pumping station. Their estimate for construction was $158,240. The HRM Council approved an expenditure of $249,000 for this project, which included consulting fees.

[3] As a usual term of the tender document, one of the conditions was that the tenders submitted would be opened in public and the results also be published. The tender document also reserved the right to reject all tenders not considered to be satisfactory and also the right to cancel any request for tender at any time without recourse by the contractor. The document also provided as an express provision in the tender document that no term or condition shall be implied which is inconsistent with or conflicts with its provisions.

[4] Prior to the stipulated deadline of July 12, 2005, three contractors bid on tender number 05-222. The tenders were opened publicly on July 12, 2005 and subsequently published on the HRM website and also by the Construction Association of Nova Scotia with the result that anyone in the construction industry, who chose to do so, was aware of the amounts bid to perform the work. The tenders were are follows:

Whebby Contracting	$773,950.00
Amber Contracting	$570,612.75
ACL Contracting	$621,000.00

[5] All of these tenders were in excess of the available budget of $249,000 as set out in the capital projects supplementary report of HRM. HRM made the decision to cancel the tender on September 15, 2005 and contacted each of the bidders by letter. Despite the cancellation of the tender, HRM conducted some negotiations after this date with the lowest bidder Amber Contracting in an attempt to negotiate a price which was acceptable to HRM.

[6] In April 2006, HRM issued another tender for the construction of this project as a tender number 06-247. The plans and specifications for this tender were substantially identical to those for tender number 05-222.

[7] Following this tender, four contractors including the plaintiff submitted bids before the stipulated deadline of April 28, 2006. The results of that tender is follows:

Amber Contracting	$589,917.80
Whebby Contracting	$613,350.00
ACL Contracting	$621,000.00
Eisener Contracting	$579,282.83

[8] HRM awarded the contract for tender number 06-247 to the lowest bidder Eisener Contracting.

[9] A similar procedure was followed by HRM for another project. With that project as well, Eisener, who had not bid in response to the first calls for tender, but with the knowledge of the amounts bid initially by the others, submitted the low tender second time around and was successful.

[10] The plaintiff Amber Contracting says that:

1. HRM breached its contractual duty of fairness and good faith, that it owed to Amber by engaging in the process of “bid shopping.”

2. HRM having breached its duty of fairness and good faith cannot rely on the privilege clause in the tender document to say that Amber has waived its rights to make a claim and;

3. Amber Contracting should be awarded damages equal to the amount of its lost profit on this contract, especially in light of the fact it did not take on an additional project after the publication of its position as lowest bidder.

[11] The defendant HRM in reply says that there was no implied contractual obligation to award the contract to the lowest bidder in the first tender and that by issuing a second tender after publicly opening and cancelling the first tender, no unfairness or compromise to the initial bidders resulted.

[12] HRM relies upon the contractual terms of the tender document and in particular:

Paragraph 17 which provides:

> The Owner specifically reserves the right to reject all tenders if none is considered to be satisfactory and, in that event, at its option to call for additional tenders.
>
> ...
>
> No term or condition shall be implied, based upon any industry or trade practice or custom, any practice or policy of the Owner or otherwise, which in inconsistent or conflicts with the provisions contained in these conditions.

Paragraph 18 which provides:

> The Owner reserves the right to cancel any request for tender at any time without recourse by the contractor. The Owner has the right to not award this work for any reason including choosing to complete the work with the Owner's own forces.

LAW AND ARGUMENT
THE CONTRACT A - CONTRACT B PARADIGM

[13] The leading case in the law of tendering is the decision of the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 where Iacobucci J., writing for the Court, considered and affirmed the judgment of Estey J. In *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, stating at para. 16:

> ¶ 16 Estey J., for the Court, held that a contract arose upon the contractor's submission of the tender. This contract, which Estey J. termed "Contract A", was to be distinguished from the construction contract to be entered into upon the acceptance of one of the tenders, which Estey J. termed "Contract B". The terms of Contract A were governed by the terms and conditions of the tender call, which included that the contractor submit a deposit that could only be recovered under certain conditions. Estey J., at p. 119, stated:
>
> > ... There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B. ...

SPECIFIC LANGUAGE AND IMPLIED TERMS

[14] The specific wording of the tender document may in large part determine whether the invitation to tender gives rise to contractual obligations upon the owner with respect to Contract A, quite apart from the actual construction contract, Contract B. Beyond the explicit wording of the tender documents, however, the courts have imposed implied terms of contract.

DUTY OF FAIRNESS

[15] It is fair to say that the central implied term of “Contract A” is the duty of the authority calling the tenders to treat all bidders fairly and in good faith. This principle was considered by the Supreme Court of Canada in *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 where Iacobucci and Major JJ., writing for the Court, stated at para. 88:

> ... Implying an obligation to treat all [page895] bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

And at para. 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).

[16] Iacobucci J. also noted in *M.J.B. Enterprises, supra*, at paras. 27-29:

> The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, per McLachlin J., and Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, at p. 1008, per McLachlin J.
>
> While in the case of a contract arising in the context of a standardized tendering process there may be substantial overlap involving custom or usage, the requirements of the tendering process, and the presumed intentions of the party, I conclude that, in the circumstances of the present case, it is appropriate to find an implied term according to the presumed intentions of the parties.
>
> As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd., supra,* that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two

> separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[17] In *M.J.B. Enterprises* the Court found the owner had an implied obligation to accept only compliant bids based on the presumed intention of the parties and that this obligation was not incompatible with the privilege clause which allowed the lowest or any tender would not necessarily be accepted.

[18] Defence counsel have relied on *Crown Paving Limited v. Her Majesty in Right of Newfoundland* 2007 NLTD 132, where budget constraints were an accepted reason for cancellation of a tender. Paras. 46-47 noted:

> The obligation of good faith that arises under the *Murphy* principles does not prohibit the Defendant from cancelling a tender for legitimate reasons, and examining its options to provide the service. The question of budget is certainly a legitimate reason. The various options available to the Department could then be canvassed, one of which would be the ability under the *Act* to extend an existing contract which was validly in force.
>
> In this case, the privilege clauses were clear. I am satisfied that there was no obligation on the Defendant to proceed with the tender. No evidence was presented which would override the effect of these clauses. The Plaintiff was, or ought to have been, aware of the provision, and has presented nothing which would negate the right of the Defendant to rely on the privilege clauses.

[19] In this case, the Department of Transportation had received tenders that were clearly over budget. The Department considered three options:

> 14 The first option was to award the contract regardless of price. This required seeking approval from Treasury Board for the additional sums. Officials in the

> Department were of the view that such an award would not be a responsible use of public funds.
>
> 15 The second option was to re-tender the same contract with the advantage of knowing the previous bids. The Department knew this was not an option, because it would undermine the integrity of the bidding process by creating a bidding war between the two contenders. A change in requirements for a new tender was also not an option, as the road still needed the same maintenance.
>
> 16 The third option involved cancelling the tender and extend the existing contract with Glenn under the authority of section 5 of the Act. In order to keep this option open, the Department began negotiations with Glenn about extending the existing contract while the bids were still open. Mr. Mercer said that Glenn was receptive, but wanted more money. He said there was agreement with a portion of this request. Extending the contract involved, for example, mobilization of resources for the upcoming winter season, since under the existing contract Glenn did not anticipate having to get winter equipment back into the field.

[20] In *Trucon Construction (1986) Ltd v. Quesnal (City)*, [1994] B.C.J. No. 2542, the court similarly dealt with a situation where the City declined to award the contract as all bids significantly exceeded the City's budget for the project. The re-tender of the project however, did include altered specifications, which is not the case in this litigation, where the re-tender was substantially identical.

[21] In *Borcherdt Concrete Products Ltd. v. Port Hawkesbury (Town)*, 2006 NSSC 321, 248 N.S.R. (2d) 388 (N.S.S.C.) Scanlan J. considered the situation where the Municipality as general contractor on the project, after the closing date of a tender engaged in third party negotiations with the competition of the plaintiff and in the end performed a portion of the original work itself that had been included in the original tender. The issue of bid shopping arose when the Municipality having received the contractor's price for the work in essence shopped the tender to the third party. In deciding to do the work itself, the Court concluded the Municipality was a non compliant bidder, in circumstances where the contractor continued to be exposed and at risk under Contract A.

[22] In assessing the issue of fairness the Court referred to the guidelines often used in the construction industry entitled Construction Contract Guidelines prepared by the Province of Nova Scotia Office of Economic Development. The Court specifically referred to guidelines 34 and 38:

CCG 34

BID EVALUATION

.1 The Contracting Authority reserves the right to reject any and all Bids or accept any Bid which in the sole opinion of the Contracting Authority is in its best interest.

.2 In the evaluation of a bid, the Contracting Authority will consider but not be limited to the following criteria:

.1 Bid price submitted.

.2 Compliance with Bid Documents.

.3 The experience of the bidder with similar projects in size and shape.

.4 Completion date.

[23] As noted under CCG34 in rejecting a bid the Contracting Authority is entitled to consider the bid price as one of the criteria in rejecting any bid. CCG38 provides as follows:

EFFECT OF BIDS HIGHER THAN THE ESTIMATED CONTRACT VALUE

.1 Where all Bids submitted in response to an invitation to bid are higher than the estimated contract value, bids shall not necessarily be invalidated for this reason.

.2 If the lowest competent Bid is within 15% of the estimated contract value, the Contracting Authority may choose to:

.1 Award the contract for the bid amount.

.2 Negotiate changes in the scope of the work with the lowest competent bidder to achieve an acceptable contract price.

.3 Failing negotiation, or if the lowest Competent Bid is greater than 15% over the estimated contract value:

> .1 The Contracting Authority may make changes in the scope of work and invite the three lowest competent original Bidders to rebid.
>
> .2 If these invited Bids fail to bring a Bid to within 15% of the estimated contract value and subject to confirmation of the Contracting Authorities budget, the Contracting Authority may take whatever action which in its opinion will result in an acceptable contract price.

[24] In reference to the duty of fairness owed Scanlan J. wrote at para. 29:

> 29 There is a duty of fairness owed to the plaintiff. The tendering process is an essential component in the construction industry and must be protected so the integrity of the process itself is maintained. In this case it is clear the plaintiff expended hours on the tender process that were lost. In that regard I note Mr. Borcherdt spent four hours consulting with a Mr. McKeen plus six hours of his own time in preparing the tenders. I am satisfied that as a minimum the plaintiff should be compensated for that 10 hour work even though the plaintiff would not have recouped those monies had it not been a successful bidder. That wasted time and effort though should now be compensated because that time was expended in a flawed process. Had the plaintiff realized they were not involved in the process that would be respected to the end, I doubt they would have expended any of the ten hours. For that work the plaintiff would, at a minimum, be entitled to ten hours at $100.00 per hour. I am, however, satisfied the proper measure of damages in this case exceeds the cost of preparing the tenders. In *Santec Construction Managers Ltd. v. Windsor (Town)* (2005), 235 N.S.R. (2d) 100, Justice Coughlan discussed the proper measure for damages. Referring to *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943 (S.C.C.) he noted at paragraph 53 and 54:
>
> > 53. 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 obligation under the tender contract. The normal measure of damages ... is the contract price less the cost to the respondent of executing or completing the work, ie., the loss of profit. ...
> >
> > 54. The plaintiff's loss of profit must be determined.

[25] The Construction Contract Guidelines were presented to the Court by plaintiff's counsel in argument and in response to defence counsel's submissions about what options were open to HRM.

> CCG41
>
> EFFECT OF BIDS HIGHER THAN THE ESTIMATED CONTRACT VALUE
>
> 41.1 Where all bids submitted in response to an invitation to bid are higher than the estimated contract value, bids shall not necessarily be invalidated for this reason.
>
> 41.2 If the lowest competent bidder is within 15% of the estimated contract value, the Contracting Authority may choose to:
>
> 41.2.1 Award the contract for the bid amount.
>
> 41.2.2 Negotiate changes in the scope of the work with the lowest competent bidder (Within the framework of the original tender call, including all sub contractors listed) to achieve an acceptable contract price. If negotiations fail, the contracting authority can make changes to the scope of work and re-tender the work or invite the three lowest competent bidders to re-bid the work.
>
> 41.3 If the lowest competent bidder is greater than 15% over the estimated contract value, the contracting authority may choose to:
>
> 41.3.1 Award the contract for the bid amount.
>
> 41.3.2 Make major changes to the scope of work (10% of estimated contract value or greater) and re-tender the work.

[26] Although I placed no reliance on this "non exhibit", Mr. MacDonald's point was that the established practices of the industry and those of HRM before this time were to negotiate with the lowest bidder or make major changes to the scope of work before re-tendering.

[27] In addition to the tender documents, the procurement policy of HRM was tendered in evidence.

[28] Among the guiding principles in policy 2 are the following:

> (c) The procurement process is to be open, fair and consistent.
>
> (e) Procurement methods are to encourage competitive bidding for the supply of goods and/or services.

and as a general provision it is stated:

> 4(3) Halifax Regional Municipality will be under no obligation to accept the lowest bid or any bid received in response to a verbal or written request.

under Methods of Procurement:

> 7. (3) Tenders:
>
> ... The award is normally to the lowest total cost bid received from a responsible bidder meeting the requirements of the tender.

and

> 7. (7) Negotiation: Negotiations with one or more suppliers for the supply of goods and/or services would take place when any of the following conditions exist:
>
> (d) All bids received are not acceptable or exceed the amount budgeted for the purchase

[29] In the circumstances of this case, HRM re-tendered the same document, but claimed the situation created no unfairness to the first bidders, in allowing Eisener to bid the same job, with full knowledge of the earlier bids.

[30] What all the parties to the second bidding process knew (the only change since the earlier tender) was that one of the two types of storage tanks, available in the summer of 2005, was no longer available for use in bidding tender number 2.

[31] HRM submits that on the purely economic issue of not taking Amber up on its offer to save some money by performing the contract in the winter months, the cost savings were too little to consider awarding the contract to Amber.

[32] As in all of the cases that were cited by counsel and to which I have given consideration, the issue of the existence of the implied terms and duty of fairness, depends heavily on each fact situation and on specific terms of the tender documents. Here the evidence of those involved in the tender process is crucial.

[33] Cases relied on by defence counsel were as follows: *Sound Contracting Ltd. v. Nanaimo (City)*, [2000] B.C.J. No. 992; *R. G. Lamarche and Associates Ltd. v. Lundy Construction (Ontario) Ltd.*, [2000] O.J. No. 3308*; L. (A.) v. Ontario Minister of Community and Social Services*, [2006] O.J. No. 4673; *Dolyn Developments Inc. v. Paradigm Properties Inc.*, [2007] O.J. No. 63; *Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic School Board*, [2002] O.J. No. 379; *Power Agencies Co. v. Newfoundland Hospital and Nursing Home Assoc.*, [1991] N.J. No. 158; and *Elgin Construction Co. v. Russell (Township)*, [1987] O.J. No. 2411.

EVIDENCE

[34] Ms. Debbie Andrews was the contract administrator who oversaw the tender process for both the original and re-tender of the Plymouth Road pumping station. She was also responsible for opening the tender documents. She testified that in her experience tenders are not cancelled because they come in over budget. Indeed, it was her evidence that it was the common practice that tenders over the estimated budget were let to the lowest bidder. She remembered no exceptions to this practice.

[35] On cross-examination Ms. Andrews addressed the emails she had exchanged with Mr. Peter Ross, the Manager of Risk and Insurance in HRM's legal department, formerly Manager of Procurement. Mr. Ross also gave evidence.

[36] Mr. Ross emailed Ms. Andrews on December 10, 2007:

> [a]nyway can you clarify in 2006 when we received tenders when we advised the construction association, was it directly after the opening? Did we ever not tell them if there was a question over the bid. I am asking concerning a bid that [a]mber put in on a job that was such higher than budget which we canceled. We are trying to find out what was known at the time.
> Peter

Ms. Andrews replied on December 17, 2007:

> We do at times not release prices when there was a question of validity relating to a bid until we got it clarified that it is valid or not. Most tenders come in way over the estimated budget that is given at the time of tender so we don't usually withhold information based on funds.
>
> However, I know in this instance, if you are talking about the pumping station tender that was retendered and Eisener was low second time, we would not have withheld information based on price/budget only if there was a problem with a bid meeting our requirements at opening (bonds, seals, signature, initialled changes, etc)
>
> Hope this helps!

[37] Mr. Gregory Rice is now an employee of the Halifax Regional Water Commission from August 2007 when the responsibilities for sewer and water were transferred from HRM to the Halifax Regional Water Commission. Before that date, he had been employed in Design Construction Services of HRM. It was his responsibility to be involved in the detail design of sewer and water projects. Mr. Rice is a civil engineer who was graduated from university in 1993. He testified that because the Plymouth Road pumping station needed electrical and construction engineers to provide more detailed design, the Terrain Groups was selected. A pre-design report had earlier estimated the cost of the project at $159,000. Mr. Rice testified that he believed of "the consultants have done a poor job for us" accounting for the large discrepancy between budget and actual tendered amounts.

[38] Mr. Rice testified that before this project, most of his experience related to road construction. With respect to the valuation of the subject tender, he was unable to estimate the value of a tank that was required to be installed in the pumping station. He acknowledged that he knew the pumping station was near a lake and that therefore, there were environmental issues involved. Mr. Rice acknowledged that he received the Terrain Groups' report, but did not review it in any detail. Indeed, it is apparent from his evidence that he did not perform any *due diligence* with respect to the report received from the Terrain Groups. Mr. Rice agreed on cross-examination that he did not return to the consultant to receive new estimates of the value of the work in light of the bids that were almost three times

higher. Rather, he used the value of the bids he had received in July 2005 for budgetary purposes in re-tendering the project the next year. He therefore accepted the project value was in excess of $500,000.

[39] Mr. Rice reviewed a series of emails that he had exchanged with his colleagues after the response to the first tender. He agreed that he had speculated he would receive better prices if the project were re-tendered in the winter of 2006. Mr. Rice testified that he was aware that there were certain post tender negotiations with Mr. Harry Pool of Amber Contracting Ltd. He also testified that he never knew of an instance where he did not award a tender to the low bidder.

[40] Mr. Ian Guppy now with the Environmental Services section of the Halifax Regional Water Commission also formerly worked in Design and Construction Services with HRM. He is a civil engineer graduating in 1989 who worked for the engineering firm of CBCL for 10 years on project design before joining HRM. With respect to the Plymouth Road pumping station, he selected the design engineer by accepting requests for proposals from project consultants. SNC Lavelin had originally prepared broad estimates for a number of HRM projects. They valued this project at $150,000. The Terrain Groups won the request for proposal and provided the detailed design drawings. They valued the project at $269,000 to cover all work from engineering design to completed construction. Mr. Guppy testified that his group was shocked when the actual bids came in 2-1/2 times higher than the estimate. He also reviewed a series of emails he exchanged with his colleagues.

[41] In the first email offered in evidence, (Exhibit 1 - Tab 13) dated July 13, 2005 from Greg Rice to Ian Guppy, Mr Rice tells Mr. Guppy:

> We had three bidders and the lowest was $498,185 (net). Terrain's estimate was $160,000 (net). According to my spreadsheet, the budget amount is $200,000. Should we proceed with the reward report?
>
> It's my opinion that we have been receiving higher than normal pricing due to the high volume of work that the contractors currently have. It's possible we may get better prices if we re-tendered in January/February.
>
> Richard, any comments?

[42] Mr. Rice inquired of the Terrain Groups why they had so miscalculated the evidence in an email dated July 16, 2005, to which Richard Stephenson of Terrain replied (Exhibit 1 - Tab 13):

> Other issues that may be factors in the bids include:
>
> 1. Deep excavation for the wet well next to the lake.
>
> 2. Allowance for the cost of shoring that may be required to control lake water should it invade the excavation.
>
> 3. Requirement for a crane to handle the large pipe and box sections.
>
> 4. Environmental issues associated with working next to the lake.
>
> 5. Contractors are very busy at this time. An early spring tender may take 15% or more off the cost.
>
> 6. Complicated project in a relatively confined space.
>
> Richard

This reply was forwarded to Ian Guppy and others.

[43] Ian Guppy then made an inquiry of his colleague Peter Sullivan regarding the life span of the pumping station. On July 18, 2005, he wrote (Exhibit 1 - Tab 14):

> Hi Peter,
>
> The tender for the pumping station came in at a cost approximately 2.5 times what we had originally budgeted. I realize the station is near the end of its service life and that there were concerns about the condition of the below grade steel structures. The questions I have for you are:
>
> How critical is it for us to complete this work? Can we delay a year or two? [e]ven more?
>
> Are there any things we could do operationally to prolong the life of the station? [or] a small capital project like installing anodes?

[44] He received his reply on the following day:

> Ian
>
> I'm sure that another year shouldn't be a problem but we might be pushing it any longer. I'll check into installing anodes & if there's any benefit at this point.
>
> Peter

[45] Mr. Guppy had inquired of Dale Carman of Procurement when he could re-tender the project and was told "any time after the 60-day validity period."

[46] Mr. Guppy testified that after the September 15 cancellation of the tender, there had been negotiations with Mr. Harry Poole of Amber Contracting to see if the project could go ahead. Even with Mr. Poole's suggestions of cost savings the project would still cost $457,000 well above the $269,000 budget. Mr. Guppy confirmed in his evidence the contents of this email of September 14, 2005, to his colleagues "Based on feedback from the construction industry we have decided to retender this project in the winter for construction next season. The hope is we will receive better prices. In addition, it will give us time to secure additional funding to ensure no shortfalls." (Exhibit 1 - Tab 17)

[47] In an exchange of emails on September 27 and 28, 2005, John Sheppard, Ian Guppy and other of their colleagues discuss the merit of negotiating with Harry Poole of Amber notwithstanding that the word may be out through consultants that other contractors are aware the job may be re-tendered. (Exhibit 1 - Tab 21) the exchange is as follows:

Charles Lloyd to all: September 27, 2005

> I spoke with Dale and (sic) this and he said these tenders have been canceled and other contractors have been notified that the plan is to tender next year.

John Sheppard to Ian Guppy:

> Have we told other contractors that we would be re-tendering Plymouth Rd PS?

Ian Guppy to John Sheppard:

I haven't spoken to any contractors other than Amber but that doesn't mean the industry doesn't know our plans to retender a number of projects through various sources, e.g. consultants etc.

John Sheppard to Ian Guppy:

The reason I am asking is this ... Harry Poole did say to us that he felt that he could do Pumping statoin (sic) work (like Plymouth Rd PS) more cost-effectively in the winter. So, I would like us to pursue that with him - no change in scope of work but better working conditions is what he says.

Peter/Dale ... is that ok that we negotiate with him in this way?

Then depending on a revised price, we might decide to proceed. (Having said this, we do not have Crespool money. I met with Bruce Fisher and Joan Broussard on yesterday about this dilemma so I am copying to them too.)

I should apologize ... I should have raised this before telling Amber that we were cancelling. But maybe we can proceed this way now.

Peter Ross to John Sheppard:

I think if we can at least discuss with [h]arry what the problem is at least he can either provide a solution or better understand our problem, part of his issue is that he waited so long to be told that he missed other work. John this type of thing that the contractors we spoke to expressed frustration over

John Sheppard to Peter Ross:

Quite true, except:

Ian Guppy had let Harry know verbally well before.

And he is way behind on a (sic) another project that he is doing for us - manhole rehabilitation. We estimate that he will have completed only 60 to 70% of the work by the target date of October 31, 2005. Maybe he will use different resources to do the Plymouth project but maybe not too.

> In any event, we will speak to Harry and see if he can reduce his price (given that he said that he liked to do pumping station work in the winter). The reality is that we seem to have no funding for the extra cost anyhow but we are working on that.
>
> Thanks for your response.
>
> Good night.

[48] In fact, the project was refunded through the budget process in the fall and winter of 2005-2006, then re-tendered in April 2006. However, as late as January 23, 2006, communications between Mr. Guppy and Greg Rice continued to indicate that the HRM was not sure whether they would take Harry up on his offer. Mr. Poole's offer was to complete the project between the months of January and June 2006 for $457,000 (Tab 27).

[49] On January 18, 2006, Greg Rice inquired of Ian Guppy (Exhibit 1 - Tab 27):

> Hey Gupman. What's going on with this project? I assume we're not taking Harry up on his offer. Do you want us to re-tender the project?

[50] Mr. Guppy together with his colleagues finally made the determination that the savings proposed by Mr. Poole were not sufficient saving on the tender and that they would re-tender "hoping to get a better price." He testified "we were ready at any time to either proceed as originally tendered or re-tender the project."

[51] On April 22, 2006, HRM received advance funding approvals which included a request for an additional $350,000 to the Plymouth Road project. The budget now reflected as $599,000 and new tenders were received in July 2006, although the work tendered was substantially identical to tender number 1. In this second process, Eisener Contracting won the bid.

[52] Mr. Guppy also testified as to the procedures of advanced funding proposals and the need to establish priorities for the expenditure of the funds available. The priorities are:

1. Projects that present legal liability issues, for example, where flooding may occur causing property damage or where the Department of the Environment finds a project to be in serious contravention of its regulations.

2. Work related to infrastructure projects that is out of compliance with the Department of Environment regulations, for example, a pumping station that regularly overflows into watercourses. The Plymouth Road pumping station fell in this category.

3. Projects designed to optimize storm wastewater management, although not urgent.

4. Local improvement projects such as service extensions of sewer and water to areas not yet served.

5. Private property drainage issues that relate more to private developers and may not be the responsibility of HRM.

[53] Mr. Guppy testified that in the fiscal year 2006, there was approximately $650 million of priority number 1 and number 2 work requiring completion. He testified that priority number 2 projects such as the Plymouth Road pumping station were funded from the debt and that only $650,000 was available in that year to complete these projects. He agreed that this was not the only source of funding.

[54] The Plymouth pumping station was a priority project. Emails shared between local councillor Andrew Younger to John Sheppard in September 2005, highlights the urgency.

[55] The project was placed on the early list of priority projects in the fall of 2005 for early April approval.

[56] On cross-examination, Mr. Guppy acknowledged that, apart from the funding issue, he was not involved in the detail analysis of this project. He was unaware of the excavation requirements relating to a wet well required to be installed under the earth works. He understood generally that the project involved the excavation of a deep trench whose depth would depend on the elevation of the incoming sewer. He testified that the excavation would include the installation of a wet well, valve chamber and storage tank for emergency power. He believed the storage tank would be of the magnitude of 20' in length and 15' in width and 10' in depth. The electrical controls would be located at the surface. He testified that he believed that the Terrain Groups blew the estimate, based on his hindsight. Mr. Guppy was unable to recall whether he had specifically reviewed the estimate.

[57] Mr. Guppy agreed that he did not pursue another estimate from the Terrain Groups and accepted the budget cost parameters as reflected in the first bids received because of industry appeared to know the value of the work. He also agreed that he used the earlier tenders in the next budget entry process, but had "hoped to get better value" by re-tendering the project (Exhibit 1 - Tab 17) "Based on feedback received from the construction industry ... ."

[58] Mr. Guppy agreed that he met with Mr. Harry Poole in September 2005, although he was uncertain whether it had been by telephone or not. He testified he did not recall the specifics of the conversation, but that they had discussed the status of the project. Tab 21 "In any event, we will speak to Harry and see if he can reduce his price ... ." Mr. Guppy agreed that he had these communications.

[59] Mr. Guppy confirmed his further communications with Mr. Greg Rice in which he asks "do we think 450K is a good price?"

[60] Mr Guppy testified that he was debating with Mr. Rice whether a 40K saving was good enough as it related to the valve chamber and the time and duration of the construction. Again, the discussion between Mr. Guppy, Mr. Rice and John Sheppard seems to have related to whether they would receive a better price if they re-tendered.

[61] Mr. Guppy accepted as being correct that the general number of construction tenders HRM deals with annually is an average of 91 tenders in each of the years 2004, 2005, and 2006. He also agreed that he had no previous experience, where a project was re-tendered under these circumstances.

[62] In early discovery evidence of May 8, 2007, Mr. Guppy was asked if the estimate had been correctly established the year before by Terrain, would the request have gone forward to council? He replied "Oh, because there was sufficient funding, yes."

[63] Mr. John Sheppard is the Manager of Environmental Services with the Halifax Regional Water Commission since the merger of August 2007. Before that he had been employed by HRM from 1996. He testified as to the reporting relationships. Mr. Guppy reported directly to Mr. Sheppard. Mr. Rice did not. He

was in another business unit of HRM Transportation and Public Works, and communicated with Mr. Sheppard's staff particularly Mr. Guppy.

[64] Mr. Sheppard testified that his involvement in the Plymouth Road pumping station was limited to his prioritizing capital projects. He testified that he had no direct involvement in the design of the station. He testified as to the various sources of funding available:

1. A fund called "Crespool" in which excess capital funds were gathered.

2. General revenues.

3. Environment of protection reserves.

4. Sewer redevelopment reserves.

5. Federal and provincial grants.

6. Local improvement charges.

[65] Mr. Sheppard's evidence was not very helpful as he had little specific memory of this tender and its re-tendering process.

[66] In his testimony, he acknowledged writing emails to his colleagues on the funding issue, but continued to reiterate that the funds were not available, even if there were early renegotiation discussions with Amber as suggested in the emails of September 25, 2005 (Exhibit 1 - Tab 21).

[67] However, in cross-examination Mr. Sheppard contradicted himself badly.

[68] He acknowledged that he had written on September 28th:

> In any event we will speak to Harry and see if he will reduce his price ... .

[69] He acknowledged that on October 7, 2005, he replied to Ian Guppy's email (Exhibit 1 - Tab 23) which referenced Harry Poole's negotiated price of $457,000 for winter construction. Mr. Sheppard wrote:

> Ian
>
> How do we feel about the price? Do we think we can get a better price by retendering? ... Or may be we say to him, reduce it by another $20,000 and we will go.

[70] Mr. Sheppard testified that he did not recall if Ian Guppy went to re-negotiate with Harry Poole.

[71] Further, he testified "I don't know why I would write such an email."

[72] In my view, there is only one plausible explanation. Mr. Sheppard knew that the funds for this project could be found. The emphasis on re-tendering was directed at getting a better price.

[73] Indeed Mr. Sheppard in his evidence recalled having met with the local contractors including Amber in the fall of 2005 to discuss "our great concern over the high prices we were getting."

[74] It is telling that on January 20, 2006, Ian Guppy emailed John Sheppard again (Exhibit 1 - Tab 26):

> Hi John
>
> As discussed, this project is under funded, the source is general taxes and we are ready at anytime to either proceed as originally tendered or retender the project.
>
> Our plan was to retender with the thinking early in the season will give us better prices, however, the way things are going, will we not be back to tendering at the wrong time? [a]nd we'll be back to poor prices?
>
> Thanks
>
> Ian

[75] That is precisely what occurred.

[76] Mr. Harry Poole is the owner of Amber. He testified at the beginning of the trial about responding to the initial tender and then being told of its cancellation.

[77] He testified that he had never experienced this situation before where “they withdrew the tender,” i.e. a case where the tender was opened and then cancelled.

[78] In his experience, he had in the past entered into negotiations to save money for HRM after he had been identified as the low bidder on the contract.

[79] Mr. Poole explained in evidence how he priced out each of the component units of the tender and then built in his profit to arrive at the bid price. He also testified how in his calculations he would mark up component units to account for his profit as he calculated the bid price.

[80] His pencil calculations (working notes) were examined in detail.

[81] Amber was notified in writing on September 15, 2005, of the cancellation.

[82] He wrote to HRM on September 21, 2005, expressing his disappointment. He wrote:

> ...
>
> I am very disappointed that these tenders were cancelled without even talking to us to see if the contracts could be revised in some manner to reduce the cost. We put considerable time, effort, and money into bidding your projects and to be low bidder. Also upsetting is the fact that being low bidder on these projects, we would not bid other projects because of our workload. These two (2) contracts represent $1,795,000.00 which we feel should not be taken lightly.
>
> I would ask you reconsider cancellation of these projects. We would be pleased to have these projects awarded and constructed in the 2006 Season.

[83] Mr. Poole gave detailed testimony concerning his price calculation for the second tender (Exhibit 1 - Tab 34 - p. 204). He gave the emergency storage tank a unit value of 390,000 up from 376,000 in the first tender. This was the only significant change between the two tenders and resulted when the round storage tank he was to provide in tender number 1 was no longer available and was replaced therefore (by all bidders) by a square tank. He accounted for the price increase by testifying that the waterproofing costs of the square tank were higher.

[84] Eisener Contracting were the low bid on the second tender and Mr. Poole expressed his surprise that they could beat his price but said, they knew his previous price.

[85] Mr. Poole testified that it was not unusual to have a contract extended into the next fiscal year, where the requirement for extra funding arose, after all the bids were received and the lowest bid excepted.

[86] He recalled a contract he was awarded in a Yarmouth County Municipality that was extended beyond a full fiscal year.

[87] He testified that he had a small company with a dedicated work force of the same individuals who had been with his company for a long time and that he did not suffer labour escalations. He also testified that his suppliers would hold their prices for him for a year to accommodate delayed start ups.

[88] Again he testified that "I always got the contract for tender when I was the low bidder ... as normally the funds would be found."

[89] He testified that during the 60-day period from when the tenders were opened he did not bid on other work.

[90] In October 0f 2005 when negotiations were entered into, after cancellation of the tender he prepared a further lump sum proposal of $457,000 plus HST, based on estimated cost savings for winter construction. This represented a $39,185 saving or 8% over his original low bid. In the winter months, the ground is frozen and there are fewer slides, he testified.

[91] While negotiations did ensue, they were ultimately unsuccessful over the issue of cost savings to HRM.

[92] Defence counsel has observed that the Eisener bid on tender number 2 was less than Amber's and that Amber's was in fact a higher number the second time around. Therefore, they argue that Eisener had no advantage knowing Amber's first bid.

[93] Mr. Poole's evidence in this regard is a reasonable explanation of how transparent the process was as between tender number 1 and tender number 2.

[94] Only one type of storage tank was available in 2006 and it was more expensive. Harry Poole calculated this item to be $14,000 greater, the increase in his second bid. Mr. Eisener and all the contractors knew the more expensive tank was the only one available. Mr. Eisener's bid was $9,000 less and he won the tender.

[95] I have no doubt that he did enjoy an advantage seeing the bids made and published after tender number 1 was opened.

[96] At the end of the day, Mr. Poole's evidence was strong on the point of his past experience of the usual negotiations that would take place with the low bidder, even if the bid submitted is over-budget. Such negotiations he testified allow the HRM to realize additional cost savings, but preserve the integrity of the bidding system.

[97] Mr. Poole pointed out that his negotiations resulted in his offer to build at a negotiated price of $457,000 when the delay in re-tendering resulted in HRM in fact accepting a higher price in Eisener's bid of $579,282.83.

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

[99] Although I recognize that this particular project presented a funding challenge to HRM, because the project had been so grossly underestimated in value by the HRM consultant Terrain, I am satisfied that the project was a sufficient priority that the early funding approval process begun in the fall of 2005 was intended to secure early 2006 funding for this project. This was in fact achieved in April 2006.

[100] I am not left in any doubt that this project was due to proceed in 2006.

[101] There is in fact an issue of credibility with all of the HRM witnesses except for Ms. Andrews. I sensed throughout that the HRM witnesses wanted to emphasize the funding issue to explain away their most obvious intention to price shop by re-tendering.

[102] Their ostensible reliance on budget constraints belies their true conduct which in my view was classic bid shopping "If we retender we'll get a better price."

[103] Although the circumstances of the case may be distinguished Gruchy J. in *Western Plumbing and Heating Limited v. Industrial Boiler Tech- Inc.* (2000), 180 N.S.R. (2d) 41 (S.C.), referenced in *Dolyn Developments*, *supra,* at para. 48 captured the essence of "bid shopping." He noted it involved:

> ... conduct **where a tendering authority uses the bids** submitted to it as a negotiating tool, **whether expressly or in a more clandestine** way, before the construction contract has been awarded, with a view **to obtain a better price or other contractual advantage** from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol. [emphasis added]

[104] Whether HRM staff understood or not, the implication of their conduct, amounted to classic "bid shopping" to the detriment of the plaintiff and the integrity of the construction industry, who go to considerable expense in submitting tenders and expect fairness in their dealings with entities such as HRM.

[105] HRM's tendering protocol was a written policy and long established practice. They worked with low bidders in the situation where bids exceeded their original estimates.

[106] This was their practice without apparent exception.

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

[108] Amber has suffered loss. The measure of the loss is well established law; the loss of profit as though Amber had performed the contract for an agreed price.

(*Santec Construction Managers Ltd. v. Windsor (Town)* (2005), 235 N.S.R. (2d) 100 (N.S.S.C.) at paras. 53 and 54.)

[109] I accept the calculation of loss as provided Exhibit 1 - Tab 9, which Mr. Poole addressed in his direct evidence.

[110] The lost profit and therefore award of damages is $147,560. The plaintiff shall have judgment for this amount and their costs and disbursements according to tariff.

[111] I will be happy to hear submissions in writing failing any agreement between the parties on the issue of costs.

Justice M. Heather Robertson