Electronic Reverse Auctions
Debunking Myths and Misconceptions

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by Who’s Who Legal as one of the top ten public procurement lawyers in the world. His portfolio includes advising on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul has an extensive track record of public speaking, publishing and training. He is the author of Government Procurement, The Laws of Precision Drafting, Accelerating the Tendering Cycle and the Procurement Law Update newsletter. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations including NIGP, SCMA, the University of the West Indies and Osgoode Hall Law School.
Electronic Reverse Auctions
A Global Perspective for Canadian Implementation

As discussed in our 2020 Vision: A Cayman Case Study, electronic reverse auctions represent the cutting edge of using procurement automation to achieve cost savings. With reference to leading practices in Europe, the UK and the US, this presentation will explain how Canadian institutions can implement these leading-edge cost-saving platforms in a treaty-compliant manner that aligns with the intricacies of Canadian tendering law.
To say that electronic reverse auctions (“ERAs”) have met some resistance across certain segments of industry would be an understatement. However, the widespread worldwide implementation of ERAs, along with their formal adoption as a legitimate public tendering method in the latest round of public sector procurement reforms, call for a better understanding of how to properly leverage this technology to achieve greater costs savings for the Canadian taxpayer.
Electronic Reverse Auctions

CCA Releases 2001 Bulletin Against Reverse Auctions

In December 2001, the Canadian Construction Association released a Special Bulletin opposing ERAs.

Special Bulletin
Canadian Construction Association – December 2001

An Owner's Guide to Reverse Auctions

Reverse Auctions: What are they? Reverse auctions (also commonly referred to as 'competitive bidding events'), are an Internet-based method of bidding for the supply of goods and services. The growing use of electronic commerce has resulted in some owners/purchasers exploring use of this procurement method, including the procurement of construction services. The intent of reverse auctions is to hold a live, on-line bidding competition, whereby the successful bidder is determined by the lowest price submitted to the tendering authority at the conclusion of the auction.

Why should reverse auctions not be used for construction? The Canadian Construction Association (CCA), in consultation with its Standard Practices Committee, General Contractors Council, Trade Contractors Council and many local construction associations across Canada, has expressed grave concerns with respect to the use of reverse auctions for the procurement of construction services.
Electronic Reverse Auctions

CCA Releases 2001 Bulletin Against Reverse Auctions

That Special Bulletin warned that ERAs are a “radical departure” from conventional construction tendering:

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Reverse Auctions: What are they? Reverse auctions (also commonly referred to as 'competitive bidding events'), are an Internet-based method of bidding for the supply of goods and services. The growing use of electronic commerce has resulted in some owners/purchasers exploring use of this procurement method, including the procurement of construction services. The intent of reverse auctions is to hold a live, on-line bidding competition, whereby the successful bidder is determined by the lowest price submitted to the tendering authority at the conclusion of the auction.
Electronic Reverse Auctions
CCA: ERAs a “Radical Departure” From Industry Norms

Why should reverse auctions not be used for construction?
The Canadian Construction Association (CCA), in consultation with its Standard Practices Committee, General Contractors Council, Trade Contractors Council and many local construction associations across Canada, has expressed grave concerns with respect to the use of reverse auctions for the procurement of construction services.

The CCA recognizes the value and benefits of Internet-based bidding and endorses its use when intended to increase the competitiveness and efficiency of the construction tendering process. In this regard, CCA is currently working with owners, contractors and other construction industry representatives to develop appropriate guidelines for the use of electronic bidding practices. However, the concept of a bidding auction is a radical departure from the principles of recommended construction procurement practices, and as such, is strongly opposed by CCA and its constituent representatives.
Electronic Reverse Auctions
CCA: “Many Risks and Pitfalls” to ERAs

The Special Bulletin also maintained that ERAs do not respect industry practices, are not designed for construction procurement, could lead to “cut-throat” pricing and corner cutting, may subject bidders to foreign laws, and could breach Canadian tendering laws and trade treaties. The Bulletin stated that “The construction industry’s objection to reverse auctions stems from many risks and pitfalls associated with their use.”
Electronic Reverse Auctions

CCA: ERAs Do Not Respect Industry Practices

The CCA explained its concern over the failure to respect industry practice as follows:

Reverse auctions do not respect the prevailing industry practices for construction procurement. The industry has long-recognized practices for traditional design-bid-build construction bidding, stipulated in documents such as CCDC 23 'A Guide to Calling Bids and Awarding Contracts' and CCDC 29 'A Guide on Standard Contracting and Bidding Procedures'. Both of these guides (prepared in close consultation with the industry, contractors, public and private owners and the design community) advocate best practices which are specifically developed and used for construction procurement. Reverse auctions disregard these recommended practices.
Electronic Reverse Auctions

CCA: ERAs Do Not Respect Industry Practices

The CCA also asserted that ERAs are not designed for construction procurement:

Owners, contractors and design professionals are familiar with the traditional bidding process and clearly know what obligations they must meet in order to fulfil their responsibilities. The reverse auction process is not designed for construction procurement, thus its use creates greater likelihood of disputes, bad faith and an increased risk of claims. By respecting prevailing industry bidding practices, owners demonstrate commitment to the project and lend greater credibility.
Electronic Reverse Auctions
CCA: "Cut-Throat" Pricing and Corner Cutting

Furthermore, the CCA claimed that ERAs could lead to "cut-throat pricing" and "corner cutting":

Under traditional bidding practices, the owner is receiving a contractor's absolute best 'competitive' price outright for providing the services required. Internet auctions encourage contractors to initially submit artificially inflated prices, knowing that there will be an opportunity to re-submit a more competitive price. As a result, an owner runs the risk of not receiving the contractor's best competitive price. In other cases, this can also lead to 'cut-throat' pricing by contractors, inevitably forcing them to cut corners to cover the difference from their best competitive price and invites greater potential to compromise the quality of a project.
Electronic Reverse Auctions

CCA: Foreign Rules and Unknown Legal Risks

The CCA also detailed concerns that ERAs could expose bidders to foreign laws and breach Canadian laws and treaties:

Traditional bidding practices have mechanisms in place to deal with governing laws and regulations, bid and contract security, mistaken bids, issuance of addenda, etc. Reverse auctions may be governed by the laws of the location of the auction's service provider, which is often remote from the actual construction project's or owner's location.

The extension of bid closing times and the ability to re-submit prices as allowed by reverse auctions can be interpreted as a form of pre-closing negotiation or bid shopping, which is discouraged within the industry as it compromises the spirit of a fair and open competitive process. Moreover, for public owners reverse auctions may contradict certain existing and proposed trade agreements.
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CCA Applauds Minister for Rejecting Reverse Auctions

On September 8, 2006, the CCA released a communiqué after the federal Minister of Public Works rejected the use of ERAs.

CCA WELCOMES GOVERNMENT’S DECISION TO ABANDON REVERSE AUCTIONS

SEPTEMBER 8, 2006

OTTAWA – The Canadian Construction Association (CCA) today applauded the announcement by Public Works and Government Services Canada Minister Michael Fortier to take off the table the idea of using reverse auctions as part of the federal government's current procurement review process. Over the past several weeks, CCA, along with many of its local and provincial member associations, had written the Minister asking that the government refuse to consider reverse auctions as a potential procurement process.
Electronic Reverse Auctions

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The CCA noted that the Minister had “responded in full” to its recommendations regarding ERAs:

In an official release issued yesterday from Public Works and Government Services Canada, Minister Fortier states: “We are working with the industry to make sure we understand their concerns and are in a position to address them in the best interests of Canadians....That is why, after further consideration, I have asked my officials to take off the table the use of reverse auctions as part of our procurement strategy for all categories of commonly purchased goods and services.” CCA has long maintained that because reverse auctions act contrary to the traditional and accepted method of “sealed bid” procurement for construction services, the federal government needed to take a strong stand against their use. The Minister’s announcement yesterday responded in full to CCA’s recommendation.
Electronic Reverse Auctions
CCA: Hoped to “Send a Clear Signal”

The CCA also expressed its hope that this would “send a clear signal” to public and private sector owners:

“We are very pleased that the Minister has heard our message against the use of reverse auctions,” stated Michael Atkinson, President of the Canadian Construction Association. “In the construction industry, reverse auctions distort traditional bidding methods, and we hope that the federal government’s abandonment of reverse auctions will send a clear signal to other owners, both public and private, that their use is unacceptable for construction procurement.” The Minister also confirmed that consultations with industry stakeholders will continue over the fall. CCA looks forward to working with the government on procurement reform, secure in the knowledge that reverse auctions are no longer being considered.
Electronic Reverse Auctions
Canadian IT Industry Also Applauds ERA Rejection

In his September 8, 2006 article in itbusiness.ca entitled “Public Works pulls plug on reverse auction plan” Shane Schick wrote that “Canadian technology providers and vendors were in a celebratory mood Friday following a decision by Public Works and Government Services Canada to scrap its planned use of reverse auctions as a vehicle for procurement reform.” He noted that “Procurement reform has attracted considerable lobbying from IT industry associations and resellers, who worried the PWGSC plan would severely limit the opportunity for small businesses to compete on government contracts.”
The article included the following explanation from the industry:

Bernard Courtois, president of the Information Technology Association of Canada (ITAC) agreed that Fortier was doing the right thing, but he warned that the issue is much broader than simply the use of reverse electronic auctions. “As a technology industry, it’s pretty hard for us to be against using technology for procurement, but there was a communications issue, and how they would use the auctions,” he said. “Every time a buyer tries to do something to save money, if you’re a supplier it’s a change, it’s a disruption.”

Schick also noted that “PWGSC is still obligated to save $2.5 billion in spending over the next five years, though it has not indicated what other methods it might use.”
Electronic Reverse Auctions

Edmonton Construction Association Calls for Boycott

On September 3, 2015, the Edmonton Construction Association released a Tender Advisory Notice.

Tender Advisory Notice

Dear ECA Members,

It has come to our attention that a U.S. corporation, Honeywell International Inc., plans to solicit bids for Project Edmonton Phase I at the Standard Life Building using a reverse bid auction process.

The Edmonton Construction Association (ECA), and the Canadian Construction Association (CCA) strongly oppose the use of reverse bid auctions for the procurement of construction services. As our policy documentation states: “The extension of bid closing times and the ability to resubmit prices under a reverse auction is a form of pre-closing negotiation or bid shopping, which compromises a fair and open competitive process.”

We have advised Honeywell and their legal department verbally, and in writing of our views, and have informed them that the ECA is asking our member companies to not participate in this reverse auction tender.

All ECA members benefit from the standard and fair tendering practices that we have developed over the past century. Now is the time to demonstrate our unity as we continue to give leadership in construction. Thank you for doing your part!

To reiterate, we are asking that none of our members participate in this bid process until it is adjusted to comply with our Canadian Standard Practices.

All the best in your fall season,

Proudly Serving Our Members,

John McNicol
Executive Director
Electronic Reverse Auctions

Edmonton Construction Association Calls for Boycott

The communication reads as follows:

Tender Advisory Notice

Dear ECA Members,

It has come to our attention that a US corporation, Honeywell International Inc. plans to solicit bids for Project Edmonton Phase II at the Standard Life Building using a reverse bid auction process. The Edmonton Construction Association (ECA), and the Canadian Construction Association (CCA) strongly opposes the use of reverse bid auctions for the procurement of construction services.
As our policy documentation states “The extension of bid closing times and the ability to resubmit prices under a reverse auction is a form of pre-closing negotiation or bid shopping, which compromises a fair and open competitive process.”

We have advised Honeywell and their legal department verbally, and in writing of our views, and have informed them that the ECA is rallying our member companies to not participate in this reverse auction tender.

All ECA members benefit from the standard and fair tendering practices that we have developed over the past century. Now is the time to demonstrate our unity as we continue to give leadership in construction. Thank you for doing your part!
To reiterate, we are asking that none of our members participate in this bid process until it is adjusted to comply with our Canadian Standard Practices.

All the best in your fall season!

Proudly Serving Our Members,
John McNicoll
Executive Director
Electronic Reverse Auctions
CCA Maintains Anti-ERA Position

Since its success in stopping federal deployment in 2006, the CCA has maintained its opposition to ERAs. Under Article 4.0 Industry Practices, its September 2017 policy statement reads as follows:

4.6 Reverse Auctions
CCA endorses the use of electronic procurement provided that it maintains the principles that are intrinsic to the construction bidding process and that it is intended to increase efficiency. CCA opposes the use of reverse auction.
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OGCA Challenges Use of ERAs

On February 28, 2018, the Ontario General Contractors Association (OGCA) wrote to the Ontario Public Buyers Association (OPBA) and the Georgian Bay Area Public Purchasing Co-Operative (GBAPPC), challenging the planned use of ERAs.

February 28, 2018

Mr. Jeremy Klassen
Member Services Coordinator
OPBA Central Office
Suite 361 – 111 Fourth Avenue
St. Catharines, Ontario L2S 3P5

Chair: Georgian Bay Area Public Purchasing Co-operative
by email: purchasing@barrie.ca

C/o Purchasing Manager
City of Barrie - Service Barrie Department
1st Floor City Hall
70 Collier Street
Barrie, Ontario L4M 4T5

Reference: Use of Reverse Auctions

Dear Sir or Madam:

By email: info@opba.ca
Dear Sir or Madam:

The Ontario General Contractors Association represents over 200 general contractors throughout Ontario. We provide the industry with a number of services including the review of tender documents and the tendering process. This is done in the belief that a clear, concise and equitable set of bidding documents, combined with a fair, open and transparent tendering process, will benefit all of the parties involved: the design professional, the contractor and most importantly, the owner.

We have been made aware of services being offered by Paul Emanuelli Procurement Office promoting the use of Reverse Auctions.

Electronic Reverse Auctions
OGCA Challenges Use of ERAs

The OGCA confirmed it had been “made aware of services being offered” that were “promoting” the use of ERAs:
Electronic Reverse Auctions
OGCA Challenges Use of ERAs

The OGCA asserted that ERAs are a form of “bid shopping”, that offend industry practice, fail to provide best price and run contrary to Canadian procurement law.

Reverse bid auctions are a form of “bid shopping” which is considered by Canadian Courts to be “repugnant conduct which has no legitimate place in the proper operation of the tendering paradigm” (see Stanco Projects Ltd. v. British Columbia (2004), 32 B.C.L.R. (4th) 302 (B.C.S.C.)). OGCA strongly objects to the use of reverse bid auctions, not only because their use offends prevailing, industry best practices, but because we do not believe they will provide the desired best price or best value for you as a purchaser of construction services and because they are contrary to the spirit of established procurement law in Canada.
The OGCA also cited two US reports from 2004 and 2005 that raised a series of concerns about ERAs:

A report released by the U.S. Army Corps of Engineers (USACE) in 2004 came to the same conclusion. From October 2002 to September 2003, USACE conducted a pilot program to evaluate the use of reverse auctions on its construction projects. It concluded that the use of reverse auctions should NOT be recommended for the procurement of construction services, because:

• Reverse auctions are not well suited to construction procurement. Construction services cannot be equated to commodities. They are not identical goods under identical conditions. They have too many variables and are one-of-a-kind projects under one-of-a-kind conditions;
Electronic Reverse Auctions

OGCA Challenges Use of ERAs

• Reverse auctions have no valid method to measure savings;

• Reverse auctions are a game of strategy that promote “bid-gaming.” The bid game is not “How low can I go?” but “How low do I have to game my bid?” Low bid is not necessarily the lowest bid;

• Reverse auctions are very labour intensive; and

• Reverse auctions show no real return on investment.
The USACE report concluded instead that the traditional “sealed bid” method is to be preferred for construction procurement since it entails a “one-shot” winner takes all environment thereby causing bidders to give their best price first. You can find more information at https://www.agc.org/reverseauction.

A study of reverse auction use in the construction industry was conducted at Louisiana State University. A preliminary report released in January 2005 found that with respect to all existing evidence regarding reverse auction use in the construction industry, “There is no data supporting the claims of costs savings for construction services.”
Electronic Reverse Auctions

OGCA Challenges Use of ERAs

The OGCA then reasserted that ERAs are not allowed under Canadian law, and requested confirmation that ERAs were not being contemplated by the OPBA or the GBAPPC:

Finally, it is important to remember that reverse bid auctions are an export from the United States. As such, they do not take into consideration the unique legal principles that apply in Canada to the construction tendering process that started with the 1981 decision of the Supreme Court of Canada in the Ron Engineering case. That case established unique Canadian law that survives today which essentially states that a “bidding contract” comes into existence as soon as a compliant bid is tendered in response to a bid call.
The U.S. legal environment and the underlying concept behind reverse bid auctions are that a bid is an opening offer which can then be negotiated. That is NOT the case in a Canadian legal setting. Here in Canada, contractors know that their first bid price automatically establishes a binding contractual relationship and therefore also know that it must be their best price.

The Ontario General Contractors Association strongly urges you to ensure that Ontario public owners will continue to follow prevailing procurement and contracting practices that are supported by both the Canadian construction industry and Canadian Courts, and asks that you confirm that the use of reverse bid auctions is not being contemplated by OPBA or GBAPPC.
Electronic Reverse Auctions

OGCA Challenges Use of ERAs

Yours sincerely,

ONTARIO GENERAL CONTRACTORS ASSOCIATION
Clive Thurston
President

CC: Michelle Palmer, President, OPBA
Eric Lee, Canadian Construction Association
Construction Design Alliance of Ontario
Council of Ontario Construction Associations

Notwithstanding the OGCA correspondence, in March 2018 GBAPPC released a Negotiated RFP with a second-stage ERA. That procurement was for copy paper, not construction.
Electronic Reverse Auctions
ERAs: A Summary of Industry Criticisms

In summary, according to the above industry criticisms:

1. ERAs are a “radical departure” from construction industry tendering practices and should be boycotted.
2. ERAs can lead to “disruptive” and “cut-throat” price reductions and corner cutting but don’t save money.
3. ERAs may expose bidders to foreign rules and breach Canadian laws and trade treaties.
4. ERAs may block access for small suppliers.
5. ERAs are an illegal form of “bid shopping”.

Electronic Reverse Auctions (ERAs) are a "radical departure" from construction industry tendering practices and should be boycotted. ERAs can lead to "disruptive" and "cut-throat" price reductions and corner cutting but don’t save money. ERAs may expose bidders to foreign rules and breach Canadian laws and trade treaties. ERAs may block access for small suppliers. ERAs are an illegal form of "bid shopping".
Claims of illegality and barriers to access appear to be greatly exaggerated since over 20 Canadian police forces already use electronic auctions to sell seized and lost goods online.
Electronic Reverse Auctions

Deals So Good They Should Be Illegal!

Here’s what Police Auctions Canada has to say about its online bidding program at policeauctionscanada.com:

Welcome to Police Auctions Canada
The vast majority of items auctioned by Police Auctions Canada are derived from law enforcement agencies, transit commissions, asset management, and other public municipalities. Police Auctions Canada brings the consumer an exciting online auction format with the thrill of Police Auctions. These items are typically seized, forfeited, or found. Although we are not privy to specifics of where the items originated, the possibility of every imaginable item allows for an eclectic array of products to be showcased. What makes us a cut above the rest is that our auction is ongoing 7 days a week, all year round. Our loyal repeat customers know that.........Smart buyers come for the value and stay for the service.
Electronic Reverse Auctions

Saw the Bust of Elvis...

No need to travel to remote locations anymore searching for once-in-a-lifetime opportunities at live auctions.
Electronic Reverse Auctions

...Online, and You Can Too!

As Police Auctions Canada explains, you can now bid 24/7 on seized or lost items from the comfort of your own home:

Previously, this merchandise has been sold off periodically at an auction event, held at a specific location. Now Toronto, York Region, Waterloo, Barrie, Peterborough, Windsor, Grey County, Norfolk, Collingwood OPP and Halton, Hamilton, Owen Sound, Orangeville, Shelburne, St. Thomas, Barrie, Guelph, South Simcoe, Chatham-Kent, Brantford, Sudbury Police Service, University of Guelph Campus Community Police, Brock University, Laurier University and University of Toronto, and Brampton Transit in conjunction with Police Auctions Canada, are moving their auctions online and into your home. Check back frequently for updates of our exciting product selection.
Electronic Reverse Auctions

CCA: ERAs “Suitable for Supplies and Materials”

In fact, even the CCAs 2001 Special Bulletin recognized that ERAs are “suitable for supplies and materials”:

Reverse auctions can be suitable for the procurement of supplies and materials, but not when combined with construction services. A supplier of stand alone office products or automobiles, for example, can easily establish their absolute minimum prices and profit margins, as these products are often catalogue items, with easily predetermined unit costs for production and delivery. Construction materials and services for a project, on the other hand, are always considered as a prototype. The scope of each construction project has a different set of factors (such as program, project location, site conditions, local codes and permit fees, material changes/availability, fluctuating labour conditions, etc.) which affect the contractors’ bid estimate and an acceptable minimum profit margin.
Electronic Reverse Auctions

The English Auction: Invented 500 BC

Police Auctions Canada uses an online version of the English auction, described in a 2007 study entitled “Electronic Reverse Auctions in the Federal Government” by Whitney E. Brown, and Lana D. Ray, as follows:

The English auction is the auction that most people envision when remembering auctions they have seen for art, jewelry, or antiques. Research by Kambil and van Heck (2002) explains that the English auction has been around since 500 BC and is commonly used by famous auction houses such as Sotheby’s and Christie’s (p. 75). English auctions have one seller, or auctioneer, who is trying to get the highest price possible for an item. Multiple buyers, or bidders, compete by shouting out prices in succession until there is one bidder left bidding the highest price he is willing to pay.
Traditional English auctions, complete with live-shouting, can be seen on TV on Storage Wars, A&E’s all-time most popular show.
Electronic Reverse Auctions

The English Auction: Popular Online!

Brown and Ray note that the English Auction is the most commonly used online auction format for selling to the public:

Campbell (2006) reports that if it is an internet auction, such as the most popular of all—eBay—then the bids are submitted electronically rather than being shouted. The item is then sold to the highest bidder at the last bid price (p. 349). During English auctions, the number of buyers bidding is typically known by all for the duration of the auction (Carter, 2004, p. 231). The length of the auction is determined by the auctioneer or seller, and time is not usually a determining function of the outcome—unless the auction is performed online. For instance, e-Bay employs a fixed-time function which pressures bidders to play against the clock and each other in order to determine a winner.
Electronic Reverse Auctions

Technological Barriers to Entry?

This format is also popular with Canadian consumers, who have been bidding online using e-Bay since the year 2000.
ERAs are simply a sub-category of the electronic auction. As Brown and Ray explain, ERAs use the English auction format in reverse since ERAs: (1) are run by a single buyer going to market for bids from multiple suppliers; (2) suppliers bid down and win by offering the lowest cost:

The most common version of the reverse auction uses the same concept as the English auction, but backwards. There is one buyer and multiple suppliers “who submit successively decreasing bids until no other bidder will announce a lower bid” (Alper & Boning, 2003, p. 11). The last bidder is the winning supplier who sells his item to the buyer or is awarded the contract for that lowest bid price.
Electronic Reverse Auctions

Technological Barriers to Entry? A Weak Argument

ERAs are typically conducted with no entry fee to bidders on easy-to-use ERA platforms supported by platform service providers or purchasing institution staff. Concerns that ERAs may create barriers to entry for Canadian government contractors are greatly exaggerated since members of the general public in Canada have been bidding online on eBay for almost twenty years and over 20 Canadian police forces now clear seized and lost property with online bidding at policeauctionscanada.com. Contractors who are interested in winning government work should also be able to navigate similar online bidding technology into the 2020s.
Electronic Reverse Auctions
Illegal in Canada?

Another common industry argument, which was asserted above by the Ontario General Contractors Association, is that the ERA is a foreign practice imported from the US and that it does not align with Canadian law. While it is true that in the US the courts do not apply Canada’s Ron Engineering “Contract A” bidding process contract rules, other jurisdictions that recognize the same bidding process rules as Canada, including the UK and its overseas territory, the Cayman Island, are already using ERAs.
Canada’s Ron Engineering “Contract A” bidding process contract rules were recognized in the UK by the Court of Appeal of England and Wales in the 1990 decision in Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council. However, the UK, which is well ahead of Canada in harmonizing its procurement rules and practices with common global standards, has formally recognized ERAs. The bidding process contract rules have not created an obstacle to ERA deployment in the UK.
Electronic Reverse Auctions

ERAs in the UK

For example, in 2004 the UK Central Buying Consortium (CBC), a non-profit federation of 21 local authorities in southern England, conducted its first ERA. Led by Coventry City Council – Procurement Services, the ERA was for a direct supply of office stationery and computer consumables. As the CBC summarized in its report:

Market intelligence suggested that stationery and computer consumable supply chains were starting to merge and it may be beneficial to explore the possibilities of tendering the two commodities together. The Management Group agreed and invited Coventry City Council to lead on this contract using an e-auction as part of the tendering process.
Electronic Reverse Auctions

ERAs in the UK

The purchasing group leveraged the assistance of a pre-approved vendor to provide fully managed ERA services for the event:

Working closely with Achilles Information Limited, one of the five approved vendors to supply a fully managed reverse e-auction management service under the OGC Electronic Reverse Auction Framework, the CBC were able to produce a programme to deliver the CBC requirements and incorporate a successful reverse e-auction into the tender process.
Electronic Reverse Auctions
ERAs in the UK

The evaluation was based on price and non-price factors, with price factoring for 55% of the total weighting:

The award of the contract was subject to Most Economically Advantageous Tender (MEAT) criteria. The evaluation ranking elements included price, delivery, availability, quality, range offered and backup support services. The evaluation scoring was weighted as 55% price and 45% for non-price elements.
As reported by the CBC, the ERA process enabled the group to run two bidding events within short timeframes and receive multiple bids from prequalified bidders:

**Benefits**
The e-auction comprised of two bidding events:

**Event 1** – Computer Consumables: with two lines OEM and Compatibles.

**Event 2** – Stationery: with two lines Core and non-core.

**Event 1.** Eight suppliers invited to participate in auction. The duration of event 1 was 90 minutes with 87 valid bids submitted.

**Event 2.** Five suppliers invited to participate in auction. The duration of the event was 150 minutes with 78 valid bids submitted.
Electronic Reverse Auctions

ERAs in the UK

The process produced significant price savings, received positive overall reviews and provided an early example of the more widespread use of ERAs across the UK today:

Based on the £8M estimated CBC spends per year (£3m stationery and £5M computer consumables) the e-auction delivered an estimated total saving of £186K p.a. (£150K 30% on stationery and £36K 18% on computer consumables). The e-auction allowed the CBC to achieve best market prices in a short time scale, increased competition and the process considered to be open, natural and fair way of achieving competitive prices. The CBC members provided positive feedback both on the auction process and of the outcome. Members were encouraged to consider hosting an e-auction on their forthcoming contracts.
Electronic Reverse Auctions

ERAs in the UK

These UK examples contradict industry assertions that ERAs do not save government money. In fact, in their 2010 article in the Journal of Public Procurement entitled “Electronic Reverse Auctions and the Public Sector: Factors of Success”, Moshe E. Shalev and Stee Asbjornsen highlighted the following UK statistics regarding cost savings achieved using ERAs:

…the United-Kingdom Office of Government Commerce [OGC] reported savings of £50 million in IT hardware e-RAs over four years, and anticipating total savings of £270 million through all e-RA purchases by the end of fiscal year 2011/2012 (OGC, 2010)
Electronic Reverse Auctions

Successful Cayman Deployment

Canada’s Ron Engineering “Contract A” bidding process rules also apply in the Cayman Islands, a UK overseas territory, pursuant to the 2003 Privy Council decision in Pratt Contractors v. Palmerston North City Council, which is the Commonwealth equivalent of Canada’s Ron Engineering. Yet, the Cayman Islands launched its first ERAs in 2017 and has since expanded that program after the success of its pilot project.
As reported by the Cayman Islands Procurement Director, Craig Milley, in a May 2017 interview with The Procurement Office, the Cayman Islands’ pilot project successfully hit the industry-standard target by achieving nearly 20% cost savings in its initial deployment. As Milley summarized, “in the auctions we’ve done to date, we achieved a savings of just over 19%. It wasn’t a surprise. We were expecting to be in that 20% range, that was what the literature and studies had shown of what the initial savings should be in our first use of electronic reverse auctions. We found that we were right in the target zone.” Like the UK rollout, Cayman’s test pilot also proved ERAs can save government money.
Electronic Reverse Auctions
Illegal in Canada? Not Correct

How are these jurisdictions able to run ERAs if the Ron Engineering Contract A bidding process rules are also recognized in their legal systems? Very simply. The law is clear that purchasing institutions can avoid the Ron Engineering operating system in favour of a more flexible set of traditional contract protocols that permit negotiations and auctions. With proper legal advice, purchasing institutions can structure their ERAs to use traditional contract law, rather than the single fixed-bid sealed-envelope tendering format that creates the Ron Engineering Contract A bidding process and its related restrictions.
The OGCA’s statement noted above (highlighted below in red font for emphasis) confuses this otherwise clear point of law:

**Reverse bid auctions are a form of “bid shopping” which is considered by Canadian Courts to be “repugnant conduct which has no legitimate place in the proper operation of the tendering paradigm” (see Stanco Projects Ltd. v. British Columbia (2004), 32 B.C.L.R. (4th) 302 (B.C.S.C.)). OGCA strongly objects to the use of reverse bid auctions, not only because their use offends prevailing, industry best practices, but because we do not believe they will provide the desired best price or best value for you as a purchaser of construction services and because they are contrary to the spirit of established procurement law in Canada.
The OGCA cites the *Stanco* case as alleged authority for the fact that ERAs are an illegal form of bid shopping. This is inaccurate. While the *Stanco* case rightfully criticized the practice of bid shopping, which is prohibited under Canadian law, the case never said that ERAs are a form of bid shopping. The illegal bid shopping in the *Stanco* case had nothing to do with ERAs. Furthermore, other than its reference to the *Stanco* case, the OGCA failed to provide any other legal authority in its correspondence for its assertion that ERAs are a form of bid shopping and therefore unlawful.
Electronic Reverse Auctions
Illegal in Canada? Not Correct

In fact, the dispute in *Stanco* was over a conventional construction tendering process using sealed-envelope, one-time irrevocable bids. The consulting engineers hired by the BC government broke the *Ron Engineering* Contract A bidding process rules by seeking follow-up bids instead of awarding to the original low bidder. This is what the bid shopping ruling was based on. The case had nothing to do with ERAs. ERAs were never even mentioned in the decision.*

*See the author’s scored and notated copy of the full *Stanco* decision attached as an appendix to this presentation to confirm this analysis.
The OGCA statements are also misleading in that they imply that the Ron Engineering Contract A bidding process rules apply to all bidding situations, when binding Supreme Court of Canada precedent recognizes the exact opposite. The Supreme Court of Canada’s 1999 decision in M.J.B. Enterprises v. Defence Construction confirmed that not all bidding processes create the Ron Engineering Contract A bidding process rules. A properly structured ERA would not be conducted using those rules, but would instead be run under traditional contract rules.
This clear and binding point of law has been applied with consistency by the Canadian courts. It was recently recognized (with red font highlights added for emphasis) in the April 2015 decision of Canada’s Federal Court of Appeal in *Rapiscan Systems Inc. v. Canada*:

An important feature in a procurement process is the established and notional contract known as “Contract A” that is created when a bidder responds to the purchaser’s tender call and submits a tender (*Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111). It is settled law that the formation of the said “Contract A” in a procurement process will create implied rights and obligations arising out of the said process...which is distinct from the contract to be awarded at the conclusion of the bidding process (“Contract B”).
The Ron Engineering Contract A bidding rules would not apply under a properly structured ERA. An ERA would therefore not constitute bid shopping. This is illustrated in the following diagram:
Electronic Reverse Auctions

Illegal in Canada? Not Correct

As with the technological barrier to entry criticisms, the “illegality” arguments advanced within industry are inaccurate and misleading. These “illegality” assertions are based on the incorrect application of rules that apply to conventional fixed-bid tendering formats but would not apply to properly structured ERAs. While these “illegality” arguments may be unfounded, they do underscore the importance of obtaining proper legal advice when embarking on an ERA process to ensure that the process is appropriately structured to comply with applicable tendering laws and broadly recognized ERA implementation practices. The following section discusses these global standards in greater detail.
The 2011 UN Model Procurement Law defines an “electronic reverse auction” (“ERA”) as “an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids.” As the 2011 revision to the UN protocols recognizes, it is broadly accepted as a common global standard for public institutions to leverage the use of technology to enhance price competition by utilizing ERAs to seek multiple real-time bids from competing suppliers.
Electronic Reverse Auctions
World Bank Implementation Guidelines

In fact, in December 2005, prior to the UN ratification, the World Bank released its own “e-Reverse Auction Guidelines for MDB Financed Procurements” which authorized the use of ERAs for development bank financed projects. Those guidelines contained a series of implementation standards:

• The value of the competition should be sufficient to encourage competition, but not so high as to limit bidders.

• An ERA should not be used to lock out bidders who do not have access to the required technology and ERA events should not start until all eligible bidders are activated.
Electronic Reverse Auctions
World Bank Implementation Guidelines

• There should be good intelligence about the relevant market to guard against bidder collusion.

• The procurement requirements must be accurately specified and the process rules and evaluation criteria must be transparently disclosed.

• Where bidders are required to prequalify, the prequalification process must be conducted in accordance with standard transparent procurement practices.
Electronic Reverse Auctions
World Bank Implementation Guidelines

• The auction platform should run automatically without human intervention and should provide transparent real-time ranking adjustments.

• The identity of bidders should not be disclosed.

• The purchasing authority should disclose the specific protocols that will govern the end of the bidding event.
Electronic Reverse Auctions
World Trade Organization

The World Trade Organization’s Government Procurement Agreement (GPA), which was updated in 2014, now also officially recognizes electronic auctions in government procurement, defining the process as follows:

**electronic auction** means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;
Electronic Reverse Auctions

World Trade Organization

The WTO’s GPA contains the following ERA provisions:

Article XIV Electronic Auctions
Where a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with: (a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction; (b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and (c) any other relevant information relating to the conduct of the auction.
Canada is a signatory to the WTO’s GPA, having signed on to the original version in 1994, and to the updated version that contains the ERA protocols in 2014.

In 2017, Canada’s federal, provincial and territorial governments entered into the Comprehensive Economic and Trade Agreement with the European Union (CETA). To harmonize domestic practices with European and global practices, they also replaced the Agreement on Internal Trade (AIT) with the new Canadian Free Trade Agreement (CFTA). Both of these new trade treaties now officially recognize the use of ERAs in Canadian public procurement.
Electronic Reverse Auctions
Harmonizing the Common Global Standards

To better understand how to implement ERAs in Canada, it is useful to consider practices within the European Union, UK and US, where many of the global standards originated and where ERAs are a well-established practice.
Electronic Reverse Auctions

European Directive

Like the WTO GPA, the European Procurement Directive was also updated in 2014 and contains detailed ERA provisions. The interpretive notes to the directive recognize that ERAs may not be appropriate for design-based projects involving intellectual services:

It should be clarified that electronic auctions are typically not suitable for certain public works contracts and certain public service contracts having as their subject-matter intellectual performances, such as the design of works, because only the elements suitable for automatic evaluation by electronic means, without any intervention or appreciation by the contracting authority, namely elements which are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.
Electronic Reverse Auctions

European Directive

The interpretive notes also caution that proper transparent processes should be put in place to ensure fair competition when using ERAs:

It should, however, also be clarified that electronic auctions may be used in a procurement procedure for the purchase of a specific intellectual property right. It is also appropriate to recall that while contracting authorities remain free to reduce the number of candidates or tenderers as long as the auction has not yet started, no further reduction of the number of tenderers participating in the electronic auction should be allowed after the auction has started.
Electronic Reverse Auctions

European Directive

Article 35 of the Directive establishes ten ERA protocols:

1. Authorization to use ERAs with automatic evaluation methods, but not for design-based (e.g. design-build) public works contracts

2. Rules requiring that ERAs only be used when the requirements can be specified with precision

3. Rules requiring the disclosure of the evaluation criteria for either low-bid or high-score awards
Electronic Reverse Auctions

European Directive

4. Disclosure protocols requiring that the purchasing institution notify potential bidders of its intention to use an ERA in the original solicitation notice

5. Rules requiring that any pre-screening criteria identified in the solicitation document be consistently applied so that non-compliant bidders are excluded from the ERA

6. Rules requiring the disclosure of the relative weightings of the evaluation criteria, including the price calculation formula
Electronic Reverse Auctions
European Directive

7. Rules requiring that real-time ranking information be provided to all bidders, while prohibiting the identification of the competing bidders

8. Rules prescribing the different options available for concluding an ERA and the transparent disclosure of the applicable rules for the specific event

9. Rules requiring that contract awards be made consistent with the results of the ERA

10. Other detailed disclosure requirements for the solicitation document prescribed in Annex VI of the Directive
Electronic Reverse Auctions

ERAs in the UK

The UK’s public procurement regulations, which are harmonized with the EU rules, also recognize the use of ERAs. In her commentary on the UK regulations, Dr. Ama Eyo describes these implementation protocols:

Effectively, they allow for a modicum of competition or “negotiation” to be used in procedures where it is not usually accepted. By their nature, electronic auctions need to be done over an electronic platform and as such are subject to the vagaries of e-procurement adoption in the UK. Electronic auctions need to be disclosed from the start (paragraph 7) and can only be used if the technical specifications have been established with sufficient precision (paragraphs 4 and 5), hence requiring a fair bit of planning.
The US Government Accountability Office (GAO) also notes increasing ERA deployment in its December 2013 report entitled “Reverse Auctions: Guidance Is Needed to Maximize Competition and Achieve Cost Savings”:

The Departments of the Army, Homeland Security, the Interior, and Veterans Affairs used reverse auctions to acquire predominantly commercial items and services—primarily for information technology products and medical equipment and supplies—although the mix of products and services varied among agencies. Most—but not all—of the auctions resulted in contracts with relatively small dollar value awards—typically $150,000 or less—and a high rate of awards to small businesses. The four agencies steadily increased their use of reverse auctions from fiscal years 2008 through 2012, with about $828 million in contract awards in 2012 alone.
Electronic Reverse Auctions
US Government Accountability Office Report

As the GAO states, in 1997 the US Federal Acquisition Regulations were updated to remove the prohibition against auctions, thereby enabling the use of ERAs:

Prior to 1997, auctioning techniques were prohibited in the federal government under the Federal Acquisition Regulation (FAR) procedures for negotiated procurements... In 1997, the FAR Council rewrote Part 15 of the FAR to eliminate these prohibitions as part of an overall effort to make the source selection process more innovative, simplify the process, and facilitate a best value acquisition approach. Currently, while the FAR does not specifically address reverse auctions, several provisions facilitate agencies’ use of them, such as allowing the use of innovative strategies and electronic commerce.
The report provides implementation statistics for four federal agencies. These statistics reflect increasing ERA adoption:

![Graph showing trends in quantity and dollars over fiscal years 2008 to 2012.](image)

Source: GAO analysis of FedBid data.
The GAO report provides a percentage breakdown by purchase category:

- Furniture
- Communication, detection, and radiation equipment
- Instruments and laboratory equipment
- Medical, dental, and veterinary equipment and supplies
- Information technology

Source: GAO analysis of FedBid data.
Electronic Reverse Auctions
US Government Accountability Office Report

And also provides a breakdown by department:

- Furniture
- Communication, detection, and radiation equipment
- Instruments and laboratory equipment
- Medical, dental, and veterinary equipment and supplies
- Information technology

Award value by dollars

Dollars (in millions)

Army
DHS
DOI
VA

Source: GAO analysis of FedBid data.
The GAO report notes that small businesses are the primary beneficiary of the ERA program:

About 86 percent of fiscal year 2012 acquisitions using reverse auctions—16,906 of 19,688—went to small businesses, in keeping with the FAR requirement that acquisitions of supplies or services with expected values of more than $3,000 but not over $150,000 for small businesses, with some exceptions. These acquisitions accounted for $661 million (80 percent) of the dollar value of all reverse auction awards.
The report also indicates that many of the ERA-based contract awards were made under existing framework agreements as second-stage competitions:

Almost half of the reverse auctions in fiscal year 2012 across the four agencies in our review—9,257 of 19,688—were conducted to place orders for products and services using existing contracts. Federal agencies can use a number of existing contract vehicles to leverage buying power and obtain lower prices, including the General Service Administration’s (GSA) multiple award schedule (Schedule) program, multi-agency contracts, and government-wide acquisition contracts.
While a 1997 amendment to the federal regulations removed the barriers to implementation, the GAO report recommends a more proactive approach for the future expansion of ERAs within the US federal government:

GAO recommends that the Director of the Office of Management and Budget (OMB) take steps to amend the FAR to address agencies’ use of reverse auctions and issue government-wide guidance to maximize competition and savings when using reverse auctions. OMB generally agreed with GAO’s recommendations, noting that FAR coverage should be considered and that, before taking concrete steps to amend the FAR, they would discuss GAO’s findings and conclusions with the FAR and Chief Acquisition Officers Councils.
Electronic Reverse Auctions

Obama Administration OKs ERAs

In a June 2015 memorandum, the Executive Office of the President of the United States Office of Management and Budget released recommendations for expanding ERAs.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 1, 2015

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Anne E. Rung
Administrator

SUBJECT: Effective Use of Reverse Auctions

This past December, the Office of Federal Procurement Policy (OFPP) issued guidance directing that agencies take a series of actions to foster innovation, increase savings, and improve
Electronics Reverse Auctions

Obama Administration OKs ERAs

The memorandum recognizes ERAs as a tool that can be used to foster innovation, increase savings and improve the acquisition process:

This past December, the Office of Federal Procurement Policy (OFPP) issued guidance directing that agencies take a series of actions to foster innovation, increase savings, and improve performance in the acquisition process. For commonly purchased goods and services, these goals will be pursued through category management and a broad set of supporting strategies to achieve better results. Reverse auctions are one of the tools agencies have used in recent years to acquire certain common needs, such as commercial off-the-shelf information technology (IT) hardware and software.
Electronic Reverse Auctions

Obama Administration OKs ERAs

Highlighting advantages including price reductions, enhanced competition and greater access to smaller business, the memorandum encourages the expanded use of ERAs within the US federal government. The memorandum also cautions that ERAs are not a one-size-fits all tool for all procurements, and encourages vendor feedback, appropriate internal controls, and proper staff resourcing and training to conduct ERAs.
Electronic Reverse Auctions

Considerations for Implementation

The following section discusses a series of considerations that should be taken into account by purchasing institutions in considering whether to use an ERA for any particular procurement.
In her ERA guide entitled “Introduction to e-auctions” published by the Chartered Institute of Procurement and Supply (CIPS), Senior Procurement Specialist Helen Alder notes that the adoption of ERAs traces back to the 1990s:

The use of on-line auctions (e-auctions) has increased rapidly in the last few years since they came onto the purchasing scene in the late 1990’s through the development of internet-based applications. Research undertaken by CIPS in conjunction with Oracle and the University of West England - IAdapt, - estimates that, within the UK alone, during 2002 there have been at least 2500 individual e-auctions undertaken by buyers and that they have grown at least ten fold each year since their arrival. The Financial Times stated on 13/03/02 that worldwide e-auctions turnover had reached $30bn with savings of $6.4bn.
As Alder’s explains, when “conducted properly with adequate participant training, it creates a more level playing field for suppliers through increased transparency”, but warns that senior level support is required to ensure success:

It is essential to have an e-auction champion with board backing, to drive through the initial e-auctions within a buying organisation, from which to gain experience. Without a champion, the programme may suffer from resistance from buyers and suppliers and may never progress. If a supplier suffers from a bad e-auction experience…then it is likely they may be reluctant to enter into the process again. Try to make sure, therefore, that before rolling out an e-auction programme, the process is as fair and transparent as possible, and has been approved by a pilot group including suppliers and that feedback from the pilot process is enacted on.
Electronic Reverse Auctions

CIPS on ERAs: Improves Front-End Performance

The guide also notes that the implementation of ERAs can produce the side-benefit of improving the overall front-end procurement process leading up to the online bidding event:

The IAdapt research found that e-auctions are almost always conducted at the end of an exhaustive purchasing process, with most buyers only inviting suppliers to bid that have passed a rigorous evaluation process. This process typically centres on a strong product or service specification, hence the result that a comprehensive specification was the most important enabler to a successful auction. e-auctions can, if conducted properly, both increase standards in the purchasing process and improve transparency, with buyers being more upfront about their requirements (the process forces buyers to be impartial, fair and really think about their requirements and procedures).
Electronic Reverse Auctions

CIPS on ERAs: Strive for Self-Sufficiency

While ERA platform providers can provide full-service support for ERA events during initial test pilot phases, in the longer term Alder recommends that purchasing institutions adopt self-managed ERA programs:

There are advantages to buying the e-auction expertise and software to host e-auctions in-house. Although initially expensive and time consuming, the ability to build upon an e-auction programme year on year, introducing an expanding range of products and services provided, does have its advantages. Many large companies who have introduced an in-house e-auction programme started off outsourcing the process to test the process and prove the process internally.
Electronic Reverse Auctions

Industry Recommendations

In an article entitled “Electronic Reverse Auctions – The Good and the Bad”, Ernest G. Gabbards warns that ERAs will not compensate for weak underlying procurement practices:

It is essential that we recognize that the software component of a reverse auction is merely an “enabler”, and not a different procurement methodology, i.e.: it is a tool with which to conduct the procurement process, and optimize the competition. This is a critical perspective, because any deficiencies in the underlying procurement process, such as inadequate product specifications, will result in defective proposals – just as they ultimately would in a traditional procurement process.
Electronic Reverse Auctions

Industry Recommendations

In fact, our watchword, based upon experience, is that success of an e-auction is as much about the quality of the procurement process as it is about the technology. I believe most e-sourcing service or tool providers would agree with this perspective.

In determining the appropriateness of an ERA, Gabbard advises that the organization should consider the product or service, as well as the market.
Electronic Reverse Auctions

Industry Recommendations

With respect to product or service considerations, Gabbard's factors include:

1. Are the items strategic to the purchaser?

2. Is the supplier relationship critical to the purchaser?

3. Is there an adequate specification for the items or services?

4. Is price the key determinant of success of an event?

5. Are there other factors, which might preclude success of an event?
Electronic Reverse Auctions
Industry Recommendations

For market analysis, Gabbard advises that organizations consider:

1. Are there sufficient suppliers?
2. Are market conditions conducive to competition?
3. Have suppliers previously participated in ERAs?
4. Will “price transparency” be accepted by suppliers?
Gabbard also identifies the following pitfalls to ERA execution:

1. Failing to analyze the market to ensure the right timing
2. Failing to identify where lower price may reduce performance
3. Failing to identify when ERAs may damage the relationship
4. Getting prices too low to allow for supplier profits
5. Assuming future ERAs will result in the saving of past ERAs
6. Failing to address pre-existing procurement process flaws
7. Failing to respect the established ERA process rules
Electronic Reverse Auctions

Industry Recommendations

Gabbard states that the failure to address the above-noted factors can undermine successful ERA deployment. He stresses the importance of proper preparation:

1. Preparing the organization to avoid culture shock
2. Preparing the RFP with appropriate process rules
3. Preparing the specification or statement of work
4. Preparing the suppliers and anticipating initial resistance
5. Developing realistic pricing expectations
6. Selecting the appropriate ERA format
Electronic Reverse Auctions
Swiss Background Data Study

In a 2011 paper for the University of Neuchâtel entitled “Electronic Reverse Auctions: Factors of Success”, Elhami Memeti assesses seven factors for successful ERAs:

1. Specification simplicity
2. ERA volume and lotting
3. Number of qualified suppliers
4. Competition among suppliers
5. Buyer-supplier relationship
6. Switching cost of incumbent suppliers
7. ERA preparation
With respect to specification simplicity, Memeti notes the importance of clear scoping:

Literature suggests that product or service to be auctioned in an eRA event should be clearly specified (Beall, et al., 2003; Shalev & Stee, 2010; Carter, Kaufman, Beall, Carter, Hendrick, & Petersen, 2004). Although eRAs may be used to purchase anything, they are normally recommended only for simple purchases, such as commodities (Shalev & Stee, 2010). Making clear and unambiguous specifications will make qualified suppliers correctly understand what they are bidding for and avoid misinterpretations.
Memeti’s conclusions are supported by data indicating a strong correlation between specification simplicity and the probability of success:

\[
p = \frac{1}{1 + e^{-z}}
\]

- \( p \) = Probability of success
- \( z = -3.731 + 1.088 \times x \)
- \( x \) = Ease of specifying demand

![Graph showing the probability of success as a function of ease of specifying demand. The x-axis represents the ease of specifying demand (1 = very complex, 5 = easy), and the y-axis represents the probability of success.]
In analyzing the background research, Memeti notes little if any correlation between overall volume (amount of contract expenditure) and success, but a high correlation between lotting (bundling of number of opportunities) and successful outcomes. This suggests that ERAs can help streamline the procurement process for suppliers by cutting down on their transactional overhead and that this may be a higher motivating factor for participation than overall contract value.
Memeti also finds a strong correlation between competition among suppliers and ERA success rates:

\[ p = \frac{1}{1 + e^{-z}} \]

- \( p \) = Probability of success
- \( z = -2.672 + 0.878 \times x \)
- \( x \) = Competition among suppliers participating
Electronic Reverse Auctions
Swiss Background Data Study

However, Memeti notes that this correlation was based on the independence of suppliers, stating that competition “was found to be one of the most important factors that impact the success of an eRA, but it was also found that is strongly correlated with number of bidders if the bidders are independent of each other.” In other words, while number of competing suppliers may increase overall ERA success rates, ERAs are unlikely to resolve pre-existing conditions of price-fixing or collusion in the particular market space.
Electronic Reverse Auctions
Swiss Background Data Study

Memeti also finds a high correlation between low switching costs to replace incumbents with new suppliers and high ERA success rates, as well as a high correlation between proper ERA planning and preparation and successful ERA deployments.
Electronic Reverse Auctions
The Procurement Portfolio Matrix

In his paper entitled “E-procurement: Multiattribute Auctions and Negotiations”, Concordia University professor G.E. Kersten characterizes typical construction tendering as a type of “sealed bid auction”:

4.1 Auctions
4.1.1 Sealed bid auctions
Traditionally, single-round sealed bid auctions have been used in procurement. Suppliers are given requests for quotations (RFQs) and asked to submit a bid (quotation) by a given deadline. At the deadline, the bids are opened and the best bid is selected.
Electronic Reverse Auctions
The Procurement Portfolio Matrix

Kersten then highlights the potential price advantages discovered in the 1990s in the use of ERAs:

4.1.2 Reverse auctions
Reverse auctions were introduced in procurement in mid-1990s and within a few years they gained popularity. Large corporations and government departments began using them because of the promises of cutting costs and making the procurement process more impartial and transparent than face-to-face negotiations. Reverse auctions establish a competitive setting which may result in the discovery of a true market price. Field studies reported savings of between 6 and 37% on indirect materials and between 2 and 22% on direct materials. Firms reported savings of 15% to 20%; (e.g., GE ran their first reverse auction in late 1999; in 2000 they saved 16% which amounts to more $500 million).
Electronic Reverse Auctions
The Procurement Portfolio Matrix

Kersten also identifies other benefits to ERA use, including expanded market reach, process speed and transparency:

In addition to price reduction of purchased goods, other benefits include shortening of the procurement process (from days or weeks to a few hours), increased buyer reach, the creation of new markets, and information transparency and price visibility.

However, Kersten also notes the hostile reception received by ERAs in the Canadian construction sector.
Electronic Reverse Auctions

The Procurement Portfolio Matrix

While he attributes part of this hostility to a lack of supplier awareness, Kersten also maintains that the type of transactional relationship will inform the appropriateness of using an ERA:

Very positive perspectives on the use of reverse auctions in procurement have been accompanied by strong criticisms. Some studies have shown that savings are greatly overstated, supplier relationships are damaged, and distrust among incumbent suppliers is created. Some organizations and business associations consider reverse auctions antithetical to business values, compromising quality.
Electronic Reverse Auctions

The Procurement Portfolio Matrix

For example, Cypress Semiconductor Corp. announced in May 2009 that the company policy is not to participate in reverse auctions, and the Surety Association of Canada and the Canadian Construction Association strongly discourage their use.

Some of these criticisms are unfounded, reflect lack of familiarity and limited experience, and conflicting reports. Others, however, note the limitations of reverse auctions, which are suitable for transactional buyer-seller relationship focused on obtaining best price, medium-to-short term contract, and requiring little collaboration. They are useful in purchasing when there are several or more qualified suppliers of goods which can be clearly specified and are of low-to-medium complexity.
Kersten identifies four types of purchaser-supplier relationships in the portfolio matrix for which ERAs will have varying degrees of complexity/risk and value/profit:

4.3 Procurement portfolio matrix
Empirical studies of supply chain management and B2B transactions result, among others, in a portfolio of supplier relationship. This portfolio, first proposed by Kraljic (1983) postulates the following four types of buyer-supplier relationships:
Electronic Reverse Auctions
The Procurement Portfolio Matrix

1. Strategic relationship with few specialized suppliers is postulated when the required goods or services are either unique or critical for the production. This relationship takes place when switching to new suppliers is difficult and/or very costly; and

2. Leverage takes place when the required products are complex and very important for the buyer but there are many capable suppliers who can provide them;

3. Acquisition involves low costs standardized goods which do not have critical impact on production. These goods, however, are not readily available or there are not many suppliers who provide them in the required amounts; and

4. Noncritical goods are easily available from multiple sources.
Kersten groups these different buyer-supplier relationships into the following quadrants:

<table>
<thead>
<tr>
<th>High Supply risk/complexity</th>
<th>Acquisition</th>
<th>Strategic</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Acquisition</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• <strong>Goods</strong>: complex, low priority;</td>
<td>• <strong>Goods</strong>: complex, critical;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Suppliers</strong>: few available;</td>
<td>• <strong>Suppliers</strong>: few available or very high switching costs;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Mechanism</strong>: posted price, automation;</td>
<td>• <strong>Mechanism</strong>: negotiations;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Relationship</strong>: good customer, cooperation;</td>
<td>• <strong>Relationship</strong>: partnership, cooperation;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Orientation</strong>: long-, medium-term.</td>
<td>• <strong>Horizon</strong>: long-term</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Noncritical</th>
<th>Leverage</th>
<th>Value/profit impact</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Noncritical</strong></td>
<td><strong>Leverage</strong></td>
<td></td>
</tr>
<tr>
<td>• <strong>Goods</strong>: simple, low priority;</td>
<td>• <strong>Goods</strong>: simple, high priority;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Suppliers</strong>: many, compete for buyers;</td>
<td>• <strong>Suppliers</strong>: many, compete for buyers;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Mechanism</strong>: spot markets, reverse auctions, automation;</td>
<td>• <strong>Mechanism</strong>: reverse auctions, negotiation, mix;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Relationship</strong>: none, customer;</td>
<td>• <strong>Relationship</strong>: customer;</td>
<td></td>
</tr>
<tr>
<td>• <strong>Horizon</strong>: short-term.</td>
<td>• <strong>Horizon</strong>: medium-, short-term.</td>
<td></td>
</tr>
</tbody>
</table>
Finally, in their 2008 paper entitled “Reverse Auctions: Benefits, Challenges, and Best Practices” Gus Manoochehri and Christy Lindsy provide the following useful summary of the ERA cost-benefit analysis:

For buyers, the primary benefits include reduced purchase price, increased market efficiency, higher procurement process efficiency, and access to a larger supplier base. However, application of reverse auctions can bring major risks and challenges. It can lead to deterioration of strategic supplier relationships, loss of trust, erosion of supply chain, and ultimately to higher total cost of purchased items. To effectively utilize reverse auctions, management must consider the nature of product, nature of market, and the nature of buyer-supplier relationship.
Electronic Reverse Auctions

Construction Industry Considerations

As industry recommendations clearly illustrate, proper ERA implementation requires proper planning. These recommendations indicate that ERAs can be useful in many procurement situations, but are not appropriate in all situations. This next section considers the use of ERAs within the construction industry.
Electronic Reverse Auctions
CCA: ERAs “Suitable for Supplies and Materials”

As noted above, in its 2001 Special Bulletin, the Canadian Construction Association acknowledged that ERAs are “suitable for supplies and material”. However, as evidenced in Article 4.0 of its September 2017 Industry Practices document, the CCA continues to maintain that ERAs are not appropriate for construction projects.
Electronic Reverse Auctions

CCA: Still Sticking to a 2001 Approach to Technology?

Notwithstanding the CCA's long-standing position, general contractors should consider whether they are compromising opportunities to be more competitive by dismissing the use of ERAs. To win more work in conventional bidding projects, general contractors could be leveraging ERAs to bring more efficiencies within their own supply chains. Failing to do so puts them at increasing risk of losing out to more technologically agile competitors. This remains a critical policy issue for the CCA to address in the interest of its own Canadian members, who now face increasing global competition under Canada's new trade treaties.
Future Considerations
Adapting to the Inevitable

A 2003 report by CAPS Research, an initiative sponsored by the University of Arizona and Institute for Supply Management, entitled “The Role of Reverse Auctions in Strategic Sourcing”, came to the following conclusions about ERAs:

• For a growing number of buying firms, e-RAs have found an appropriate niche in their strategic sourcing toolkit, allowing them to efficiently source goods and services that are highly standardized, have sufficient spend volume, can be replicated by a reasonable number of qualified competitors, and have insignificant switching costs. In contrast, the research indicates that those suppliers of strategic items, where alliance-level supplier relationships are critical, are usually not subjected to e-RA sourcing.
Future Considerations
Adapting to the Inevitable

• Reported payback usually can be achieved after the first few uses of the e-RA tool.

• There is little or no evidence that e-RAs are driving a significant number of suppliers into non-sustainable relationships with buyers.

• Firms who have taken a “wait-and-see” strategy indicated that they could be at a serious competitive disadvantage unless they add e-RA tools to their mix of sourcing strategies.

• Buyers believe that e-RAs are no different from traditional negotiations with regard to ethical improprieties, and suppliers indicate that e-RAs, in general, are a fairer process of awarding business, because they “level the playing field” through increased transparency.

• E-RAs are here to stay and that their use will continue to grow.
Future Considerations

Adapting to the Inevitable

One of the case studies featured in this CAPS report was that of Bechtel Corporation, the largest construction company in the US. By 2003, Bechtel had already trained 300 staff in the use of ERAs as part of its internal ERA deployment program. The results were as follows:

Bechtel calculates savings from budgets established during the initial phase of a project. The direct financial benefits achieved from reverse auction have averaged over 10 percent, with a range of 1 percent to 20 percent. Over 90 percent of Bechtel's e-ERAs have achieved savings from budget.
Future Considerations
Adapting to the Inevitable

That case study offered the following conclusions with respect to the reasons why Bechtel deployed the use of ERAs:

Bechtel performs electronic reverse auctions because they believe e-reverse auctions:

• provide competitive advantage
• provide lower market pricing
• provide lower cost for material, equipment, and services
• save negotiation time
• determines total installed cost for all bidders
The case study also highlighted the following success factors:

Bechtel considers the critical success factors are:

- Market and cost knowledge
- Clear scope with minimal uncertainty
- Selection of qualified bidders in competitive bidding environment
- Integrity, ethics, professionalism, and fairness
- Training, planning, and organization
Electronic Reverse Auctions
A Way to Improve Tendering Practices

In addition to considering downstream benefits within their own supply chains, general contractors in the Canadian construction industry should also be taking a second look at the use of ERAs as a vehicle to improve tendering practices when bidding on government contracting opportunities. Continuing to speculate on the potential risks associated with the ERAs does little to address the actual serious issues that have impacted Canadian construction industry tendering practices under the single sealed bid public opening format in recent decades.
Electronic Reverse Auctions

Problems? What Problems?

For example, to say that the current process is working fine ignores the excessive amount of litigation created by the *Ron Engineering* Contract A bidding process rules over the last three and a half decades. A quick survey of the Canadian case law since *Ron Engineering* reveals that a disproportionate amount of government procurement tendering lawsuits across the Canadian public sector involve the construction industry. This is hardly a positive distinction for the construction industry, for Canadian public institutions, or for the Canadian taxpayer.
Electronic Reverse Auctions

Canada's Two Largest Cities

Furthermore, attacking ERAs does little to address the fact that conventional sealed-bid public opening practices failed to prevent price-fixing, collusion and bid-rigging in municipal tendering in Montreal or Toronto, as evidenced by the Charbonneau Commission in Quebec and resulting police investigations and convictions, and, more recently, a 2017 City of Toronto Auditor General’s Report on municipal paving contracts.
In fact, the City of Toronto Auditor General identified the use of paper-based bidding and the lack of electronic records as a key obstacle in its investigation. These outdated tendering practices are also a key obstacle to proactively tracking pricing patterns for potential collusion. Concerns of bid-rigging vulnerabilities in public procurement were also raised by Canada's Auditor General and Nova Scotia's Auditor General in 2017 audits.* Using ERAs would allow institutions to track pricing with far greater accuracy to detect potential collusion.

*For more details, see 2017 Countdown Newsreel Trends: Special Feature on Bid Rigging and Collusion at : http://procurementoffice.com/event/2017-countdown-of-top-newsreel-trends/
Finally, as noted in a 2018 study entitled “Electronic Reverse Auctions in Public Sector Construction Procurement: Case Study of Czech Buyers and Suppliers” T. Hanák of the Brno University of Technology states that ERAs are starting to work in public sector construction:

Qualitative research was conducted to examine the experiences, opinions and attitudes of both buyers and suppliers to e-RA through semi-structured interviews. It was concluded that when certain principles and limitations are respected, e-RA can be used successfully for the acquisition of goods, services and works related to construction by public procurement.
Hanák observes that the pressure to become more efficient is driving the construction industry towards a broader adoption of ERAs:

...practitioners mainly rely on traditional work practices and a survey of KPMG shows that the construction industry is still not taking full advantage of new technologies. This is an obstacle for performance improvement, for without adoption of new technologies it is impossible to achieve the best performance. However, due to increasing competition, companies are forced to search for economical solutions to help them perform more efficiently.
Hanák’s research also notes that the low overall levels of ERA adoption for construction across the European public sector underscores significant potential for future growth:

Contemporary data reveals poor utilization of e-procurement and e-RA in construction. This has been documented e.g. for Austria or the Czech Republic, where just 0.036% of public works tenders used e-RA. At the European level, auctions are used infrequently (less than 1% in terms of number and volume of contracts awarded); in Portugal, e-RA took place in 0.7% of the tenders. The above-cited data shows that there is still a significant potential for more widespread use of e-RA.
Electronic Reverse Auctions
Construction Industry Research

Hanák’s report underscores the importance of proper communications with the industry, and training and preparation of staff:

It is therefore necessary that buyers provide suppliers with detailed information about the rules of the game so that they can understand the process. Accuracy, clarity and open communication between the buyer and the suppliers are the basic prerequisites for the success of the auction. The readiness of the staff must be ensured not only on the part of the suppliers, but also on the part of the buyer. The user must be familiar with the options for the set-up of the auction and their impact on the process and outcome of the purchase. Training by the system operator and supervision of the preparation and implementation of several initial auctions should be a matter of course.
Hanák’s study also notes that any concerns over ERAs harming business relations by driving down price should be counterbalanced with the potential to improve those relations through greater process transparency:

In connection with e-RA, it is sometimes mentioned that auctions may harm the business relationship between the supplier and the buyer, this effect is severe especially in a limited supplier base. Severe detrimental effect the relationship emerges if a large bid price decrement over the course of e-RA is reported. However, auctions may have also a positive impact on the trust between the supplier and the buyer due to the transparency and objectivity of the process.
Towards that end, Hanák notes that process transparency and the adherence to established rules are paramount to creating trust in the ERA process:

The trust in auction can be negatively influenced by technical problems, rumors or an inadequate auction format. It is therefore important that buyers run e-RA in a fair manner, which requires clear explanation and communication of non-discriminatory auction rules and conditions to suppliers.
Hanák’s study concludes that the adoption of ERAs in public procurement for construction projects requires top-down support within government institutions. As he states, the “adoption of auctions by public authorities was usually initiated by the local administration…It must be noted that the adoption of auctions in the public sector is largely a political decision, so the support of local administration (board or council/management) is inevitable.”
Future Considerations
Implementation Steps: 2020 Vision

The question is no longer whether ERAs can or should be used. Even the Canadian Construction Association, one of the most vocal opponents of ERAs, recognized in 2001 that ERAs are suitable for supplies and materials. Given this widespread consensus, there is no excuse to wait any longer to move within that space. The question is how much further can ERAs be expanded across all sectors, including the construction industry, to achieve improved process efficiencies and cost savings. Moving forward, as prices start going down by using ERAs, adoption rates in the Canadian public sector will surely go up.
Future Considerations
Implementation Steps

Organizations interested in implementing ERAs should take the following seven steps:

1. Adopt legally vetted NRFP templates with ERA protocols
2. Update to ERA-friendly policies and procedures
3. Develop an industry strategy to select the right projects
4. Create a rollout plan to control internal deployment
5. Ensure appropriate internal training and awareness
6. Get initial launch support from experienced advisors
7. Develop a plan for self-sufficient long-term use
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:  Stanco Projects Ltd. v. HMTQ & Aplin & Martin Consultants Ltd.,
2004 BCSC 1038

Date: 20040730
Docket: SO15590
Registry: Vancouver

Between:

STANCO PROJECTS LTD.

Plaintiff

And

Her Majesty the Queen In Right of the Province of British Columbia as Represented by the Ministry of Water, Land and Air Protection

Defendant

And

Aplin & Martin Consultants Ltd.

Third Party

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Plaintiff:  John S. Logan
Counsel for the Defendant: James L. Maxwell
Counsel for the Third Party: Gregory S. Miller and Stacey L. Boothman

Date and Place of Trial/Hearing: January 19, 20, 21, 22, 26, 27, 28, 29 & 30, 2004
Vancouver, B.C.
INTRODUCTION

[1] The plaintiff, Stanco Projects Ltd. (“Stanco”), claims that the defendant Ministry breached a contract (known in tendering law as a Contract A) which it asserts arose when Stanco submitted a formal tender for work to be performed at Cypress Bowl Provincial Park. The Ministry denies liability and maintains that if Stanco’s claim against it is successful, the Ministry is entitled to indemnity and/or contribution from the third party engineers, Aplin & Martin, who were central to the preparation of the tender package and evaluation of the submitted bids. The Ministry’s claim against Aplin & Martin is framed both as a breach of contract and in negligence, including negligent misrepresentation.

BACKGROUND

[2] The salient facts are largely not in dispute but are extensive.

[3] In 2000, the Ministry commenced the planning of a project to upgrade the water system within Cypress Provincial Park in British Columbia in order to meet the domestic and fire protection needs of the park, including the commercial ski facilities.

[4] As part of the water system upgrade, the Ministry proposed to construct two reservoirs near the Cypress Bowl ski area within the park. The two proposed reservoirs came to be known as the “Alpine” tank and the “Nordic” tank.

[5] Graham Lorimer was the individual within the Ministry who was primarily responsible for the reservoirs project. He had been a Ministry employee in various capacities for more than 25 years. At the relevant time, he was a special projects person involved in those of the Ministry’s major construction undertakings which were beyond the capabilities of the Ministry’s ordinary field staff.


1.1 OVERVIEW
The objectives of contract administration are to:

- establish a **consistent framework** for contracting in the Ministry;
- provide qualified contractors with **fair access** to the contract business of government;
- ensure that the government receives the **best value** for the money spent;
- ensure **integrity/honesty** in the acquisition of contracted services;
- establish **specific criteria** for the selection of contractors and award of contracts;
- ensure that contracts negotiated are **legally binding**, in writing, and clearly describe the obligations of all parties;
- specify the **approval, payment and reporting requirements** pertaining to the use of contracts;
- assign direct accountability to program areas for contract administration; and
- establish policy and guidelines for: the acquisition of service(s); monitoring and evaluation of contracts; and the management of risk.

(underlining in original)

2.5 Choose Solicitation Type

...
Tender (ITT). Tender is the most formal solicitation type – typically used for construction, maintenance and some operational service requirements – where there is a definite intention to enter into a contractual agreement (provided that the offers received are competitive and provide value to the Ministry), and where:

... 

- the award decision will be based on the lowest qualified tender that meets all specified conditions and qualifiers.

(underlining in original)

3.1 General Acquisition Procedures

- OPERATING PRINCIPLE: The importance of process integrity when involved in the solicitation stage of the contract cycle is paramount. Not only must the solicitation be conducted with the utmost integrity and fairness, it must also have the appearance of integrity.

3.1.1.3 Fair and Equal Treatment of Bidders

FAIRNESS

Fairness ensures that all potential, qualified bidders are solicited, and that the Ministry awards a contract in accordance with the terms stated in the solicitation document (e.g., Ministry should not invite tenders for a 4-year contract and award a 2-year contract).

EQUAL TREATMENT

Equal Treatment refers to a fair, equitable evaluation of bids and qualifiers. For example, non-disclosure of a “local bidder preference” policy has been considered inequitable and unsuccessful contractors bidding may recover expenses of submitting a bid.

3.2.1.2 Conditions of Tender/Evaluation Criteria

...
The Conditions of Tender essentially become, in legal context ‘the terms or conditions of the Bid Contract’ (also referred to in law as Contract A). It is therefore imperative that these conditions are reviewed for each contract situation to ensure that all conditions are appropriate as both parties are bound by those conditions and they cannot be altered once the tender is closed.

3.2.1.4 "Lowest or Any Tender" Clause

It has become standard practise to include a condition in Ministry solicitations that states ‘the lowest or any tender will not necessarily be accepted’. This clause can provide flexibility for the Ministry in certain situations. It allows the Ministry to: accept the next to lowest tender if the lowest bidder is not qualified or withdraws; or, cancel the entire solicitation call if uncontrollable circumstances prevent the award of the contract to any bidder. However, it does NOT allow the Ministry to select any tender by any qualified bidder. (emphasis in original)

3.2.2.10 Amendment to Tender

Extreme care must to taken to ensure that all bidders base their tender on identical information. The Ministry must issue corrected or additional information to the tender package by written addenda to all bidders. (emphasis in original)

... 

If major changes are required in the tender documents, serious consideration should be given to cancelling and re-tendering the works/services.

3.2.4.7 Lowest Qualified Tender

After all things are considered, the lowest qualified tender is to be accepted unless uncontrollable circumstances justify cancelling the tender call entirely. The Ministry cannot accept ‘any’ qualified tender.
3.2.4.8 Negotiate Off Low Tender (Caution)

This practice of negotiating, typically associated with RFP, may be used in the case of tender if the tender conditions stipulated your intention to negotiate. This practice must be approached with caution for the following reasons:

- if Contract Managers are known to be hard bargainers, bidders will pad their bids to allow for downward movement later;
- other bidders may feel that they should be given the opportunity to revisit their price; and
- virtually any change will impact the cost of providing the services.

3.6.1.1 Caution: Counter-offer

Care must be taken – especially in the case of tender – to accept the exact offer made, unconditionally. If the acceptance is made subject to any conditions, in law what has been communicated is not really acceptance but a counter-offer. The introduction of a counter-offer has two main implications for Contract Managers:

- a counter-offer voids the Contractor’s original offer; and
- presenting a counter-offer places the award decision in the control of the Contractor, as he/she now has the opportunity to either accept or reject the counteroffer (this means the Contractor can reject the counter-offer without penalty for withdrawal because such rejection is not really withdrawal).

[8] Mr. Lorimer confirmed that the policies, procedures and guidelines applicable to the reservoirs project were as set out in the Contract Administration Manual. It was his responsibility to ensure adherence to them in respect of the reservoirs project.

[9] On July 25, 2000 the Ministry engaged the third party, Aplin & Martin, a firm of professional engineers, as its
consultant in relation to the water system upgrade project. The Ministry’s primary contact at Aplin & Martin was Mark Casidy.

[10] The terms of the agreement were set out in a Service Contract between Aplin & Martin and the Ministry. The services which Aplin & Martin agreed to provide to the Ministry were described in Schedule A to the Service Contract and included, among other things, the following:

...detailed design, tendering, construction management and inspection services for a water system upgrade within Cypress Provincial Park;

...detailed design, all additional survey requirements, tendering and construction management services for a water system upgrade within Cypress Provincial Park;

...the consultant will prepare, distribute tender packages to pre-qualified contractors and recommend an award of up to eight construction contracts.

[11] Other pertinent provisions of the Service Contract can be summarized this way:

- Aplin & Martin agreed to perform the services described in Schedule A to a standard of care, skill and diligence maintained by persons providing, on a commercial basis, services similar to those described in Schedule A;

- Aplin & Martin agreed to “indemnify and save harmless the Ministry and its employees and agents (each an “Indemnified Person”) from any losses, claims, damages, actions, causes of action, costs and expenses that an Indemnified Person may sustain, incur, suffer to be put to at any time, either before or after this agreement ends, which are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission by [Aplin & Martin] or by any of [Aplin & Martin’s] agents, employees, officers, directors, or subcontractors in providing the Services except liability arising out of any independent negligent act by [the Ministry];

- Aplin & Martin agreed that the work would be undertaken in accordance with current engineering
practices and procedures using the latest version of the Master Municipal Specifications.

- Aplin & Martin is described as an independent contractor and not the Ministry’s employee, agent or partner.

[12] As part of its mandate, on August 16, 2000 Aplin & Martin invited contractors to pre-qualify as bidders. The objective of the pre-qualification was to streamline the bidding process by confirming in advance that potential bidders had the qualifications and capability to undertake the desired work.

[13] Hamilton McDonald joined Stanco in January 1996 and subsequently retired in February 2003. At the relevant time, Mr. McDonald was the vice-president and chief financial officer in charge of Stanco’s projects with respect to the supply of reservoirs and the design and the installation of chemical feed systems.

[14] Mr. McDonald testified that Stanco is a wholly owned subsidiary of Mequipco Sales Ltd. (“Mequipco”). The officers of both corporations were identical and the directors of Stanco were the spouses of the Mequipco directors. At the operational level, Mequipco frequently acted as Stanco’s agent in securing its contract work and occasionally bought and sold water treatment equipment. It is predominately Stanco, however, which contracts with third parties in respect of undertakings relating to water and waste water.

[15] In total, eight companies made pre-qualification submissions to Aplin & Martin. One of those was Mequipco, on behalf of Stanco. On August 24, 2000 Aplin & Martin wrote to the Ministry recommending that six of those eight companies be invited to submit tenders.

[16] A recurring submission by counsel for the Ministry is that it was the separate entity of Mequipco — rather than Stanco — who was actually pre-qualified as a tenderer. In my view, it is clear from Aplin & Martin’s August 24 letter to which I have just referred as well as the evidence as a whole, that neither the Ministry nor Aplin & Martin drew a distinction between Mequipco and Stanco and any apparent approval of the former as a pre-qualified tenderer was both in fact and in effect, the approval of Stanco as such.

[17] In addition to the reservoirs project there were other related contracts being carried out at Cypress Bowl Provincial
Park. One of them was for a water treatment facility which had already been tendered and awarded to Westport Construction Group Inc. (“Westport”). Aplin & Martin had secured a separate consulting contract with Cypress Bowl Recreation Ltd. (“CBRL”) in respect of the water treatment facility involving Westport. Westport is one of Stanco’s competitors in the business of supplying reservoirs. As will be seen in the unfolding of this case, Westport’s involvement in the bid for the reservoirs work is a key factor in the events which give rise to this litigation. A further connection was that CBRL itself was providing a portion of the funding for some of the water system upgrades including the proposed reservoirs.

[18] Kevin Healy of CBRL is a professional engineer with considerable construction experience. Although he had no formal role, Mr. Healy was an important background force in the reservoirs tender.

[19] In assembling the tender package in late 2000 and early 2001, Mr. Casidy of Aplin & Martin sought and received input from several of the pre-qualified bidders, including Stanco, about the draft specifications and, in particular, whether the Ministry would be better served by reservoirs that were glass fused to steel or epoxy coated. The pre-qualified bidders exchanged correspondence with Aplin & Martin on these matters and, in some cases, made recommendations. For its part, Stanco expressed the view that the additional cost for a glass fused to steel tank was not worth the premium.

[20] In early 2001, both Mr. Lorimer of the Ministry and Kevin Healy of CBRL, requested that certain changes be made to the draft tender documents. The last of those suggested revisions were incorporated by Aplin & Martin in May 2001. Aplin & Martin did not send the final version of the tender package to the Ministry before it notified the pre-qualified bidders to collect the tender package.

[21] The Instructions to Bidders comprising part of the tender package stipulated that tenders were to be filed with Aplin & Martin no later than 3:00 p.m. on June 13, 2001. It further provided that any bid received after the closing time would be returned to the bidder unopened. The bids were irrevocable for a 60 day period. The Instructions to Bidders also included, among other provisions, the following:

1. **Submission of Tenders**

   ...

Commented [P5]: This was not an electronic reverse auction process, this was a conventional fixed-bid construction tender with a 60-day irrevocability period that created Contract A. This case had nothing to do with electronic reverse auctions.
The [Ministry] reserves the right to alter the scope of the project at any time.


10. **Omissions or Discrepancies**

If a Bidder finds omissions or discrepancies in the Tender Package Documents, or is in doubt as to their meaning, he shall immediately notify the [Ministry’s] representative. Every request for an interpretation shall be made in writing and addressed and forwarded to the [Ministry’s] representative. The [Ministry’s] representative shall make the interpretations to the Bidders in writing.

22. **Alternate Bid**

The Bid shall be based upon the whole of the Specifications and Contract Documents, without reservation. If a Bidder wishes to propose an alternative Bid based on specifications, other than those furnished herewith, he shall submit his proposed alternative in letter form, in addition to his Bid. The [Ministry] shall be the sole judge as to whether any such proposed alternative to the Bid is acceptable. (underlining in original)

24. **Basis of Award**

The [Ministry] reserves the right to reject any or all Bids and will not necessarily award the Contract to the lowest Bidder.

... 

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

[22] Also forming part of the tender package was a CCDC2 - 1994 Stipulated Price Contract which eventually would be signed by the successful bidder and the Ministry. Of particular note in this case is Part 6 of that contract which establishes a detailed procedure for the Ministry, through Aplin & Martin, to
modify or delete portions of the contemplated work once the contract had been awarded. The procedure was that Aplin & Martin would provide a specified notice describing the proposed work change. In response, the contractor would then suggest a method or amount of adjustment of the contract price and contract time. If the Ministry and the contractor were not able to agree, Aplin & Martin would issue a change directive and the contractor would be obligated to proceed promptly with the altered work. The work would then be carried out on the basis of the cost of expenditures and savings to perform the work attributable to the change. In the event that the parties could not agree on the change in price or change in contract time, Aplin & Martin was entitled to make a determination. If the contractor disagreed with that determination, then the parties would be entitled to call for resolution of the dispute via mediated negotiations and, failing that, through arbitration.

[23] On or about June 4, 2001 the bidders, including a representative from Stanco, attended a mandatory site meeting. At that meeting the bidders were informed by the Ministry that due to budget constraints there might be only one reservoir constructed in 2001.

[24] Three separate addenda to the tender package were issued by Aplin & Martin.

[25] The first addendum was issued on June 6, 2001, seven days prior to the June 13 deadline. Aplin & Martin sent a draft of the addendum to the Ministry with a copy to Mr. Healy inviting review and comment. Mr. Healy made suggested changes to the draft which he faxed to Mr. Lorimer who, in turn, forwarded Mr. Healy’s fax to Aplin & Martin. Mr. Lorimer testified that he took “a quick look” at the draft, saw nothing “obviously wrong” with it and made no revisions himself.

[26] A key component of the tender package as it pertains to this litigation is a document called “Appendix C to Bid”. It requested a breakdown of the individual prices for the Alpine and Nordic tanks manufactured in glass fused to steel. At its foot, Appendix C asks for a global price saving if epoxy tanks were supplied rather than two glass fused to steel tanks. That provision read as follows:

A price savings of $______ would be realised if epoxy-coated steel tanks are supplied and installed in lieu of the glass-fused-two-steel tanks, for a Total Lump Sum Contract Price of $______. 
Appendix C was modified by addendum no. 1 so as to include at the end of it, this fresh paragraph:

“Due to budget constraints, the Owner may decide only to construct a reservoir in either the Alpine Area or the Nordic Area, but not both. The above noted Lump Sum Prices assume that only one Reservoir will be constructed. If there is sufficient budget available, a price savings of $_____________ would be realized if both Reservoirs are included in one Contract.”

Paragraph 1 of addendum no. 1 explained the inclusion of this new paragraph as follows:

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

The words “individually and separately” were incorporated in addendum no. 1 at Mr. Healy’s request in place of the phrase “separately under two Contracts”. He made no suggested edits to the body of Appendix C.

The simple objective of the Ministry and Aplin & Martin was for Appendix C to elicit an individual price quote for each tank in epoxy, as had been done in respect of the glass fused to steel tanks. As will become evident, Appendix C, even as subsequently augmented by addendum no. 1, was clumsily worded and did not elicit this pricing information. It is fair to say that this entire case arose from the manner in which the Ministry and Aplin & Martin attempted to address this oversight.

Other changes contained in addendum no. 1 included seismic considerations and, more notably, a relaxation for the scope of the work in relation to only one bidder, Western Tank and Lining Ltd. (“Western Tank”), who was given permission to bid on epoxy tanks only.

On June 11, 2001 Stanco wrote to Aplin & Martin objecting to the provision in addendum no. 1 which allowed Western Tank to bid only on the epoxy coated tanks, while the rest of the bidders were required to bid on both the epoxy and the glass fused to steel tanks. Stanco, and possibly other pre-qualified
bidders, also requested an extension of the June 13, 2001 deadline.

[32] On learning of Stanco’s objection, Bob Naylor of Western Tank wrote two letters to Aplin & Martin intimating that Stanco was trying to get Aplin & Martin to make glass fused to steel tanks the “base bid” because Stanco had a competitive advantage on those particular tanks. Mr. Naylor warned that Stanco “will be bidding this both ways and are working on you to sew themselves up as the winner by the contract language alone”. His letter goes on to say in reference to Stanco:

These folks have a “Mike Tyson” approach to contracting that includes a pummelling before, during and after the event.

[33] Mr. Casidy of Aplin & Martin admitted that Western Tank’s complaints caused him to become concerned that Aplin & Martin might have been “set up” by Stanco.

[34] The tender period was extended to June 20, 2001 by addendum no. 2. It appears as though Mr. Casidy did not send a draft of addendum no. 2 to Mr. Lorimer or Mr. Healy before sending it to the bidders. However, he testified that he believes that he discussed the deadline change with Mr. Lorimer in advance—a point which was not really contested by Mr. Lorimer—and I conclude that he did so.

[35] Aplin & Martin issued addendum no. 3 on June 18, 2001. Among other things, and despite the views expressed by Western Tank, it rescinded the earlier provision permitting Western Tank to bid only on the epoxy coated tanks.

[36] Stanco and three other pre-qualified bidders submitted their tenders by the extended June 20, 2001 deadline. They all complied with the terms set out in the Instructions to Bidders contained in the tender package and none noted any exceptions in their bids.

[37] The tenders were opened on June 20, 2001 at the offices of Aplin & Martin with some or all of the bidders present.

[38] Stanco was the low bidder by a significant margin on the glass fused to steel tanks, priced separately and together. It was also low bidder by $54,250 on the two tanks in epoxy. Westport was the second lowest. 

Commented [P6]: This was a conventional sealed bid process, this was not an electronic reverse auction. This case had nothing to do with electronic reverse auctions.
Stanco bid $769,000 for the two glass fused to steel tanks ($415,000 for the larger Alpine tank and $354,000 for the smaller Nordic one). Its bid included a mark-up of 33% which was roughly in the middle of Stanco’s mark-up range of between 25-39%. Stanco completed the bottom portion of Appendix C indicating there would be a price savings of $90,250 on the $769,000 if the two tanks were to be epoxy rather than glass fused to steel. The resultant bid for the two epoxy tanks was therefore $678,750. In response to the last paragraph of Appendix C (incorporated as a result of addendum no. 1), Stanco offered a further $1,000 credit if both tanks were included in the contract.

Prior to the close of tenders, neither Stanco nor the other bidders were asked to provide an individual price for each epoxy tank. Moreover, Appendix C did not require Stanco to allocate its price saving of $90,250 for two epoxy tanks, between the Alpine and Nordic tanks. Simply put, the bid did not request a separate price for the Alpine tank in epoxy and a separate one for the Nordic in epoxy.

Shortly after the tenders were opened, Mr. Lorimer confirmed to Mr. Casidy that the decision had been made to proceed with just the one Alpine tank in epoxy. It was at this stage that it became apparent to these gentlemen that Appendix C neglected to ask for a separate price for each tank in epoxy. Mr. Casidy advised Mr. Lorimer he would contact Stanco to get a price for the Alpine reservoir, in epoxy. Mr. Lorimer agreed to that approach.

On June 21, 2001 Mr. Casidy sent a fax to Mr. Lorimer enclosing the tenders, confirming that Stanco was the low bidder for the epoxy coated tanks and reporting that Mr. Casidy would confirm with Stanco their price for the Alpine reservoir, in epoxy. Mr. Casidy closed his fax by saying “I will forward letter recommending the award of the contract to Stanco subject to their adjusted price and also confirmation of the adequacy of their proposed tank.” As promised, Mr. Casidy then telephoned Stanco and Stanco advised that it would break out a price for the one Alpine tank in epoxy and get back to Mr. Casidy.

Mr. Lorimer, in turn, faxed his superiors, Ron Lampard and Ray Peterson, that same afternoon. He reported, among other things, that the tenders had opened and that Stanco had submitted the low bid at $769,000 for glass lined tanks, with a global credit of $90,250 if epoxy tanks were used. Although at this point Mr. Lorimer did not have Stanco’s price for the one Alpine epoxy tank, he stated in his fax that he believed Stanco’s price would be approximately $360,000. Mr. Lorimer

Commented [P7]: Nice profit mark-up. The evidence here shows how much lower the bidder could have gone compared to its initial fixed bid had an electronic reverse auction been used. The bidder could have dropped 19% from the top end of its 39% profit margin range and still earned 20% profit. This is almost exactly what the industry standard 20% saving in ERAs illustrates. Instead, the single bid came in at a 33% profit markup. An ERA could have driven a further savings of 13% compared to the single bid (and 19% less than the top end profit margin rate) while still allowing a reasonable 20% profit to the contractor.
arrived at his estimate by taking 60% of the $90,250 credit ($55,000) and subtracting it from Stanco’s $415,000 bid for the Alpine glass fused tank.

[44] At the time Stanco received Mr. Casidy’s request for a break out price for the Alpine tank in epoxy, it knew — as did all the tenderers — that it was low bidder on all of the prices requested in the tender package. Mr. McDonald testified that because Stanco was the compliant low bidder across the board, he assumed that it would be awarded the construction contract. He believed that if there were any disagreement on the epoxy price of the Alpine tank, the price would be discussed and fixed by Aplin & Martin pursuant to Part 6 of the terms of the CCDC2 Stipulated Price Contract contained in the tender package. Mr. McDonald assumed that Mr. Casidy’s request for a price for the single epoxy tank was simply part of that process.

[45] Meanwhile, also on June 21, 2001, during a conversation with a representative of Westport in connection with Westport’s separate water treatment facility contract already underway, Mr. Casidy asked that representative what Westport’s price for the Alpine tank in epoxy would be. At this point, Westport was of course aware of Stanco’s low bid and would have been able to use that information in arriving at its price. Less than an hour later, Westport delivered a written quote for the one epoxy Alpine tank to Aplin & Martin. Westport’s price was $365,000. That figure was almost $12,000 less than its pro rata price as calculated by Aplin & Martin. Included with Westport’s $365,000 quotation was a letter from Western Tank (Westport’s epoxy tank supplier) confirming that the $365,000 figure was based on a 3 mil. epoxy coating. That coating thickness did not meet the 8.5 mil. specification in the tender package.

[46] Stanco was not aware that Aplin & Martin had asked Westport for a price on the Alpine tank in epoxy. Nor was Mr. Lorimer aware of this.

[47] At trial Mr. Casidy admitted that he was curious to know what Westport’s price would be in that it might help to ensure that he would not be “taken advantage of” by Stanco. Western Tank’s warning about Stanco’s so-called “Mike Tyson” approach no doubt fuelled Mr. Casidy’s concern.


[49] Mr. Casidy was expecting a price lower than $385,000. He had calculated a price of $367,366 on a pro rata basis and,
unbeknownst to the other parties, had Westport’s $365,000 quote in his mind. The Ministry shared that expectation as Mr. Lorimer had already estimated a pro rata price in the area of about $360,000 and relayed that number to his superiors. Mr. Casidy, Mr. Lorimer and Mr. Healy all agreed that Stanco’s $385,000 price was too high.

[50] I accept Mr. McDonald’s evidence that he based Stanco’s price on the actual cost for the Alpine tank in epoxy, with the same 33% mark-up that had been used in calculating Stanco’s original tender prices. I also accept Mr. McDonald’s evidence that from Stanco’s standpoint arriving at a price for the one epoxy tank was not simply a matter of performing a pro rata calculation. This was primarily because Stanco had originally obtained a two tank discount from its epoxy tank supplier and the same discount would not apply if only one tank were acquired. Mr. McDonald’s evidence — which again I accept — was that although Stanco had made a small error of about $5,000 in its original price calculation, it did not try to recoup its costs by increasing its price for the one Alpine tank. To the contrary, Stanco’s costs for the one epoxy tank, plus its 33% mark-up, resulted in a price of $390,000 and it deducted approximately $5,000 from that price to ensure that its error was not visited upon the Ministry.

[51] To complicate matters, it appears as though Mr. Casidy mistakenly believed that Stanco’s $385,000 price was for a 3 mil. exterior coating. His mistaken belief seems to have come about this way. Stanco had enclosed with its June 22 price quote letter, a coating specification listing. The cover letter clearly stated that its price was based on a “system 4” coating and the accompanying coating specification listing shows that “system 4” has a 7 mil. thickness. Mr. Casidy erroneously interpreted the reference to “system 4” as a reference to “paragraph 4” of the enclosed coating specification listing. Paragraph 4, under exterior coatings, refers to an epoxy coating of only 3 mil. He circled that paragraph 4 on the specification sheet before faxing it to Mr. Lorimer. The Ministry makes much of this confusion in relation to its claim against Aplin & Martin and I will briefly revisit that point later in my reasons under that heading.

[52] On June 29, 2001, Mr. Casidy wrote to Stanco expressing disappointment about Stanco’s $385,000 price and asking it to explain why his $367,366 pro rata price would not apply. Mr. Casidy also pointed out that the exterior coating specification in the tender package called for an 8.5 mil. coating and that
Stanco’s coating appeared to be for 3 mil. Mr. Casidy did not take up the coating thickness point with Westport, even though Westport’s $365,000 price was explicitly stated to be for a 3 mil. coating.

[53] Stanco replied by letter that very day explaining why, in its view, Mr. Casidy’s pro rata calculation was not valid. In my view, the explanation is somewhat oblique and fails to state in a straightforward way the message that Mr. McDonald testified it was intended to convey namely, that a pro rata calculation was not appropriate because Stanco enjoyed a larger discount on two epoxy tanks than on just one. Stanco’s letter also explained that the “system 4” coating was its premium exterior coating and enclosed another copy of the coating specification sheet which showed it was a 7 mil. coating.

[54] On July 3, 2001 Mr. Casidy forwarded a copy of Stanco’s letter of explanation to Mr. Lorimer and Mr. Healy and advised them that he could not still justify Stanco’s “apparently high price” for the epoxy Alpine reservoir. Mr. Healy left a voicemail with Mr. Lorimer to the effect that Stanco’s price was still not justified. Mr. Casidy admitted in cross-examination that the $365,000 price he had received from Westport after the close of tenders may have tainted his view of the reasonableness of Stanco’s $385,000 quote. I have little difficulty inferring that it did indeed.

[55] Some days later on July 11, Mr. Casidy requested a price for the Alpine tank in epoxy from another of the four bidders, Tritech. Tritech gave a price of $400,000, which was $17,444 below its pro rata price. Both Stanco and the Ministry were unaware of Aplin & Martin’s communications with Tritech.

[56] On more than one occasion, Stanco suggested to Aplin & Martin that if budget constraints necessitated Aplin & Martin achieving its $367,366 pro rata figure, Stanco would work with them to reduce the price by deleting unnecessary work contained in the specifications, on the footing it was awarded the construction contract as low bidder. One of Stanco’s suggestions was to reduce the tank coating thickness. However, Aplin & Martin was still operating on the mistaken assumption that Stanco’s “system 4” referred to a 3 mil. coating rather than a 7 mil. coating and were therefore not prepared to reduce the coating to a thickness below 3 mil.

[57] Mr. Casidy says that he considered the prospect of rejecting all tenders and re-tendering on the epoxy Alpine tank alone, but decided that there was no time to do so as construction had to
Mr. Healy shared that view. Mr. Casidy felt that because it was a public tender and the prices were already known to all, re-tendering might not be fair to the bidders.

[58] Mr. Casidy was growing uneasy about how the situation was evolving and discussed it with senior members of his firm. It was decided that the best course of action would be to attempt to “formalize” the post-closing tender discussions by requesting that each of the four bidders complete a document titled “Offer of Credit” which would elicit the price of the single Alpine tank in epoxy. The Ministry voiced no objection to the Offer of Credit approach. The Offer of Credit was faxed to each of the original bidders on July 12, 2001.

[59] Mr. McDonald was confused by the receipt of the Offer of Credit. He had been operating on the assumption that as compliant low bidder Stanco was about to be awarded the contract and had already provided its $385,000 price for the one Alpine tank in epoxy. In the hope of clarifying matters, Mr. McDonald telephoned Mr. Casidy. Once again Mr. Casidy suggested that Stanco’s price should be the pro rata price of $367,366 and once again Mr. McDonald explained his competing view. Mr. McDonald informed Mr. Casidy that Stanco was not prepared to complete the Offer of Credit as it did not wish to “re-bid” the tender. However, he reiterated that if for budget reasons the price of $367,366 had to be achieved, Stanco could meet that on a re-examination of the specifications, including the paint thickness. During this conversation Mr. McDonald pointedly asked Mr. Casidy whether he had been talking to other bidders. Mr. Casidy assured Mr. McDonald that he had not. This statement was untrue. At trial Mr. Casidy admitted that he was concerned that if he told Mr. McDonald that he had been talking to other bidders after the close of tenders, Mr. McDonald would think that Mr. Casidy was “bid shopping”. As it turns out, his concern was prophetic.

[60] On July 13, 2001, Stanco requested a meeting with Aplin & Martin, however Mr. Casidy was about to leave on vacation and the meeting never materialized. Robert Wridgway of Aplin & Martin assumed conduct of the matter during Mr. Casidy’s absence. Mr. Casidy had fully briefed Mr. Wridgway prior to his departure.

[61] Mr. Wridgway wrote to Stanco on July 16, 2001, stating that it was his understanding that Stanco stood by its $385,000 price and suggesting that “in order for Stanco to remain in contention” to be recommended for the project, it should re-evaluate its stance and complete the Offer of Credit. As was
the case with many other bits of Aplin & Martin’s correspondence to bidders, the Ministry did not know about this letter in advance of it being sent.

[62] When he received the letter, Mr. McDonald telephoned Mr. Wridgway and reiterated his suggestion that once Stanco was awarded the construction contract, they could explore an alteration of the scope of the work, including the paint thickness, in order to bring down the price. Mr. Wridgway made it clear that the 8.5 mil. paint specification in the tender package would stand.

[63] It was during this conversation that Mr. Wridgway revealed to Mr. McDonald that Mr. Cassidy had spoken to other bidders about their price for the one epoxy tank. On learning this, Mr. McDonald cautioned Mr. Wridgway that the process which Aplin & Martin was engaging in was dangerous and inappropriate and that Stanco was reluctant to sanction it through participation in the Offer of Credit process.

[64] Mr. McDonald testified that as soon as he discovered that Aplin & Martin had been dealing with other contractors, he realized that he could no longer operate on the assumption that Stanco, as the low bidder, was about to be awarded the contract. He further realized that Stanco had not simply been working with Aplin & Martin to agree on a price for the one tank as was contemplated by the terms of the CCDC2 Contract, which Mr. McDonald had assumed Stanco would be signing. Accordingly, Stanco immediately stopped engaging in any further exchange with Aplin & Martin concerning a price for the one Alpine tank in epoxy and refused to complete the Offer of Credit.

[65] The other three bidders did complete the Offer of Credit. Westport’s price remained the lowest at $365,000.

[66] On July 20, 2001, Aplin & Martin sent a lengthy reporting letter to the Ministry recommending that the Ministry enter into a contract with Westport for the epoxy Alpine tank for Westport’s quoted price of $365,000. The context of the letter as a whole makes it clear to the reader that Aplin & Martin had asked both Stanco and Westport for their respective quotes before it sent out the Offer of Credit. The letter goes on to explain the Offer of Credit process and its outcome. It reports on Stanco’s refusal to complete the Offer of Credit and its complaint about the process. It also reports on Stanco’s willingness to take steps to reduce its $385,000 quote on the basis that it would be awarded the construction contract. Although there are some omissions and small
inaccuracies in the letter, in my view, the imprecision of the letter is not material to the issues at hand.

[67] On July 23, 2001 Mr. Lorimer sent to his superiors, Messrs. Lampard and Peterson, a copy of Aplin & Martin’s July 20 reporting letter. In his fax, Mr. Lorimer alerts his superiors to the fact that “this contract tender process was unusual”. Moreover, he takes the time to prepare his own summary of events and ultimately endorses Aplin & Martin’s recommendation:

Original tenders received were for two tanks with glass fused linings. The tender documents included a credit if an epoxy lining was selected. The credit was for both tanks and did not identify the credit if only one tank was constructed. We approached the contractor with the low tender and asked them to break out the credit for the Alpine tank. The credit issued for the one tank was not proportional to the relative tank sizes. I asked the engineer to request justification for this discrepancy. The company’s explanation did not satisfy our consultant, CBRL or me. We then went to the [sic] all companies that submitted tenders and requested that they break out their credit for the Alpine tank. The company with the low tender initially chose not the [sic] respond. The company with the lowest price for installation of the Alpine tank based on the credit for the one tank was the firm that had submitted the second lowest tender for the installation of the two tanks. It should be noted that their amended price was $11,607 lower than the proportional amount based on our calculations. (i.e. credit rather that [sic] penalty for choosing to install the one tank). Please note that the company that submitted the initial low tender is not pleased at all with the fact that we are questioning their credit for the one tank and the fact that based on this concern have requested that the other company submit their credit for the Alpine tank. I would like to request that our engineers proceed with preparation of the contract documents and award the contract to Westport Construction Group for an amount of $365,000. (bold in original)
On July 30, 2001, the Ministry gave the go-ahead to Aplin & Martin to award the contract to Westport for $365,000 and Aplin & Martin promptly did so.

On learning of the award recommendation, Stanco attempted to persuade Aplin & Martin to reconsider the decision. Dave Clark, another vice-president of Stanco, advised Mr. Wridgway that Stanco vigorously protested awarding the contract to Westport and viewed the post-closing events as an abuse of the tender process and threatened to obtain legal representation. Mr. McDonald spoke to Mr. Lorimer as well as to Mr. Peterson and Mr. Lampard along the same topic lines. Mr. Lampard stated that the Ministry had called in “outside auditors” to review the procedures and if they were found to be defective, the project would be re-tendered the following year.

Stanco’s strenuously voiced complaints prompted the Ministry to put Westport’s contract on hold while it sought input from its internal legal department. Evidently Mr. Lorimer’s superiors, Messrs Lampard and Peterson, were charged with the final decision about whether to award to Westport. They did not give evidence. On August 3, 2001, Mr. Lorimer sent a memorandum to Richard Wong, described as a contract specialist within the Ministry, setting out a brief chronology of events and attaching pertinent documents. Mr. Lorimer testified that he understood this package made its way to the Ministry’s legal services department for review. The nature of Mr. Wong’s advice, or even whether it was forthcoming, was not revealed at trial. What is known is that on August 15, 2001 the Ministry decided to proceed with the award of the contract to Westport. On August 21, 2001, Aplin & Martin sent the contract (which had an effective date of August 1, 2001) to Westport and in due course it was signed by the parties and Westport carried out the work.

ISSUES

As mentioned at the outset, Stanco asserts that a contract known as Contract A was formed between it and the Ministry when Stanco submitted its formal tender to the Ministry in accordance with the tender package. It asserts that the Ministry breached the terms of Contract A and that, but for its breach, the Ministry would have awarded Stanco the construction contract (known in tendering law as Contract B) for the single Alpine reservoir, in epoxy. Stanco contends that as a result of the Ministry’s breach of Contract A, it has been deprived of the profit it would have otherwise made in relation to the Alpine reservoir project.
The Ministry’s first position is that a Contract A was never formed between Stanco and the Ministry and, in the alternative, if it did exist, the Ministry did not breach any of its terms. In the further alternative, the Ministry asserts that if it did breach Contract A, that breach did not cause the damages claimed by Stanco.

The Ministry also contends that Aplin & Martin breached the terms of the Service Contract as well as its duty of care owed to the Ministry and claims against it for contribution and/or indemnity based on negligence (including negligent misrepresentation) and breach of contract. Aplin & Martin deny any liability to the Ministry and say that the Ministry acted of its own volition concerning the decisions of significance and not in reliance on any of Aplin & Martin’s representations and, in any event, Aplin & Martin’s conduct did not amount to a breach of contract or duty of care owed to the Ministry.

Broadly described, the issues to be decided are:

1) whether a Contract A was formed between the Ministry and Stanco;

2) if a Contract A arose, whether the Ministry breached one or more of its terms;

3) if the answer to the second issue is yes, what damages, if any, flow from the Ministry’s breach; and

4) whether the Ministry is entitled to contribution and/or indemnity from Aplin & Martin.

DISCUSSION AND ANALYSIS

The tendering process in Canada is governed by the law of contract. The current law has largely developed in the years following the landmark decision of the Supreme Court of Canada in The Queen in Right of Ontario v. Ron Engineering and Construction (Eastern) Ltd., 1981 CanLII 17 (SCC), [1981] 1 S.C.R. 111. The Ron Engineering case introduced what is now known as the Contract A/Contract B paradigm to address perceived deficiencies in the application of traditional contract principles to the law of tendering. In so doing, it significantly altered the law.

Prior to the introduction of the Contract A/Contract B structure, an owner’s request for tenders from contractors was
viewed in contract law as an invitation to treat. When a contractor responded to the invitation, its tender was considered to be an offer to complete the work for the price set out in the tender. Because the tender was merely an offer, an owner was under no particular obligation to assess the tender in accordance with any defined or predictable criteria or even accept it. A contractor could therefore incur significant expense in preparing its quote without any assurance that it had a genuine chance of obtaining the construction contract or that its tender would be treated fairly. Nor did the contractor have any assurance that its tender would not simply be used as a starting point for negotiations between the owner and the contractor and/or others.

[77] Conventional contract law principles were also poorly equipped to respond to the business needs of owners. Because a contractor’s tender was a mere offer, the owner was not assured that it would be able to hold a contractor to the submitted price. There was nothing to prevent the contractor from withdrawing its offer at any point up to the time of acceptance.

[78] In general terms, contractors desired a system which assured them that if they assumed the risks inherent in the tendering process their bids would be dealt with fairly. For their part, owners wanted a process which would encourage competitive prices at the outset which could be made binding. The development of a unique set of contract law principles better capable of protecting the reasonable expectations of the parties and imposing a degree of certainty and, ultimately fairness, was required. That was in large measure achieved by the Supreme Court of Canada in Ron Engineering.

[79] In Ron Engineering, the contractor, Ron Engineering, was the low tenderer on a general construction contract. The contractor discovered immediately after the tenders were opened that it had mistakenly neglected to include a significant component of $750,058 in its bid. The error was invisible in the sense that it was not apparent on the face of the bid documents. Ron Engineering notified the owner of its mistake. The owner would not allow Ron Engineering to revoke its tender and forwarded it a construction contract for signature. Not surprisingly, Ron Engineering refused to sign the contract and demanded the return of its $150,000 bid deposit. The owner entered into a construction contract with the next lowest bidder and refused to return Ron Engineering’s bid bond. Ron Engineering claimed that because it had notified the owner about the mistake before the tender had been accepted, the tender was incapable of acceptance and, accordingly, it was entitled to the return of its bid
bond. Until the decision in *Ron Engineering*, a contractor finding itself in such circumstances would have generally been permitted to withdraw its tender without forfeiture of its bid bond at any time before communication of the owner’s acceptance. *Ron Engineering* changed all that.

[80] Justice Estey, writing for the Court, described the tendering process as consisting of the formation of two separate contracts: Contract A and Contract B. Contract A governs the manner in which the tender process is to be conducted. Contract B is the substantive construction contract to perform the work that has been bid. According to Justice Estey’s analysis, an owner’s invitation to tender amounted to an offer to enter into Contract A. At the moment the tenderer submitted its bid, the owner’s offer has been accepted triggering the formation of Contract A.

[81] Once the tenderer submitted its bid, the existence of and obligations under Contract A crystallized, and the tenderer became contractually bound to enter into the construction contract, Contract B, if the owner accepted its tender. Contract A comes to an end when: a tendering authority enters into the construction contract with one of the bidders; the tendering authority rejects all of the bids; or when the irrevocability period of the tenders (if applicable) expires.

[82] At pages 122 and 123 Justice Estey described the main elements of Contract A as follows:

> The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

[83] The Contract A/Contract B formulation was seen to provide the level of certainty which parties in a tendering process expected and desired. Competition had replaced individualized negotiation.

[84] *Ron Engineering* did not fully explore the nature of the obligations triggered by Contract A; that subject area evolved in the decisions that followed. A development of significance in this regard was the recognition of the existence of an implied duty of fairness (sometimes referred to as the duty of

Commented [P15]: Electronic reverse auctions do not use this protocol, they use traditional contract law if properly designed.
good faith) upon those calling for tenders in relation to their dealings with tenderers. That duty was summarized by Mr. Justice Romilly in this Court in Fred Welsh Ltd. v. B.G.M. Construction Ltd. (1996), 1996 CanLII 850 (BC SC), 24 B.C.L.R. (3d) 52, 10 W.W.R. 400 (S.C.):

Though there has been some apparently conflicting authority regarding the Ron Engineering analysis, the courts agree on the need to create and monitor a legal framework which attempts to preserve the reasonable expectations of those involved in the bidding process. The court must attempt to protect the integrity of the bidding system in the context of the tension between the parties involved in the process...

The plaintiff submits that the law of tendering from the Ron Engineering line of cases is an attempt by the courts to reconcile the reasonable expectations of all parties within the context of acceptable commercial standards and practice. I concur with that view of the court’s role. Moreover, there is, now, a generally accepted duty of fairness upon those calling for tenders that includes a duty to avoid mischief and not give unfair advantage to any participant: Foundation Building West Inc. v. Vancouver (City) (1995), 22 C.L.R. (2d) 94 (B.C.S.C.). The extent and scope of this duty in the particular circumstances is largely defined by the rules established in the Contract A between the parties. (at paras. 42 and 43)

[85] Another core theme recognized in Ron Engineering and repeatedly emphasized in the jurisprudence thereafter, is the need to maintain the integrity of the tendering process and thereby preserve the reasonable expectations of the parties who engage in it. This important policy objective is at play in many of the cases that followed Ron Engineering and is an underpinning of the importation into Contract A of the implied duty of an owner (and, in appropriate cases, a subcontractor) to act fairly in relation to the bidders.

[86] The Supreme Court of Canada revisited the Contract A/Contract B paradigm in M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619. In M.J.B., the second lowest bidder claimed that the owner had breached Contract A when it accepted the lowest bid, which, although being the lowest price for the work, did not fully comply with the conditions set out in the tender package. The Court focused on whether Contract A had come into being and on
the effect of a particular privilege clause. A good portion of the unanimous decision delivered by Justice Iacobucci looks at whether there was an implied term in Contract A that the owner would accept only compliant bids.

[87] A careful reading of *Ron Engineering* makes it clear that it did not hold that a Contract A was automatically formed every time a bid was submitted. That point was confirmed by the Court in *M.J.B.* In *M.J.B.*, Justice Iacobucci explained that the question of whether a Contract A has arisen depends “on whether the parties intend to initiate contractual relations by the submission of a bid” in response to the invitation to tender. (at para. 19). The Court clarified further that the terms of Contract A “are governed by the terms and conditions of the tender call”. (also at para. 19).

[88] At paragraph 41, Justice Iacobucci remarks:

> The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd.*, supra, at p. 30, with respect to a similar tendering process, this procedure is heavily weighted in favour of the invitor. It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid...

[89] This passage is of interest in at least two respects. First, the Court highlights the mutual exclusivity of negotiation and tendering as methods for soliciting prices. Second, the Court acknowledges the business risk and expense associated with preparing a bid and the “obvious” point that tenderers would have little motivation to engage in the process if an owner could circumvent it by accepting a non-compliant bid. The Court held that an implied term to accept...
only compliant bids was incorporated into Contract A and concluded that the owner had breached that term.

[90] As mentioned above, in M.J.B. the effect of the inclusion of a “privilege clause” in a Contract A was also considered. A clause of that kind is typically included to provide the tendering authority with additional discretion in relation to its acceptance or rejection of tenders. In M.J.B. Justice Iacobucci noted at paragraph 44:

[T]he 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.

And at paragraph 50:

...a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping

[91] In Martel Building Ltd. v. Canada, 2000 SCC 60 (CanLII), [2000] 2 S.C.R. 860, the Supreme Court of Canada dealt squarely with the duty of fairness in the tendering system. At paragraph 88, the Court, in a unanimous decision, underscored the importance of maintaining the integrity of the bidding system and the companion existence of an implied duty of fairness in a Contract A:

In the circumstances of this case, we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process. As discussed above, this Court agreed to imply a term in M.J.B. Enterprises that only compliant bids would be accepted since it believed that it would make little sense to expose oneself to the risks associated with the tendering process if the tender-calling authority was allowed, in effect, to circumscribe this process and accept a non-compliant bid (para. 41). Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. This implication has a certain degree of obviousness to it to the extent that the parties, if
questioned, would clearly agree that this obligation had been assumed. Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process...

[92] Continuing at paragraph 89, the Court noted:

A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly.

[93] In *Martel*, the Court made the important point that the tender documents must be examined closely to determine the full extent of an owner’s obligation of fair and equal treatment among tenderers. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender.

[94] In the recent case of *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 40 B.C.L.R. (3d) 168, 2004 BCCA 5 (CanLII), the British Columbia Court of Appeal strongly endorsed the preservation of the integrity of the bidding system. There the plaintiff submitted a “mistaken bid” as had occurred in *Ron Engineering*. However, unlike in *Ron Engineering*, this bid did not comply with the tender documents. The tender documents included a clause that, in essence, gave the defendant the discretion to determine whether any defect in a tender was material. If the defendant decided that the defect was immaterial, it could accept the tender. The Court of Appeal held that this provision did not permit the defendant to accept a non-compliant bid. The following excerpts from the reasons demonstrate the Court’s focus on safeguarding the integrity of the bidding system in arriving at its conclusion.

At paragraph 25 of 2004 BCCA 5 (CanLII):

Since *Ron Engineering*, supra, the focus of the Supreme Court’s jurisprudence in this area has been protection of the integrity of the tendering process and ensuring
that owners observe their duty to treat bidders fairly and equally...

And at paragraph 26:

Major J. similarly notes in "The Law of Tendering", supra at 12:

In order to maintain the integrity of the tendering process, bidders must have some confidence that their efforts in preparing bids in conformity with the detailed tender specifications will not be thwarted by the acceptance of a bid that does not conform to those specifications.

And finally at paragraph 29:

The conclusion that the Discretion Clause cannot operate to bring a non-compliant bid into existence and thereby create Contract A does not introduce uncertainty into the tendering process. Rather, it enhances certainty. It ensures that the owner will only exercise its decision-making discretion in respect of bids that are materially compliant. It also ensures that all contractors can be confident that their bids will receive fair consideration and be neither accepted nor rejected for arbitrary reasons. In these respects, I consider that my conclusion protects the integrity of the tendering process.

[95] A matter of particular significance in the case at hand and one vital to maintaining the integrity of the tendering process is the rejection of bid shopping and conduct akin to it within the tendering milieu. The jurisprudence since Ron Engineering has indicated that such conduct is incompatible with the tender process. In Fred Welsh, at para. 6, Romilly J. described bid shopping as "nefarious practice". In a similar vein, the British Columbia Court of Appeal in Ken Toby Ltd. v. British Columbia Buildings Corp. (1999), 1999 BCCA 214 (CanLII), 173 D.L.R. (4th) 169, 62 B.C.L.R. (3d) 308, (C.A.) noted, in obiter, that "the purpose of the Contract A and Contract B concept developed by the Supreme Court of Canada was to prevent bid shopping." (at para. 32) Likewise, in Western Plumbing and Heating Ltd. v. Industrial Boiler-Tech Inc. (2000), 1999 CanLII 2917 (NS SC), 48 C.L.R. (2d) 82, 180 N.S.R. (2d) 41 (N.S.S.C.) the Court stated that the "process of bid shopping is destructive of the tendering system." (at para. 48). Although
the decision in *M.J.B.* did not examine bid-shopping, the Court did indicate that negotiation (and bid shopping is, in its essence, the act of negotiation) has no place in the true tendering system, at least while the tendering authority is still evaluating the bids and determining the successful tenderer.

[96] Bid shopping is a serious matter. The Federal Government of the United States is currently reviewing a bill aimed at prohibiting bid shopping with respect to federal contracts over $1,000,000 and imposing hefty penalties for any violations (See: H.R. 1348, Construction Quality Assurance Act of 2003, referred to the Committee on Government Reform on March 19, 2003, available online: http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.1348:) Section 2 of the bill summarizes the problems associated with bid shopping this way:

Congress finds the following:

2.(1) Certain abhorrent and undesirable practices, known as bid shopping, have arisen from time to time in construction work for the Federal Government.

(2) Bid shopping threatens the integrity of the procurement of construction services.

(3) The practice of bid shopping deprives taxpayers of the full benefits of fair competition among contractors and subcontractors, and often results in poor quality of material and workmanship to the detriment of the public.

(4) When bid shopping occurs, the cost savings gained are not passed on to the Federal Government, but the simultaneous reductions in quality and value are passed on to the Federal Government.

(5) The procurement practices of the Federal Government should be modified to prohibit bid shopping at any level.

[97] In Canada, there is no legislation in place that curbs bid shopping on the part of an owner. There are, however, criminal and pecuniary penalties imposed under the *Competition*
In the trial level decision of *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (1996), 30 C.L.R. (2d) 195 (Ont. Ct. J. (Gen. Div.)) bid shopping was articulated as:

> [T]he practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal at p. 200 as cited in *Naylor Group Inc. v. Ellis-Don Construction Ltd.* 2001 SCC 58 (CanLII), [2001] 2 S.C.R. 943 at para 9.

That definition is probably unduly narrow. A wider approach was endorsed by the Court of Appeal in *Naylor Group Inc.* which thought it sufficient if the “shopping” was to get a bid “for the same value or less” (as cited by the Supreme Court of Canada in *Naylor Group Inc.* at para. 9). In my view, the preferable analysis is the broader one adopted by Gruchy J. in *Western Plumbing and Heating Ltd. v. Industrial Boiler-Tech Inc.* (2000) 1999 CanLII 2917 (NS SC), 48 C.L.R. (2d) 82, 1780 N.S.R. (2d) 41 (N.S.S.C.). In that case, a subcontractor (Western) received a quote from a supplier (Industrial). Western used Industrial’s quote to prepare its own tender to a general contractor. Western was awarded the contract. Western contacted Industrial and asked them to lower the price in their quote by $2,000. When Industrial re-examined their quote to determine whether they could lower their price, they discovered that they had made an error in their calculation. Industrial refused to supply the equipment at the mistaken quoted price. Western sued for the difference between Industrial’s price and the next lowest quote. Although the decision turns on whether Contract A existed between the parties, the Court provided obiter comments regarding Western’s request for a $2,000 reduction in the price of the equipment. In doing so, Gruchy J. suggested that the Court’s analysis should not get bogged down about whether the particular practice fits into a technical definition of “bid shopping.” On the contrary, Gruchy J. suggested that the term should refer to any post-closing price manipulations that could negatively impact the integrity of the bidding system. In that regard, the relevant portion of the decision is as follows:
Various witnesses said bid shopping is not ethical but the practice described above, according to them, is not bid shopping. The witnesses said that bid shopping is when a contractor obtains a price from a subcontractor and then uses that price as a bargaining chip to bargain with other suppliers or subcontractors. The witnesses distinguish that practice from a subcontractor going back to a supplier and asking for a price revision.

It is my conclusion, in the circumstances as described to me by the various witnesses, that the contractors and subcontractors have turned the tendering process into a sham. The assertion that the practice described to me is not bid shopping appears to be sophistry and hypocritical. The practice encourages subcontractors and suppliers to put in inflated bids, keeping in mind that ultimately the contractor will attempt to force them to lower their prices. The lowered prices will result in a profit to the contractor, but with no saving passed on to the owner. This practice will ultimately defeat (and arguably has done so) the value of a bona fide tendering process. In effect, Western has by this action requested the Court to validate the bargaining process as I have described it. I will not do that.

The value of the integrity of the bidding system was addressed in *R. v. Ron Engineering and Construction Limited*, by Estey, J. of the Supreme Court of Canada when he said:

> I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do.

I must agree with that view. The companion view is that an attack on the integrity of the bidding system should not be protected, where possible.

The process of bid shopping is destructive of the tendering system. In my view the process followed by Western amounted to bid shopping and as described to me borders on deceit” (at paras. 44-48)

[100] I concur with Justice Gruchy’s view that the term “bid shopping” should be given an expansive interpretation so as to
encompass conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol.

[101] As already noted, unanimous panels of the Supreme Court of Canada in *M.J.B.* and *Martel* observed that tenderers expose themselves to significant risks and incur material costs when tendering and would be disinclined to do so without the assurance that their bids would be treated fairly (*Martel*) or the assurance that the tendering authority would only accept compliant bids (*M.J.B.*). These implied terms are required to give Contract A business efficacy.

[102] Conceptually, this analysis has some application to the improper bid manipulation scenario as well. It strikes me as obvious that a tenderer would not expose itself to the expense and other risks of tendering if it were conceivable that its bid could be used by an owner as a mere bargaining tool in post-closing tender negotiations with that tenderer or other bidders. An assurance to the contractor that the tendering authority will not use any of the bids as a springboard to engage in negotiations aimed at obtaining a better price or like advantage during the tender evaluation period, is a reasonable expectation of the most fundamental kind. It goes to the very heart of the integrity of the tendering process. A tendering authority ought not to be entitled to contemporaneously purport to adhere to the tendering model and enjoy the benefits flowing from it and, once the bids have been revealed and are under consideration, to unilaterally implement the contrasting model of free bargaining.

[103] It is my opinion that the duty on the part of the tendering authority not to engage in manipulative bid conduct is captured under the umbrella of the implied duty of fair and equal treatment to bidders. It is a fundamental element of procedural fairness in tendering. I suppose it is conceivable that such a duty is so fundamental to the successful engagement of genuine tendering, that it may even amount to a stand alone implied term of Contract A. Either way the result is the same —
bid manipulation of the kind I have described is repugnant conduct which has no legitimate place in the proper operation of the tendering paradigm. Of course, like any other implied term, this one would exist only to the extent that it is consistent with the express terms of Contract A.

[104] The facts in Thompson Bros. (Const.) Ltd. v. Wetaskawin (City) (1997), 1997 CanLII 14848 (AB QB), 34 C.L.R. (2d) 197, 205 A.R. 185 (Alta. Q.B.) are remarkably similar to those in the case at bar. In that case, the City of Wetaskawin issued tenders for the excavation of a pond. Thompson Bros. bid on the pond excavation and was the lowest bidder. The bids were opened publicly, so all of the bidders were aware of the others’ prices. After opening the bids, the City decided that the excavated material should be used to construct a landfill that was slated for construction. The City asked Thompson Bros. and the next lowest bidder, Central, to submit prices to haul the excavated material to the landfill. Thompson Bros. was not told that the work would be awarded on the basis of the lowest cumulative price. Thompson Bros. did not give the lowest cumulative price. The Court concluded that Central had adjusted its second price to absorb the amount by which it had exceeded Thompson Bros.’ original bid. It held that the City’s use of the tendering system had compromised the integrity of the tendering process. The Court stated at paras. 50-52:

The question is whether what the City did was unfair and constituted a special circumstance which compromised or jeopardized the integrity of the tendering process such as to constitute a violation of its obligations under the terms and conditions of the tender documentation.

The problem in this case is the use to which the City of Wetaskawin put the tenders it received, and in particular the plaintiff’s tender and that of Central. Rather than accepting or rejecting one tender or another, or accepting none of those submitted, which it had the right to do, the City had the plaintiff and Central bid on entirely different work, the Landfill project. When they received those bids, the City coupled them with the tenders submitted with respect to the Lake project and awarded the contract to Central who had the lowest cumulative price. The contract awarded was not responsive to the tender process. Rather, it was for work of a different scope than that contemplated by the tender documentation. What the City did also amounted to a
change or modification of the scope of the work after the close of tenders. The City as well changed the use to which the tenders were to be put by using them as a component with the Landfill project price to determine who would be awarded the contract. By using the plaintiff’s tender in this manner, the City gave Central a second chance to bid on the Lake project which was akin to a form of bid shopping and was unfair to the plaintiff.

It was not a term of the tender documentation that the tenders could be used in this manner and by doing so the City was in breach of contract A.

[105] Also instructive is the decision of *A. Dynasty Roofing (Windsor) Ltd. v. Marathon Construction Services (1991) Inc.* (2002), 16 C.L.R. (3d) 43. In *A. Dynasty*, a general contractor (Marathon) requested, and received, tenders from subcontractors. A. Dynasty put in the lowest bid at $198,500. After Marathon was informed that it would be awarded the contract, it approached A. Dynasty and asked it to enter into a contract to perform the work for $195,000. A. Dynasty refused. Marathon then approached the subcontractor who had submitted the second lowest bid and made the same offer. That subcontractor agreed and entered into a subcontract for $195,000. A. Dynasty submitted that Marathon had breached Contract A. The Court agreed, stating at para. 11:

The defendant’s conduct created a sham of the bidding process. The defendant used the lowest bid to arrive at a lower figure which it ‘shopped’ to the plaintiff and then Smith Peat... The defendant had no intention of maintaining the integrity of the bidding system. The defendant offered the contract to the plaintiff and Smith Peat at a price below the lowest bid knowing that if both refused, the defendant could force the plaintiff to perform the contract for $198,500.

(a) Existence of a Contract A

[106] The Ministry takes the position that its tender package left open the prospect of the parties engaging in further negotiations and therefore the parties did not intend to initiate contractual relations through the submission of Stanco’s bid. It follows, says the Ministry, that no Contract A was formed. Despite the Ministry’s submissions to the contrary, on reading the terms of the tender package as a whole, I readily conclude that the cumulative effect of several of the provisions

Commented [P18]: Weak argument by the government. They obviously intended to create Contract A at law since they asked for irrevocable bids, which is the lynchpin as cited by the court above quoting Estey from Ron Engineering. Too late to argue against Contract A being created after you ask for binding bids and then seek follow up bids. That is bid shopping. This case had nothing to do with electronic reverse auctions, which would not create Contract A in the first place if they are properly structured.
is that the Ministry intended to bind the tenderers to a number of contractual obligations, which I accept are typical in a Contract A, should they submit a bid.

[107] The Ministry contends that Stanco, as well as the other bidders, engaged in a process of negotiation with Aplin & Martin throughout the relevant period by virtue of their providing input to Aplin & Martin in relation to the specifications and other aspects of the reservoir project.

[108] In my opinion, the Ministry’s characterization of the exchange of information between Stanco (and other bidders) and Aplin & Martin prior to the opening of the bids as amounting to a negotiation between the parties is plainly wrong. There is no mandatory code of silence between tenderers and the tendering authority or its consultant. Indeed, in this case, the Instructions to Bidders specifically requested that the tenderers forward any questions they might have to the Ministry and several of the tenderers did so. As well, the tender documents indicated that the bidders were all required to attend a mandatory site meeting prior to the submission of their bids. The purpose of the site meeting, as indicated in the Ministry’s Contract Administration Manual, was to answer any questions the tenderers might have regarding the work specifications, site conditions, extent of the work area and matters relevant to the proposed works/services and the contract. Clearly the Ministry expected to receive communications from tenderers on a wide variety of issues relating to the tender prior to the submission of bids and that is precisely what occurred. At trial Mr. Lorimer stated that this kind of communication is customary in a formal tender process and is often the reason that addenda to the tendering package become necessary. Mr. Casidy agreed. In my view, Stanco’s communications (and those of the other tenderers) with Aplin & Martin and/or the Ministry during this period cannot be construed as amounting to negotiations between the parties of the sort that would indicate a lack of intention to enter into contractual relations and, accordingly, in no way undermine the existence of a Contract A.

[109] In M.J.B., the Supreme Court of Canada concluded that the parties had intended to initiate contractual relations because the owner had invited:

“tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the [tenderer] accepted this offer. The submission of the tender is
good consideration for the [owner’s] promise [to consider the bid], as the tender was a benefit to the respondent, prepared at a not insignificant cost to the [tenderer] appellant, and accompanied by the Bid Security.” (at para. 23).

[110] The factual circumstances in M.J.B. are not distinguishable in a meaningful way from those present here. By comparison, I find that the cases which the Ministry offers in support of its contention that a Contract A did not arise are readily distinguishable from the Stanco circumstances.

[111] It is my opinion that the Ministry’s submissions in support of its position that a Contract A was not in place emphasize a false depiction of the parties’ true intentions in the case at hand. There is no cogent evidence to suggest that the Ministry intended to leave open the prospect of negotiation. In fact, the evidence establishes the converse. The bids were irrevocable for a stated period. Each time the Ministry issued its addenda and even the Offer of Credit, it confirmed that it was operating in the formal tender arena. It is abundantly clear from Aplin & Martin’s July 20 recommendation letter that both it and the Ministry were proceeding in the context of the original tender. The Contract B ultimately entered into between the Ministry and Westport was, in all material respects, identical to the contract comprised in the original tender package, except that the contract price was $365,000 for the construction of the one Alpine tank, in epoxy. The Ministry’s message was explicit throughout — it would be selecting a contractor through a formal tender process. Mr. Lorimer’s unwavering intention from the outset was to proceed within the tender milieu as contemplated in the Ministry’s Contract Administration Manual. He admitted that the bid prices were not intended to be a starting point for negotiations. In cross-examination both Mr. Lorimer and Mr. Casidy acknowledged that they were operating within the formal tendering structure which was being used to replace negotiation with competition. The Ministry had every intention of engaging the formal tender model and initiating contractual relations with the bidders and the other bidders had a parallel intention.

[112] I reject as well the Ministry’s assertion, also aimed at refuting the formation of a Contract A, that Stanco’s bid was non-compliant. There is no evidentiary basis whatsoever to support that assertion — the evidence is overwhelmingly the other way.
[113] The Ministry further contends that Contract A did not arise because the Ministry did not accept the bids but instead made a counter-offer to the tenderers which, in effect, produced a new tender. It says that the Ministry’s counter-offer was not accepted by Stanco and therefore no deal was struck.

[114] In support of the counter-offer line of argument, the Ministry relies principally on the British Columbia Court of Appeal decision in *Westgate Mechanical Contractors v. PCL Construction Ltd.* (1989), 33 C.L.R. 265 (B.C.C.A.). In *Westgate*, the general contractor, PCL, used a quote from the contractor, Westgate, in its price build-up and in its tender. It listed Westgate in its bid as its subcontractor. After the bids were opened, the owner launched into negotiations with the three lowest general contractors who had submitted tenders. The Court of Appeal accepted the trial judge’s analysis that the owner had made a counter-offer to the general contractors’ tenders by engaging in those negotiations. PCL was found to have accepted the counter-offer and have entered into a contract with the owner on those countered terms. The contract ultimately made was therefore different from the Contract B which had been included in the owner’s tender documents. Because PCL had not entered into the Contract B which had been included in the tender documents, the Court concluded PCL was under no obligation to enter into a contract with Westgate at the price that Westgate had previously quoted. The issue of significance that was not before the Court of Appeal in *Westgate* was whether the owner had in fact breached its Contract A with the general contractors when it engaged in the negotiation process. The Court of Appeal merely concluded that PCL had entered into something other than Contract B because the owner had made a counter-offer which PCL accepted. Because the issue was not before it, the Court of Appeal did not concern itself with the appropriateness of the post-closing tender activities between PCL and the owner (the latter was not even a party to the action). Accordingly, *Westgate* is of no assistance in relation to the issue of whether an owner breaches Contract A when it engages in such post-closing negotiations.

[115] Based on the evidence in this case, it would be a distortion to say that the communications by Aplin & Martin and the Ministry to Stanco in the post-closing tender period concerning the price for the single Alpine tank in epoxy, amounted to a counter-offer. The post-closing dealing with bidders by Aplin & Martin and the Ministry was not a re-tendering of the project. There was only one tender package and
the bid bonds applied only to the work described in that tender package. As I have already noted, the Ministry and other parties intended to operate at all times within the ordinary tender context.

[116] The bid Stanco submitted on June 20, 2001 in response to the Ministry’s call for tenders was compliant and I conclude that upon its submission, a Contract A between it and the Ministry arose. The consideration flowed both ways. As I explain below, what was truly going on after the tenders were submitted and a Contract A established, was not a counter-offer or re-tendering at all but, rather, the nefarious conduct which Justice Romilly warned against in *Fred Welch*.

[117] In my view, an implied term of the Contract A in this case was the duty to treat bidders fairly and equally, which encompasses an obligation that the Ministry not engage in bid shopping or bid manipulation conduct. To my mind, the incorporation of such a term in the case at hand is consistent with the express terms of Contract A. Indeed, in cross-examination both Mr. Lorimer and Mr. Casidy admitted that the reasonable expectation of all parties was that all bidders, including Stanco, would be treated fairly. That expectation was in keeping with the overwhelming theme of the tender provisions contained in this Ministry’s Contract Administration Manual, to the effect that the Ministry is to accord fair and equal treatment to all bidders.

(b) Did the Ministry breach any term of Contract A?

[118] The Ministry asserts that when Stanco was calculating the work-up for its price quote prior to the submission of its bid, it must have noticed the failure of Appendix C to ask for a separate price for each epoxy tank and was under a positive obligation by the terms of the tender package to inform the Ministry about that omission, which it failed to do. There is no evidence that Mr. McDonald or anyone else at Stanco discovered this flaw in Appendix C prior to the submission of the bids. What the evidence does demonstrate is that the Ministry, Aplin & Martin and Mr. Healy (and evidently the three other tenderers) were all blind to the problem until the bids were opened on June 20 and that Stanco first became aware of it after the tenders closed when Aplin & Martin contacted it seeking a price for the one epoxy tank. The responsibility for the muddled Appendix C is as much the Ministry’s as it Aplin & Martin’s.

Commented [P20]: Yes, this was bid shopping and the Ministry should be liable, but this case had nothing to do with electronic reverse auctions.
After the tender opening, the Ministry was faced with finding a way to deal with the oversight in Appendix C while still upholding its obligations under Contract A. There were at least two ways that the Ministry could have adequately addressed the problem within the boundaries of Contract A.

One available option would be to reject all of the tenders and to re-tender the project on a modified scope of work. The evidence indicates that the Ministry did not want to re-tender because it might jeopardize completion of the Alpine reservoir within the Ministry’s anticipated timeframe.

A second option would have been to award Contract B for one of the scenarios that the Ministry had obtained prices for (e.g. one tank in glass fused to steel or two tanks in epoxy) and then adjust Contract B after it had been awarded. Unlike Contract A, Contract B permitted the Ministry to make changes to the contract once it was in place. After Contract B was awarded, the Ministry could have issued a change order or a change directive, altering the scope of work and adjusting the contract price. As mentioned, Mr. McDonald assumed that the Ministry was pursuing this approach.

The Ontario High Court of Justice discussed this latter solution in Ben Bruinsma & Sons Ltd. v. Chatham (City) (1984), 11 C.L.R. 37, 29 B.L.R. 148 (Ont. H.C.J.). The City of Chatham invited tenders for removing existing sod and laying new sod on soccer fields. On the tender form, the tender price was broken down into several unit prices, including a price to remove the existing sod. Ben Bruinsma & Sons Ltd. was the low bidder. After opening the bid, the City decided that it could save a considerable amount of money by deleting the removal of the existing sod (the City proposed laying the new sod over the existing sod). Rather than cancelling the bids and re-tendering, the City recalculated the tenders with the prices for the sod removal deleted from the tenderers’ prices. As a result of the recalculation, Ben Bruinsma & Sons Ltd. were no longer the lowest bidder. The City contracted with the “recalculated” low bidder for the amended scope of work. The Court found that in doing so, the City had breached Contract A.

Considering the tender and contract documents as a whole, and relying on the case just quoted, The Queen v. Ron Engineering Construction Ltd., it is my view that the tender and contractual documents do not permit Chatham to delete items from the tender before acceptance. Rather, Chatham has the obligation to accept or reject a tender as submitted. Its right to delete major items...
of the tender will arise after the construction contract is made, and then only upon payment of compensation for deletion of any major items. In my view any other interpretation would lead to unfairness in tendering. The practice adopted by Chatham could permit public bodies to accept items from a tender that appeared to them to be favourable and reject the balance; and then to call for new tenders on the items deleted - all without compensation to the tenderers and without consent. In my opinion this was a serious interference with the tendering process and one not permitted by the tender and contract documents. (at para. 16)

[123] Mr. Lorimer suggested that awarding Contract B and then issuing a significant change order was not an option the Ministry would generally pursue. According to him, the Ministry does not typically issue a change order for more than fifteen percent of the contract price. Mr. Lorimer noted that, if the contract had been awarded to Stanco for two epoxy tanks at Stanco’s tender price of $678,750, the change order to delete one of the tanks would have amounted to almost fifty percent of the contract price. I find this, in itself, an empty rationale for not awarding the Contract B and proceeding with the change in that context. Any reluctance on the part of the Ministry based on this general guideline ought to have been overcome by the mischief that might arise by failing to proceed in that manner. Moreover, the Ministry could have awarded the Contract B for one glass fused to steel tank in the Alpine area and then could have changed the coating specification to epoxy. This would have involved a change order from $415,000 to, at the lowest, $365,000. This $50,000 change would have amounted to a twelve percent change, well within the Ministry’s desired fifteen percent. In reality, however, it did not even occur to Mr. Lorimer to proceed in this way; he simply did not turn his mind to it.

[124] Rather than resolving the difficulty within the parameters of Contract A, Aplin & Martin, and ultimately the Ministry, chose a different path.

[125] With the Ministry’s agreement and authorization, Aplin & Martin asked Stanco for its cost for the one epoxy Alpine tank. The initial approach was a casual one over the telephone. I accept that Stanco provided the price requested for the Alpine epoxy tank and engaged in the related discussions in the belief (which in all the circumstances I consider was reasonably held) that as compliant low bidder it was going to be
awarded Contract B and the modified scope of the work would be
dealt with via the mechanisms set out in it to which I have
referred previously. Dissatisfied with Stanco’s price, Aplin &
Martin made clandestine price inquiries of two of the other
three tenderers. These illicit discussions only became apparent
to Stanco much later in the process when it was told to lower
its price “to remain in contention.” It was at that stage
Stanco came to realize that the belief upon which it had been
operating was misconstrued. Upon that realization, Stanco
refused to participate further in the price discussions. I am
persuaded that Stanco would not have participated in the post-
closing process had it known of Aplin & Martin’s undisclosed
communications with Westport and Tritech.

[126] In my opinion, in evaluating whether an owner has engaged
in improper bid manipulation, the Court must assess the totality
of an owner’s conduct within the particular circumstances.

[127] The first objectionable step was Mr. Casidy’s post-closing
clandestine price request of Westport. The Ministry did not
participate in this conduct and was not aware until later that
it had transpired. However, as I explain later in my reasons
dealing with the Ministry’s third party claim, by the time that
the Ministry made its final award decision in mid-August, 2001,
it was aware, or reasonably ought to have been aware, of this
communication. In any event, the unfairness and bid
manipulation in this case goes much further. The adoption of
the Offer of Credit course of action was an extension and more
formalized version of shopping the bid. It enabled the other
tenderers to effectively “re-bid” the Alpine tank work with full
knowledge of Stanco’s lowest tender price; they were given an
opportunity to undercut Stanco. Mr. Lorimer did not raise any
objection or show any hesitation in proceeding in this
manner. He admitted that he did not take the time to think
about the effect of putting out the Offer of Credit after
everyone knew Stanco’s prices, stating that, at the time, he had
a lot on his mind.

[128] Westport was no fool. It sharpened its pencil to ensure
that its fresh price was not only less than its pro rata one,
but, more shrewdly, less than Stanco’s pro rata price too. At
trial Mr. Lorimer more or less agreed that Westport was
undercutting Stanco.

[129] Mr. Lorimer referred to the post-closing solicitation of
prices for the epoxy tank as “clarifications” of the credits for
epoxy coating contained in Appendix C. Mr. Casidy made a
similar comment regarding his efforts to obtain a price for the

Commented [P21]: Classic bid shopping, bad practice.

Commented [P22]: You can try calling it an “Offer of
Credit” but at law this was bid shopping.
one epoxy lined tank from Stanco. The “clarification” term is euphemistic and was an attempt by Mr. Lorimer and Mr. Casidy to put the best spin on a process that they knew was defective. The Offer of Credit process was a poorly conceived attempt to “put the genie back in the bottle” and try to remedy a tender process that had gone off the rails.

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

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

(c) Damages

[132] In Naylor Group Inc., supra, the Supreme Court of Canada followed its earlier reasoning in M.J.B. concerning damages and noted:

[T]he 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., 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)

[133] Mr. Lorimer admitted that it was assumed as a matter of course that the tender would be awarded to the lowest compliant bidder. The preponderance of the evidence amply satisfies me that but for the breach of Contract A, Stanco as the low compliant tenderer on all prices by a considerable margin, would
have been awarded the contract to construct the Alpine epoxy reservoir. There can be little doubt that the conduct of Mr. Lorimer as well as Mr. Casidy in relation to Stanco immediately after the bids were opened and for a period of time thereafter, was based on the premise that Stanco was going to be awarded Contract B.

[134] As indicated by the Supreme Court of Canada in *Naylor Group Inc.*, the quantum of Stanco’s damages should attempt to put Stanco in the same position, financially speaking, as it would have been in but for the Ministry’s breach of Contract A.

[135] Mr. McDonald presented as a most forthright and honest witness. His evidence was helpful and earnestly given. It is obvious that he has considerable experience and expertise in bidding jobs such as the reservoirs project and in compiling the detailed information necessary to support a price quote. I have no hesitation accepting his evidence that Stanco’s loss of profit on the Alpine tank in epoxy (and assuming a 3 mil. thickness) would have been in the range of $91,766 and $111,766 depending on the finding as to the ultimate contract price and assuming it lay somewhere between $365,000 and $385,000.

[136] Given Stanco’s willingness to co-operate with the Ministry to perform the work for the pro rata price of $367,366 on condition it was awarded the construction contract, I conclude that had Contract B been awarded to Stanco it would have done the job for that price. That price would have been based on an agreed 3 mil. epoxy coating; an agreement I have no difficulty finding would have been readily achieved. On this point, I note that Westport was permitted to use that coating thickness.

[137] The Ministry raised a question about whether a $24,500 deduction from Stanco’s alleged profit ought to be made because that figure is shown in Stanco’s computer spreadsheet as a commission payment to Mequipco. I accept Mr. McDonald’s explanation to the effect that Stanco’s particular computer program automatically calculates and deducts a percentage sum as commission but that a commission would have never in fact been paid to Mequipco in this case. Accordingly, there is no principled basis to make that deduction and I decline to do so.

[138] The Ministry further submits that Stanco has failed to mitigate its loss. The main thrust of the argument is based on a revival of the Ministry’s attempt to cast blame upon Stanco for failing to discover the omission in Appendix C or, at a minimum, seek some kind of price clarification in that regard prior to the tender closing. The Ministry appears to say, in
effect, that although neither it nor Aplin & Martin (nor Mr. Healy for that matter) who were driving the project identified the flaw, Stanco ought to have foreseen that a break-out price for each tank in epoxy might possibly be required and hence it was incumbent on Stanco to facilitate a rectification of that oversight by raising the point with the Ministry. According to the Ministry, Stanco’s failure to have done so translates into a failure to mitigate. Not only is this analysis ill-conceived, it must be truly galling to Stanco to be made a scapegoat in that fashion.

[139] The Ministry goes on to assert that Stanco’s refusal to agree to construct the Alpine tank at the pro-rated price of $367,366 was unreasonable because it was only marginally less than Stanco’s $385,000 price. The Ministry’s position is untenable because acceptance of it would mean that, without the assurance of being awarded Contract B, Stanco was required in the tendering structure to give in to a price insisted upon by the Ministry in the face of Stanco’s rational counter position. That cannot be reasonably seen as an avoidable loss. The Ministry has not shown that Stanco failed to mitigate.

[140] I find that Stanco’s estimated loss of profit based on its actual cost plus the 33% mark-up it applied on its bid, is a reasonable measure of its damages for the Ministry’s breach of Contract A. The Ministry has not raised any issues or elicited evidence that would justify a reduction of damages based on negative contingencies. Mr. McDonald calculated the loss of such profit to be in the range of $91,766 to $111,766 depending on the Court’s ultimate finding of the contract price. I have found the contract price would have been $367,366 and, accordingly, the damages are to be calculated on that basis (using Stanco’s actual costs with a 33% mark-up and assuming a 3 mil. coating). Based on the evidence before me, I do not have sufficient particulars to carry out the calculations in order to determine where between the sums of $91,766 and $111,766, that damage figure will fall. If, based on the foregoing, counsel are unable to agree on the calculation of precise figure they are at liberty to appear before me.

[141] Stanco is also entitled to pre-judgment interest from October 31, 2001 (being the anticipated date of completion of the project) to the date of judgment pursuant to the Court Order Interest Act.

(d) Is the Ministry entitled to contribution and/or indemnity from Aplin & Martin?
The Ministry argues that any liability it may have to Stanco is the result of Aplin & Martin's acts and omissions including negligent misrepresentations upon which the Ministry relied. It alleges that Aplin & Martin breached the terms of its Service Contract and its duty of care.

At the core of the Ministry's claim for breach of contract is the assertion that Aplin & Martin breached two main provisions of its Service Contract, namely its obligation “to perform the services to a standard of care, skill and diligence maintained by persons providing on a commercial basis, services similar to the [s]ervices” and its agreement to undertake the work “in accordance with current engineering practices”. Both Mr. Casidy and Mr. Wridgway testified that the latter phrase meant that Aplin & Martin was required to meet professional engineering standards when carrying out its work. Mr. Casidy added that the work must also meet the standards required under the legislation which governs professional engineers.

It is my view that nearly all of the breaches alleged by the Ministry amount to little more than misguided quibbling from which nothing of consequence flows. Some of the allegations are even baseless on the evidence. I would include within these categories, the Ministry’s allegations that Aplin & Martin: (1) did not give the Ministry sufficient time to review the final version of the tender package or addendum no. 1; (2) failed to pre-qualify Stanco; (3) failed to distinguish between Stanco and Mequipco; (4) failed to clarify the basis of Stanco's discretionary $1,000 credit amount in Appendix C; (5) failed to seek input from the Ministry in respect of addenda nos. 2 and 3; (6) failed to send the Ministry a copy of addendum 2 in a timely manner; (7) failed to require the bidders to set out the coatings for the reservoirs on which the bids were based; and (8) failed to keep the Ministry apprised of every conversation and piece of correspondence it had with bidders prior to the tender closing. Mr. Lorimer gave the appearance in his evidence of consternation that Aplin & Martin had not obtained his specific authority to perform the most mundane of tasks. Yet, the evidence as a whole indicates that the Ministry had no desire or expectation to have a chapter and verse account of its agent’s dealings with bidders.

The Ministry also complains about Aplin & Martin’s failure to elicit through the tender package and addenda, a breakout price for a single epoxy-coated reservoir, even though it was at that stage aware that the Ministry was considering building just one tank. It says that had Aplin & Martin got it right in the first place, the entire fiasco would have been avoided. As I
have already observed, the omission in Appendix C was overlooked by all of the parties involved; it was an unfortunate oversight and the Ministry is as much to blame as Aplin & Martin. The Ministry led no evidence to support its contention that Aplin & Martin's failure in this regard amounted to a breach of its standard of care in tort or a breach of its standards of performance contemplated under the Service Contract. There is no evidentiary basis to support a finding that Aplin & Martin fell below any of those standards in relation to the preparation of the tender documents.

[146] In contrast to its pre-closing tender conduct some of Aplin & Martin's actions after the close of tender are of deeper concern. It is the Ministry's position that included among these breaches are:

• Aplin & Martin's clandestine communications with Westport and Tritech concerning the price of the Alpine tank in epoxy;

• Aplin & Martin's "representation" that Stanco's $385,000 quote was based on a 3 mil. coating thickness;

• Aplin and Martin's failure to tell the Ministry in a timely way of Stanco's willingness to change the scope of its work to arrive at a lower price for the one epoxy Alpine tank; and

• Aplin & Martin's failure to inform the Ministry that Westport's bid was based on a 3.0 mil. coating.

[147] The nature of these allegations calls for a closer examination of what the Ministry did and did not know and may have relied upon at various points in the post-closing tender period.

[148] As already noted, Mr. Lorimer recommended against re-tendering the contract to his superiors and approved of Aplin & Martin communicating with Stanco in relation to a price for the one epoxy tank. He had actually performed his own pro-rata calculations early on and shared Aplin & Martin's view, also expressed by Mr. Healy, that Stanco's price was just too high. Mr. Lorimer received a copy of Stanco's June 22 letter putting forth its $385,000 price with the specifications attachment showing that the "system 4" coating it referenced had a 7 mil. coating thickness. He also received Stanco's
subsequently letter attempting to justify its $385,000 price which further referenced and elaborated on the “system 4” coating. Although Aplin & Martin contributed to some initial confusion on the part of the Ministry about the coating thickness, it is readily apparent on reading Stanco's attachment that “system 4” refers to a 7 mil. coating.

[149] My overall impression of Mr. Lorimer was that he mostly skimmed the material received from Aplin & Martin and elected to pay little attention to much detail beyond the price. I infer that he did not turn his mind to the coating thickness one way or the other, and find that had he been interested in doing so, he would have seen (among other things) that Stanco's price was based on a 7 mil. coating.

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

[151] Aplin & Martin's July 20, 2001 recommendation letter, although not comprehensive, explicitly reported on a number of material events which had transpired post-closing. It made clear that Aplin & Martin had solicited a price from Westport prior to the Offer of Credit; that Stanco was prepared to take steps to reduce its price provided it was awarded Contract B; that Stanco had refused to complete the Offer of Credit and considered the Ministry and Aplin & Martin to be treading on “dangerous ground”; and, that Westport's bid was lower than its pro-rata price (it was self-evident that its bid was lower than Stanco’s pro-rata price also). Yet aware of the foregoing, Mr. Lorimer nevertheless endorsed Aplin & Martin's recommendation that Westport be awarded the contract. As matters continued to unfold in late July and early August, 2001, the Ministry’s awareness of the pertinent circumstances expanded even further.

[152] Mr. McDonald, unhappy with the recommendation in favour of Westport, spoke directly to Messrs Lampard and Peterson. He laid out the facts as he understood them and was advised that
auditors were being engaged to review the situation. A promise was given that the contract would be re-tendered if the process was found to be defective. Mr. McDonald stated that he invited contact from the auditors so that the “full story” could be revealed. The Ministry then put matters on hold for nearly two weeks in order to obtain advice from its legal services department.

[153] By this stage, the Ministry had as full a picture as it needed of the post-closing state of affairs in order to properly assess its options and determine an appropriate course of action to be followed. The only relevant matter which the Ministry may not have known about was that Aplin & Martin had solicited a price from Tritech prior to the circulation of the Offer of Credit. I find, however, that nothing turns on the Ministry’s lack of knowledge of that fact. I am prepared to find, as a matter of commonsense and without the need for expert evidence about an engineering firm’s standard of care, that Aplin & Martin’s post-closing telephone price solicitation from Westport and Tritech amounts to a breach of the Service Contract and its duty of care. It was plainly wrong and Mr. Casidy knew so. However, the Ministry must not only establish that what Aplin & Martin did or omitted to do was negligent (including negligent misrepresentation) or constituted a breach of contract, it must further show that such acts or omissions brought about the loss suffered by the Ministry in order for such loss to be recoverable. That connection is an essential ingredient in the Ministry’s claim against Aplin & Martin and I find it has failed to establish it in this case. The Ministry is an experienced party in tendering, has experienced personnel in the persons of Messrs. Lorimer, Lampard and Peterson, has and used internal legal expertise, has formulated a detailed Contract Administration Manual governing tenders and was in possession of the essential facts necessary to decide for itself whether to proceed with the award of the contract to Westport in the face of the Stanco’s strenuous opposition. Its claim of reliance on Aplin & Martin simply does not ring true. In my opinion, once the Ministry had been reasonably informed of the surrounding material circumstances and chose to evaluate the situation for itself, any reliance which it might have placed upon Aplin & Martin’s acts, omissions or statements up until that point in relation to the entirety of the post-closing affairs, became superseded by the Ministry’s own informed and self-reliant action and decision. The bottom line is that the Ministry was driven by the bottom line. As Mr. Lorimer put it at trial, when presented with the two prices of $365,000 and
$385,000, the choice “was a no-brainer”. He added, “if you can get a tank for $365,000, then you are going to go with it.”

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

[155] For the foregoing reasons, the Ministry’s claim against Aplin & Martin is dismissed.

[156] The parties have leave to make submissions on costs. All submissions are to be filed by October 15, 2004. I will leave it to counsel to agree about the timing and sequence of exchange among themselves of their respective submissions.

“S.K. Ballance, J.”
The Honourable Madam Justice S.K. Ballance

Commented [P25]: Note that the decision against the B.C. government was upheld on appeal, but the BC Court of Appeal reversed this finding and also found the external consultants liable for recommending the bid shopping in the first place.