



Environmental Appeal Board

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DECISION NO. 2016-WIL-007(a) and 2016-WIL-008(a)

In the matter of two appeals under section 101.1 of the *Wildlife Act*, RSBC 1996, c. 488

BETWEEN:	Kim Sedrovic and Gordon Silverthorne	APPELLANTS
AND:	Regional Manager, Recreational Fisheries and Wildlife Program	RESPONDENT
AND:	Paul Samycia and William Wilcox	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on December 19, 2016	
APPEARING:	For the Appellant Kim Sedrovic: Graeme R. Nunn, Counsel For the Appellant Gordon Silverthorne: Gordon Silverthorne For the Respondent: Meghan Butler, Stephen E. King, Counsel and Jillian Thibadeau (Articled Student) For the Third Party Paul Samycia: Paul Samycia For the Third Party William Wilcox: William Wilcox	

APPEALS

[1] These appeals arise in relation to the process used for the allocation of additional angler day quota on the Wigwam River by the Ministry of Forest, Lands and Natural Resource Operations (the "Ministry") in 2016. The Wigwam River is located in the Kootenay Region of the Province. Both of the Appellants are licensed angling guides on the Wigwam River. Both Appellants were among those guides who applied for the new angler day quota in response to written tender instructions, guidelines and bid forms (together the "Tender Package") provided to all bidders by John Krebs, the Regional Manager of Recreational Fisheries and Wildlife Programs in the Kootenay Boundary Region (the "Regional Manager").

[2] On June 28, 2016, after completion of the tender process, the Regional Manager informed the Appellants by separate letters of his decisions (the "Decisions") that their respective applications were unsuccessful. The Decisions also state that the winning applicants were: Paul Samycia for lots 1 through 4, and lots 9 through 16, for a total of 60 days; and, William (Bill) Wilcox for lots 5 through 8, for a total of 20 days. The language in the Decision letters is identical except that each is addressed to Mr. Sedrovic, and Mr. Silverthorne, respectively.

[3] By separate emails dated July 8, 2016, the Regional Manager provided both Appellants with a written explanation for the Decision regarding their respective applications, and they were advised of their right to appeal the Decision.

[4] By Notice of Appeal dated July 26, 2016 (No. 2016-WIL-007), Mr. Sedrovic appealed the Decisions insofar as they affected him. By Notice of Appeal dated July 29, 2016 (No. 2016-WIL-008), Mr. Silverthorne did likewise. Given that the appeals were from virtually identical Decisions of the Regional Manager regarding applications for the same guided angler days, the Environmental Appeal Board (the "Board") joined the appeals so that they may be heard together (group appeal No. 2016-WIL-G01).

[5] The Board has the authority to hear this appeal under Part 8 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides:

(5) On an appeal, the appeal board may

- (a) send the matter back to the regional manager or director, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[6] Mr. Sedrovic asks the Board to reverse or vary the Decisions and to allocate some or all of the new guided angler days to him, or alternatively, send the matter back to the Regional Manager for reconsideration with directions.

[7] In his Notice of Appeal, Mr. Silverthorne initially sought a review of "the carrying capacity of this river system as it is totally under utilized" and asked that nearly 30 guided days that had been removed from him under the classification process in 2006 be returned to him as his relief on his appeal. In his written submissions, Mr. Silverthorne made no reference to the relief sought in his Notice of Appeal, and instead sought essentially the same relief as Mr. Sedrovic summarized above.

[8] The Regional Manager and the successful bidders, the Third Parties Mr. Samycia and Mr. Wilcox, ask the Board to confirm the Decisions and dismiss both appeals.

BACKGROUND

The Legislative Framework and Background leading to issuance of the Tender Package by the Regional Manager

[9] Under sections 53(1)(b), (g) and (2) of the *Wildlife Act*, the Lieutenant Governor in Council (i.e. Cabinet) may create regulations that impose restrictions on guiding for fish and angling, as follows:

53 (1) The Lieutenant Governor in Council, by regulation, may do one or more of the following:

...

- (b) limit the number of angler days on which members of a class of persons may be guided for fish on a stream or lake or in an area of British Columbia during a specified period;

...

- (g) provide for the allocation of angler day quotas to and among angler guides and for the disposal of angler day quotas by auction or tender or any other means;

...

- (2) For the purpose of subsection (1) (e), (g), (h), (i), (j), (k) and (l), the Lieutenant Governor in Council may make different regulations for different classes of streams or lakes or for different areas of British Columbia.

[10] Section 1 of the *Wildlife Act* includes the definitions of "angler day" and "angler day quota" as follows:

1 (1) In this Act:

"angler day" is a unit representing one person angling during any part of a day and is used to determine the extent to which a stream, lake or area specified under section 53 may be used for angling, for example, "a limit of 1 000 angler days" means that the total obtained by adding together the number of anglers using the stream, lake or area on each day of a specified period must not exceed 1 000;

"angler day quota" means the number of angler days allocated by the regional manager to an angling guide for the use of the angling guide's clients, or a class of those clients, during a period specified under section 53;

[11] In 2006, the Wigwam River was designated as "classified water" in the Kootenay Region under the *Angling and Scientific Collection Regulation*, B.C. Reg. 125/90 ("*Regulation*"), in force under the *Wildlife Act*. As a result of this designation, the available angler day quota on the Wigwam River was limited to a maximum of 150 guided angler days in order to protect the fish stock and integrity of the river. Before this designation, the *Regulation* imposed no limit on the number of guided angler days on the Wigwam River.

[12] In 2014/15, the Ministry reviewed and updated the management plan for the Kootenay Region classified waters, including the Wigwam River. The 2015 Kootenay Angling Management Plan dated September 2015 ("2015 Management Plan") summarizes the regulatory measures and amendments that address the East Kootenay region, including the Wigwam River. This review resulted in an amendment to the *Regulation* that increased the angler day quota on the Wigwam River from 150 to 230 days. After the *Regulation* was amended, the 80 additional guided angler days on the Wigwam River became available for allocation to qualified guides.

[13] The allocation of angler day quota for classified waters is the responsibility of the Regional Manager in accordance with sections 11(1), (1.1) and (1.2) of the *Regulation*, which provide:

- 11** (1) Subsections (1.1) to (2) apply with respect to angler day quota for classified waters.
- (1.1) Subject to subsection (1.2), a regional manager may allocate angler day quota to an angling guide by issuing a certificate to the angling guide only if
- (a) a management plan applies to the classified water for which angler day quota is to be issued,
 - (b) the allocation is in accordance with
 - (i) the management plan, and
 - (ii) the requirements of this section, and
 - (c) the period for which the angler day quota is allocated is 20 years or less.
- (1.2) A regional manager must use one of the following processes for allocating angler day quota for classified waters:
- (a) a process that requires an angling guide to bid for angler day quota for one or more classified waters by sealed tender or auction;
 - (b) a process that requires an angling guide to submit a written proposal for the use of angler day quota;
 - (c) a process that requires an angling guide to submit a sealed tender referred to in paragraph (a), together with a written proposal, as referred to in paragraph (b).

[14] While it has not been put in issue by the Appellants, the Panel finds as a fact that the 2015 Management Plan covering Wigwam River is a "management plan" as that term is used in section 11(1.1) of the *Regulation*.

[15] In deciding how to allocate the 80 additional guided angler days on the Wigwam River within the parameters of section 11(1.2) of the *Regulation*, the Regional Manager took into account the processes for allocating guided angler days used in other regions, such as Cariboo and Skeena. He also reviewed a Ministry policy titled "Disposition of Angler Days to Guides on Classified Waters Via Bid and Prospectus", dated May 1991 (the "Policy"), which, though outdated, remains in effect and is intended as a guideline for the process respecting the allocation of guided angler days.

[16] The Regional Manager decided to allocate 20 of the additional 80 days of angler day quota by a sealed tender ("bid only") process, and the remaining 60 days by a sealed tender together with a written proposal ("bid & proposal") process, as contemplated by sections 11(1.2)(a) and 11(1.2)(c) of the *Regulation*, respectively. In bid only allocation processes, the winning bid is selected solely based on highest bid offered, assuming any other qualifying criteria have been met. In contrast, in allocation processes that involve written proposals, the applicants are asked to include much more information, including their past experience and

business history as an angling guide, any history of violations of fisheries laws, and how their business contributes to fisheries management and conservation.

[17] As the Regional Manager was implementing both a bid only and a bid & proposal process, he decided that the bid & proposal application should emphasize the proposal aspect. As a result, in evaluating the bid & proposal applications, the Regional Manager decided to allot 15 points for the bid component and 85 points for the proposal component, for a combined total of 100 points. This allocation breakdown was a departure from the guideline found in the Policy.

[18] The Regional Manager further decided that the 80 days of angler day quota to be allocated on the Wigwam River would be divided into 16 lots, with each lot consisting of 5 days of the new angler day quota. Each 5-day lot is described as a numbered "LOT" in the application documents. LOTS 1-4 (20 days total) would be allocated under the bid only process. LOTS 5-16 (60 days in total) would be allocated under the bid & proposal process. This decision to offer LOTS was also a departure from the guideline in the Policy, but consistent with the process used in other regions of the Province.

The Application Process

[19] On or about March 18, 2016, the Regional Manager sent an email to all angling guides in the Kootenay Region, including the Appellants and the Third Parties, notifying them of the upcoming allocation of 80 new guided angler days on the Wigwam River set to take place in April 2016. The email further set out the Regional Manager's intention to allocate approximately two thirds of the new days in separate lots by bid & proposal, and to allocate the remaining days in lots by bid only. The email also stated that the intention was to "offer potential new entrants an opportunity to compete for the new days" under the bid only process, since no information about past guiding experience is scored under a bid only process, and to offer existing angling guides "credit for diligent use and existing investment" under the bid & proposal process.

[20] The Regional Manager, with the assistance of Kevin Heidt, the Senior Fisheries Technician for the Kootenay Boundary Region, and Jeff Burrows, Senior Fish Biologist for the Kootenay Boundary Region, finalized the contents of the Tender Package governing the allocation process.

[21] On or about April 24, 2016, the Regional Manager sent a follow-up email to the same angling guides enclosing the Tender Package with a cover email stating:

All the information necessary to prepare your bid/proposal for new Wigwam and/or Skookumchuk rod days is attached. Please read the instructions carefully to assist you in your preparations.

Please note the following:

- 1) Bid/Proposals & Bids are due at 430 pm MST on **May 20, 2016** ...
- 2) Please contact Kevin Heidt @ 250 342-4290 if you have questions.

[22] Following receipt of the Tender Package, and prior to submitting their applications in response to the Tender Package, both Mr. Sedrovic and Mr. Silverthorne separately contacted Mr. Heidt on a number of occasions to discuss the bid & proposal process with him. According to an affidavit sworn by Mr. Heidt,

during these conversations, neither of the Appellants asked Mr. Heidt for clarification on what the bid amount was supposed to reflect.

The Tender Package

[23] The Tender Package for the Wigwam River bid only allocation included one printed page of instructions containing nine bullet points with a one-page bid form.

[24] The printed instructions for the bid only process included the following:

- There are four lots available on the Wigwam River for allocation through the BID ONLY process. Each lot will consist of 5 guided angler days each (total of 20 guided angler days). These lots will be referred to as LOT 1, LOT 2, LOT 3, and LOT 4, when referencing the lot you chose to bid on in the BID ONLY form.

...

- Bids can be of any monetary value \geq \$0.

...

- The winning bid will be based solely on the highest bid offered for each lot, assuming the other qualifying criteria have been satisfied.

...

[25] The bid form for the bid only process included the following:

...

Having met the aforementioned criteria, I am submitting a bid in consideration for a 10 year lease (renewable after 5 years), for LOT #____ (one of lots # 1-4) on the WIGWAM RIVER in Kootenay Region, and hereby offer the Province of British Columbia: \$_____.

[26] The Tender Package for the Wigwam River bid & proposal allocation included two printed pages of instructions containing eleven bullet points, two printed pages of proposal form guidelines, and a one-page bid form.

[27] The printed instructions for the bid & proposal process included the following:

- There are twelve lots available on the Wigwam River for allocation through the BID & PROPOSAL process. Each lot will consist of 5 guided angler days each (total of 60 guided angler days). These lots will be referred to as LOT 5, LOT 6, LOT 7, LOT 8, LOT 9, LOT 10, LOT 11, LOT 12, LOT 13, LOT 14, LOT 15 and LOT 16 when referencing the lot you chose to bid on in the bid form for BID & PROPOSAL.

...

- Bids can be of any monetary value \geq \$0.

...

- The BID & PROPOSAL application process for the Wigwam River requires the applicant to submit a detailed proposal along with a bid form. Refer to the instructions included in the BID & PROPOSAL package and ensure you have included all required information. An overview and a list of

scoring criteria/points are included in the instructions to assist in writing the proposal (see "Proposal Instructions – Wigwam River"). ...

...

- The winning BID & PROPOSAL application for each lot will be determined by the highest scores for each lot (15% for the bid component and 85% for the proposal component), assuming all other qualifying criteria have been satisfied.

...

[28] The proposal form guidelines for the bid & proposal process identified five subject categories to be covered in the proposal and set out the following maximum points available for allocation under each category to make up the maximum 85 points available for the proposal:

Angling Guide Experience = 10 points

Angling Guide Experience – Kootenay Region = 10 points

Angling Guides – Kootenay Classified Water = 25 points

Compliance Record = 15 points

Proposal quality/Business Case/Value Added = 25 points

[29] The proposal form guidelines for the bid & proposal process also set out key details to be addressed under each of the five subject categories, and included the following statement:

Overall score of the proposal will be based on a summary evaluation of the details provided, an evaluation of diligent use, compliance records and the quality of the proposal provided. Please ensure you include the details necessary for evaluation. ...

[30] The bid form for the bid & proposal process included the following:

Having met the aforementioned criteria, in addition to my proposal, I am submitting a bid in consideration for a 10 year lease (renewable after 5 years), for LOT #___ (one of lots # 5-16) on the Wigwam River in Kootenay Region, and hereby offer the Province of British Columbia: \$_____.

Ranking the Applications

[31] The Regional Manager established a review committee to assist him in assessing and ranking the applications received. The committee was made up of Ministry employees Mr. Heidt, Mr. Burrows, and Joe Strong who is also a Fisheries Technician (the "Committee"). The Committee reviewed the applications that were received, and then made recommendations to the Regional Manager.

The bid only process

[32] Both of the Appellants, as well as Mr. Samycia (and others), submitted a bid for each of the four LOTS that were available (LOTS 1-4) on the Wigwam River under the bid only process.

[33] Mr. Samycia was the highest bidder for each of LOTS 1-4, having bid \$1525 for LOT 1, \$1575 for LOT 2, \$1775 for LOT 3, and \$1825 for LOT 4.

[34] Mr. Sedrovic bid \$501 for each of LOTS 1-4, while Mr. Silverthorne bid \$501 for each of LOT 1 and LOT 2, \$601 for LOT 3, and \$701 for LOT 4.

[35] Based on the instruction in the Tender Package that "The winning bid will be based solely on the highest bid offered for each lot, assuming the other qualifying criteria have been satisfied", the Regional Manager concluded that Mr. Samycia was the successful bidder under the bid only process on LOTS 1-4.

The bid & proposal process

[36] Both of the Appellants as well as Mr. Samycia submitted bids & proposals for each of the 12 LOTS that were available (LOTS 5-16) on the Wigwam River under the bid & proposal process. Mr. Wilcox only submitted bids & proposals for LOTS 5-8.

[37] There were a total of seven bids & proposals submitted for LOT 5, a total of six bids & proposals submitted for LOTS 6-8, a total of five bids & proposals submitted for LOTS 9-11 and a total of four bids & proposals submitted for LOTS 12-16.

Methodology – bid points

[38] With respect to the 15/100 points allocable to the bid portion of the bid & proposal application, the Regional Manager instructed the Committee to rank the submitted bids from highest to lowest and assign a value for the first place bid, second place bid, and so on. This was done by dividing the maximum available 15 points by the number of bids received per LOT, with the resulting quotient being the basis upon which the bids were scored from 1st place on down. For example, if a total of six bids were received, then $15/6 = 2.5$ points per place were to be allocated. In this example, first place is awarded 15 points, 2nd place 12.5 points, 3rd place 10 points etc., down to 6th place of 2.5 points. Identical bid amounts were awarded identical points. This scoring methodology adopted by the Regional Manager for the allocation of the 15 available bid points was not disclosed to bidders in the Tender Package.

[39] The Committee and the Regional Manager applied the above described methodology to the scoring of the bid portion of the bid & proposals submitted by all bidders including the Appellants and Third Parties respectively for LOTS 5-16, with the following results:

1. Based on his bid of \$250 for each of LOTS 5-16 Mr. Sedrovic received bid scores ranging from 2.5-3.8 points;
2. Mr. Silverthorne received bid scores ranging from 5-11.3 points based on his bids of \$301 for each of LOTS 5-8; \$351 for each of LOTS 9-12; \$376 for each of LOTS 13-14; and \$401 for each of LOTS 15-16;
3. Based on his bid of \$1000 for each of LOTS 5-8, Mr. Wilcox received bid scores of 12.5 points; and
4. Mr. Samycia received bid scores of 15 points for his bids of \$1325 for LOT 5, \$1375 for LOT 6, \$1425 for LOT 7, \$1475 for LOT 8, \$1525 for LOT 9, \$1575 for LOT 10, \$1625 for LOT 11, \$ 1675 for LOT 12, \$1725 for LOT 13, \$1775 for LOT 14, \$1825 for LOT 15 and \$1875 for LOT 16.

Methodology – proposal points

[40] With respect to the 85/100 points allocable up to specified maximums under each of the five subject categories to be covered in the proposal, the Regional Manager instructed the Committee to score the proposals under each of the five categories by applying a particular methodology. This methodology was also not disclosed to bidders in the Tender Package.

[41] Under “Angling Guide Experience”, a maximum of 10 points were available based on the applicant’s years of experience as an angling guide. Guides with over 10 years of experience were awarded five points, and up to five points were awarded for the operations, diversity and scale of the applicant’s guiding experience generally.

[42] Under “Angling Guide Experience – Kootenay Region”, a maximum of 10 points were available, with five points awarded for over 10 years of experience. Up to five points were also awarded for the operations, diversity and scale of the applicant’s guiding experience specific to the Kootenay region.

[43] Under “Angling Guides – Kootenay Classified Water”, the maximum of 25 points was scored by applying the following methodology:

1. Up to five points were available for the operations, diversity and scale of the guided angling experience, specifically in classified waters within the Kootenay Region, including whether the applicant operated a lodge or shop;
2. Up to five points were available based on the applicant’s years of experience as an angling guide in classified waters within the Kootenay Region, with five points given to guides with over 10 years of experience, and three points given to guides with 5-10 years of experience;
3. Up to five points were available based on the applicant’s diligent use of the Kootenay Class II license(s) held by the applicant;
4. Up to five points were available for providing up-to-date, complete and accurate Angling Guide Reports, as required by the Kootenay Class II license conditions; and
5. Up to five points were available for the applicant’s past investment(s) related to the Wigwam River watershed.

“Diligent use” (item 3 above) represented the percentage of each applicant’s allocated angler days for the Kootenay Classified Waters that were in fact used each year, based on information provided to the Ministry by guides under self-reporting obligations. Five points were awarded for diligent use of over 75%; four points for diligent use between 50-75%, three points for diligent use between 25-50%, etc.

[44] Under “Compliance Record”, the maximum of 15 points was scored by applying the following methodology:

1. Up to five points were available for the applicant’s reporting performance, including the past provision of up-to-date, complete and accurate Angling Guide Reports;

2. Up to five points were available, subject to deduction, for any adverse entries against the applicant in the Conservation Officer On-line Reporting System; and
3. Up to five points were available based on any additional data, such as data/files from the River Guardian Program.

[45] Under "Proposal quality/Business Case/Value Added", the maximum of 25 points was scored by applying the following methodology:

1. Up to 10 points were available to the applicant for the quality of the written proposal;
2. Up to five points were available to the applicant for the business case or operating plan provided; and
3. Up to 10 points were available to the applicant for value added by the applicant to the relevant area, including past and future value added, contributions to conservation or fisheries management objectives, and the applicant's environmental footprint.

[46] The Committee and the Regional Manager applied the above described methodology to the scoring of the proposal portion of the bid & proposals submitted by all bidders including the Appellants and Third Parties respectively for LOTS 5-16 with the following results:

1. Mr. Sedrovic received a score of 77/85 points.
2. Mr. Silverthorne received a score of 76/85.
3. Mr. Samycia received a score of 80/85.
4. Mr. Wilcox received a score of 83/85.

Scoring results for Lots 5-16

[47] Mr. Wilcox had the highest scores for LOTS 5-8 with a combined score of 95.5 for each LOT; made up of 83 points for his proposal and 12.5 points for each of his bids.

[48] Mr. Samycia had the highest scores for LOTS 9-16, with a combined score of 95 for each LOT; made up of 80 points for his proposal and 15 points for each of his bids;

[49] The results of the combined scores for the Appellants and Third Parties for LOTS 5-16 are summarized as follows:

APPLICANT	LOT 5	LOT 6	LOT 7	LOT 8	LOT 9	LOT 10	LOT 11	LOT 12	LOT 13	LOT 14	LOT 15	LOT 16
Wilcox	95.5	95.5	95.5	95.5								
Samycia	95	95	95	95	95	95	95	95	95	95	95	95
Silverthorne	81	81	81	81	82	82	82	83.5	87.3	83.5	83.5	83.5
Sedrovic	79.5	79.5	79.5	79.5	80	80	80	80.8	80.8	80.8	80.8	80.8

Regional Manager's Decisions on Lots 5-16

[50] The Regional Manager reviewed the Committee's scoring results, including how each bid & proposal application was weighted, with the Committee members. The Regional Manager also reviewed each of the submitted proposals, and agreed with the Committee's recommendations. Based on the instructions in the Tender Package that "The winning BID & PROPOSAL application for each lot will be determined by the highest scores for each lot (15% for the bid component and 85% for the proposal component), assuming all other qualifying criteria have been satisfied", the Regional Manager decided that Mr. Samycia was the successful bidder on his bid & proposal applications on LOTS 9-16, Mr. Wilcox was the successful bidder on his bid & proposal applications for LOTS 5-8, and each of the Appellants were unsuccessful in their applications.

Notice of Decisions and Appeals

[51] By letters dated June 28, 2016, the Appellants were informed in writing by the Regional Manager of his Decisions. In addition, in follow-up emails dated July 8, 2016, the Regional Manager provided each of the Appellants, as well as all other unsuccessful bidders, with a written explanation of the Decisions.

[52] By a responding email dated July 10, 2016 to the Regional Manager, Mr. Silverthorne offered an explanation for why his submitted bids were low, stating "I made my bid on a per rod day basis". He further stated "I felt I understood this process and have made an error" in his submitted bids.

[53] In his Notice of Appeal, Mr. Sedrovic appealed the Decisions with respect to the bid & proposal process for LOTS 5-16 inclusive. Mr. Sedrovic requested a reconsideration of the proposal scoring, based on a number of factors including his extensive experience and history on the classified waters in the East Kootenay Region. On the bid scoring, Mr. Sedrovic asserted that his bid of \$250 per LOT was in fact meant to be a bid of \$250 per day, which would be equivalent to \$1250 per LOT (based on five days per LOT). As set out above, Mr. Sedrovic asks the Board to reverse or vary the Decisions and to allocate some or all of the new guided angler days to him, or alternatively, send the matter back to the Regional Manager for reconsideration with directions.

[54] In his Notice of Appeal, Mr. Silverthorne appears to have initially intended to appeal the Decisions with respect to both the bid & proposal process for LOTS 5-16

as well as the Decisions on the bid only process with respect to LOTS 1-4. In his written submissions, while Mr. Silverthorne defines the term "Lots" to include all 16 possible guiding lots on the river and he references his erroneous bid amounts for LOTS 1-4 in paragraph 7 f., he makes no submissions with respect to his unsuccessful bid only applications on LOTS 1-4. Mr. Silverthorne limited the substance of his submissions to his unsuccessful bid & proposal applications on LOTS 5-16. In his submissions, the Regional Manager notes Mr. Silverthorne's apparent abandonment of his appeal with respect to LOTS 1-4. However, to avoid any further confusion on this aspect of the matter and to ensure that all issues are addressed, the Panel has proceeded on the basis that Mr. Silverthorne's appeal is from the Decisions in relation to all of LOTS 1-16.

[55] In his Notice of Appeal, Mr. Silverthorne questioned the correctness of the Decisions on his proposal scoring, comparing his guiding business to that of the successful bidders. On the bid scoring, Mr. Silverthorne stated that the bid process was not clear with regard to how the bid should be completed, and that there was no indication on the bid line that it was to be in the LOT format. Mr. Silverthorne stated that, as a result, his bid was presented on a per rod day basis, but should have been for a LOT which is five rod days. In his written submissions, Mr. Silverthorne asks the Board to reverse or vary the Decisions and to allocate some or all of the LOTS to him, or alternatively, send the matter back to the Regional Manager for reconsideration with directions.

ISSUES

[56] Before setting out the issues in these appeals, the Panel finds it logical to first address Mr. Silverthorne's request, in his Notice of Appeal, for a review of "the actual carrying capacity of this river system as it is totally under utilized", and his request for the return of the "nearly 30 guided days" that were "removed" from him under the classification process in 2006. Mr. Silverthorne has presented no evidence or submissions in support of this relief. On this matter, the Panel finds that it was the 2006 change in the *Regulation*, referred to above, that resulted in Mr. Silverthorne losing guided days in 2006. The Panel further finds that this ground of appeal and claim for relief ought to be struck or dismissed, because it is clearly beyond the Board's jurisdiction. There is no question that the angler day quota limit for the Wigwam River is established in the *Regulation* by the Lieutenant Governor in Council, and not in the Decision of the Regional Manager. Under sections 101 and 101.1(1) of the *Wildlife Act*, certain decisions of a regional manager or a director may be appealed to the Board, but not decisions of the Lieutenant Governor in Council. Even if decisions of the Lieutenant Governor in Council could be appealed to the Board, the time limit for an appeal of the 2006 changes in the *Regulation* would have expired long ago. Section 101.1(2) of the *Wildlife Act* provides that the time limit for commencing an appeal is 30 days after notice of the decision is given to the affected person. Accordingly, this aspect of Mr. Silverthorne's appeal must be struck or dismissed because it is clearly outside of the Board's jurisdiction.

[57] In deciding these appeals, the Panel has considered the following Issues:

1. Do the principles of fairness and equality apply to the tender process that led to the appealed Decisions?
2. Was the Regional Manager's decision to depart from certain guidelines of the Ministry Policy in setting the specifications for the bid & proposal processes either unfair to bidders or otherwise an error?
3. With respect to the proposal component of the bid & proposal process, in addition to disclosing the criteria and the number of points to be applied to those criteria, was it necessary in order to be fair to all bidders that the Tender Package also describe the particular methodology that would be adopted in allocation of points to those criteria?
4. Was the Tender Package unclear or ambiguous as to the meaning of the term "LOT"? If not, should the Appellants' bid scores be adjusted upwards as sought by the Appellants based on their bid amounts being in error or should their bid scores be based on the actual bid amounts submitted by them in the tender process?
5. Should the scoring of the proposal component of the Appellants' applications be adjusted upward as sought by the Appellants?

RELEVANT LEGISLATION

[58] The relevant sections of the *Wildlife Act* and the *Regulation* are reproduced where they are referred to in the body of this decision.

DISCUSSION AND ANALYSIS

1. Do the principles of fairness and equality apply to the tender process that led to the appealed Decisions?

The Parties' submissions

[59] The Appellants submit that the decision-maker in a tender process, such as the Regional Manager in the process for allocating the LOTS, has a duty to ensure that all bidders are treated fairly and equally, as confirmed by the Supreme Court of Canada in *Martel Building Ltd. v. R.* [2000] 2 SCR 860; [2000] SCJ No. 60 [*Martel*], at para. 88. The Appellants further submit that this principle was cited and applied by the Board in *Stan Doll and Dustin Kovacovich v. Regional Manager, Recreational Fisheries and Wildlife Program* (Decision No. 2012-WIL-021(b) and 2012-WIL-022(b), issued April 17, 2013) [*Doll*], at para. 179. In addition, the Appellants submit that the Board's decision in *Andrew Rushton v. Regional Manager, Recreational Fisheries and Wildlife Program* (Decision No. 2014-WIL-020(a), issued May 8, 2015) [*Rushton*], at para. 62, confirmed that the implied duty of equality and fairness in tender processes leads to the proposition that a decision rendered with erroneous facts is unfair and should be overturned if those facts were material to the decision.

[60] Applying those principles to the present case, the Appellants argue that the Regional Manager and the Committee made a mistake of fact or a material error in

considering and scoring the Appellants' applications. Specifically, regarding the bid component, the Appellants submit that they (the Appellants) misapprehended the "confusing" bid form and submitted single day bids rather than five-day LOT bids. Regarding the bid & proposal process, the Appellants submit that their proposal scores should have been higher based on the five factors that were considered.

[61] The Regional Manager agrees with the Appellants that the principle of treating all applicants fairly and equally, as cited in *Martel* and adopted by the Board in *Doll*, applies in this case. However, the Regional Manager submits that *Rushton* is distinguishable on its facts, because the error in that case was made by the regional manager whereas the error in this case was made by the Appellants. The Regional Manager submits that the instructions in the Tender Package were clear, and the Appellants had ample opportunity to clarify any aspects that they were unclear about before they submitted their applications. Moreover, the Regional Manager submits that even if the Board accepts that the Appellants' bids were a material error that should result in adjusted bid scores, the Appellants still would not achieve high enough scores to win any of LOTS 5-16.

The Panel's findings

General Principles of the Law of Tenders

[62] The Panel agrees with the Board's findings in *Doll* at paras. 178-180, to the effect that the tender process used by a regional manager to allocate angler day quota is governed by the general principles of the law of contract applying to tenders. Those principles have been set out by the Supreme Court of Canada in decisions starting with *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 SCR 111 [*Ron Engineering*], and including *Martel*.

[63] The general principles of the law of tenders, which the Panel finds are applicable to this appeal, include the following as discussed at paras. 79 to 83 in *Martel*:

General Principles of the Law of Tenders

79 Any discussion of the duties or obligations arising from the tender process must begin with reference to *The Queen in Right of Ontario v Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 SCR 111. This case established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid in response to the call for tenders, may become a binding contract. Estey J. explained that this contract, which he labelled "Contract A", imposed certain obligations upon the contractor who had submitted a tender.

80 In *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, this Court confirmed that Contract A also imposes obligations on the owner... This Court stated as follows, at para. 19:

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 the

tender, depending upon whether the parties intended 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.

82 The Court [in M.J.B.] noted that in determining the intention of the parties, attention must be paid to the express terms of the contract.

83 It is now well established that parties to a tender process may have reciprocal obligations arising from Contract A either expressly or impliedly.

[64] Based on the forgoing statement of the applicable law, the Panel finds that the Tender Package established the express contractual terms in effect between the Ministry and all those who submitted bid only and bid & proposal applications in response to the call for tenders, including both Appellants and Third Parties. These terms include reciprocal obligations.

[65] Material express contractual terms binding both the Ministry, and all those who submitted bid only and bid & proposal applications in response, set out in the Tender Package include the following from the printed instructions for the bid only process:

There are four lots available on the Wigwam River for allocation through the BID ONLY process. **Each lot will consist of 5 guided angler days each** (total of **20 guided angler days**). **These lots will be referred to as LOT 1, LOT 2, LOT 3, and LOT 4**, when referencing the lot you chose to bid on in the BID ONLY form.

Bids can be of any monetary value >_\$0.

The winning bid will be based solely on the highest bid offered for each lot, assuming the other qualifying criteria have been satisfied.

[emphasis added]

[66] The material express contractual terms from the bid form for the bid only process include:

Having met the aforementioned criteria, **I am submitting a bid** in consideration for a 10 year lease (renewable after 5 years), **for LOT #____** (one of lots # 1-4) on the WIGWAM RIVER in Kootenay Region, and hereby offer the Province of British Columbia: \$_____.

[emphasis added]

[67] The material express contractual terms from the printed instructions for the bid & proposal process include:

There are twelve lots available on the Wigwam River for allocation through the BID & PROPOSAL process. **Each lot will consist of 5 guided angler days each** (total of **60 guided angler days**). **These lots will be referred to as LOT 5, LOT 6, LOT 7, LOT 8, LOT 9, LOT 10, LOT 11, LOT 12, LOT 13, LOT 14, LOT 15, and LOT 16**, when referencing the lot you chose to bid on in the bid form for BID & PROPOSAL.

Bids can be of any monetary value >_\$0.

The BID & PROPOSAL application process for the Wigwam River requires the applicant to submit a detailed proposal along with a bid form. **Refer to the instructions included in the BID & PROPOSAL package and ensure you have included all required information.** An overview and a list of scoring criteria/points are included in the instructions to assist in writing the proposal (see "Proposal Instructions – Wigwam River").

The winning BID & PROPOSAL application for each lot will be determined by the highest scores for each lot (15% for the bid component and 85% for the proposal component), assuming all other qualifying criteria have been satisfied.

[emphasis added]

[68] The material express contractual terms from the bid form for the bid & proposal process include:

Having met the aforementioned criteria, in addition to my proposal, **I am submitting a bid** in consideration for a 10 year lease (renewable after 5 years), **for LOT #___** (one of lots # 5-16) on the Wigwam River in Kootenay Region, and hereby offer the Province of British Columbia: \$_____.

[emphasis added]

[69] The material express contractual terms from the proposal form guidelines for the bid & proposal process include:

Overall score of the proposal will be based on a summary evaluation of the details provided, an evaluation of diligent use, compliance records and the quality of the proposal provided. **Please ensure you include the details necessary for evaluation.**

[emphasis added]

Implied term of fairness

[70] The Supreme Court of Canada in *Martel* went on to observe that various appellate courts have found the need to imply a contractual term into "Contract A", as mentioned in *Martel* (i.e., the invitation to tender which may, upon the submission of a bid in response, become a binding contract), to treat all bidders fairly and equally. In *Martel*, the Court stated the law at paras. 85 and 88 as follows:

85 The implied contractual duty of fair and equal treatment was also discussed in *Martselos Services Ltd. v Arctic College* (1994), 111 DLR (4th) 65 (NWTCA), leave to appeal refused, [1994] 3 SCR viii. The majority held that in order to protect the integrity of the bidding system, there should be "a duty to treat all bidders equally but still with due regard to the contractual terms incorporated into the tender call (p. 71)...

88 In the circumstances of this case, we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process.... Implying an obligation to treat all

bidders fairly and equally is consistent with the goal of protection and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

[71] The above statement of the law from *Martel* concerning the implied contractual duty of fair and equal treatment has been accepted by the Board in previous decisions as applicable to the allocation process for angler day quota under section 11 of the *Regulation*: see *Doll* and *Rushton*. The Panel agrees with that approach.

[72] Based on the forgoing statement of the applicable law, the Panel finds that the contract in effect between the Ministry and all those who submitted bid only and bid & proposal applications in response to the call for tenders, including both Appellants and Third Parties, includes the implied contractual term that the Regional Manager would treat all bidders fairly and equally throughout the tender process.

[73] The Panel notes that the implied obligation on the Regional Manager to treat all bidders fairly and equally is for the benefit of both the successful as well as the unsuccessful bidders.

2. Was the Regional Manager's decision to depart from certain guidelines of the Ministry Policy in setting the specifications for the bid & proposal processes either unfair to bidders or otherwise an error?

[74] When formulating the specifications and requirements applicable to the allocation process under section 11(1.2) of the *Regulation*, the Regional Manager chose to depart from the Ministry Policy guidelines with respect to both the offering of the angler day quota by LOTS and the allocation breakdown under the bid & proposal process (85 proposal/15 bid). For bid & proposal processes, the Ministry Policy sets out a procedure whereby each bidder's score is calculated by dividing the bidder's price per day by the highest price per day of all proposals, and multiplying the resulting number by a 33.3%.

[75] In *Martel*, the Court held at paras. 117 and 118:

A party calling for tenders has the discretion to set out its own specifications and requirements. ...

The terms of the call may grant a great deal of discretion upon the tender calling authority in evaluating the bid, and tenderers must make various assumptions and estimations in submitting a tender. As such, inherent risks are involved in submitting a tender bid, risks of which *Martel* was aware. ...

[76] In *DeLuca v. Deputy Regional Manager, Recreational Fisheries and Wildlife Programs*, (Decision No. 2016-WIL-003(b), issued September 21, 2016), the Board held at paras. 77 and 78:

The Ministry's policies and procedures set out guidelines to assist the Regional Manager, but there is no mandatory language in these documents that, in any way, restricts the discretion to be exercised by the Regional Manager.

The wide scope of discretion that the Regional Manager may exercise was recognized by the Board in its decision ... [in *DeLuca v. Regional Manager of Fish and Wildlife*, (Decision Nos. 2013-WIL-046(a) & 2013-WIL-047(a), October 21, 2013)]. In that decision, the Board considered the role of the Ministry's policies and procedures in the context of that discretion and found at paragraph 36:

By way of conclusion to this discussion, the scheme of the *Wildlife Act* grants wide discretion to officials; the procedures constitute non-binding advice/guidance for officials only, to assist them in the exercise of that discretion.

[77] In *Doll*, the Board held at para. 175:

The Panel agrees with the Regional Manager's position that he has the discretion to adapt and modify policy and procedures to address particular situations within his operational unit. In fact, it could be contrary to law if he did not do so. As stated by the Board in *Pacific Northwest Raptors Ltd. v. British Columbia (Ministry of Environment)* [2007] B.C.E.A. No. 2 at paragraph 45-46:

45 The exercise of discretion is also properly informed by any relevant policies and guidelines. As a matter of law, such policies are relevant and properly considered, but they cannot result in fettering of the Regional Manager's discretion.

46 Discretion must be exercised, and policies applied, fairly and reasonably, with a view to promoting the goals and objects of the Act. ...

[78] Based on the foregoing authorities, the Panel finds that the Regional Manager had the discretion to depart from Policy guidelines. It was within the scope of his discretion to weight the bid at a maximum of 15 out of 100 points, rather than at 33.3% of the total score as suggested in the Policy. The Tender Package notified all bidders of the 15/85 weighting for the bid and proposal, respectively. The Panel finds that Regional Manager exercised his discretion in a manner that was neither unfair to the bidders nor otherwise in error.

[79] The Panel also finds that the Regional Manager exercised his discretion with a view to promoting the goals and objects of the *Wildlife Act* and *Regulation* by giving more weight to the proposal and less weight to the bid, as compared to the Policy guidelines. This is evident from the fact that the proposal took into account criteria such as the applicant's past guiding experience and compliance history, whereas the bid is simply a monetary value.

[80] In any event, the Panel notes that giving the bids greater weight, such as 33.3% as recommended in the Policy, would actually have the effect of reducing the Appellants' overall scores, because their bids were lower than the Third Parties' bids.

- 3. With respect to the proposal component of the bid & proposal process, in addition to disclosing the criteria and the number of points to be applied to those criteria, was it necessary in order to be fair to all bidders that the Tender Package also described the particular methodology that would be adopted in allocation of points to those criteria?**

[81] The scoring methodology adopted by the Regional Manager for the allocation of the 15/100 available bid points as part of the bid & proposal process was not disclosed to bidders in the Tender Package.

[82] With respect to the 85/100 points allocable up to specified maximums under each of the five subject categories to be covered in the proposal, the Regional Manager instructed the Committee to score the proposals under each of the five categories applying a particular methodology. This methodology was also not disclosed to bidders in the Tender Package.

[83] When considering whether the duty of fairness was breached by dealing with “undisclosed criteria and evaluation utilized in connection with the experience and residency components”, the Board in *Rushton* held at paras. 53-54:

... The Application Package does not specifically state that there would be a 15 year cap on experience and residency. The question that has to be addressed is whether, in addition to disclosing the criteria and the number of points to be applied to those criteria, it was necessary that the Application Package also described the particular methodology that would be adopted in allocating points to those criteria.

The Panel finds that this was not necessary. A failure to state the criteria applied is different than a failure to state the specific methodology to be applied in consideration of those criteria. ... It was open to the Regional Manager, so long as he was applying the disclosed criteria, to adopt a particular methodology for allocating points in connection with those criteria. This includes application of a cap to the points awarded for years of residency or experience. In summary, the Panel finds that the application of a cap in the circumstances here does not constitute an application of undisclosed criteria. The cap is simply a means or methodology of applying the disclosed criteria, and is consistent with the criteria as disclosed.

[84] The Panel agrees with the Board’s findings in *Rushton* quoted above, and finds that the Regional Manager applied the disclosed criteria, and it was open to him to adopt a particular methodology for allocating points in connection with those criteria. The Tender Package fully disclosed the criteria and number of points to be applied to those criteria. It was not necessary that the Tender Package also describe the particular methodology that the Regional Manager adopted in allocating points to those criteria.

[85] The Panel finds that the instructions found in the Tender Package were clear and unambiguous, and the applicants were informed of the criteria upon which their applications would be scored. The criteria and scoring methodology was the same for all bidders and applied consistently. The bid scoring process was fair and reasonable in all of the circumstances.

4. Was the Tender Package unclear or ambiguous as to the meaning of the term "LOT"? If not, should the Appellants' bid scores be adjusted upwards as sought by the Appellants based on their bid amounts being in error or should their bid scores be based on the actual bid amounts submitted by them in the tender process?

[86] In their written submissions, both of the Appellants assert:

- The Bid Form is unclear with respect to the terms of the LOT being bid on.
- Nowhere in the Bid Form is there a definition of a LOT.
- It was only after each Appellant received the results of the Applications that they each realized the bid was per 5 day LOT (as opposed to single rod days).
- Each Appellant's bid amount per LOT was made under the assumption that he was bidding per rod day as opposed to bidding for 5 days.

[87] While the term "LOT" is not defined in the Bid Form, the Panel finds that it is clearly defined in the printed instructions for both the bid only and bid & proposal process found in the Tender Package. In that regard, the instructions for the bid only process state:

There are four lots available on the Wigwam River for allocation through the BID ONLY process. **Each lot will consist of 5 guided angler days each** (total of **20 guided angler days**). **These lots will be referred to as LOT.**

[emphasis added]

[88] Similarly, the instructions for the bid & proposal process state:

There are twelve lots available on the Wigwam River for allocation through the BID & PROPOSAL process. **Each lot will consist of 5 guided angler days each** (total of **60 guided angler days**). **These lots will be referred to as LOT.**

[emphasis added]

[89] The Panel finds that the instructions as to the meaning of LOT are clear and straightforward. No ambiguity exists.

[90] The instructions forming part of the Tender Package make it clear that a total of 80 guided angler days were being made available for bidding in 16 separate LOTS of five guided angler days each.

[91] As parties to the contract of tender, the Appellants are bound by and presumed in law to be aware of all of provisions thereof, including the quoted instructions defining the meaning of LOTS that all bidders were invited to bid upon.

[92] The Panel finds that the meaning of the term LOT set out in the Tender Package could not reasonably be expected to cause confusion amongst bidders causing them to make mistakes in their bids. This was not a source of any unfairness in the bidding process.

[93] Furthermore, following receipt of the Tender Package and prior to submitting their applications in response to the Tender Package, both Mr. Sedrovic and Mr. Silverthorne separately contacted Mr. Heidt on a number of occasions to discuss the

bid & proposal process with him. During these conversations, neither of the Appellants asked Mr. Heidt for clarification on what the bid amount was supposed to reflect.

[94] When submitting his bid & proposal application for LOTS 5-16, Mr. Sedrovic included a one page cover note titled "Proposal for New Allocation of Guided Angler Days on the Wigwam River" in which he states:

I, Kim Sedrovic, am seeking to obtain a minimum of 5 Lots in order to be allocated at least 25 more guiding days on the Wigwam River. Please find the attached chart as it demonstrates the amount of days I have used in the past before the management plan was put in place. I have placed proposals and bids for all 12 Lots in order to obtain my objective of a minimum of 25 more guiding days. Please find my proposal and bidding sheets attached.

The Panel finds that this cover note, authored by Mr. Sedrovic, clearly evidences that at the time he submitted his bids on LOTS 5-16 he was not confused as to the meaning of "LOT" and he understood that the term LOT meant five guiding days.

[95] The Panel further finds that any alleged mistaken assumption that either Appellant might have made that they were bidding per guide day as opposed to bidding per 5 guide days was in no way caused or contributed to by any lack of clarity either in the Bid Form or elsewhere in the express provisions of the Tender Package.

[96] Based on his bid of \$250 for each of LOTS 5-16, Mr. Sedrovic received bid scores ranging from 2.5-3.8 points. Mr. Sedrovic submits those bid amounts were in error, with his intention being to bid \$1,250 per LOT. He submits this would have earned him a bid score of 13.75 out of the maximum 15 points.

[97] Mr. Silverthorne received bid scores ranging from 5-11.3 points based on his bids of \$301 for each of LOTS 5-8; \$351 for each of LOTS 9-12; \$376 for each of LOTS 13-14; and \$401 for each of LOTS 15-16. Mr. Silverthorne submits those bid amounts were in error, with his intention being to bid amounts ranging from \$1,505 - \$2,005 per LOT. He submits this would have earned him bid scores of between 14 and 15 out of the maximum 15 points.

[98] The decision of the Supreme Court of Canada in *Ron Engineering* provides further guidance when considering the analysis of the appropriate outcome when a bidder in response to an invitation to tender submits its bid in a mistaken amount and the error is not disclosed until after the opening of the tenders, as is the situation presented by both Appellants in these appeals. Although *Ron Engineering* was not addressed by the parties, it was cited and discussed by the Board in *Doll*.

[99] In *Ron Engineering*, the respondent contractor sued for return of a \$150,000 deposit it had paid by way of a tender deposit at the time of filing its bid in response to a call for tenders. The respondent discovered that its bid was in error after the opening of tenders. In the Court's analysis, a unilateral contract, contract A, arose automatically upon the submission of a tender between the contractor and the owner. The principal term of contract A was the irrevocability of the bid, and the corollary term was the obligation in both parties to enter into a construction contract, contract B, upon the acceptance of the tender.

[100] In the course of reaching its conclusion that the respondent was bound by contract A regardless of its bid error, and was accordingly not entitled to a return of its deposit, the Court in *Ron Engineering* stated as follows at pages 123-124:

There is no question of a mistake on the part of either party up to the moment in time when contract A came into existence. The employee of the respondent intended to submit the very tender submitted, including the price therein stipulated. Indeed, the President, in instructing the respondent's employee, intended the tender to be as submitted. However, the contractor submits that as the tender was the product of a mistake in calculation, it cannot form the basis of a construction contract since it is not capable of acceptance and hence it cannot be subject to the terms and conditions of contract A so as to cause a forfeiture thereunder of the deposit. The fallacy in this argument is twofold. Firstly, there was no mistake in the sense that the contractor did not intend to submit the tender as in form and substance it was. Secondly, there is no principle in law under which the tender was rendered incapable of acceptance by the appellant. For a mutual contract such as contract B to arise, there must of course be a meeting of the minds, a shared *animus contrahendi*, but when the contract in question is the product of other contractual arrangements, different considerations apply. However, as already stated, we never reach that problem here as the rights of the parties fall to be decided according to the tender arrangements, contract A. At the point when the tender was submitted the owner had not been told about the mistake in calculation. Unlike the case of *McMaster University v. Wilchar Construction Ltd. et al.* [3] there was nothing on the face of the tender to reveal an error. There was no inference to be drawn by the quantum of the tender (bearing in mind the estimate by Gore and Storrie) that there had indeed been a miscalculation.

[101] In their submissions, both Appellants state that they calculated their bid amounts in error by assuming they were bidding per day and not per five-day LOT. However, the Panel finds that, as was the case in *Ron Engineering*, there was nothing on the face of the Bid Forms submitted by either Appellant to reveal an error. Their sworn Bid Forms make no mention that their bid amounts were being submitted on a "per day" basis. Each of their sworn Bid Forms, on their face, simply bid a stated dollar amount for a specified LOT.

[102] A review of the bid amounts of all bids submitted by all bidders on each of the LOTS demonstrates a strategic aspect to the particular bid amounts submitted by bidders for any particular LOT under the sealed tender process. The particular amounts bid fell over a reasonably wide range. As was again the case in *Ron Engineering*, the Panel finds that no inference can reasonably be drawn based on the amounts bid by either of the Appellants that they miscalculated their bid amounts.

[103] In the foregoing circumstances, the Panel finds that both of the Appellants were contractually bound (as were the Regional Manager and all other bidders), to have their bids considered and scored by the Regional Manager based on the actual dollar amounts bid by them for each LOT, as specified by them in each Bid Form, regardless of the alleged error on their part.

[104] Both Appellants submit that the implied duty of equality and fairness in the *Wildlife Act* tender process leads to the proposition that a decision rendered with

erroneous facts is unfair and should be overturned if those facts are material to the decision. The Appellants refer to the following portion of the Board's decision in *Rushton*, at para. 62:

An error in consideration or scoring of applications must be material in order to render the process unfair or justify the decision to set aside the process. This issue was considered in *Martel*, which has been noted above.

[105] The Appellants assert that reliance upon the allegedly erroneous bids submitted by them to the Regional Manager constituted an "error in consideration or scoring" as contemplated by the Board in *Rushton*.

[106] The Panel agrees with the quoted proposition from *Rushton*, but disagrees with the Appellants' submission that reliance upon the allegedly erroneous bids submitted by them to the Regional Manager constituted an "error in consideration or scoring" by the Regional Manager, as contemplated in *Rushton*.

[107] The Panel finds that a correct reading of the decision in *Rushton* limits the "errors" being referred to therein to those errors committed by the Regional Manager in his consideration and scoring of applications. The "errors" mentioned in *Rushton* do not extend to errors allegedly made by applicants in their submitted bid amounts, which were relied upon in good faith by the Regional Manager. Quoting more completely from *Rushton*, at paras. 60 through 62:

... The Regional Manager concedes in his submission that more rigorous review of the bids indicates that there was an error in preliminary scoring.

... The Regional Manager states that this error would have resulted in no change to the rankings. Again, the Panel finds that this is consistent with the evidence. The difference based on the alleged errors would be only a single point.

An error in consideration or scoring of applications must be material in order to render the process unfair or justify the decision to set aside the process. This issue was considered in *Martel*, which has been noted above. In that case, the Supreme Court of Canada noted that the Government erred in its consideration of one aspect of the tenders, specifically in relation to the question of whether a requirement for a secure card system should be included in the bids. This resulted in the plaintiffs' bid being treated differently than certain other bids. However, on the evidence, the resulting difference in bids would not have made a difference to the outcome. Accordingly, the error did not justify setting aside the decision. The same reasoning applies here. On the evidence before the Panel, the deduction of a single point from Mr. Kovacovich's application would have made no difference to the outcome.

[108] The instructions in the Tender Package were seen as straightforward and easy to follow by the Third Parties. The Panel finds it would be unfair to the Third Parties to allow the Appellants a "second kick at the can" to correct, on appeal, what they ought to have done properly in the first instance.

[109] Even if the Appellants' bid scores were adjusted as suggested by them, they would not have been the successful bidders on any of LOTS 5-16. As such, even if the Panel had found that there was an error by the Regional Manager arising from the Bid Forms, the Panel finds that such an error was not "material" in nature.

[110] In conclusion on this issue, the Panel finds that it was neither unfair nor in error for the Regional Manager to render his Decisions on bid scores based on the bid amounts submitted by all bidders including the Appellants, regardless of the alleged errors in the Appellants' submitted bid amounts. The Appellants are not entitled to any upward adjustment in their bid scores as sought by them in these appeals.

[111] Before leaving the topic of errors in calculation of bid scores, the Regional Manager's submissions admit that an error was made respecting the bid scores calculated for LOT 5: it appears the bid scores were calculated on the basis that there were six applicants, when in fact there were seven applicants. However, the corrected bid scores do not change the outcome respecting LOT 5. The Panel finds, relying on *Rushton*, that this admitted error was not material. Given that the error made no difference as to the outcome, the error does not render the process unfair or justify granting any of the remedies requested by the Appellants.

5. Should the scoring of the proposal component of the Appellants' applications be adjusted upward as sought by the Appellants?

[112] Mr. Sedrovic submits that the Regional Manager erred in his apprehension of the evidence submitted by him when assessing his proposal and arriving at a proposal score of 77/85. The Panel has summarized his submissions on that matter as follows:

- a. Insufficient points were awarded for his written proposal under the categories "Experience as an angling guide" (particularly with respect to experience as an angling guide I Kootenay classified waters), "Business case" and "Value Added";
- b. Mr. Sedrovic ought to have received a proposal score of 85/85 owing to his years of experience as an angling guide in classified waters within the Kootenay Region, his investment in the City of Fernie, the potential expansion of his business and the overall quality of his proposal.

[113] Mr. Silverthorne also submits that the Regional Manager erred in his apprehension of the evidence submitted by him when assessing his proposal and arriving at a proposal score of 76/85. Mr. Silverthorne submits that insufficient points were awarded for his written proposal, owing to his years of experience as an angling guide in classified waters within the Kootenay Region, his investment in the City of Fernie, the potential expansion of his business and the overall quality of his proposal. He submits a score of 85/85 for his proposal is appropriate.

[114] Both Appellants assert the Regional Manager's scoring of their proposals failed to give due consideration to:

- a. The length of time they have been guides in the Elk Valley and on Kootenay Classified Waters;
- b. The substantial investments made by them in the Elk Valley area and the economic benefits of their successful businesses (including the employment of seasonal and full time staff);

- c. The potential expansion of their businesses if allotted more angler day quota; and
- d. How these factors compared against the successful applications of the Third Parties.

[115] Details of the results of the scoring of the proposal portion of the bid & proposals submitted by the Appellants and Third Parties were as follows:

1. Mr. Sedrovic received a score of 77/85 points. Under "Angling Guides – Kootenay Classified Water", his score was reduced by a total of 3 points made up of 2 points lost due to his diligent use record of 43.5% (3 points of maximum of 5 allocated for use between 25-50%), and by another 1 point reduction from the maximum of 5 points available for the applicant's past investment(s) related to the Wigwam River watershed. Under "Proposal quality/Business Case/Value Added", his score was reduced by a total of 5 points made up 2 points lost for overall presentation ("good"); 1 point lost for not including more detail to assist in evaluation; 1 point lost for unconstructive approach to communication demonstrated over time; and 1 point lost for lack of specific examples of environmental impacts of business.
2. Mr. Silverthorne received a score of 76/85. Under "Angling Guides – Kootenay Classified Water", his score was reduced by a total of 3 points made up of 1 point lost due to his diligent use record of 55% (4 points out of a maximum of 5 allocated for use between 50-75%), 1 point lost for late submission of audit per condition of license (4 of maximum 5 points for license compliance), and another 1 point reduction from the maximum of 5 points available for the applicant's past investment(s) related to the Wigwam River watershed. Under "Compliance Record", his score was reduced by 1 point for late submission of audit per condition of license (4 out of a maximum 5 points for reporting performance). Under "Proposal quality/Business Case/Value Added", his score was reduced by a total of 5 points made up 2 points lost for overall presentation ("good"); 1 point lost for business case, lack of detail; 2 points lost for lack of direct involvement in fisheries management and investment in community.
3. Mr. Samycia received a score of 80/85. Under "Angling Guides – Kootenay Classified Water", his score was reduced by a total of 1 point from the maximum of 5 points available for the applicant's past investment(s) related to the Wigwam River watershed. Mr. Samycia had a diligent use record of 99.9%, receiving the maximum of 5 available points for diligent use. Under "Proposal quality/Business Case/Value Added", his score was reduced by a total of 4 points made up 2 points lost for overall presentation ("good"); 1 point lost for lack of analysis and detail; and 1 point lost for lack of detail regarding business approach to the environment and reducing environmental footprint.
4. Mr. Wilcox received a score of 83/85. Under "Angling Guides – Kootenay Classified Water", his score was reduced by a total of 2 points, made up of 1 point lost due to his diligent use record of 63.1% (4 points out of a maximum of 5 allocated for use between 50-75%), and 1 point lost for the

size of his operation. Mr. Wilcox received the full 25 points available under "Proposal quality/Business Case/Value Added".

5. Both of the Appellants and both of the Third Parties received the maximum available points under "Angling Guide Experience" and "Angling Guide Experience – Kootenay Region".

[116] The Panel finds that the Tender Package comprehensively set out the criteria and the number of points to be applied to those criteria for submitted proposals. The Panel further finds that the instructions and guidelines clearly set out what information the proposal was to include, and how criteria would be weighted. The guidelines expressly emphasized that:

Overall score of the proposal will be based on a summary evaluation of the details provided, an evaluation of diligent use, compliance records and the quality of the proposal provided. Please ensure you include the details necessary for evaluation.

[117] The Panel concludes that the bid & proposal process was fair and reasonable to all applicants, including the Appellants.

[118] Having reviewed the process and results of the scoring of the proposals submitted by the Appellants and Third Parties (including the rationale given for deductions from the maximum proposal scores available), as well as the written submissions of all Parties, the Panel agrees with the Regional Manager's scoring decisions. The Panel finds that the Appellants are not entitled to any upward adjustment in their proposal scores as sought by them in these appeals.

[119] The Panel finds overall that the consideration and scoring of all applications, including the Appellants' applications, was conducted by the Regional Manager fairly and consistently in accordance with the Tender Package, his implied duty of fairness, and section 11(1.2) of the *Regulation*. Neither Appellant is entitled to relief under section 101.1(5) of the *Wildlife Act*.

DECISIONS

[120] In making these decisions, the Panel has considered all of the relevant evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[121] For the reasons set out above, the Panel confirms the Decisions of the Regional Manager, and dismisses both appeals.

"Michael Tourigny"

Michael Tourigny
Panel Chair

April 4, 2017