M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619

Supreme Court Reports

Supreme Court of Canada
Present: Lamer C.J. and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.
1998: November 6 / 1999: April 22.
File No.: 25975.

[1999] 1 S.C.R. 619 | [1999] 1 R.C.S. 619 | [1999] S.C.J. No. 17 | [1999] A.C.S. no 17

M.J.B. Enterprises Ltd., appellant; v. Defence Construction (1951) Limited and the said Defence Construction (1951) Limited carrying on business as Defence Construction Canada and the said Defence Construction Canada, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Contracts — Tendering process — Tender documents defining material to be included in valid tender — Privilege clause providing that lowest or any tender would not necessarily be accepted — Lowest bid accepted but that bid not in conformity with tender requirements — Whether inclusion of a "privilege clause" in the tender documents allows the person calling for tenders to disregard the lowest bid in favour of any other tender, including a non-compliant one.

The respondent invited tenders and awarded the contract to the lowest tenderer of the four received notwithstanding the fact that the bid did not comply with the tender specifications. The tender documents included a "privilege clause" that stated that the lowest or any tender would not necessarily be accepted. The winning bid included a hand-written note outlining a schedule of final costs even though amendments to the tender documents required tenderers to submit only one price. The other tenderers complained that this note constituted a qualification that invalidated the tender. The respondent nevertheless determined that the note was merely a clarification and accepted the bid. The appellant, who had submitted the second lowest tender, brought an action for breach of contract claiming that the winning tender should have been disqualified and that its tender should have been accepted as the lowest valid bid.

The parties agreed on damages prior to trial, subject to the determination of liability. The trial judge found that the note was a qualification but held that, given the presence of the privilege clause, the respondent was under no obligation to award the contract to the appellant as the next lowest bidder. The Alberta Court of Appeal dismissed the appeal. At issue here is whether the inclusion of a "privilege clause" in the tender documents allows the respondent to disregard the lowest bid in favour of any other tender, including a non-compliant one.

Held : The appeal should be allowed.

The submission of a tender in response to an invitation to tender may give rise to contractual obligations

(Contract A), quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender (Contract B), depending upon the intentions of the parties.

Contract A arose in this case. At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the bid security.

The tender documents govern the terms, if any, of Contract A and they include no explicit term imposing an obligation to award Contract B to the lowest valid tender. Terms may be implied, however, (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 that they had obviously assumed. In the circumstances of the present case, it was appropriate to find an implied term according to the presumed intentions of the parties. This obligation was to accept only a compliant tender, although the respondent need not accept the lowest compliant tender.

A determination of the presumed intentions of the parties focuses 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. The implication of the term must have a certain degree of obviousness to it and may not be found if there is evidence of a contrary intention on the part of either party.

The Instructions to Tenderers and the Tender Form, which were the crucial documents for determining the terms and conditions of Contract A, revealed that the contractor (1) was to submit a compliant bid and (2) could not negotiate over the terms of the tender documents. These documents also indicated that the invitation for tenders may be characterized as an offer to consider a tender if that tender is valid. An invalid tender would be one that, among other things, altered the Tender Form. For the respondent to accept a non-compliant bid would be contrary to the express indication in the Instructions to Tenderers and contrary to the entire tenor of the Tender Form which does not allow for any modification of the plans and specifications in the tender documents. The respondent did not invite negotiations over the terms of either Contract A or Contract B. The tendering process replaces negotiation with competition which entails certain risks for the appellant, such as the effort expended and cost incurred in preparing the bid, and the making of the bid security deposit. Exposure to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. It was 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 privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties. This clause did not override the obligation to accept only compliant bids because, on the contrary, there is a compatibility between the privilege clause and this obligation. The decision to reject the "low" bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

The accepted bid was conceded to be non-compliant. The respondent in awarding the contract to this bidder breached its obligation to the appellant and the other tenderers that it would accept only a compliant tender. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.

The general measure of damages for breach of contract is expectation damages. On a balance of probabilities, the record supports the appellant's contention that as a matter of fact it would have been awarded Contract B had the non-compliant bid been disqualified. The loss of Contract B, although caused by the breach of Contract A, is not too remote. Here, both parties knew that if the respondent awarded Contract B to a non-compliant bid then one of the tenderers who submitted a compliant bid would suffer the loss of Contract B and that this tenderer could be the appellant. The appellant is therefore entitled to damages in the amount of the profits it would have realized had it been awarded Contract B.

Cases Cited

Followed: Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd. (1978), 83 D.L.R. (3d) 267, aff'd (1979), 115 D.L.R. (3d) 511, [1980] 2 S.C.R. 118; considered: R. in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111; referred to: Megatech Contracting Ltd. v. Carleton (Regional Municipality) (1989), 34 C.L.R. 35; Bate Equipment Ltd. v. Ellis-Don Ltd. (1992), 132 A.R. 161, aff'd (1994), 157 A.R. 274, application for leave to appeal dismissed, [1995] 2 S.C.R. v; Martselos Services Ltd. v. Arctic College, [1994] 3 W.W.R. 73, application for leave to appeal dismissed, [1994] 3 S.C.R. viii; Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council, [1990] 3 All E.R. 25; Hughes Aircraft Systems International v. Airservices Australia (1997), 146 A.L.R. 1; Pratt Contractors Ltd. v. Palmerston North City Council, [1995] 1 N.Z.L.R. 469; Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Cartwright & Crickmore, Ltd. v. MacInnes, [1931] S.C.R. 425; Acme Building & Construction Ltd. v. Newcastle (Town) (1992), 2 C.L.R. (2d) 308; Glenview Corp. v. Canada (1990), 34 F.T.R. 292; Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1987), 28 C.L.R. 290, aff'd (1989), 35 C.L.R. 241; Kencor Holdings Ltd. v. Saskatchewan, [1991] 6 W.W.R. 717; Fred Welsh Ltd. v. B.G.M. Construction Ltd., [1996] 10 W.W.R. 400; George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality) (1997), 34 C.L.R. (2d) 123; Twin City Mechanical v. Bradsil (1967) Ltd. (1996), 31 C.L.R. (2d) 210; Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City) (1997), 34 C.L.R. (2d) 197; Hadley v. Baxendale (1854), 9 Ex. 341, 156 E.R. 145; Riggins v. Alberta (Workers' Compensation Board) (1992), 5 Alta. L.R. (3d) 66.

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APPEAL from a judgment of the Alberta Court of Appeal (1997), 196 A.R. 124, 141 W.A.C. 124, 33 C.L.R. (2d) 1, [1997] A.J. No. 238 (Q.L.), affirming a decision of the Court of Queen's Bench (1994), 164 A.R. 399, 18 C.L.R. (2d) 120, [1994] A.J. No. 993 (Q.L.), dismissing the appellant's claim. Appeal allowed.

W. Donald Goodfellow, Q.C., and Eugene Meehan, for the appellant. Larry M. Huculak, for the respondent.

Solicitor for the appellant: W. Donald Goodfellow, Calgary. Solicitor for the respondent: The Department of Justice Canada, Edmonton.

The judgment of the Court was delivered by

IACOBUCCI J.

I. Introduction

1 The central issue in this appeal is whether the inclusion of a "privilege clause" in the tender documents allows the person calling for tenders (the "owner") to disregard the lowest bid in favour of any other tender, including a non-compliant one. The leading Canadian case on the law of tenders is R. in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111, which concerned the obligations of a contractor who submitted a bid in response to a call for tenders. This Court held that, upon the submission of this tender, a contract arose between the contractor and the owner in that case and imposed certain obligations upon the contractor. The contract, referred to as "Contract A", was distinguished from the construction contract, "Contract B", to be entered into if the tender was accepted. Contract A imposed certain obligations upon the contractor. The present appeal instead asks whether Contract A arose in this case and what obligations, if any, it imposes on the owner. It is the contention of M.J.B. Enterprises Ltd. (the "appellant") that in the circumstances of this case Defence Construction (1951) Limited (the "respondent") was obligated to accept the lowest valid tender. The respondent argues that the privilege clause precludes the finding of such an obligation.

II. Factual Background

2 The respondent invited tenders for the construction of a pump house, the installation of a water distribution system and the dismantling of a water tank on the Canadian Forces Base in Suffield, Alberta. Four tenders were received, including one from the appellant. The contract was awarded to Sorochan Enterprises Ltd. ("Sorochan"), the lowest tenderer, and the work was carried out. The appellant was the second lowest tenderer.

3 The respondent had issued detailed directions to tenderers in the 11 documents which, according to the Tender Form, comprised the tender documents. One of these documents was the Instructions to Tenderers, paragraph 13 of which stated: "The lowest or any tender shall not necessarily be accepted". The parties have referred to this as the "privilege clause". In addition, prior to the close of tenders, the respondent issued two amendments to the tender documents.

4 The original specifications in the tender documents contemplated that the tenderers would provide a lump sum price for the construction of the pump house and demolition of the water tank, but would submit a per lineal metre price for construction of the water system. There were

three different types of material in which water pipe might be laid and with which the trenches for the pipes might be backfilled: Type 2 (essentially a large gravel fill), Type 3 (native backfill) or Type 4 (a lean slurry concrete). The site engineer would determine the type of material required at various parts of the distribution system. Since the lineal costs of these different fills varied widely, the specifications originally included a schedule of quantities which allowed the tenderers to submit their bids on a basis which would make the final cost contingent upon the amount of the different fills required, i.e., the tenderer could set out different amounts per lineal metre for each of Types 2, 3 and 4 fill. However, the amendments to the tender documents deleted the schedule of quantities. The effect of this was to require the tenderers to submit only one price per lineal metre for the water distribution system regardless of the type of fill which would ultimately be designated by the engineer during construction. The appellant interpreted this to assign the risk of knowing how much of Type 2, Type 3, and Type 4 fill would be required to the successful contractor, as the contractor would receive the same cent unit price per lineal metre of measurement regardless of the actual costs incurred by the contractor.

5 The tender submitted by Sorochan included a handwritten note stating:

> Please note:
>
> Unit Prices per metre are based on native backfill (Type 3). If Type 2 material is required from top of pipe zone to bottom of sub-base, material for gravel or paved areas, add $60.00 per metre.

Despite complaints by the appellant and other tenderers that this note constituted a qualification by Sorochan that invalidated its tender, the respondent determined the note was merely a clarification and accepted Sorochan's bid. The appellant brought an action for breach of contract, claiming that Sorochan's bid should have been disqualified and that its tender should have been accepted as the lowest valid bid.

6 Prior to trial, the parties agreed on damages of $398, 121.27, subject to the determination of liability. However, there were two issues they did not agree on, the cost of a supervisor and the cost of Type 2 backfill that was included in the appellant's tender that, had the appellant been awarded the construction contract, would not have been required by the engineer. The amount in dispute totals $251, 056.89.

7 The trial judge found that the note was a qualification but held that, given the presence of the privilege clause, the respondent was under no obligation to award the contract to the appellant as the next lowest bidder. The Alberta Court of Appeal dismissed the appeal.

III. The Courts Below

A. Alberta Court of Queen's Bench (1994), 164 A.R. 399

8 Rowbotham J. noted that the appellant sought damages for breach of Contract A as described by Estey J. in Ron Engineering, supra. However, relying on Megatech Contracting Ltd. v. Carleton (Regional Municipality) (1989), 34 C.L.R. 35 (Ont. H.C.), and Bate Equipment Ltd. v. Ellis-Don Ltd. (1992), 132 A.R. 161 (Q.B.), aff'd (1994), 157 A.R. 274 (C.A.), application for leave to appeal dismissed, [1995] 2 S.C.R. v, Rowbotham J. held that the submission of a tender does not create a contract and that therefore there could be no breach of contract in this case entitling the appellant to damages.

9 However, Rowbotham J. held that the note attached to Sorochan's tender was a qualification, rather than a clarification, that invalidated the tender. He observed that, since the tender accepted was not a valid tender, there may have been a "technical" breach of the obligation to treat all tenderers fairly. Consequently, Rowbotham J. stated that the other tenderers should be reimbursed for the expenses incurred in the preparation and submission of their tenders, although he made no formal order to this effect. He dismissed the action and declined to make any findings of fact regarding the issues in dispute with respect to damages.

10 Subsequently, Rowbotham J. dismissed an application for leave to reargue. However, during the hearing he acknowledged that he had made an error in holding that no Contract A had been formed upon the submission of the tender.

B. Alberta Court of Appeal (1997), 196 A.R. 124

11 McClung J.A., for the court, held that an express term such as the privilege clause could not be overridden by a term implied by virtue of custom or industry usage to the effect that the lowest valid tender must be accepted: Martselos Services Ltd. v. Arctic College, [1994] 3 W.W.R. 73 (N.W.T.C.A.), application for leave to appeal dismissed, [1994] 3 S.C.R. viii, and other cases.

12 McClung J.A. held that the meaning of the privilege clause was not ambiguous, and was placed in the bidding process to protect the expenditure of public funds which are a common property resource of the people of Canada. Although the Alberta Guide to Construction Procedures provides that the construction contract should be awarded to the contractor submitting the lowest proper tender, those rules only apply where they are not inconsistent with the terms of the federal bidding package. In this case, "the privilege clause, section 13, is a complete answer to M.J.B.'s action" (p. 127).

13 The Court of Appeal therefore dismissed the appeal. However, it affirmed the trial judge's recommendation that fairness dictates that the appellant be reimbursed for the provable costs of preparing its rejected tender, although these costs were not specifically pleaded.

IV. Issues

14 The major issue in this appeal comes down to the following: does the respondent's inclusion of a "privilege clause" in the tender documents at issue in this case allow the respondent to disregard the lowest bid in favour of any other tender, including a non-compliant one?

I. Analysis

II. General Principles

15 As I have already indicated, any discussion of contractual obligations and the law of tendering must begin with this Court's decision in Ron Engineering, supra. That case concerned whether the owner had to return the contractor's tender deposit, a sum of $150,000. The terms and conditions attaching to the call for tenders had included the statement (at pp. 113-14) that:

> Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents required herein, the Commission may retain the tender deposit for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable.

Other terms and conditions included the ability to withdraw a tender, under seal, until the official closing (p. 120). In rushing to compile its tender, the contractor omitted to add its own labour costs to its bid, but only discovered its error after the close of the tender call. It was the lowest out of eight bids. The contractor did not seek to withdraw its tender, but instead maintained that because it gave notice of this error to the owner prior to the acceptance of its tender by the owner that the owner could not, in law, accept its tender, and therefore had to return the contractor's $150,000 deposit.

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:

> The revocability of the offer must, in my view, be determined in accordance with the "General Conditions" and "Information for Tenderers" and the related documents upon which the tender was submitted. 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. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender. [Emphasis added.]

As the tender call conditions were not met, the deposit was not recoverable by the contractor.

17 This Court therefore held that it is possible for a contract to arise upon the submission of a tender and that the terms of such a contract are specified in the tender documents. The submissions of the parties in the present appeal appear to suggest that Ron Engineering stands for the proposition that Contract A is always formed upon the submission of a tender and that a term of this contract is the irrevocability of the tender; indeed, most lower courts have interpreted Ron Engineering in this manner. There are certainly many statements in Ron Engineering that support this view. However, other passages suggest that Estey J. did not hold that a bid is irrevocable in all tendering contexts and that his analysis was in fact rooted in the terms and

conditions of the tender call at issue in that case. As he stated, at pp. 122-23:

> The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders. [Emphasis added.]

Therefore it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that Ron Engineering suggests otherwise, I decline to follow it.

18 I also do not wish to be taken to endorse Estey J.'s characterization of Contract A as a unilateral contract in Ron Engineering. His analysis has been strongly criticized: see R. S. Nozick, Comment on The Province of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd. (1982), 60 Can. Bar Rev. 345, at p. 350; J. Swan, Comment on The Queen v. Ron Engineering & Construction (Eastern) Ltd. (1981), 15 U.B.C. L. Rev. 447, at p. 455; G. H. L. Fridman, "Tendering Problems" (1987), 66 Can. Bar Rev. 582, at p. 591; J. Blom, "Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd." (1981-82), 6 Can. Bus. L.J. 80, at p. 91; S. M. Waddams, The Law of Contracts (3rd ed. 1993), at para. 159. However, each case turns on its facts and since the revocability of the tender is not at issue in the present appeal, I see no reason to revisit the analysis of the facts in Ron Engineering.

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

20 I note that the jurisprudence in other common law jurisdictions supports the approach that, depending upon the intentions of the parties, an invitation to tender can give rise to contractual obligations upon the submission of a bid: see Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council, [1990] 3 All E.R. 25 (C.A.); Hughes Aircraft Systems International v. Airservices Australia (1997), 146 A.L.R. 1 (F.C.); and Pratt Contractors Ltd. v. Palmerston North City Council, [1995] 1 N.Z.L.R. 469 (H.C.).

21 So this brings us to ask whether Contract A arose in this case and, if so, what were its terms?

B. Contract A

22 Both parties in the present appeal agree with the Contract A/Contract B analysis outlined in

Ron Engineering and that the terms of Contract A, if any, are to be determined through an examination of the terms and conditions of the tender call. In particular, they agree that Contract A arose, but disagree as to its terms. However, this agreement is influenced by an interpretation of Ron Engineering that I have rejected. Because of this, it is important to discuss whether Contract A arose in this case.

23 As I have already mentioned, whether or not Contract A arose depends upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. In the present case I am persuaded that this was the intention of the parties. At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the Bid Security. The question to be answered next is the precise nature of the respondent's contractual obligations.

24 The main contention of the appellant is that the respondent was under an obligation to award Contract B to the lowest compliant tender. As the Sorochan bid was invalid, Contract B should have been awarded to the appellant. In this regard, the appellant makes two arguments: first, that it was an explicit term of Contract A that the construction contract be awarded to the lowest compliant bid and second, that even if such a term was not expressly incorporated into the tender package it was an implied term of Contract A.

1. Explicit Term of Contract A

25 With respect to the first argument, the appellant submitted that the notice to the construction industry of the call for tenders advised that the Federal Standard Rules of Practice for Bid Depositories would apply and that these Federal Standard Rules incorporate local rules where these local rules are not in conflict with the Federal Standard Rules. The appellant argued that the respondent had confirmed that the Alberta Guide to Construction Procedures and the Canadian Construction Documents Committee Guide to Calling Bids and Awarding Contracts (CCDC 23) were part of the local rules, that they applied to the project in question, and that these local rules indicated that the contract should be awarded to the lowest proper tender.

26 I find this argument unpersuasive. The notice to the profession is ambiguous as to whether the Federal Standard Rules of Practice for Bid Depositories would apply to the general contractors or to the trade sub-contractors submitting their bids to the general contractors through the Alberta Construction Tendering System. This ambiguity is, to my mind, resolved by the Tender Form that tenderers were required to submit, which stated:

> We certify that Tenders for trades named under (a) and (b) below were received through the Alberta Bid Depository Ltd., ... in accordance with the Standard Rules of Practice for Bid Depositories (Federal Government Projects) as required by this Tender.

The tender documents do not include the notice to the profession and do not make any other reference to the Standard Rules of Practice for Bid Depositories (Federal Government Projects). As it is the tender documents that govern the terms, if any, of Contract A, I do not take the Standard Rules of Practice for Bid Depositories (Federal Government Projects) to be binding upon the respondent with respect to the tenderers; they are binding upon the tenderers with

respect to the sub-contractors. Thus I find that there is no explicit term in Contract A imposing an obligation to award contract B to the lowest valid tender.

2. Implied Term of Contract A

27 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.

28 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.

29 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.

30 In this respect, I find it difficult to accept that the appellant, or any of the other contractors, would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted. However, I find no support for the proposition that, in the face of a privilege clause such as the one at issue in this case, the lowest compliant tender was to be accepted. A review of the tender documents, including the privilege clause, and the testimony of the respondent's witnesses at trial, indicates that, on the basis of the presumed intentions of the parties, it is reasonable to find an implied obligation to accept only a compliant tender. It is to a discussion of the tender documents, the effect of the privilege clause, and the testimony at trial to which I now turn.

(a) Tender documents

31 The tender documents contain, as already noted, paragraph 13, which states: "The lowest or any tender shall not necessarily be accepted". I will deal with the effect of this privilege clause after discussing the tender documents more generally, as it must be interpreted in its context.

32 In the present appeal, the tender documents are enumerated in the Tender Form and include:

(a) Instructions to Tenderers - Form DCL 193 (R-7-90)

(b) Tender - Form DCL 150

(c) Articles of Agreement - Form DCL 24 (R-7-90)

(d) Terms of Payment "B" - Form DCL 25 (R-7-90)

(e) General Conditions "C" - Form DCL 32 (R-7-90)

(f) Drawings, Specifications and Addenda thereto - Job No. C-S380-9304/4

(g) Special Conditions and Instructions - File: SD16310

(h) Labour Conditions 180 (Rev. 01/88) 7540-21-900-0766

(j) Insurance Conditions "E" File: SD16310

(k) Insurers Certificate of Insurance - DCL 232

(l) Contract Security Conditions "F" - Form DCL 32-F (R-7-90)

Most of these documents detail the terms and conditions of the construction contract to be entered into, or Contract B. However, the Instructions to Tenderers and the Tender Form are the crucial documents for determining the terms and conditions of Contract A. The salient features of the parties' agreement revealed by an examination of these documents are twofold: the contractor must submit a compliant bid and the contractor cannot negotiate over the terms of the tender documents.

33 The Instructions to Tenderers include important provisions outlining the conditions under which a tender may be found to be invalid. For example, paragraph 1(a) provides that tenders received after the specified closing time are invalid. Paragraph 2 provides that, inter alia, "[a]ll tenders must be submitted on Tender Form DCL 150(S)" and paragraph 7(b) requires that only the Tender Form and the bid security be submitted with the tender. Paragraph 4 states:

> Any alterations in the printed part of the Tender Form DCL 150(S) or failure to provide the information requested therein, may render the tender invalid.

Paragraph 6(a) states:

> Tenders must be based on the plans, specifications and tender documents provided. ... For a tender to be valid, the tendered price must be based on materials established as acceptable for the project prior to the tender closing date.

Paragraph 9 states that the tender is invalid unless accompanied by the required bid security.

34 The Tender Form, which, as stated above, is the only document required to be submitted

along with the bid security, requires that the tenderer agree to the following statement:

> We [name] having informed ourselves fully of the conditions relating to the work to be performed, having inspected the site and having carefully examined the plans and specifications and all the terms and covenants of the Tender documents (IT BEING UNDERSTOOD AND AGREED THAT FAILURE TO HAVE DONE SO WILL NOT RELIEVE US OF OUR OBLIGATION TO ENTER INTO A CONTRACT AND CARRY OUT THE WORK FOR THE CONSIDERATION SET OUT HEREAFTER) do tender and offer to perform the said work in strict accordance with the said documents and such further details, plans and instructions as may be supplied from time to time and to furnish to Her Majesty the Queen in Right of Canada, all materials, plant, machinery, tools, labour and things necessary for the construction or carrying out and proper completion of the said work for the following sums of lawful money of Canada....

This certificate underscores the significance of tenderers adhering to the terms and conditions as found in the tender documents. In other words, the certificate is further evidence of the necessity to ensure bids are compliant.

35 The Tender Form sets out additional circumstances that could render a bid invalid. It requires that the tenderer agree that an imbalance between unit and lump sum prices or between individual unit prices "would be considered cause to render our Tender invalid" (para. 3). The tenderer must certify that the sub-trades it lists in its Tender Form were received through the Alberta Bid Depository in accordance with the Standard Rules of Practice for Bid Depositories (Federal Government Projects) and that failure to comply with these Rules of Practice may disqualify the tender (para. 8).

36 It is clear from the foregoing description of the Instructions to Tenderers and the Tender Form that the invitation for tenders may be characterized as an offer to consider a tender if that tender is valid. An invalid tender would be, as outlined in these documents, one that either was submitted too late, was not submitted on the required Tender Form, altered the Tender Form or did not provide the information requested, did not include the required bid security, had an imbalance in prices, did not comply with the Rules of Practice for sub-trades, or did not conform to the plans and specifications.

37 A tender, in addition to responding to an invitation for tenders, is also an offer to perform the work outlined in the plans and specifications for a particular price. The invitation for tenders is therefore an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the contractor. The goal for contractors is to make their bid as competitive as possible while still complying with the plans and specifications outlined in the tender documents.

38 In this regard, it is important to note that the respondent did not invite negotiations over the terms of either Contract A or Contract B. The only items to be added to the Tender Form by the tenderer, in addition to the tenderer's name and its prices are: GST registration number, the names of sub-contractors, its structural steel fabricator and erector, the number of days it will start work after notification of the contract award, signature, witness to signature and address, date, telephone and fax number. Furthermore, paragraph 12(b) of the Instructions to Tenderers provides:

> Tenderers are advised that requests for suggested amendments to the tender documents should be received by the Manager, Tender Call Section, at least fourteen calendar days before the specified tender closing time.

This request indicates that any negotiations are to follow a special procedure, presumably so that if a suggested amendment is accepted, all tenderers may be notified so that they may also enter an alternate bid.

39 This interpretation is supported by the testimony at trial of Mr. Enders, Director of Contract Services for the respondent, regarding alternate bids:

> A We follow industry practice. As long as there is a valid bid it can be accompanied by an alternate price and if it happens before tender close and it is judged that it - it's worthwhile entertaining, we would issue an amendment asking all bidders to price that alternative. If it happened afterwards we would award the contract and deal with the alternative after the fact.
>
> Q Why don't you - after the tenders closed when you receive what you consider an alternate bid, why don't you then go to the contractors and say, Somebody submitted this. What's your price?
>
> A Again that would put the low bidder at a disadvantage and it might be considered bid shopping.

40 Therefore, according to the Instructions to Tenderers and the Tender Form, a contractor submitting a tender must submit a valid tender and, in submitting its tender, is not at liberty to negotiate over the terms of the tender documents. Given this, it is reasonable to infer that the respondent would only consider valid tenders. For the respondent to accept a non-compliant bid would be contrary to the express indication in the Instructions to Tenderers that any negotiation of an amendment would have to take place according to the provisions of paragraph 12(b). It is also contrary to the entire tenor of the Tender Form, which was the only form required to be submitted in addition to the bid security, and which does not allow for any modification of the plans and specifications in the tender documents.

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 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., supra, at p. 30, 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.

42 Having found that there was an implied term in Contract A that the respondent was to accept only compliant bids, I must now deal with the argument that the privilege clause overrode this

implied term.

(b) Effect of the Privilege Clause

43 Although the respondent has not disputed the trial judge's finding that the Sorochan tender was non-compliant, the respondent argues that the privilege clause gave it the discretion to award the contract to anyone, including a non-compliant bid, or to not award the contract at all, subject only to a duty to treat all tenderers fairly. It argues that because it accepted the Sorochan tender with the good faith belief that it was a compliant bid, it did not breach its duty of fairness.

44 The words of the privilege clause are clear and unambiguous. As this Court stated in Cartwright & Crickmore, Ltd. v. MacInnes, [1931] S.C.R. 425, at p. 431, "there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail". However, the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.

45 I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation. I believe that the comments of I. Goldsmith, in Goldsmith on Canadian Building Contracts (4th ed. (loose-leaf)), at p. 1-20, regarding the importance of discretion in accepting a tender are particularly helpful in elucidating this compatibility:

> The purpose of the [tender] system is to provide competition, and thereby to reduce costs, although it by no means follows that the lowest tender will necessarily result in the cheapest job. Many a "low" bidder has found that his prices have been too low and has ended up in financial difficulties, which have inevitably resulted in additional costs to the owner, whose right to recover them from the defaulting contractor is usually academic. Accordingly, the prudent owner will consider not only the amount of the bid, but also the experience and capability of the contractor, and whether the bid is realistic in the circumstances of the case. In order to eliminate unrealistic tenders, some public authorities and corporate owners require tenderers to be prequalified.

In other words, the decision to reject the "low" bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

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

in this manner does not require or indicate that there needs to be a discretion to accept a non-compliant bid.

47 The additional discretion not to award a contract is presumably important to cover unforeseen circumstances, which is not at issue in this appeal. For example, Glenview Corp. v. Canada (1990), 34 F.T.R. 292, concerned an invitation to tender whose specifications were found to be inadequate after the bids were submitted and opened by the Department of Public Works. Instead of awarding a contract on the basis of inadequate specifications, the department re-tendered on the basis of improved specifications. Nonetheless, this discretion is not affected by holding that, in so far as the respondent decides to accept a tender, it must accept a compliant tender.

48 Therefore, I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the lowest compliant bid. With respect to this latter proposition, the privilege clause must prevail.

49 The appellant disagrees with this conclusion and submits that the majority of Canadian jurisprudence supports the proposition that the person calling for tenders should award Contract B to the lowest valid tender despite the presence of a privilege clause like the one in issue in this appeal. To the extent that these decisions are incompatible with the analysis just outlined, I decline to follow them. Nonetheless, I have reviewed the cases submitted to this Court and find that they do not stand for the proposition that the lowest valid tender must be accepted. Those cases that in fact deal with the interpretation of the privilege clause in the context of a finding that Contract A arose between the parties are instead generally consistent with the analysis outlined above.

50 For example, a number of lower court decisions have held that an owner cannot rely on a privilege clause when it has not made express all the operative terms of the invitation to tender: see Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1987), 28 C.L.R. 290 (B.C. Co. Ct.), aff'd (1989), 35 C.L.R. 241 (B.C.C.A.); Kencor Holdings Ltd. v. Saskatchewan, [1991] 6 W.W.R. 717 (Sask. Q.B.); Fred Welsh Ltd. v. B.G.M. Construction Ltd., [1996] 10 W.W.R. 400 (B.C.S.C.); George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality) (1997), 34 C.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)); Martselos Services Ltd., supra. Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping: see Twin City Mechanical v. Bradsil (1967) Ltd. (1996), 31 C.L.R. (2d) 210 (Ont. H.C.), and Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City) (1997), 34 C.L.R. (2d) 197 (Alta. Q.B.).

(c) Testimony at Trial

51 Finally, I note that my conclusion regarding the intention of the parties supporting an obligation to accept only a compliant bid is supported by the trial testimony of the respondent's own witnesses. The aforementioned Mr. Enders answered the following questions of the appellant's counsel:

> Q What I'm suggesting to you, sir, is that when Defence Construction Canada put out the tender package, there were no undisclosed terms that Defence Construction Canada was going to follow in awarding the tender that were not included in the tender package. In other words, the tender package was all inclusive?
>
> A That's correct.

Q And you would agree with me if I suggested to you that it would be improper to have undisclosed terms that the tenderers would not know about?

A That's correct.

...

Q My question quite simply is this, sir. f you, Defence Construction Canada, decided that the note on Sorochan's tender was a qualification, would you agree with me that Defence Construction would have rejected the Sorochan tender and not considered it?

A Had we concluded that it was a qualification, yes, and Sorochan would have continued to refuse to withdraw it, yes, we would have rejected it.

Therefore, at trial, the respondent's own witnesses revealed that it was always the respondent's intention to accept only compliant tenders, assessed in accordance with the terms disclosed in the tender package.

C. Breach of Contract A

52 Applying the foregoing analysis to the case at bar, I find that the respondent was under no contractual obligation to award the contract to the appellant, who the parties agree was the lowest compliant bid. However, this does not mean that Contract A was not breached.

53 Sorochan was only the lowest bidder because it failed to accept, and incorporate into its bid, the risk of knowing how much of Type 2, Type 3 and Type 4 fill would be required. As the Court of Appeal outlined, this risk was assigned to the contractor. Therefore Sorochan's bid was based upon different specifications. Indeed, it is conceded that the Sorochan bid was non-compliant. Therefore, in awarding the contract to Sorochan, the respondent breached its obligation to the appellant and the other tenderers that it would accept only a compliant tender.

54 The respondent's argument of good faith in considering the Sorochan bid to be compliant is no defence to a claim for breach of contract: it amounts to an argument that, because it thought it had interpreted the contract properly, it cannot be in breach. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.

D. Damages

55 Given that Contract A was breached, the next question for the Court to determine is the question of damages. The general measure of damages for breach of contract is, of course, expectation damages. In the present appeal, we know that the respondent intended to award Contract B, as it in fact awarded this contract, albeit improperly, to Sorochan. Therefore, there is no uncertainty as to whether the respondent would have exercised its discretion not to award Contract B. Moreover, the award of the contract to Sorochan was made on the basis that it was the lowest bid. The question is whether the appellant can claim that, had Contract B not been awarded to Sorochan, it would have been awarded to the appellant for submitting the lowest valid bid.

56 In my opinion, on a balance of probabilities, the record supports the appellant's contention that, as a matter of fact, it would have been awarded Contract B had the Sorochan bid been

disqualified. The testimony of Mr. Enders on this point at Discovery on April 1, 1992 is as follows:

Q Would you agree with me, sir, that if you had arrived at the conclusion that the Sorochan Enterprises Limited tender, in fact, contained a qualification, would you agree with me that you would have ruled that tender as invalid?

A Had we determine that -

Q The note was a qualification. Yes. I think we would have disqualified them.
A

Q And by disqualify, that means that you disregard the tender and don't consider it in the deliberations as to who would receive the contract?

A That's correct.

Q And you then would have awarded the contract to the next lowest tenderer?

A Subject to verification.

Q And by this time and by verification, you are talking about who their site superintendent would be and whether their experience record was acceptable.

A I think in the case of M.J.B., that is right, because they are known to us, I think, so that the verification - but I would have had to look to see whether their trades named in the tender form bid through the bid depository.

Q I take [sic] you never came to the conclusion that there was anything wrong with the M.J.B. tender, other than the price wasn't the lowest?

A I - until I had finished dealing with Sorochan, I didn't think about the M.J.B. tender at all. I - our approach is we deal with the low bidder, if we award, we award. If we don't, we disqualify or whatever action needs to be taken before proceeding to deal with the second bidder.

Q I take it in preparation for this examination for discovery you have had a fair opportunity to review all the documentation regarding this project, especially the tender matters. Is that a fair statement?

A Yeah. That's right.

Q And has anything come to your attention to date, today, that the M.J.B. tender was improper or qualified or invalid?

A No.

Q And I take it that you had, in July of 1991, come to the conclusion that M.J.B. had worked for Defence Construction Canada before, so you were not concerned that they weren't a qualified contractor - by "qualified," I mean a contractor qualified to do the work?

A I understand what you are saying.

Q But you would agree with me they were qualified to do the work?

A Yes, sir.

57 Even if the evidence supports that, on a balance of probabilities, Contract B would have been awarded to the appellant, it still must be determined whether the loss of Contract B,

although caused by the breach of Contract A, is nonetheless too remote. The classical test regarding the remoteness of damages is that provided in Hadley v. Baxendale (1854), 9 Ex. 341, 156 E.R. 145, at p. 151, per Alderson B.:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

58 In this case, the respondent may be taken to know that if it decided to award Contract B and awarded it to a non-compliant bid, then one of the tenderers who submitted a compliant bid would suffer the loss of Contract B. In this context, it is sufficient that the respondent knew that this tenderer could be the appellant.

59 This finding is consistent with the decision of Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd. (1978), 83 D.L.R. (3d) 267 (Ont. H.C.), aff'd (1979), 115 D.L.R. (3d) 511 (Ont. C.A.), and [1980] 2 S.C.R. 118. In that decision, Cornwall Gravel was awarded damages for breach of contract against Purolator owing to the late delivery of a tender prepared by the plaintiff. It was admitted that had the tender been delivered in time, Cornwall Gravel would have been awarded a contract for which it would have realized a profit of $70,000. R. E. Holland J. held at p. 274 that since Purolator knew that it was delivering a tender which had to be delivered by a particular time, it "must have realized that if delivered late the tender would be worthless and a contract could well be lost" (emphasis added). The lost profits on the contract therefore fell within the rule laid out in Hadley v. Baxendale. Appeal to this Court was dismissed from the bench, with Laskin C.J. stating at p. 118 that "[w]e are not persuaded that there was any error in the disposition made by the Courts below". If the lost profits were reasonably foreseeable to the courier delivering the tender, then I believe that lost profits must be found to be reasonably foreseeable in the present instance.

60 The appellant is therefore entitled to damages in the amount of the profits it would have realized had it been awarded Contract B. Subject to the determination of liability, the parties have agreed to damages in the amount of $398,121.27, with two further amounts in dispute. The first issue in dispute is whether the appellant is entitled to $21,600.00 for the cost of a supervisor and the second issue is whether the appellant is entitled to $229, 456.89, being the amount of money that the appellant states that it included in its tender to purchase Type 2 backfill that, had it been awarded the construction contract, it would not have been required by the engineer to purchase and place. The respondent submits that the entire issue of damages should be referred back to the Court of Queen's Bench of Alberta for assessment.

61 I would enforce the agreement of the parties and remit only the two issues in dispute to trial for assessment. In coming to this conclusion, I agree with the following statement by Major J.A., then of the Alberta Court of Appeal, in Riggins v. Alberta (Workers' Compensation Board) (1992), 5 Alta. L.R. (3d) 66, at p. 77:

> It is regrettable when agreements between counsel made to a trial judge later become clouded. The trial judge is entitled to rely on these agreements; such agreements are common and assist the trial process. Counsel's understandings and agreements ought not to be given lightly because they are binding.

VI. Disposition

62 For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, set aside the order of Rowbotham J. at trial, and substitute judgment for the appellant in the amount of $398,121.27. The appellant shall have its costs here and in the courts below. The matter of the two remaining issues in dispute regarding damages, described above, is remanded to the Court of Queen's Bench of Alberta for determination.

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