

*In an attempt to boost the economy, both levels of government are investing millions of dollars in new infrastructure projects across the country. As the money begins to flow to municipalities, local governments will be engaging in the tendering process. This article introduces the general tendering framework and considers the rights and obligations imposed on the owner and the bidder throughout the tendering process. The purpose of the article is to highlight the areas of concern that can lie ready to trap the unwary participant.*

## The Tendering Process – A Legal Overview

### I. INTRODUCTION

Until the Supreme Court of Canada dramatically altered the law in 1981, the rules governing tender calls were derived from general contract law. Bids were “offers” that did not trigger legal obligations until they were “accepted”. This formulation led to undesirable commercial results. Owners could negotiate with bidders after receiving all offers, allowing “bid shopping”, or they could impose further costly conditions. Bidders, by contrast, could withdraw their offers prior to acceptance, which could leave the owner unsure of the status of the tender process.

### II. THE LEGAL FRAMEWORK

#### (a) General Principles of Contract

The following are required to create an enforceable contract:

- (1) an agreement between parties with capacity to contract,
- (2) some type of value (“consideration”) to be exchanged, and

(3) an intention to create legal relations. These elements must be incorporated into an “offer” by one party and “acceptance” by another.

#### (b) The “Ron Engineering” Revolution

Prior to 1981, a tender call did not create contractual relations. This changed with the Supreme Court’s decision in *R v. Ron Engineering and Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. It introduced a “two contract” model to tendering law – Contract A and Contract B. Prior to this decision, a contractor could generally withdraw a bid before it was accepted by the owner.

In *Ron Engineering*, the contractor submitted a bid for a construction project together with a bid deposit of \$150,000.00. Its bid was the lowest by a significant amount. After the close of tenders, it was discovered that the bid contained an error. The contractor asked to withdraw the bid. The owner refused. When the contractor would not sign the construction contract, the owner accepted the second lowest bid and retained the deposit. The contractor sued to recover the deposit.

The trial judge found that the owner was entitled to retain the deposit. *Ron Engineering* appealed. The Court of Appeal concluded that the owner could not accept the offer, which it knew contained a significant error.

*...continued on page 2*

## What’s inside

Page 2, 3 & 4

- The Tendering Process – A Legal Overview (cont’d)

# The Tendering Process – A Legal Overview *(continued from page 1)*

The owner successfully appealed to the Supreme Court of Canada. The Court found that the tendering process involves two contracts, Contract A and Contract B. Contract A is an agreement between the owner and a bidder on how the main contract will be awarded. It arises when a bid that complies with the terms of the tender documents is submitted. The call for bids was an “offer”, a bid was an “acceptance” of that “offer”. The Court held that, generally, the bidder cannot withdraw its bid once Contract A is formed. The actual contract for the construction work is Contract B. This analysis was recently reaffirmed by the Supreme Court of Canada in *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116.

Contract A is dependent on the wording of the tender documents. If the tender documents state that no Contract A will be formed when a tender is submitted, then Contract A cannot come into existence. Without Contract A, an owner’s obligations are extremely limited.

An owner can protect itself from litigation by exclusion clauses in the tender documents. One example is *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2007 BCCA 592. Tercon unsuccessfully submitted a highway construction proposal to the Ministry. The successful proponent was not qualified, but Tercon was. The trial judge awarded damages to Tercon for the Ministry’s breach of Contract A. The British Columbia Court of Appeal reversed the award, based on the exclusion clause in the RFP, which stated:

*Except as expressly and specifically permitted in these instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.*

The British Columbia Court of Appeal said that the “broad words of the clause [covered] the full range” of possible breaches of Contract A.

The words used in a tender package are therefore supremely important. Tender documents must both protect the owner’s discretion to choose the

most appropriate bid and be sufficiently detailed to enable contractors to prepare compliant bids.

## *(c) Requests for Proposals (RFP)*

At this point it is worth pausing to consider where Requests for Proposals (RFPs) fit in, and whether the above analysis applies to RFPs. Generally speaking, it will not. However, naming a process a “Request for Proposals” or “Invitation to Tender” does not determine its legal status. If the RFP requests general designs or expressions of interest and states that negotiations will follow, the Ron Engineering analysis will likely not apply. If, in contrast, an RFP closely resembles a traditional tender call – inviting irrevocable bids that will form a substantive contract if accepted - then it will be treated as a tender call at law.

## III. THE BID PROCESS - SEEKING THE CONTRACT

### *(a) Methods of Tendering*

A tender is nothing more than an offer to carry out construction on certain terms and conditions. Contractors submit a tender based on the tender documents, which form the basis for the resulting Contract A that governs the process.

One of the owner’s first decisions is one whether it wants to open the tender call to all contractors (public) or if only specific contractors can submit bids (invitational). Private sector owners are free to choose between these methods, but generally, government works require a public call for tenders in the interest of transparency and fairness.

### *(b) The Bid Package and Contents*

The documents contained in the bid package govern every aspect of the proposed construction project. The normal tender package will include most, if not all, of the following documents.

1. Invitation to Tender;
2. Instructions to Bidders;
3. The Written Contract and General Conditions;
4. Bid Form;
5. Supplementary Conditions;
6. Plans and Specifications; and
7. Other Information.

## IV. RIGHTS AND OBLIGATIONS OF THE PARTIES INVOLVED

### A. Evaluation and Selection of Bids

#### (a) Pre-Qualification

The owner is entitled to pre-qualify contractors before issuing a call for tenders. The procedure usually involves an owner contacting contractors to determine interest, and request that interested contractors provide specific information. The owner will then evaluate that information. Those contractors that are found to be qualified are invited to submit a tender. Ultimately, the process screens out contractors who may not be able to perform the work, while providing pre-qualified contractors with the benefit of reduced competition.

No contractual relationships are established during pre-qualification, though governmental owners may be scrutinized for fairness. Also note the decision of Ed. Brunet and Associates Inc. v. 154469 (2002), 19 C.L.R. (3d) 173 (Ont. S.C.J.), where the Court held that the owner is generally not entitled to discriminate among pre-qualified bidders based on criteria contained in the pre-qualification process.

#### (b) Privilege Clauses

One of the central areas of contention in tendering law is: how much discretion does an owner have in choosing from the bids submitted? Is the owner obligated to accept the lowest bid?

At the time of Ron Engineering, low bidders tended to rule. Yet low bidders may lack expertise, or underprice the work. Ultimately this may lead to increased costs. To retain a wide scope of discretion, owners customarily include a "privilege" clause in the Instructions to Bidders. This discretion is also necessary to cover unforeseen circumstances, i.e. where all bids exceed the owner's budget.

The wording of a privilege clause is usually fairly straightforward, for example:

*"The Owner reserves the right to reject any or all bids submitted or any part and the lowest or any bid will not necessarily be accepted."*

The Supreme Court of Canada sanctioned the use of privilege clauses in the 1999 decision of M.J.B. Enterprises. The Court's decision recognized that there may be more to "cost" than the bottom line in a tender. The privilege clause signals this to potential bidders.

#### (c) Violations of the Duty of Fairness

Privilege clauses do not grant unfettered discretion. Courts will disregard the privilege clause if the owner does not evaluate the bids in good faith. In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, the Supreme Court of Canada found that procedural good faith and fairness are implied terms of Contract A.

What does this general duty of fairness entail? All bidders must bid on the same basis and be evaluated on the same, transparent, criteria. If the owner has a preference it must be made known to all bidders. A recent example is *Continental Steel Ltd. v. Mierau Contractors Ltd.*, 2007 BCCA 292. In that case the two lowest tenders for a subcontract "complied fully" with the tender documents. The plaintiff's bid was the lowest, but was refused because the general contractor believed disputes could arise with the plaintiff and delay the project.

At trial the plaintiff was successful, but that decision was reversed on appeal. The British Columbia Court of Appeal held that the general contractor acted fairly in not selecting the plaintiff's bid, based on the small price differential, short construction timetable, past experiences with the plaintiff, negative information from other contractors, and the plaintiff's previous litigious posture.

*Continental Steel* may be contrasted with *Santec Construction Managers Ltd. v. Windsor (Town)*, 2005 NSSC 132, where Santec was the lowest compliant tender, but was not awarded the contract. The Town picked the second lowest bidder, Winbridge. The court found that the Town's reasons for preferring Winbridge did not withstand scrutiny.

# The Tendering Process – A Legal Overview (continued from page 3)

The above cases evidence that while an owner can choose any compliant tenderer, he must treat compliant tenders equally and objectively justify his choice. If lack of experience disqualifies the low tenderer, the owner cannot ignore a similar lack of experience on the part of the selected tenderer.

In *M.J.B. Enterprises* the Supreme Court of Canada held that a privilege clause does not allow the owner to select a non-compliant bid. As appears from the following discussion, interesting questions arise on whether bids containing errors can be considered “compliant”.

## B. Errors in the Bid

### (a) *Errors Fatal to the Bid*

The contractor’s main responsibility is to ensure that submitted bids are compliant. Non-compliant tenders are invalid. These failures can cost the contractor time and a chance to obtain the contract.

The following are errors that should prove fatal to the bid:

1. The bid is submitted after the close of tenders;
2. The bid is submitted on improper forms;
3. The bid fails to nominate subcontractors;
4. The bid fails to comply with the deposit, security, or bid bond provisions;
5. The bid does not comply with the stipulated bid depository rules;
6. The bid does not correspond to the plans and specifications; and
7. The bid does not include a required schedule or completion date.

The bid is not capable of acceptance if it is “qualified”. Such bids are treated as counter-offers rather than an acceptance of the Invitation to Tender.

### (b) *Material Compliance*

The examples above are all significant errors or oversights. Errors can also be simple and trivial. Owners can reserve the right to waive such irregularities, and most do. But how can an owner determine if an error is only an irregularity?

Compliance is an objective determination. A non-compliant bid must be “materially lacking in some essential element”, and appear clearly non-compliant to a third party. Errors that do not meet this standard are irregularities.

The leading case on this point is *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116. In that case, the City called for tenders on a landfill contract. The tender documents required all equipment to be 1980 or newer. The City accepted the bid of Sureway. When Sureway did not use equipment from 1980 or newer, Double N, another bidder, sued the City. A badly split (5:4) Supreme Court of Canada found that while Sureway’s tender contained an error, it was an informality that could be waived by the City. The City was not compelled to investigate the truthfulness of the bids.

## V. CONCLUSION

The law of tendering forms an immense body of knowledge. Textbooks and articles can be (and have been) written on portions of the material that this overview has attempted to cover. The subject is further complicated by its constant state of flux.

There is a significant benefit to being forewarned of potential legal issues. For owners, potential damages include not only a contractor’s significant cost to prepare a bid, but also the lost profit that the contractor would have earned under the contract. For breaches by a government owner, the entire bidding process may also be quashed. Needless to say, these remedies (or penalties) can result in expensive judgments. And that should be incentive enough to pay careful attention to the process.

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