# IN THE SMALL CLAIMS COURT OF NOVA SCOTIA Cite as: 3089467 Nova Scotia Ltd. v. Bridgewater (Town), 2016 NSSM 8

2015 Claim No. SCBW 445087

**BETWEEN:** 

# 3089467 NOVA SCOTIA LIMITED

## Claimant

- and -

#### **TOWN OF BRIDGEWATER**

## Defendant

Hearing Dates: January 4 and January 22, 2016
Appearances: Claimant - Jeff Jollimore, President

Defendant - M.E. Donovan, Q.C.

## **DECISION and ORDER**

- [1] This is a claim arising from a public tender process.
- [2] The Defendant, Town of Bridgewater, issued a tender request for a parkade removal under date of September 15, 2015. The Claimant submitted a bid dated October 7, 2015. The Claimant's tender was the lowest bid but was not accepted as the Defendant deemed the Claimant's bid submission to be not compliant with its requirements. Specifically, the Town took the view that the tender was non-compliant with the safety certification requirements. I will explain this in greater detail below.
- [3] In its Notice of Claim, the Claimant asserts that it was wrongfully deemed non-compliant on the job and that it was given to a higher bidder. Is claims \$25,000.

[4] The written Defence states that the tender was not awarded to the Claimant because its tender bid did not include the required Letter of Good Standing issued by the Nova Scotia Construction Safety Association in accordance with Article 18.1 of the Bridgewater tender. It goes on to state that the Defendant puts the Claimant to its proof that the loss of profit on the tender, if any, is in the amount claimed.

# **Analysis**

- [5] There was very little dispute in the evidence at least as it related to the issue of liability.

  As I will develop more fully below, the essential issue here comes down to whether or not the Claimant complied with the bid requirements.
- [6] Jeff Jollimore, who is the President and principal or sole owner of the Claimant, gave evidence on behalf of the Claimant and was the only witness for the Claimant. He submitted Exhibit C1, a binder of documents which essentially included his evidence and submission. He asserts that his company did and does follow appropriate safety certification and all of this was presented in the tender submission. In regards to the specific issue of the Nova Scotia Construction Safety Association Certificate, he referred to the *Public Procurement Act*, S.N.S., c. 12, 2011, which in Section 14 states that every public tender notice must be consistent with the *Construction Contract Guidelines*. The *Construction Contract Guidelines* were also included in his Exhibit and in section 17.1 they state that the successful bidder must provide a Certificate of Recognition jointly issued by the Workers' Compensation Board and an occupational health and safety organization approved by the Workers' Compensation Board.
- [7] The issue of the application of the *Public Procurement Act* and *Construction Contract Guidelines* was not part of the original claim documents and, consequently, was not addressed in the Defendant's pre-hearing submission. As it appeared to raise an important issue I felt it in order to adjourn the matter to afford the Defendant an opportunity to respond to the issue of the application of the *Public Procurement Act* and *Construction Contract Guidelines*. As a result, the hearing which originally commenced

- on January 4<sup>th</sup> was adjourned to January 22<sup>nd</sup>. Prior to January 22, counsel for the Defendant filed a supplementary written submission.
- [8] As referenced above, the *Public Procurement Act* is relied on by the Claimant. The *Public Procurement Act* applies to the Town of Bridgewater. Section 4 of the *Act* reads:
  - 4. This Act applies to public sector entities acquiring and suppliers providing goods, service, construction and facilities.
- [9] Section 3 contains the definitions and clause (p) reads:
  - 3(p) "public sector entity" means
    - (ii) **municipalities**, municipal water utilities and service commissions, as defined in the Municipal Government Act. [Emphasis Added]
- [10] Section 2 of the Act reads:
  - 2. The purpose of this Act is to
    - (a) provide for the procurement of goods, services, construction and facilities by public sector entities in a fair, open, consistent and transparent manner resulting in best value;
    - (b) encourage competition, innovative ideas and solutions while respecting trade agreement publications;
    - (c) promote sustainable procurement in procurement decisions including identifying and exploring opportunities to work with and support social enterprises and businesses that are owned by and who employ under-represented populations.
- [11] Also relevant is section 3(h) which reads:
  - 3(h) "Construction Contract Guidelines" means standard instructions developed in consultation with the Construction Association of Nova Scotia that support construction tenders issued by Her Majesty in right of the Province.
- [12] As stated, the *Public Procurement Act* applies to the Town of Bridgewater. This was acknowledged by the Defendant, Town of Bridgewater.

[13] Of most relevance in this case is Section 14(2) of the Act which reads:

14(2) The terms and conditions of every tender notice <u>must</u> be consistent with the Atlantic Standard Terms and Conditions for the procurement of goods and services and Construction Contract Guidelines for the procurement of construction.

[Emphasis supplied]

[14] The Construction Contract Guidelines state, in Section 17:

## CCG 17 Certificate of Recognition Program – Letter of Good Standing

17.1 The Occupational Health and Safety Requirements of all contracts dictate that any prospective contractors and sub-contractors must meet the minimum standards of the Province of Nova Scotia. **Prior to contract award, at the request of the contracting authority, the successful bidder must provide:** 

17.1.1 A Certificate of Recognition issued jointly by the Workers' Compensation Board and an occupational health and safety organization approved by the Workers' Compensation Board. Or,

17.1.2 A valid letter of good standing from an occupational health and safety organization approved by the contracting authority indicating the contractor is in the process of qualifying for the Certificate of Recognition. Similarly, sub-contractors must provide certification within the period of time as stipulated in the tender documents.

[Emphasis supplied]

- [15] It would appear that the Claimant did supply, and I would so find, a certificate that complied with the requirement of 17.1.1 of the *Construction Contract Guidelines*.
- [16] In the exhibits filed in this case (see Exhibit 2, Affidavit of Larry Feener, dated December 21, 2015) is a copy of a certificate issued to the Claimant by the Workers' Compensation Board of Nova Scotia and H.S.E. Integrated Limited. Also in the evidence is material which shows that H.S.E. Integrated Limited is a Workers' Compensation Board certified safety audit provider. I would, accordingly, conclude from this that H.S.E. Integrated Limited is an "occupational health and safety organization approved by the Workers' Compensation Board."

- [17] I would further conclude that the certificate provided in the bid filed by the Claimant is a Certificate of Recognition issued jointly by the Workers' Compensation Board and an occupational health and safety organization approved by the Workers' Compensation Board, as stipulated by 17.1.1. of the *Construction Contract Guidelines*. In short, I conclude that the Claimant did indeed meet the requirements of the *Construction Contract Guidelines* in respect of the safety requirements.
- [18] The Claimant's position is since it met the *Construction Contract Guidelines* and since Section 14(2) of the *Public Procurement Act* requires that every public tender notice <u>must</u> be consistent with the *Construction Contract Guidelines*, its tender was, as a matter of law, compliant with the bid request of the Town of Bridgewater in the subject tender call.
- [19] Against that position the Town, and I refer here to the supplemental pre-hearing submission filed by counsel for the Defendant, argues that terms and conditions attached to the tender are in fact consistent with the *Construction Contract Guidelines* and therefore meet the requirements of Section 14(2) of the *Public Procurement Act*. The relevant terms and conditions are Article 18.1 of the bid document which reads as follows:

## 18. Safety Certification

- 1. Submit with Tender, a copy of Tenderer's current and valid Letter of Good Standing issued by the Nova Scotia Construction Safety Association.
- [20] The Town's submission states that Article 18.1 is consistent with the Guidelines in that it, (1) requires the provision of a safety certificate; (2) requires a safety certificate by an organization recognized by the Nova Scotia Workers' Compensation Board; and (3) only differs from the Guidelines to the extent that it limits the Workers' Compensation Board recognized organization to the Nova Scotia Construction Safety Association. The submission on behalf of the Defendant goes on to state that the terms and conditions only need be "consistent with" and not "identical to" the Guidelines and a departure from the Guidelines is not inconsistent with the purpose and intent of the Guidelines.

- [21] With all due respect, I take a different view. For the reasons which follow, I conclude that the requirement in section 18, that a Letter of Good Standing be supplied from the Nova Scotia Construction Safety Association is inconsistent with the *Construction Contract Guidelines*.
- [22] I again refer to section 2 of the *Public Procurement Act* and in particular, clause (a) as follows:
  - 2. The purpose of this Act is to
  - (a) provide for the procurement of goods, services, construction and facilities by public sector entities in a fair, open, <u>consistent</u> and transparent manner <u>resulting in best value</u>.

[Emphasis Supplied]

[23] I refer to the *Interpretation Act*, R.S.N.S. 1989, c. 235, at Section 9(5), which reads as follows:

Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to attain;
- (e) the former law, including other enactments, same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of the legislation on the subject.

[24] Also I have considered the following which is a statement from the Provincial website discussing the *Public Procurement Act* and procurement, which reads:

Public Procurement Act

Working together makes us stronger. The new Public Procurement Act is about creating a community with the tools to thrive in this increasingly complex world of public procurement. It's about sharing ideas, managing risk, and <u>standardizing practices</u> to ensure our taxpayers are getting the best value for their dollars and our vendors are getting every chance to compete in local and global markets.

Today's trade agreements, procurement law, and generally accepted procurement practices can be difficult to navigate. Our growing understanding of local, national, and international markets, in combination with our growing understanding of why and how we need to purchase sustainably, is rapidly changing the way we calculate cost and value. Staying on top of the rising sea of information on broader social, environmental, and economic costs can be a challenge. Ready access to advice, peer support, and current best practices is crucial to be able to meet legal obligations and take advantage of new opportunities, especially for smaller public entities with fewer resources.

Greater standardization makes it easier for vendors to understand and compete in Nova Scotia's procurement process. Knowing what to expect from county to county and organization to organization allows vendors to concentrate on putting together their best proposal or bid rather than learning the ins and outs of a new process for each opportunity. In addition to creating consistency among tendering processes, the new Act mandates that all public sector entities must post notice of any tender over Atlantic Trade Agreement thresholds (goods \$25,000; services \$50,000) to the provincial tenders website. This gives vendors a reliable place to start looking for opportunities. Going beyond requirements, many organizations are choosing to post notice of all their tenders to the province's website, regardless of amount.

The public sector spent more than \$2 billion last year, and more than 80 per cent of that locally. By collaborating and working more strategically, we are making our money work harder and smarter. In a commitment to transparency and accountability, all public sector entities have, or are in the process of, posting their procurement policy to their websites.

[Emphasis supplied]

[25] I am of the view that the intention of the *Public Procurement Act* is to provide for standardization and consistent requirements as between various public sector entities who do business with the private sector. I note in particular the statement:

Knowing what to expect from county to county and organization or organizations allows vendors to concentrate on putting together their best proposal or bid rather than learning the ins and outs of a new process for each opportunity.

- [26] Here, the Claimant submitted a proposal which met the requirements of the *Construction Contract Guidelines*. The Claimant is, in my view, entitled to assume that those *Construction Contract Guidelines* will be consistently applied between county and county and between municipality and municipality and between various departments of the Provincial government. The safety certification requirement should not vary as between those entities. That is, I take it, a fundamental objective of this *Act*.
- [27] Mr. Jollimore testified that his company had made other public tender proposals and his safety certification had been accepted in other instances. To now be rejected on that basis it seems to me to run completely contrary to the intention and the objective of the *Public Procurement Act*. In fact, what occurred here is what the *Public Procurement Act* is intended to avoid.
- [28] I might also add that, contrary to what has been submitted on behalf of the Defendant, Article 18.1 of the Defendant's tender requirements does not itself require a safety certificate by an organization approved by the Nova Scotia Workers' Compensation Board. In fact all it says is there must be a valid Letter of Good Standing issued by the Nova Scotia Construction Safety Association in favour of the tenderer. While it apparently is the case that the NSCSA is recognized by the WCB, such is not a requirement of Article 18.1.
- [29] While I accept that "consistent with" is not the same thing as "identical to," I conclude that the tender requirements of the Defendant in this matter and, in particular Article 18, were not and are not consistent with the *Construction Contract Guidelines*.
- [30] It follows therefore that the Defendant's tender notice in this case did not comply with Section 14(2) of the *Public Procurement Act* which, through the use of the word "must," mandatorily requires consistency between its terms and conditions and those contained in the *Construction Contract Guidelines*.

- [31] There were no other reasons given for denying the Claimant's tender submission. I conclude, therefore, that its submission was a compliant bid.
- [32] The next lowest bid was also rejected as being non-compliant. The Town accepted the third lowest bid which, in its view was the lowest compliant bid.
- [33] I refer to the report from Larry Feener and Jessica MacDonald to the Bridgewater Town Council dated October 15, 2015, (Exhibit 3 to Affidavit of Larry Feener dated December 21, 2015), under the heading "Recommendation" at page 2:

Staff recommends council award tender #15-11E to the <u>lowest compliant tender</u> – Dexter Construction, for a value not to exceed the amount of \$107,820, plus HST...

[Emphasis supplied]

[34] Further, in the minutes of Town Council meeting of October 19, 2015, (Exhibit 4 to Affidavit of Larry Feener dated December 21, 2015), at item 4.1:

. . .

The Engineering Department issued four Tender packages and received four (4) tenders for the King Street Redevelopment – Phase 1A – Parkade Removal. Staff reviewed the four submissions and concluded that the two (2) lowest submissions did not meet the requirements outlined in the tender document. The other two submissions were in order.

Staff recommended that council award Tender 15 11E to the lowest compliant bidder, Dexter Construction, for a value not to exceed the amount of \$107,820, plus HST...

. . .

Moved by Councillor Tanner, seconded by Deputy Major McInnis, that Town Council for the Town of Bridgewater endorse the recommendation of staff and award Tender 15-11E – King Street Redevelopment – Phase 1A – Parkade Removal to the lowest compliant bidder, Dexter Construction, not to exceed the amount of \$107,820, plus HST (\$112,441.17 net HST) as outlined in the tender document and presented in Document 15-165. Motion carried.

[Emphasis supplied]

- [35] Town staff recommended awarding the tender to the lowest compliant bid and Town Council endorsed the recommendation and did in fact award the tender to the lowest compliant bid. Given this and given that there was no other reason to reject the Claimant's I find, on a balance of probabilities, that had the Town treated the Claimant's submission as a compliant bid, it would have awarded the tender to the Claimant.
- [36] I turn now to the "privilege" or exclusion clause.
- [37] In its original pre-hearing submission the Defendant referred to the privilege clause in the Defendant's specification which reads as follows:
  - 17.1 The Owner reserves the right to accept or reject any Tender and to cancel the tendering process and reject all tenders at any time prior to the award of the Contract without incurring any liability to affected Tenderers.
- [38] Reference was made to the Supreme Court of Canada decision in *M.J.B. Enterprises Ltd.* v. *Defense Construction (1951)*, [1999] 1 S.C.R. 619 to support the proposition that the Bridgewater privilege clause would not be a basis for accepting a non-compliant tender from the Claimant. I have already determined that the tender submitted by the Complaint here was compliant so that is not a live issue.
- [39] The *M.J.B. Enterprises* case is nevertheless relevant and instructive to this case for the comments about the general approach to a privilege clause and for how the Supreme Court arrived at a ruling in favour of an unsuccessful tenderer, which is the case here.
- [40] I refer to the following comments of lacobucci, J. in M.J.B.:
  - b) Effect of the Privilege Clause
  - 43 Although the respondent has not disputed the trial judge's finding that the Sorochan tender was non-compliant, the respondent argues that the privilege clause gave it the discretion to award the contract to anyone, including a non-compliant bid, or to not award the contract at all, subject only to a duty to treat all tenderers fairly. It argues that because it accepted the Sorochan tender with the good faith belief that it was a compliant bid, it did not breach its duty of fairness.
  - 44 The words of the privilege clause are clear and unambiguous. As this Court stated in

Cartwright & Crickmore, Ltd. v. MacInnes, 1931 CanLII 37 (SCC), [1931] S.C.R. 425, at p. 431, "there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail". However, the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.

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

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

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

- 46 Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of "cost" than the prices quoted in the tenders. In this respect, I agree with the result in Acme Building & Construction Ltd. v. Newcastle (Town) (1992), 2 C.L.R. (2d) 308 (Ont. C.A.). In that case, Contract B was awarded to the second lowest bidder because it would complete the project in a shorter period than the lowest bid, resulting in a large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost. However, needing to consider "cost" in this manner does not require or indicate that there needs to be a discretion to accept a non-compliant bid.
- 47 The additional discretion not to award a contract is presumably important to cover unforeseen circumstances, which is not at issue in this appeal. For example, Glenview Corp. v. Canada (1990), 34 F.T.R. 292, concerned an invitation to tender whose specifications were found to be inadequate after the bids were submitted and opened by the Department of Public Works. Instead of awarding a contract on the basis of inadequate specifications, the department re-tendered on the basis of improved specifications. Nonetheless, this discretion is not affected by holding that, in so far as the respondent decides to accept a tender, it must accept a compliant tender.
- 48 Therefore, I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the <u>lowest</u> compliant bid. With respect to this latter proposition, the privilege clause must prevail.
- 49 The appellant disagrees with this conclusion and submits that the majority of Canadian jurisprudence supports the proposition that the person calling for tenders should award Contract B to the lowest valid tender despite the presence of a privilege clause like the one in

issue in this appeal. To the extent that these decisions are incompatible with the analysis just outlined, I decline to follow them. Nonetheless, I have reviewed the cases submitted to this Court and find that they do not stand for the proposition that the lowest valid tender must be accepted. Those cases that in fact deal with the interpretation of the privilege clause in the context of a finding that Contract A arose between the parties are instead generally consistent with the analysis outlined above.

- For example, a number of lower court decisions have held that an owner cannot rely on a privilege clause when it has not made express all the operative terms of the invitation to tender: see Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1987), 28 C.L.R. 290 (B.C. Co. Ct.), affd (1989), 1989 CanLII 241 (BC CA), 35 C.L.R. 241 (B.C.C.A.); Kencor Holdings Ltd. v. Saskatchewan, 1991 CanLII 7891 (SK QB), [1991] 6 W.W.R. 717 (Sask. Q.B.); Fred Welsh Ltd. v. B.G.M. Construction Ltd., [1996] 10 W.W.R. 400 (B.C.S.C.); George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality) (1997), 34 C.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)); Martselos Services Ltd., supra. Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping: see Twin City Mechanical v. Bradsil (1967) Ltd. (1996), 31 C.L.R. (2d) 210 (Ont. H.C.), and Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City) (1997), 1997 CanLII 14848 (AB QB), 34 C.L.R. (2d) 197 (Alta. Q.B.).
- [41] In *M.J.B.*, there was a privilege clause which stated that the lowest or any tender would not necessarily be accepted. The Supreme Court found that that clause did not override the implied term that only compliant bids would be accepted. The court found there was compatibility between the privilege clause and this obligation.
- [42] Further, it discusses the discretion that the owner retains through a privilege clause to not necessarily accept the lowest bid but to take a more nuanced view of the "cost" than the prices quoted in the tenders. Despite this the Court ultimately accepted the lower court's factual finding that had the non-compliant bid been disqualified the respondent would have, as a matter of fact, awarded the contract to the appellant.
- [43] Similarly, in the present case, as I have discussed above, the record indicates that, as a matter of fact, had the Claimant not have been considered non-compliant, the Town would have awarded the contract to it.
- [44] In its pre-hearing submission the Defendant also submitted that Article 17.1 of the tender constitutes an exclusion clause that insulates the Town from any liability to any tenderer.

In support of the proposition reference is made to the Supreme Court of Canada case of *Tercon Contractors Ltd.* v. *Her Majesty the Queen in Right of Province of British Columbia et al,* [2010] 1 S.C.R. 69.

- [45] I again quote Article 17.1 of the Defendant's specifications:
  - 17.1 The Owner reserves the right to accept or reject any Tender and to cancel the tendering process and reject all tenders at any time prior to the award of the Contract without incurring any liability to affected Tenderers.
- [46] The Town submits that the last clause of 17.1 constitutes an exclusion clause thereby allowing the Town to exclude a Tender without risk of liability.
- [47] As a general proposition, clearly worded exclusion clauses will be enforced. Is this a clearly worded exclusion clause? In my view it is not but, rather, is ambiguous.
- [48] The owner has purported to reserve two things the right to accept or reject any tender and to the right to cancel the tendering process and reject all tenders. The question and the ambiguity is whether the concluding words "without incurring any liability to affected tenderers" applies to both of these rights. It can reasonably bear either interpretation and therefore, is ambiguous.
- [49] An ambiguous clause can and often is interpreted against the drafter. This is known as the doctrine of *contra proferentem*. Alternatively, if the clause in question is an exclusion clause, purporting to exclude any liability, the court will not apply the exclusion clause if it is ambiguous. Either way, the clause here does not operate as asserted by the Defendant.
- [50] Even if it was not ambiguous, the *Tercon* case would suggest it not be applied. In that case, the clause in question read as follows:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for 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.

- [51] In *Tercon*, the majority held that the exclusion clause did not insulate the Province of British Columbia from the claim made by the unsuccessful compliant bidder where the contract award was made to an ineligible bidder.
- [52] In this case, the Claimant was deemed non-compliant by the Defendant. As I have already ruled, the Defendant was, in my view, in error. The *Public Procurement Act* trumps the language of the Defendant's specification documents.
- [53] In the *Tercon* case, the majority found that the very expressly wording exclusion clause did not bar recovery. In the same way that the exclusion clause did not apply to insulate the Defendant in the *Tercon* case where it had awarded the contract to an ineligible bidder, here, Article 17.1 should, in my view, not insulate the Town from its liability to a bidder who has complied in all respects with the Town's requirements when viewed in the context of the obligations imposed on the Town by the *Public Procurement Act*.
- [54] In addition, the language of 17.1 is much less explicit than that contained in the *Tercon* case and, as discussed above, is ambiguous as to being an exclusion clause that would apply here.
- [55] For these reasons, I would reject the suggestion that the Town is insulated from the claim herein by virtue of Article 17.1.

## **Damages**

[56] In the *M.J.B.* case, the Supreme Court of Canada found that on a balance of probabilities, the record supported the contention that, as a matter of fact, had the non-compliant bid been disqualified the respondent would have awarded the contract to the appellant. In this present case, I have found that, on a balance of probabilities, the record shows that

had the Town treated the Claimant's submission as a compliant bid, it would have awarded the tender to the Claimant.

- [57] In the *M.J.B.* case, the Supreme Court stated that the measure of damages in a case such as this is expectation damages. As was the case in *M.J.B.* that is achieved by awarding damages to the Claimant for the amount of profits it would have realized had it been awarded the main contract or, as it is referred to in the case law, "contract B".
- [58] The Claimant has, as part of his submission in Exhibit 1, Tab 4, tendered a document entitled "Cost/Profit Breakdown." It shows lost profit on the parkade structure removal, traffic control, silt fence and hay/straw cover in the amount of \$20,086. In addition, it shows a value for the scrap metal which it would have been entitled to, estimated at 180 tonnes at \$90 per tonne, for a total of \$16,200, for the loss of scrap steel. The alleged total loss profit is therefore \$36,286.
- [59] Against that, Mr. Feener, for the Defendant has prepared an analysis of the various items contained in the Claimant's submission and presented those through a spread sheet which was tendered as Exhibit 8. In Mr. Feener's analyses he uses the Nova Scotia Roadbuilders' Association 2012 rates for analysis 1, 2015 contractor rates sheet for analysis 2, and RSA rates for 2013 for analysis 3. The estimated costs are significantly different as between the Claimant's information and the figures put forward in Mr. Feener's analysis.
- [60] In the following table I show the Claimant's information for the four pieces of equipment which it would have utilized in the project and the costs which the Claimant asserts would have been incurred. These appear to be the items where there is the most divergence in amount. The following table shows the Claimants asserted costs for the items and the same items under analysis 1, analysis 2, and analysis 3, as prepared by Mr. Feener.

TABLE A Claimant Defendant

| TOTALS                                       | \$ 32,250 | \$ 75,100  | \$60,950   | \$62,812   |
|--|-----------|------------|------------|------------|
| Tractor Trailer                              | \$ 3,000  | \$ 8,400   | \$ 6,000   | \$ 5,202   |
| Tandem Truck                                 | \$ 8,750  | \$ 20,000  | \$ 14,750  | \$ 19,175  |
| Mid-Size Excavator                           | \$ 5,500  | \$ 11,200  | \$10,200   | \$ 9,460   |
| Small Excavator<br>with Hammer<br>Attachment | \$ 15,000 | \$ 35,000  | \$ 30,000  | \$ 28,975  |
|  |           | Analysis 1 | Analysis 2 | Analysis 3 |

- [61] It will be immediately apparent that the figures put forward by the Claimant are significantly less than the figures suggested by the Defendant. The Claimant's figures put forward by Mr. Jollimore were provided without any additional backup apart from his own testimony. Nevertheless, they are he states, an accurate representation of what his company's costs are for these items.
- [62] Mr. Feener's analysis on the other hand does have supporting documentation which was tendered respectively as Exhibits 9, 10, and 11. However, these figures he has used are not costs but are actually rates; in other words, what a lessee would have to pay to rent the equipment in question. Therefore there is an element of profit built into these rates. To reflect that, Mr. Feener's analysis backs out 20% overhead and profit in the lower part of his spread sheet.
- [63] On at least on one view, what the industry costs are, is largely irrelevant. What is relevant is the Claimant's actual costs and the only information I had on that is what has been presented by the Claimant.

- [64] On the other hand, if the Claimant's costs were so out of line with what generally would be seen to be costs for the same items, then one could reasonably question the veracity of the figures put forward by the Claimant. The question here is whether we approach that degree of divergence.
- [65] If I take the Defendant's lowest figure for these four items, the amount is, as contained in Analysis 2, \$60,950. As I have no evidence to establish whether 20% is an appropriate amount to back out, I have used various percentages for overhead and profit, and backed that out as shown in the following table:

#### TABLE B

| Less     | 20%      | 25%      | 30%      | 35%      | 40%      | 45%      | 50%      |
|----------|----------|----------|----------|----------|----------|----------|----------|
| \$60,950 | \$48,760 | \$45,713 | \$42,665 | \$39,618 | \$36,570 | \$33,523 | \$30,475 |

- [66] As will be seen, even if the lowest of the three analyses is used, it requires and backing out some 45% to yield something close to the figure claimed by the Claimant for these four items. It may well be that the Claimant operates in such a manner and with such a degree of efficiency to keep its costs very modest in respect of industry averages. However, when I review the figures put forward by the Defendant, which are based on objective third party information, and after reviewing the analysis shown in Table A and Table B, I am compelled to conclude that the Claimant has understated the costs.
- [67] In any damages assessment a court is bound to do what is reasonable to do justice as between the parties. It has been stated more than once that the function of assessing damages is not a precise science. Whether it be a superior court or a small claims court, a decision maker is guided often by notions of basic common sense and what appears to be reasonable in the circumstances.

- [68] Without some backup material from the Claimant, I am left only with Mr. Jollimore's Exhibit which, as I have already indicated, is a significantly divergent from the other figures put forward after taking out a significant amount, over 45%, as an allowance for overhead and profit.
- [69] Accordingly, I am of the view that some adjustment is required to do justice between the parties. If I were to adjust the amount for the four items small excavator with hammer attachment, mid-size excavator, tandem truck and tractor trailer to \$40,000 that would represent something more reasonable and in line with the figures in Analysis 2 put forward by the Defendant. That appears to be the reasonable approach and I will do so.
- [70] With this adjustment, the "profit on work" in Tab 4 to Exhibit 1, is reduced to \$12,336.
- [71] The other issue relates to the claim for the scrap metal. Mr. Jollimore presented no third party information about what that price amount was, merely his *viva voce* evidence of \$90 per tonne.
- [72] The Defendant, on the other hand, has produced current information showing \$40 per tonne to be the appropriate amount. Again, I am persuaded by the objective information. I will utilize the figure put forward by the Defendant.
- [73] The claim for the loss of scrap metal is therefore reduced to \$7,200.
- [74] The total loss therefore according to this revised calculation is the total of \$12,336 and \$7,200, = \$19,536. This will be grossed up by 15% to represent HST, which yields \$22,466.40.
- [75] I will allow cost for the filing fee of \$199.35.

#### ORDER

| [76] | It is hereby | y ordered that the | Defendant par  | v to the   | Claimant as f   | ollows:    |
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Debt \$22,466.40 (inclusive of HST)

Costs <u>199.35</u>

Total \$ 22,665.75

DATED at Halifax, Nova Scotia, this 31st day of March, 2016.

MICHAEL J. O'HARA ADJUDICATOR