IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Cambridge Plumbing Systems Ltd. v. Owners, Strata Plan VR 1632,*** 2009 BCSC 605

Date: 20090501
Docket: S065538
Registry: Vancouver

Between:

Cambridge Plumbing Systems Ltd.

Plaintiff

And:

The Owners, Strata Plan VR 1632

Defendants

Before: The Honourable Madam Justice Dorgan

Reasons for Judgment

Counsel for the Plaintiff:	J. M. Moshonas
Counsel for the Defendants:	J. R. Singleton, Q.C.
Dates and Place of Trial:	March 10 to 14, 17 to 20 and July 3, 2008
	Vancouver, B.C.

Introduction

[1] This action arises out of a tendering process conducted for the replacement of a hot and cold domestic water system at Newport Quay, a 158 unit, 11-story strata complex in Vancouver, British Columbia. The defendant strata corporation is comprised of the owners of units in Newport Quay (the “Owners”). The plaintiff is Cambridge Plumbing Systems Ltd. (“Cambridge”), one of the bidders for the re-piping project (the “Project”).

[2] Cambridge alleges that the Owners breached their obligations under Contract A (the tendering contract) in failing to award Contract B (the construction contract) to Cambridge, or in entering into negotiations with Cambridge and Brighter Mechanical Ltd. (“Brighter”) during the tendering process, the latter of which was eventually awarded the Project. The position of the Owners raises the preliminary issue of whether Cambridge's bid was compliant with the terms and conditions of the tendering documents.

Background of Dispute

[3] On January 11, 2006, Graham Aspinall, the Owners’ consultant for the tendering process, issued an Invitation to Tender to three contractors, Cambridge, Brighter, and Curaflow of British Columbia Ltd. (“Curaflow”). All three companies submitted bids in response to the Invitation to Tender.

[4] The tenders were reviewed by the Owners’ strata council at a meeting on March 21, 2006. The strata council agreed to meet with Mr. Aspinall and representatives of Cambridge, which they did on March 28, 2006. Following that meeting, the strata council issued a report to the Owners respecting the tender process and the bids, and recommended that Cambridge be hired to undertake the Project.

[5] On April 18, 2006, the Owners held an “informational meeting” with Mr. Jurinak, Cambridge’s President, and Mr. Aspinall. The purpose of the meeting

was for the strata owners to learn about Cambridge, hear about Cambridge's plans for the Project, and ask any questions they had about the Project.

[6] On April 24, 2006, the Owners held a Special General Meeting to vote on the Project, pursuant to the requirements under the *Strata Property Act,* S.B.C. 1998, c. 43. The resolution drafted by the strata council asked the Owners to raise $1,850,000 to hire Cambridge to undertake the Project. This price was based on Cambridge's bid, GST for the Project, the consulting firm's fee, and a 10% contingency. The pertinent wording of that resolution is as follows:

> **BE IT RESOLVED** by a ¾ vote resolution of The Owners, Strata Plan VR-1632, that a sum of money not exceeding $1,850,000 be raised and spent for the purpose of retaining Cambridge Plumbing to undertake the re-piping of Newport Quay, such expenditure to be charged as a special levy upon the owners in proportion to the unit entitlement of their respective strata lots.

The Owners voted against the resolution.

[7] Cambridge was immediately notified by the strata council and Mr. Aspinall that the resolution to fund the Project had not passed.

[8] Following the vote, in early May 2006, the president of the strata council, Mr. Howitt, entered into negotiations with Cambridge and Brighter for the Project. Both firms provided Mr. Howitt with lower prices than they had originally tendered. The strata council decided to recommend Brighter.

[9] The strata council called a second Special General Meeting on May 24, 2006 to raise $1,670,000 for the Project. This new amount reflected Brighter's lower quote and a reduced contingency fee of 5%. The Owners passed this resolution and Brighter was awarded the Project.

[10] Cambridge alleges that the Owners were obligated to award Cambridge the contract for the Project (Contract B) and that the Owners entered into unauthorized negotiations with Brighter before the tendering process closed, breaching their obligations under Contract A. Cambridge claims, as damages, the costs that it

incurred in preparing its tender bid, as well as the profit it expected to make had it been awarded the Project contract.

[11] The Owners claim that Cambridge's bid was materially non-compliant with the terms of the tender call and, thus, no Contract A was formed. As Cambridge's claims are based on a breach of Contract A, the Owners submit that all Cambridge's claims must fail.

[12] If Contract A did form, however, the Owners submit that the tender documents allowed them to reject any or all bids. Further, they argue that the tendering process ended when the Owners voted against the April 24, 2006 resolution, which was before they entered into negotiations with Cambridge and Brighter. As a result, even if there were a valid Contract A between Cambridge and the Owners, the Owners say that they did not breach any of their obligations to Cambridge because they had already rejected its bid.

[13] In order to award damages, Cambridge must show, on balance, that:

(1) Its bid was compliant with the terms of the tendering documents (i.e. Contract A formed),

(2) The owners breached an express or implied term of Contract A,

(3) But for that breach of Contract A, the Owners would have awarded Contract B to Cambridge, and

(4) The damages Cambridge seeks are not otherwise too remote.

The Law: Contract A / Contract B Framework

[14] The starting place for tendering disputes is the Contract A / Contract B analysis established in *R. v. Ron Engineering & Construction (Easter) Ltd.*, [1981] 1 S.C.R. 111, [1981] S.C.J No. 13. This framework was most recently articulated in *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, [2007] S.C.J. No. 3 ("*Double N*") by Madam Justice Abella and Mr. Justice Rothstein as follows:

> [2] A call for tenders involves a party’s (often referred to as the “owner”) requesting the submission of bids to complete a particular project. Where the parties intend to initiate contractual relations, a submission in response to a call for tenders can lead to the formation of Contract A. The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted. A bidder accepts that offer by submitting a bid that complies with the requirements set out in the tender documents. The contractual rights and obligations of the parties to Contract A are governed by the express or implied terms of the tender documents.
>
> [3] A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought. Where a bid is accepted, the terms of the tender and bid documents become the terms and conditions of Contract B.

[15] In other words, Contract A “is the process contract in the call for tenders” and Contract B is the “ultimate construction contract”: *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 1, leave to appeal allowed [2008] S.C.C.A. No. 42.

[16] If a bid is compliant with the terms and conditions of the tendering documents, it forms a Contract A, crystallizing any rights and obligations under that contract. It follows that if Contract A does not exist, those rights and obligations do not either: *Graham Industrial Services Ltd. v. Greater Vancouver Water District,* 2004 BCCA 5, 40 B.C.L.R. (4th) 214 ("*Graham*"), at para. 19. Clearly, compliance is critical to both owner and bidder.

[17] That an owner is “incapable” at law of accepting a non-compliant bid is an implied term of Contract A: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, [1999] S.C.J. No. 17, *per* Mr. Justice Iacobucci ("*M.J.B.*"). The rationale underlying this implied term was articulated at para. 41 of *M.J.B.* as follows:

> [41] The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant [the bidder]. The appellant must expend effort and incur expense in preparing its tender

> in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd* [citation removed], with respect to a similar tendering process, this procedure is "heavily weighted in favour of the invitor". It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. Therefore I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted.

The implied term that only a compliant bid may be accepted at law, thus, protects the reasonable expectations of the parties and maintains the integrity of the tendering process, which replaces negotiation with competition.

[18] The assessment of the compliance question starts with the express terms of the tender documents. In some cases, whether a bid is compliant with the tender call will be relatively obvious. However, even the most obvious defect may not ultimately render a bid non-compliant; it is open to the owner to allow for the creation of irregular or even some forms of non-compliant Contract A's in the tendering documents. This reserved right manifested in the "discretion clause" permits an owner to waive irregularities, informalities and, if clearly expressed, forms of non-compliance in the evaluation process.

[19] The material non-compliance test, as refined by our Court of Appeal in *Graham,* is the lens through which the scope of an owner's discretion must be viewed.

[20] In *Graham*, the discretion clause was as follows:

> … If a tender contains a defect or fails in some way to comply with the requirements of the Tender Documents, which in the sole discretion of the Corporation is not material, the Corporation may waive the defect and accept the Tender. [emphasis added.]

At trial, the court held that since the discretion clause expressly allowed the owner to waive forms of non-compliance that were not material, the proper test was whether the defect was material to the invitation to tender.

[21] On appeal in *Graham*, the Court canvassed the definition of "materiality" at paras. 32–34, as follows:

> [32] Material" is defined in the Concise Oxford Dictionary to be "important, essential, relevant...concerned with the matter not the form of reasoning ... ". Black's Law Dictionary [citation removed] includes in the definition for material: "of such a nature that knowledge of the item would affect a person's decision-making process; significant, essential".
>
> [33] This Court also considered the definition of materiality recently in *Inmet Mining Corp. v. Homestake Canada Inc.* [citation removed]. In the context of determining disclosure obligations of a seller under a contract for purchase and sale of a gold mine, Levine J.A. held that a material fact is one where there is
>
>> ...a substantial likelihood that disclosure of the omitted fact would have assumed actual significance in the deliberations of the reasonable purchaser, or would have been viewed by the reasonable purchaser as having significantly altered the total mix of information made available.
>
> [34] According to these definitions, in the context of the present case, material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

[22] According to *Graham,* the material non-compliance analysis is essentially a two-part test requiring the court to look at the importance of the defect given the terms of the tender call, and the consequences of that defect on the owners' decision-making process.

[23] Although the *Graham* test arose from a consideration of what defects might be waived given the tender documents in that particular case, it was affirmed by the Court of Appeal as the default test for evaluating non-compliance in the context a

tender call with a discretion clause in *Silex Restorations Ltd. v. Strata Plan VR 2096*, 2004 BCCA 376, 35 B.C.L.R. (4th) 387 ("*Silex*"). At para. 12, Madam Justice Saunders summarized the law in British Columbia as follows:

> [12] After reviewing *Ron Engineering*, and subsequent jurisprudence on the law of tender which need not be replicated here, this Court held:
>
> 1) a non-compliant bid does not, by its mere submission, create Contract A;
>
> 2) the measure of non-compliance, where there is a "discretion clause" is substantial compliance, not strict compliance. In other words, the question is whether there is material non-compliance;
>
> 3) material non-compliance must be assessed on an objective basis.

[24] According to *Silex*, the breadth of an owner's discretion to accept non-compliant bids may be drawn directly from both the acceptance and rejection clauses, and the material non-compliance test may apply even where the discretion clause does not expressly say that forms of "non-compliance" may be waived. Indeed, *Silex* suggests that any compliance question in the context of a discretion clause that is "of the same ilk" as the one in *Graham* will automatically be scrutinized by the *Graham* test: *Silex,* at paras. 12 and 22.

[25] With respect to analyzing materiality, the court must look more generally and objectively at the impact of the defect on the tendering process and the principles and policy goals underlying it. Materiality must be considered against the backdrop that a defective bid may expose the owners to an action brought by a compliant bidder or give the bidder a competitive advantage regarding overall price, thereby impacting both the reasonable expectations of the parties and undermining the integrity of the tendering process - the twin principles that underlie the tendering process.

[26] In the case at bar, the Owners raised the compliance argument only after the tendering process had ended and a dispute had arisen. Their statement of defence

was the first notice to Cambridge of this position. What then is the significance of the Owners' evaluation of bids and their actions during the tendering process on the question of compliance?

[27] The discretion to waive defects never allows an owner to create a Contract A from a materially non-compliant bid (*Graham*, *Silex*). Since a materially non-compliant bid is incapable of acceptance at law, arguably the Owners' acceptance of Cambridge's bid, on its own, is not relevant to the determination of material non-compliance. Furthermore, the authorities require that the analysis of the issue of compliance be undertaken objectively. Looking to the actions of the owners could arguably introduce a subjective component into what is supposed to be an objective analysis.

[28] Cambridge raises one case that seems to look at the actions of owners to determine compliance: *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2007 BCSC 1512, [2007] B.C.J. No. 2209. In that case, the owner told the tenderer that his bid was in order, which the trial judge determined "could only be taken to mean that it was compliant": at para 109. However, it was the trial judge's interpretation of the terms and conditions of the tender documents themselves, and not the actions of the owners, that led him to conclude the bid was compliant. Instead, the owners' behaviour lent support to the trial judge's view that an owner should "promptly advise a contractor if its position is that the contractor's bid is non-compliant", as this is part of the owner's obligation to treat bidders fairly: at para.116. In any event, the trial judge's conclusions on the implied terms of fairness have been overruled on appeal: 2009 BCCA 167, [2009] B.C.J. No. 752 ("*Hub*").

[29] Nevertheless, it is worth noting that other authorities have referenced the actions and perspective of owners in tendering disputes as well. For example, in *Double N*, Justices Abella and Rothstein noted that the "evidence show[ed] that City officials did not view the provision of licence and serial numbers as a material condition of the tender": at para. 41. The referenced evidence supported the

conclusion that the defect at issue was not obviously material to any of the parties in that dispute.

[30] The actions of the owners during the tendering process were also “not without significance” to the Court of Appeal’s conclusion that the bid at issue was materially non-compliant in *Silex*: at para. 29. Specifically, the fact that the owners requested that the bidder extend the duration of the bid bond to ensure its irrevocability throughout the entire tendering process suggested to the Court that the owners knew the bidder had not complied with the required terms of the tender call.

[31] I am persuaded by these authorities that while the Owner's actions are not determinative of compliance *per se*, on an objective basis, the Owners' actions may support the conclusion that a defect has not deleteriously impacted the reasonable expectations of the parties (especially those of the other bidders) or obviously undermined the tendering process as a whole. In other words, this evidence cannot be relied on to conclude whether a term is required or essential to the terms of the tender documents, but may provide context to the latter portion of the *Graham* test with respect to the materiality of any non-compliance at issue.

[32] In summary, I am satisfied that the approach to the issue of compliance is as follows:

1. Read the terms of the tendering documents to determine the owner or tendering authority’s scope of discretion to waive defects.

2. Where there a discretion clause or some indication that there is discretion to waive non-compliant bids, the default test is the material non-compliance analysis from *Graham*.

3. Identify the defect and assess its importance to the terms of the invitation.

4. If the omission or defect is essential, the materiality of that defect to the owner’s decision-making process is measured objectively. In

assessing the consequences of the defect, take into consideration the objectives underlying the tendering process as a whole and the reasonable expectations of the parties, particularly the other bidders in that process. If the defect undermines fairness of the competition or the process of tendering (*Maple Reinders,* 2004 BCSC 1775, [2004] B.C.J. No. 2856 ("*Reinders*"), *Silex, Graham*), impacts the cost of the bid or the performance of contract B (*Double N*, *Silex, Graham*), or creates a risk of action by other (compliant) bidders (*Silex, Graham*), the bid at issue will be materially non-compliant.

Application

What discretion did the Owners have to waive defects?

[33] The front page of the Invitation to Tender says the following:

> The owners reserve the right to open Tenders privately, to waiver irregularities, and to reject any or all bids. Awards will be made on a combination of price, schedule, quality and any other considerations as deemed to be in the best interest of the Owners. **The lowest** bid will not necessarily be accepted. [emphasis in original.]

[34] The Instructions to Bidders include the following terms:

> **5.0 CONSIDERATION OF BIDS**
>
> ...
>
> 2. Rejection of Bids
>
>   1. The Owners shall have the right to reject any or all Tenders and to reject a Tender not accompanied by any required bid security or by other data required by the Tendering Documents, or to reject a Tender which is in any way incomplete or irregular.

> 3. Acceptance of Tender (Award)
>
> > 1. It is the intent of the Owners to award a Contract to the lowest responsible Bidder provided the Tender has been submitted in accordance with the requirements of the Tender Documents and does not exceed the funds available. The Owners shall have the right to waive any informalities or irregularities in any Tenders received and to accept the Tender which, in his judgment, is in the Owners' best interest.

[35] I am satisfied that the Owners' discretion pursuant to the terms of the tendering documents is "of the same ilk" as in *Graham* and *Silex*, thus, the material non-compliance test applies.

Positions of the Parties

[36] The Owners say the terms of the Invitation to Tender included a security requirement and a requirement that tenderers keep their bids open for acceptance for a 90-day period. Cambridge, however, attached 60-day consents of surety, thus, they were not "available" for the entire duration of the tendering process. The Owners say that the consents of surety were part of a general security requirement and that the shorter consents of surety rendered Cambridge's bid materially non-compliant.

[37] Although the Owners suggest that the shorter duration consents of surety are materially deficient on their own, they raise two arguments with respect to the objective materiality of the defect. First, the Owners say that had the contract been awarded to Cambridge between day 61 and 90, there would have been no assurance that the surety company would have issued the required bonds for Contract B. Second, the Owners argue that Cambridge's non-compliance brought the risk of legal action by a compliant bidder, Brighter. Therefore, on an objective basis, the Owners say that the shorter duration of surety would have impacted their decision making.

[38] Cambridge argues that the duration of the consents of surety was not a required term of the tender documents. Cambridge particularly focuses on the latter portion of the *Graham* test to illustrate that its bid was materially compliant. Cambridge says that the evidence demonstrates that the shorter consents of surety would not have impacted the Owners' deliberations and, in fact, did not impact their decision prior to trial.

[39] Alternatively, Cambridge argues that if the bid was materially non-compliant, the owners waived that non-compliance. The Owners, correctly, point out that only certain forms of non-compliance can be waived, and that a discretion clause may not be used to render a materially non-compliant bid compliant after the fact.

What is the defect at issue?

[40] According to the evidence of Mr. Grey, Cambridge's insurance broker, a consent of surety is an undertaking from a surety company that if the contractor enters into a construction contract with the owner, the surety will provide any bonds required under that contract.

[41] Consents of sureties provide important assurances to the owner. As I understand the evidence, those assurances are twofold: first, the ability of the bidder to receive bonding demonstrates to the owner that it has sufficient resources to have the support of a reputable bonding company. Second, the bonds delivered pursuant to those consents of surety provide security for defaults under Contract B; the performance bond assures the owner that the contractor will faithfully perform all obligations under the construction contract, and the labour and materials bond provides the assurance that the project will be lien free. Thus, the consents of surety are effectively a secured promise to bond under Contract B.

[42] Given the importance of this promise, it is highly likely that, where expressly required, a consent of surety would not just be an essential term of a tender call, but its omission would be material to the deliberations of the owner since its absence would affect the performance of Contract B (*Double N*).

[43] Here, however, Cambridge did not fail to include the required consents of surety. The defect in this case is not their absence, but rather their duration. The question then becomes whether the length of the consent of surety is a required term of the tendering documents, and whether the term was significant to the deliberations of the owners.

Was Cambridge's bid materially non-compliant for not attaching 90-day consents of surety?

[44] Although I was given no authority that considered the duration of consents of surety, the materiality of a bid bond's duration was considered in *Silex.* A bid bond is also an important form of security to an owner; according to Mr. Grey, its importance centres on the fact that it imposes a penalty on the contractor if the contractor refuses to enter into Contract B.

[45] In *Silex*, the tenderer submitted a 60-day bid bond even though the tender call required the bids to remain open for 90 days after closing. The trial judge's conclusion respecting the materiality of the bid bond's duration is laid out at paras. 26-28 of the Court of Appeal decision:

> [26] That the bid bond was required to last 90 days comes from reading together clause 6.1 (requiring a security deposit or bid bond to accompany the bid) and clause 7.1.1 (requiring a tender to be irrevocable for 90 days). In order for the bid to be a valid bid, the bond was required. To be irrevocable for 90 days required 90 days of security, either by a bid bond or a security deposit. I have no doubt that the bid was as the trial judge treated it, non-compliant.
>
> [27] The question then is whether the non-compliance was material. In my view the answer is yes. The scheme set out in the invitation to tender included a security requirement for the duration of time within which it may be accepted. There is a cost to securing a bid bond, no doubt proportionate in some fashion to its duration. On this requirement, at least, the bidder with the shorter security will incur lower costs, giving it an advantage. For that reason, acceptance of Silex's bid could expose the Strata Corporation to a claim by a compliant bidder, of which there was one: *M.J.B. Enterprises v. Defence Construction (1951) Ltd.* [citation removed].

> [28] In considering materiality, the rationale for the tendering process, which is to effect fair competition, and the risk of action by compliant bidders must be considered.

[46] The Court of Appeal determined that the duration of the bid bond was a required term of the tender call because its shorter length impacted the irrevocability of the bid. That is, the shorter duration of bid security would have allowed the bidder to revoke its bid between the 60 and 90-day mark. This, alone, justified strict scrutiny of the duration of the bid bond during the tendering process.

[47] Notwithstanding this conclusion, the Court still assessed the materiality of that "non-compliance"; essentially, the Court found that the shorter bid bond would impact the integrity of the tendering process by giving that bidder a competitive advantage. On this basis, the Court concluded that *Silex's* bid was materially non-compliant.

[48] Each of the parties relies on the reasoning in *Silex*, but in different ways. The Owners analogize the consents of surety to a bid bond and rely on para. 27 of *Silex* to assert that the duration of the consents of surety was essential to the terms of the tendering documents. Cambridge asserts that this is not an apt analogy because the construction industry treats consents of surety differently from bid bonds. Unfortunately neither party sufficiently explains how the two forms of security are substantively similar or different.

[49] Cambridge relies on paras. 28-29 of *Silex,* the discussion on the materiality of the bid bond's duration, to conclude that the defect in this case was not material to the tendering documents. Specifically, Cambridge asserts that since it gained no competitive advantage by attaching shorter consents of surety, its bid did not impact the deliberations of the Owners, or, thus, undermine the twin principles underlying the tendering process. Of course, competitive advantage is only one means of assessing the materiality of a defect and its absence is not sufficient on its own to satisfy the latter portion of *Graham* test.

[50] The front page of the tender call reads as follows:

> Tendering Schedule:
>
> …
>
> The following documents must accompany the submission of Tenders:
>
> - A bid bond in the amount of 10% of the bid price.
> - A consent of Surety for a Performance Bond to a value of 50% of the bid price.
> - A consent of Surety for a Labour and Material Payment Bond to a value of 50% of the bid price.
>
> **Note: A certified cheque is not acceptable in lieu of the bid bond.**
>
> Please note the following:
>
> - Bids are to remain open for 90 days from the closing date. [emphasis in original.]

The "requirement" to attach consents of surety to the bid is repeated once in the tendering documents, specifically in reference to the performance bond.

[51] Cambridge acknowledges that the front page of the tender call says that both the consents of surety and bid bond must accompany the tender. However, it argues that the bid bond is the critical form of security required by the tender documents. Apart from the two references above, there are no other express terms regarding the consents of surety. By contrast, there is a lengthy and detailed provision on bid security, reinforcing the importance of attaching it to the tender itself:

> **4.0 BIDDING PROCEDURE**
>
> …
>
> 2. Bid Security
>
> 1. If so stipulated in the advertisement or Invitation to Tender, each Tender shall be accompanied by a bid security in the form and amount required by pledging that the Bidder will enter into a Contract with the Owners on the term stated in his Tender and will, if required, furnish

bonds as described hereunder covering the faithful performance of the Contract and the payment of all obligations arising thereunder. Should the Bidder refuse to enter into such Contract or fail to furnish such bonds if required, the amount of the bid security shall be forfeited to the Owners as liquidated damages, not as a penalty. The amount of the bid security shall not be forfeited to the Owners in the event the Owners fails to award the Contract.

2. If a surety bond is required, it shall be issued by a licensed surety company chartered in Canada, and the attorney-in-fact who executes the bond on behalf of the surety shall affix to the bond a certified and current copy of his power of attorney.

3. The Owners will have the right to retain the bid security of Bidders to whom an award is being considered until either (a) the Contract has been executed and bonds, if required, have been furnished, or (b) the specified time has elapsed to the Tenders may be withdrawn, or (c) all tenders have been rejected.

[52] Nothing in the bid security clause reinforces the critical nature of the consents of surety to the tender call. In fact, the only references to the consents of surety are implied because of their inherent connection to the Contract B bonds. Further, what is underscored as important with respect to those bonds is assuring their delivery if Contract B is awarded.

[53] Cambridge's position that the bid security is one of the most critical aspects of the tender is strengthened by the language of the rejection clause:

5.0 CONSIDERATION OF BIDS

…

2. Rejection of Bids

1. The Owners shall have the right to reject any or all Tenders and to reject a Tender not accompanied by any required bid security or by other data required by the Tendering Documents, or to reject a Tender which is in any way incomplete or irregular. [emphasis added.]

[54] The terms respecting sureties themselves also draw out important aspects about the consents of surety. With respect to the bid security clause, what appears to be critical is that the surety company be a legitimate, professional company, and able to furnish the bonds in the required legal manner. This is reinforced through other terms in the tender documents relating to Contract B bonding, for example these clauses in the Instructions to Bidders:

> **7.0 PERFORMANCE BOND AND LABOUR AND MATERIALS PAYMENT BOND**
>
> 1. Owner's Right to Require Bonds
>
>   1. The Owners shall have the right, prior to the execution of the Contract, to require the bidder to furnish bonds covering the faithful performance of the Contract and the payment of all obligations arising thereunder in such form and amount as the owners may prescribe and with such sureties secured through the Bidder's usual sources as may be agreeable to the parties.
>
>   …
>
> 2. Time of Delivery and Form of Bond
>
>   …
>
>   3. The Bidder shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of the power of attorney. [emphasis added.]

Similar to the bid security clause, these above terms underscore the importance of ensuring that there is a professional company willing and able to support the tenderer's bid and able to deliver bonds in the proper form if Contract B is awarded.

[55] The Bonds and Certificates section of the tender call again articulates the requirements that the surety company be bound by an attorney-in-fact and that the bonds have the seal of the bonding company affixed to it.

[56] In my view, these terms respecting the surety itself speak directly to the purposes of the consents of surety. By demonstrating that there is a reputable surety willing to back any bond (bid, performance or otherwise), the bidder is effectively assuring the owner that it can guarantee its promise to bond under Contract B.

[57] Important aspects of the consents of surety may also be drawn from the terms on Contract B bonding. For example, delivery and execution of the bonds is discussed as follows in the tender call:

> **7.0 PERFORMANCE BOND AND LABOUR AND MATERIALS PAYMENT BOND**
>
> 2. Time of Delivery and Form of Bond
>
>   1. The Bidder shall deliver the required bonds to the Owners no later than three days following the execution of the Contract. If the Work is to be commenced prior thereto in response to a letter of intent, the bidder shall, prior to commencement of the Work, submit evidence satisfactory to the Owners that such bonds will be furnished in accordance with this paragraph.
>
>   2. The bonds shall be dated on or after the date of the Contract.

Although strict with respect to the requirement that delivery occur, the provision is flexible, providing that the bonds may even be furnished, in some instances, after Contract B has been entered into, so long as there are proper assurances that the bonds will be provided. Again, this can be contrasted by the strict terms relating to the bid bond, outlined in the bid security clause, which stresses the importance of attaching the bid bond to the tender itself.

[58] What these provisions suggest is that what is critical about the consent of surety, pursuant to the tendering documents, is the strength of the secured promise to bond in the event Contract B arises. By contrast, what is critical about the bid bond, as expressed in the tendering documents, is its status as a secured promise for obligations under Contract A and Contract B.

[59] These provisions underscore what I am satisfied is a fundamental conceptual distinction between the bid bond and the consent of surety. Although both are crucial forms of security, their importance is attached to the different aspects of the contractual relationship between the owner and contractor.

[60] The bid bond is critical during the tendering process because it provides for damages in the event that any contractor refuses to enter into the construction contract or fails to perform under that contract. That is, in addition to providing assurance to the owners regarding performance under Contract B, the bid bond is material to the tendering process because it guarantees Contract A's irrevocability, which is a principal term of Contract A.

[61] The consent of surety, on the other hand, is the guarantee from a reputable surety company that it will provide the requisite security for future obligations that might arise under Contract B, should it be awarded. This is critical security, of course, but it is material to the performance of the construction contract, not to the tendering process. This is a temporal distinction that differentiates the two forms of security within the Contract A/ Contract B analysis.

[62] Given its importance to the tendering contract and construction contract, it is not surprising that the express terms of the tender call emphasize the requirement for bid security. As the security for both Contracts A and B, the duration of the bid bond is essential to the owner in the tendering process. If the bid security is not available at the 90-day mark, the owner does not have the required assurance that the contractor will enter into Contract B, which undermines both the basic principle that bids are irrevocable, and the integrity of the tendering process, as noted in *Silex*.

[63] The consents of surety, on the other hand, do not represent security to the tendering process. As security to a potential Contract B, what is critical about the consents of surety during the tendering process is whether there is a secured promise to bond at the 90-day mark.

[64] On this basis, I cannot conclude that the duration of the consent of surety was essential to the terms and conditions of the tendering documents.

[65] I turn now to the question of the materiality of the duration of the consents of surety. As noted above, anything that might impact the reasonable expectations of the parties or undermine the integrity of the tendering process constitutes material non-compliance. This includes defects that might impact the price or performance of Contract B, provide a competitive advantage to a bidder, raise a chance of action by another compliant bidder, or any other consequence that could conceivably undermine the reasonable expectations of the parties or the integrity of the tendering process.

[66] The Owners say that between day 61 and 90, there was no assurance that the surety would deliver the bonds under Contract B, thus, the defect impacted the performance of Contract B.

[67] I am satisfied that had the consents of surety not been available at the 90-day mark, the assurance that Cambridge would furnish Contract B bonds would have been intact. Pursuant to the bid security clause, the Owners were able to retain the successful bidder's bid bond as security until the Contract B bonds were furnished under that agreement. If Cambridge had not delivered those bonds, the Owners would have taken the bid security as liquidated damages. Although the bid security does not entirely secure the delivery and execution performance and labour and material bonds, this clause provides critical assurance to the owner that those bonds will be furnished.

[68] Further, the fact that Cambridge secured the support of a legitimate surety company for the purpose of delivering both the bid bond and the consents of surety must have provided reasonable assurance of its secure promise to bond under Contract B, as required by the tender call.

[69] Cambridge also asserts that consents of surety are treated flexibly by the construction industry during the tendering process. First, Mr. Aspinall, who reviewed

all the bids tendered, testified that the shorter-length consents of surety did not make, in his view, Cambridge's bid non-compliant. This conclusion is reflected in his report to the Owners after he reviewed all of the bids, in which he indicates that all bids were compliant with the terms of tender.

[70] Mr. Aspinall testified that the fact that a consent of surety related to Contract B bonds is not open for the entire tendering period has never been an issue for any project in which he has been involved. In fact, Mr. Aspinall testified that in his work as a consultant, he frequently does not receive consents of surety open for the entire duration of the tendering period. Further, he said that if he rejected bids based on the duration of the consent of surety, in some situations there would be only one or, sometimes, no valid bids. For that reason, as a consultant, he stipulates only that there be a letter of surety attached to the bid without reference to the duration of the tendering process.

[71] The fact that the other two bids were not strictly compliant with respect to their consents of surety is not insignificant, given Mr. Aspinall's evidence. If anything, the lack of care with respect to the duration of the consents of surety attached to each bid tendered confirms Mr. Aspinall's experience and suggests that it was reasonable for all the parties to expect that their bids were materially compliant or that there was some flexibility with respect to the length of the consents of surety.

[72] Another piece of evidence that speaks directly to the Owners' assurances of Contract B performance relates to another norm of the construction industry as testified to by Mr. Grey. Cambridge tendered Mr. Grey as an expert in the field of surety bonding and, in particular, for the arrangements that were in place between sureties and their contractor clients for providing bid bonds and consents of surety for the period before and including 2006, the timeline germane to this case.

[73] Mr. Grey testified that before and during 2006, surety contractors typically paid a relatively small annual service fee to a surety company for issuing documents and covering underwriting during the course of the year. Once the contractor paid that annual fee, there were no additional charges for the issuance of any bid bond or

consent of surety through the year. He testified that the time limits prescribed in consents of surety or bid bonds are sometimes extended if requested by the owner.

[74] I note that Mr. Grey testified that had Cambridge been offered the construction contract, he was authorized to issue the performance bond and labour and material bonds and would have issued the required bonds. He also noted that Cambridge has never been denied authorization of construction bonds.

[75] Finally, Cambridge relies on the Owners' behaviour during the tendering process as evidence of its material compliance. First, Cambridge points to an email sent by one of the strata council members to the board, dated March 23, 2006, commenting that Cambridge completed the tender in the manner requested. Second, Cambridge says that the board decided to meet with Mr. Jurinak to discuss conditions of the construction contract. Finally, when the Owners decided to "reject" Cambridge's tender, they did so on the question of price, not because they found the tender to be non-compliant.

[76] The tendering documents, the evidence from Mr. Aspinall and Mr. Grey, and the behaviour of the bidders lends support, in my opinion, to the assertion that the construction industry treats consents of surety rather flexibly. The evidence also speaks to the question of how "obvious" the requirements respecting the consents of surety were to all the parties involved (*Double N*, *Reinders*). The lack of concern of all parties respecting the technicalities of the consents of surety (up until trial, that is) supports Cambridge's contention that the shorter consents of surety would not have impacted, on an objective basis, the deliberations of the owners during the evaluation process.

[77] The Owners argue that if they had accepted the non-compliant bid, they would have been left vulnerable to an action by a compliant bidder, in this case Brighter. The difficulty with this submission, as Cambridge points out, is that none of the consents of surety were "strictly compliant" with the terms of tender as the Owners interpret them: Curaflow's bid was only open for 60 days, and Brighter's only attached a consent of surety for the performance bond. If the duration of the consent

of surety is a defect that cannot be waived, certainly the omission of a consent of surety entirely is not a defect that can be waived. If all three bids were non-compliant, then no Contract A's existed, and each bid constituted a counter offer: *Graham* at para. 23 citing *Kinetic Construction v. Comox-Strathcona (District),* 2003 BCSC 1673, at para. 41. In this result, there was no risk of any action by any party.

[78] Finally, I note that Cambridge argued that it gained no competitive advantage as a result of the shorter duration of its consent of surety. The evidence supports that contention. However, although I agree that a bid that gives a tenderer a competitive advantage would be materially non-compliant, this is not the only consequence of material non-compliance. The central question is whether the defect would impact the deliberations of the owner when accepting or rejecting a bid.

Conclusion

[79] In summary, I find that the Cambridge bid was materially compliant with the terms of the tender call and, thus, Contract A was formed between Cambridge and the Owners. The defect was the duration of the consent of surety, which I cannot conclude was an essential requirement to the tender documents. The fundamental requirement with respect to the consent of surety was, instead, sufficient assurance that the bonds under Contract B would be furnished. This assurance was in place.

[80] Looking at the consequences of the defect on the deliberations of the Owners, I have concluded that the duration of the consents of sureties attached did not undermine the tendering process as a whole or impact the reasonable expectations of the parties.

The Law: Breach of Contract A

[81] Having found that Contract A was capable of acceptance at law, I now turn to the position of Cambridge that the Owners breached Contract A in failing to award it Contract B.

[82] Once Contract A is capable of acceptance at law, all rights of the parties under that contract have crystallized: *Ron Engineering*, p. 121. The terms of Contract A are determined by examining the terms and conditions of the tendering documents, however the principle terms are the irrevocability of the bid and the obligation of all parties to enter into Contract B if that bid is accepted: *M.J.B.,* at para. 22, *Hub* (C.A.), at para. 31.

[83] When faced with a tenderer alleging a breach of Contract A, an owner will generally attempt to rely on the privilege clause in the tendering documents as a full answer to that breach. However, the discretion granted to an owner pursuant to a privilege clause is not absolute. The privilege clause is always counterbalanced by other legal principles. First, the privilege clause is only one term of Contract A, and must be read harmoniously with the rest of the tender documents: *M.J.B.* at para. 44.

[84] Second, there are a number of implied terms under Contract A that govern the application of the privilege clause: *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 ("*Martel*"), at paras. 80-84. Implied terms A reflect the twin policy goals underlying the tendering process: to protect the parties' expectations, particularly those of the bidders who have put effort and expense into forming their bids, and to protect the integrity of the bidding process as a whole (See: *M.J.B.* at para. 41; *Martel* at paras. 88-89, *Stanco* (S.C.) at paras 102-103; *Hub* (C.A.), at para. 33).

[85] For the purposes of this case, the most relevant "implied term" of Contract A is the owner's obligation to treat bidders fairly and equally: *Martel* at para. 84. Under the "umbrella" of fair and equal treatment are the following duties, both of which Cambridge alleges the Owners breached:

- The owner must use consistent and equal evaluation of bids without:
    - hidden preferences or secret evaluation criteria, or

- o giving a bidder an unfair competitive advantage within the tendering process criteria (*Martel, Chinook Aggregates v.* Abbotsford [1989] B.C.J. No. 2045, 35 C.L.R. 241 (C.A.) ("*Chinook*")), and

- The owner must not to engage in bid manipulation or "bid shopping": *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land & Air Protection*), 2004 BCSC 1038, 32 B.C.L.R. (4th) 302, varied but aff'd on this point at 2006 BCCA 246, 53 B.C.L.R (4th) 16 ("*Stanco*").

[86] From the authorities, the steps in analyzing the obligations and the potential breaches under Contract A are these:

> 1. Look at the express terms of the tendering documents, including the privilege clause, to determine the scope of the owners' discretion. Determine whether the express terms limit any implied terms already recognized by the courts.
>
> 2. Look at the facts of the case (often the actions of the owners) to determine whether any recognized express or implied terms have been breached.
>
> 3. Determine whether another term must be implied in the circumstances of the case. Terms are implied through the general principles of contract law, but are connected, in the context of tendering, to protecting the parties' reasonable expectations and maintaining the integrity of the tendering process.

[87] One issue that arises in this case is the timeframe of the tendering process – that is, over what period of time were the parties' rights, obligations and actions defined by and interpreted through the tendering process?

[88] According to *Stanco* (S.C.) at para. 81, the tendering process ends when one of the following events occur:

1. all the bids tendered are rejected,
2. when one bid is accepted and Contract B is entered into by the parties, or
3. when the period of irrevocability expires.

[89] In *Dolyn Developments Inc. v. Paradigm Properties Inc.*, [2007] O.J. No. 63, 61 C.L.R. (3d) 295 (Ont. S.C.J) ("*Dolyn*"), all the bidders submitted tenders exceeding the defendant owner's budget, so all bids were rejected. After rejecting the bids, the defendant contacted the bidders to ask them whether they could do the work for less. The defendant first contacted the lowest bidder, who said no, then the second lowest bidder, who also said no. The contract was finally awarded to the third lowest bidder. The plaintiff, the lowest bidder, argued that the defendant had engaged in bid shopping.

[90] The court determined that the defendant's conduct did not amount to bid shopping because the tendering process was over. The appeal judge noted, at paras. 53 and 55 that there was "ample evidence" for the trial judge to find that "none of the bids were accepted and that the tender process was therefore terminated", and that the defendant had acted in good faith and had not "breached acceptable bid and tender practice". The owner owed no further obligation to the plaintiff once its bid was properly rejected.

[91] *Dolyn* underscores that, although the owner may rely on the express words (or lack thereof) of the tendering documents to end the tendering process, it must comply with all implied terms when ending that process as well.

Positions of the Parties

[92] The Owners argue that Cambridge's bid was rejected when the Owners voted against funding the Project, which was the subject of the tender call. The Owners rely on two express terms of Contract A to support this conclusion. First, the Owners focus on a specific term that reserved their right to reject bids in excess of their budget. Second, they say that they were able to rely on the tender call's privilege clause to reject "any or all bids". The Owners argue that Cambridge's bid was

rejected for cost considerations, which was a legitimate reason pursuant to either of these express terms. As a result, when the Owners voted against providing the funding to hire Cambridge for the Project, they rejected Cambridge's bid, and also effectively terminated the tendering process.

[93] Cambridge's arguments focus on the implied term of Contract A that the owner has an obligation to treat bidders fairly and equally. Cambridge submits that the Owners breached their fairness obligations in a number of ways. First, Cambridge alleges that it was not clear in the tendering documents that the award of Contract B was subject to financing and, thus, the Owners assessed its bid on the basis of "extraneous" considerations or criteria. Second, Cambridge submits that the Owners orchestrated the vote to bring about an early end to the tendering process. Third, Cambridge alleges that the Owners' "interpretation" of the vote's effect was not communicated to Cambridge.

[94] The consequence of each of the above three allegations leads Cambridge to conclude that the tendering process was not impacted by the vote and remained "open" after April 24, 2006. This context forms the basis for the fourth claim against the Owners, which is that they engaged in bid manipulation while the tendering process was in place.

Application

Did the Owners evaluate Cambridge's bid on the basis of an extraneous criterion?

[95] Cambridge argues that the terms of the invitation ought to have expressly indicated that the project was "subject to financing" and, thus, the Owners breached their obligation of fair and equal treatment of bidders (*Martel*).

[96] Cambridge supplied a number of cases to support this allegation, however, none of them decide the issue before me. The Ontario Court of Appeal drew an adverse inference that the municipality used un-stated criterion in assessing a bid because it refused to provide a reason as to why a particular bidder was chosen in

Tarmac Canada v. Hamilton-Wentworth (Regional Municipality), [1999] O.J. No. 3273. The central issue in *Mardave Construction Ltd. v. York (Regional Municipality)* [2006] O.J. No. 2237 (Ont. Sup. Ct. J) was whether the bid rejected was non-compliant, which it was. Finally, the distinguishable facts and *obiter* referred to in *Naylor Group Incorporated v. Ellis-Don Construction Ltd.*, [1999] O.J. No. 913 (C.A.) do not assist Cambridge's case.

[97] The Instructions to Bidders include the following term:

> **2.0 BIDDER'S REPRESENTATION**
>
> 1. Each bidder by making his Tender represents that
>
> 1. the Bidder has read and understood the Tendering Documents and his Tender is made in accordance therewith.
>
> …

And as earlier noted:

> **5.0 CONSIDERATION OF BIDS**
>
> ...
>
> 2. Rejection of Bids
>
> 1. The Owners shall have the right to reject any or all Tenders and to reject a Tender not accompanied by any required bid security or by other data required by the Tendering Documents, or to reject a Tender which is in any way incomplete or irregular.
>
> 3. Acceptance of Tender (Award)
>
> 1. It is the intent of the Owners to award a Contract to the lowest responsible Bidder provided the Tender has been submitted in accordance with the requirements of the Tender Documents and does not exceed the funds available. The Owners shall have the right to waive any informalities or irregularities in any Tenders received and to accept the Tender which, in his judgment, is in the Owners's [sic] best interest.

[98] The above terms are not ambiguous. The documents expressly highlight that there are budgetary limits to the Project and that the Owners have the right to reject a bid if it exceeds funds available. Read together with the “bidder’s representation” provision, it was reasonable for the Owners to assume that each bidder knew that if it submitted a bid that was too high, the bid faced automatic rejection.

[99] In my view, the express provision respecting budgetary restrictions in the tender documents solely reinforces the existing reasonable expectations of any tendering party. As the process replaces negotiation with competition, there is a possibility that all bids received in any tendering situation may be higher than an owner has anticipated. At that point, the process places no obligation on the owner to accept one of those bids unless the owner has breached another term of Contract A. If all bids are too high, the owner may legitimately reject them all for cost considerations.

[100] Furthermore, surely all parties to a tendering process must reasonably expect that projects are subject to budgets and that not all tenders will fall within that budget. In many tendering contexts a project will be conditional on receiving the appropriate funding. This is not an “extraneous criterion”; it is a critical criterion that should be implied in the evaluation process. While the Invitation to Tender did not expressly state that the proposed project was “subject to financing,” that does not amount to a failure to disclose a material term of the tender call in these circumstances.

Did the Owners orchestrate the vote on April 24th to end the tendering process?

[101] Pursuant to the *Strata Property Act*, funding for strata-wide renovations or projects is subject to special resolutions. In this case, the strata council took the responsibility of hiring a consultant and reviewing the bids tendered for the Project. As a council, they then recommended Cambridge to the Owners.

[102] On April 24, 2006, the Owners held a special general meeting to vote on the Project. This resolution sought to do two things:

(1) raise the necessary funding for the Project, and

(2) accept Cambridge's bid, and thereby enter into the construction contract with Cambridge.

The resolution failed to reach the 75% threshold required by the *Act*; of the 79 strata Owners present or in proxy, 53 voted in favour, 24 opposed, and two abstained.

[103] Cambridge submits that the reason that the resolution did not pass was because the Owners wanted an opportunity to negotiate price and the only way to do this was to formally end the tendering process. Cambridge essentially alleges that the Owners acted in bad faith or abused the tendering process.

[104] Cambridge relies heavily on communications among strata council members to argue the "vote orchestration" allegation. In late March or early April, following the receipt of all the bids and Mr. Aspinall's recommendation, the strata council recommended that the Owners hire Cambridge for the Project in a report to all the strata owners.

[105] Shortly after issuing this recommendation, one of the council members sent an email to other council members asking them and Mr. Aspinall whether it was too late to negotiate with Cambridge. Mr. Gertner suggests in that April 4, 2006 email "say we've spoken to the residents, and they feel the price of doing this job is rather high". On April 6, 2006, Mr. Aspinall replied that this could not be done within the context of a formal tendering process.

[106] Mr. Howitt, strata council president, was away from March 13 to April 3. After returning to Vancouver, he expressed concerns regarding the bids' costs. On April 7, Mr. Howitt sent an email to all council members asking them to meet to "further discuss the piping project", noting that there were "some issues" that needed to be discussed before the information meeting with the Owners.

[107] Mr. Howitt contacted Mr. Aspinall to ask about negotiating the price of the Project. Mr. Aspinall told him that it was not possible to negotiate with bidders during

the tender process. Mr. Howitt interpreted that response as "a good slap" and says he did not negotiate. Mr. Aspinall also testified that he told Mr. Howitt that the normal practice when all bids are too high was to develop a list of cost saving items and put them to the lowest bidder. I note this is consistent with the *obiter* at para. 58 of *Dolyn*.

[108] On April 19, 2006, Mr. Howitt sent an email to the strata council members, noting a discussion the council held immediately following the information meeting:

> …
>
> 2. After further discussions with [members of council] late last night it was agreed that we try to arrange a meeting with Graham [Mr. Aspinall] and Cambridge to pursue some price concessions.
>
> 3. Sleep and some more discussion with [a member of the council] this morning suggest that to approach Cambridge before a vote places us in a weak negotiating position.
>
> 4. My recommendation is for me to call Graham and give him a “heads up” that the sense is that the motion will be voted down because the price is beyond the expected budget. If this was to happen I would assure him that we would immediately have another meeting ([in] 3 weeks) to attempt to pass the motion again and reiterate it is our intention to proceed with the project.
>
> Graham will pass this on to Cambridge so there are no surprises and we will then have the opportunity to talk to Cambridge and all others to negotiate a better price.

[109] Three members of council responded to this email. One suggested that there be another brief council meeting to “formulate a recommendation to Owners for the upcoming vote.” Another discusses an earlier letter from Mr. Aspinall suggesting that the contractors’ bids should be within $1.5 to $1.6 million, the implication being that Cambridge’s quote was higher than the original budget. The final response details concerns from the Owners, some expressing worry about the “risk” of not passing the resolution, and others saying that they wanted more information.

[110] The minutes of the April 24, 2006 (the night of the vote) note the following with respect to the Owners' vote on the resolution:

> Mr. Herstein took a moment to speak on behalf of the council President, Bruce Howitt who was absent. Mr. Howitt has expressed concern about the cost of the project and stated that he does not feel the price is right. Mr. Howitt recommended attempting to negotiate with the contractors for a better price for Newport Quay.
>
> An owner spoke on behalf of the presentation made by Graham Aspinall and stated that she does not want to go on a "hunch" when the presentation was clear on the validity of pricing.
>
> Mr. Fraser stated before the vote and that council is unanimous that the pipes need to be replaced and that they have followed the process laid out for them by the owners. The only disagreement is on the price.
>
> *Question:* *What happens if there is a "no vote"?*
>
> Answer: Council stated that there is a risk that the price may be higher if the strata waits to commence with the project. If the vote fails, council will try to renegotiate the price and payment plans.

[111] On all the evidence, I am satisfied that the strata council understood that once the tendering process was over, the potential for negotiation was available. While I am satisfied that Mr. Howitt was the one council member who favoured that route, all council members but Mr. Howitt voted in favour of the Cambridge bid.

[112] The duty of fairness that arises when a Contract A is formed exists throughout the process of assessing bids in the tendering process: *Hub* (C.A.), at paras. 39-40. Until that process is over, either through acceptance of a bid, rejection of all bids, or when the irrevocability period has lapsed, an owner is obligated to treat all bidders fairly and equally in their assessment of those bids. This "good faith" obligation is directly connected to the twin principles meant to protect the integrity of the tendering process.

[113] Here, there is some evidence suggesting that a few of the strata owners were interested in using their own procedure, pursuant to their status under the *Act,* to

bring the tendering process to an early close. Not unlike the policy objectives underlying the bid manipulation cases, there is a degree of "obviousness" to the principle that an owner must not utilize its own approval processes to circumvent or abuse the assessment of bids in the tendering process. Indeed, if bidders understood that such procedural unfairness were a possibility, they would not quickly undertake the task of submitting a bid.

[114] However, based on the notes from the special general meeting and the testimony of the strata council members, one of the central concerns for the individual owners was the cost of the Project. Members of the strata council (Mr. Fraser, Mr. Herstein, Mr. Howitt) testified that, following the April 18, 2006 information meeting with Mr. Jurinak and Mr. Aspinall, the strata owners were confused and concerned about costs, and that Mr. Aspinall did a poor job of explaining costs to them. In particular, some strata owners were unsure as to what was or was not included in Cambridge's price.

[115] I find that the evidence does not support a conclusion that the Owners or the strata council collectively orchestrated a negative vote in order to end the tendering process and/or enable them to negotiate with any or all of the bidders.

Did the April 24, 2006 vote end the tendering process and, if so, was this effectively communicated to Cambridge?

[116] Cambridge says that the Owners' "interpretation" of the effect of the vote was not communicated to Mr. Jurinak or Mr. Aspinall and, thus, the Owners failed to reject Cambridge's bid.

[117] Cambridge's submission is difficult for two reasons. First, as noted above, it was reasonable for the Owners to "interpret" the vote's effect as they did because of the express terms of Contract A. In particular, I note that there are no express terms in the Invitation to Tender regarding how the Owners must communicate bid acceptance or rejection of a bid, or the end of the tendering process. Since the resolution failed to receive the support of 75% of the strata owners, there was no

funding for the work and, thus, the contract could not be awarded. The vote rejected Cambridge's bid as being in excess of the funding for the project (zero dollars). Thus, communication of the vote's outcome should have sufficiently notified Cambridge that its bid had been rejected. As the other two bids had been rejected prior to that vote, it was reasonable to conclude that the tendering process was over.

[118] Second, the following evidence demonstrates that Cambridge understood that the strata council could only recommend a contractor, and that acceptance or rejection of its bid was subject to the Owners' vote:

- Mr. Jurinak's acknowledgment at trial that he understood there was a qualification for funding, but that he did not see it as a big issue because, in his experience, "99% of the time" strata voters support funding requests (because of the urgency behind them, rising costs, and, in this case, the expense and effort invested in the process).

- The testimony of Mr. Fraser (a strata council member) that he told Mr. Jurinak in a meeting held with council on March 28, 2008 that the strata council had no authority to retain Cambridge and explained the process by which the Owners could approve the Project, and thereby accept Cambridge's bid.

- Mr. Jurinak's acknowledgment that as of March 28, 2006, the contract could only be entered into after the Project was approved by the strata owners. He affirmed that it was reasonable to conclude that his understanding of the process at that time was that Mr. Aspinall would make a recommendation to the strata council and that the council would, in turn, make a recommendation to the Owners, but that only the strata owners has the "ultimate say" as to whether or not they would accept the bid.

- An email from Mr. Aspinall on April 3, 2006 to all three tenderers stating that "the owners have not yet held a meeting to decide if they are going to proceed with this project, when they do we will let you know".

- An email from Mr. Jurinak, sent on April 5, 2006, asking Mr. Aspinall to provide a letter of intent "suggesting that we are the chosen contractor pending the outcome of the future vote".

- An email response to Mr. Jurinak from Mr. Aspinall stating "I will be sending to you a letter of intent, subject to the Owners raising the necessary funding".
- Mr. Jurinak's acknowledgment that Mr. Aspinall advised him by phone that the "project had not been passed".
- Mr. Jurinak's acknowledgment that in a meeting with Mr. Howitt on May 4, 2006 he knew that the vote had failed.
- Mr. Howitt's notes (exhibit 8) of the subjects discussed at his May 4, 2006 meeting with Mr. Jurinak includes "rejecting bids".

[119] I find that the vote signaled to all involved that the Owners would not commit the funds required for the Project as tendered by Cambridge. I conclude that the tendering process ended on April 24, 2006 when the Owners voted against awarding Cambridge Contract B and subsequently communicated this rejection to Mr. Jurinak. Furthermore, I am not persuaded that Mr. Howitt's notes do not reflect the topics of conversation between the parties at their May 4, 2006 meeting. Finally, I am satisfied that Mr. Howitt's notes were made during the meeting, notwithstanding the submissions of Cambridge to the contrary.

Did the Owners engage in bid manipulation?

[120] Cambridge's next argument is that the tendering process was not over when the strata council, on behalf of the Owners, began discussing contract price with the contractors. As noted, I have found that the tendering process fairly and legitimately ended with the April 24, 2006 vote and the communication of that result to Cambridge. Thus, the question is whether any bid manipulation occurred prior to that date.

[121] According to Madam Justice Ballance in *Stanco* (S.C.), bid shopping constitutes the following:

> [100] … the term "bid shopping" should be given an expansive interpretation so as to encompass 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.

[122] I do not believe that the Owners engaged in bid manipulation as Madam Justice Ballance describes. Although there is some evidence that some of the strata council members wanted to negotiate Cambridge's price prior to the vote, a desired strategy does not, in my mind, amount to bid shopping. On April 13, 2006, Mr. Aspinall emailed the strata council noting that "[w]ith regard to concerns about possible cost savings we have contacted Cambridge to put their thinking cap on over the weekend & see what they can come up with." While this approach was arguably confusing as to the timing, there is no evidence that any bids were used to negotiate a lower price prior to the Owners' vote. And Cambridge did not lower its bid prior to the vote. Instead, consistent with the industry standard outlined in *Dolyn*, it was only following the vote (when tendering was over) that Mr. Jurinak began to suggest how costs could be cut to better fit the Owners' budget.

[123] Further, there is no evidence that the Owners negotiated in any way with either of the two other bidders before the vote. It was only after the tendering process was over that Mr. Howitt contacted Brighter to negotiate price. Again, Mr. Howitt's conduct seems consistent with standard practice in the construction industry once tendering had ended.

[124] As noted in *Dolyn*, at para. 56, once a judge finds that an owner properly rejected all bids and that the tendering process was over, she or he is open to "conclude that subsequent negotiations did not occur in the context of a true tendering process in which [the owner] was still evaluating the previous bids".

[125] I am satisfied that after the vote, the Owners understood that the tendering process was over. At this point, they began discussions with Cambridge and Brighter on cost adjustments. All of these negotiations occurred after the tendering process

was over and the Owners were not obligated to Cambridge; as Cambridge's Contract A had been rejected, any rights and obligations that had crystallized under that Contract were also gone.

[126] As a result, Cambridge's argument that the Owners engaged in bid manipulation must be rejected.

Conclusion

[127] Although Contract A was formed between the Owners and Cambridge, the Owners fairly rejected Cambridge's bid when they voted against hiring Cambridge on April 24, 2006. As all other bids in the tendering process had been previously rejected, the effect of the vote was to end the tendering process.

[128] The Owners did not breach their obligation of fair and equal treatment to Cambridge under Contract A. That the Project was "subject to financing" was not an extraneous criterion that needed to be expressed in the tender call. There is no persuasive evidence upon which I can conclude that the Owners abused their procedures in order to bring about an early end to the tendering process and negotiate price.

[129] Once the Owners rejected Cambridge's bid and this was communicated to Cambridge, which it was, the tendering process was over.

[130] Finally, after the vote and the communication to bidders of the result, the Owners had no obligation to Cambridge or any of the other bidders as the tendering process was over. All Contract A's had been rejected, thus, any negotiations that occurred after all bids were rejected were legitimate.

[131] Cambridge's action against the Owners is dismissed.

[132] The parties are at liberty to set down the matter of costs.

"J. L. Dorgan, J."
The Honourable Madam Justice Dorgan