IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways),*** 2006 BCSC 499

Date: 20060327
Docket: S020132
Registry: Vancouver

Between:

Tercon Contractors Ltd.

Plaintiff

And

Her Majesty The Queen In Right Of The Province Of British Columbia, By Her Ministry of Transportation and Highways

Defendant

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

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Date and Place of Trial/Hearing:	November 1-5, 15-19, 22-26, 2004 November 29-30, 2004 December 2 & 3, 6-10, 13-15, 2004 February 14-17, 2005 June 13-17, 2005 August 2-3, 2005 Vancouver, B.C.

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A. Introduction

[1] The plaintiff, Tercon Contractors Ltd. ("Tercon"), seeks to recover damages from Her Majesty the Queen in Right of British Columbia, by her Ministry of Transportation and Highways (the "Ministry"), for failure to reject the first ranked proposal from Brentwood Enterprises Ltd. ("Brentwood") allegedly contrary to a request for proposals ("RFP") formally issued on January 15, 2001, which was for the construction of 25 kilometres of highway in the Nass Valley of British Columbia from Greenville to Kincolith. The plaintiff alleges that the RFP formed a contract which was breached when the contract was awarded to a joint enterprise between Brentwood and Emil Anderson Construction Co. ("EAC"). Tercon asserts that if the Ministry had complied with the terms of the contract, the plaintiff would have been ranked first and would have been awarded the contract. It seeks damages based upon the revenue that Tercon would have received had it performed the contract, less its costs of performing the work.

[2] The Ministry has denied that a contract existed with Tercon; but, if it did, that Brentwood never formed a joint enterprise and that Tercon was treated fairly. Further, the Ministry says that Tercon's proposal did not comply with the terms of the RFP and that its claim is barred by an express limitation of liability clause. Finally, the Ministry says that Tercon would not have been awarded the contract, or its damages are either nominal or should be substantially discounted.

B. Facts

1. Development of the Kincolith Extension Project

[3] Kincolith traditionally was the most important village of the Nisga'a people, situate at the mouth of the Nass River along the coast of British Columbia. It was accessible only by float plane or ferry from Prince Rupert. Over the years, it had fallen into decline as it was eclipsed by other villages that were accessible by road. After many years of negotiations, the federal and provincial governments and the Nisga'a had agreed to jointly fund the construction of a 25 kilometre, two lane gravel highway from Greenville to Kincolith. The Kincolith Extension Project was an extremely challenging project through the Nass River estuary and alongside cliffs overlooking the river. The federal government contributed $10 million to the project. In April 1996, the provincial government executed a funding agreement with the British Columbia Transportation Funding Authority ("BCTFA") for its share of the funds for the project. The Nisga'a was unable to procure its share of the funding and the project was delayed while alternate arrangements were made for the Nisga'a contribution. The budget for the project was tight because the Nisga'a bore the ultimate risk of cost overruns pursuant to its agreement with the BCTFA. Keeping the cost within budget was of paramount importance, a significant factor that led to a unique construction contract in the end.

[4] On February 4, 1999, the BCTFA and representatives of the Nisga'a agreed in principle to development of the Kincolith Highway ("Principles of Agreement"). The project costs could not exceed $34 million. The BCTFA assumed financial management and the Ministry of Transportation and Highways ("MOTH") was the delivery agent for the project. Construction was to be completed within four years of the date of the Principles of Agreement.

[5] On February 9, 2000, the Ministry issued a Request for Expressions of Interest ("RFEI") based on a design-build model wherein the contractor designed and built the highway for a fixed price. The RFEI anticipated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents for the project which was estimated to take as much as three construction seasons. Each team was to provide a description of the legal structure of the team, for example a partnership or joint venture, and to describe the role of each team member as a partner, joint venturer, consultant, or subcontractor as the case might be. The extent of involvement of each team member as a percentage of the total scope of the project was also to be provided. An organization chart was to indicate

the role of each team member. Any change in team management, principal, legal or key positions required notice in writing to the Ministry which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

[6] Submissions were received from six teams including Tercon/Surespan and Brentwood. The evaluation panel and independent review recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was not included in the short list and had been evaluated fifth. EAC had not participated at all and was not one of the six original respondents. The results of the evaluation were not communicated because the Ministry changed course.

[7] On July 7, 2000, the Ministry invited all six RFEI respondents to a meeting at which time it was outlined that the Ministry had changed the delivery strategy for the project. The Ministry now intended to design the project and would issue a RFP for an "alliance" contract with the Ministry. All six original respondents to the RFEI were now to be eligible to submit proposals. Although the "alliance" concept was modeled on an Australian model that was described in literature handed out at the meeting, there were significant differences in the model proposed for the Kincolith Extension Project. Within the "alliance" model proposed by the Ministry, and unlike the Australian alliance model, the preferred proponent was not to be chosen arbitrarily by the owners but was to be decided by competition based primarily on price, followed by negotiation of a contract based on the "alliance" model. A key aspect of the Australian alliance model was that everyone involved in the project was to win or lose together depending on how actual outcomes compared with pre-agreed targets in cost and performance areas. But, under the proposed modified "alliance" model, the contractor was to assume all of the risk of a cost overrun after a certain point because of the financial limitations of the Nisga'a. The formula called for the proponent to present a total proposal price which was a significant component of the total target price. In consideration of contingencies, the owners agreed to contribute a contingency amount of $1 million as the "price adjustment for risk" above the total proposal price for cost overruns. After that, the owners and the proponent would share cost overruns up to $2 million on a 50/50 basis. Once that mark was reached, any risk was the sole responsibility of the contractor and the contractor would not be compensated for any further cost overrun. The Ministry invited responses to this idea. Tercon responded. Brentwood did not.

[8] On October 19, 2000, the Ministry gave approval for this alternative contracting process to provide competitively established costs for performance of the project pursuant to subsection 23(c) of the ***Ministry of Transportation and Highways Act***, R.S.B.C. 1996, c. 311. At that time, it was established that "only those firms who are shortlisted as a result of the RFEI evaluation will be eligible to submit proposals to the Project". Without this approval, it would have been obligatory to invite tenders by public advertisement and award to the lowest tender. Notwithstanding the approval for only those shortlisted to submit proposals, the June 28, 2000, agreement between the Nisga'a, the Ministry, and the BCTFA called for the major contract to be selected from the six "teams" that had responded to the RFEI, all of whom had been found capable to perform the contract.

[9] The Ministry's internal estimates for funding in April 2000 established maximum available funding of $35.2 million. Fixed internal costs (the "other alliance participants fixed costs") of $8.7 million left $26.47 million within the construction budget, including a $2 million risk/contingency allocation.

[10] In December 2000, an independent estimate based on estimated quantities was released to proponents by the Ministry, along with Ministry estimates. The independent estimate, corrected to include bridges, was $26,935,166 with a 10% contingency and the Ministry estimate was $25,241,000 with a 15% contingency. The project was budgeted at $25 million for the design/build contract with an overall budget of $30 million including certain monies already spent. This was revised in January 2001 so that the Ministry's project team operated on the premise that maximum available funding was $33.2 million.

[11] The Ministry formally issued its RFP on January 15, 2001, to the six original respondents to the RFEI. The letter to each respondent from the Project Director, Tom Tasaka ("Tasaka") of Pacific Laicom, "...confirmed [the] firm's eligibility to submit a proposal to undertake the Kincolith Extension Project". Proposals were to be submitted by February 27, 2001. Among other things, proponents were required to complete Part A and Parts B1 and B2 of the Schedule of Prices to come up with a total proposal price. Part A, Fixed Prices, was to include fixed lump sum prices of no less than $6 million which was to include profit, corporate overhead, management fees, administration costs and other related costs. Part B1, Bare Unit Prices, was to include "'bare unit prices" for items in that part which meant "...exclusive of all margins for profit, overhead ...and other indirect cost (For clarification, all such costs [were] to be included in the Schedule of Prices, Part A, Item A1)". This schedule of prices was to be used for evaluation and to determine the total proposal price. Part B2, Bare Rates and Prices, was to include bare rates and prices for items in that part.

[12] The B.C. Road Builders and Heavy Construction Association, through agreement with the Ministry, annually publish an equipment rate rental guide called The Blue Book ("Blue Book"). These rates are used to establish payment rates for Ministry day labour contracts. They are also used for "force account rates", for change orders, or extra work which are the Blue Book rates plus a markup of 15 percent for owned equipment. The Blue Book allows for a 10 percent markup for work in remote northern locations above the "Meziadin junction". The Ministry did not specify rates for equipment by reference to the Blue Book published rates for construction equipment in keeping with the competitive nature of the bidding process. Part B2 was to be the amount that the Ministry would ultimately pay the contractor in

compensation for the work. The Part B1 total was to equal the total in Part B2. The amount in Part A was guaranteed to be paid so that this profit was to be realized regardless of how quickly or economically the project was completed. The amounts in Part B were capped. The contractor's total proposal price was the sum of Part A and Part B1.

[13] The RFP provided in para. 2.8 (a) and (b):

> 2.8 Submission Requirements
>
> (a) Eligibility
>
> 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.
>
> (b) 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.

[14] All proponents were required to provide a list of subcontractors or suppliers on a form required to be completed (section 4.2(e)). After the award, the Ministry was to notify the subcontractors named on the list and any change of assignment for a subcontractor required the successful proponent to notify the Ministry.

[15] The RFP also included a detailed contractor selection process that involved evaluation by an evaluation panel to result in two shortlisted proponents, interviews of shortlisted proponents, and preferred proponent selection. The purpose of the interview, among other things, was to confirm the team structure and team member roles. The Ministry reserved the right to reject proposals containing prices which were unbalanced or unreasonable and in which significant portions of the work were subcontracted. The preferred proponent was expected to enter into commercial negotiations in good faith with the Ministry and undertake a value engineering process to identify construction savings and to ensure that the work could be done on budget in the expectation that an agreement generally as set out in the alliance agreement attached to the RFP would be executed. If the preferred proponent failed to execute the alliance agreement, the security would be lost.

[16] The RFP included a cancellation clause wherein the Ministry reserved the right to cancel the RFP process at any time and to initiate a new RFP process for the same project in which case it was not to be limited to eligibility under this RFP or to the respondents of the original RFEI process.

2. The "Brentwood Proposal"

[17] A key issue in this case is whether Brentwood submitted its response to the RFP in the form of a joint venture with EAC. The title to this section is not meant to convey that the proposal was submitted by Brentwood; rather, it is used for convenience only. The discussion is to ensue as to whether the submission was as a joint venture.

[18] Brentwood was one of the six original proponents under the RFEI. Its Expression of Interest ("EOI") had included an outline of the key team members with drilling and blasting to be performed by other team members as Brentwood lacked this expertise, a deficiency apparent to other proponent competitors. EAC was not on Brentwood's team. With the delay in issuing the RFP, Brentwood was faced with limited local bonding due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors, limited equipment to perform the work, and the perceived increased difficulty in the work. The president of Brentwood, Mark Littke ("Littke"), contemplated not bidding. Following a discussion with his assistant, Bill Swaine ("Swaine"), Swaine contacted EAC in January 2001 and it was proposed that a joint venture would be formed with EAC, the effect of which would relieve Brentwood of half of the bonding capacity required for the project through indemnification of EAC. EAC had the expertise in rock drilling and

blasting and were a larger company that could be relied upon to provide more competitive pricing than the original team members identified for this work.

[19] Brentwood and EAC met on January 22, 2001. The following day, Brentwood met with the bonding agent for both EAC and Brentwood and attended the pre-submission meeting arranged for proponents of the project. EAC had provided Brentwood with a pre-bidding agreement that provided that: the contract for the Kincolith Extension Project would be undertaken in the name of Brentwood-Anderson, a joint venture; the work would be sponsored and managed by the joint venture; upon being awarded the contract, the parties would enter into a joint venture agreement; each and every obligation created would be joint and several; the interest of each in the project and the work to be performed would be 50 percent-50 percent; each would share costs and expenses, losses and gains in the same proportion; and a monthly management meetings would be attended with equal representation of both parties. It was common and known in the industry for contractors to agree to joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded. Brentwood and EAC acted consistently throughout with this industry standard.

[20] On the morning of January 24, 2001, Swaine sent the following letter by fax to the Project Director, Tasaka, at Pacific Liacom ("the January 24 letter"):

> "Preliminary Proposal"
>
> Tom:
>
> As per section 2.8(b) of the Instructions to Proponents we would like to inform you of a proposed material change to our team's structure. We are forming a joint venture with Emil Anderson Construction of Hope BC and ourselves in order to submit a more competitive price to the Owner.
>
> Should you have any questions regarding this change please contact me.
>
> Yours truly,
>
> Bill Swaine, Project Manager

[21] This letter conformed to the RFP, Instructions to Proponents, section 2.8(b), and advised of a material change to the Brentwood team structure. In substance, however, it was a request under section 2.8(a) to change the legal nature of the proponent, Brentwood. The letter conformed to the original RFEI that required identification of the legal arrangement of a team as a joint venture. From the evidence of John Brown, who was working with Brentwood on the proposal, and the evidence of Swaine, it is apparent that this letter was written because Brentwood thought that it could be disqualified under section 2.8(a) if it submitted a proposal as a joint venture unless prior arrangements had been made. Brentwood was seeking an advance ruling as to its qualification to submit a proposal as a joint venture with EAC. This crucial letter was not produced by the defendant and was not found in Pacific Liacom's files, although acknowledged to have been received. It was found in Brentwood's files.

[22] Swaine sent another fax letter to Tasaka in the afternoon of January 24 seeking clarification on another matter of a relatively minor nature. This second fax was forwarded to Tasaka, who was not in the offices of Pacific Liacom on January 24, by Nasir Kurji ("Kurji"), Tasaka's assistant. Kurji was responsible to oversee all issues in relation to the procurement process and ensured that all matters were properly dealt with by Tasaka. Kurji was a drafter of the RFP and was aware of section 2.8(a) and (b). He was expected to, and did generally, forward all correspondence to Tasaka. Although Kurji initially said that he could not remember receiving the January 24 letter, and then said that he had not seen it, I conclude that he must have seen it as Kurji was detailed and exact with respect to most matters and it is highly unlikely that such an important matter would not have been attended to immediately. Certainly Tasaka had received the letter prior to a telephone conversation with Swaine on January 26. Kurji testified that he knew that Brentwood intended to form a joint venture with EAC but could not specifically identify when he gained that knowledge. From this evidence, I conclude that, on January 24, 2001, Tasaka received the fax from Swaine informing that Brentwood was forming a joint venture with EAC and that Brentwood sought approval to do so.

[23] Swaine called Tasaka on January 25 and 26, leaving messages. By late afternoon of January 26, Brentwood and EAC had both signed the pre-bidding agreement when Tasaka returned the call. Tasaka knew that Brentwood and EAC were proposing a joint venture. The brief conversation concerned the January 24 letter. Tasaka informed Swaine that the qualified team was Brentwood, that the proposal had to be in Brentwood's name as the qualified proponent, and that the makeup of the team would be reviewed at the evaluation stage. He did not specifically say that there could not be a joint venture although it was Tasaka's understanding at the time that a proposal from a joint venture of Brentwood and EAC would be ineligible. Tasaka did not respond in writing to the letter, which he acknowledged was required by section 2.8 (b), testifying that he thought the matter so basic that it was not necessary after the phone call. Tasaka said that his concern was that there was a qualified team, that he thought the matter should proceed one step at a time, and that it was not his decision as to the effect of any contractual arrangement between Brentwood and EAC. He did not have a concern with respect to eligibility as long as the proposal was submitted under the Brentwood name. The effect of not responding in writing and not specifying that Brentwood could not proceed as a joint venture was to leave the impression that the

Brentwood/EAC proposal did not require approval under section 2.8(a) or (b) and that Brentwood could proceed with the joint venture as long as the submission was in the name of Brentwood. Indeed, this is how Brentwood proceeded.

[24] Prior to the closing date, there were other calls between Swaine and Tasaka, the specifics of which are not recorded. From all of this, Brentwood's representatives perceived that Tasaka had advised that the proposal had to be submitted in the name of Brentwood with the expectation that the contract would be awarded to the joint venture if Brentwood succeeded in the selection process. Brentwood knew that EAC had to be named in the proposal in some way to indicate their major role because EAC had not formed part of the team in the original response to the RFEI. Brentwood set out to "...soften the blow...", according to John Brown, by listing EAC as a major member of the team. However, Brentwood and EAC always intended between themselves to form a joint venture. Brentwood did not seek a quote from EAC for its participation in the project as it generally would have with subcontractors. Following the conversation with Tasaka, Brentwood was confident that it was going to be able to work with EAC on the Kincolith Extension Project. Once the contract was secured, Brentwood and EAC intended to formalize their joint venture agreement.

[25] On January 29, 2001, a copy of the executed pre-bidding agreement was sent to the bonding agent along with an undertaking of surety. Swaine and Tasaka spoke on January 30 and again on February 13. There is no record of these conversations apart from telephone records. Brentwood and EAC jointly prepared the RFP submission over three days near the end of February 2001 following discussions as to how to frame the document. It was structured on the 50/50 arrangement reflected in the pre-bidding agreement. The legal name on the submission remained Brentwood. EAC was described as "a major member of our team" without specifying the legal relationship between Brentwood and EAC. EAC was listed as a subcontractor for "road building" as opposed to a specific portion of road building work; however, there is no subcontract work or pricing for EAC listed in Part B2, Bare Sub-contract Rates and Prices. Brentwood and EAC carried out their intent to split everything down the middle, including equipment, labour, materials, consumables, and payment of subcontractors. John Brown said that they came up with the idea to list EAC as a subcontractor on the list of subcontractors in response to the requirement that the proposal be in the name of Brentwood but including EAC as a member of the team for disclosure purposes; however, EAC was to participate in Part A profits equally with Brentwood under the proposal. Their arrangement bore no similarity to a standard subcontractor agreement. The role of EAC was purposefully obfuscated to avoid an apparent conflict with section 2.8(a) of the RFP Instructions to Proponents.

[26] Brentwood and EAC worked together and agreed on the estimates. They calculated an overall profit margin of about 10 percent. The profit margin was partially included in their equipment rates in Part B. Swaine explained that this made both Brentwood and EAC more comfortable in the overall mark-up so that risk was included to a certain extent in equipment rates. Swaine testified that the "bare rates" required in the RFP meant without labour according to industry standard, but with a profit margin built into equipment to account in some part for risk. He said that there was a profit margin built into equipment rates so that "...we wouldn't substantially get hurt if things went off the rails". He testified that Tasaka had described at one of the meetings of proponents that Part B2 rates were to be at reasonable industry standard. As a practical matter, Brentwood used 91 percent of the Blue Book rates published by government in an effort to be competitive, acknowledging that this rate allowed for certain profit in the equipment.

[27] The total proposal price for the Brentwood proposal was $23,935,166.

3. The Tercon Proposal

[28] Following the Ministry decision to fundamentally alter the delivery model, to assume all responsibility for design, and to reduce the available work window, Tercon felt that the need for most of its team proposed under the RFEI had been gutted. As a result, Tercon substantially changed its team, deleting some of the subcontractors that were no longer required. In particular, when bridge design was taken over by the Ministry, Surespan no longer had an interest in the project and Tercon decided to build the bridges itself. Surespan had been a subcontractor as part of the Tercon team under the response to the RFEI. Tercon's position, however, remained the same as the prime contractor for the roadwork and the sole surety on the bond. Tercon itemized who was to do the specific work so the involvement and relationships within the remaining team was clear throughout their proposal. Because the changes in the Tercon team were mandated by Ministry changes in the delivery model, in that some contractors were automatically and apparently deleted, Tercon did not feel it necessary to apply pursuant to Section 2.8(b) for approval for a material change of team but felt that there was sufficient flexibility in the RFP to allow for change to take advantage of competitive prices within the build/"alliance" model. This was consistent with the Ministry view that changes to the team were to be considered in relation to ability to perform and complete the work. This is distinguished from a change to the original eligible proponent under the RFEI.

[29] Tercon remained able to perform the work that was required under the Kincolith Extension Project despite the time delay and commitment to other projects. Daryl Salanski ("Salanski"), the man responsible for Tercon's heavy civil division and estimating, testified that there were sufficient manpower and equipment resources available. I accept his testimony as I found him to be a detailed, reliable, candid, and honest witness.

[30] The Tercon estimates as prepared by Salanski initially provided for an overall profit margin of 12 percent, a reasonable margin considering Swaine's testimony that the margin in the industry could be as high as 40 percent. When

reviewed by Glenn Walsh ("Walsh"), the owner of Tercon, he directed that the overall profit margin in Part A should be increased by 20 percent to $4 million given the location, complexity of the project, and "alliance" model. This was still a reasonable profit margin. Part A, section 1.01, offsite margin, overhead, and fees was increased to $3,410,000 from $2,410,000. $590,000 was added to onsite overhead in A1.02 for a total of $1,577,400.

[31] Walsh also directed that an additional $2 million contingency for risk be added to Part B1, bare unit prices, related to rock and excavation elements, the area where Walsh considered the greatest risk to be. Additional amounts per cubic metre were added to excavation costs in items B2.04, B2.05, and B2.07 and a slight adjustment was made to B1.01. This increase was also reflected in prices for equipment rates in Part B2 as B1 and B2 had to be equal. Salanski added an average increase to internal rental rates for equipment of 27 percent, including 10 percent above the Blue Book rate and a 10 percent margin for the Meziadin rate increase.

[32] Salanski established rates for Tamrock drills for rock blasting and drilling to include 50 percent amortization of the capital costs of their purchase because these drills were to be bought for the project and would have limited use otherwise. This capital cost was normally factored into equipment rates as part of ownership costs, as opposed to pure rental rates when the equipment was not owned. This estimate was consistent with Blue Book "bare" rates that include ownership costs and profit, including purchasing and financing. The inclusion of this amortization left Tercon room to negotiate the rates for the drills as contemplated to occur once the preferred proponent was selected. The Tamrock drill was selected based upon Tercon's considerable expertise in rock drilling. It was a larger drill than proposed by Brentwood and resulted in a lower estimate of drilling and blasting hours than was estimated by the Ministry and other proponents using more traditional drills. I accept the reliability of Tercon's estimate of drill hours based upon Salanski's and Walsh's expertise and the evidence concerning the productivity of the Tamrock drills.

[33] Leaving aside the capital cost contribution to drill costs, the net effect of increases to Part B2 was to create a contingency for risk of an overrun of $2,000,000. According to the plan of the model contract, $1 million of this risk was already covered as a contribution of the owners to a cost overrun. There would, therefore, have to be a cost overrun of $3 million before Tercon stood to lose profit under Part A pursuant to its proposal. Tercon assumed that negotiations at the end of the selection process included the potential for negotiation of the split of cost overruns after the $1 million contribution.

[34] The total proposal price for the Tercon proposal was $26,083,623.

4. The Evaluation and Selection Process

[35] The evaluation process under the RFP called for the evaluation of the proposals by an evaluation panel appointed by the Ministry (the project evaluation panel or "PEP"). The Ministry set up an independent review panel ("IRP") independent of the requirements of the RFP. The IRP terms of reference required it to examine the fairness and consistency with which the PEP evaluated, selected and shortlisted the candidates and to ensure that the PEP selected a preferred proponent in accordance with the RFP documents. The IRP was to ensure that the process was fair, transparent and free from bias. The IRP decision was to be communicated to the Project Director. There were six steps to the evaluation which will be reviewed in the course of this analysis. The timeline for the evaluation was extremely tight. The process was documented. Four proposals were submitted including Tercon and Brentwood.

[36] The first step called for evaluation of technical compliance with the RFP. Kurji reviewed the Brentwood and Tercon proposals for this purpose and passed each forward on March 1, 2001. He was aware that Brentwood intended to form a joint venture with EAC from the January 24 letter. He can also be taken to know from his experience that the joint venture is formally entered into after the contract is granted. Kurji satisfied himself that the submission was in the name of Brentwood and did not question the identity of the proponent.

[37] The PEP proceeded through steps 2 to 5 as set out in section 5.3 of the RFP Instructions to Proponents. The unit prices for each of the proposals were run against the Ministry's internal estimates for unreasonableness and unbalancing. Pursuant to section 5.2 of the RFP, the Ministry requested clarification and amendment from Tercon. Tercon was allowed to adjust an arithmetic error in its proposal related to the equal calculation of Parts B1 and B2 where the final totals did not balance but the equations actually did. Tercon amended its construction schedule to clarify an apparent encroachment on an environmental variation with a resultant slight modification in the proposal price of $25,000. This change was not necessary to the proposal in all of the circumstances of changing environmental restrictions and the detail of the work affecting the environmental concern. Tercon met the terms and conditions for proposal security but amended its letter of credit in response to a request for clarification. Tercon's proposal passed with an evaluation score of 89.9.

[38] The Brentwood proposal passed with a score of 93. The other two proponents ranking was 70.8 and 66.4, placing Brentwood and Tercon "head and shoulders" over the others, according to the chair of the IRP.

[39] The PEP met with the IRP on March 5, 2001. The IRP had two concerns: unbalanced bids, and the level of subcontracting. The chair of the PEP noted that the subcontracting question related to why EAC was not in B2, where subcontractor prices would be listed, even though EAC was listed as a subcontractor in the list of subcontractors. The

significance of this within the "alliance" model was that if a large portion of the work was subcontracted to someone other than the prime contractor, there would be limited flexibility in amending the price through value engineering and negotiation. It was, therefore, important to know the terms of any subcontract arrangement. Put another way, a primary concern of the Ministry was to ensure that it could negotiate risk and reward flexibly with the prime contractor within the new "alliance" model. The PEP wanted to be sure that EAC was retained as a lump sum subcontractor to Brentwood. As a result of this concern, a member of the PEP recommended that a letter be sent to Brentwood seeking information as to the business relationship with EAC.

[40] Tasaka spoke with Swaine on March 5, 2001, and Swaine left a message for Tasaka on March 6, 2001.

[41] The chair of the PEP sent a letter to Brentwood on March 7, 2001, requesting clarification of the "structure of the business arrangements" between Brentwood and EAC. Although the time when this letter was sent is unclear, it must have been in the morning and it must have been before a conversation between Tasaka and Swaine around 9:30 a.m. The inference of this timing is that the topic of this letter must have been discussed. Swaine responded to the letter from the chair of the PEP at 12:50 p.m. on March 7, 2001. He stated:

> The business arrangement between Brentwood and Emil Anderson is structured on a pre bid agreement to form a 50/50 joint venture if successful in the RFP. This agreement was put in place to strengthen our team structure and as such, we have jointly prepared the RFP. The overall structure of the team has not changed and we feel with the involvement of EAC on a 50/50 joint venture arrangement that this only solidifies the ability of two very capable companies to team together and construct a very difficult job in a safe and timely manner.

[42] The PEP understood from this letter that Brentwood and EAC had a "similar interest" in the risk and reward to be awarded under the contract. EAC was not a lump sum subcontractor or a subcontractor at all. PEP representatives who testified asserted that their only interest was to ensure that the risk/reward aspect of the "alliance" contract could be negotiated with flexibility. Any other implication of the Brentwood/EAC arrangement was ignored.

[43] Swaine and Tasaka spoke again on March 8. Also, on March 8, 2001, the Swaine letter of March 7, 2001, was circulated to PEP members with a schedule for a meeting the next day at which time the matter would be discussed and an opinion would be received with respect to the second issue, unbalanced bidding and pricing. The chair of the PEP wrote to Salanski on March 8, 2001, asking whether the bare rates for the Tamrock drills were correct and what an equivalent drill would be. Salanski confirmed by letter that the bare equipment rates were as quoted and said that there was no equivalent to the Tamrock drills as they were new hydraulic drills with a large hole size.

[44] The PEP met on the morning of March 9 to prepare its report to the IRP, the step 5 report. A member of the PEP testified that he was aware of the Brentwood/EAC relationship but was more interested that the risk and reward under the proposed "alliance" model was preserved and "didn't really do anything about [the joint venture]". Although the member testified that Brentwood "...wanted to contract with EAC for a big chunk of the work...", this was never Brentwood's plan; this was never conveyed to the PEP; and this is inaccurate. Throughout, the members of PEP testified that the submission was from Brentwood, and that Brentwood and EAC only intended or proposed to form a joint venture. I find this testimony purposefully ignorant of the reality of the situation. The PEP was so concerned to preserve the new "alliance" model that the relationship between Brentwood and EAC was of little importance or concern as long as Brentwood remained in name as the proponent.

[45] The PEP's draft report to the IRP said that due to limited time available for review of technical proposals, requests for clarification were limited to serious or material consequences that would impact whether a proponent passed or failed. All other requests were to be dealt with at the interview of the shortlisted proponents. The PEP never informed the IRP of the PEP's request for clarification of the Brentwood/ EAC relationship and never forwarded Swaine's letter of March 7, 2001, to the IRP. The PEP concluded that "...the level of subcontracting activity proposed...was acceptable". The evaluation of subcontracting attached to the report listed Brentwood's bare subcontracts total, obviously not including EAC. Clearly, the PEP did not consider EAC as a subcontractor. The step 5 report did not inform about the contents of the Swaine letter of March 7, 2001.

[46] At the March 9 meeting, the PEP accepted the opinion that there were no unbalanced bids, concluding that, although there was a possibility of some unbalancing, there was not sufficient evidence to disqualify any of the proponents. At this point, the concern as shown by notes taken by Tasaka and the chair of the PEP at the time was not about an unbalanced bid by Tercon sufficient to fail them, but whether rates could be negotiated if Tercon was the successful proponent. Tercon's number of hours for drilling was lower by a significant margin than the other bidders and the cost per unit of drill hours was higher. This was accounted for in the increased productivity of the Tamrock drills, of which nobody was particularly familiar except for Salanski, and which are different from the tank drills upon which Ministry estimates were based.

[47] Brentwood and Tercon were the first and second shortlisted proponents. Tasaka had never informed the PEP of his conversations with Swaine or of the January 24 letter from Swaine. He did not raise a question about the eligibility of the Brentwood/EAC proposal to the PEP. On the morning of March 9, 2001, the chair of the PEP called Tercon and

Brentwood to advise that interviews would be held on March 12, 2001. A meeting of the PEP and IRP was scheduled for March 11, 2001, at 5:30 p.m. On the afternoon of March 9, 2001, Swaine and Tasaka talked by telephone.

[48] On March 11, 2001, the PEP and IRP met and the draft step 5 PEP report as described was presented. The PEP members signed the report on the morning of March 12, 2001. The PEP met with Tasaka and Kurji to prepare the questions for the interview of the shortlisted proponents. Some of the questions for Brentwood were: "What is the contractual arrangement between Brentwood and Emil Anderson? Does your partner understand the support of the Alliance Model? Have you worked together before?" One of the questions for Tercon was whether it was prepared to review its bare equipment rates where the rates were significantly higher than the "book rates." A focal point of the interviews was the understanding and willingness of proponents to participate in the "alliance" model.

[49] The contractor selection was Step 6 of the process under the RFP. It was to begin with interviews of the shortlisted proponents by the PEP, the purpose of which was, among other things, to confirm the team structure and team member roles and to verify commitment to the "alliance" model. One preferred proponent was to be selected at the end of the interview at which time the Ministry would commence commercial discussions and value engineering. The Ministry reserved the right not to select the highest ranked proponent but could select the proponent who would most likely complete the project within the overall objectives.

[50] Tercon sent Walsh, Salanski and another representative to the interview. Walsh was openly sceptical that this was a true alliance model and engaged in a few tense moments with the committee. However, Tercon showed willingness to engage the model as presented and envisioned certain value engineering.

[51] Brentwood and EAC sent three representatives from Brentwood (Littke, Swaine, and Brown) and four representatives from EAC, including the owner and chief executive officer, Bob Hasell ("Hasell"). This should have been a clear indication that EAC considered itself a proponent. Brentwood/EAC expressed enthusiasm for the "alliance" model. In response to a request to clarify the joint venture relationship, Swaine said that the pre-bid agreement was based upon a 50/50 share of equipment, manpower, losses, etc and that the joint venture had to be set up, referring to the formal joint venture agreement which would be signed once the award was obtained.

[52] Following the interviews, the PEP prepared its step 6 report. It was signed by all four members of the PEP on March 12, 2001. The important parts of the report state:

> Interviews were held with the two shortlisted proponents, Tercon Construction Ltd. and a joint venture of Brentwood Enterprises Ltd. and Emil Anderson Construction Co. Ltd. in Victoria on March 12, 2001.
>
> ...
>
> Both proponents expressed a willingness to explore the alliance model. Brentwood/EAC had previous experience with the alliance delivery model and were enthusiastic with its application to this type of work. Brentwood/EAC appeared committed to reaching the project objectives.
>
> Brentwood/EAC had a better understanding of the objectives of the value engineering process and a willingness to explore all possible avenues to achieve the project objectives. Furthermore, they demonstrated that they have the project control tools to carefully monitor progress and costs.
>
> ...
>
> Brentwood/EAC are committed to achieving the objectives of local hire, skills development, and local economic development. The joint venture has had discussions with their trade unions and has reached an informal understanding regarding arrangements for this project. The joint venture intends to obtain a comfort letter regarding
>
> 1. The use of non-union sub-contractors
> 2. The waiving of requirements for owner-operators to become members of the applicable trade union
> 3. The agreement of the trade unions to local hire and the acceptance of new members.
>
> Based on these interviews, the Evaluation Panel has selected Brentwood/EAC as the preferred proponent.

[53] The report references "Brentwood/EAC" throughout. I am satisfied that this report represented the views and conclusions of the PEP at that time and I prefer this written record to other evidence suggesting that Brentwood had only requested to form a joint venture at the interview. Kurji's notes of the interview do not indicate that such a request was made. As far as Brentwood was concerned, the request had been made on January 24, 2001, and had not been denied. Their position was clear from the March 7, 2001, letter. Brentwood/EAC had never altered from the pre-bid agreement and had never indicated anything other than that it intended to follow the pre-bid agreement. The substance of the proposal was as a joint venture and this must have been apparent to all. The PEP approved Brentwood/EAC as joint

venturers as the preferred proponent. The PEP was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC.

[54] The PEP met with the IRP after the interviews on March 12, 2001, and presented the step 5 and step 6 executed reports, along with an oral summary of the interviews. Tasaka, the project director present at the meeting, did not give any indication that a joint venture was ineligible and did not apprise anyone of his conversation with Swaine on January 26 or subsequently. The chair of the IRP testified that he did not consider it within the IRP terms of reference to verify proponent identity or assess whether EAC was a subcontractor. The IRP was not aware of the Brentwood/EAC pre-bid agreement; however, the chair said that such an arrangement was common in the industry and would have indicated the expectation that a joint venture was to happen once the selection had been made.

[55] On the morning of March 13, 2001, the chair of the PEP met with Tasaka, Kurji, and representatives of the Ministry, the BCTFA and the Nisga'a. The purpose of the meeting was to present the view of the PEP and to present Brentwood/EAC as the preferred proponent. Notes were taken by Kurji and the chair of the PEP. Discussion ensued as to how next to proceed with negotiations with the selected proponent. Tasaka, the chair of the PEP, and a construction lawyer were to conduct negotiations, including finalizing the form of the "alliance" agreement. Tasaka was to find legal counsel familiar with construction work. Concern was expressed about the Brentwood joint venture, specifically that the selected proponent could not be named as the joint venture between Brentwood and EAC. Kurji noted that it was agreed that "...[they] need to be careful", referring to the concern about the joint venture. The group remained satisfied that the successful proponent was as named, Brentwood, and did not discuss eligibility of a joint venture, according to Kurji. However, it was decided to send a single letter to Brentwood and not to debrief the unsuccessful proponents at that time, just in case the second shortlisted proponent was to come up for negotiations. The effect of these decisions was: to ignore the substantive implications of EAC's involvement and the relationship with Brentwood; 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. It appears that the conclusion was reached that by submission in Brentwood's name alone, the ineligibility issue could be overcome. The letter announcing Brentwood as the successful proponent was copied to the unsuccessful proponents.

[56] Following this meeting, the chair of the PEP sent the step 6 report as signed by all members of the PEP and as given to the IRP to Kurji "for revision". This request was made because it was apparent that a joint venture was not eligible to submit a proposal. It was decided between Kurji and the chair to revise the report to delete reference to the joint venture. Kurji suggested referring only to the "Brentwood team". The report was revised and circulated to the rest of the members of the PEP for signature. The chair eventually signed the document on March 27 and the last signature was dated May 16, 2001.

[57] On March 14, 2001, Tasaka met informally with Brentwood/EAC at EAC's offices in Hope, B.C., to prepare for upcoming negotiations. Tasaka contacted legal counsel to represent the Ministry and informed him of the joint venture between Brentwood/EAC, although the lawyer could not recall the specifics of this conversation. The lawyer listed both Brentwood and EAC as parties "acting against" for purposes of a conflicts check.

[58] Walsh of Tercon spoke with another proponent about the process on March 14, 2001. The other proponent told Walsh his price, the price of the other losing proponent, and Brentwood's price. It was not unusual for bidders to call around to determine the prices, notwithstanding that the procurement process was not formally closed. Walsh had received the copy of Tasaka's letter to Brentwood advising that Brentwood was the preferred proponent and that if an agreement was not concluded, the Ministry would be free to commence discussions with the other shortlisted proponent, Tercon.

[59] At some point before March 16, 2001, the chair of the IRP prepared a draft report of that committee. It identified Brentwood as the interviewee and reported that the interview concluded that "[Brentwood and EAC] intend to enter into a joint venture". The IRP agreed with the PEP recommendation that Brentwood be selected as the preferred proponent. Kurji contacted the chair of the IRP, as a result of which, the chair removed reference to EAC and a joint venture in the IRP report. The report was then circulated and signed by other IRP members. The changed, signed copy was eventually forwarded to Tasaka on March 22, 2001.

5. Negotiation with Brentwood and Draft of the Final Agreement

[60] The first meeting in the negotiation phase with the preferred proponent was held on March 19, 2001. The first matter for discussion was the joint venture. Swaine was clearly ready for this issue. He had spoken with Walsh prior to this meeting and had purposefully brought up the issue of potential litigation. Walsh had seen representatives of EAC with Brentwood following the interviews and asked Swaine if they had formed a joint venture. Swaine asked whether Tercon was going to sue and Walsh had said 'no', without further comment or information. Swaine advised those present at the negotiation meeting that there would be no litigation. Swaine provided a copy of the pre-bid agreement, unsigned, notwithstanding that Brentwood and EAC had signed the agreement on January 26. He also presented a letter to Tasaka requesting that the legal name in Brentwood's submission be changed from Brentwood to Brentwood Enterprises/Emil

Anderson Joint Venture. This was in keeping with the pre-bid agreement that called for the contract to be in the name of the joint venture. The letter concluded: "As we submitted our RFP in compliance with the Instructions to Proponents, specifically 2.8(a), we trust the Ministry will favourably consider our request." In making this request, Swaine was not specifically responding to the conversation with Walsh, but was implementing the pre-bid agreement with EAC. Tasaka did not disclose that he had discussed this matter with Swaine previously. He spoke in favour of granting the contract to the joint venture. The formal minutes of the meeting record the instructions to the lawyer to "...review proponent eligibility requirements specified in the RFEI and RFP documents and advise MOTH and Brentwood on an acceptable structure for [EAC] inclusion in the Brentwood team as a joint venture partner."

[61] On March 22, 2001, Tasaka again met with the representatives of the Ministry, BCTFA and the Nisga'a to update them as to the status of negotiations. The group discussed the potential of "...a complaint from unsuccessful proponents on the joint venture structure of the successful proponent... ." This referred to the arrangements that the group knew were in place as a result of the pre-bid agreement between Brentwood and EAC and their knowledge that a joint venture was ineligible. It was decided to refer the matter to legal counsel to decide how to minimize future risk exposure arising from this issue.

[62] The lawyer was not asked to determine whether Brentwood's proposal was ineligible as a result of the joint venture. He was not aware of the January 24 letter from Swaine to Tasaka or the conversations between them. He was unaware of the March 7 letter from Swaine to the chair of the PEP and the statements of Swaine at the March 12 interview describing the joint venture arrangements. He was not informed about the changes made to the PEP and IRP reports following the March 13 meeting. He did know that a request had been made under section 2.8(b) and that EAC was not an eligible proponent. He did not review the pre-bid agreement and did not have reference to the March 19 letter from Swaine to Tasaka.

[63] Swaine spoke with Tasaka on March 23 to discuss how the meeting of March 22 had gone.

[64] The lawyer had prepared a draft letter of intent by March 28, 2001. It was directed to Brentwood and identified EAC as: "...a significant member of the Brentwood team. Therefore, Brentwood will immediately instruct EAC to mobilize in accordance with the commitments between Brentwood and EAC for timely completion of the work." Brentwood and EAC were to refrain from any public comment unless authorized by the Ministry. This letter of intent indicated resolution of the identity of the named contracting party.

[65] Kurji spoke with Swaine on March 29 and planned for Kurji to follow up with the lawyer on the joint venture issue. Kurji then had a conversation with the lawyer and expressed the consensus of the Ministry, BCTFA, and the Nisga'a that the award should go to Brentwood, not the joint venture to avoid exposure. The lawyer said that he could address the Brentwood concern through stressing EAC involvement in the words of the agreement. By this time, all agreed that the joint venture was not an eligible proponent but wanted to structure an agreement to satisfy Brentwood/EAC.

[66] A conference call was then held between representatives of Brentwood, EAC, their legal counsel, and the Ministry lawyer to try to convince the Ministry lawyer to make the joint venture the contracting party. Swaine attended in the office of the Ministry lawyer. Hasell told the Ministry lawyer that the proposal had been put in as drafted based upon advice from Tasaka. It was apparent to the Ministry lawyer that the position that the Ministry was now taking, that the contract could not be in the name of a joint venture, was not what EAC had expected. A meeting was arranged in Vancouver between EAC's lawyer and the Ministry lawyer.

[67] Hasell immediately drove to Vancouver to meet with his legal counsel. Swaine met with Kurji and expressed dissatisfaction with the Ministry decision but said that Brentwood would accept it. Kurji noted that the matter could be resolved through the agreement and internally through Brentwood/EAC.

[68] In Vancouver, Hasell and his lawyer tried to convince the Ministry lawyer to reverse the decision not to award the contract in the name of the joint venture. Hasell and his lawyer discussed how to re-structure their arrangement with Brentwood in the circumstances. Hasell, however, did not consider it paramount that the contract be in the name of the joint venture, knowing all along that his company had not participated in the RFEI. The Ministry lawyer expressed no concern as to how Brentwood and EAC organized their affairs. Following this meeting, the Ministry lawyer reported to his client that the matter had been dealt with and that both parties were satisfied with an award to Brentwood.

[69] The final resolution was described at the April 3, 2001, meeting between Tasaka, Kurji, the chair of the PEP, Brentwood and EAC as follows:

> Issue is resolved. Award will be to the firm pre-qualified in the RFEI process, i.e. Brentwood Enterprises. Brentwood and Emil Anderson will have a separate agreement formalizing their internal arrangement. The Alliance Agreement will state that Emil Anderson is a key component of Brentwood's team.

[70] The Ministry lawyer never did review the proponent eligibility requirements of the RFEI and RFP. He appears to have operated on the assumption that Brentwood had been irreversibly selected. The award was to be 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. The Ministry and its lawyer were not concerned with the legal

relationship between Brentwood and EAC as long as the "alliance" principles were protected and advanced. As the lawyer explained, there was a proposal and there was an undertaking of surety: the rest did not matter.

[71] Brentwood and EAC executed a revised pre-contract agreement on April 17, 2001, that provided that, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/ subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties, and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP. No contract between Brentwood and EAC was ever provided or attached to Brentwood's proposal.

[72] There were several drafts of the Kincolith Extension Construction Alliance Agreement ("Alliance Agreement") generally following the form of "alliance" agreement attached to the RFP. The first draft agreement was between the defendant and Brentwood but identified EAC in rehearsal clause F as "...a key member of [the] construction team. The Agreement recognizes this role and provides special rights and obligations in relation to the involvement of [EAC]". The reference to EAC in the first draft paragraph 4 was as follows:

> 4. EMIL ANDERSON CONSTRUCTION CO. LTD.
>
> 4.1 The Contractor has identified Emil Anderson Construction Co. Ltd. ("EAC") as a major member of the Contractor's construction team. The Contractor will provide EAC with a copy of this Agreement. In addition, the Contractor will enter into a contract with EAC which incorporates each of the terms of this Agreement and requires EAC to perform all work on the Project in accordance with this Agreement.
>
> 4.2 The Contractor 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, the Contractor 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.

[73] Brentwood and EAC were quick to react to paragraph 4 as Swaine wrote to Tasaka on April 30, 2001, asking that items 4.2 and 4.3 be deleted. He said:

> Proposed Revisions:
>
> 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?

Swaine explained that Brentwood and EAC were sharing the risk and reward on a 50/50 basis and so were not similar to a standard subcontract agreement. The Ministry wanted EAC to remain engaged to complete the project because it was considered stronger than Brentwood in terms of capability and financial strength.

[74] In the final form of the Alliance Agreement, Brentwood and the Ministry were defined as parties. EAC was identified in rehearsal clause E as "...a key member of [the] construction team and the parties want that role to be identified in this Agreement." Brentwood was required to enter into a contract with EAC which incorporated each term of the Alliance Agreement and required EAC to perform all work on the project according to the alliance agreement (paragraph 5.1). Initial draft paragraphs 4.2. and 4.3 were deleted and replaced with the following at paragraph 5.2:

> 5.2 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.

A senior EAC representative was to be available at all times to act as agent for EAC with respect to consultation with the Ministry on the site (paragraph 9.4) and site meetings were to be held at least once per week (paragraph 10.1). The agreement and all communications leading to the agreement were confidential and not to be released to third parties (paragraph 30.25). Key personnel to the agreement included equal representations from Brentwood and EAC. The schedule of subcontractors did not list EAC. Swaine signed the agreement on behalf of Brentwood on May 9, 2001, with Hasell witnessing his signature.

[75] Brentwood and EAC entered into their own "Subcontract Alliance Agreement Kincolith Extension" on May 9, 2001. It identified EAC as the "principal subcontractor" to Brentwood on the project. All benefits and burdens arising from the Alliance Agreement and completion of the project were to be shared equally. Work, labour, and equipment were provided equally. EAC acknowledged receipt of the Alliance Agreement and agreed to perform all work on the project according to that agreement. If the Alliance Agreement was to be terminated by the Ministry, EAC would assume the obligations of Brentwood. Any problems between Brentwood and EAC were to be mediated by Tasaka. Both Brentwood and EAC executed an indemnity agreement in favour of the surety in respect of all potential liabilities under the performance bond. The Ministry never requested a copy of this agreement although all subcontracts were required to be provided.

[76] After conclusions of negotiation with Brentwood, the final revised budget was set at $34.63 million. This included Ministry and other costs of $8.73 million and risk and contingency costs of $2.25 million.

6. Performance of the Work

[77] Following value engineering which reduced the price by $359,000, the total proposal price awarded to Brentwood/EAC was $23,650,000. The final amount paid to Brentwood was $25,290,000, $640,000 above the total target price excluding other alliance participants costs ($23,650,000 + $1,000,000). The total overrun on the project was $1,280,000 of which Brentwood was only entitled to collect half. The final cost of the project was $25,930,000.

C. Contract Analysis

1. Was a contract created? If so, what were its terms?

[78] The first issue to be decided is whether a contract was created between the parties when a proposal was submitted in response to the RFP. Did the defendant intend to create a binding contractual relationship when it issued the RFP or was the process intended to be a non-binding invitation to enter into negotiations?

[79] The plaintiff submitted that a contract arose as the RFP was structured similar to a tender document, and therefore, the "contract A" analysis from ***Ontario v. Ron Engineering and Construction (Eastern) Ltd.***, [1981] 1 S.C.R. 111, 119 D.L.R. (3d) 267 [***Ron Engineering***] applies. The defendant said that this was not a tender call but a request for proposals with negotiation as the end result, thus distinguishing it from the contract A situation in ***Ron Engineering.*** They argue that there was no intention to create contractual relations but only a wish to utilize proposals as a basis for further negotiation potentially leading to a contract.

[80] In ***Ron Engineering*** at 121, the Supreme Court of Canada established the principle that the integrity of the bidding system should be upheld under the law of contract if possible. The court established an analytical framework to determine whether contractual relations were established in the tendering process by distinction between the process contract in the call for tenders (contract A) and the ultimate construction contract (contract B) (see ***Powder Mountain Resorts Ltd. v. British Columbia*** (2001), 94 B.C.L.R. (3d) 14, [2001] 11 W.W.R. 488, 2001 BCCA 619 per Lambert J.A. at para.77 [***Powder Mountain CA***]). As further defined in ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577 at para. 17 [***M.J.B.***], a contract can arise upon submission of a compliant tender, the terms of which are specified in the tender documents. It is also possible that a contract does not arise, depending on the terms and conditions of the tender call. The submission of a response to the tender call may give rise to a contract quite apart from any eventual contract B. Contract A is not, therefore, automatic; rather, it is a question of whether the parties intended to initiate contractual relations by submission of a bid (***M.J.B.*** at paras. 19 and 23). In ***M.J.B.*** at para.23, the intention to create contractual relations was indicated by the formality of the tendering process inviting complex documentation in response to the tendering call.

[81] Whether contract A is formed depends of the precise language and intention of the tender call. The court will look only to the substance of the transaction in the context of the procurement documents in order to determine whether the parties intended to enter into contractual relations (***Powder Mountain CA*** at para. 111; see also G.H.L. Fridman, *The Law of Contract in Canada, 4th ed.* (Scarborough: Carswell, 1999) at 495, as cited in ***Melco Developments Ltd. v. Portage La Prairie (City)***, [2001] 11 W.W.R. 282, 2001 MBQB 236 [***Mellco QB***], aff'd [2003] 1 W.W.R. 216, 2002 MBCA 125

[***Mellco CA***], leave to appeal to S.C.C. refused, [2002] S.C.C.A No. 502). The courts have recognized several factors or terms indicative of an intent to form contract A. The irrevocability of the bid is one such factor. (***Ron Engineering*** at 122-123***; M.J.B.*** at para. 17; ***Powder Mountain Resorts Ltd. v. British Columbia,*** [1999] 11 W.W.R. 168, 47 C.L.R. (2d) 32 at para. 105 (B.C.S.C.) [***Powder Mountain SC***], aff'd by ***Powder Mountain CA, supra***; ***Leeds Transit Sales Ltd. v. Ottawa (City)***, [2004] O.J. No. 3933 (Sup. Ct. J.) [***Leeds***]; ***MRK Holdings Ltd. v. Newfoundland and Labrador Housing*** (2005), 245 Nfld. & P.E.I.R. 177, 2005 NLTD 24 [***MRK Holdings Ltd.***]). Other factors include the formality of the procurement process, whether tenders are solicited from selected parties, whether there was anonymity of tenders, whether there is a deadline for submissions and for performance of the work, whether there is a requirement for security deposit, whether evaluation criteria are specified, whether there was a right to reject proposals, whether there was a statement that this was not a tender call, whether there was a commitment to build, whether compliance with specifications was a condition of the tender bid, whether there is a duty to award contract B, and whether contract B had specific conditions not open to negotiation (***Ron Engineering; Mellco QB***; ***Mellco CA***; ***Powder Mountain SC***; ***Powder Mountain CA***; ***Maple Ridge Towing (1981) Ltd. v. Maple Ridge (District)*** (2001), 22 M.P.L.R. (3d) 297, 2001 BCSC 1328 [***Maple Ridge***]; ***Buttcon Ltd. v. Toronto Electric_Commissioners*** (2003), 65 O.R. (3d) 601, 38 B.L.R. (3d) 106 (Sup. Ct. J.) [***Buttcon***]; ***Leeds***; Derek A. Brindle, "Hybrid Procurement and the Duty of Good Faith" (2003) 25 C.L.R. (3d) 30).

[82] The label or name of the tender document is not a determinative factor (***Mellco CA*** at para. 38; ***MRK Holdings Ltd.*** at para. 15). Neither is the requirement for a security deposit or the existence of established timelines (***Buttcon*** at para. 48).

[83] An offer to negotiate is generally not considered to give rise to contractual relations. This is because a bare agreement to negotiate has no legal content (***Walford and Others v. Miles and Another***, [1992] 2 A.C. 128 at 138, [1992] 1 All E.R. 453 (H.L. (Eng.)). In ***M.J.B.*** at para. 38, it was important that no negotiation over either contract A or B had been invited. However, new breeds of procurement model, called "hybrids", have both an element of negotiation and competition (see Brindle, *supra*). This was recognized by Tysoe J. in ***Powder Mountain SC*** at para. 107 when he said that a tender giving rise to contract A may allow for a limited form of negotiation, but the final form of contract must be substantially non-negotiable in the form specified in the tender. There, no terms of contract B were specified in the procurement documents. The window for limited negotiation was impliedly acknowledged in ***Leeds*** at para. 19, when the court pointed out that there was to be subsequent discussion and negotiation of the fundamental details of contract B. In ***Buttcon***, no contract A arose when there was three months set aside for negotiation of a final contract in a situation where neither the design nor the site had yet been selected.

[84] In ***Mellco***, the city's offer to commence design, planning and development negotiations with the "most attractive" proponent was not indicative of an intention to create contractual relations. This was in contrast to a formal bidding process where bids are scrutinized for conformity. The Manitoba Court of Appeal concluded at para. 74:

> As we have seen, where the final terms of the contract are contained in the bid (i.e. there is no need for negotiation), courts will readily find a valid tender and not a mere invitation to treat. See, for example, *R. v. Canamerican Auto Lease & Rental Ltd. et al.* (1987), 37 D.L.R. (4th) 591 (Fed. C.A.). But these are not the facts before us. It is not possible to identify the terms of any Contract B. As set forth in the RFP, subsequent discussions and negotiations were required respecting fundamental detail. Cases such as this do not fall to be decided under the law of tenders as articulated in *Ron Engineering & Construction (Eastern) Ltd.*

[85] In ***Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic School Board*** (2002), 155 O.A.C. 139, 13 C.L.R. (3d) 163, the procedures provided for in the RFP included an ability to "purchase by negotiation" if the lowest bid exceeded "the estimated cost of the goods". There was also a provision that the scope of the project, "the estimated costs of the goods", was subject to funding being available. The plaintiff's bid came in below the initial budget for the project but above a budget revised by the time that the proposals were evaluated. The Board did not have time to make a new RFP and decided to invoke the negotiation clause and to proceed with purchase by negotiation with all three lowest bidders. The court held that wider negotiation was available based upon the terms of the RFP and procedures, with it being clear that the scope of the project was subject to funding availability.

[86] In ***Elite Bailiff Services Ltd. v. British Columbia*** (2003), 10 B.C.L.R. (4th) 264, [2003] 4 W.W.R. 228, 2003 BCCA 102 [***Elite Bailiff***], the court recognized at para. 5 that the usual contract A/contract B pattern can vary to include negotiation with the successful party for the final contract, a form of which was attached. The call for tenders still fell within the ***M.J.B./Ron Engineering*** paradigm.

[87] Any requirement to negotiate in good faith is repugnant to the adversarial position of parties in a negotiation. There is no implied duty to negotiate in good faith in any contract A. (***Powder Mountain SC*** at para. 116). There is, therefore, no independent duty to negotiate in good faith in contract unless the parties expressly agree to do so.

[88] The parties intended to create contractual relations with the submission of a proposal by the plaintiff in this case. The overwhelming balance of terms of the RFP considered within the specific context of the circumstances, objectively

viewed, support this conclusion.

[89] The province was obliged under the Principles of Agreement executed in February 1999 to complete the Kincolith Extension Project within four years. The province was committed to awarding a construction agreement subject only to securing a right of way across certain native reservation lands. By section 6.1 of the RFP, the Ministry was required to select a preferred proponent with whom it would commence commercial discussions and a value engineering process. Although the RFP said that the Ministry could cancel "at any time" and "for any reason", the reference was specifically to procurement of the right of way and the government still had then to pay for the cost of preparing a proposal, not to exceed $15,000 (section 2.9). This was not similar to the situation in ***Powder Mountain*** because here there was a certain commitment to complete the Kincolith Extension Project within a specified time and according to a specified design. There was no uncertainty in the process or in the commitment to it.

[90] The procurement process was formal with explicit, prescribed documentation required according to design specifications set out in the RFP. Unlike in ***Buttcon*** and ***Leeds***, the nature of the work and materials were specific here with no fundamental details awaiting input from proponents. A proponent was subject to failure if there was not compliance with specifications. There was no general right reserved to reject any proposal (except in the event of total cancellation of the RFP) as the Minister was required to select the first and second ranked proponents (section 6.1).

[91] Although entitled an "RFP", the procurement documentation did not say that this was not a tender call.

[92] Bids were irrevocable for 60 days (sections 2.8(c) and 4.3(a)). Only parties selected from the RFEI process were invited to submit proposals (sections 1.1 and 2.8(a)). A security deposit was required according to a specific form. Deadlines were imposed. Evaluation criteria was specified, was not subjective in nature, and included a duty of fairness (sections 5, 5.2, and 5.3-6.3). It was competitive, with a requirement to rank each proposal and limited room for rectification based upon the ultimate pass/fail criteria. Although there was a general exclusion clause (section 2.10), this does not assist the defendant here as it otherwise indicates an intention to rely on its terms to protect the defendant if any proponent should put forth a claim as a result of the procurement process (see further, Part C 4, "Does the exclusion clause apply? Should it be enforced?" at para. 140).

[93] A specific form of "alliance" agreement was attached to the procurement documents. A proponent was required to accept this form of contract B substantially in the form as attached. The security was lost if an agreement was not executed (section 4.3(a)). The price and other essential terms of the alliance agreement were fixed and non-negotiable. It was not an open invitation to negotiate. Acceptance of the alliance model was an essential criterion in the evaluation process (section 6.1). There was also a duty placed upon a proponent selected to negotiate the alliance agreement in good faith to reach and execute an agreement. This is clearly indicative of an intention to contract as the defendant could not have secured such a duty independent of an explicit contractual term. It matters not that the defendant now suggests that this term was unenforceable. The good faith requirement is antithetical to a true negotiation. Any negotiation contemplated within the RFP did not form the backbone of the procurement process as was the case in ***Melco CA*** (at para. 77). In any event, the process of procurement, the subject of any contract A, was not subject to negotiation and was competitive.

[94] The RFP provided for commercial discussions to ensue, and a value engineering process to take place, to ensure that the work was within budget and to identify cost savings (section 6.2). This was a purposive requirement to stay within or below budget with a goal to establish a total target price which was a fixed price, not subject to adjustment. There was a cap placed upon commercial discussions and a cap on the amount that the defendant would have to pay. The owner's exposure was limited to $2 million over the contractor's total price, while the contractor's exposure was uncapped. The defendant was required to pay a proponent for value engineering (up to $35,000) even if the defendant did not proceed with that proponent (section 6.2(b)). The defendant has suggested that this was a "discrete contract". But, why would a proponent do value engineering for this amount and let the defendant keep the work product if not to get a chance at contract B? The uniqueness of this term does not mitigate against an intention to create contractual relations generally.

[95] From all of this, it is concluded that the defendant surely must have intended to create contractual relations when a compliant bid was submitted. The defendant was committed to a specifically defined project, invited proposals from eligible proponents, and evaluated them according to specific criteria outlined in the RFP. Any negotiation was constrained and did not go to the fundamental details of either the procurement process or an ultimate contract. Although the plaintiff expressed the expectation in evidence that a broader negotiation was anticipated if it could get away with it and even a retort that this was not a tender process, this was commentary on the use of an alliance model as the proposed contract B and does not alter the terms of the RFP nor the fact that the plaintiff submitted a proposal indicating acceptance of the terms of the RFP.

2. Was the plaintiff's proposal substantially compliant?

[96] The defendant argued that Tercon did not submit a compliant bid so that a contract never arose. Alleged non-compliance included: (a) the mark up of bare rates for equipment in Part B1 of the Schedule of Prices to include $2.7 million profit; (b) discussion with another proponent to learn competitive prices prior to announcement of the final award;

(c) the total prices in Part B1 of the Schedule of prices did not equal the total price in Part B2 as required by section 4.3(d) of the Instructions to Proponents; (d) the irrevocable letter of credit was not in prescribed form; and (e) the proposed construction schedule overlooked environmental restrictions. The defendant focused on (a) and (b).

[97] The plaintiff said that Tercon's proposal had three non-material defects that did not undermine substantial compliance with the RFP and were, in any event, remedied in accordance with section 5.2 of the Instructions to Proponents. That section provided:

> **Waiver of Defects**
>
> If any Proposal is obscure or contains a defect or fails in some way to comply with any requirement of the Instructions to Proponents which, in the opinion of the Ministry, may be clarified or amended without being unfair to other Proponents, the Ministry may waive the obscurity, defect, or non-compliance and accept the Proposal as submitted or request clarification or rectification before further considering the Proposal. The determination of fairness; whether or not to disqualify any Proposal; waive any obscurity, defect, or failure to comply; whether or not to require rectification, and the adequacy and acceptability of any clarification or rectification submitted by a Proponent shall be made at the sole discretion of the Ministry. The Ministry shall not be bound by industry custom or practice in the exercise of its discretion.

The plaintiff said that the Tercon bid was materially compliant.

[98] Both parties agreed that the law is as recently stated by the British Columbia Court of Appeal in ***Graham Industrial Services Ltd. v. Greater Vancouver Water District*** (2004), 25 B.C.L.R. (4th) 214, 40 B.L.R. (3d) 168, 2004 BCCA 5 [***Graham***]. In that case, the tenderer had failed to provide detailed information regarding management of the hauling operations and minimization of the impact to local residents and had failed to provide an environmental protection plan, stating that it would do so following award of the contract. Both were required under the instructions to tenderers. In upholding the chambers judge's finding that there had been substantial non-compliance, Finch C.J.B.C. first reviewed the principles from ***Ron Engineering*** and concluded at para. 19 that if a bid is not filed in conformity with the terms and conditions under which the tender call is made, contract A is never crystallized. For that reason, a discretion clause could not be used to render complaint a bid which was otherwise non-compliant because the discretion clause did not operate until contract A was established. A legal relationship is established when a bid is capable of acceptance in law. A bid is capable of acceptance when it is materially compliant (para. 21). This is based upon an objective standard. "Material" connotes an essential or important requirement that likely would have been significant to the deliberations of the owner in deciding which bid to select. Chief Justice Finch concluded at para. 34:

> According to these definitions, in the context of the present case, material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

[99] The matter was revisited by the Court of Appeal in ***Silex Restorations Ltd. v. The Owners, Leasehold Strata Plan VR 2096*** (2004), 35 B.C.L.R. (4th) 387, 36 C.L.R. (3d) 73, 2004 BCCA 376 [***Silex***]. There, the bid bond was for only 60 days instead of the 90 days required in the instructions to bidders. The court affirmed that the test of compliance is not whether there is strict compliance with the tender instructions but whether there is material compliance. In that case, the non-compliance was material as it gave an advantage to the bidder over others as the costs associated with a 60 day bond were less and presumably incorporated into the ultimate price. Saunders J.A. for the court said that materiality was related to the rationale of the bidding process, which was to effect fair competition.

[100] The test to be applied to the facts here is whether there was material non-compliance by Tercon as assessed on an objective basis. The discretion clause in section 5.2 is of no assistance to Tercon except as it may relate to the behaviour of the parties as an indication of the significance of a particular bid requirement to a reasonable person (***Graham*** at para. 21). In ***Silex*** at para. 29, the behaviour of the strata corporation in requesting that the bond be extended while unaware of the issue of non-compliance was an indication of what the reasonable person would have considered material in that circumstance.

[101] A general review of cases involving non-compliance suggests the scope for materiality. It starts with ***Ron Engineering*** when Estey, J. said at 125 that there might be a situation "...where a form of tender was so lacking as not to amount in law to a tender". In ***Graham***, the failure to provide management and environmental plans was patently deficient. In ***Ron Engineering***, reference was made to ***McMaster University v. Wilchar Construction Ltd.***, [1971] 3 O.R. 801, 22 D.L.R. (3d) 9 (H.C.J.), aff'd (1973) O.R. (2d) 512 (C.A.), where failure to include the entire first page of a bid was so incomplete as to not amount in law to a tender. The tender instructions and forms set out the circumstances which will render a bid invalid. Failure to provide one price per linear metre for fill regardless of the type of fill as required in the tender documents was enough to render the bid non-compliant in ***M.J.B.***. Failure to include a price for a temporary road as required in tender documents made the bid non-compliant in ***J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society*** (2002), 16 C.L.R. (3d) 111, 171 B.C.A.C. 190, 2002 BCCA 323 at paras. 6-8. However, the fact that the bid was

missing four pages when the information was supplied elsewhere in the bid and the inclusion of different milestone dates when there was a committal to the substantial completion period did not hinder substantial compliance.

[102] Applying these considerations to the facts at hand, the three defects outlined as (c), (d) and (e) above in paragraph 96 were not material. The error in the final B1 amount was a readily apparent arithmetical error. Although Tercon's irrevocable letter of credit was not in identical form, it was the terms and conditions that were required to be identical and Tercon's irrevocable letter of credit exceeded these requirements and was substantially compliant. Tercon's schedule for construction of one of the bridges was within the environmental window by two weeks. However, the no work zone timing was not a requirement but a "window" with the exact timing to be determined in consultation with environmental agencies dependent upon the nature of work completed to date. All of these non-material defects were corrected at the request of the evaluating team.

[103] The Ministry alleges that the conversation between Walsh and another proponent on March 14, 2001, as described in paragraph 58 constituted material non-compliance because it offended the non-collusion provision of section 2.8(d) of the RFP. That section says:

> **Non-Collusion**
>
> A Proponent will not discuss or communicate with any other Proponent about the preparation of its Proposal. Each Proponent will ensure that its participation and that of its team members and senior representatives in the RFP process is conducted without collusion...

The Ministry said that by this section, proponents were forbidden from discussing proposal prices between themselves before the award of a final construction contract. Tercon maintains that the purpose of the section was to prevent collusion in the preparation of the proposals.

[104] Tasaka had written a letter to Brentwood, copied to the other proponents, on March 13, 2001, advising Brentwood that the evaluation panel had concluded its deliberations and had selected Brentwood as the preferred proponent. He noted that if the Ministry failed to conclude an acceptable agreement with Brentwood, then it could terminate discussions and commence discussions with the other shortlisted proponent, which was Tercon. The Ministry says that if it had terminated discussions with Brentwood, the competitive aspect of the process was now materially compromised because Tercon knew the price of the third lowest bidder. The Ministry says that the process was not closed. Walsh testified, however, that it was common in closed tenders for the bidders to call around after the tenders were submitted, although this call had not been initiated by Walsh. This was not contested in other evidence.

[105] "Collusion" within section 2.8(d) denotes a fraudulent, secret understanding or scheme that undermines the RFP process. This did not occur here. Tercon had not discussed its proposal with other proponents during preparation. There was no secrecy or scheming between Walsh and the other proponent that undermined the process. No effort was made to affect the process as a result of the phone call. No changes were made to bids or any action taken to undermine any of the bids or any apparent advantage obtained. The competitive bidding process was over. Competition was reduced to the two shortlisted proponents as it was most unlikely that the Ministry would have gone to the third ranked proponent given its price above budget. The possibility that Tercon could have used the information to its advantage within the negotiation of value engineering had it been chosen after Brentwood is too speculative and restrictive given the budget and limited scope for value engineering. There was no specific evidence as to how such information could have been successfully used. If the Ministry had wanted proponents not to discuss the matter beyond the submission of bids, it should have said so. For the foregoing reasons, I find that the conversation between Walsh and the other proponent did not constitute material non-compliance.

[106] The Ministry's main argument for non-compliance was that Tercon did not use bare equipment rates in the estimated cost of excavation as required by the pricing scheme but added a $2.7 million allowance for risk that should have been included in Part A. The contractor's total proposal price was the sum of the fixed, lump sum prices in Part A ("contractor's fixed prices") plus the bare unit prices extended by the listed estimates of quantities in Part B1. Part A was required to be no less than $6 million and included profit, overhead, management fees, administrative and other management oriented costs. Part B1 included "bare unit prices" for excavation multiplied by quantity. "Bare" was defined to mean "exclusive of all margins for profit, overhead (including on-site and head office) and other indirect cost" according to section 2 of the Schedule of prices, Part B1. For clarification, all such costs were to be included in the schedule of prices in Part A. Because the Ministry was unsure of its quantities estimate in Part B1, it included in section 3.5(c) a maximum lump sum price adjustment of $1 million to cover risk. Pursuant to section 3.7, if cost overruns went beyond the $1million, the next $2 million would be shared equally with the contractor. After $3 million, the contractor was solely responsible for overruns. According to the Ministry, this was the essence of the "alliance model" as it limited its exposure to cost overruns. With bare unit costs fixed, there was incentive to keep costs down. The Ministry argued that with Tercon's bare equipment rates including risk, Tercon had no incentive to incur underruns but, instead, would use all of the $1 million risk allocation, thus increasing its profit to $3.7 million over the total proposal price.

[107] Tercon said that conformity was not to be measured upon "bare" unit prices but according to the evaluation criteria of whether prices were unbalanced or unreasonable within market pricing. There was nothing that said that if equipment

rates were not "bare" the proposal would be considered non-conforming. The step 3 evaluation (section 5.3(c)) said: "... the Ministry reserves the right to reject Proposals containing prices which, in the Ministry's judgment, are unbalanced or unreasonable". Further, the term "bare" as used in the RFP was not the industry meaning and could not be ascertained for a specific proponent. Tercon's specific response for $700,000 was to say that the costs of certain drills, the Tamrock drills, included half of the capital costs of the new drills over the term of the project, a legitimate factor in equipment costs. Tercon acknowledged that Part B1 costs were adjusted to include an overall increased risk factor of $2 million to excavation costs which was reflected in increased unit prices for equipment upon review of the bid. Tercon also had increased its profit in Part A at this review. Tercon argued that whether increased risk was placed in Part B1 or elsewhere made no difference to the total proposal price which was used to rank Tercon.

[108] The term "bare" within the industry as defined by the Blue Book means without operator or labour but inclusive of ownership costs including purchase and financing, insurance, repairs and profit. This was the rate that was to be applied if no rate for an item of equipment was included in a proposal. It is difficult to interpret the meaning of "bare" in the RFP schedule of prices when the special provisions included a fallback rate, the Blue Book rate, which included profit. The Ministry had no means to ascertain whether bid rates represented pure costs and it was understood by the Ministry that each proponent used different criteria to determine equipment cost. Tasaka had outlined at one of the meetings with proponents that the Part B1 rates had to be at a reasonable industry standard. Members of the independent review panel described that they were looking for unreasonable and "unbalanced" rates, meaning unit rates that were very, very high and could result in unreasonable profit over the bid price. Reasonableness was to be determined by the evaluation panel based upon a comparison of the bid rate for equipment with the Blue Book rate. Tasaka had noted a proposed question for interviews with shortlisted proponents as to whether each would be prepared to discuss specific rates if the bid rate exceeded the Blue Book rate.

[109] Both Swaine of Brentwood and Walsh of Tercon understood this to mean that the usual profit margin in equipment rates was included in Part B1 equipment rates. Brentwood included profit in its rates, as did Tercon. No issue was taken by the Ministry with Brentwood's inclusion of profit within its B1 equipment rates which were, in any event, to be subject to commercial discussions if the rates were higher than the Blue Book rates. Tercon's rates were determined to be reasonable by the technical and evaluation groups after comparison with Blue Book rates and Tercon's bid was considered compliant in this respect. This determination is indicative of whether the inclusion of any profit margin in Tercon's equipment rates, viewed objectively, was material.

[110] There is also a concept of unbalanced unit prices. This was determined by running bid pricing against estimates and competitive pricing. It is not in issue that Tercon's bid was compliant in this respect.

[111] The RFP right to reject a bid as non-compliant was based upon the evaluation criteria of unbalanced and unreasonable bids. This was an overriding qualification to any description of a "bare" rate that was not industry standard, that was poorly drafted, that was inapplicable if no rate was specified, and that was misinterpreted, according to the Ministry, not only by both shortlisted proponents but also by their own technical and evaluation teams. The RFP "bare" rate was ambiguous. This is especially so when the concept is rendered meaningless by a cap on price so that funding of cost overruns was not unlimited. What was material was whether the bid rates compared with the Blue Book rates and, if not, whether the bid rate was so high as to be unbalanced or unreasonable. In this respect, Tercon's rates were materially compliant.

[112] Tercon submitted a compliant bid. A contract arose with the Ministry when the compliant bid was submitted.

3. Was Brentwood's proposal compliant? Did the Ministry breach contract A?

[113] The analysis of this part involves dual possibilities for breach of contract A by the Ministry. The first is a question of whether the Brentwood bid, as submitted, was compliant. The second is whether the performance of contract A by the Ministry in evaluating the Brentwood bid was in breach of contract A. As described in ***Martel Building Ltd. v. Canada***, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, 2000 SCC 60 at para. 76 [***Martel***], performance of the contract in evaluation of a bid can give rise to different considerations from preparation of tender documents. While the concern here is not preparation of the tender documents as in ***Martel***, a parallel consideration is whether Brentwood submitted a compliant or responsive bid in the first place. To put it simply, if the Brentwood bid was not compliant, the Ministry could not have accepted it and was in breach of contract A to have done so. This really ends the matter. However, there is a further possible breach by the Ministry in performance of the evaluation if a duty to treat all bids fairly and equally arose and was breached. These two possibilities require separate consideration.

[114] There is an implied term of Contract A that the owner may only accept compliant bids (***M.J.B.*** at para. 41; ***Martel*** at para. 88; ***Graham*** at paras. 25-29; ***Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land & Air Protection)*** (2004), 32 B.C.L.R. (4th) 302, 242 D.L.R. (4th) 720, 2004 BCSC 1038 at para. 89 (S.C.) [***Stanco***]).

[115] Whether Brentwood submitted a compliant bid revolves around the issue of whether the proposal was submitted by a joint venture. It was uncontested that section 2.8(a) of the RFP required that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. Brentwood was qualified. EAC was

not qualified. It was uncontested that a joint venture was also not qualified.

[116] 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. In ***Graham***, failure to submit a conforming bid meant that contract A did not arise. The issue here is whether the bid was valid. If Brentwood submitted as a joint venture, the bid was incapable of acceptance.

[117] The Ministry argued that the Brentwood bid was compliant and that the submission was not from a joint venture. It also argued that there was no requirement to look beyond the face of the proposal to determine who was bidding. Their submission was that the proposal was in the name of Brentwood, period, end of story.

[118] Was the Brentwood proposal from a joint venture? The leading authority in British Columbia defining the characteristics of joint ventures is ***Canlan Investment Corp. v. Gettling***, [1996] B.C.J. No.1803 (S.C.) [***Canlan***], aff'd (1997), 37 B.C.L.R. (3d) 140, [1998] 2 W.W.R. 31 (C.A.) [***Canlan*** C.A.]. In that case, Gettling had approached Canlan to build a hockey arena and letters of intent to enter into a joint venture were exchanged but never signed. Gettling was to purchase shares in Canlan as consideration but the parties were unable to eventually agree on the terms of purchase of the shares. No joint venture was found although the parties had represented to the municipality and financial institutions that they were joint partners and had paid fees equally. The characteristics of a joint venture as described in ***Central Mortgage & Housing Corp. v. Graham*** (1973), 43 D.L.R. (3d) 686 at 706-707, 13 N.S.R. (2d) 183 (S.C.(T.D.)) [***Central Mortgage & Housing***] were accepted by Tysoe, J. in ***Canlan*** and found by Goldie, J.A. to be "...a reasonable and compendious statement of the characteristics of a joint venture" (***Canlan*** C.A. at para. 32). In ***Central Mortgage & Housing*** at 709, the court adopted this quote from Volume 2 of *Williston on Contracts*, 3rd ed. (1959) (***Canlan*** at para. 59):

> In summary, then, a working definition of joint venture based on the actual judicial decisions may be thus formulated: A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.

[119] And, at pp. 706-707 (***Canlan*** C.A., para. 31), the court further quoted from *Williston on Contracts*:

> Besides the requirement that a joint venture must have a contractual basis, the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
>
> (b) A joint property interest in the subject matter of the venture;
>
> (c) A right of mutual control or management of the enterprise;
>
> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

[120] While it is essential that a joint venture have a contractual basis, the necessary contract can be inferred from all of the circumstances, particularly when the business venture has become operational and before a formal agreement has been executed (***Canlan*** C.A. at para. 33). The intention of the parties is particularly important, together with consideration of whether the parties have agreed on all essential terms (***Seaspan International Ltd. v. British Columbia Railway Co.***, 2005 BCSC 256 at para.105; ***Canlan*** C.A. at para. 33). The joint venture itself can take many forms and be described in many ways as long as the co-adventurers have a contractual underpinning (***Canlan*** C.A. at para. 35).

[121] Brentwood and EAC executed their pre-bid agreement on January 26, 2001, following a series of meetings together and with their bonding agent and following the January 24 letter to Tasaka informing him that Brentwood and EAC were forming a joint venture in order to submit a more competitive price. The pre-bid agreement was intended by Brentwood and EAC to be binding on both Brentwood and EAC and was executed with the intention to undertake the Kincolith Extension Project as a joint venture. Whether it was a joint venture in law depends upon whether the criteria from ***Canlan*** were satisfied. Upon review, it is apparent that all of the factors from ***Canlan*** were satisfied such that, in all of the particular circumstances, a joint venture can be found.

[122] The joint venture had a contractual basis in the pre-bid agreement. It was agreed that both parties would equally

contribute money, property, effort, knowledge and skill to the project. Paragraphs 7 and 9 of the pre-bid agreement said that the parties would equally share the costs and expenses, rights and benefits, and losses and gains, flowing out of or in any way connected to the contract or work related to the Kincolith Extension Project. There was to be a joint property interest in the subject matter: paragraph 7 said that the interest in the work or contract was to be 50-50; and paragraph 6 said that each and every obligation under a contract for the Kincolith Extension project was to be a joint and several obligation. Brentwood and EAC agreed to share mutual control and management of the enterprise through a joint venture committee. Both Brentwood and EAC expected to make a profit from the project and agreed in paragraphs 7 and 9 to share equally in the profits. The pre-bid agreement was limited in paragraph 13 to the Kincolith Extension project.

[123] In addition to satisfying the ***Canlan*** criteria, it is significant to note that paragraph 2 of the pre-bid agreement gave each party a way out of the agreement if they were unable to agree on the terms of the bid or proposal for any reason. They agreed on all of the terms of the Brentwood proposal. This included the clever, audacious, and rather insolent description of EAC as a "major member of the team" and a "proposed subcontractor" for "road building" without including any EAC costs within Part B2, Schedule of Prices, which, by section 3.6 of the RFP was to include the contractor's actual costs paid to subcontractors. It was submitted to the Ministry on February 27, 2001, with the full concurrence of both Brentwood and EAC. At this point, the joint venture was operational.

[124] The proposal was from a joint venture. Brentwood and EAC intended to jointly adventure on the Kincolith Extension Project, they contracted to do so, and they never wavered from this intention, operationally or contractually. It matters not that the eventual contract with the Ministry was not taken in the name "Brentwood-Anderson (A Joint Venture)" as contemplated in paragraph 3 of the pre-bid agreement. Both Brentwood and EAC knew from Tasaka's instructions prior to completion of the bid that the name on the bid had to be "Brentwood" in order to be considered at all. Brentwood and EAC obviously agreed to this or the bid would not have been submitted. The parties eventually addressed this in the revised pre-contract agreement of April 17, 2001, as discussed in paragraph 71 above. This later agreement constitutes the formal joint venture agreement that was contemplated in paragraph 5 of the pre-bid joint venture agreement. It also does not matter that a corporation or other instrument was not formed because the form in which Brentwood and EAC classified their relationship is not determinative: the determining factor is the substance of the agreement as ascertained by all of the surrounding circumstances. In any event, the pre-bid agreement was clear that the joint venture was to be governed by an agreement, not by formation of a corporation.

[125] It is also significant to note that the pre-bid agreement did not specify what form the final agreement for the project would take. The parties were flexible on this as long as they were able to continue with the sharing of profits and costs as set out in the pre-bid agreement. The submission of the bid in the name of Brentwood and the careful description of EAC show that Brentwood and EAC were not fixed on the form as long as the substance of the agreement between them was not altered. It was this flexibility that facilitated the final arrangement of April 17, 2001, and the formal contracting for the project in the name of Brentwood.

[126] The Brentwood proposal was from an ineligible proponent, a joint venture between Brentwood and EAC. This was material non-compliance. 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. The Brentwood proposal was not valid. It was not capable of acceptance.

[127] The next question relates to the conduct of the Ministry in performance of the evaluation of the Brentwood proposal. The integrity of the tendering process depends upon no competitive advantage being given to any tenderer. As a result, there is an implied duty of fairness upon those calling for tenders in relation to their dealings with tenderers which calls for the reasonable expectation of the parties involved in the bidding process to be respected (***Martel*** at para. 88; ***Stanco*** at paras. 84-85; ***Fred Welsh Ltd. v. B.G.M. Construction Ltd.*** (1996), 24 B.C.L.R. (3d) 52, [1996] 10 W.W.R. 400 (S.C.)). The scope of the duty is defined in consideration of the terms of contract A so that the fate of proponents is not determined by undisclosed standards (***Martel*** at paras. 88-89; ***Elite Bailiff*** at para. 2). Fairness means consistent application of the tender rules without "...any colourable attempt...to achieve a desired result..." (***Martel*** at paras. 95 and 100). There can be no special treatment (***Martel*** at para. 96). Requirements cannot be ignored (***Martel*** at para. 98).

[128] In ***Elite Bailiff*** at para. 3, the court considered the duty to treat all bidders fairly within the assessment process and asked itself:

> "...At what point does the owner's discretion to carry out a "nuanced" assessment of the tenders received by it, amount to the invalid attachment of an undisclosed condition, or "secret preference"?"

[129] 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 (***Elite Bailiff*** at para. 30). To draw from an old case, an owner by himself or through his agent cannot take means not to know something in order to make a contract without responsibility for knowledge of a material fact (***Blackburn, Low & Co. v. Thomas Vigors*** (1887), 12 A.C. 531 at 537(H.L.)).

[130] It is no defence for the owner to say that it acted in good faith or that it thought that it had interpreted a contract correctly. In ***M.J.B.***, the owners had not considered a note on the tender documents as qualifying the bid, so allowing the bidder not to incorporate into its bid the amount of fill required. As a result, the bid was lowest because others had incorporated a quantification of the fill into their bids as required by the tender documents. Iacobucci J. said at para. 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.

[131] In ***Tectonic Infrastructure Inc. v Middlesex Centre (Township)***, [2004] O.J. No. 4933, 2004 CarswellOnt 5115 at paras. 123-126, the owners had accepted an apparent shell numbered company as one and the same as a well respected local contractor because some of the principles were related. Although the bidder had listed the local contractor within its list of subcontractors, it had not listed the subcontractor as one whose work was valued at $250,000 or more. The acceptance of this ambiguity was considered to be a significant deficiency which could put the owner at risk. This case is indicative of the care that must be taken in inspection of the bid as it relates to the relationship between bidder and subcontractors. This is not to say, however, that the owner is required to investigate and adjudicate complex legal and factual issues that arise between contractors and subcontractors (see ***Twin City Mechanical v. Bradsil (1967) Ltd.*** (1999), 43 C.L.R. (2d) 275, 116 O.A.C. 396 as quoted in ***Ken Toby Ltd. v. British Columbia Buildings Corp.*** (1999), 62 B.C.L.R. (3d) 308, 173 D.L.R. (4th) 169, 1999 BCCA 214 at para. 28).

[132] As it relates to considerations of materiality, the fact that the risk of legal action by other bidders was considered by the owner may be indicative of the materiality of a non-compliance (***Silex*** at para. 28). It may also be considered as evidence of knowledge by the owner of the significance of the issue of non-compliance.

[133] Consideration of the defendant's conduct begins with Tasaka's advice to Brentwood of January 26, 2001, that ignored the substance of the January 24 letter, ignored the requirement of para. 2.8 (b) of the RFP to respond in writing to a material change described by Brentwood as a "preliminary proposal", and ignored the obligation to confirm team structure and roles. Instead of fulfilling its obligations at this point, the defendant through Tasaka informed Swaine by casual telephone conversation that the proposal had to be submitted in the name of Brentwood. Although this was preliminary to the formal evaluation process, it coloured all of the process because Tasaka never informed anyone about the January 24 letter aside from Kurji, his assistant who received the letter and forwarded it to Tasaka. Brentwood acted upon Tasaka's advice and submitted the proposal in the name of Brentwood, thus setting up the means whereby the proposal would be accepted as compliant. Tasaka's position as Project Director was such that his knowledge can be imputed to the defendant (***Huxley v. Aquila Air Ltd.*** (1995), 5 B.C.L.R. (3d) 94, [1995] 6 W.W.R. 149 at para. 15 (S.C.)). This was the first opportunity that the defendant failed to address the substance of the Brentwood proposal.

[134] The PEP independently questioned the arrangements between Brentwood and EAC as a result of the failure of Brentwood to include EAC in Part B2. Brentwood's response letter of March 7, 2001, was unqualified. Brentwood and EAC had a pre-bid agreement to form a 50/50 joint venture. This was the common procedure in the industry. The PEP acknowledged this information as indicated by the draft of questions for the interview referring to EAC as Brentwood's "partner". Brentwood provided the same information at the interview. The PEP concluded in its step 6 report that the shortlisted proponents were Tercon and "...a joint venture of [Brentwood] and [EAC]...". The significance of the information was ignored. In so doing, the PEP either failed to confirm the team structure and roles as required under para. 6.1(iii) of the RFP or shirked this responsibility.

[135] It is important to realize that it was this step 6 report that went to the IRP, not the revised report that was not fully executed until May 16, 2001. Thus, the IRP whose function was to ensure that the process was fair according to the RFP documents also failed to acknowledge the significance of the submission of a bid from an ineligible proponent, a joint venture.

[136] This matter came to the fore at the March 13 meeting of the owners, Tasaka, and the chair of the PEP when the eligibility question was directly addressed in terms of who actually was the successful proponent. Clearly, it could not be the joint venture. Although Kurji said that eligibility was not discussed, there could be no other reason for concern about naming Brentwood/EAC as a joint venture. Following this meeting, the real relationship between Brentwood and EAC was smothered through a number of steps including: revision to the step 6 report; sending only "Brentwood" the formal selection notification letter; and removal of reference to the joint venture in the draft IRP report.

[137] The Ministry was concerned that unsuccessful proponents would sue, an indication of knowledge of the materiality of granting the project to a joint venture. In order to minimize this risk, the lawyer was instructed to integrate the joint venture within an acceptable structure. In this way, the guise of "Brentwood" continued within contract B whilst incorporating EAC by requiring it to agree with each and every term of contract B in a separate internal agreement between Brentwood and EAC which the Ministry did not want to see.

[138] 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.

[139] 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.

4. Does the exclusion clause apply? Should it be enforced?

[140] The Ministry relied upon the exclusion clause in para. 2.10 of the RFP to protect it from liability in the event that a breach of contract A was found. It says:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.

[141] From ***Elite Bailiff***, *supra* at paras. 31-35, it is apparent that an owner may limit its liability for breach of contract A by an appropriately drafted clause. However, this case does not stand for the proposition that exclusion clauses are necessarily enforceable in the tendering context. In ***Graham*** at para. 29, a discretion clause could not be used to bring a non-compliant bid into existence because contract A was never formed in that case. This was interpreted in ***Stanco*** at para. 94 to mean that an exclusion clause could not be used to accept a non-compliant bid. In ***Martel*** at para. 92, a privilege clause could not be used to treat a bidder unfairly.

[142] The proper focus in this case where contract A was formed between the plaintiff and defendant is not to compare limiting or discretionary provisions from caselaw, but to ask whether this is an appropriate circumstance for intervention in a bargain between parties with equal bargaining power (***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 at para. 56 [***Guarantee***]). This depends upon an assessment of fundamental breach and the construction of section 2.10 in the face of fundamental breach.

[143] If a breach is fundamental to the contract, the breaching party may be prevented from relying on an exclusion clause as a matter of construction. In ***Guarantee*** at para. 52, the court affirmed the contractual interpretation approach to fundamental breach as adopted in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 [***Hunter***]. The court said:

> 52. Noting that the contractual interpretation approach was adopted in England in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), and in prior jurisprudence of the Court (see *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*, [1975] 2 S.C.R. 678; *Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co.*, [1980] 2 S.C.R. 718), both Dickson C.J. and Wilson J. affirmed that whether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

[144] The court also said, at paras. 53 and 56 that this reasoning can also apply to limitation clauses. This approach was not, however, applied to the limitation clause in ***Elite Bailiff***, presumably because the breach was not found to be fundamental. The matter never arose in ***Graham*** because there was no contract A.

[145] The preferred definition of fundamental breach was stated by Wilson J. in ***Hunter*** at 499. A fundamental breach occurs when the event arising as a result of one party's breach has the effect of depriving the other of substantially the whole benefit that the parties intended that he receive under the contract. Aside from deprivation of the benefit of the contract, fundamental breach has also been described as undermining the underlying nature and purpose of the contract (***Genesis Tower Ltd. v. Cheung*** (2002), 6 B.C.L.R. (4th) 294, 4 R.P.R. (4th) 193, 2002 BCCA 582 at paras. 14 and 18 [***Genesis***]). The breach must be pertinent, germane, or essential to the contract. The test is objective. (***Genesis,*** *supra.*)

[146] The breach here was, first, to accept a non-compliant bid and, second, to approve a non-compliant bid as the successful proponent when the proponent was ineligible to bid in the first place. This attacks the essence of the tender documents, that is, to ensure that only compliant bids are accepted. It attacks the underlying premise of the process to ensure fair competition. It denied the plaintiff any potential benefit from contract A. The breaches were fundamental.

[147] The next question is whether the exclusion clause applies to the breach in question. In ***Shelanu Inc. v. Print***

Three Franchising Corporation (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577 at para. 32 (C.A.) [***Shelanu***], the court considered a form of exclusion clause and, applying ***Hunter***, said that the issue is whether as a matter of construction the clause covers the breach, keeping in mind that the clause must be read *contra proferentem* and clear words are necessary for the clause to apply. This must be looked at within the context of the contract as a whole (***Beaufort Realities (1964) Inc. and Belcourt Construction (Ottawa) Ltd. v. Chomedey Aluminum Co. Ltd.***, [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193 [***Beaufort***]). It would take very clear language to effect a result whereby a party could be assured that irrespective of his non-performance of contractual obligations, he could benefit from an exclusion type clause (***Beaufort***, *supra*). The exclusion of liability for fundamental breach of contract must have been within the reasonable contemplation of the parties in formulating the agreement (***International Terminal Operators Ltd. v. Miida Electronics Inc et al.***, [1986] 1 S.C.R. 752 at 799, 28 D.L.R. (4th) 641; ***MacKay v. Scott Packing and Warehousing Co. (Canada) Ltd.*** (1995), [1996] 2 F.C. 36, 192 N.R. 118 at para. 9 (C.A.) [***MacKay***]). In ***Guarantee*** at para. 61, Iacobucci and Bastarache JJ., said that commercial reality is often the best indicator of contractual intention and that if a given construction would lead to an absurd result, the assumption is that the parties could not have intended the clause to apply in this way. In ***Westcoast Transmission Co. v. Cullen Detroit Diesel Allison Ltd.*** (1990), 45 B.C.L.R. (2d) 296, 70 D.L.R. (4th) 503 (C.A.), Taylor J.A. explained that exclusion clauses are regarded with hostility and judged with exacting standards because of the high degree of improbability that the contracting party would have agreed to such a limitation of liability.

[148] Section 2.10 is broadly drafted to exclude "any claim for any compensation of any kind whatsoever as a result of participating in this RFP". It does not refer to the contract A agreement or to any specific liability that is sought to be avoided. Particularly, it does not specifically exclude liability for damages for fundamental breach of contract A or for acceptance of a non-compliant bid. It is unclear exactly what "participating" means. In this case, it is inconceivable that, given the preparation, detail, and expense required to submit a bid based upon elaborate tender documents, the practice and legal requirement to accept only compliant bids, and the eligibility requirements in the RFP, that Tercon would have agreed that the Ministry could accept a non-compliant bid without legal recourse against the Ministry for damages for breach of contract. It is equally inconceivable that the Ministry could expect to fundamentally breach the contract and expect a bidder to accept that they had no legal recourse after it had submitted a compliant bid itself. The ambiguity in section 2.10 must be resolved in favour of the plaintiff. The clause does not apply to these breaches.

[149] Given this conclusion, it may not be necessary to address the enforceability of the exclusion clause. However, reason not to enforce the clause exists in the circumstances here. According to the approach in ***Guarantee*** and ***Hunter***, whether the exclusion clause survives fundamental breaches depends on whether the result is unconscionable or unfair, unreasonable, or contrary to public policy (see also ***Shelanu***). While it has been suggested that there may be no real difference between these approaches and both are to be used sparingly, it appears that fairness and reasonableness can be assessed at the time of the breach and not just at the time the contract is concluded (***Hunter*** at 510-511; ***MacKay*** at paras.12-14; ***Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*** (2004), 245 D.L.R. (4th) 650, [2005] 7 W.W.R. 419, 2004 ABCA 309 at para. 51). A party should not be allowed to commit a fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated (***Hunter*** at 509-510). While unconscionability is usually considered in situations of unequal bargaining power, there can be situations of equal bargaining power that still give rise to an unconscionable result (***Hunter*** at 515-516).

[150] In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause. Although both parties are sophisticated, it could not have been contemplated that there would be no recourse if the Ministry accepted a non-compliant bid: to suggest otherwise would change the base of the tender system without notice. Enforcement of the exclusion clause in these circumstances would not give effect to the intention of the parties and would render the duty of fairness that underlies the dealings between the owner and bidder meaningless. The conduct of the Ministry deprived the plaintiff of any benefit under the contract, including the opportunity to conclude a contract B and to eventually construct the Kincolith Extension. The Ministry acted egregiously when it knew or should have known that the Brentwood bid was not compliant and then acted to incorporate EAC indirectly in contract B whilst ensuring that this fact was not disclosed. These circumstances do not lead this court to give aid to the defendant by holding the plaintiff to this clause.

5. Assessment of Damages

[151] The plaintiff claimed damages according to the difference between the revenue that it would have earned had it been awarded contract B and the costs that it would have incurred in performing the work on the Kincolith Extension Project. Tercon said that it was reasonably probable that it would have been awarded contract B. It was assumed that Tercon would have undertaken the work in the same manner, sequence and using the same methodology as Brentwood, including value engineering, with adjustments for differences in equipment. The plaintiff did a detailed assessment of the differences based upon the actual equipment hours used by Brentwood on the project with comparison based on productivity rates for Tercon's equipment with consequent further adjustment costs such as labour.

[152] The Ministry maintained that Tercon would not have been able to negotiate contract B. At most, Tercon lost an opportunity to negotiate contract B and should receive nominal damages only for breach of contract A. In the alternative,

the Ministry said that Tercon was only entitled to reliance damages in relation to contract A which was the cost of participating in the RFP process. In the event that Tercon's damages were to be assessed on the basis of expectation damages, the Ministry submitted that Tercon's estimate was grossly overstated and should be substantially discounted for various reasons.

[153] The most recent statement from the Supreme Court of Canada on damages within the tendering process was in ***Naylor Group Inc. v. Ellis-Don Construction Ltd.***, [2001] 2 S.C.R. 943, 204 D.L.R. (4th) 513, 2001 SCC 58 [***Naylor***]. Although that case concerned the relationship between contractor and sub-contractor whose bid was incorporated into the tender, Binnie J. applied the contract A/contract B analysis from ***Ron Engineering***, ***M.J.B.***, and ***Martel*** and used basic principles of contract to state the principle for damages for breach of contract A at para. 73 as follows:

> 73 The well-accepted principle is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost to the respondent of executing or completing the work, i.e., the loss of profit: *M.J.B. Enterprises Ltd., supra*, at p. 650; *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), at pp. 225-26; S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at para. 5.890; H. McGregor, *McGregor on Damages* (16th ed. 1997), at para. 1154.

[154] In ***M.J.B.*** at paras. 55-56, the court described the general measure of damages as "expectation damages" and asked whether on a balance of probabilities, as a matter of fact, the appellant would have been awarded contract B. Damages were lost profits based within the rule in ***Hadley v. Baxendale***. The appellant was awarded the amount of profits it would have realized had it been awarded contract B.

[155] The assessment of loss of profit should not be done as though it was a certainty. However, lost profits established with reasonable certainty on a balance of probability are fully recoverable (***Houweling Nurseries Ltd. v. Fisons Western Corp.*** (1988), 37 B.C.L.R. (2d) 2, 49 D.L.R. (4th) 205 at 215 (C.A.)).

[156] I have carefully considered the decision of ***Tercon Contractors Ltd. v. British Columbia***, [1994] B.C.J. No. 1636 [***Tercon***], and concluded that the analysis of damages based upon the difference between the revenue that the plaintiff would have received had it been awarded the contract and the costs that it would have incurred in performing the work is a good prototype for assessment in this case. After finding that there was a reasonable probability that Tercon would have been awarded the contract, Brenner J. (as he then was), selected an approach that produced the most probable result had Tercon done the job, using actual results as the benchmark with adjustments for Tercon's equipment and plans. In that case, as here, the actual profit made by the contractor who performed the work was unknown. Tercon's original estimates were used with appropriate adjustments for actual conditions, dependent upon the adjustments being reasonable. This approach was also described in ***Naylor*** when the court said that job site conditions and related performance problems should be integrated into the calculation of loss of profit as an estimate of the chances that a particular thing would have happened or not.

[157] This calculation is difficult, but I will do my best. There must be a detailed review of the evidence to find facts to form the basis of the assessment. Although I have worked through the damages claim based on the estimates and actual costs on a line by line basis, it is impractical to attempt a detailed line by line analysis in these reasons and I will not do so. Instead, I will summarize my conclusions and reasons. Where possible, I have used actual costs and compared with the Tercon proposal: where not possible, I have considered the estimated differential between Tercon and Brentwood.

[158] The first question is whether the plaintiff has proven as a reasonable probability that it would have obtained contract B. The chance that contract B would have gone to the plaintiff is not certain. However, the task of the trial judge is to estimate that chance and to reflect those chances in the award of damages (***Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)*** (1997), 34 C.L.R. (2d) 197 at para. 66, [1998] 1 W.W.R. 101 (Alta. Q.B.) [***Thompson***]). If the risk of not being awarded the contract is small, there might be no discount to the profits (***Thompson*** at para.67). It should be remembered that there was a duty to negotiate in good faith under the RFP. Consequently, I conclude that every reasonable effort would have been made to come to agreement on contract B.

[159] As in ***M.J.B.***, the defendant awarded contract B in this case, so any uncertainty as to whether the contract would have been awarded is greatly reduced. Although the Ministry retained discretion not to enter into a contract, it was obliged to enter into good faith discussions to reach agreement. The Ministry was under considerable constraints to get the project underway as it was already late. It was, however, constrained by a budget and I conclude that the Ministry would have insisted that the final negotiated price be within the budget for the total proposal price of $24.4 million. To this would eventually be added the risk and contingency monies of $2 million. Tercon's proposal price was $26,083,483. Brentwood's was $23,935,166. The next lowest price was $3.4 million more than Tercon. I find that the negotiated price would have been between $23,935,166 and $24.4 million. I find that the Ministry would have been motivated to negotiate with Tercon given the next closest bid. I also find that the Ministry would have negotiated hard on equipment rates, given Tasaka's reputation in the industry. The Ministry would also have tried to come as close as possible to the Brentwood bid.

[160] Tercon was well known, experienced, and respected in the industry as a rock contractor. Tercon had ranked highest in the RFEI process. It was chosen as one of two first ranked proponents during the evaluation process, ranking "head and shoulders" with Brentwood above the other bidders. Although the defendant argued that Tercon grossly underestimated drilling and blasting hours, I accept the evidence of Salanski about the productivity and appropriateness of the Tamrock drills. This estimate was not questioned during the evaluation stage. Salanski's considerable experience and estimating skill was not challenged in cross-examination and generally withstood scrutiny.

[161] It was appreciated by the evaluation panel that Tercon had a good understanding of the RFP including the alliance model, had the capability and desire to complete the project, and would have been successful in delivering the project if chosen. Although a great deal was made of Walsh questioning the alliance model at the interview, it was acknowledged that the questions and discussion was appropriate and that Tercon indicated willingness to go along with the model as set out in the RFP as a business decision. Tercon was prepared to value engineer and to negotiate rates for drilling equipment. It demonstrated flexibility in how it would approach the work, understanding the urgency of getting underway with plans to commence work as soon as a letter of intent was issued. Tercon passed the assessment for unbalanced bids. As stated by Hibbins, a member of the evaluation panel and representative of the owner during the RFEI process, "...there was no reason for me to conclude that Tercon wasn't able to perform this work" and "...both companies had the ability and capacity to do the job."

[162] The Ministry intended to negotiate equipment rates. Contrary to the argument of the defendant, however, I do not find that the Ministry was constrained to negotiate only the Blue Book rates. Tercon had flexibility in this regard and was prepared to negotiate with the $2 million risk that it had added to the bare unit prices for rock and excavation elements. Salanski said: "...we had that room to move" but did not specify what rates would ultimately be offered in negotiation. This amount was a risk adjustment and not a profit margin calculation. It included half of the capital cost of the Tamrock drills that had to be purchased for the project. The evidence established that this rate could have been adjusted by application of a longer amortization period and use of standard rates charged by Tercon. Salanski testified that these rates were $210 per hour for the Tamrock 500 drills and $226 per hour for the Tamrock 700 drills. The Ministry calculations in the original comparisons of equipment rates priced the Tamrock 500's at $178 and the Tamrock 700's at $204. Given that the rate quoted in the proposal was $425 and $450 respectively, there was clearly room to manoeuvre here. I accept the plaintiff's calculation that a $951,540 price reduction would have been available for negotiation by application of Tercon's standard pricing for equipment. There was more room to adjust this price by deduction of a $100,000 rounding off amount.

[163] Tercon had also considered changes to design that were as proposed by Brentwood and adopted in the value engineering stage. Tercon would have adjusted its price for excavation volume and backslope quantity reductions and environmental works as did Brentwood for a reduction of $359,000. Tercon also proposed to value engineer an alignment change between Red Bluff and Keaszoah Creek. This re-alignment would have required a new right of way. There is insufficient evidence to determine that such a change was probable.

[164] With these negotiated changes, Tercon would have been within budget price.

[165] Tercon is a reputable, capable, experienced rock and road contractor who was highly qualified for this project. Based upon these considerations, there is reasonable certainty that Tercon would successfully have negotiated contract B. The degree of probability is such that I conclude that it is almost certain that Tercon would have been awarded the contract.

[166] The assessment of damages should be the expectation profit or the contract price less the cost to the plaintiff of executing or completing the work (***Naylor***). The approach is to establish the most probable result had Tercon done the work. I reject the Ministry argument that Tercon would have made no profit at all "given its impractical, large scale construction methodology and its unduly optimistic estimates concerning time and costs". Tercon was experienced and reasonable in its estimates. It is possible to compare the Tercon bid estimate against the actual hours of equipment and labour and material costs for the project, with appropriate adjustments. I accept that the Tamrock drills could have been successfully used on this project as concluded by the review and independent committees and as established in the evidence through Salanski. I also conclude that Tercon was a competent contractor who would have fulfilled the project in as economical a manner as possible.

[167] The Ministry's alternative approach to assessment asked this court to start with a conclusion as to the amount of profit that Tercon would have made under Part A of the RFP and then discount it, line by line, for negative contingencies, resulting again in a conclusion that Tercon would have made no profit. Unfortunately, the Ministry did not undertake this assessment itself. Also, this approach is based upon the argument that this was not a tender, an argument that has been rejected. It is also based upon the Ministry's position that all profit had to be within Part A without consideration of whether additional profit could ultimately have been achieved through risk adjustments on rates for equipment in Part B. This argument has also been rejected and, in any event, would not be determinative of a profit assessment under the revenue/costs assessment approach. Finally, it is also based upon what the Ministry described as such "speculative assumptions" of the plaintiff as to render the likelihood of profit nothing more than a "mere speculative chance" so to fall below an expectation claim. While I have considered and incorporated the discount factors argued by the defendant as

appropriate, I prefer the plaintiff's approach to assessment, following Brenner J. in ***Tercon***, *supra*.

[168] The Ministry's ultimate argument was that this court should assess the profit margin actually achieved by Brentwood and use that as the starting point for a Tercon expectation loss claim. The problem with that approach is that there is no evidence of the Brentwood profit, although it could have been introduced. To embark upon that assessment is speculative and not legally based. The requirement is to put the plaintiff in as good a position that it would have been had the Ministry performed its obligations under the contract. It is the plaintiff's position that is to be assessed and not someone else's, even though Brentwood's actual costs and sometimes its estimates will be used in this assessment to ascertain the most probable result. The actual costs for Tercon equipment during this period will be also be taken into account.

[169] The revenue that Tercon would have received is the result of the negotiation for contract B. As described, Tercon was prepared to alter its rates on the Tamrock drills to standard pricing. With 1320 estimated hours for the Tamrock 500's and 4620 estimated hours for the Tamrock 700's, this saving from $425 to $210 and $450 to $226 would have been $1,318,680. There was also an additional $100,000 rounding off that would have been included. The value engineering would have been deducted at $359,000. Therefore, Tercon's total proposal price would have been $24,305,803. To this would have been added the guaranteed risk adjustment of $1 million from the total target price in section 3.5 of the RFP for total revenue to Tercon of $25,305,803. After calculation of costs, this revenue will be further adjusted for shared contribution to overrun pursuant to section 3.7 of the RFP.

[170] The total target price under section 3.5 of the RFP would have been $34,005,803 ($24,305,803 + $8,700,000 + $1,000,000).

[171] Tercon estimated its Part A fixed prices at $7,976,600 including A1.01 profit margin of $3,410,000. This figure had been increased in the original estimates by $1 million to reflect the 20% increased profit margin that Walsh wanted. Another $590,000 of this increased profit margin was placed into A1.02 "on site overhead" costs. The real cost estimate here was $987,400 ($1,577,400 - $590,000). Considering real cost estimates, the Tercon and Brentwood bids differed by $1,292,719 for on site overhead costs. This differential is partially accounted for by ambulance and first aid costs, transportation costs, and travel and live out costs that were placed by Tercon under temporary facility costs in A3, still leaving a differential of about $814,000. Tercon attempted to account for $698,280 of this amount by suggesting that certain transport and maintenance costs were included elsewhere in the Tercon bid. However, there was insufficient evidence before me to know where it was in the bid to make this calculation. Swaine testified that mobilization and supervisory costs for the project were more than Brentwood anticipated. Tercon's personnel supervisory costs should not be reduced from their estimate. In conclusion, reasonable and probable Part A1.02 costs to Tercon would have been closer to Brentwood's estimate of $2, 280,000. I conclude this amount at $1,800,000.

[172] There was also a differential in the estimated costs for A2 mobilization and demobilization of about $300,000. Salanski said that it was Tercon's practice to include half its mobilization costs in subsequent projects. Swaine said that his actual mobilization costs were higher than the estimate by about $50,000. I accept Tercon's practice and Swaine's evidence of higher costs, concluding that mobilization costs would have been $546,000.

[173] I conclude that the A3 temporary facilities costs would have been as set out by Tercon at $2,468,000. As already described, some of Brentwood's A1.02 costs were included here by Tercon. The ultimate differential is attributable to Brentwood's purchase of a hovercraft.

[174] Therefore, Tercon's Part A costs would have been $4,814,000. This leaves aside the A1.01 profit margin of $3,410,000 for the moment. I have used these Part A figures for all purposes, including calculation of the total incurred cost in section 3.6 of the RFP, regardless that section 3.6 calls for this to be the listed and not the actual Part A costs. This calculation links to the overrun contribution in section 3.7 of the RFP.

[175] The calculation of Tercon's Part B costs necessarily begins with a determination as to whether the Ministry was correct to argue that Tercon estimated that it would complete the project in 12 months as opposed to the 18 months that it took Brentwood to complete the project. Tercon's estimates of overhead for personnel and other Part A costs were based on 18 months. The Tercon construction schedule included in its proposal indicated the project commencing in April 2001 and ending in September 2002. Brentwood's actual construction time was 14 months. Although Tercon's estimated drill hours and planning suggested that it would complete the construction in 12 months, Tercon argued for damages based upon the drill hours actually used by Brentwood over 14 months with specific productivity ratios built into the calculation. In the result, I find that the Ministry's argument that Tercon could not have completed in 12 months does not withstand scrutiny. The delays and difficulties that were encountered along this 29 kilometre stretch of rugged terrain were ultimately handled by Brentwood within its construction schedule and there is no reason why Tercon could not have managed the same result.

[176] Tercon's Part B2 equipment cost estimates were challenged for underestimation of drilling and blasting hours and inappropriate use of heavy haul trucks. The Ministry said that this would have seriously affected Tercon's profitability. Each of these will be dealt with in turn.

[177] Tercon's drilling and blasting estimates were significantly less than Brentwood's. Salanski had calculated Tercon's estimates of drilling and blasting hours based upon his experience and knowledge of the capacity of the hydraulic Tamrock drills that Tercon planned to use. Tercon only used hydraulic drills. It did not use tank drills. Brentwood used a combination. Swaine testified that there is no industry standard for the type of drills used in road building. I accept Salanski's evidence that the hydraulic Tamrock drills are more productive than tank drills by a ratio of 1.8. Salanski said that the Tamrock 700 hydraulic drill overall drill rate per hour was 90 feet as opposed to the tank drill pioneering drill rate of 50 feet. There was evidence that the rates differed as to pioneer and production drilling but ultimately Salanski's evidence of the superior drilling rates of hydraulic Tamrock drills was supported by Swaine. Swaine's calculations of pioneering drill rates set the ratio at 1.67 enhanced productivity from hydraulic drills. Salanski's ratio is reasonable as there was evidence that this ratio can increase to three times in production capacity. Salanski estimated 5,940 drilling hours: the government estimates were 10,900 hours. With application of the productivity ratio either at 1.67 or 1.8, Tercon's estimated drill hours are reasonable. In any event, Tercon based its assessment of damages on the actual hours used by Brentwood with a productivity adjustment of 1.8 for the Tamrock 700. Salanski had also estimated larger blast patterns based upon the larger bore size of the Tamrock drills. While this calculation was initially challenged in direct evidence by the construction manager who had been onsite during the project, it did not withstand cross-examination as the manager was not an experienced estimator, was not familiar with drill holes of the size to be used by Tercon, had not seen the entire Salanski analysis, did not know the difference in productivity rates between tank and Tamrock drills, and was unaware of the superior manoeuvrability of the Tamrock drills. I conclude that Tercon's estimates were reasonable based upon the type of drills that it planned to use and that the actual drill hours used can realistically form the basis for the calculation of equipment costs in B2.

[178] The other challenge to Tercon's calculated equipment costs was the proposed use of larger capacity heavy haul Cat773 trucks. The construction manager testified that the comparable but smaller heavy haul Cat769 trucks used by Brentwood could only be used on 25 percent of the project due to the soft underlying soils and that more pullouts would have to have been constructed for larger trucks. The Ministry argued that any advantage in productivity of the larger trucks was overwhelmed by the loss of productivity on the majority of the project and represented a significant miscalculation. It was shown, however, that the dimensions of the larger Cat773 truck were substantially the same as the smaller capacity Cat669 used by Brentwood for 20 percent of hauling so that the argument for more pullouts is doubtful. Salanski testified that Tercon used only Cat773's and that their experience with turnouts was not problematical. I prefer his view as the construction manager had no experience with the Cat773's. The evidence also showed that the ground contact pressure for the Cat773 is less than for the Cat669 due to the size of the tires despite the larger capacity of the Cat773. These trucks accounted for 3,199 of 15,746 hours of hauling by all trucks. The rest of the trucks to be used by Tercon were the same type of articulated trucks used by Brentwood but with larger box capacity. The increased productivity of these larger trucks was established through the Blue Book comparison of box capacity. I accept Tercon's increased productivity ratios for their Cat D300 articulated haul trucks.

[179] I also accept Salanski's evidence to establish Tercon's increased productivity ratio for the larger excavators that it intended to use. Salanski testified that he was familiar with the excavators used by Brentwood. He said that the Cat330 and Cat375 excavators used by Tercon were larger, heavier and had bigger bucket capacity than Brentwood's Cat320, Cat225, Cat 345 and Cat350.

[180] There was evidence of the Brentwood as-built equipment hours for each piece of equipment used on the project. Tercon accepted in argument that Tercon would have worked its equipment the same number of hours except for the equipment with increased productivity ratios as described. This is a reasonable basis for calculation of costs as it includes the contingencies that were encountered on the project. There is no basis to suggest that Tercon would not have worked as well as Brentwood once it started the project. Tercon's personnel were experienced and professional and I accept that it would have embraced the alliance arrangement to maintain a successful business venture.

[181] The proposed rates per hour for the Tercon equipment were accepted at the interview stage after questions about the rates for the Tamrock drills. However, Tercon had built in the $2 million risk that it was prepared to negotiate. There was evidence of the actual costs through to September 2003 for Tercon's equipment that would have been used on the project. All of these costs were lower than the hourly rates proposed by Tercon. In argument, Tercon conceded these costs for assessment of damages and reduced its hourly rates accordingly. Total equipment costs in Part B2 were assessed at $7,487,377, a reduction of $1,758,633 from the proposal estimate of $9,246,010. Based upon my conclusions above about probable equipment use, my acceptance of Tercon's actual hourly equipment costs, and my conclusion that most of the $2 million risk would have been negotiated away to secure contract B, I accept the figure of $7,487,377 for equipment costs in Part B2.

[182] Part B2, sub-contractor and material costs were bid at $6,524,738 by Brentwood and $5,877,773 by Tercon. The as-built materials and subcontractor costs were $5,787,398. Tercon had included rock stabilization in its sub-contract at $495,000 while Brentwood did not subcontract this work, presumably because it was done by EAC. The plaintiff attempted to account for this difference through inclusion of materials costs for rock stabilization in this part and allocation of labour and equipment costs in those parts. However, the figures were not clear and there was no evidence on this point so that I cannot conclude that the $495,000 has been included. Because Brentwood's actual costs in this regard

were substantially lower than bid, I conclude that Tercon's costs here would have been about the same as bid or $5,877,773. This is slightly higher than Brentwood's as built costs taking into account that Tercon would have subcontracted the rock stabilization work.

[183] The final cost to be included in Part B2 is labour. Tercon estimated this at $2,966,664 in its bid. Brentwood's bid was $3,967,588 and the as-built price was $4,934,405. Tercon's type of larger capacity equipment meant fewer working hours and no driller's helper for the Tamrocks. Having accepted the productivity ratio of 1.8 for the Tamrock drills, it is apparent that the hours of labour would have been reduced and there would have been no cost for a driller's helper. The plaintiff calculated this saving at $446,606. There would also have been a savings in labour hours from the larger capacity excavators and heavy haul trucks. The plaintiff calculated this saving at $114,863. From the actual labour costs of $4,934,405, there was $266,332 for labour for rock cut stabilization which Tercon would have paid for by subcontract as described. All of these adjustments would have been made when Tercon performed the work resulting in savings of $827,801. In addition, Brentwood's labour costs as bid were four percent higher on average than Tercon's. This would have resulted in further labour savings with Tercon. I conclude that the final labour price would have been (($4,934,405 - $827,801) / 1.04) $3,948,658.

[184] Part B costs that Tercon would have incurred in performing the work are: labour $3,948,658, materials and subcontractors $5,877,773 and equipment $7,487,377. Total Part B costs would have been $17,313,808. Total Part A costs would have been $4,814,000. Total costs to Tercon would have been $22,127,808.

[185] Total incurred costs of the project according to section 3.6 of the RFP are the contractor's total construction charges plus the other alliance participants lump sum prices of $8,700,000. For purpose of calculation of damages, I have set the Part A, Contractor's Fixed Prices, at $8,224,000 ($4,814,000 + $3,410,000). The Part B costs are $17,313,808. The contractor's total construction charge for purposes of calculation of total incurred cost in section 3.6 is $25,537,808. Actual final costs were $25,930,000 so this amount roughly compares given the adjustments to total proposal price and costs. The total overrun on the project is based on the difference between the total incurred costs and the total target price (section 3.7 of RFP). Total incurred costs were $34,237,808 ($25,537,808 + $8,700,000). The total target price would have been $34,005,803, leaving an overrun of $232,005. Tercon would have been entitled to half of these costs according to section 3.7 of the RFP for additional revenue of $116,003.

[186] Tercon's damages are summarized as follows:

Revenue	Total proposal price	$24,305,803
	Price adjustment for risk	1,000,000
	Overrun entitlement	116,003
		$25,421,806
Costs	Part A	$4,814,000
	Part B	17,313,808
		$22,127,808

[187] Revenue minus costs is $3,293,998. This is the amount that is awarded to Tercon in damages subject to mitigation.

6. Mitigation

[188] The plaintiff argued that Tercon's equipment and labour was not fully utilized during 2001 and 2002 and that these were slow years for Tercon such that the plaintiff had the equipment and labour to complete the Kincolith Project as well as all the other projects that it did complete during this period. The defendant denied this, providing evidence of the use of some of Tercon's equipment fleet during this period. Ultimately, however, the Ministry said that "it is difficult on the evidence to delineate the exact nature and extent of Tercon's successful mitigation" but it is "substantial".

[189] An accountant testified for the defendant that he had reviewed Tercon's equipment estimates for the Kincolith project and compared them with hourly use of the same equipment over the period in question. Based upon an assumption that any equipment used over 1000 hours during the period would not have been available for use on Kincolith, the defendant asked this court to conclude that there would not have been sufficient equipment available for Tercon to have completed Kincolith as well as the other projects that it did complete during this period.

[190] The accountant was unaware of the equivalencies in equipment in the Tercon fleet and so could not say whether a certain piece of equipment that was not initially identified for use on Kincolith could have been used on Kincolith or elsewhere. He relied solely on Salanski's estimated determination of equipment from Tercon's proposal but Salanski was not asked about this assessment in cross-examination. He did not consider leased equipment which was listed in the Tercon fleet. He failed to consider all of the equipment listed. The assumption of 1000 hours used as the basis for unavailability was not established in reliable evidence. Tercon uses 2000 hours per year for maintenance and rental rate purposes so that 1000 hours does not represent full usage.

[191] Salanski informed the court about the projects that Tercon successfully bid on during this period of time. He testified that Tercon had enough equipment to complete Kincolith and the other projects that Tercon actually performed in 2001-2002. To put it in perspective, on one project before Kincolith, Tercon moved a million and a half cubic meters of rock per year. On a project underway at trial, Tercon moved 700,000 cubic meters of rock per month. The whole of the Kincolith project required movement of about 500,000 cubic meters of rock.

[192] Tercon had bid on two dozen projects during this period and was successful on some. In cross-examination, Salanski said that this was a slow period for them and that they had a few, but not big, jobs. He said that Tercon ended up selling equipment during this period because it did not have the work. He would have "loved" to have secured all of the jobs that Tercon bid on and considered that equipment could have been sourced if necessary for any successful bid. He said that Tercon would have made adjustments to secure as much work as possible and that he "would have loved to have a high volume of work". Salanski also testified that identified personnel would have been made available for Kincolith and that others were available for assignment to other projects.

[193] Salanski's evidence was not discredited and the accountant evidence was never put to him. There was no other evidence to suggest that Tercon's capacity was limited. There was no evidence about the profitability of the other projects undertaken. There was no evidence of projects that should have been bid on but were not.

[194] There is insufficient evidence before me to conclude that there was profit earned or costs recovered that would not have been earned or recovered had Tercon successfully completed the Kincolith Project. I agree with the defendant that this court cannot define the nature or extent of any successful mitigation. Tercon appears to have undertaken as much work as it could get during this period. It could have undertaken more. It could have completed the Kincolith Project.

D. Tort Analysis: Free-standing duty of fairness

[195] Based on the conclusions I have reached with respect to the liability of the Ministry under the law of contract, it is not necessary for me to decide if the Ministry owed Tercon a free-standing duty of fairness in tort. However, if I was to decide the issue, I would be inclined to find that the Ministry owed Tercon no such free-standing duty of fairness. In my view, I would be bound to find in this manner as a result of the two decisions of the Court of Appeal in ***Midwest Management (1987) Ltd. (c.o.b. Midwest/Monad – A Joint Venture) v. British Columbia Gas Utility Ltd.*** (2000), 82 B.C.L.R. (3d) 79, 5 C.L.R. (3d) 140, 2000 BCCA 589 at paras. 13-14; and ***Powder Mountain CA***, *supra* at para. 72.

E. Conclusion

[196] The plaintiff is awarded damages in the amount of $3,293,998. At the request of counsel, costs are reserved pending further submissions.

"J.R. Dillon, J."
The Honourable Madam Justice J.R. Dillon