Date: 20081028

Docket: T-277-07

Citation: 2008 FC 1102

BETWEEN:

IRVING SHIPBUILDING INC. AND FLEETWAY INC.

Applicants

and

THE ATTORNEY GENERAL OF CANADA AND CSMG INC.

Respondents

AMENDED REASONS FOR ORDER

HARRINGTON J.

[1] CSMG Inc. is a corporation formed by Devonport Management Limited and Weir Canada Inc. for the purpose of bidding on a contract to provide in-service support for Canada's Victoria Class submarines. Its initial bid and the bids of the other two hopefuls were rejected because not all the mandatory requirements were met. The second time around both its bid and that of BAE Systems (Canada) Inc. met those requirements. Public Works then rated the CSMG bid higher technically and subsequently negotiated with and entered into a contract with it. If optional extensions are exercised, the value of the contract is said to be approximately $1.5 billion.

[2] Two of BAE's subcontractors, Irving Shipbuilding Limited and Irving's affiliate, Fleetway Inc. – but not BAE itself – seek an order quashing the decision that CSMG's bid was technically better and setting aside all that flowed therefrom, including the subsequent award of the contract to CSMG.

[3] The principal ground advanced in support of the application is that the CSMG bid should not have been considered at all because Weir employees had been involved in the development of the Statement of Work which led to the Request for Proposal from Public Works and because at least one of those employees then formed part of the CSMG bidding team. This gave CSMG an unfair advantage and so it should have been conflicted out of the bidding process.

[4] A second ground is that CSMG did not meet the mandatory requirement with respect to available shipyard facilities.

[5] The application has been strongly contested by the Attorney General and CSMG. They raise a number of issues including:

a. Lack of Standing

Subsection 18.1(1) of the *Federal Courts Act* provides:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. [Emphasis added.]	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. [Je souligne.]

Irving and Fleetway did not bid for the contract. Had the contract been awarded to BAE, they would have been BAE subcontractors. Thus, at best, they are only indirectly affected by the decision.

b. <u>No Conflict</u>

As stated by Mr. Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, [1976] S.C.J. No. 118 (QL): "an apprehension of bias must be a reasonable one, held by reasonable and right minded persons." The test as framed by the Federal Court of Appeal in that case, and which he applied, is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?" According to the respondents, such a person would conclude there was no reason to be apprehensive because the work done by Weir personnel was minimal; was substantially revised by the time the bidding documents were made public; there is no evidence the individual who joined the CSMG bidding team actually did any work on the CSMG bid; he was taken off the job when requested by Public Works and, in any event, even if he had worked on the bid, that bid was unsuccessful. It was only some time later that, on the second round, both CSMG and BAE met all mandatory requirements.

c. Waiver

In any event, even if there were a reasonable apprehension of bias in not eliminating CSMG on the grounds of conflict of interest, Irving and Fleetway waived their right to argue that point.

d. Timebar

An application for judicial review should be made within 30 days from the time the decision or order was first communicated. The decision which is really under attack is the decision of Public Works to refuse BAE's request to eliminate CSMG from the bidding. That decision was made almost a year before these proceedings were filed.

DECISION

[6] I have decided that this application should be dismissed because Irving and Fleetway do not have standing.

[7] However, should I be wrong, and although there was an appearance of a conflict of interest on the first bid, it would be unreasonable to hold that there was an apprehension of bias arising from this initial conflict which gave CSMG an unfair advantage on the second bid.

[8] I am satisfied that, although Irving and Fleetway waived such rights as they may have had to complain about the role of Weir employees in the work leading up to the Request for Proposal, they

made no such waiver with respect to any failure on Weir's part to impose a cone of silence on those so involved. Their application in that regard is not out of time.

[9] There is no evidence to support the submission that CSMG failed to meet a mandatory requirement. On the contrary; the only evidence, that of Commander Hallé, is unassailable.

GOVERNMENT PROCUREMENT PROCESS

[10] The law and practice relating to tenders and the government procurement process is well known. The courts have developed the concept of a double contract. The first contract (Contract A) begins with an offer as contained in the Request for Proposal issued by Public Works and Government Services Canada. The acceptance is the submission of a compliant bid. There may be several compliant bids and therefore several contracts A. In this case there are two, one with CSMG and the other with BAE. Thereafter the compliant bids are analyzed. The winner is selected and negotiations leading to a formal contract for the work itself are concluded with it (Contract B) (*Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, [1981] S.C.J. No. 13 (QL); *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, [1999] S.C.J. No. 17 (QL)).

[11] When this application for judicial review was filed, Contract B had not been concluded with CSMG, but by the time of the hearing it had. This gave rise to a second application for judicial review issued 29 July 2008 under docket T-1176-08. That application, which is still at an early stage, seeks an order quashing the decision to award the contract to CSMG, terminating the contract

signed 30 June 2008 and terminating any call-ups and task authorizations issued thereunder. The application in this case sought an order enjoining the Crown from awarding a contract to CSMG but, if awarded, then terminating any call-ups or task authorizations. I accept the submission from counsel for Irving and Fleetway that the second judicial review was taken out of an abundance of caution. As a result of the decision in this case, it would appear to be moot.

[12] The normal rule is that, pursuant to the *Department of Public Works and Government Services Act*, the Minister of Public Works and Government Services purchases goods and services for all government departments, in this instance the Department of National Defence. The Minister may, as in this case, solicit bids by means of a Request for Proposal and set down the terms and conditions thereof as well as those of Contract B. The integrity of the process, the reasonable expectation of interested parties, public confidence and basic fairness require that one bidder not be given an unfair advantage over another (*Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 at paragraphs 83 and following).

[13] It may have been open for Public Works to avoid competitive bidding altogether, as per the *Government Contracts Regulations*, on the basis that it would not be in the public interest to solicit bids. Although this was not done, the national security exceptions provided for in the North American Free Trade Agreement (NAFTA), the *World Trade Organization Agreement on Government Procurement* (WTO-AGP) and the *Agreement on Internal Capital Trade* (AIT) were invoked. The reasons given were that the work had to be carried out at a Canadian shipyard and there were not at least three suppliers capable of certifying 80% Canadian content for goods and

services. The requirement of an adequate Canadian shipyard obviously severely limited the pool of potential bidders. The invocation of national security exceptions also ousted the jurisdiction of the Canadian International Trade Tribunal (CITT) which normally deals with complaints arising from bid evaluations and the award of federal government contracts. However, the superintending power of this Court over decisions of federal boards and tribunals, by way of judicial review, was not ousted; hence the application to this Court.

[14] Having opted for a competitive bidding process, the principles of procedural fairness and the right to expect the decision-maker to be impartial apply.

STANDING

[15] The parties have cited a great many cases, old and new, from this and other jurisdictions on the vexing issue of standing. It appears to me that in this Court there are those who have standing as of right and those who are given standing as a matter of discretion. The latter category is subdivided into those who successfully invoke the public interest and those who are personally sufficiently aggrieved that justice demands they be given their day in court.

[16] It is difficult to isolate standing from whether or not it is appropriate to grant the remedy sought, often one of the extraordinary common law remedies such as *mandamus* or *certiorari*. As noted by Thomas (now Mr. Justice) Cromwell in his book *Locus Standi – a Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at page 209: “Courts have often fallen into

the trap of collapsing standing and merits". Nor should it be forgotten that much has happened since his book was published in 1986.

[17] These cases are fact-driven. Some were final decisions while others were on preliminary motions to strike. In the latter case, despite the broad language often used, the issue was whether it was "plain and obvious" that the applicant lacked standing. Indeed in this very case Prothonotary Tabib dismissed the Attorney General's motion to strike and she was upheld on appeal by Madam Justice Layden-Stevenson (2007 FC 933).

[18] Care must also be taken in considering decisions from other courts as the provincial legislature in question may not have enacted language such as "directly affected" but rather may have described the applicant as a "person aggrieved", or may have simply have recognized the traditional, but extraordinary, common law remedies (*De Smith's Judicial Review*, Sixth ed., (London: Sweet & Maxwell, 2007) at paragraph 2-055.).

[19] Section 18.1 of the *Federal Courts Act* only came into force in 1992. Until that time the "directly affected" limitation was found in then-section 28(2) of the Act which dealt with those judicial reviews over which the Court of Appeal had first instance jurisdiction.

[20] BAE and the other unsuccessful bidder were clearly "directly affected". As derived from the decision of the Federal Court of Appeal in *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, 2005 FCA 213, [2006] 1 F.C.R. 53 at para. 56, the phrase "application… may

be made…" is permissive. The wording of the subsection is certainly broad enough to encompass applicants who meet the test for public interest standing. Irving and Fleetway do not assert public interest. They assert their private economic interests, but this in itself is not an automatic bar.

[21] The question becomes whether subcontractors of a bidder whom they say should have been successful are "directly affected" so that they may seek judicial review as of right. The second question is that if the answer to that is "no", should the Court in its discretion nevertheless grant them standing in this case?

[22] I am satisfied that Irving and Fleetway were not "directly affected" by the decision. In context, "direct" means without intermediaries. Although the analogy is not perfect I find references in the case law to direct damage arising in claims in tort for pure economic loss to be helpful. In considering directness in the context of the civil law notion of delict, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 (QL), at paragraphs 238 and 260 Madam Justice McLachlin (as she then was) noted that the control mechanism against unlimited liability lies in the determination "whether the loss is a direct, certain and immediate result of the negligence." "Distant losses which arise from collateral relationships do not qualify for recovery."

[23] In *Bow Valley Huskey (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, [1997] S.C.J. No. 111 (QL), charterers of an oil rig damaged by fire sued for their resulting economic loss. Their identity was well-known to the tortfeasor. They argued, much like Irving and

Fleetway in this case, that they were in a “common venture”, albeit not a joint venture in law, with the rig owner who suffered physical loss, and that the losses of the rig owner were transferred to them so that they should be able to claim as though they stood in its shoes. In effect Irving and Fleetway are arguing that they, in fact, are in a 50/50 venture with BAE.

[24] The *Bow Valley* action was dismissed. At paragraph 69 Madam Justice McLachlin noted that the rig owners and charterers freely organized their affairs the way they did. They could have organized matters differently before the fire occurred. So it is in this case as well. The Request for Proposal specifically allowed joint ventures.

[25] There were at least two ways Irving and Fleetway could have organized their affairs prior to the award of Contract A so as to be directly affected by the decision determining that CSMG’s bid was technically better. Together with BAE they could have formed a new corporation, such as Devonport and Weir formed CSMG. They could also have bid as a joint venture or partnership. Any such arrangement would have required BAE’s consent.

[26] In addition, BAE as prime contractor could have stipulated benefits for its subcontractors. This could be done by way of a “Himalaya Clause” by which BAE would be contracting on its own behalf, and also as agent or trustee for its subcontractors. (*ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 (QL); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, [1992] S.C.J. No. 84 (QL)). However

this approach would not only require BAE's consent, but also Public Works'. The terms of the Request for Proposal did not allow a "Himalaya Clause", or anything like it.

[27] All this goes to prove that there were intermediaries in place with the result that Irving and Fleetway were not "directly affected" by the decision.

[28] This leads to the recent decision of the Supreme Court in *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] S.C.J. No. 22. This was an action by subcontractors of an unsuccessful bidder based on the premise that Public Works owed them a duty of care in tort not to award a contract to a non-compliant bidder. The action was dismissed. Among other things, Mr. Justice Rothstein considered it relevant that the appellants had had an opportunity to form a joint venture and thus be parties to Contract A. He said there was an overriding policy reason that tort liability should not be recognized in those circumstances:

> [56] The fact that the appellants had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW and Olympic, is an overriding policy reason that tort liability should not be recognized in these circumstances. Allowing the appellants to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, Olympic and the appellants. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract …

[29] In my opinion, the same policy considerations apply here. Irving and Fleetway submit that standing in an application for judicial review cannot be closely equated with a cause of action in tort. I disagree. If the subcontractors in *Design Services* had a "direct interest" pursuant to section 18.1 of the *Federal Courts Act*, then their action in tort should have been dismissed as premature. The Court of Appeal has held in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287 and in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2008] F.C.J. No. 1004, that it is a condition precedent to an action in damages resulting from a decision of a federal board or tribunal that an application in judicial review be launched.

[30] Indeed, as stated in *Grenier*, the decision of the federal board or tribunal retains its legal force and authority and remains judicially operative and effective until it has been invalidated. A litigant who seeks to impugn such a decision is not free to choose between a judicial review and an action in damages. He must at least launch an application for judicial review as a condition precedent to an action in damages (see paragraphs 17-20).

[31] It would be most peculiar indeed if Irving and Fleetway who, on the basis of *Design Systems*, have no claim against Public Works in tort for pure economic loss, (although BAE might have a claim in breach of contract), could by a roundabout route set aside the bidding process and the third time around, whether with BAE or others, succeed. This could lead to a chain of events whereby they would end up with contract B, something akin to specific performance, while they have no claim in damages.

[32] I do not think that the decision of the Federal Court of Appeal in *Moresby Explorers Ltd. et al. v. Canada (Attorney General) et al.*, 2006 FCA 144, 350 N.R. 101, helps the applicants. In that case, Mr. Justice Pelletier said:

> [17] Standing is a device used by the courts to discourage litigation by officious inter-meddlers. It is not intended to be a pre-emptive determination that a litigant has no valid cause of action. There is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue.

However, the appellants were within the intendment of the challenged policy. At paragraph 16 he said: "They do not have to wait until it causes them a loss to challenge it on jurisdictional grounds."

[33] Indeed, public interest, even that as a mere taxpayer, may give rise to sufficient standing to contest the constitutionality of a statute or a regulation (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, [1974] S.C.J. No. 45 (QL)).

[34] The applicants raise no jurisdictional or constitutional issue.

[35] Nevertheless, the courts may grant standing even if only to allow an applicant to pursue a private interest. The decision of the Nova Scotia Court of Appeal in *Ogden Martin Systems of Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment)* (1995), 130 D.L.R. (4th) 326, [1995] N.S.J. No. 504 (QL), is a good example. Another is the decision of Mr. Justice Strayer in *Western Pulp Inc. v. Roxburgh*, [1990] 39 F.T.R. 134, [1990] F.C.J. No. 1043 (QL), maintained in appeal,

(1990), 122 N.R. 156, [1990] F.C.J. No. 1140 (QL). In that case, Mr. Justice Strayer said at paragraph 7:

> There is a broad discretion in the Court to grant standing to seek certiorari even to a "stranger", particularly where the issue is one of jurisdiction to make the order under attack. "Persons aggrieved" by an order automatically have standing and I am satisfied that the applicant is a "person aggrieved".

[36] However, as a result of the subsequent introduction of section 18.1 of the *Federal Courts Act*, "persons aggrieved" no longer automatically have standing unless they are also "directly affected".

[37] A decision which appears to be squarely on point and which, at first glance, favours the applicants is *Socanav Inc. v. Northwest Territories (Commissioner)*, (1993) 16 Admin. L.R. (2d) 266, [1993] N.W.T.J. No. 85 (QL), an interlocutory decision of the Northwest Territories Supreme Court. Socanav was the potential subcontractor of an unsuccessful bidder on a fuel supply contract. It sought an order in the nature of *certiorari* or, alternatively, a declaration and possibly damages. The Court refused *certiorari* but did grant standing on the grounds that it had a direct interest as per the guidelines set out by the Supreme Court in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73 (QL). However, as aforesaid, the real issue was whether it was "plain and obvious" that Socanav did not have standing. Furthermore, I do not see how *Finlay* assists as it held that Mr. Finlay met criteria set down for the discretionary recognition of public interest standing. It also precedes *Design Systems* and I do not agree that it has current value.

[38] To conclude on this point, I am not persuaded that Irving and Fleetway should be, as a matter of discretion, given standing. They, unlike those in other cases, such as *Western Pulp,* could have organized their affairs so as to give them standing as of right. There were advantages and disadvantages in what they did. One advantage is that they could not have been sued directly by Public Works for breach of contract. They should not be allowed to sidestep circumstances of their own making.

NO CONFLICT

[39] As I may have erred in holding that Irving and Fleetway lack status as of right to launch this judicial review and as my refusal to exercise my discretion to allow them standing may have been exercised on wrong principles or a misapprehension of the facts, it is necessary to determine whether there is a reasonable apprehension of a conflict of interest on the second Request for Proposal which opened in July 2006 and closed in October 2006.

[40] Although I am concerned with the first round of bidding, I have come to the conclusion that there is no reasonable apprehension of conflict on the second bid, in the sense of CSMG being able to use Weir's insider knowledge to its advantage.

a. The Evidence

[41] The evidence consists of affidavits from W. Brent Holden, General Manager – Ottawa, for Fleetway Inc. and Commander Marcel Hallé, the officer commanding the Class Desk for submarines, as well as cross-examinations thereon. Much of the record is taken up by information Irving and Fleetway obtained through Access to Information and by the record produced by the Attorney General pursuant to rule 317 of the *Federal Courts Rules.*

[42] The potential for conflict arises from Weir's participation in the Naval Engineering Test Establishment (NETE), a government-owned contractor-operated organization which is one of the Navy's principal consulting engineering resources. Its purpose is to provide independent and impartial test and evaluation services. In accepting this contract, Weir undertook to ensure that its results would not be biased or perceived to be biased by a conflict of interest with the other work it undertook, that it would not be provided with an unfair competitive advantage over other bidders by virtue of the NETE contract through insider knowledge, and that personnel conducting, reviewing and approving test and evaluation work as part of NETE would not be involved with other non-NETE work for the Department of National Defence.

[43] Weir, previously known as Peacock Inc., has held the NETE contract for more than 50 years. The last time the contract was put up for bid was in 1999.

[44] The project manager is a full-time position. The other positions are part-time. At relevant times there were a total of 10 Weir personnel involved with NETE, six of whom worked on tasks relating to the Victoria Class submarines statements of required work.

[45] The following timeline may be helpful:

a. The four Victoria Class submarines in question, which were purchased from the United Kingdom, were imported in 2001. Various commercial enterprises, including BAE and Irving, were contracted over the next few years to carry out various works in relation thereto.

b. Public Works issued a public "Letter of Interest" in March 2004 titled *Victoria Class In-Service Support*. The letter indicated that the intention was to consolidate outsourcing which was to be detailed later in a Request for Proposal. The successful contractor would provide maintenance support, act as the Department of National Defence's technical records agent, provide engineering support and perhaps some goods and services, including repair and overhaul.

c. In accordance with the Letter of Interest, there was an industry day meeting 23 April 2004. The NETE manager, an employee of Weir, was present. Others in attendance included BAE, Irving and Fleetway. Some concern was expressed in Public Works, at least internally, of a potential conflict involving Weir.

d. July 2004 - February 2005: NETE was given various tasks with respect to the Victoria Class In-Service Support. It worked on a draft Statement of Work and its conversion to a Performance Work Statement Structure as well as some Data Item Descriptions (DID).

e. 24 April 2005: a second industry day was held, to be followed by private briefings if requested.

f. 16 May 2005: one of the six Weir personnel, Robert Dunlop, who was part of the NETE group working on early stages of the Statement of Work, left NETE.

g. 19 May 2005: Public Works and National Defence met with Weir as a potential bidder. Mr. Dunlop was in attendance. The reactions within Public Works and National Defence ranged from very concerned to not concerned at all.

h. 3 August 2005: Public Works met with Weir concerning Mr. Dunlop's involvement. Weir pulled him off the job and issued a letter 10 August agreeing to abide by DND's post-employment restrictions, i.e. a cooling-off period of one year.

i. 22 September 2005: issue of the Request for Proposal with a closing date of 28 February 2006, later extended to 27 April 2006.

j. December 2005: BAE, and another, met with Public Works and verbally made allegations regarding Weir's involvement in the Request for Proposal.

k. Late 2005: BAE, Irving and Fleetway, by way of Access to Information, gathered particulars of NETE's involvement with the Statement of Work, but not of Mr. Dunlop's transfer from NETE to the bidding team.

l. January-April 2006: BAE, with the knowledge and consent of Irving and Fleetway, wrote to Public Works to request that Weir, or any entity in which Weir participated, be conflicted out of the bidding. Public Works refused and invited BAE to file an application for judicial review sooner rather than later. BAE decided not to, and submitted a bid.

m. 1 June 2006: BAE was informed that the bidding process was cancelled as no bidder met all the mandatory requirements.

n. 21 July 2006: the second Request for Proposal was issued, closing date September, later extended to 10 October 2006.

o. 10 January 2007: Public Works wrote to BAE stating that although it met all mandatory requirements, the successful party was CSMG.

[46] The parties agree that in pith and substance the first and second Request for Proposal were the same. We do not have benefit of either of CSMG's bids as they were kept out of the record by way of order of Prothonotary Tabib based upon section 30 of the *Defence Production Act*. Therefore, although CSMG obviously improved its proposal as regards the mandatory items, we do not know whether it took advantage of the opportunity to improve its technical proposals. Indeed, the record only contains BAE's second proposal so that a comparison with its first is not possible either.

b. The Legal Principles

[47] In determining whether Weir, as a result of its management of NETE, had insider knowledge which gave it an unfair advantage so that the CSMG bid should have been discarded, the following inter-related questions come to the fore:

a. What insider information did the Weir employees at NETE have?
b. Was that information shared with the CSMG bidding team?
c. Did this insider information give the CSMG bidding team an unfair advantage?
d. Should findings of fact (including those by way of inference) be based on the balance of probabilities, or on some other standard?

[48] Six Weir employees with NETE were very much involved in the early stages of the Statement of Work which led to the first Request for Proposal issued months later on 22 September 2005.

[49] There were two routes through which that information could have been shared with the bidding team. It is possible that any of the members of the NETE team working on the Statement of Work could have passed it on. Despite the subsequent assurances and certificates issued by Weir, there is no evidence that employees associated with NETE were instructed not to discuss their work with others at the company. The confidentiality agreements, in three different forms, which were in place prohibit an employee from using Weir's company information to the company's detriment. It may be that one, but only one, of the forms, the Independent Consultant Services Agreement, was adequate but it was a form signed by only two of the six Weir employees or consultants, and Mr. Dunlop was not one of them.

[50] There is no evidence as to what Mr. Dunlop did during his two and a half months with the bidding team, but the circumstances are such I infer on the balance of probabilities that Mr. Dunlop shared his insider information. People who work together are presumed to share confidences (*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41 (QL)). Reasonable measures had not been taken to ensure no disclosure on his part. In the light of this finding, I do not consider it necessary to consider the likelihood that the five other NETE members involved in the Victoria Class Submarines Statements of Work may also have shared information.

[51] The next question is whether this insider information gave the CSMG bidding team an unfair advantage. It must be kept in mind that just about every bidder, or subcontractor, had advantages in one aspect or another over others. BAE was the incumbent custodian of the technical documents, and it was Irving who had been retained to repair the HMCS Chicoutimi after her

disastrous fire in October 2004. Commander Hallé's evidence is strong. He points out that some six months had passed from the time NETE was working on Statements of Work to the issuance of the first Request for Proposal and that there had been many changes. For instance, following the industry day in April 2005, many of the prospective bidders made suggestions which were incorporated and only two of the 12 DIDs NETE worked on were actually incorporated in the Request for Proposal.

[52] It is not possible to make a conclusive finding as to whether Weir's insider information worked to its advantage. The possibility is certainly there. For instance the fact that it knew Public Works considered it unnecessary to incorporate 10 of the DIDs may have given CSMG insight. As counsel for Irving and Fleetway put it, he who helps the teacher set the exam has an advantage when sitting the exam. CSMG's scoring was augmented by its better understanding, perhaps an understanding of what not to say.

[53] However, with all deference to Commander Hallé, we are dealing with perception, not necessarily reality. Canadians in general, and bidders in particular, should have confidence in the bidding system.

[54] In my view the standard is that of "probability of mischief" and not "possibility of mischief". The "possibility of mischief" standard applies to lawyers (*MacDonald Estate, supra*). However, lawyers, with their fiduciary relationships and the requirement that justice not only be done but be seen to be done, are held to a higher standard. In *Committee for Justice and Liberty,*

above, the Court applied the "probability of mischief" standard to whether the Chairman of the National Energy Board should have been conflicted out of a hearing due to his previous involvement with one of the parties. The Court noted that the Board discharged some quasi-judicial duties. While not so in this case, the bidding process requires fairness. Public Works cannot be held to a standard higher than that of a board exercising quasi-judicial functions and so I opt for the "probability of mischief" standard.

[55] Mr. Dunlop rubbed shoulders on a weekly basis with the overall evaluation manager and three of the four technical team leaders. It is reasonable to infer that he had insight into their states of mind, their likes and dislikes. Nevertheless, the fundamental point is this: CSMG's bid was rejected. By the time the second proposals were due, more than a year had passed since Mr. Dunlop had left NETE; the cooling-off period had expired and he may possibly have rejoined the CSMG's bidding team. The record is silent. However, by then Fleetway had employed three ex-Department of National Defence personnel and another BAE subcontractor had employed another. As Commander Hallé put it "…and list goes on, all of these folk have had some exposure to VISSC prior to their change to industry from having been in uniform".

[56] The evidence is to the effect that there is only a small pool of organizations in position to bid as prime contractor or as important subcontractors. The workforce is mobile, and those entitled to take retirement from the Department of National Defence are courted by private industry. The passage of time is the most important factor and, in reality, each bidder had some insight, and some advantage, over the others due to prior involvement with the submarines, such as the fact that BAE

acted as guardian of the technical records and Irving had considerable hands-on experience in repairing the Chicoutimi.

NO WAIVER

[57] In January 2006, BAE wrote to Public Works, on behalf of itself and its subcontractors Irving and Fleetway, to express concern over their understanding that Weir intended to submit a bid in response to the Request for Proposal either alone or with a joint venture or partners. The letter focuses on Weir's involvement with NETE and alleges that it performed a variety of significant tasks leading to the preparation of the solicitation documents for the then-current Request for Proposal. Those tasks were said to include in-depth assessment and development of the Statement of Work and the preparation of bid evaluation criteria (the record shows they were involved in early versions of the Statement of Work, the significance of which has been debated, but that they were not involved in the preparation of bid evaluation criteria). Public Works was called upon to confirm that it would not accept any bid proposal submitted by Weir alone or with others. The matter was debated over the next few months with Public Works refusing to accede to BAE's request and inviting it to seek a judicial review of that decision sooner rather than later.

[58] On 7 April 2006, BAE again wrote on behalf of itself, Irving and Fleetway, this time to say they intended to support Public Works in the continuation of the Victoria Class In-Service Support and had decided not to apply for judicial review regarding the conflict of interest surrounding Weir. The letter continued:

> Please be advised that, in making this decision, we are relying upon your representation and assurance that all possible steps have been taken by the Crown to avoid conflict of interest at all times by any party. We therefore confirm we will be submitting a bid by 27 April 2006 and we look forward to working with the Crown in the future.

[59] As it turns out, when BAE wrote the letter in January 2006, it had just received documentation via Access to Information which detailed NETE's involvement in the project, but which did not mention that Mr. Dunlop had crossed over from NETE to the Weir bidding team.

[60] By this April 2006 letter, Irving and Fleetway waived any conflict arising from Weir's involvement with NETE. However, that was predicated on there being appropriate firewalls in place, which there were not with respect to at least four of the six Weir personnel involved in tasks pertaining to the Victoria Class In-service Support, and certainly cannot be construed to extend to the most blatant conflict, that of Mr. Dunlop wearing two hats; one immediately following the other.

[61] The respondents argue that since the record shows that someone complained in May 2005 of Mr. Dunlop's involvement with the Weir bidding team, the Court should infer that the complaint issued from BAE and so is covered by the waiver. The complainant was never identified, and could well have been someone within Public Works, many of whose officials did not see eye to eye with DND on the issue.

[62] In *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 (F.C.A.), [1989] S.C.J. No. 505 (QL), Mr. Justice MacGuigan delineated inference and conjecture as follows:

> [34] The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in **Jones v. Great Western Railway Co.** (1930), 47 T.L.R. 39, at 45, 144 L.T. 194, at 202, (H.L.):
>
> > "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference."
>
> [35] In **R. v. Fuller** (1971), 1 N.R. 112, at 114, Hall, J.A., held for the Manitoba Court of Appeal that "[t]he tribunal of fact cannot resort to speculative and conjectural conclusions". Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123; 1 N.R. 110, at 112.

[63] If I were to speculate at all, I would think that Irving and Fleetway were not aware in April 2006 that in May 2005 Mr. Dunlop had joined Weir's bidding team. As this is the most blatant example of a conflict, one would assume that that fact would have been front and centre in any complaint.

[64] It was only through the subsequent productions as ordered by Prothonotary Tabib pursuant to rule 317 that Mr. Dunlop's involvement came to light.

NO TIME BAR

[65] It follows that the decision of Public Works in March 2007 is not relevant and is not the real decision under review.

[66] In summation, this application for judicial review shall be dismissed on the grounds that the applicants lack standing and that, in any event, there is no reasonable apprehension of bias tainting the decision of Public Works on or about 10 January 2007 that CSMG achieved the highest final score under the evaluation methodology described in the Request for Proposal.

CONFIDENTIALITY

[67] The above reasons were issued 1 October 2008 under seal and were accompanied by the following direction:

> The confidential reasons for order have been issued under seal as, given the confidentiality orders in place, the parties requested they be given an opportunity to inform the Court if they consider any portion of the reasons should be deleted or modified in the public version thereof. The parties have until Wednesday, 22 October 2008 to do so.

[68] All the parties have now informed the Court that there is no need to delete or modify any portion of the reasons in the public version.

"Sean Harrington"
Judge

Ottawa, Ontario
October 28, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR ORDER:	HARRINGTON J.
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