

CANADA / JUDGMENT

Stanco Projects Ltd. v. HMTQ and Aplin & Martin Consultants Ltd.

2006 BCCA 246

COURT

British Columbia Court of Appeal

DECIDED

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2006 BCCA 246 Stanco Projects Ltd. v. HMTQ and Aplin & Martin Consultants Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Stanco Projects Ltd. v. HMTQ and Aplin & Martin Consultants Ltd.,

2006 BCCA 246

Date: 20060517

Docket: CA032232

Between:

Stanco Projects Ltd.

Respondent

(Plaintiff)

And

Her Majesty the Queen in Right of the

Province of British Columbia as represented

by the Ministry of Water, Land and Air Protection

Appellant

(Defendant)

And:

Aplin & Martin Consultants Ltd.

Respondent

(Third Party)

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Braidwood

J.L. Maxwell

Counsel for the Appellant

J.S. Logan

Counsel for the Respondent

Stanco Projects Ltd.

G.S. Miller

W.A.C. Serne

Counsel for the Respondent

Aplin & Martin Consultants Ltd.

Place and Date of Hearing:

Vancouver, British Columbia

September 22, 2005

Place and Date of Judgment:

Vancouver, British Columbia

May 17, 2006

Written Reasons by:

The Honourable Madam Justice Ryan and The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Braidwood

Reasons for Judgment of the Honourable Madam Justice Ryan and the Honourable Madam Justice Newbury:

Introduction

- [1] This is an appeal by Her Majesty the Queen in Right of the Province of British Columbia ("the Province") against the order of Madam Justice Ballance pronounced July 30, 2004 finding the Province liable for damages for breach of contract made between the Province and Stanco Projects Ltd. ("Stanco") after a tendering process. Alternatively, the Province appeals the order of Ballance J. dismissing its third party claim against the engineering firm that conducted the tender for it, Aplin & Martin Consultants Ltd. ("Aplin").

Factual Background

- [2] Sometime in 2000 the Province, through the Ministry of the Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection) began planning to upgrade the water system in Cypress Provincial Park. The upgrade was required to meet the expansion plans of Cypress Bowl Recreation Ltd., which runs the ski operations in the park.
- [3] The planning for the upgrade was handled by BC Parks, a division within the Ministry of Environment, Lands and Parks. (During the course of these reasons we will refer to the appellant interchangeably as "the Ministry", "BC Parks" or "the Province" depending on the context.) Mr. Graham Lorimer was the recreational officer for the Lower Mainland District of BC Parks. He was responsible for construction in the provincial parks in his district. Because BC Parks did not have the expertise or personnel to handle the proposed upgrade it decided to hire an engineering firm to oversee it. To that end BC Parks issued, in June of 2000, a "Request for Proposals" with respect to the Cypress Provincial Park water system upgrade.
- [4] Aplin, a firm of professional engineers, was the successful proponent.
- [5] On July 25, 2000 the Province entered into a contract with Aplin to undertake the project. Among other things the contract, known as the "General Service Contract", provided:

Scope

Undertake detailed investigation of intake/dam to confirm capacity, extraction rate. Investigate various water treatment options and provide detailed design. Provide detailed design, all additional survey requirements, tendering and construction management services for a water system upgrade within Cypress Provincial Park. This will involve the review of existing conditions, review of existing reports, review of domestic water needs, review of fire protection requirements and review of existing approvals. The Project Management required will include the following:

...

Provide tendering services. This may involve up to eight separate contracts.

Tendering and Award

The Consultant shall pre-qualify contractors to expedite the tendering process on behalf of BCP while the detailed design is being completed. It is important that prospective contractors be experienced and proficient in the environmentally sensitive installation of works, within a narrow right of way, over steep mountainous terrain. A proven track record in this kind of project is required. Experience with sedimentation control and erosion control are essential. The Consultant will prepare, distribute tender packages to pre-qualified contractors and recommend award of up to eight Construction Contracts. Consultant will place advertisement(s) in a major Vancouver newspaper for contractor pre-qualification for construction services.

Advertisement(s) costs will be included in the contract. Advertisement(s) will indicate that the Skill Development and Fair Wage Act (SDFWA) apply to the Upgrade of the Cypress Bowl Water System Project for contracts estimated to cost more than \$250,000 dollars.

Tenders shall be requested from pre-qualified firms for the water system construction and repair. The cost of supplying all necessary drawings and contract documents are to be included in the fee proposal. The consultant shall respond to inquiries and issuing of addenda as required throughout the tender period. The Consultant shall provide tender review and award recommendation. Consultant shall co-ordinate and conduct site meeting and be responsible for preparation of the Contract Documents for execution.

Consultant will provide all contract documents and correspondence at the completion of the contract term.

[6] The contract also contained these general provisions:

CONTRACTOR'S OBLIGATIONS

...

3. You must perform the Services to a standard of care, skill and diligence maintained by persons providing, on a commercial basis, services similar to the Services.

...

15. You must indemnify and save harmless us and our employees and agents (each an "Indemnified Person") from any losses, claims, damages, actions, causes of action, costs and expenses that an Indemnified Person may sustain, incur, suffer or be put to at any time, either before or after this agreement ends, which are based upon, arise out of or occur, directly or indirectly, by reason of, any act or omission by you or by any of your agents, employees, officers, directors, or subcontractors in providing the Services, except liability arising out of any independent negligent act by us.

GENERAL

28. You are an independent contractor and not our employee, agent, or partner.

- [7] The Ministry of Environment, Lands and Parks had produced a Contract Administration Manual which contained the Ministry's policies, procedures and guidelines in relation to the preparation and management of its contracts. This manual was used by BC Parks as a guide in hiring Aplin, but it was not given to Aplin for use in its tendering process. Mr. Lorimer explained that BC Parks expected Aplin to provide services based on the current industry standard of professional engineers pursuant to clause 3 of the General Service Contract, *supra*. The content of the manual was a major focus of the plaintiff and was mentioned extensively in the reasons for judgment of the trial judge.
- [8] Mr. Casidy, an engineer with Aplin, proceeded to draft the tender documents for the proposed water reservoirs or tanks. He made revisions to the tender documents based on comments from Mr. Lorimer and Mr. Healy of Cypress Bowl Recreation Ltd. It seems that Mr. Healy was kept apprised of the process because, pursuant to its contract with the Province, Mr. Healy's employer was to contribute to the cost of the reservoir upgrade.
- [9] On May 31, 2001 Aplin provided tender documents for the proposed water reservoirs (referred to by the parties as "tanks") to the bidders. The bidders included Stanco Projects Ltd., Westport Construction Group Inc. and Trittech Industries Ltd.
- [10] The portion of the tender documents, entitled "Instructions to Bidders", stipulated tenders were to be filed with Aplin no later than June 13, 2001. The bids would be irrevocable for 60 days. Paragraph 24 of the instructions to bidders asserted that the owner (the Province) reserved the right to reject any or all bids and would not necessarily award the contract to the lowest bidder. It also stated that the owner would not be held liable for any costs incurred by the bidders if the contract were awarded to other than the lowest bidder or to no bidder at all. This has come to be known as the "privilege clause". We will return to it later in these reasons.
- [11] A key component of the tender package was "Appendix C to Bid" ("Appendix C"). It required the bidders to provide a price for one glass-fused-to-steel Alpine tank and the price for one glass-fused-to-steel Nordic tank plus a combined price for the two glass-fused-to-steel tanks. It is important to note here that the Alpine tank and the Nordic tank were to be of different proportions. Appendix C also requested the price saving if there were two epoxy-coated tanks rather than two glass-fused-to-steel tanks.
- [12] On June 4, 2001, at a mandatory site meeting, the bidders were told that due to budget constraints the Province might decide to build only one reservoir or tank. The bidders were not advised which one.
- [13] As a result of this new information Aplin prepared a draft "Addendum No. 1" which made changes to Appendix C. In its final form Addendum No. 1 read in part as follows:

1. Appendix C of the Form of Bid has been modified and a revised copy is enclosed. The contractor is to provide a price for the reservoirs based on the reservoirs being constructed individually and separately. A credit is to be provided at the bottom of "Appendix C" for any cost saving associated with constructing the two reservoirs at the same time under one Contract.

[14] Thereafter followed a number of changes to the tender requirements. We have not reproduced them because they are irrelevant to the issues on this appeal.

[15] Addendum No. 1 concluded with an area entitled "Schedule of Prices". It required bidders to set out the prices for various components first of the Alpine tank, and second of the Nordic tank.

[16] The Schedule of Prices ended with these clauses:

A price savings of \$____ would be realized if epoxy-coated steel tanks are supplied and installed in lieu of the glass-fused-to-steel tanks, for a Total Lump Sum Contract Price of \$____.

Due to budget constraints, the owner may decide only to construct a reservoir in either the Alpine Area or in the Nordic Area, but not both. The above noted Lump Sum Prices assume that only one Reservoir will be constructed. If there is sufficient budget available, a price savings of \$____ would be realized if both Reservoirs are included in one Contract. (Appeal Book Vol. 7 p. 1287-1290.)

[17] This Addendum was released to the bidders on June 5, 2001.

[18] The tender package and Addenda did not require the bidders to provide a separate price for an epoxy-coated Alpine tank nor a separate price for an epoxy-coated Nordic tank.

[19] After a second Addendum was issued by Aplin the tender period was extended to June 20, 2001. On that date Aplin publicly opened the bids of four companies. Stanco was the low bidder on the two glass-fused-to-steel tanks and on the two epoxy-coated tanks.

[20] Probably because Appendix C did not specifically set it out in the Schedule of Prices none of the bids provided a price for a single epoxy-coated tank. This oversight only became apparent to Aplin after the bids were opened.

[21] Shortly after the bids were opened Mr. Lorimer confirmed with Mr. Casidy that the Province had made the decision to proceed with a single epoxy-coated tank in the Alpine area of the park. Mr. Casidy told Mr. Lorimer that he would contact Stanco to obtain a price for the single tank. Mr. Lorimer agreed to this approach.

[22] Mr. Casidy made the request of Stanco by fax on June 21, 2001. He closed the communication with these words:

I will forward letter recommending the award of the contract to Stanco subject to their adjusted price and also confirmation of the adequacy of their proposed tank.

- [23] On the same day, this time without the knowledge of Mr. Lorimer, Mr. Casidy made the same request of Westport and Trittech. Westport replied very soon thereafter with a fax stating that their price would be \$365,000.
- [24] On June 22, 2001 Mr. McDonald, a Stanco representative, advised Aplin that their price would be \$385,000. He testified that he would not have done this if he had known that Aplin was soliciting prices from the other bidders. He said that he understood that the Province would ultimately award it the contract as low bidder, and that Stanco was being asked to discuss a potential change in the work from two tanks to one. He believed that the change would be formalized on the award of the contract.
- [25] The Stanco price was forwarded to Mr. Lorimer the same day by Mr. Casidy with his comment that "the price seems a little high in relation to the credit given for the two tanks in their tender." In addition Mr. Casidy mistakenly circled specifications in the attachment which showed that the thickness of the exterior coating was only 3 mm. rather than the 8.5 mm. required in the tender package. As it turned out, it was neither. The Stanco price was based on a "System 4" coating of 7 mm.
- [26] On June 29, 2001 Mr. Casidy informed Stanco that Aplin was disappointed with Stanco's price and asked it to look at what Aplin termed "discrepancies" between the latest price and what was in the original bid. Aplin wrote to Stanco:

Even if we were to assume that the cost savings were split 50/50 between the Alpine area and the Nordic area the revised cost for the Alpine Reservoir should be \$369,875. We would like to remind you that your total lump sum price for the epoxy-coated tanks of \$678,750 was based on the tanks being constructed under two separate contracts. Please review this apparent discrepancy as soon as possible.

- [27] On July 11, 2001 Trittech notified Aplin that its price for the single epoxy-coated tank would be \$400,000.
- [28] Once Aplin had prices from three of the four bidders, Mr. Casidy said that he discussed the matter with other members of the company. They realized that they were in a "difficult situation." Someone suggested that they send an "offer of credit" to each of the four bidders requesting them to complete a document setting out the price of the single epoxy-coated tank. "Offer of credit" is not a term of art in the tendering context. It was something thought up by Aplin. Mr. Casidy testified that this approach had been used by the company in the past.
- [29] It was Mr. Lorimer's evidence that once the bids were in he realized the need for the bidders to clarify what the cost of a single epoxy tank would be if a contract were awarded to them. He did not know that Aplin had faxed the "offer of credit" to all the bidders. He said that he relied on Aplin and accepted that approach because he thought that Aplin had the expertise and experience to know what it was doing.

- [30] On July 12, 2001 Mr. McDonald telephoned Mr. Casidy. He asked if Aplin was sending the same "offer of credit" to the other tenderers. Mr. Casidy told Mr. McDonald that he was not speaking to the other bidders. Mr. McDonald advised Mr. Casidy that if Stanco were awarded the contract, it would be flexible on its price for the single epoxy-coated tank if the scope of the work was reduced.
- [31] All the bidders, except Stanco, completed and returned the "offer of credit".
- [32] On July 16, 2001 Aplin sent a fax to Stanco advising them that for Stanco to remain in contention to be recommended for the project, Aplin recommended that the company re-evaluate their stance on the issue. After receiving the fax Mr. McDonald spoke on the telephone the next day to Mr. Wridgway, who was standing in for Mr. Casidy while on vacation. Mr. McDonald reiterated to Mr. Wridgway that Stanco was willing to explore changing the scope of the work to accommodate the Province if it was awarded the contract. It was during this conversation that Mr. McDonald learned that prices for a single epoxy-coated tank had been elicited from Westport and Tritech.
- [33] Stanco refused to participate any further in the process and declined to submit the "offer of credit" for the single epoxy-coated tank.
- [34] On July 20, 2001 Aplin sent a lengthy reporting letter to BC Parks recommending that Westport, the lowest bidder for the single epoxy-coated tank, be awarded the contract. The letter advised BC Parks of its dealings with Stanco and Westport before it sent out the "offer of credit". It also reported Stanco's willingness to reduce its \$385,000 price if it was awarded the contract.
- [35] On July 23, 2001 Mr. Lorimer sent Aplin's reporting letter to his superiors at BC Parks. He noted that the tendering process was "unusual". He set out his own summary of events, and ultimately endorsed Aplin's recommendation. His summary said:

Original tenders received were for two tanks with glass fused linings. The tender documents included a credit if an epoxy lining was selected. The credit was for both tanks and did not identify the credit if only one tank was constructed. We approached the contractor with the low tender and asked them to break out the credit for the Alpine tank. The credit issued for the one tank was not proportional to the relative tank sizes. I asked the engineer to request justification for this discrepancy. The company's explanation did not satisfy our consultant, [Cypress Bowl Recreation Ltd.] or me. We then went to the [sic] all companies that submitted tenders and requested that they break out their credit for the Alpine tank. The company with the low tender initially chose not the [sic] respond. The company with the lowest price for installation of the Alpine tank based on the credit for the one tank was the firm that had submitted the second lowest tender for the installation of the two tanks. It should be noted that their amended price was \$11,607 lower than the proportional amount based on our calculations. (i.e. credit rather than [sic] penalty for choosing to install the one tank). Please note that the company that submitted the initial low tender is not pleased at all with the fact that we are questioning their credit for the one tank and the fact that based on this concern have requested that the other company submit

their credit for the Alpine tank. I would like to request that our engineers proceed with preparation of the contract documents and award the contract to Westport Construction Group for an amount of \$365,000. [Bold in original.]

[36] On July 30, 2001 the Ministry told Aplin to award the contract to Westport for \$365,000.

[37] On July 31, 2001 Aplin wrote to Westport awarding the contract to them for the single epoxy-coated tank. It wrote as well to Stanco and the other bidders advising them that the contract for the tank had been awarded to Westport. The bid bonds were returned to the bidders at the same time.

The Reasons for Judgment

[38] The trial judge issued lengthy reasons in this case. Relatively few of the facts were contested. The trial judge was left to resolve the legal issues raised in the case on the basis of her assessment of the facts before her and the inferences she drew from them. The trial judge made a number of findings. We will refer only to those findings which are necessary to the resolution of this appeal.

[39] After referring to several leading cases in the area of tendering law, the trial judge stated her conclusion that a Contract A had been formed when Stanco tendered a compliant bid within the terms of the tender package. She concluded that the Province had breached Contract A when, instead of awarding Contract B to Stanco and negotiating for changes, its agent, Aplin, solicited price requests from the other bidders. The trial judge concluded that the "offer of credit" request sent out to all the bidders enabled the other tenderers effectively to re-bid the Alpine tank work with full knowledge of Stanco's lowest tender price. As the trial judge said, "they were given the opportunity to undercut Stanco". She concluded:

In all the circumstances of this case, I find that Stanco's bid was being used as a bargaining tool in the post-closing tender period with a view of obtaining a better price for the one tank work. The prospect of constructing just one reservoir had been known by all after the mandatory site meeting and before the close of tenders. Although Aplin & Martin had concerns about the process, they were not able to resist the temptation of attempting to obtain lower prices through its use. Nor could the Ministry resist.

I conclude that the after-tender closing conduct engaged in by the Ministry amounted to bid manipulation and was patently unfair and in breach of the Ministry's implied duty to act fairly under Contract A. [Paras. 130-131.]

[40] After setting out her award of damages, the trial judge turned to the Province's claim of contribution and/or indemnity from Aplin. The trial judge dismissed the Province's claim that Aplin had breached the General Service Contract in its pre-closing tender conduct, as "little more than misguided quibbling". However, she found that Aplin had breached its contract with the Ministry in its post-tender conduct. She said:

I am prepared to find, as a matter of commonsense and without the need for expert evidence about an engineering firm's standard of care, that Aplin & Martin's post-closing telephone price solicitation from Westport and Trittech amounts to a breach of the Service Contract and its duty of care. It was plainly wrong and Mr. Casidy knew so. [Para. 153.]

[41] Having found negligence and breach of contract, the trial judge continued:

However, the Ministry must not only establish that what Aplin & Martin did or omitted to do was negligent (including negligent misrepresentation) or constituted a breach of contract, it must further show that such acts or omissions brought about the loss suffered by the Ministry in order for such loss to be recoverable.

[42] The trial judge concluded:

I find it [the Province] has failed to establish it in this case. The Ministry is an experienced party in tendering, has experienced personnel in the persons of [Mr. Lorimer and his superiors] has and used internal legal expertise, has formulated a detailed Contract Administration Manual governing tenders and was in possession of the essential facts necessary to decide for itself whether to proceed with the award of the contract to Westport in the face of the [sic] Stanco's strenuous opposition. Its claim of reliance on Aplin & Martin simply does not ring true. In my opinion, once the Ministry had been reasonably informed of the surrounding material circumstances and chose to evaluate the situation for itself, any reliance which it might have placed upon Aplin & Martin's acts, omissions or statements up until that point in relation to the entirety of the post-closing affairs, became superseded by the Ministry's own informed and self-reliant action and decision. The bottom line is that the Ministry was driven by the bottom line.

[43] Finally, the trial judge said this:

The establishment of a causal linkage between breach and loss is vital as well in relation to triggering the indemnity provision contained in the Service Contract in favour of the Ministry. That provision contemplates that as a pre-requisite to indemnification, the loss, damage, costs, etc. sustained by the Ministry must be based upon, arise out of or occur directly or indirectly by reason of any act or omission by Aplin & Martin. That basis has not been established. [Para. 154.]

The Grounds of Appeal

[44] The Province appeals on these grounds:

1. The learned trial judge erred in finding that the Province breached Contract A between the Province and Stanco. (Three errors are alleged under this ground).
2. Alternatively that the learned trial judge erred in finding that the Province was vicariously liable for the conduct of Aplin.
3. The learned trial judge erred in dismissing the Province's third party claim against Aplin.

[45] Shortly after the commencement of the oral hearing of this appeal, counsel for the Province, properly we believe, abandoned a ground of appeal that alleged that Stanco had not tendered a compliant bid.

[46] We will turn now to the first ground of appeal.

Did the Province breach Contract A?

[47] The trial judge found that the Province breached Contract A with Stanco in engaging in post-tender conduct which amounted to bid manipulation.

[48] Counsel for the Province acknowledged that one of the terms of any Contract A is an implied duty of fairness, and that the implied contractual duty to treat all bidders fairly and equally includes being "fair and consistent in the assessment of the tender bids." (Martel Building Ltd. v. Canada [2000] 2 S.C.R. 860, [2000] S.C.J. No. 60 (Q.L.) at paras. 85, 88.)

[49] It was the position of counsel, however, that any implied duty of fairness must be defined with due consideration to the express contractual terms of the tender, particularly any privilege clause.

[50] In the case at bar paragraph 24 of the instructions to bidders provided:

Basis of Award

The Owner reserves the right to reject any Bids and will not necessarily award the Contract to the lowest Bidder. Aplin & Martin Consultants Ltd. will notify the successful Bidder, in writing, of the acceptance of his Bid and Aplin & Martin Consultants will prepare the Agreement for signature by both parties.

The Owner shall not be held liable for any costs incurred by Bidders if the Contract is awarded to other than the lowest Bidder or to none of the Bidders.

[51] The Province says that this "privilege clause" was a clear and unequivocal warning that the Province was under no obligation to award the contract to any bidder, and that it cannot be held liable because it did not.

[52] The privilege clause in question here has been referred to in other cases as a "bare bones" privilege clause. In Martel, supra, Justices Iacobucci and Major noted, at para. 89 that, "[a] privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly". The tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment.

[53] The trial judge did not find that the Province had breached its duty by failing to award the contract to the lowest bidder. She found that the Province had breached its duty to treat all bidders fairly when Westport, having learned of Stanco's bid prices, was permitted to undercut Stanco and re-bid the contract. There was nothing in the tendering document which would permit the Province to engage in post-closing negotiations or to treat bidders unequally or unfairly.

[54] We would not accede to this ground of appeal.

[55] Next, the Province submits that the trial judge "erred in finding that bid-shopping was in its essence the act of negotiation". The passage to which he objects is found in the judge's overview of the law at the beginning of her analysis of the issues raised in the case. At one point in her discussion the trial judge said this:

Although the decision in M.J.B. did not examine bid-shopping, the Court did indicate that negotiation (and bid-shopping is, in its essence, the act of negotiation) has no place in the true tendering system, at least while the tendering authority is still evaluating the bids and determining the successful tenderer. [Para. 95.]

[56] Counsel for the Province submitted that the reality of commercial activity is that not all tenders and not all bids will be perfect all of the time, and accordingly one must recognize that there will be situations where there are flaws in the tender or flaws in the bids which necessitate negotiations between the owner and bidders after the tender opening. He submitted that the trial judge's definition of bid-shopping does not accord with the descriptions of bid-shopping established by other legal authorities.

[57] It is unnecessary to examine the issue raised by the Province in further detail. The breach of contract found by the trial judge did not turn on whether she correctly labeled the activity in question as bid-shopping or not. The trial judge explained it this way:

I concur with Justice Gruchy's view [in *Western Plumbing and Heating Ltd. v. Industrial Boiler-Tech Inc.* (2000) 48 C.L.R. (2d) 82, 1780 N.S.R. (2d) 41 (N.S.S.C.)] that the term "bid shopping" should be given an expansive interpretation so as to encompass conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol. [Para. 100.]

[58] The trial judge summed up her views as follows:

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. [Para. 103.]

[59] At the end of the day the trial judge found that the conduct in which Aplin engaged after the bids were open breached the implied duty of fair and equal treatment to bidders. She found that Stanco had been dealt with unfairly. Whether Aplin's conduct should have been characterized as "bid manipulation", it was that conduct that constituted the breach.

[60] We would not give effect to this ground of appeal.

[61] Next, the Province complains that the trial judge "erred in finding that Aplin's communications with Westport and Trittech about the price for a single epoxy tank and Aplin's use of the offer of credit constituted "bid-shopping"."

[62] The argument of the Province on this point turns on its contention that once the appellant had decided to proceed with the single epoxy-coated tank for which none of the bidders had provided a price, the parties knowingly entered into negotiations and intended to terminate Contract A through the commencement of the negotiations.

[63] In our view this contention cannot be sustained. As counsel for Stanco has noted, there was evidence before the trial judge that Stanco participated in a discussion about the price of a single epoxy-coated tank only because it understood, from what Aplin told them, that they were talking about a pricing change order that would be made following the award of Contract B to Stanco. Once Stanco became aware that Aplin was asking all bidders to bid on one epoxy tank, it refused to participate.

[64] We would not characterize the parties' conduct after the opening of the bids as constituting negotiations for a single epoxy-coated tank. We are of the view that there was evidence to support the conclusion of the trial judge, whether or not Aplin could be correctly described as "bid-shopping."

[65] We would not accede to this ground of appeal.

The Province's Claim for Indemnity or Contribution

[66] In its alternative argument, the Province submitted that the trial judge erred in finding the Province vicariously liable for Aplin's conduct. Counsel for the Province submits that by virtue of its contract with the government, Aplin was an independent contractor and that such a relationship rarely gives rise to vicarious liability. However, even if one assumed that Aplin was not acting as the Ministry's agent in its dealings with Stanco and the other bidders that does not resolve the claim for indemnification or contribution made by the Ministry on the strength of clause 15 of the General Service Contract.

- [67] There is no question that having been hired by the Ministry to provide detailed design, tendering and construction management services for the project, and to "prepare, distribute tender packages to pre-qualified contractors and recommend an award of up to eight construction contracts", Aplin was bound by contract and by tort law to provide advice to a standard of "care, skill and diligence" reasonably expected of professional engineering consultants. Consistent with this, Aplin bound itself to indemnify the Ministry in respect of any loss or claim which arose "directly or indirectly by reason of any act or omission by [Aplin] or by any of [its] agents, employees, officers, directors or sub-contractors" in providing these services, but excluding liability "arising out of any independent act" of the Ministry.
- [68] We have already mentioned various errors which the trial judge found Aplin had committed in its dealings with the bidders and the Ministry. First, the tender package and addendum did not require the bidders to provide a separate price for an epoxy-coated Alpine tank nor a separate price for an epoxy-coated Nordic tank. As a result, none of the bids provided a price for a single epoxy-coated tank - an oversight that became apparent to Aplin only after the bids were opened. Mr. Casidy then told Mr. Lorimer he would contact Stanco to obtain a price for the single tank. However, he also contacted Westport and Trittech - without Mr. Lorimer's prior approval or knowledge.
- [69] These initial errors clearly led, in our view, to the unravelling of the entire bid process. Stanco was allowed to assume that it would be awarded the contract as low bidder, and apparently in this belief, provided Aplin with the \$385,000 price for the single tank. When Mr. Casidy forwarded the Stanco price to Mr. Lorimer, he undercut this assumption, commenting that the price seemed high. In addition, he made an error concerning the required thickness of the exterior coating for the tank. Next, he asked Stanco to look at "discrepancies" between its latest price and that in the original bid. At that point, Mr. Casidy crossed the line between making a legitimate inquiry of a party who for all intents and purposes would be awarded the bid, and the series of manoeuvres which the trial judge called "bid manipulation". Recognizing the "difficult" situation in which the Ministry had been placed, Aplin then suggested using the "offer of credit" stratagem to elicit prices from each of the four bidders. Mr. Lorimer testified that he did not know Aplin had faxed the "offer of credit" to the bidders. He relied on Aplin's expertise to know what it was doing.
- [70] Then followed yet another "error" on the part of Aplin, when Mr. Casidy told Mr. McDonald that he was not speaking to the other bidders, when in fact he was. It was only after this point that the Ministry realized discussions with the other bidders had taken place. Finally, Aplin in its reporting letter to the Ministry in July, recommended that Westport be awarded the contract, and the Ministry took that advice.

- [71] The trial judge found that Aplin's failure to request a separate price for a single epoxy-coated tank was an "unfortunate oversight", but did not fall below the applicable standard of care. Similarly, she found that although Aplin had contributed to "some initial confusion" on the Ministry's part regarding the coating thickness, it would have been readily apparent on a reading of Stanco's attachment that the thickness proposed by Stanco was 7 mm. Overall, she said, "Mr. Lorimer did not turn his mind to the coating thickness one way or the other."
- [72] With respect to the more serious matter of the discussions between Aplin and the bidders in July, the trial judge reasoned as follows:

By early to mid-July 2001, it was clear to Mr. Lorimer that the Ministry and Stanco were at an impasse in relation to the price for the epoxy Alpine tank. Although he did not then know that Mr. Casidy had also obtained prices from Westport and Trittech, or that Stanco had let it be known to Aplin & Martin that it was prepared to reduce its price quote if it was awarded Contract B and the scope of the work were altered, I am not satisfied on the preponderance of the evidence that had Mr. Lorimer been aware of those matters the Ministry would have comported itself in a different manner. Specifically, I am not persuaded that had the Ministry been so apprised it would have awarded Contract B to Stanco at that stage and opted out of the Offer of Credit process.

Aplin & Martin's July 20, 2001 recommendation letter, although not comprehensive, explicitly reported on a number of material events which had transpired post-closing. It made clear that Aplin & Martin had solicited a price from Westport prior to the Offer of Credit; that Stanco was prepared to take steps to reduce its price provided it was awarded Contract B; that Stanco had refused to complete the Offer of Credit and considered the Ministry and Aplin & Martin to be treading on "dangerous ground"; and, that Westport's bid was lower than its pro-rata price (it was self-evident that its bid was lower than Stanco's pro-rata price also). [Paras. 150-151.]

The trial judge emphasized that Aplin's reporting letter referred explicitly to all that had happened post-closing but that nevertheless, Mr. Lorimer endorsed its recommendation in favour of Westport. Mr. McDonald of Stanco then "expanded" the "Ministry's awareness of the pertinent circumstances even further" and the Ministry put matters on hold for two weeks to obtain legal advice. According to the trial judge, the only relevant matter the Ministry may not have known about by this time was that Aplin had solicited a price from Trittech before it had circulated the so-called offer of credit. She found, however, that nothing turned on this lack of knowledge.

- [73] The trial judge did find that "as a matter of common sense and without the need for expert evidence about an engineering firm's standard of care" Aplin's solicitations of Westport and Trittech amounted to a breach of its contract with the Ministry and of its duty of care. In her words, "It was plainly wrong and Mr. Casidy knew so." However, she (correctly) stated, "The Ministry was required not only to prove breach of the standard of care but that what Aplin did or failed to do brought about the loss suffered by the Ministry - i.e. its liability to Stanco for the breach of Contract A, the quantum of which was found by the trial judge to lie

somewhere between \$91,766 and \$111,766, plus interest and costs. The crux of her reasoning on causation was as follows:

That [causal] connection is an essential ingredient in the Ministry's claim against Aplin & Martin and I find it has failed to establish it in this case. The Ministry is an experienced party in tendering, has experienced personnel in the persons of Messrs. Lorimer, Lampard and Peterson, has and used internal legal expertise, has formulated a detailed Contract Administration Manual governing tenders and was in possession of the essential facts necessary to decide for itself whether to proceed with the award of the contract to Westport in the face of the Stanco's strenuous opposition. Its claim of reliance on Aplin & Martin simply does not ring true. In my opinion, once the Ministry had been reasonably informed of the surrounding material circumstances and chose to evaluate the situation for itself, any reliance which it might have placed upon Aplin & Martin's acts, omissions or statements up until that point in relation to the entirety of the post-closing affairs, became superseded by the Ministry's own informed and self-reliant action and decision. The bottom line is that the Ministry was driven by the bottom line. As Mr. Lorimer put it at trial, when presented with the two prices of \$365,000 and \$385,000, the choice "was a no-brainer". He added, "if you can get a tank for \$365,000, then you are going to go with it." [Para. 153; emphasis added.]

She concluded that the Ministry had failed to show that its loss or damage had occurred directly or indirectly by reason of any act or omission of Aplin.

[74] In our view, this reasoning ignores the fact that it was Aplin's negligence that placed the Ministry in the situation in which it was presented with a choice between the two prices and, not surprisingly, chose the cheaper one. If Aplin had written the bid so as to elicit a separate price for an epoxy-coated tank, if Mr. Casidy had not contacted Westport and Trittech after telling Mr. Lorimer he would contact Stanco, if he had not asked Stanco to reconsider its revised price, if Aplin had not come up with the idea of an "offer of credit", and if Mr. Casidy had not misspoken to Mr. McDonald about his communication with other bidders, the Ministry's situation would have been very different in mid-July. Indeed, it is difficult not to conclude that the bid process would have proceeded without incident and that the Ministry would simply have chosen the best bid without further discussion, avoiding all the post-tender activity that ultimately led the trial judge to conclude that the duty of fairness owed by the Ministry to Stanco was breached. It is that breach of duty for which damages were awarded - not Stanco's loss of Contract B per se.

[75] With respect, it seems to us that the judge's reasoning quoted above is tantamount to the application of the doctrine of "last clear chance", which was long ago discarded in favour of the broader approach to causation exemplified by cases such as *McGhee v. National Coal Board* [1972] 3 All E.R. 1008 (H.L.) and in Canada by *Athey v. Leonati* [1996] 3 S.C.R. 458. Under this approach, the general test for causation is the "but for" test. Since it may not be workable in some situations, courts also recognize that causation is established "where the defendant's negligence 'materially contributed' to the occurrence of the injury". (*Athey*, at paras. 14-15.) Thus the existence of various contributing causes does not negate the liability

of a negligent actor, as s. 8 of the Negligence Act, R.S.B.C. 1996, c. 333 makes clear. In the words of Major J. in *Athey*:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

This proposition has long been established in the jurisprudence Lord Reid stated in *McGhee v. National Coal Board*, *supra*, at p. 1010:

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, *supra*, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm [Paras. 17-19; emphasis added.]

[76] In the case at bar, while it is true that it was the Ministry's decision to award the contract to a bidder other than Stanco, Aplin contributed materially to the breach of the duty of fairness owed by the Ministry to Stanco. The Ministry's decision was the culminating event of the process - but not the only contributing cause. Contrary to the trial judge's suggestion, the Ministry's expertise concerning the tendering process should not operate to shield the consultant from its share of responsibility in the matter.

[77] Several questions then arise, including the effect of clause 15 of the General Service Contract (quoted above at para. 6) and the exception it contains; whether the Ministry can claim contribution or indemnity from Aplin for all or part of its loss (i.e. the liability to Stanco for breach of contract) when the Ministry also failed to take reasonable care in the circumstances; and if so, whether the Negligence Act or the common law applies to limit the proportion of Aplin's liability. (In this regard, we note this court's decision in *Crown West Steel Fabricators v. Capri Insurance Services Ltd.* 2002 BCCA 417, and *Doiron v. Caisse Populaire d'Inkerman Ltee.* (1985) 17 D.L.R. (4th) 660.) Unfortunately, we did not receive extensive argument on any of these questions and are reluctant to reach conclusions on them without such argument.

[78] We therefore request that counsel make written submissions to us at their early convenience. We assume counsel will be able to agree on a timetable but if they cannot, they may seek directions through the registrar.

[79] In the meantime, we would dismiss the appeal insofar as it relates to the finding of liability on the part of the Ministry to the plaintiff. We would also defer the issue of costs until the appeal has been entirely disposed of.

"The Honourable Madam Justice Ryan"

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Braidwood"

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