

**THIS EXAMINATION CONSISTS OF 10 PAGES (INCLUDING THIS PAGE)  
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**THE UNIVERSITY OF BRITISH COLUMBIA  
FACULTY OF LAW  
FINAL EXAMINATION – DECEMBER 22, 2021**

**LAW 439.001  
Construction Law**

**Adjunct Professors David Mckenzie  
and David Curtis**

**TOTAL MARKS: 100**

**TIME ALLOWED: 3 HOURS**

- **THIS IS AN OPEN BOOK EXAM**
  
  - **Section 1: Answer 2 out of the 4 fact pattern questions**
    - **Answer in Exemplify or your Exam Answer Booklet**
    - **Please indicate the question number you are answering**
  
  - **Section 2: Answer all of the multiple choice questions**
    - **Answer in Exemplify or your Exam Answer Booklet**
    - **For each multiple choice question, please indicate the question number and your answer (a, b, c, or d)**
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**SECTION 1: FACT PATTERN QUESTIONS (80 MARKS)****ANSWER 2 OF THE FOLLOWING 4 QUESTIONS****(Each Answer is 40 marks)****Question 1**

Newtech Utility Corporation (the "Owner") is constructing a 10 km long pipeline project in northeastern British Columbia (the "Project"). It hired an engineering firm called ABC Engineering Corporation (the "Engineer") to design the pipeline and to assist with the procurement process.

With the design drawings for the Project complete, the Owner asked Engineer to prepare a Tender Package so that the Owner could engage a qualified general contractor to construct the Project according to the Engineer's design.

The Engineer prepared a Tender Package for the Owner (the "Tender"). The Tender included the Engineer's drawings and construction specifications, and the following clauses were included in the Instructions to Bidders section:

- **Clause 1:** The Closing Date is February 1, 2022 at 4:00 P.M. PST (the "Closing Date"). No bids will be accepted or considered by the Owner after the Closing Date.
- **Clause 2:** Bids submitted to the Owner in response to the Tender shall be irrevocable and remain open for acceptance by the Owner for a period of 60 days from the Closing Date (the "Review Period"), whether another bid has been accepted or not.
- **Clause 3:** All bids must provide a lump sum price for completing all the work. The lump sum prices of each bid will be read out loud at the Owner's offices at 4:30 P.M. on February 1, 2022.
- **Clause 4:** The Owner reserves the right to reject any or all bids. The lowest or any bid will not necessarily be accepted.
- **Clause 5:** If a bid contains a defect or fails in some way to comply with the requirements of the tender documents, which in the sole discretion of the Owner is not material, the Owner may waive the defect and accept the bid.
- **Clause 6:** All bids must include a bid bond of \$250,000, and any bid received that does not include a bid bond will be rejected. If any tenderer revokes its bid during the Review Period or refuses to sign the General Contract if awarded by the Owner, then the Owner may demand that the surety pay the bid bond amount of \$250,000.

The Owner received three bids in advance of the Closing Date (Bidder 1, Bidder 2, and Bidder 3), and a fourth bid on February 2, 2022, at 3:00 P.M. PST (Bidder 4).

The following is a summary:

- Bidder 1 was the lowest bidder of the three who responded before the Closing Date. Bidder 1 is well known for being litigious. Some of the staff from the Engineer have had direct experience

dealing with Bidder 1 and report that Bidder 1 is known to bid very low, and then attempt to claw back its profit through the change order process. On a recent project involving the Engineer, this approach resulted in a significant budget increase and an arbitration ensued after the project was completed. Bidder 1's response is meticulous and contains no omissions or errors.

- Bidder 2 was the second lowest bidder. Bidder 2's bid failed to include critical information about Bidder 2's technical expertise that is necessary for the Owner to be able to properly evaluate Bidder 2's ability to execute the Project. The inclusion of this information was identified as "mandatory" in the tender. Although the information was not included, the Owner is aware of the fact that Bidder 2 is a very experienced general contractor, and well known for its ability to execute pipeline work.
- Bidder 3 was the highest price bidder. Bidder 3's bid omits to include the list of serial numbers for the equipment that it will use, and the CVs of a few of its management team, though the CVs of all the critical management employees were included.
- Bidder 4 provided its bid on February 2, 2022. Bidder 4's bid was an even lower bid than Bidder 1, by a substantial margin. Neither the Owner nor the Engineer is sure whether Bidder 4 was at the office of the Owner on February 1 when the prices from the other three tenders were read out loud. However, at least one staff member from the Owner suspects that one of Bidder 4's employees was there.

Five days after the Closing Date, Bidder 2 called the Owner to say that it had a critical error in the calculation of its lump sum price and that it wishes to withdraw its bid. It asks the owner to return the bid bond.

**Please address all of the following questions:**

- a) What, if any, legal obligations does the Owner have to the bidders who responded to the Tender?
- b) In addition to the express terms of the tender package, are there any other terms implied by law that govern the review of the bids and, if so, how would these terms impact the assessment of the four bids received?
- c) Does the "Privilege Clause" allow the Owner to accept the Bidder 2 and Bidder 4 bids? Why or why not?
- d) According to *Sound Contracting* could the Owner reject Bidder 1's tender, and if so on what basis could it do so?
- e) In regard to Bidder 2's bid, what are the Owner's options for:
  - a. accepting the bid; and/or
  - b. consenting to the withdrawal; and/or
  - c. keeping the bid bond?
- f) Could the Owner accept Bidder 3's tender and what is the basis for your answer?

- g) Could the Owner accept Bidder 4's tender and what is the basis for your answer?
- h) If the Owner accepted Bidder 4's bid, and Bidder 3 came to you and asked what it could do about this, what would be your advice to Bidder 3 about its rights and potential remedies?

**Question 2**

You are a junior associate. A senior partner just got a call from a potential client named Lisa.

Four years ago Lisa purchased a newly built house in the City of Victoria from a developer named Suspect Homes Ltd. The house was built by a well-known local general contractor named Homer Construction Inc.

Just recently Lisa noticed one side of the house appears to be sinking. Looking more carefully, she saw small cracks in the basement foundation and some of the siding at the back of the house is falling off. Engineers came to look at the problem. They confirmed the back half of the house is sinking because the ground is just sand. Because of the sinking the house is being deformed and suffering stress cracks. For now the house is still structurally sound but they recommend keeping an eye on it to see if it gets worse. They estimate a full repair will cost more than \$100,000.

Lisa went to the head office of Suspect Homes Ltd. but the doors were locked and the signs had been taken down. She also read in the newspaper that Homer Construction Inc. has been named in a lot of new lawsuits. At the city hall desk, she was told by a surly clerk it's not the City's problem.

Lisa's made an appointment for this afternoon with the senior partner to discuss whether she has a case. The partner has no knowledge of construction law. Your task is to outline Lisa's potential case and make the partner look smart.

Your focus should be on the following: who could be liable, all options for recovering damages, the key legal issues that could present an obstacle, and the applicable case law and how those cases could help or hinder on those legal issues.

**Question 3**

A windfarm is being constructed in a remote area located in the interior of the province. A number of wind turbines are being constructed on untitled land. The turbines are being connected to the provincial power grid through electrical lines that pass over or through various statutory rights of way and pipeline easements. There are some mineral mining and natural gas extraction operations near the area where the windfarm is located.

The windfarm is being constructed by Blowhard Contracting Ltd., the general contractor for the windfarm. Blowhard Contracting Ltd. was engaged by the developer. The name of the developer on Blowhard Contracting Ltd.'s contract is given as Thirst for Power Group. The power grid connections, however, are being constructed by Allgemeine Elektrische AG, a contractor hired directly by the developer.

The project has not gone as intended. The developer's original electrical engineer was terminated early on and a new engineer was hired to complete the engineering work. This involved significant changes to the design of the power grid lines and connections, which affected the turbine locations and resulted in a

redesign of the wind farm after construction had commenced. As a result of these delays, Blowhard Contracting Ltd.'s costs increased significantly. When the turbines were half completed, Blowhard Contracting Ltd. made a claim to the developer for compensation due to the delay. Thirst for Power Group rejected that claim and stopped paying Blowhard Contracting Ltd. altogether. In response, Blowhard Contracting Ltd. walked off the project site.

Blowhard Contracting Ltd. has been contacted by a number of trades and suppliers seeking payment, including a metal manufacturer, Magnitogorsk Inc., that supplied metal to the blade manufacturer, W. T. Snipes Inc., a subcontractor of Blowhard Contracting Ltd. This metal was incorporated into the turbine blades that were then supplied to the project site by W.T. Snipes Inc. and installed by Blowhard Contracting Ltd.

Blowhard Contracting Ltd. has heard that Thirst for Power Group is in financial distress and has used the financing on this project to finance other projects. Blowhard Contracting Ltd. comes to you 5 weeks after walking off the project site and wonders if it can secure and pursue its claims for unpaid amounts for work performed, compensation for delay, and lost profit on the terminated contract. It also wonders what lien rights the trades and suppliers seeking payment from Blowhard Contracting Ltd. may have.

Advise Blowhard Contracting Ltd. as to its potential options and as to lien rights. Ensure to note what information may be required from Blowhard Contracting Ltd. or other sources to provide accurate advice and obtain the best security for your client.

#### **Question 4**

Years ago, Mr. Monopoly bought all of the properties running from Broadway to Arbutus in the City of Vancouver. He's now in the middle of an ambitious project to build a subway line along that route. The construction requires a large tunnel boring machine ("TBM").

To design and supply the TBM, Mr. Monopoly hired a large engineering firm with a great reputation for doing state of the art work. They are called NASA Engineering Inc. and are based in Texas. The general contractor hired by Mr. Monopoly is a local company called Moleman Contracting Ltd.

NASA delivered the TBM and it started the tunnelling. Halfway through the length of the planned tunnel, the TBM broke down because it started to rust during a week of exceptionally heavy Vancouver rain. When the TBM broke down, sparks from rusty components caused a fire that burned the nearby subway tracks installed by Moleman Contracting.

A forensic report revealed NASA Engineering could have installed a rain guard that is commonly used on TBMs in rainy environments and costs about \$200,000.

Mr. Monopoly sent a claim to the insurer under the project's Builders Risk insurance policy seeking payment for costs of replacing the TBM and the subway tracks for a total of \$5 million. The insurers responded that they did not have to pay because of the exclusion clause which reads:

*This Policy excludes:*

*all costs rendered necessary by defects of design or workmanship, and should damage occur to any portion of the Insured Property containing any of the said defects the cost of*

*replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.*

*It is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of design or workmanship.*

Mr. Monopoly does not understand Builders Risk insurance and he definitely does not understand what this is meant by an exclusion clause and what this one means. He's come to you because he's heard you are a smart lawyer. He's also really mad the engineers at NASA Engineering and wants to know his legal rights.

He needs you to:

- a) Provide a detailed outline applying case law to explain to Mr. Monopoly how Builders Risk insurance works and, specific to this exclusion clause, what is and is not covered here; and
- b) Provide a detailed outline explaining if Mr. Monopoly were to bring an action against NASA Engineering, based on the case law what might be the legal issues, what evidence would help to win on those issues, what might the damages be and where might the money come from to pay those damages?

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**SECTION 2: MULTIPLE CHOICE SECTION (20 MARKS)****(Answer All)**

1. Section 4 of the *Builders Lien Act* creates the holdback requirement such that:
  - a. The statutory holdback is the maximum amount required to be held back
  - b. The statutory holdback is mandatory
  - c. Barring any lien claims, the holdback may be paid out on the 56th day after completion
  - d. All of the above
  
2. The purpose of Section 23 of the *Builders Lien Act* is to:
  - a. Allow an Owner to cancel a lien if the lien is expired or clearly invalid
  - b. Allow an Owner who has lien holdback liability to be removed from lien disputes in return for payment into court of the maximum amount of that liability
  - c. Allow an Owner to secure a lien by paying the amount of the lien into escrow
  - d. All of the above
  
3. If a subtrade has not been paid by a general contractor, the subtrade can:
  - a. File a builders lien and sue the general contractor
  - b. File a builders lien and sue the architect
  - c. Remove any materials they have incorporated in the project
  - d. Require the owner to pay the subtrade directly
  
4. An Architect retained by an Owner on a Project:
  - a. Is entitled to file a Claim of Lien for architectural services for a proposed development when no construction proceeds
  - b. Is a contractor for the purpose of the *Builders Lien Act*
  - c. Has subconsultants who have the right to file a Claim of Lien
  - d. Is not entitled to file a Claim of Lien on the Project
  
5. In the BC *Supreme Court Civil Rules*, the rule that requires parties to prepare a list of documents and serve it within 35 days of the end of the pleading period is:
  - a. Rule 3-2
  - b. Rule 9-1
  - c. Rule 7-1
  - d. There is no such rule

6. One of the preconditions to meet the threshold for admission of expert opinion evidence:
  - a. The evidence is helpful to the trier of fact
  - b. The expert is properly qualified, including willing and able to fulfill the expert's duty to the court
  - c. The expert visited the construction site and made her own observations
  - d. The expert developed a novel approach and it can be used to resolve the issue
  
7. The prohibition of mid-term strikes and lockouts as stated in the *BC Labour Relations Code* originated from:
  - a. The Calvin Model
  - b. The Wagner Model
  - c. The Grodin Doctrine
  - d. The Delainy Doctrine
  
8. To establish discrimination under the *BC Human Rights Code*:
  - a. The complainant must be a resident of British Columbia
  - b. A finding of discriminatory intent is required
  - c. There must be a concurrent violation of s. 15 of the *Charter*
  - d. A finding of discriminatory intent is not required
  
9. For a design error, a design engineer will be found negligent unless the engineer:
  - a. Consulted with a world-renowned expert in the field before finalizing the design
  - b. Afterwards, took all possible steps to avoid damage occurring as a result of the error
  - c. Complied with the standard of care established by other engineers practicing in the same field in the same jurisdiction
  - d. All of the above
  
10. Letters of Assurance are filed with a local government building department:
  - a. To confirm that the engineer or architect will perform field reviews
  - b. To notify neighbours that the project is proceeding
  - c. To confirm that the owner has hired an licensed engineer or architect;
  - d. (a) and (c)
  
11. A municipality, before issuing a building permit, will expect to receive from the consultant
  - a. The Owner's commitment to hire the consultant
  - b. A Letter of Assurance
  - c. Drawings bearing a professional seal
  - d. All of the above



12. A P3 project is one which:
  - a. Includes green building technology
  - b. Is designed and built by a design/build contractor
  - c. Is designed and built by a public authority
  - d. Is designed, built, financed and maintained by a private consortium for a public authority
  
13. When providing field services during the course of construction an architect must:
  - a. Review the builder's work for non-conformance with the design
  - b. Represent the owner's interests in any disputes between the owner and the builder
  - c. Pay the builder's progress claims from the Project fund
  - d. Advise the builder on the construction methods to be used to build a project
  
14. A builder's general liability insurance policy provides coverage for:
  - a. Only claims for pure economic loss
  - b. Liability for property damage caused by the builder's negligence
  - c. Cost overruns on a project
  - d. Design errors
  
15. In the case of a claim being advanced against its insured, the obligation of a liability insurer under standard policy wording is to:
  - a. Pay the claim if it raises an allegation which if proven would trigger the duty to indemnify the insured
  - b. Obtain regular reports from the insured on the progress of the claim and set aside reserves to pay the insured at the end
  - c. Defend the claim if it raises an allegation which if proven would trigger the duty to indemnify the insured
  - d. Defend the claim regardless of the allegation raised and then obtain reimbursement from the insured if the allegation fails
  
16. The purpose of a privilege clause in tender conditions is to enable the owner:
  - a. To enable the owner to take a more nuanced view of the bids and not necessarily award to the lowest bid
  - a. To award a contract based on undisclosed preferences
  - b. To award the contract to the contractor of their choice want
  - c. To waive material compliance

17. A successful bidder that fails to enter into the stipulated formal contract with an owner:
- Is entitled to refuse to enter into the stipulated formal contract if the market prices have changed by 15% or more in the previous month
  - Would forfeit its Bid Bond
  - Will lose its right to bid on future tenders
  - Is legally required to find another contractor to do the work
18. The term “Bid Shopping” means:
- An owner issuing a tender inviting contractors to bid on a contract to build the owner’s project
  - An owner asking an engineer what the price of the project is likely to be
  - A contractor colluding with another contractor to rig their bid prices
  - After the close of a tender, the owner using the low bid price to solicit other bidders to lower their prices
19. The *Winnipeg Condo* case changed the law relating to:
- The complex building theory
  - Recovery for the cost of repairing shoddy workmanship
  - The duty to warn after construction is complete
  - Dangerous construction defects that result in pure economic loss
20. The role of a mediator in a construction dispute is to:
- Make sure the case does not go to trial
  - Assist the parties in arriving at a settlement
  - Make a decision on which project participant is liable for the damage
  - Cross-examine a witness from each party to establish what went wrong on the Project

**END OF EXAMINATION**