RESPONSE FACTUM OF THE APPELLANT TERCON CONTRACTORS LTD.
(Pursuant to Rules 29(4) and 35(4) of the Rules of the Supreme Court of Canada)

A. Introduction

1. The Ministry seeks to uphold the decision of the British Columbia Court of Appeal on a ground not relied on in the reasons for that decision. Accordingly, Tercon provides this factum in response, pursuant to Rules 29(4) and 35(4) of the Rules of the Supreme Court of Canada.

B. The Ground Relied On By The Court of Appeal

2. The decision of the Court of Appeal is summarized in these paragraphs from the reasons for judgment:

> The appeal raises two questions:
>
> (1) Was the successful bid non-compliant?
>
> (2) Is the claim barred by an exclusion clause in contract A?
>
> I would allow the appeal and dismiss the claim on the basis of the second question. In my respectful opinion, the judge erred in interpreting the exclusion clause and in refusing to give effect to it.
>
> The first question involved the consideration of the legal status of a joint venture. The judge found that, in substance although not in form, the appellant accepted a bid from a joint venture consisting of a qualified bidder and one which was not. She also found that the appellant tried to hide the true identity of the contracting party by issuing contract B only in the name of the qualified bidder. The appellant argues that it had no alternative but to award the contract to the qualified bidder because a joint venture has no legal personality. It further argues that the judge's negative characterization of this behaviour is undeserved because contract A contemplated the possibility that the successful bidder might form a team in order to carry out the job.
>
> Because I would dispose of the appeal on the second question, I do not find it necessary to resolve the issues associated with the first question.
>
> Ref.: Judgment of Court of Appeal below, at paras. 3-6, [Record, Vol. I, Tab 4]

3. The Court of Appeal thus rendered its decision based entirely on the exclusion clause issue.

4. The issue raised but not dealt with by the Court of Appeal, which it posed as the question "Was the successful bid non-compliant?", was clearly directed to the breach of contract A which had been found by the trial judge:

> The defendant breached contract A in two respects: first, it accepted a bid that was incapable of acceptance for non-compliance; second, it treated the plaintiff unfairly in the evaluation process by approving a non-compliant bid as the successful bidder.
>
> Ref.: Judgment of Supreme Court below, at para. 139, [Record, Vol. I, Tab 2]

C. The Ground Relied On By The Respondent Not In The Court Of Appeal Reasons – Breach of Contract A

5. The Court of Appeal expressly declined to reconsider the trial judge's finding that contract A had been breached by the Ministry.

6. The Ministry, however, seeks to uphold the Court of Appeal decision on the basis that there was no breach of contract A.

> Ref.: Respondent's Factum, paras. 1, 18, 36-43

D. The Ground Raised By The Ministry Not Relied On By The Court Of Appeal Does Not Justify The Conclusion of the Court Of Appeal

7. The ground raised by the Ministry, not relied on by the Court of Appeal, does not justify the Court of Appeal's decision to deny damages to Tercon.

8. The Ministry (at paragraphs 36-43 of the Respondent's Factum) takes the position that the Brentwood/EAC joint venture <u>was</u> eligible to submit a bid and, as a result, there was no breach of contract A with Tercon. This argument was not made at trial. There, the Ministry did not contest that a joint venture between Brentwood and EAC was ineligible to submit a proposal, accepting Tercon's position in its opening and argument. The Ministry's position was that "there was no requirement to look beyond the face of the proposal to determine who was bidding. Their proposal was in the name of Brentwood, period, end of story."

> Ref.: Judgment of Supreme Court below, at para. 117, [Record, Vol. I, Tab 2]

Tercon's Trial Opening (extract), in the Supreme Court of British Columbia, [Supp. Record, Tab 1]
Tercon's Trial Argument Summary (extracts), in the Supreme Court of British Columbia, [Supp. Record, Tabs 2 and 3]

9. The trial judge rejected this argument for three reasons:

- "Fair and equal treatment of all tenderers requires close examination of the tender documents at the evaluation stage to respect the expectation that only valid tenders will be accepted The owner cannot close its eyes to the information that is produced or fail to direct its mind to the merits of a matter… [A]n owner… cannot take means not to know something in order to make a contract without responsibility for knowledge of a material fact…".

- The Brentwood proposal was from a joint venture between Brentwood and EAC which was ineligible to submit a bid and the Ministry knew it was a joint venture and ineligible.

- The Ministry "…breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage."

Ref.: Judgment of Supreme Court below, at paras. 126, 129-131, 138, [Record, Vol. I, Tab 2]

10. The Ministry now reasserts the argument it made at trial (at paras. 37-38 of the Respondent's Factum) with the added twist that the Brentwood/EAC joint venture cannot have been a Proponent, eligible or ineligible to bid, because a joint venture is not a legal person with the capacity to contract. This ignores the point that the legal persons comprising a joint venture do have capacity.

E. Brentwood/EAC Joint Venture – Not an Eligible Proponent

11. The question is: Following the contractual model of tendering first articulated by this Court in *Ron Engineering*, was it intended that contract A arise with EAC as a joint bidder with Brentwood pursuant to their joint venture? Or, to put it another way, was the bid submitted in Brentwood's name on its own behalf and as agent for EAC compliant and capable of giving rise to contract A?

Ref.: *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, [BA, Vol. I, Tab 35]

12. Following the contract A model, the Ministry made offers to enter into tendering contracts (contracts A) with six shortlisted contractors, each of whom was entitled to accept the offer, and crystallize its respective contract A, by submitting a compliant proposal. An express term of each contract A – a promise made by the Ministry to all six contractors – was contained in clause 2.8(a):

> Eligibility Clause
>
> Only the six Proponents, qualified through the RFEI process, are eligible to submit responses to this RFP. Proposals received from any other party shall not be considered.
>
> Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, [Record, Vol. II, Tab 1]

13. To consider whether the Brentwood/EAC joint venture was intended to be one of the "the six Proponents" it is necessary to refer to the RFP and the factual matrix leading up to it:

- The RFP defines Proponent as "a team that has become eligible to respond to the RFP as described in paragraph 1.1 of the Instructions to Proponents". Paragraph 1.1 of the Instructions to Proponents states:

  > On March 16, 2000 the Ministry received Expressions of Interest from six design/construct teams. After evaluating the six Expressions of Interest, the Ministry advised the Owners that all six were qualified to undertake the Project. The Ministry subsequently advised that all six teams would be eligible to respond as Proponents to the subsequent RFP.

- On July 7, 2000 the Ministry informed the six RFEI respondents that it did not intend to proceed on a design/construct basis. The Ministry would carry out the design itself and the contractor would construct only. The fallout of this new approach was that the design portion of the team was no longer necessary. The delivery strategy for the project was now a construction procurement by RFP. The Ministry conveyed that all six contractors who had responded to the RFEI with a design/construct team would be shortlisted for the upcoming RFP.

- The Ministry proceeded to obtain the required approval of the Minister to an alternative tendering process which stated:

  > 3. EOI Evaluation and Shortlist
  >
  > MoTH evaluated all the EOI's received in order to shortlist firms which best met the eligibility requirements for the Project as described in the RFEI. <u>Only those firms who are shortlisted as a result of the EOI evaluation will be eligible</u> to submit proposals to the Project.
  >
  > 4. Request for Proposals (RFP)

> Shortlisted firms will receive a copy of the Request for Proposal (RFP) and be invited to submit a proposal. The RFP will describe the Project and the considerations which will be used by MoTH in evaluating proposals. [Emphasis added.]

- On January 15, 2001 a letter was sent to each of the six contractors shortlisted, inviting them to submit a proposal. The letter states:

> At our meeting of July 2000 in Richmond, B.C., we confirmed your firm's eligibility to submit a proposal to undertake the Kincolith Extension Project.
> …
> At this time, on behalf of the Ministry of Transportation and Highways, I am pleased to invite you to participate in the next phase of this procurement, the RFP. [Emphasis added.].

Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, [Record, Vol. II, Tab 1];
Meeting Minutes, July 7, 2000, [Record, Vol. I, Tab 8]
Minister's Authorization, October 19, 2000, [Record, Vol. 1, Tab 9]
January 15 Invitation to Participate in RFP, [Record, Vol. 1, Tab 10]

(i) EAC Not Entitled To Bid – Breach of Express Term of Contract A

14. Tercon and Brentwood were two of the six shortlisted "firms" invited to respond to the RFP. EAC was not. EAC had not responded to the RFEI. EAC had been involved in advising the Ministry in relation to the Project in 1998 and disagreed with the Ministry's decision to deliver the project by way of a design/construct model. In the fall of 2000 the Ministry asked EAC to prepare an internal bid for comparison purposes as EAC was not entitled to bid on the Project. EAC declined.

Ref.: Evidence of R.J. Hasell, Trial Transcripts, at p. 189 (Lines 3-13, 31-47) and p. 297 (Lines 1-39), [Supp. Record, Tab 4]
Evidence of T. Tasaka, Trial Transcripts, at p. 296 (Lines 39-47) and p. 297 (Lines 1-7), [Supp. Record, Tab 5]

15. The Eligibility Clause confirmed the Ministry's promise to the six eligible contractors that competition would be limited to the eligible six. A submission in EAC's name alone would clearly have offended the Eligibility Clause. EAC could not have overcome its ineligibility by remaining undisclosed and having Brentwood advance EAC's proposal merely as agent – this would have been a sham. EAC's ineligibility is rendered no less obvious where both parties are

disclosed and self-described as 50/50 principals, as they were here. A joint venture of Brentwood/EAC was not an eligible proponent.

Ref.: Judgment of Supreme Court below, at para. 115, [Record, Vol. I, Tab 2]

16. If there is any uncertainty whether the Eligibility Clause disentitled Brentwood/EAC to bid as a joint venture, it is resolved in Tercon's favour by the Ministry's conduct after bid submission, which is consistent only with the Brentwood/EAC joint venture being ineligible (see paragraph 34 of the Respondent's Factum).

Ref.: Judgment of Supreme Court below, at paras. 52-55, 61-64, 68-70, 73, 133-138, 150, [Record, Vol. I, Tab 2]

17. As recognized by Professor McCamus in his text *The Law of Contracts,* the Canadian position in relation to the legal relevance of subsequent conduct was summarized by Lambert J.A. of the British Columbia Court of Appeal, as follows:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

Ref.: McCamus, John. *The Law of Contracts*. York University: Irwin Law Inc., 2005, at pp. 713-715, [Supp. BA, Tab 6]

18. Brentwood's RFP submission cannot be viewed as an acceptance of the Ministry's offer to form a contract A. Brentwood was saying to the Ministry, in effect: "Here is our proposal, but please note this variation from the terms you proposed: We are offering to contract not only for ourselves but also as agent for EAC, who will be a 50/50 principal with us if our proposal is accepted." Its submission was merely a counteroffer, which the Ministry was disentitled to consider. At no time was there a valid contract A between the Ministry and Brentwood.

19. The counteroffer submitted in Brentwood's name was clearly intended to lead to a contract B binding <u>two</u> parties to the Ministry: Brentwood and EAC. This was not concealed

from the Ministry – it was made explicit in the March 7 letter from Brentwood and at the March 12 interview with Brentwood/EAC. The counteroffer, had it been accepted, would therefore have been as binding on EAC as it would be on Brentwood.

Ref.: Judgment of Supreme Court below, at paras. 41, 51-53 [Record, Vol. I; Tab 2]

20. The Ministry (in paras. 42 and 43 of the Respondent's Factum), in arguing that the RFP does not forbid eligible proponents from forming joint ventures, asserts that Brentwood's arrangement with EAC was its own business and did not vitiate Brentwood's eligibility. The Ministry asserts that clause 2.8(b) authorized it to approve or reject the Brentwood/EAC joint venture. Clause 2.8(b) states:

> Material Changes Since the RFEI
>
> If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, if the Proponent's senior management and supervision personnel has changed, or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent, and reject its Proposal.
>
> If a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal. The preliminary submission should be limited to describing the change(s) that has occurred. A preliminary submission should be clearly marked as a "Preliminary Proposal". The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal. [Emphasis added.]

Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, [Record, Vol. II, Tab 1]

21. Clause 2.8(b) addresses circumstances where the Proponent's "team members" have changed (as opposed to the Proponent itself) such that the Proponent's ability to perform the work is diminished. Clause 2.8(b) allows the Proponent to seek an advance ruling on its qualification to perform the work if it is concerned that it has undergone a material change, which the Ministry may consider as grounds for rejection. The trial judge concluded that Clause

2.8(b) was not intended to deal with a change to the legal nature of the Proponent. In fact, Clause 2.8(a) forbids it.

Ref.: Judgment of Supreme Court below, para. 21, [Record, Vol. I, Tab 2]

22. Furthermore, this argument can be rebutted by asking the question: Did the Ministry receive and entertain a proposal which, to the Ministry's knowledge, was intended to lead to contractual relations between the Ministry and EAC? It certainly did. Such a proposal must be characterized as a proposal "received from" the ineligible EAC, despite having been submitted via an eligible agent. The Ministry's terms had been: "Proposals received from any other party shall not be considered."

23. The Ministry should have rejected the counteroffer by Brentwood/EAC. It did not. The Ministry was sufficiently interested in the counteroffer that it selected the joint venture of Brentwood/EAC as its Preferred Proponent. By doing so the Ministry's breach of its contract A with Tercon was complete.

(ii) Events Following – Breach of Contract A Cannot be Rectified

24. When the PEP interviewed Brentwood on March 12, it also interviewed EAC. When the PEP issued its final recommendation, it expressly identified "a joint venture of Brentwood Enterprises Ltd. And Emil Anderson Construction Co. Ltd." as the Preferred Proponent. When it later revised its choice to "Brentwood", it did not require, and could not lawfully have required, any alteration to the proposal it had received from them, which it knew to have emanated from Brentwood and EAC acting together as principals. The attempt by the Ministry to forge the record could not convert the non-compliant bid into a compliant one.

Ref.: Original Step 6 Report, [Record, Vol. II, Tab 7]
Judgment of Supreme Court below, at paras 51-56, [Record, Vol. I, Tab 2]

25. The Ministry's conduct in papering over the non-compliance was antithetical to tendering. As explained in *Graham Industrial*:

> [N]o bidder would participate in a tendering process in which the owner had the unreviewable, subjective right to deem patently non-compliant bids to be compliant bids. The effect of such a provision would return the construction industry to the pre-*Ron*

Engineering days where negotiation on undisclosed terms, rather than competition on specified terms, governed the tendering process.

Ref.: *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214 (B.C.C.A.), at para. 28, [BA,Vol. I, Tab 13]

26. On March 19 – with negotiations towards contract B underway – the joint venture parties, to the Ministry's knowledge, were still expecting to execute contract B in the name of the Brentwood/EAC joint venture. Between March 19 and 29, discussion continued (it was first raised by the Ministry on March 13) about the potential of "…a complaint from unsuccessful proponents on the joint venture structure of the successful proponent…" All involved on the Ministry side agreed that the joint venture was not an eligible Proponent. The issue was resolved on April 3 – award was to be made "…in the name of Brentwood notwithstanding the reality that Brentwood/EAC would give effect to their joint venture in separate documentation that the Ministry did not want to see."

Ref.: Judgment of Supreme Court below, at paras. 60-70, [Record, Vol. I, Tab 2]

27. On April 20 the Ministry prepared a draft contract B containing a term which reflects the joint venture arrangement between Brentwood and EAC:

> 4.2 [Brentwood] will enter into a contract with EAC which includes the following term:
>
> > *In the event the Ministry of Transportation and Highways ("MOTH") terminates the Agreement between MOTH and Brentwood Enterprises Limited Partnership ("Brentwood") for the construction of the Kincolith Extension Project as a result of an Event of Default as defined in that Agreement, then EAC will complete the Work required by the Agreement between MOTH and Brentwood in accordance with the terms of that Agreement. EAC agrees that in that event, MOTH is entitled to take all action in its own name or in the name of Brentwood to enforce Brentwood's rights under the agreement between Brentwood and EAC notwithstanding any provision to the contrary and without EAC's consent.*
>
> 4.3 If the circumstances set out in the provision above occur, [Brentwood] will cooperate with the Ministry and will assist with the enforcement of the obligation of EAC to perform the Work in accordance with this Agreement.

Ref.: Judgment of Supreme Court below, at para. 72, [Record, Vol. I, Tab 2]

28. Contrary to the Ministry's assertion at paragraph 8 of the Respondent's Factum, Brentwood and EAC did not present drafts of the contract to the Ministry. All drafts were prepared by the Ministry. Brentwood and EAC provided comments. Brentwood/EAC commented on the April 20 draft by letter of May 3 referred to at paragraph 7 of the Respondent's Factum (corresponding to the April 30 letter quoted at paragraph 73 of the trial judgment). The letter states:

> Article 4 — Emil Anderson Construction Co. Ltd. — Delete items 4.2 and 4.3 entirely. The Owner's [sic] have made it quite clear from the beginning that they would not let us change our submission to a joint venture due to the possibility of litigation. We would suggest that if certain parties were to see this document worded like it is it would be obvious that this is more than just a contractor, sub-contractor relationship. This is the first time we have seen such wording to cover a prime contractor, sub-contractor relationship. Do the Owner's [sic] not feel secure enough with the bonding that we are required to provide? [Emphasis added.]
>
> Ref.: Judgment of Supreme Court below, at para. 73, [Record, Vol. I, Tab 2]

29. Brentwood and EAC were pointing out correctly that if the Ministry left the April 20 draft contract in place, it would be "obvious" that the relationship between Brentwood and EAC was "more than just a contractor, sub-contractor relationship." The letter indicates Brentwood and EAC's frustration with the Ministry in refusing to name both Brentwood and EAC as contracting parties. The Ministry heeded the point, one infers, as the Article was modified, eventually becoming paragraph 5.2 in the final form of agreement, which states:

> In the event the Ministry terminates this Agreement as a result of an Event of Default, the Agreement between the Contractor and EAC will require EAC to immediately enter into good faith negotiations with the Ministry and in such event the Ministry will participate in such good faith discussions, for the purpose of reaching an agreement by which EAC would assume the Contractor's obligations under this Agreement. For certainty, nothing in this Agreement obligates either EAC or the Ministry to enter into an agreement for the completion of the Work.

30. Paragraph 5.2 is not materially different from the previous Article 4 from the April 20 draft. EAC would be required to enter into good faith discussions to agree on terms to complete the Work which surely must result in the same terms the Ministry and EAC had already agreed upon in good faith discussions pursuant to Clause 6.2(c) of the Instructions to Proponents.

Ref: Request for Proposals, Kincolith Extension Project, January 15, 2001, [Record, Vol. II, Tab 1]

31. The final resolution of the joint venture issue amounted to a sham put into effect May 9 when the Construction Alliance Agreement was signed by Swaine of Brentwood and witnessed by Hasell of EAC. On the same day Brentwood and EAC entered into a joint venture agreement entitled 'Subcontract Alliance Agreement' which obligated each other to carry out the project as a 50/50 joint venture. The effect was that the Ministry had contracted with the joint venture. The Construction Alliance Agreement was enforceable against both Brentwood and EAC to the same extent as if EAC had been a signatory – Brentwood had EAC's authority to sign. The Ministry cannot be heard to say that EAC was merely a subcontractor with whom it did not contract and point to the form of the Construction Alliance Agreement, which it crafted to disguise the reality of the transaction. The Ministry cannot shut its eyes to the joint venture agreement between Brentwood and EAC, which it "did not want to see" when it knew from the start that Brentwood and EAC had agreed to carry out the project as a joint venture. From the moment the Brentwood proposal was submitted the joint venture was set in stone as it was the foundation for the price and the terms of the Construction Alliance Agreement to which Brentwood and EAC had agreed.

Ref.: Judgment of Supreme Court below, paras. 69, 73-75, 124-125, 137, [Record, Vol. I, Tab 2]

32. What could clearly not be accomplished directly – EAC as a bidding contractor – was accomplished indirectly by naming Brentwood as the contracting party, which was simply a pretence to disguise the fact that contract B would be performed by Brentwood and EAC as joint venturers. This was done to minimize the Ministry's exposure to litigation. In this manner the Ministry, Brentwood and EAC were able "…to follow Tasaka's original plan and consider the named proponent as the successful proponent regardless of the relationship; and not to indicate to others that the successful proponent was Brentwood/EAC as a joint venture." As the trial judge said:

> The whole of this conduct leaves me with no doubt that the defendant breached the duty of fairness to the plaintiff by changing the terms of eligibility to Brentwood's competitive advantage. At best, the defendant ignored significant information to its detriment. At worst, the defendant covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the defendant to say that a joint venture was only proposed. Nor can the defendant say that it was unaware of

> the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the defendant's risk that the contract would be unenforceable against EAC if arrangements did not work out. This was a risk that the defendant was prepared to take: this risk did not materialize. The defendant was also prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.
>
> Ref.: Judgment of Supreme Court below, at paras. 55,73-75, 138, [Record, Vol. I, Tab 2]
> Subcontract Alliance Agreement, dated May 9, 2001, Exhibit 1, Vol. 10, Tab 230, [Record, Vol. II, Tab 18]

33. The Ministry argues (at paragraphs 37 and 39-41 of the Respondent's Factum) that by naming Brentwood as the contracting party in contract B, the award was to an eligible bidder, not to an ineligible joint venture. Even if one were to accept that contract B was with Brentwood alone, this argument is of no assistance to the Ministry. The trial judge did not base her finding of breach on a conclusion that contract B was ultimately entered into between the Ministry and the Brentwood/EAC joint venture. The breach correctly identified by the trial judge occurred earlier in the process, when the Ministry selected the joint venture as its Preferred Proponent, despite a bid from this source being patently ineligible. At that moment the Ministry had breached its contract A obligations to Tercon, and Tercon's cause of action had crystallized.

34. Furthermore, the Ministry's argument that it ultimately entered into contract B with a compliant bidder (Brentwood), and therefore Tercon cannot complain that Brentwood's proposal was non-compliant, amounts to an argument that a non-compliant bid can be cured or rendered compliant after bids are submitted.

35. The idea that a non-compliant bid can be cured is inconsistent with the tendering model of procurement as expressed by Charron J. in the dissenting Judgment of this Court in *Double N*:

> I fail to see how the integrity of the bidding process is protected by allowing a bidder to get rid of the competition unfairly and then hash it out with the owner after it has been awarded the contract. Approaching the tendering process in this manner encourages precisely the sort of duplicity seen in the present appeal. A bidder can submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects, secure in the knowledge that if it is awarded Contract B, it will be in a strong position to renegotiate essential terms of the contract. And an owner can reason that it may be best not to resolve any ambiguity before awarding Contract B, since at that time all Contract A obligations towards other bidders will terminate and it can then enter into

> renegotiations with the successful bidder without fear of liability. This approach is not consistent with a fair and open process. [Emphasis added.]
>
> Ref.: *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, at para. 123, [Supp. BA, Tab 1]

36. Clearly, the Ministry materially altered or departed from a process it was legally bound to follow scrupulously.

37. As stated by the British Columbia Court of Appeal:

> … the tendering process is, and must always be, a carefully controlled process, since the opportunity for abuse or distortion is ever present. While that is not what happened in this case, the process must nonetheless be, and be seen to be fair to all bidders. For that reason, the process is often attacked for technical reasons and the law has accordingly applied strict rules for any alteration in the process by both bidder and owner.
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> Ref.: *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 136 D.L.R. (4th) 307 (B.C.C.A.), at para. 40, [Supp. BA, Tab 5]

(iii) Breach of Implied Term of Fairness

38. The Ministry promised, in Clause 2.8(a) of the RFP, that the field of eligible Proponents would not include EAC. It was obviously material to Tercon that it did not have to compete against EAC as a prime contractor in the RFP competition. EAC is a large contractor with drilling and blasting expertise which Brentwood lacked. The contractors competing with Brentwood knew it lacked drilling and blasting expertise. When the RFP was issued the six eligible contractors knew with whom they were competing and prepared bids in order to win the competition. Knowledge of competitors is a material factor in preparing the winning bid. Price and approach are influenced by the identity of competitors. A contractor's goal is to maximize profit while at the same time obtaining the work by submitting the lowest priced bid. Tercon knew it was competing against Brentwood and, as a result, Brentwood's drill and blast price would likely not be as competitive. Tercon knew it would not be competing against EAC with its expertise as a prime contractor responsible for coordinating and managing the project. This was material to the preparation of Tercon's bid, especially its price.

> Ref.: Judgment of Supreme Court below, at para. 18, [Record, Vol. I, Tab 2]

39. Brentwood may not have bid, but for EAC's involvement as a joint prime contractor. Brentwood lacked equipment and expertise in drilling and blasting. Without EAC's involvement as a joint prime contractor, Brentwood was faced with limited bonding capacity, a shorter construction period, the potential unavailability of subcontractors, limited equipment to perform the work, and the perceived increase of difficulty in the work.

Ref.: Judgment of Supreme Court below, at para. 18, [Record, Vol. I, Tab 2]

40. Even if Brentwood had managed to retain EAC's services as a drilling and blasting subcontractor, the competitive advantage afforded Brentwood by the involvement of EAC as a joint venture would be diminished. As was recognized by Swaine of Brentwood in his May 3 letter, the relationship between Brentwood and EAC was "more than just a contractor, sub-contractor relationship." A joint venture requires the right of mutual control or management of the enterprise. This is one of the fundamental differences between a joint venture partnership and a prime contractor/subcontractor relationship. There is also a question whether EAC would have entertained acting as a subcontractor and if so on what terms. Discussions between Brentwood and EAC resulted in a joint venture for the entire project. It is to be inferred this solved Brentwood's problems and met EAC's requirements. Even if EAC was agreeable to a subcontract arrangement, there was an impediment: clause 5.3(c) of the Instructions to proponents would have to be met. It states:

> It is important to the Ministry that the Contract Pricing Scheme is effective to encourage and facilitate the Alliance Model, and accordingly, the Ministry reserves the right to reject Proposals in which, in the Ministry's judgment, significant portions of the Work are subcontracted. The Ministry requires that most of the Work be subject to the Contract Pricing Scheme as described in this RFP. [Emphasis added.]

Ref.: Request for Proposals, Kinkolith Extension Project, January 15, 2001, [Record Vol. II, Tab 1]
Judgment of Supreme Court below, at paras. 18, 73, 118-119, [Record, Vol. I, Tab 2]

41. By allowing EAC to compete as prime contractor without disclosing this in advance of the RFP submission, Brentwood and EAC were given a competitive advantage over other bidders. They knew all their competitors. The other five bidders did not. This was unfair, in breach of the implied duty of fairness in contract A. Tercon's competitive calculus – the essence

of successful tendering – was for naught when EAC emerged as an accepted joint venture Proponent. As found by the trial judge:

> There can be no doubt that submission of a proposal by a party ineligible to bid constitutes material non-compliance. It goes to the root of the tendering process, the implementation of fair competition. Such a bid is incapable of acceptance.
> …
> From Brentwood's point of view, the joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process. Allowing Brentwood to jointly venture with EAC gave a competitive advantage to Brentwood.

Ref.: Judgment of Supreme Court below, at paras. 73, 116, 126, [Record, Vol. I, Tab 2]

42. In relation to contract A, good faith and fair dealing is required to protect the integrity of the tendering system. This includes full, fair and honest disclosure equally to all bidders in the tender call and during the evaluation and selection stage. Other contractual settings requiring the application of good faith and fair dealing are insurance, employment, franchise and matrimonial.

Ref.: *Fidler v. Sun Life Assurance Co. of Canada,* [2006] 2 S.C.R. 3, [BA, Vol. I, Tab 10];
Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533 (Ont. C.A.), [BA, Vol. 1, Tab 40];
Wallace v. United Grain Growers, [1997] 3 S.C.R. 701, [BA. Vol. 1, Tab 46];
Rick v. Brandsema, 2009 SCC 10, [Supp. BA, Tab 2]

43. Had the Brentwood/EAC proposal been eliminated from contention, as fairly it should have been, Tercon would have been named the most Preferred Proponent, would have entered into contract B, and would ultimately have earned the profit which was awarded as damages at trial.

Ref.: Judgment of Supreme Court below, at para. 165, [Record, Vol. I, Tab 2]

44. The trial judge found that the Ministry's manipulation of the tender process produced a second breach of its contract A with Tercon: breach of an implied duty of fair and equal treatment – "first, it accepted a bid that was incapable of acceptance for non-compliance; second, it treated the plaintiff unfairly in the evaluation process by approving a non-compliant bid as the successful bidder". The trial judge's review of the Ministry's conduct, which she considered breached the duty of fairness it owed to Tercon, is set out at length in her Reasons for Judgment.

Ref.: Judgment of Supreme Court below, at paras. 55, 61-64, 68-70 73, 132-139, 150, [Record, Vol. I, Tab 2]

45. What happened here was that the Ministry set out to use the tendering model of procurement to obtain certain benefits for itself: the bid preparation and competitive pricing from Proponents; the irrevocable tender security posted by them; their obligation, if selected as Preferred Proponent, to increase the security, perform value engineering, and to negotiate the terms of contract B in good faith. It was able to obtain these benefits by promising to Tercon and others that it would limit competition to eligible and compliant bidders and conduct the evaluation according to the RFP terms.

46. Once the bids were received, however, the Ministry abandoned the tendering model and resorted to free bargaining with a tainted bidder. This manipulation of the process was a breach of an implied duty:

> A tendering authority ought not to be entitled to contemporaneously purport to adhere to the tendering model and enjoy the benefits flowing from it and, once the bids have been revealed and are under consideration, to unilaterally implement the contrasting model of free bargaining.
>
> It is my opinion that the duty on the part of the tendering authority not to engage in manipulative bid conduct is captured under the umbrella of the implied duty of fair and equal treatment to bidders. It is a fundamental element of procedural fairness in tendering. I suppose it is conceivable that such a duty is so fundamental to the successful engagement of genuine tendering, that it may even amount to a stand alone implied term of contract A. Either way the result is the same – bid manipulation of the kind I have described is repugnant conduct which has no legitimate place in the proper operation of the tendering paradigm. Of course, like any other implied term, this one would exist only to the extent that it is consistent with the express terms of contract A.

Ref.: *Stanco Projects Ltd. v. HMTQ & Aplin & Martin Consultants Ltd.* (2004), 32 B.C.L.R. (4th) 302 (B.C.S.C.), [Supp. BA, Tab 3]; affirmed 53 B.C.L.R. (4th) 16 (B.C.C.A.), [Supp. BA, Tab 4]

47. The Ministry cites no inconsistency between the implied duty found by the trial judge and the express terms of contract A, such as would engage the principle referred to in the *Stanco* extract above.

48. The Ministry argues (in paragraph 36 of the Respondent's Factum) that if this Court declines to find breach of any express term in contract A, then it may not impose liability for

breach of an implied duty. It cites no authority for this proposition, except that “businesses value certainty above protection”. The suggestion that any owner, not least a provincial government, should be entitled to treat a bidder unfairly and unequally is contrary to all tendering law in Canada since *Ron Engineering* in 1981.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

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B.G.N. McLean
C.R. Armstrong
W.S. McLean
Counsel for the Appellant

TABLE OF AUTHORITIES

at Paras.

Caselaw

Texts