THIS EXAMINATION CONSISTS OF 10 PAGES

PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA

PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2022

LAW 439

Construction Law

Section 1

Adjunct Professors Curtis, Preston and McKenzie

**TOTAL MARKS**: 100

**TIME ALLOWED**: 3 HOURS,

INCLUDING READING AND WRITING TIME

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**NOTE:** 1. This is an open book examination.

2. ANSWER ALL QUESTIONS.

THIS EXAMINATION CONSISTS OF:

2 FACT PATTERN QUESTIONS

1 ESSAY QUESTION

15 MULTIPLE CHOICE QUESTIONS

**Section 1 – Fact Pattern Questions**

**Question 1** 25 MARKS

Transportation Corporation BC (the “Owner”) is constructing a new bridge over the Fraser River near Mission, British Columbia (the “Project”). The Owner hired an engineering firm called Smart Engineering Corporation (the “Engineer”) to design the bridge and to assist with the procurement process.

With the design drawings for the Project complete, the Owner asked the 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 following Instructions to Bidders:

* **Clause 1**: The Closing Date is December 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.
* **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 discretion of the Owner is not material, the Owner may waive the defect and accept the bid.
* **Clause 6**: Tenders will not be accepted by the Owner from any person, corporation or other legal entity (the “Party”) if the Party, or any officer or director of a corporate Party, is, or has been within a period of two years prior to the tender closing date, engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner in relation to any contract with, or works or services provided to the Owner; and any such Party is not eligible to submit a tender.

The Owner received three bids in advance of the Closing Date. The following is a summary of the three bids received:

* **Bidder 1** submitted the lowest lump sum price to complete the work. One year prior to submitting its bid, Bidder 1 started a legal proceeding against the Owner in the Supreme Court of British Columbia, seeking damages in respect of another contract that Bidder 1 had with the Owner. Furthermore, Bidder 1 has worked on other projects with the Owner and with the Engineer, and both the Owner and Engineer have found that Bidder 1 is a difficult contractor to work with, and frequently advances claims for extra compensation that have no merit, and often threatens litigation when its demands are not met.
* **Bidder 2** submitted the second lowest lump sum price to complete the work. The Instructions to Bidders required the bidders to submit a list of all of the heavy equipment that they would use for the work, including serial numbers for all heavy equipment. Bidder 2 listed all of the heavy equipment by name (i.e. excavator, tractor, etc.) but neglected to include the serial numbers. The instructions did not indicate that this was a mandatory requirement of the bid submission, and the serial numbers were only needed by the Owner for administrative reasons and would not factor in the Owner’s decision making of which bid to accept.
* **Bidder 3** submitted the highest lump sum price. Its bid was compliant with the instructions in all respects. Following submission of the bids, one of the Engineer’s employees who is friends with an employee of Bidder 3, told the employee of Bidder 3 that his company’s bid was too high for the Owner, but that if it resubmitted its bid at a 15% lower price, the Owner would cancel the tendering process, reject all bids, and award the contract to Bidder 3 at the lower price.

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

1. Briefly and succinctly explain the legal framework that governs the submission and evaluation of the bids, with reference to the seminal case (**4 marks**)
2. Does the Owner have to accept the bid from Bidder 1 because it is the lowest priced bid? With references to the Instructions to Bidders set out above and relevant case law, explain two bases upon which the Owner could reject Bidder 1’s claim. **(7 Marks)**
3. With reference to the Instructions to Bidders set out above and relevant case law, explain whether the Owner can accept the bid of Bidder 2, even though the serial numbers for the heavy equipment were not included with the bid? (**7 marks**)
4. Was there anything improper about the Engineer’s employee contacting his friend at Bidder 3 and suggesting that Bidder 3 submit a lower bid? If Bidder 3 went ahead and submitted a lower bid, would the Owner be permitted to cancel the tender, reject all tenders, and then accept Bidder’s 3’s new and lower bid? (**7 marks**)

**Question 2** 25 MARKS

Your client (Condo Inc.) is a developer.

Your client hires an architect, Design-It Ltd., to produce drawings for an upcoming project in Burnaby. Design-It makes a number of site visits and prepares a draft set of drawings for the project. Your client, however, becomes dissatisfied with Design-It’s work and fires Design-It in March of 2021.

Your client then hires another architect, WeCan Design Ltd., to prepare the design for the project. WeCan Design doesn’t like Design-It’s work, and so starts from scratch.

Your client hires WeBuild (Burnaby) Inc. as the general contractor. WeBuild (Burnaby) Inc. is one of a number of companies in the WeBuild Group that offer construction and related services in the Lower Mainland.

The building to be constructed is located on a single parcel of titled land registered with the Land Title and Survey Authority of BC (the “Project Lands”). The project also requires some civil work on an adjacent roadway owned by the City of Burnaby. There is also some equipment storage and a site office installed on a neighbouring property (the “Neigbouring Lands”) that is not owned by your client. Your client leases this neighbouring property from the fee simple owner and directly hires the trades who install the site office and provide electrical and mechanical hook-ups to it.

The project has some problems. WeBuild (Burnaby) eventually terminates its subcontract with the first forming contractor, BC Forming Inc., in November 2021. The stated reason is BC Forming’s work is very slow and the quality is poor.

WeBuild (Burnaby)’s mechanical subcontractor, HVAC Inc., then makes a number of claims for extras during the course of its work, which WeBuild (Burnaby) denies. HVAC nonetheless continues and completes its work in September 2022. On the basis of WeBuild (Burnaby)’s declaration that HVAC’s subcontract was completed in September, your client pays out HVAC’s holdback amount of $40,000 to WeBuild (Burnaby). However, later on, HVAC refuses to perform any warranty work on the basis that the aforesaid claimed extra work remains unpaid.

The architect WeCan Design eventually issues a certificate of completion for the project. The certificate states the street address, a description of the project and a description of the contract between WeBuild (Burnaby) and your client. The certificate states that WeBuild (Burnaby)’s contract was completed on October 5, 2022, but the signed certificate is dated October 10, 2022.

On December 10, 2022, the president of your client calls you and explains that WeBuild (Burnaby) has requested that its holdback and last progress draw be paid out, but when she ran a land title search, she found that the following claims of lien had been filed:

1. A claim of lien in the amount of $25,000 by F.L. Wright, who claims to have been engaged by Design-It Ltd. to provide drawings for the project. The claim of lien was filed against the Project Lands on November 5, 2022.
2. A claim of lien in the amount of $100,000 by Cal & Agregar Ltd., who claims to be a concrete supplier to BC Forming Inc. The claim of lien was filed against the Project Lands on November 20, 2022.
3. A claim of lien in the amount of $500,000 by HVAC. The claim of lien was filed against the Project Lands and the Neighbouring Lands on November 1, 2022.
4. A claim of lien in the amount of $50,000 by the civil contractor that performed the civil work on the roadway. The claim of lien names “WeBuild Group” as the entity that engaged the civil contractor. The claim of lien was filed against the Project Lands on November 18, 2022.

The total contract price for the contract with WeBuild (Burnaby) is $4.9 million. Your client maintains a holdback from WeBuild (Burnaby) in the amount of $450,000 (after payout of the $40,000 in respect of the HVAC’s subcontract). WeBuild (Burnaby)’s last progress draw invoice that your client has not yet paid is for $100,000. Your client does not dispute the $100,000 is properly due and owing to WeBuild (Burnaby).

Your client is in a panic because WeBuild (Burnaby) told your client yesterday that if your client does not pay WeBuild (Burnaby) its holdback and last draw, WeBuild (Burnaby) will be filing its own claim of lien against the Project Lands and the Neighbouring Lands. Your client’s landlord for the Neighbouring Lands has also demanded that HVAC’s claim of lien be removed, as its presence is alleged to constitute a breach of the lease agreement.

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

1. Are any of the claims of lien potentially invalid by reason of a claimant: (i) not being entitled to claim a lien; and/or (ii) not being entitled to claim against the land in question? Explain why and/or advise if there is additional information that you may require to make this determination. (**8 marks**)
2. Are any of the claims of lien out of time? Explain why and/or advise if there is additional information that you may require to make this determination. **(6 Marks)**
3. It is now well into December. Does your client need to worry about a future claim of lien filed against the Project Lands and/or the Neighbouring Lands by WeBuild (Burnaby)? Are there any other potential claims of lien that could be asserted that your client should be aware of. (**3 marks**)
4. What potential options does your client have to remove the claims of lien from the Project Lands and the Neighbouring Lands? **(6 marks)**
5. Assuming all lien claims were valid and in time, what would your client’s potential maximum exposure be? (**2 marks**)

**Section 2 – Essay Question**

Question 3 20 MARKS

In *Ledcor v Northbridge*, 2016 SCC 37:

1. what purposes of builder’s risk policies were identified by Justice Wagner;
2. why exactly did he consider those purposes in his analysis; and
3. how did they influence his final decision?

In contrast, explain in detail why the BC Court of Appeal in *Acciona v Allianz*, 2015 BCCA 347, did not need to consider the purposes of builder’s risk policies in its analysis of the exclusion clause.

**Section 3 – Multiple Choice Questions**

30 MARKS (15 questions, 2 marks per question)

1. Which of the following need be established for a stay of an action pursuant to Section 7 of the *Arbitration Act*:
   1. There must be a binding arbitration agreement
   2. The applicant must not have submitted a response on the substance of the dispute
   3. There be must an arguable case that the parties agreed the dispute was intended to be resolved by arbitration
   4. All of the above
2. In a standard CCDC-2 2020 contract that has been duly executed by the parties, if a dispute in relation to the work arises during the project, then resolution by arbitration is:
   1. Only available if both parties agree to arbitrate
   2. Mandatory if either party provides notice in writing within 10 working days of the termination of the mediated negotiations
   3. Mandatory if either party requests arbitration within 15 working days after receipt of the finding of the consultant
   4. Mandatory before the dispute can be resolved by adjudication
3. The role of a mediator in a construction dispute is to:
4. Make sure the case does not go to trial
5. Assist the parties in arriving at a settlement
6. Make a decision on which project participant is liable for the damage
7. Cross-examine a witness from each party to establish what went wrong on the Project
8. In the case *Schindler Elevator v Walsh Construction*, the critical path analysis was used by the court to determine:
   1. Which delays were a breach of contract by Schindler Elevator
   2. Which of Schindler Elevator’s delays were its own fault
   3. The cumulative total of all delays by all parties on the Project
   4. The overall project delay that was caused by Schindler Elevator’s delays
9. In the case *Graci v New Steel Roofers,* the expert provided an opinion on:
   1. A recommendation to remedy the issues with the roof
   2. Deficiencies in the installation of the roof
   3. The normal rate of degranulation of roofing tiles
   4. All of the above
10. In the case *Graci v New Steel Roofers,* the court held the workmanship warranty required the contractor to perform the installation in accordance with:
    1. Its internal manual of installation practices
    2. Industry standards and the manufacturer’s specifications
    3. Its right to return to the site to repair deficiencies
    4. A roof that would be fireproof and leak-free for 50 years
11. Your client bought a 15-year-old house and after moving in discovered a defect in the roof. If the original contractor who built the house is to be held liable, what would your client need to prove:
    1. The defect in the roof was dangerous to the health and safety of the occupants
    2. The roof was installed less than 10 years ago
    3. The vendor who sold the house to your client is bankrupt
    4. All of the above

1. The duty of care in *Winnipeg Condo* was based on:
   1. The contractor’s agreement to construct the building in a workmanlike manner
   2. The foreseeability of injury if the contractor performs the work improperly
   3. The legal policy that subsequent purchasers should be able to hold the builder responsible for defective construction
   4. All of the above
2. Your client bought a new house and immediately upon moving in discovers a crack in the foundation. In regard to the necessary first step to claim under the home warranty insurance policy, you advise her to:
   1. Bring a claim against the developer who sold her the house
   2. Confirm whether she has paid all the necessary premiums on the home warranty policy
   3. Deliver notice of the defect to the home warranty insurer
   4. Commence an action in tort against the contractor

1. Your client owns a condo that is 6-years old and he explains to you that he just found out that over the past 3 years rain water has been leaking into a small gap where the exterior wall meets the balcony and this has caused extensive rot inside the walls. In regard to the home warranty insurance policy, you advise him that:
   1. He must bring a claim before the 10-year limitation expires
   2. For a successful home warranty insurance claim he will need an expert report stating the water damage began 3 years ago
   3. He can bring a successful claim if the condo is part of a strata
   4. It is too late to bring this claim under the home warranty insurance policy
2. For a design error, a design engineer will be found negligent unless the engineer:
3. Consulted with a world-renowned expert in the field before finalizing the design
4. Afterwards, took all possible steps to avoid damage occurring as a result of the error
5. Complied with the standard of care established by other engineers practicing in the same field in the same jurisdiction
6. All of the above
7. A P3 project is one which:
8. Includes green building technology
9. Is designed and built by a design/build contractor
10. Is designed and built by a public authority
11. Is designed, built, financed and maintained by a private consortium for a public authority
12. When providing field services during the course of construction an architect must:
13. Review the builder’s work for non-conformance with the design
14. Represent the owner’s interests in any disputes between the owner and the builder
15. Pay the builder’s progress claims from the Project fund
16. Advise the builder on the construction methods to be used to build a project
17. In the case of a claim being advanced against its insured, the obligation of a liability insurer under standard policy wording is to:
18. Pay the claim if it raises an allegation which if provenwould trigger the duty to indemnify the insured
19. Obtain regular reports from the insured on the progress of the claim and set aside reserves to pay the insured at the end
20. Defend the claim if it raises an allegation which if provenwould trigger the duty to indemnify the insured
21. Defend the claim regardless of the allegation raised and then obtain reimbursement from the insured if the allegation fails
22. In construction, the purpose of a performance bond is:
    1. To bar a subcontractor from liening the project
    2. To oblige a surety to pay the builder to complete the project if the owner stops paying
    3. To oblige a surety to complete the contractual obligations of a builder who is in default
    4. To engage a surety to supervise the tender process

**END OF EXAMINATION**