

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2015-01192

BETWEEN

LUTCHMEESINGH'S TRANSPORT CONTRACTORS LIMITED

Claimant

AND

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday 7th July 2016

Appearances:

**Mr. Simon Hughes Q.C. and Ms. Jessica Harragin instructed by Mr. Derek Balliram for
the Claimant**

**Mr. Kelvin Ramkissoon instructed by Mr. Nizam Saladeen led by Dr. Claude Denbow S.C.
for the Defendant**

JUDGMENT

1. This decision on a preliminary issue deals with the limited contractual obligations that may arise between a tenderer and invitor in a typical tendering arrangement before a contract accepting the tender has been made. The very narrow issue for determination is whether there can be implied in any such contract an obligation on the invitor to provide to the tenderer detailed or sufficient reasons if a decision is made by the invitor to reject or not proceed with the tender.

2. Lutchmeesingh's Transport Contractors Limited, the Claimant, was one of five tenderers who responded to an Invitation to Tender (ITT)¹ issued by National Infrastructure Development Company Limited (NIDCO), the Defendant, for the construction of a flyover at the intersection of Churchill Roosevelt Highway and the Southern Main Road. The Claimant was invited by the Defendant to enter into negotiations with it on the tender. The ITT allowed for the Defendant to reject the tender if it was unable to agree on detailed costs or compensation for the tenderer's services. By letter dated 6th February 2015 the Defendant advised that it did not anticipate arriving at an agreement on scope and price for the execution of the contract and withdrew from the negotiations. The Claimant instituted a claim for breach of contract against the Defendant formulated on the basis that the Defendant failed to provide "detailed (alternatively sufficient)" reasons for its purported decision to reject or not proceed with the Tender. The Claimant contends that such an obligation is express or implicit within the conditions of the ITT.
3. Both parties accept that the express terms of the ITT stipulated that the Defendant could withdraw from its negotiations with the Claimant at any time and that those express terms do not impose an obligation on the Defendant to provide reasons if it elects to reject or withdraw from the tendering process or negotiations. They both agree however that in the limited circumstances of this case there arose binding contractual obligations upon the Claimant's submission of a tender and before entering into a formal contract for the scope of works. One such obligation is an implied duty to act in "good faith". What they do not agree on, and which falls for determination, is whether that duty to act in good faith includes a duty on the Defendant to provide any or any sufficient reasons to the Claimant for the withdrawal from the negotiations. This also puts under sharp focus the extent to which parties are bound to such contractual obligations during the course of negotiations between a tenderer and invitor before a main contract for the works has been entered into by the parties.
4. In my view, for the reasons set out in this judgment, no such obligation arises and accordingly the Claimant's claim for damages for breach of contract against the Defendant based on such an implied term is unsustainable.

¹ The ITT is known as #1307/03 Design Build Contract for package D- Churchill Roosevelt Highway/Southern Main Road Flyover and Ancillary Works

The preliminary issues

5. At the second Case Management Conference the Court set down for trial two preliminary issues:
- i. Whether the Invitation to Tender ITT#1307/03 issued by the Defendant in July 2013 gives rise to any contractual rights and obligations to found a justiciable case for breach of contract as pleaded in the Statement of Case.
 - ii. If it does whether the matters pleaded in paragraphs 8(1)-(4) in the Statement of Case gives rise to express or implied terms in the ITT.
6. The parties agreed to rely on their written submissions and the documents agreed by the parties for the resolution of these issues.² In their written submissions both parties accepted that the ITT could give rise to binding obligations in two scenarios (i) upon submission of the tender (Contract A) and (ii) upon the actual contract being entered into for the execution of the project (Contract B). The Court permitted brief oral amplification of two issues which really goes to the heart of this case³: (a) the meaning and content of the duty to act in “good faith” as implied in the term of Contract A and (b) does that duty to act in good faith or the

² The Claimant agreed to all the documents produced by the Defendant’s List of Documents filed on 15th February 2016. See Claimant’s Statement of Agreed Facts dated 11th March 2016.

³ By email dated 1st June 2016, in response to the Defendant’s letter dated 27th May 2016, the Court directed that at the next hearing the Court shall give the parties the opportunity to:

- a. Indicate to the Court whether the parties agree:
 - i. That the ITT could give rise to binding contractual obligations in two scenarios:
 - (i) Upon submission of the tender (Contract A) and
 - (ii) Upon an actual contract being entered into for the execution of the project (Contract B).
 - ii. That this Claim is for breach of Contract A and not Contract B.
 - iii. That there is no express term of the ITT contract or Contract A to provide reasons to the tenderer if the Defendant elects to reject or withdraw from the tendering process/negotiations, before the formation of Contract B.
- b. The parties to give brief oral clarifications on the following:
 - iv. The meaning and content of the duty to act in “good faith” as implied in the terms of Contract A.
 - v. Does that duty to act in good faith or the limited contractual rights implied under Contract A include a right to provide the tenderer with reasons if the Defendant elects to withdraw from the negotiations before the formation of Contract B.

limited contractual rights implied under Contract A include a right to provide the tenderer with reasons if the Defendant elects to withdraw from negotiations before the formation of Contract B.

Brief Background

7. The question of the content of any implied duty of good faith in contractual relations is one of context and must be examined against the factual backdrop of the dealings between the parties and the express terms of the ITT. The Defendant received five tender bids including one from the Claimant at the close of the tender submission period on 2nd of October, 2013. The tenders were evaluated and ranked. After unsuccessful negotiations with the first ranked tenderer, the Claimant, being the second ranked tenderer, was invited by letter dated the 28th of October, 2014 to enter into negotiations with the Defendant. Those negotiations commenced on 5th November, 2014. Meetings between representatives of both parties started on 12th November, 2014. An exchange of correspondence followed and by report dated 8th of December, 2014 a Negotiations Committee identified several risks associated with the Claimant's tender.
8. The Report of the Negotiations Committee (RNC) addressed issues regarding the Design and Project Management Costs and Preliminary General Costs, the Negotiation Committee noted at paragraphs 4.2.1 and 4.2.2 respectively of the Report that:
 - The Claimant's breakdown indicated design fees of 21 million and project management fees representing over 14% of the total cost of the project, which the Negotiation Committee believed to be excessive in relation to the value of the measured works.
 - The Preliminary and General costs for the project, inclusive of the design fees was over 24.3% of the tendered amount which the Negotiation Committee believed to be extremely high as these costs are usually in the order of 10-15% of the contract amount.

- The Claimant's proposal was for 68m span overpass, which the Negotiation Committee believed created conditions which have not met the Employer's Requirements.
- The cost of a traffic analysis and any additional works required to achieve acceptable levels of service were not included in the bidder's proposal.
- The contractor stated that the additional lands will be required for implementation of its design, however, the cost of the additional lands is for the Employer's account.
- The tendered price is approximately 12.9% below the Engineer's Estimate which is just below the margin that could be considered acceptable.
- The Claimant has some high overheads included in its tender and this is a cause for concern.⁴
- The contractor's statements in the negotiation meetings clearly indicate that the Claimant is quite prepared to challenge the adequacy and accuracy of the Employer's Requirements with a view to passing on any cost increases required to satisfy the Employer's Requirements for the account of NIDCO.⁵

⁴ "Front loading of the costs to obtain payments that are not in proportion to the value of the measured works.

The cost of the Claimant's measured works is \$212,116,526.00 compared with the Engineer's Estimate of \$278,356,157.20 (VAT Exclusive). This difference is considered to be high and results in a high risk to the successful completion of the project.

Under valuing of the measured works to the extent that the Engineer's determinations (valuations) for claims based on the value of the measured works as presented by the Claimant in its price breakdown is potentially unlikely to reflect reality.

The Claimant's price does not include the cost of elements that the NC considers are for the contractor's account, and which arise from the Claimant's assumptions, namely, land acquisition and extension of southern frontage road to Morequito Ave that is required to achieve the Employer's requirements. These elements are estimated to cost \$50M- \$60M and is in addition to the cost of that the Claimant is willing to assume in its offer, that is, the cost to increase the size of the ramps to meet the specified road profiles."

⁵ "The Claimant's proposed MMM Group project Manager stated in the 3rd Negotiation meeting of Wednesday, 3rd December 2014 (Appendix II) that he will advise the Claimant immediately upon start of the contract that the Dispute Adjudication Board be invoked to treat with the difference in views regarding what is or is not the scope works as defined in the Employer's Requirements. The Claimant believes that the elements of scope identified by

9. Consequently, by letter dated 6th of February, 2015 the Defendant informed the Claimant that it did not anticipate arriving at an agreement with it on the scope and price for the execution for the contract and did not propose to continue negotiations with the Claimant.
10. By letters dated the 11th, 12th and 26th of February, 2015 the Claimant indicated its intention to issue a formal protest pursuant to section 6 of the ITT and requested an extension of time to file same. By its letter dated 2nd of March 2015, the Defendant granted the Claimant an extension to file its protest by 20th March 2015. The Claimant failed to lodge a protest and subsequently instituted these proceedings.
11. In its Statement of Case the Claimant alleged that the following were the express and implied terms of the ITT:
 - a. That the Tender would be evaluated strictly in accordance with Section 3 of the Instructions and by reference to the criteria there set out.
 - b. That the Defendant would not reject the Tender on a capricious basis and/or by reference to criteria outwith those contained in Section 3 of the Instructions.
 - c. That the Defendant would at all times act in good faith towards the Claimant, and in the consideration of the Tender, abiding by the true intent and purpose of the ITT (including the Instructions).
 - d. That the Defendant would provide the Claimant with reasons if the Defendant at any stage decided to reject and/or not proceed with the Tender. For the avoidance of doubt, the Claimant contends that:
 - i. A party in the position of the Defendant, properly adhering to the procedure for evaluation set out in Section 3 of the Instructions, would necessarily have reasons, including detailed reasons, for any decision to reject or not proceed with a tender bid.
 - ii. The entire procedure for 'Protests' in Section 6 of Instructions is predicated upon the timeous provision of detailed reasons, alternatively sufficient reasons, by the Defendant.

- iii. If the Defendant, by a failure to give detailed or any sufficient reasons, renders the procedure in Section 6 of the Instructions unworkable or inoperable, then the purported limitation on rights and remedies contained in Section 6.1 is ineffective, and the Claimant has full recourse to such remedies as it may establish at law.⁶

12. The alleged breach of contract was specifically pleaded by the Claimant as a failure by the Defendant to provide detailed or sufficient reasons for this decision to withdraw:

“Wrongfully, and in breach of contract, the Defendant has:

- i. Failed to provide detailed (alternatively sufficient) reasons for its purported decision, recorded in its letter dated 6 February 2015, to reject or not proceed with the Tender. It was express, (alternatively sufficient) reasons for any decision to reject or not proceed with the Tender.

Hindered and/or prevented the Defendant in the Defendant’s operation of the ‘Protests’ procedures set out in Section 6 of the Instructions, by the Claimant’s failure to provide detailed (alternatively sufficient) reasons for its purported decision to reject or not proceed with the Tender. Given the requirements for a protest set out in Section 6.2(a), (b) and (c) of the Instructions, it was necessary and inherent within the proper operation of the section 6 ‘Protests’ procedure that the Defendant, first, provide its detailed (alternatively sufficient) reasons. In failing and/or refusing to do so, the Defendant has made it impossible for the Claimant to formulate a protest. This consequence cannot have been the intention of the ITT (including the Instructions) on a true construction of the same and the Claimant will rely on the maxim of construction that the Court will not place upon an instrument an interpretation which allows a party to derive a benefit from its own wrong.”⁷

13. The express terms of the ITT point clearly towards the convenience of the invitor to accept tenders, consider them and move on to other tenders in their process of negotiation without

⁶ See paragraph 8 of Statement of Case.

⁷ See paragraph 11 of Statement of Case.

entering into any contract or contractual obligations. The ITT spells out expressly the following:

- That the ITT will not bind the Defendant to accept the lowest or any tender.⁸
- The Defendant may in its absolute discretion and in accordance with the Defendant's right in section 2 of the ITT to disqualify any respondent that fails to comply with this requirement.⁹
- The tender form includes an acknowledgement that the Respondent agrees that the Defendant is not bound to accept any tender it receives.¹⁰
- That no binding contract is made until a contract is signed by the Defendant and the Claimant.¹¹
- The ITT is not a binding undertaking or an obligation to otherwise enter into a continuing business or other relationship.¹²
- The Claimant released NIDCO from any liability associated with the tendering process.¹³
- The bidder with the best tender overall for the project will be invited to enter into contract negotiation. If an agreement on the terms of the contract is not reached with the first bidder, negotiations will be initiated with the second bidder and so on until a satisfactory agreement is reached.¹⁴
- The inability to agree on detailed costs or compensation for the services or a judgment on the part of the Defendant that such costs of compensation are

⁸ See Clause 6.0 of the ITT.

⁹ Ibid.

¹⁰ Clause 2.1 of the ITT.

¹¹ Clause 4.1 b (ii).

¹² Clause 4.1 b (iii) of the ITT.

¹³ Clause 2.20 of the ITT.

¹⁴ Clause 4.1 of the ITT.

inappropriate or excessive shall be sufficient cause for the rejection of the tender and termination of negotiations with the bidder which follows in order of merit.¹⁵

14. This signifies a seamless business operation for the convenience of the tenderer Defendant to quickly assimilate the tenders on offer and move quickly on through its negotiating process with multiple bidders to eventually arrive at a final agreement with one of the tenderers. Once a tender is rejected it will not be recalled for further negotiations on the contract. This does not restrict the ability of the invitor to reject the tender but provides a basis for the rejection of tender and initiation of negotiations with another bidder.
15. The express terms of the ITT also provided for a written procedure where a tenderer could submit a written protest regarding events occurring before or after the deadline for receipt of tenders including the contract award. The written protest remedy set out in clause 6 of the ITT made the following provision:

“All Protests must include the following:

- a) The name and address of the Tenderer;
- b) A detailed statement of the nature of the protest and the grounds on which the protest is made; and
- c) All factual and legal documentation in sufficient detail to establish the merits of the protest. Evidentiary statements must be provided under penalty of perjury.

The protester must demonstrate or establish a clear violation of a specific law or regulation, e.g., a violation of a requirement.

Protests regarding the ITT shall be filed only after the Tenderer has informally discussed the nature and basis of the protest with the Secretary to the Tenders Committee and other representatives of NIDCO, as determined necessary to NIDCO, in an effort to remove the grounds for protests.

¹⁵ Clause 4.1 of the ITT.

NIDCO will not proceed with procurement in connection with the ITI until after a decision is rendered by the Protest Committee unless, in the absolute discretion of NIDCO, it is determined to be in the best interest of NIDCO to proceed.”¹⁶

16. There is no obligation in the protest process for the invitor to provide reasons to the tenderer. This points to an obvious direction that in setting out in detail the contract between the parties and the process to be followed between the tenderer and the invitor in this contract, the invitor, whom admittedly has the advantage over the tenderer, deliberately excluded such a step, process or obligation in the protest process.
17. It is against this backdrop that the two preliminary issues arise for determination.

Issue 1: Whether the ITT gives rise to any contractual rights and obligations to found a justiciable case for breach of contract?

18. There appears to have been a misconception between the parties as to the purpose of defining and determining the preliminary issues. The Claimant submitted that it has not addressed the issue of breach but simply whether any contractual obligations arise before a tender is accepted by the invitor. The Defendant has made it clear however that the issue of justiciability is intertwined with the issue of breach as clearly if there is no breach there can be no cause of action. At the stage of defining the issues it was not clear precisely what terms or what contract was the subject of this cause of action and the Defendant appeared to contend in the large part that no contract was formed at all between the parties. After the dust settled, after the filing of the parties’ submissions, it is now clear that both parties agree that there are limited contractual obligations between tenderer and invitor when the tenderer’s bids are validly submitted for consideration. However, intertwined with the issue of justiciability must also be the Claimant’s cause of action which is transfixed on clearly articulated breaches of contract pleaded in its Statement of Case in this case on the failure to provide detailed (alternatively sufficient) reasons for its purported decision as an implied term of the contract arising between the parties. Clearly if there is no such express or implied term the claim fails.

¹⁶ Clause 6.2 of the ITT.

19. The issuance of an ITT is obviously not an offer by the invitee. Equally a tender is merely an offer to the invitor which it may accept or reject.¹⁷ However, in a typical tendering arrangement there may arise two contracts. First, the tendering process itself is to be viewed as being guided by the terms and conditions agreed to by the parties which are gleaned from the express and implied terms arising from the invitation to Tender. This has been referred to as Contract A. See **Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons** [1999] 67 ConLR 1.
20. The body of case law in the Commonwealth amply demonstrates that by the language used in the ITT, both parties, the invitor and tenderer, can create a tender evaluation process governed by rules and procedures which are more than a matter of mere expectation but can themselves have contractual force. To that extent the parties do intend to create contractual relations to the limited extent provided by their arrangement.¹⁸ This conclusion can be made by adopting the Contract A/B approach of the Canada Jurisdiction (**M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619, **Ellis Don Construction Ltd Naylor Group** [2001] 2 RCS 943) or examining whether the language gave rise to a preliminary procedural contract (**Pratt Contractors Limited v Transit New Zealand** [2003] UKPC 83) in determining whether by the mandatory language used it is consistent with the imposition of binding obligations on the parties. (**Hughes Aircraft Systems International v Air Services Australia**).
21. Second, there is the actual contract covering the subject scope of works. This is referred to as “Contract B”. Both contracts deserve their own independent consideration and analysis and this case involves an interpretation of the rights and obligations of “Contract A” between the Claimant and Defendant.
22. The limited contractual rights and/or duties that arise in Contract A includes the right to consider the invitor’s tender in conjunction with all conforming tenders and a duty to act fairly and in good faith. But ultimately the determination of this agreed tender evaluation process is a task of examining the express terms of the ITT and the implied terms that of

¹⁷ **Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons** [1999] 67 ConLR 1.

¹⁸ Per Bingham LJ in **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195 at 1202.

necessity must arise in such a contract. See **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195, **Fairclough Building Limited v BC of Port Talbot** (1992) 62 BLR 82, **Pratt Contractors Limited v Transit New Zealand** [2003] UKPC 83, **Hughes Aircraft Systems International v Air Services Australia** [1997] FCA 558, **Cooperative Centrale Raiffeisen –Boerenleenbank BA v Motorola Electronics Pte Limited** [2010] SGCA 47, **Gerard Martin v Belfast Education & Library Board** [2006] NICh 4, **M.J.B Enterprises Ltd v Defence Construction** (1951).

23. What is important therefore is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call and such terms that are to be reasonably implied. See **M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619, para 19.
24. An example of the application of these principles is famously provided in **Blackpool**. In **Blackpool**, the Court of Appeal considered whether any breach of contract arose by the failure of the invitor to consider the tenderer's bid which was mistakenly considered to have been received after the deadline for the submission of tenders and therefore not considered. The bid had in fact been submitted in time and had it not been for the error would have been considered. Bingham LJ found force in the argument that to resolve the question of whether obligations arose the question should be asked: how would the ordinary person reading the document construe it. He sought to examine what would have been the "confident assumptions of commercial parties both tenderer and invitor". He considered that the limited right was at the very least protection of the tenderer that if he submits a conforming tender before the deadline he is entitled as of a contractual right to be sure that his tender will be opened and considered in conjunction with other conforming tenderers. Bingham LJ tested such a proposition with the "officious bystander test" as follows: "had the club before tendering inquired of the council whether it could rely on any timely and conforming tender

being considered along with others I feel quite sure that the answer would have been “of course”.”

25. Importantly, Bingham LJ in that case recognised the obvious disadvantage of the tenderer in the tendering process having absolutely no assurances that any contract would be made of the subject works and that the tender may not be accepted. As such, Bingham LJ did not see the duty to provide reasons to the invitor as part of the limited contractual obligations between the parties:

“A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here be put to considerable labour and expense in preparing a tender ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare but the invitor does not commit himself to proceed with the project whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received.”

26. **Blackpool** simply illustrates that although in the world of private commercial parties it would be tempting to import such public law notions of fairness and reasonableness and equity one cannot rewrite the contract for the parties if it fails the test for the implication for terms as discussed above. Where the tenderer has assumed all the risks in making the tender and the invitor has clearly put itself in the most advantageous position it would be wrong to import obligations and duties alien to either or both parties.

27. This point is also illustrated in **Pratt Contractors Ltd v Transit New Zealand**¹⁹ where Lord Hoffman opined that the duty of good faith did not impose a duty on the invitor to act judicially. It would therefore be wrong to import the public law notions of fairness and a duty to provide reasons. The Court of Appeal in **NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited** Civ. App. No.

¹⁹ [2003] UKPC 83.

95/2005 clearly recognised that the relationship between tenderer and invitor resides in private and not public law.

The Duty of Good Faith

28. It is equally clear that in treating with tenders, there is an implied duty to act fairly and in good faith on the part of the invitor. However, the content of that duty is a question of context. In my view, it is not sufficient for the Claimant to simply rely on an implied duty of good faith without further proving that duty includes contextually a duty to give reasons. The duty of good faith and to act honestly as a term to be implied in the contractual relations of parties has been the subject of much debate and authority. In **Yam Seng Pte v International Trade Corp** (2013) EWHC 111 (QB) Leggatt J concluded after summarising the pertinent academic and judicial commentary both outside and within the English jurisdiction that “I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts to the extent that it still persists is misplaced.”
29. Leggatt J pronounced that the test of good faith is an objective one that “it depends not on either party’s perception of whether particular conduct is improper but on whether, in the particular context, the conduct would be regarded as **commercially unacceptable by reasonable and honest people**.” (Emphasis mine) Therefore, the court is not concerned with the “subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.”
30. In **Pratt**, Lord Hoffman observed:

“The nature of the implied duty to act fairly and in good faith has been the subject of a great deal of discussion in the commonwealth authorities. In *Pratt Contractors Ltd v Palmerston City Council* [1995] 1 NZLR 469,483, Gallen J said that fairness was a “rather indefinable term”. In *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1,36-37, Finn J said that the duty in cases of preliminary procedural contracts for dealing with tenders is a manifestation of a more general obligation to perform any contract fairly and in good faith. That is a somewhat controversial question into which it is unnecessary for their Lordships to enter because it

is accepted that, in general terms, such a duty existed in this case. The issue is rather as to its specific content in relation to particular acts required to be performed by Transit in evaluating the tenders.”²⁰

31. The narrow issue in this case is whether the context of the duty of good faith or to act honestly includes a duty to give reasons if the tenderer elects to withdraw from negotiations and move on to another bidder. That freedom to move to terminate negotiations and convene fresh negotiations is an express term of the ITT and what good faith requires is sensitive to context:

“The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest...the development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinising the motives of contracting parties.” See **Bhasin v Hrynew [2014] 3 S.C.R. 494**, para 70.

“The principle of good faith exemplifies the notion that, in carrying out his or her performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interest will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith.” **Bhasin v Hrynew 2014] 3 S.C.R. 494**, para 67.

32. Good faith therefore is not an objective standard or abstract formula superimposed on parties as to what “should” be fair or “ought to be” honest dealings. It is a principle which recognizing on the one hand a degree of proper and acceptable conduct but on the other recognizes commercial realities, legitimate self-interests of contractual parties, freedom of contract and being careful not to make moral judgments on legitimate commercial arrangements.

²⁰ Per Lord Hoffman in [2003] UKPC 83, para 45.

33. To therefore state that the ITT gives rise to the implied duty to act fairly and in good faith is on its own unhelpful unless the Court can from the context of the parties' dealings imply as fact specific terms which are consistent with or advance the general duty. Contracts are not however to be lightly implied. The Court must be able to conclude with confidence both that the parties intended to create legal relations and that the agreement was to the effect contended for. Per Bingham LJ in **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195 at 1202.
34. Terms may be implied in a contract: (1) based on the custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed. See: **M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619.
35. In **Hughes Aircraft Systems International v Air Services Australia** [1997] FCA 558 Finn J echoed the statement of Priestley JA in **Renard Constructions (ME) Pty Ltd v Minister for Public Works** (1992) 26 NSWLR 234, 256 where the learned Justice of Appeal stated:
- "The implied term must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it, so obvious that 'it goes without saying'; capable of clear expression; and must not contradict any express term of the contract."
36. A Court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. The implication of the term must have a certain degree of obviousness to it, why if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. See: **M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619, paras 27, 28 & 29.
37. The following principles on the implication of contractual terms can be culled from the recent authorities of **Marks and Spencer plc v BNP Paribas Securities Services Trust**

Company Ltd [2015] UKSC 72 and **Attorney General of Belize v Belize Telecom Limited** [2009] UKPC 10.

- (a) The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association.
- (b) It cannot introduce terms to make the contract “fairer” or “more reasonable”.
- (c) It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended.
- (d) The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
- (e) In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen.
- (f) The implication of a term was “not critically dependent on proof of an actual intention of parties” when negotiating the contract.
- (g) However a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed to it if it had been suggested to them.
- (h) It is questionable whether reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.
- (i) Business necessity and obviousness can be alternatives in the sense that only one of them needs to be satisfied. In practice it would be a rare case where only one of those two requirements would be satisfied.

- (j) If one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care"; and
- (k) Necessity or business efficacy involves a value judgment. However simply put a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

38. Lord Carnwath observed the fact that:

“While more stringent rules apply to the process of implication, it can be a useful discipline to remind oneself that the object remains to discover what the parties have agreed or "must have intended" to agree. In that respect it remains, and must be justified as, a process internal to the relationship between the parties, rather than one imposed from outside by statute or the common law²¹.

39. Objectivity which informs the whole process of construction should not descend into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication.²²

40. In this case a justiciable cause of action can only arise if there is an implication of a term in the agreed evaluation process that the Defendant ought to provide sufficient or detailed reasons for the rejection of a tender. In answering this question the Court must not slide into speculation. It must not allow the value judgment of what is a necessary term of the contract or one which gives it business efficacy to be steered in favour of abstract notions of fairness ignoring commercial realities, the express bargain of the parties and their respective freedom of contract. In my view, there is no such implied duty in fact to provide any or any sufficient or detailed reasons for withdrawing from the tender.

41. In my view from the express terms of the ITT, the bargain struck by the parties set out earlier in this judgment demonstrates that the tenderer assumed the risk of making the tender. The cards were stacked heavily in favour of the invitor avoiding liability and giving it freedom to negotiate amongst multiple bidders in order of merit after failed negotiations.

²¹ Per Lord Carnwath in **Marks and Spencer PLC v BNP Paribas Security Services** para 69.

²² Per Lord Hoffman **Attorney General of Belize v Belize Telecom Limited** [2009] UKPC 10, para 25.

42. There is no authority submitted which support the view that an implied duty to provide reasons exists in law in the limited context of contract A. In fact, Bingham LJ's judgment in **Blackpool** goes affirmatively in the other direction that no such obligation arises at all. See **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195 at 1202. In **Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons** [1999] 67 ConLR 1, the obligation to provide reasons to an unsuccessful bidder was expressly provided for in the detailed 1991 Regulations governing the tendering process and awards of public contract. Moreover such regulations are governed by principles in European Union Law. A paramount consideration in such a legislative regime is a minimum guarantee of fair and equitable treatment. It is not difficult to see how in that context the duty to provide reasons would feature in the contractual obligations of the parties. **Harmon** however is no more an authority for the proposition that where competitive tenders are sought and responded to a contract comes into existence where the prospective employer impliedly agrees to consider all tenders fairly. The duty to act fairly is however one of context and must be interpreted having regard to the facts of each case. **Harmon** is no authority for a general implication of a term to provide reasons as a component of a duty of good faith in all contracts.
43. As discussed above the existence and content of the obligation to act in good faith is a question of fact. Whereas the parties have agreed in this case that there is a duty to act in good faith but this does not in the context of the express terms of the contract and the negotiations between the parties amount to the obligation to provide sufficient reasons. The clear terms of the ITT avoided reference to the provision of reasons to the tenderer and to furthermore insist on a term that sufficient or detailed reasons be provided simply begs the question: what would be sufficient or detailed reasons? Such uncertainty is an impractical business arrangement. Looked at another way the contract made between the parties as to the appropriate tendering process does not lack commercial or practical coherence without the implication of such a duty to provide reasons.
44. Naturally a protest would have been lodged where the tender can challenge the decision to withdraw from the negotiations. In this case the Defendant made it clear to the Claimant that

it could not agree on cost and price. The onus is on the Claimant pursuant to the protest remedy to make out its case that the Defendant should not have withdrawn from the negotiations.

Issue 2: Whether the matters pleaded in paragraphs 8(1)-(4) in the Statement of Case gives rise to express or implied terms in the ITT

45. From the analysis above there is no room for the implication of the term to provide reasons as articulated in paragraph 8(4) of the Statement of Case or as a component of the duty to act in good faith. There is no room for implying the term as set out in para 8 (a) of the Statement of Case.

46. An obligation to act in good faith as pleaded in paragraphs 8(1) to (3) of the Statement of Case for the reasons explained above is unhelpful unless there is in the contract a specific obligation which founds the cause of action for breach of contract of the failure to provide sufficient or detailed reasons.

47. I have resolved these preliminary issues against the Claimant and accordingly as a consequence, I agree with the submissions of the Defendant that the claim as pleaded must be dismissed. In any event, properly read the letter issued by the Defendant does state clearly the reasons for the rejection of the tender on its inability to agree cost and price. To insist on something more simply goes beyond what both parties had intended in agreeing on this preliminary tendering process.

Conclusion

48. The claim is dismissed with half of the Defendant's costs to be paid by the Claimant to be quantified by this Court in default of agreement.

Vasheist Kokaram
Judge