

# OVERVIEW OF THE LAW OF BIDDING AND TENDERING

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*The Contract A/Contract B analysis used by the Supreme Court of Canada in the seminal case of R. v. Ron Engineering was not the innovation that many commentators believe it to have been; collateral contracts have long been recognized by the courts. The law of bidding and tendering is no more than a set of presumptions, generally capable of being rebutted by careful drafting by the Owner in a Call for Tenders. The integrity of the bidding process can be protected in ways other than requiring a Bidder whose Bid price is too low due to a mistake to honour its price. The Owner's duty of "fairness" in bidding and tendering should be more precisely defined as an implied term that an Owner will not base its decision on criteria which are neither expressly disclosed nor inferable from the Call for tenders.*

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*L'analyse du concept Contrat A / Contrat B réalisée par la Cour suprême du Canada dans l'arrêt R. c. Ron Engineering n'était pas aussi novatrice que certains commentateurs l'ont cru; les contrats collatéraux sont reconnus depuis longtemps par les tribunaux. Le droit relatif aux soumissions et aux appels d'offres n'est guère plus qu'un ensemble de présomptions pouvant généralement être renversées par une rédaction soignée de l'appel d'offres par le propriétaire. Obliger un soumissionnaire qui propose par erreur un prix trop bas à honorer sa soumission n'est pas le seul moyen de protéger l'intégrité du processus de soumission. Le devoir d'« équité » du donneur d'ouvrage en matière de soumission et d'appel d'offres devrait être mieux défini pour comprendre, de façon implicite, l'obligation pour le donneur d'ouvrage de ne pas fonder sa décision sur des critères qui ne sont pas expressément divulgués ou ne peuvent être déduits à partir de l'appel d'offres.*

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\* Robert Pattison, of Counsel, SNC-Lavalin Inc., Toronto, Ontario. The comments and observations contained herein are those of the author, and do not necessarily represent the views or policies of SNC-Lavalin Inc. This paper is restricted to cases decided by the courts in the common law provinces and territories and the Supreme Court of Canada.

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### *I. Introduction*

Bidding and Tendering is (in the context of a construction project) the process by which a person (the “Owner”) who wishes to enter into an agreement for construction to be carried out on the Owner’s land (a “Construction Contract”) by another person (the “Contractor”), solicits binding offers, with a view to obtaining the best price and other terms.

To this end, the Owner<sup>1</sup> issues a call for tenders (a “Call”) for the Construction Contract. The Call contains “Instructions to Bidders” which define the terms under which Bids will be accepted and the Construction Contract will be awarded. The term “Bidder” describes each potential Contractor that submits a Bid for the work. The words “Bid” and “Tender” are interchangeable, and they mean an offer to enter into the Construction Contract on the terms set out in the Bid.

The Construction Contract documents, including such standard form agreement as the CCDC-2 (1994) stipulated price construction contract, and the plans and specifications for the work are referred to herein as the “Agreement”.

## *II. A Warning*

The law of bidding and tendering is characterized by a variety of presumptions and implied terms. In this commentator’s view, most of these may be overcome with sufficiently clear language. This paper concludes that, based on a principled analysis of the authorities, an Owner may (subject to the general law of contract) impose any terms it chooses on Bidders, provided that it makes those terms clear, by express language or necessary inference.

In fact the practice has been developing among Owners of drafting instructions to bidders which are designed specifically to militate against the obligations imposed on Owners as a result of the cases referred to herein.

Consequently, any commentary on “The Law of Bidding and Tendering” is to be read with caution, and each case must be assessed on its specific facts, including a detailed understanding of all of the terms of the Call in order to determine the relevance of decided cases in any assessment of legal rights and obligations in a particular situation. As such, legal counsel advising an Owner or a Bidder in respect of a disputed bidding process should insist on reviewing the bid documents and the bids in question, in their entirety, prior to advising their clients, or qualify their advice due to their inability, in the circumstances, to do so.

## *III. Offer and Acceptance: Contracts 101*

The law of bidding and tendering is simply an application of the law of offer and acceptance.

A contract, of course, is merely an enforceable promise, or set of

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<sup>1</sup> Throughout this paper, the term “Owner” is generally used to refer to any person that accepts tenders, and includes a Bidder which issues a Call to sub-trades.

mutually enforceable promises. Broadly speaking, in order to be enforceable, a promise must have been made for consideration, or under seal; however, a contract is not formed simply by the existence of a common intention among parties; communication is generally essential. Contract formation requires an offer by one party, and an acceptance of that offer by the other. An offer is to be contrasted with an invitation to treat, which is simply a non-binding statement of a general intention to bargain.<sup>2</sup>

An offer may be withdrawn at any time prior to acceptance; in fact, even an offer which is stated to remain open for a certain period may be withdrawn unless the promise to hold the offer open is itself given for consideration or under seal (i.e. unless bargained for).<sup>3</sup> As we shall see, these exceptions to the right to withdraw an offer prior to acceptance have particular significance in the bidding and tendering context.

Acceptance does not necessarily require communication of acceptance to the offeror. In the case of a unilateral contract, the offeree accepts the offer (causing a contract to come into effect) simply by performing some act specified in the offer, whether or not that act is communicated to the offeror. The classic example of such a contract is *Carlill v. Carbolic Smoke Ball Co.*,<sup>4</sup> in which the distributor of a cold remedy offered a sum of money to any person who used the remedy and was not cured. It was held that a Plaintiff who used the remedy and was not cured was entitled to be paid the promised amount, even though he had not given prior notice to the offeror. It has been observed of unilateral contracts that “[w]hat would seem to be involved are: (i) an indication from the nature of the offer that communication is either impossible or undesirable; and (ii) conduct by the offeree that is consistent only with his having accepted the offer, such that he may be said to have accepted it by what he has done.”<sup>5</sup>

#### *IV. Bidding and Tendering: The Bid Contract*

##### *A. The Bidding Process*

When the Owner issues a Call, it may pre-qualify Bidders (i.e. decide in advance which Bidders will be allowed to Bid on the work), or it may

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<sup>2</sup> In this regard, note that this paper discusses recent developments in the law in respect of the distinction between a Call for Tenders, and a Request for Proposals. These two procurement methods appear to have substantially different legal consequences attached to them.

<sup>3</sup> *Davis v. Shaw* (1910), 21 O.L.R. 474 (Ont. Div. Ct.).

<sup>4</sup> [1893] 1 Q.B. 256 (C.A.); see also *Goldthorpe v. Logan*, [1943] 2 D.L.R. 519 (Ont. C.A.).

<sup>5</sup> G.H.L. Fridman, *The Law of Contract*, 4th ed. (Toronto: Carswell, 1999) at 78.

issue an open Call, which is typically published in local newspapers and trade publications such as the *Daily Commercial News and Construction Record*. A Call is typically published several weeks prior to the deadline for submitting Bids. During that time, Bidders review the Construction Contract documents, including plans and specifications, and attempt to determine the cost of doing the work, and a price at which they are willing to do the work.

There is a standard form of Bid,<sup>6</sup> produced by the Canadian Construction Documents Committee (the “CCDC”), but there are numerous other standard and non-standard forms of Bid in use. Typically, the Instructions to Bidders require that the Bid be accompanied by a bid bond, or letter of credit or certified cheque (the “Bid Security”) to ensure that the Bidder chosen by the Owner and awarded the construction contract undertakes the work.

Bids may be submitted to and opened by the Owner, or the Owner may utilize the local Bid Depository (where one is in existence), in which case the Bid Depository Rules, promulgated by the Ontario Bid Depository Council, apply, to the extent incorporated into the Instruction to Bidders by reference.<sup>7</sup> Bid depositories are particularly useful to manage subcontractor bids on large projects where several prime contractor bidders will all rely on bids from the same class of subcontractor bidders.

### *B. The “Traditional” Approach*

It has been stated that the traditional view of the courts in Canada was that, although a Bid was considered to be an offer, and the contract award as the acceptance of that offer (leading to the formation of the Construction Contract), the Call itself was simply viewed as an offer to treat.<sup>8</sup> This analysis, however, does not survive close scrutiny.

*McMaster University v. Wilchar Construction Ltd.*<sup>9</sup> is often cited as an example of the traditional approach. In that case, the City of Hamilton was in the grip of a strike by unionized carpenters and electrical workers at the time a Call was issued; other trades were locked out. The Hamilton Construction Association promulgated a “wage escalator clause”, and suggested that its members make any tenders that they submitted during the strike subject to this clause, in light of the likelihood of an increase in

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<sup>6</sup> See Stipulated price bid, CCDC-10 1994 (Toronto: Construction Specifications Canada, 1994).

<sup>7</sup> *Moncton Plumbing & Supply Co. v. Brunswick Construction Ltd.* (1984), 52 N.B.R. (2d) 309 (Q.B.), aff’d (1985), 62 N.B.R. (2d) 98 (C.A.).

<sup>8</sup> G.H.L. Fridman, “Tendering Problems” (1987) 66 Can. Bar Rev. 582.

<sup>9</sup> [1971] 3 O.R. 801 (H.C.J.).

labour costs following settlement of the strike.

All Bidders except Wilchar and one other included the clause in their Bids for the contract in question. The Court held that it must have been immediately apparent to the Owner upon opening Wilchar's Bid that the clause was intended to be included therein, but was missing. The court found that the Bid contained a unilateral mistake, which rendered the Bid incapable of acceptance. In the result, the Owner's claim for damages against a Bidder and the surety under a Bid Bond was dismissed.

Another oft cited example of the "traditional" approach is the decision of the Ontario Court of Appeal in *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al.*<sup>10</sup> In *Belle River*, the low Bidder discovered after Bids were opened that its Bid was low due to an error in calculation. Prior to the award of the contract for which Bids had been called, the Bidder advised the Owner of the mistake, and withdrew its Bid, notwithstanding a term in the Instructions to Bidders that the Bid was to be irrevocable for a period of 60 days. The Court of Appeal dismissed a claim by the Owner on a Bid Bond posted by the Bidder and held that: "an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract. (Price is obviously one such term...)"<sup>11</sup> The Court held that the Bidder was bound to hold its Bid open for 60 days, but held that it was immaterial whether or not the Bidder withdrew its Bid; once the Owner was advised of the mistake, the Bid was rendered incapable of acceptance.<sup>12</sup>

The courts in *Wilchar* and *Belle River* clearly found that the Bidders had made an enforceable promise to keep their Bids open for a set period: in *Wilchar*, the court found that the promise was made enforceable by virtue of the fact that it was made under seal.<sup>13</sup> In *Belle River*, the court simply stated that "the tenderers must be deemed to have contracted with reference to the instructions sent to them"<sup>14</sup> without explaining how it came to that conclusion.<sup>15</sup> In both cases, however, the analysis led to a finding that the Bidder was bound to leave open an ineffective offer or Bid for the irrevocable period set out in the Instructions to Bidders.

### C. *The Queen v. Ron Engineering & Construction Ltd*

The most important bidding and tendering decision to date in Canada

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<sup>10</sup> (1978), 20 O.R. (2d) 447 (C.A.), aff'g (1977), 15 O.R. (2d) 738 (H.C.J.).

<sup>11</sup> *Ibid.* (C.A.) at 452.

<sup>12</sup> *Ibid.* (C.A.) at 453.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> *Supra* note 10 (C.A.) at 453.

<sup>15</sup> However, in the decision at trial, it was noted that the Bid was submitted under seal: *ibid.* (H.C.J.) at 739.

is (for better or worse) that of the Supreme Court of Canada in *The Queen v. Ron Engineering & Construction Ltd.*<sup>16</sup>

### 1. *The Facts*

In response to a Call, Ron Engineering & Construction Ltd. (“Ron”) submitted a Bid under seal to perform certain construction work. One of Ron’s employees attended the tender opening, and discovered that Ron’s bid was lower than the next lowest bidder by \$632,000, due to the failure to include \$750,058 “for our own work and general condition”. Had the additional amount been included, Ron’s bid would have been \$3,498,058. The calculations leading to the amount of the tender were not set out in the tender itself.

An hour and a quarter after the bids were opened, Ron advised the owner in writing of the mistake, stating:

Due to this unfortunate error, we would appreciate being given the opportunity to show you our estimate indicating the error and to request to withdraw our tender...<sup>17</sup>

Ron did not withdraw its tender; it took the position, however, that its bid was not capable in law of being accepted. The call for tenders provided, in part, as follows:

Except as otherwise herein provided, the tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents required herein, the Commission may retain the tender deposit for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable...After the execution of the Contract and the receipt by the Commission of the Performance Bond and the Payment Bond the tender deposit of the successful tenderer will be returned.<sup>18</sup>

The Owner submitted the Agreement for Ron’s signature, in accordance with the Instructions to Bidders. Ron refused to sign the Agreement, and sued for the return of the tender deposit in the amount of \$150,000. The Owner counterclaimed for damages allegedly incurred as a result of hiring the next lowest bid as a result of the contractor’s

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<sup>16</sup> [1981] 1 S.C.R. 111, rev’g (1979), 24 O.R. (2d) 332 (C.A.).

<sup>17</sup> *Ibid.* (S.C.C.) at 115.

<sup>18</sup> *Ibid.* (S.C.C.) at 113-14.

refusal “to carry out the terms of its tender”.

## 2. *The Ontario Court of Appeal*

Ron appealed the trial judgment in which the claim and counterclaim were dismissed. The Owner did not appeal, and the Ontario Court of Appeal reversed the trial judge and found that Ron was entitled to the return of the tender deposit.<sup>19</sup> The Court of Appeal had relied on its own reasons in *Belle River*, and found that an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract.

## 3. *The Supreme Court of Canada*

The Supreme Court reversed the Court of Appeal’s decision, and held that the Owner was entitled to retain the deposit. The following sections analyze the reasoning of the Supreme Court of Canada in *Ron Engineering*.

### (a) *Contract A - Contract B*

Estey J., writing for the Supreme Court of Canada held that a “unilateral” contract (“Contract A” or the “Bid Contract”) arises upon the submission of a tender. The offer giving rise to Contract A is the call for tenders, and the acceptance is the bid itself. The “principal term” of Contract A, according to the court, is the irrevocability of the bid; other terms include the qualified obligation (controlled by the terms and conditions of the call for tenders) of the Owner to accept the lowest tender. It is these mutual obligations which constitute the Bid Contract.

The Court’s characterization of Contract A as a “unilateral contract” is suspect, since one of the hallmarks of a unilateral contract is the impracticability of, and resulting dispensation with, notice of acceptance.<sup>20</sup> In the bidding and tendering context, communication of acceptance of Contract A (in the form of a Bid) is obviously essential. As such, Contract A is more accurately characterized as a “Collateral Contract” to Contract B. The existence of such contracts is well established in Canadian law.<sup>21</sup> The court’s description of Contract A as a unilateral contract is likely based on the fact that, as in the archetypal *Carbolic Smoke Ball* case, the offer is subject (except where bidders are pre-qualified) to acceptance by a potentially large and ill-defined class.<sup>22</sup>

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<sup>19</sup> *Ibid.* (C.A.)

<sup>20</sup> Fridman, “Tendering Problems”, *supra* note 8 at 589.

<sup>21</sup> Fridman, *The Law of Contract*, *supra* note 5 at Chapter 13.

<sup>22</sup> *Supra* note 4.

The Construction Contract (also referred to in the decision as “Contract B”) does not arise at any time prior to acceptance of the Bid by the Owner; the terms of the Instructions to Bidder determine whether Contract B comes into existence at that moment or at some later time such as the time at which acceptance is communicated to the Bidder, or at the time when the parties execute the Agreement. The Bid constitutes the offer giving rise to the Construction Contract; typically, the announcement of the Contract B “award” constitutes the acceptance of that offer, and Contract B arises at that time without further formalities (although the requirement to sign a form of Agreement is typically a term of Contract A); however, as noted above, and as demonstrated in subsequent court decisions, the language of the Call is paramount; the acts giving rise to Contract B will in each case depend on the words of the Instructions to Bidders. In *Lanca Contracting Ltd. v. Brant County Board of Education* the Instructions to Bidders stated as follows:

4.2 The successful tender [sic] shall execute the formal contract as called for within seven days after notification of the acceptance of his tender or forfeit the amount of the Bid Bond or portion thereof, as stipulated in clause 3 of the Tender Form.<sup>23</sup>

In *Lanca*, the Owner (a school board), passed a resolution at a public meeting attended by a representative of the plaintiff Bidder that the Construction Contract be awarded to the Plaintiff. Shortly thereafter, the Owner purported to terminate the Construction Contract due to concerns about provincial funding. The Plaintiff sued on Contract B, and lost at trial. The Court of Appeal held that Contract B came into existence once the Plaintiff became aware of the award. In this regard, the Court stated that notice of acceptance was required as a matter of law, but noted that “[s]ignificantly, there is no mention of or reference to a requirement for written notice of acceptance.”<sup>24</sup> The court specifically rejected the proposition that Contract B did not come into effect because of the failure to execute the formal Agreement contemplated by the Instructions to Bidders.<sup>25</sup>

In the recent *Toronto Transit Commission v. Gottardo Construction Company Limited et al.*<sup>26</sup> case, the Owner issued a Call which provided a two-step tender process. Step one comprised the submission of several documents, including a Form of Tender in which, among other things, the Bidder stated “We agree to accept and will comply with all terms and conditions of the Tender Documents”.<sup>27</sup> Step two comprised the submission, within two business days of a request by the Owner, of certain

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<sup>23</sup> (1986), 54 O.R. (2d) 414 (C.A.) at 420.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 422-23.

<sup>26</sup> (2004), 68 O.R. (3d) 356 (Ont. S.C.J.).

<sup>27</sup> *Ibid.* at 369.

other information, including a completed cost summary, a list of contracts currently underway, a list of other Owners for whom the Bidder has performed similar work, evidence of incorporation and financial status, and a list of major subcontractors.

The Bidder in *Gottardo* advised the Owner that it had made a mistake in its bid prior to the Owner having given consideration to the Bids or changing its position in reliance on any of them.<sup>28</sup> The Bidder, upon being requested by the Owner to comply with step two, submitted a breakdown which disclosed the math error, thereby creating, in the view of the court, an error on the face of the Bid. In the result, the court found that Contract A never came into existence. A better interpretation would be that Contract A came into existence, but that Contract A contained an obligation (as per the portion of the Tender Form quoted above) to comply with step two, and that compliance with step two itself made manifest the error on the face of the Bid documents (i.e. the documents which the Owner intended to consider in choosing the successful Bidder). This is entirely consistent with the policy reasons for recognizing a mistake on a face of the bid: since the step two submission was stated to be a requirement only upon written request, the Owner could theoretically make an award without requesting the step two information, so the Bidder was “at risk” following submission of the Tender Form in step one. At the same time, this would acknowledge that, on its face, the step one submission purported to undertake a contractual liability.

Nevertheless, *Gottardo* stands for the proposition that a two-step process of this sort is risky for an Owner, and may be incompatible with the goal of creating a clear set of binding obligations on Bidders. This process, which differs from “BAFO” process (in which all Bidders submit a non-binding indicative price, and a short list of Bidders submit a binding “Best and Final Offer”), seems bound to create uncertainty, and should be avoided.

*(b) Mistake*

In *Ron Engineering*, Estey J. stated that “much argument was undertaken in this Court on the bearing of the law of mistake on the outcome of this appeal”.<sup>29</sup> The Court in *Ron Engineering* noted that since Contract B never came into existence, “we are therefore concerned with the law of mistake, if at all, only in connection with Contract A”.<sup>30</sup> Later, the Court observed that “...the issue in my view concerns not the law of mistake, but the application of the forfeiture provisions contained in the tender documents.”<sup>31</sup>

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<sup>28</sup> *Ibid.* at 362.

<sup>29</sup> *Ron Engineering*, *supra* note 16 (S.C.C.) at 122.

<sup>30</sup> *Ibid.* (S.C.C.).

<sup>31</sup> *Ibid.* (S.C.C.) at 125.

Nonetheless, the Court did discuss the law of mistake at some length, and the decision clearly changed the law of mistake in the province of Ontario. As noted above, the Ontario Court of Appeal in *Belle River* held that: “an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract. (Price is obviously one such term...)”.<sup>32</sup> In so doing, it expressly rejected the decision of the British Columbia Court of Appeal in *Imperial Glass Ltd. v. Consolidated Supplies Ltd.*,<sup>33</sup> in which the Defendant had submitted a Bid which was extremely low due to a calculation error.<sup>34</sup> The person to whom it submitted its Bid accepted the Bid prior to being advised by the Bidder of the mistake. The Construction Contract was held to be binding on the Bidder notwithstanding the mistake.

The Ontario Court of Appeal noted that *Imperial Glass* was criticized “almost at once after its publication” and that it had never been followed in Ontario.<sup>35</sup> The case may be distinguished in any event since the Contractor to whom the Bid was submitted itself submitted a Bid (which was accepted by the Owner) based on the amounts set out in the Defendant’s Bid.

The rejection by the Supreme Court in *Ron Engineering* of the Bidder’s argument that since the Bid was the result of a mistake in calculation, it was incapable of being accepted, is breathtaking in its dismissiveness:

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 Owner].<sup>36</sup>

To find that the Bidder intended to submit the Bid in the amount that it did even though that amount was the result of an error does grave violence to the word “intention”, and to any sense of fairness or commercial reasonableness. The Court acknowledged that:

It might be argued that by some abstract doctrine of law a tender which could not form the basis of a contract upon acceptance in the sense of contract B, could not operate as a tender to bring into being Contract A. It is unnecessary to consider such a theory because it was not and could not be argued that the tender as actually submitted by the contractor herein was not in law capable of acceptance immediately upon its receipt by the owner...<sup>37</sup>

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<sup>32</sup> *Supra* note 10 (C.A.) at 452.

<sup>33</sup> (1960), 22 D.L.R. (2d) 759 (B.C.C.A.).

<sup>34</sup> The Bidder calculated the surface area of the glass which was the subject of the Bid at 202.62 sq. ft. instead of 2026.24 sq. ft.

<sup>35</sup> *Supra* note 10 (C.A.) at 452.

<sup>36</sup> *Supra* note 16 (S.C.C.) at 123.

<sup>37</sup> *Ibid.* (S.C.C.) at 125.

The court did not consider (and therefore did not reject) the companion argument: that a tender which gave rise to Contract A could be incapable of supporting Contract B, which was the *ratio* of the Court of Appeal's decision in *Belle River*. The Supreme Court did, however, reject the Court of Appeal's statement in *Ron Engineering* that "...when that mistake is proven by the production of reasonable evidence, the person to whom the tender is made is not in a position to accept the tender or to seek to forfeit the bid deposit."<sup>38</sup> [emphasis added]

It would be commercially reasonable to allow an Owner to accept a Bid that it knew to have resulted from a calculation error if it acted in reliance on the Bid (as in *Imperial Glass*); it is not reasonable, and it is wrong in principle to allow such a result absent such reliance.

#### 4. Summary: The Law in Canada since *Ron Engineering*

The "two contract" analysis in *Ron Engineering* has often been characterized as an innovation; however, as noted above, the courts had clearly accepted, prior to that decision, that a binding obligation arose upon the submission of a Bid. In the result then, *Ron Engineering* is most notable not for its purported introduction of the "two contract" analysis, but for its analysis of the law of unilateral mistake. This is regrettable in light of the court's fleeting analysis of that issue.

The purpose of the bidding system is to ensure that the lowest price is obtained by competition. Absent a competitive process of sealed Bids, it is anticipated that prices would be higher than under a sealed competitive Bid process, since Bidders could wait and see what the competition quoted to do the work before going to its own bottom line. In such a situation, it is anticipated that Bidders would engage in a sort of reverse auction, reducing their bids by the smallest possible increments as bidders drop out of the bidding. The fear, of course, is that a Bidder might claim to have made a mistake once it sees the competing Bids, and attempt to amend its Bid price to a small amount less than the next lowest Bid. In order to prevent this, it is not necessary to prevent Bidders from withdrawing mistaken Bids; that result could be achieved by allowing to withdraw, but not amend, a Bid which resulted from an error in calculation.<sup>39</sup> In this regard, it should be noted that courts have rejected the

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<sup>38</sup> *Ibid.* (S.C.C.) at 118.

<sup>39</sup> In *Vaughan (Town) v. Alta Surety Company et al.* (1991), 42 C.L.R. 305 (Ont. H.C.J.), the low Bidder ("Acme") discovered after Contract B was awarded that it had made a mistake in calculating its Bid price. It was successfully sued by the Owner for the difference between the amount of its Bid, and the Bid price of the second lowest Bidder ("West"). The court rejected Acme's argument that, in mitigation of its loss, the Owner should have awarded Contract B to Acme at an adjusted price (which would include the costs mistakenly omitted from its Bid) and recover as damages only the

argument that, where a low Bidder refuses to honour its Bid, in breach of Contract A, the Owner has mitigated its loss where it accepts the next lowest Bid, despite the offer of the low Bidder to agree to a price somewhere between its original Bid and the second lowest Bid.<sup>40</sup>

Consequently, *Ron Engineering*<sup>41</sup> cannot be justified by the stated goal of protecting the “integrity of the bidding system”; it does little more than confer a windfall on an Owner that is lucky enough to have a low Bidder refuse to enter Contract B as a result of a mistake in its Bid.

Although the British Columbia Court of Appeal in *Ken Toby Ltd. v. British Columbia Buildings Corp.* expressed the view that “[t]he purpose of the Contract A and Contract B concept developed by the Supreme Court of Canada was to prevent bid shopping”,<sup>42</sup> it is respectfully submitted that this view is wrong for at least two reasons: (i) as noted elsewhere in this paper, there was nothing novel about the ancillary contract approach used, nor the recognition of contract rights and obligations arising in the bidding and tendering context;<sup>43</sup> and (ii) the emerging recognition of, by the courts, of obligations on Owners in the wake of *Ron Engineering* is an ancillary, though inevitable, result of the recognition of Contract A by the courts; the *Ratio* of the case, dealt only with preventing abuses by Bidders, not Owners.

In any event, *Ron Engineering* is clearly here to stay, although, more can claim familiarity with the decision than can claim to understand it: in *Calgary (City) v. Nor. Const. Co. Div. of Morrison-Knudsen Co.*,<sup>44</sup> the Supreme Court of Canada was asked to rule on another bidding and tendering case. In reported reasons of less than two pages (more than one page of which comprises the headnote) the court dismissed the Bidder’s appeal and held that it was bound by *Ron Engineering*. This analysis is rather discouraging, since the issue in that case was expressly reserved by the Supreme Court in *Ron Engineering*. The lesson is that “black letter law” in the area of bidding and tendering law is inherently misleading.

### 5. Effect of *Ron Engineering* on Owners

Interestingly, discussion of the harsh effects of *Ron Engineering* tend to focus on the effect on Bidders, not on Owners. However, the effect of

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difference between that price and West’s Bid price.

<sup>40</sup> *Gloge Heating & Plumbing Ltd. v. Northern Construction Co.* (1986), 42 Alta. L.R. (2d) 326 (C.A.); *Calgary (City) v. Northern Construction Co.* (1985), 42 Alta. L.R. (2d) 1 (C.A.), aff’d [1987] 2 S.C.R. 757.

<sup>41</sup> *Supra* note 16 (S.C.C.) at 121.

<sup>42</sup> (1999), 62 B.C.L.R. (3d) 308 at para. 32.

<sup>43</sup> s. IV(C)(3)(a), above.

<sup>44</sup> [1987] 2 S.C.R. 757 (S.C.C.).

the decision on Owners is just as dramatic. Prior the decision in *Ron Engineering*, an Owner was not bound to accept the lowest tender, even absent an express reservation of the right not to accept the lowest or any tender.<sup>45</sup> There is now no doubt under Canadian law that an Owner has a duty not to award Contract B to a Bidder in a manner which contradicts the express or implied terms of Contract A as set out in the call for tenders.<sup>46</sup>

### 6. *Strategies for Managing the Effects of Ron Engineering*

The Supreme Court sent out several clear signals in its unanimous reasons in the case, to indicate that the case may be restricted to its facts. Those, and a consideration of principles not discussed in the case, suggest strategies and arguments which might be used to avoid the harsh effects of *Ron Engineering*.

#### (a) *For Bidders*

##### (i) *Relief from forfeiture*

Although the Supreme Court in *Ron Engineering* stated that the only issue was the application of the forfeiture provisions of Contract A,<sup>47</sup> the court did not consider the effect of the relief from forfeiture provision of the *Judicature Act* which, from the time of the facts giving rise to the decision to the time of the court's decision read as follows:

22. The court has the power to relieve against all penalties and forfeitures, and, in granting such relief, to impose such terms as to costs, expenses, damages, compensation and all other matters as are considered just.<sup>48</sup>

The successor provision, s. 98 of the *Courts of Justice Act* reads as follows: "A court may grant relief against penalties and forfeitures, on such terms as to compensation as are considered just."<sup>49</sup>

The precise legal theory under which the hapless unlucky Bidder in *Ron Engineering* sought to recover the deposit is unclear from the reported decisions of the Court of Appeal and the Supreme Court of Canada, but in this commentator's view, a request for relief from

<sup>45</sup> *Spencer v. Harding* (1870), L.R. 5 C.P. 561. The typical "Privilege Clause" reads "Lowest or any tender not necessarily accepted".

<sup>46</sup> *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1997), 33 C.L.R. (2d) 1 (Alta. C.A.), rev'd [1991] 1 S.C.R. 619.

<sup>47</sup> *Supra* note 16 (S.C.C.) at 125.

<sup>48</sup> *Judicature Act*, R.S.O. 1980, c. 223, s. 22.

<sup>49</sup> R.S.O. 1990, c. C.43.

forfeiture due to mistake in calculations ought to be looked on kindly by the courts, absent some reliance or change of position by the Owner, for instance where the bidding process is time sensitive due to some emergency situation or deadline which is externally imposed on the Owner. Unfortunately, the courts have reacted sceptically to such claims.<sup>50</sup>

(ii) *Mistake on the face of the bid*

The Supreme Court was careful to point out that it was not saying that the amount of the bid itself may not, in some circumstances, render a tender incapable of being “accepted” thereby forming Contract A; suggesting, for example that a Bid to sell goods for “\$20 per ton” where the offeror meant to say “\$200 per ton” might not be capable of being “snapped up”. This reservation is particularly important, since the owner’s consulting engineers in *Ron Engineering* had prepared a budget for the project of \$2,744,700 (\$3,300 less than Ron’s bid), and the trial judge found that the budget was a reasonable price for completion by a conscientious contractor, and included provision for contractor’s profit.

In the same vein, the Supreme Court distinguished the *McMaster University v. Wilchar Construction Ltd. et al.*<sup>51</sup> decision, in which a call for tenders was put out, and bids submitted, during a strike by certain construction trades. In light of the likelihood that wage rates would increase in the wake of the strike, the local construction association had circulated a form of “wage escalator clause” to be inserted in contracts to protect contractors’ rights. The clause was not contained in the instructions to bidders or in the form of tender required by the owner to be submitted; rather, each bidder simply attached the clause to its own bid. In distinguishing the case, the Supreme Court noted the observation of the trial judge in *McMaster* that it must have been apparent to the owner that the clause was meant to be included, and was missing by mistake.

As such, a Bidder seeking to escape liability under its Bid should consider whether there is a mathematical error on the face of the bid, or whether the amount of the bid is so low that the Owner can be taken to have known that it was based on a mistake. In this regard, counsel should seek evidence on discovery of the estimated cost of the work in question generated by the owner prior to issuing the call for tenders. It should be noted, however, that a court may look for an exceedingly clear and obvious error: In *City of Ottawa Non-Profit Housing Corporation v.*

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<sup>50</sup> *S.S. Contracting Inc. v. Edenwold (Rural Municipality No. 158)* (2002), 19 C.L.R. (3d) 134 (Sask Q.B.); *Nelson River Construction (1984) Inc. v. Winnipeg (City)* (1993), 11 C.L.R. (2d) 12 (Man Q.B.).

<sup>51</sup> *Supra* note 9.

*Canvar Construction (1991) Inc.*<sup>52</sup> the Tender stipulated \$2,289,000 as the tender price, but enclosed a bid bond in the amount of \$149,450, which recited that it represented “five percent of the tender price”; the defendant Bidder escaped liability under the bid bond on the basis that its Bid was invalid, since \$149,450 represented five percent of \$2,989,000 (which the Bidder stated, in defence of the Owner’s claim, was its intended Bid price) not five percent of the actual price on the face of the Bid \$2,289,000 which would have been \$114,450. The court held that this made it clear to the careful reader that there was a mistake on the face of the bid.

(iii) *Wording of bid documents - Express terms of Contract A*

The Supreme Court of Canada states in *Ron Engineering* that “the revocability of the [Bidder’s Tender] must...be determined in accordance with the “General Conditions” and “Information for Tenderers” and the related documents upon which the tender was submitted”.<sup>53</sup> As such, as noted above, it is impossible to advise a Bidder on its rights and obligations without reviewing the Instructions to Bidders (including any documents which are incorporated by reference therein, such as the Agreement, Bid Depository Rules, and the form of Tender itself). It is not unheard of for the Bid Depository Rules and other documents incorporated by reference into Contract A to conflict with the Instructions to Bidders, and such conflict may be used to avoid liability under Contract A.<sup>54</sup>

Consider whether the Instructions to Bidders, by their terms, provide that Bids are irrevocable for a stated period, or if there is any provision for their withdrawal. Note whether the instructions to Bidders call for the Bid to be sealed with the Bidder’s corporate seal, and whether in fact, it is under seal, since a promise made in a document under seal is a “deed”, and the promise is enforceable without consideration.<sup>55</sup> Where the Bid is not sealed, consider whether an argument can be made that the Owner has so qualified its obligations under the Bid Contract (particular in light of recent practice arising from attempts by Owners to mitigate the effects of court decisions recognizing a duty of fairness) that it can be argued that

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<sup>52</sup> (1999), 46 C.L.R. (2d) 116 (Ont. Sup. Ct. J.)

<sup>53</sup> *Supra* note 16 (S.C.C.) at 119.

<sup>54</sup> Although Goldie J.A. of the British Columbia Court of Appeal doubted in *obiter* in *Ken Toby* (*supra* note 42 at para. 34) whether “it is necessary to have recourse to the concept of Contracts A and B” where the “Bid Depository system is regulated by a comprehensive set of rules”, it is respectfully submitted that these doubts are unfounded. Bid depository rules do not typically have the force of law, and are therefore only binding on the parties by virtue of the terms of Contract A.

<sup>55</sup> *Davidson v. Norstrant* (1921), 61 S.C.R. 493 at 504.

there is no consideration for the promise to leave the Bid open for the specified period.

Note as well that an added level of complexity arises where an Owner calls for Tenders from general contractor Bidders, who in turn call for tenders from sub-contractor Bidders. It is not uncommon for conflicts to arise either on the face of the two levels of Call documents, or due to activities by the Owner during the bidding period.

Another option for a Bidder seeking to avoid liability under Contract A is to consider whether the Construction Contract itself is enforceable, since the Agreement is typically incorporated by reference into the Instructions to Bidders.

The applicable principles in respect of the interplay between express terms of a Call and applicable legislation were thrown into considerable confusion as a result of the decision of the Newfoundland Court of Appeal in *Emery Construction Ltd. v. St. John's (City) Roman Catholic School Board*.<sup>56</sup> In that case, the court considered the situation in which a tender call purported to incorporate bidding guidelines established by a government department (which required bidders to carry in their price the lowest sub-contractor and supplier bids), which conflicted with the requirements of admittedly applicable legislation which was not referred to in the Call, but which was given effect during review by the Owner of bids (which required that bids be compared on the basis of inclusion of a local sub-contractor). The Court of Appeal held that the statutory requirements took precedence, and the court upheld the trial judge's decision dismissing a claim by a Bidder which was low absent consideration of the statutory local content criteria. It is respectfully suggested that a better result would have been to find that the Bid was incapable of forming the basis of Contract A, due an internal conflict between the purported terms of that contract.

(iv) *Claim by Bidder v. claim by Owner*

It is noteworthy that the Owner's lawyer in *Ron Engineering* distinguished *Belle River* at the Court of Appeal on the basis that *Belle River* involved a claim by an Owner under a Bid Bond:

The proposition which is put to us by counsel for the respondents is that there is a distinction between the use of a bid bond (which was the factual situation in the *Belle River* case) and the use of a deposit such as was employed by the Commission in this case.<sup>57</sup>

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<sup>56</sup> (1996), 141 Nfld & P.E.I. R. 24 (Nfld. C.A.).

<sup>57</sup> *Supra* note 16 (C.A.) at 334.

Although the Supreme Court did not note that such argument was made in front of it, such must be presumed to be the case: the Supreme Court of Canada refused to grant leave in *Belle River* on the same day as it issued its judgment in *Ron Engineering*. There does not appear to be anything to distinguish the words of the Instruction to Bidders in the two cases (nor did the Supreme Court purport to do so in *Ron Engineering*), so the fact that the Bidder was Plaintiff in *Ron Engineering* and the Owner was Plaintiff in *Belle River* would seem to be the only factor distinguishing the cases. As such, it appears that, *Ron Engineering* was intended to set out the law in respect of recovery of a cash deposit by a Bidder whereas *Belle River* was intended to set out the law in respect of a claim by an Owner for damages (particularly under a Bid Bond).<sup>58</sup>

In *Defence Construction (1951) Ltd. v. Municipal Enterprises Ltd.*<sup>59</sup> the Nova Scotia Court of Appeal found that the Supreme Court of Canada in *Ron Engineering* did not overrule the Ontario Court of Appeal in *Belle River*. In *Defence Construction*, the Instructions to Bidders set out certain wage rates which the successful Contractor would be required to pay to workers, in accordance with the *Fair Wages and Hours of Labour Act*. Although the Instructions to Bidders placed the risk of increases in those rates *during the course of the Contract* on the Contractor, the court held that the Contract B resulting from the Plaintiff's Bid was void due to the Owner's misrepresentation, where the Owner was aware (but did not advise the Bidder prior to submission of its Bid) that the rates had been increased prior to that time. The Court held that since the Bid price was calculated based on wage rates which violated the applicable statute, the Bid itself was incapable of acceptance, and Contract B was therefore void.

The conclusion that the court in *Ron Engineering* did not intend to overrule *Belle River* is supported by the following statement, which made by the Court while setting out issues that were not before it:

Nor are we concerned with the position of the parties were an action is brought upon a refusal to form contract B as was the case in *McMaster*...<sup>60</sup>

In *Belle River*, as in *McMaster* but unlike in *Ron Engineering*, the Defendant Bidder withdrew its Bid prior to award. The Court in *Ron Engineering* stated as follows:

Therefore, the issue in my view concerns not the law of mistake but the application of the forfeiture provisions contained in the tender documents...Neither are we here concerned with a question as to whether a construction contract can arise between two

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<sup>58</sup> See, however, footnote 63 below.

<sup>59</sup> (1986), 23 D.L.R. (4th) 653 (N.S.C.A.).

<sup>60</sup> *Supra* note 16 (S.C.C.) at 126.

parties in the presence of a mutually known error in a tender be it, at least initially, either patent or latent.<sup>61</sup>

One is led to the view, by the paragraph cited, in the context of the Court's refusal to grant leave in *Belle River* that the Court was of the view that a strict formalistic approach was (for some inexplicable reason) warranted in construing the forfeiture provisions, but that such an approach would not support a claim against a Bidder or its surety.

In the result, the author's view is that where possible, a Bidder should submit a bid bond, or Bid Security other than cash, in an attempt to exploit the distinction drawn in *Ron Engineering*,<sup>62</sup> although in the case of a dispute, one will have to find a way to distinguish or otherwise deal with *Calgary (City) v. Northern Construction Co.*<sup>63</sup>

(v) *Restitution*

In *Municipal Enterprises*,<sup>64</sup> the Owner accepted a Bid, knowing of an error therein. The Court granted restitution to the Bidder in an amount equal to the excess costs resulting from the mistake. It is submitted that, even if the distinction between a claim by an Owner and a claim by a Bidder were to be rejected by the courts, it would be open to a Bidder to claim back from the Owner (in restitution) the damages recovered from the Bidder for the breach of Contract A.

(vi) *Penalty*

The court in *Ron Engineering* made a point of noting that the law of penalty as it relates to the retention of a deposit was not argued;<sup>65</sup> as such, the door is open for a party to argue that the forfeiture provision is a penalty, and therefore not enforceable. In this regard, *Quare* whether the Bid Security forfeiture provisions are enforceable where the effect is oppressive.<sup>66</sup>

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<sup>61</sup> *Ibid.* (S.C.C.) at 125.

<sup>62</sup> *Supra* note 16.

<sup>63</sup> *Supra* note 44; it should be noted that *Calgary (City) v. Northern Construction Co.* involved a claim on bid bond; however, the case may be distinguished on the basis that the issue of the distinction between a claim by Owner and a claim by a Bidder for return of a deposit does not appear to have been argued.

<sup>64</sup> *Supra* note 59.

<sup>65</sup> *Supra* note 16 (S.C.C.) at 125-27.

<sup>66</sup> In this regard, see *J.G. Collins Insurance Agencies Limited v. Elsley Estate*, [1978] 2 S.C.R. 916.

(b) *For Owner*

Since the terms of the Bid Contract are set by Owners, it is open to Owners to ameliorate the effects of *Ron Engineering* on Bidders by drafting Instructions to Bidders which allow a Bidder to withdraw its Bid at any time prior to either Deadline for submission of Bids,<sup>67</sup> Bid opening, or Contract Award.

At the very least, an Owner should be careful not to include any language in its Instructions to Bidders to the effect that the Construction Contract “shall” be awarded to any Bidder under any particular set of circumstances (or that it “shall not” be awarded to any Bidder under some other set of facts), and should always include some version of Privilege Clause. There is, of course, nothing (except commercial pressures) to stop an Owner from drafting a Privilege Clause as broadly as it likes to mitigate the effect of the principles set out in the various court decisions referred to herein; for an extreme example of this principle in practice, see *Sound Contracting Ltd. v. Nanaimo (City)*.<sup>68</sup>

Many Owners that call for Bids are public authorities, and in the author’s view, it is a responsible exercise of public power to balance the need to obtain value for money on behalf of taxpayers, with a willingness to forego a windfall to reduce the punitive effect of *Ron Engineering* on a mistaken Bidder; Instructions to Bidders might provide, for instance, that the Bid Security be applied towards actual losses suffered by the Owner due to the withdrawal of the low Bid, including any reliance damages resulting therefrom.

Furthermore, an Owner may protect itself by reserving to itself the right to accept any Bid (notwithstanding any informality), and, as noted above, to reject any or all Bids. As well, the Instructions to Bidders should set out a procedural step to be taken which will constitute acceptance of the Bid and award of the Contract, so that the Owner may set the precise time of acceptance.

Some Owners may be taking this principle too far; this commentator has encountered a trend towards Owners including language which purports to oust the inherent jurisdiction of the court; *Quare* whether such language is enforceable.

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<sup>67</sup> In fact, such a provision was contained in the Instructions to Bidders in *Ron Engineering*.

<sup>68</sup> (2000), 74 B.C.L.R. (3d) 239 (C.A.); but see W. Donald Goodfellow, “Look What the British Columbia Court of Appeal Has Done to the Privilege Clause” (2000), 2 C.L.R. (3d) 7.

## D. Owner's Duties to Bidders

### 1. Qualified Duty to Award and Enter Contract

The court in *Ron Engineering* held that the Owner bore the following duties under Contract A (although the degree of this obligation is controlled by the terms and conditions established in the call for tenders, and may be eliminated by careful drafting):

- A “qualified obligation” to accept the lowest Bid
- To enter into Contract B upon acceptance of the tender.<sup>69</sup>

The latter is particularly noteworthy: it means that, even prior to signing a formal contract document, an Owner may be liable to the successful Bidder upon communicating its acceptance of the Bid. This conclusion was expressly endorsed in *Lanca Contracting*.<sup>70</sup> As noted elsewhere in this paper, an Owner may mitigate the effects of this principle by granting itself broad, clearly stated powers in the call for tenders to accept or reject, on the basis of criteria either stated or implied, any bid.

As to the former, the Supreme Court's statement in this regard should be viewed with some suspicion, particularly in light of how the Court has since dealt with the issue: In *M.J.B. Enterprises*<sup>71</sup> the Instructions to Bidders included a standard traditional Privilege Clause (“The Lowest or any tender shall not necessarily be accepted”). The Court found that there was an implied contractual duty only to award to a compliant Bidder (although not necessarily the lowest compliant bidder). The Court considered whether the Privilege clause overturned this implied term of Contract A, and found that it did not. It also appears to have sounded the death knell for the “qualified obligation” to accept the lowest bid, referred to in *Ron Engineering*,<sup>72</sup> except in cases where the Instructions to Bidders specifically state or imply such an obligation.

*M.J.B Enterprises'* underlying reasoning (where Instructions to Bidders impose mandatory requirements on Bids, the Court may infer an intention that the Owner may accept only compliant Bids) is to be preferred to the fairness cases discussed below, but the decision is still unsatisfactory on the facts of the case as recited in the decision.<sup>73</sup> The

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<sup>69</sup> *Supra* note 16 (S.C.C.) at 122-23.

<sup>70</sup> *Supra* note 23.

<sup>71</sup> *Supra* note 46 (S.C.C.)

<sup>72</sup> See also *Wind Power Inc. v. Saskatchewan Power Corp.* (2002), 15 C.L.R. (3d) 291 at para. 30 (Sask. C.A.).

<sup>73</sup> *Supra* note 46 (S.C.C.).

Instructions to Bidders contained the following provision: “Any alterations in the printed part of the Tender Form DCL 150(S) or failure to provide the information requested therein, may render the tender invalid”.<sup>74</sup> This language clearly implies the exercise of some discretion by the Owner. It must be assumed that the discretion implied by the word “may” in the section was not argued, because on its face, it would seem to overturn the presumption at least in part.

Furthermore, the case is an apt example of the principle that “hard cases make bad law”. According to the reasons of the Alberta Court of Appeal in the case the original Call stated that the site engineer would, after Contract B came into effect, and during performance thereof, decide whether water pipes which formed part of the work would be laid in Type 2 fill (gravel), Type 3 (native backfill) or Type 4 (concrete slurry). The cost of these different types of fill varied widely, so the Instructions to Bidders and Tender form originally contemplated a schedule of quantities and price per metre for each type of material, so that Bids could be compared on the basis of each. For some reason not explained in the reasons of any of the courts involved in the case, the Instructions to Bidders were amended to require one price only for fill, without specifying which Type was to be specified.

This change placed Bidders in an impossible situation: if a Bidder assumed the most expensive material, it might price itself out of the running compared with more daring competitors; on the other hand, if it assumed cheaper fill, it might be forced, after award, to accept a cost for which it had not budgeted. On its own initiative, the successful Bidder submitted a price, along with a stated assumption that Type 3 fill was included in the price, and that the price would go up by a stated amount in the event that Type 2 fill was required instead.

The case illustrates the unreasonable commercial burden assumed by Bidders in the Call for Tenders process; one can easily imagine the Bidder, having invested substantial time and money in preparing a Bid, trying to submit a rational Bid in response to an irrational process.

Interestingly, at least one court has allowed a low Bidder, whose Bid was too low, due to math errors, to use certain defects in the form of its Bid as a “shield” to prevent the Owner from purporting to accept the Bid.<sup>75</sup>

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<sup>74</sup> *Ibid.* (S.C.C.) at para. 33 (but not analyzed by the Court).

<sup>75</sup> *Graham Industrial v. Greater Vancouver Water District*, [2003] B.C.J No. 2614 (S.C.) (Q.L), aff’d [2004] B.C.J No. 5, (C.A.) (Q.L.).

## 2. Duty of Fairness: Undisclosed Criteria and Bid Shopping

As noted above, the language of the Instructions to Bidders defines the obligations of the parties in a bidding situation. Although Owners are well advised to reserve to themselves the right to reject any or all tenders, the courts have recognized that has been referred to, somewhat unfortunately, as a duty of “fairness” or “good faith” on the part of an Owner in considering bids submitted in response to a Call for Tenders.

In *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)*<sup>76</sup> a municipality called for bids for a construction contract. The instructions to bidders stated that “lowest or any tender will not necessarily be accepted”. The Owner had an undisclosed policy of accepting the lowest bid by a local Bidder whose bid was within 10% of the Bid price of the low non-local Bidder. The decision not to disclose the policy was a considered one, the effect of which was to give the Owner the benefits of a competitive market, at the expense of outside contractors.

The low Bidder (which was not a local company) sued for an undisclosed amount of damages when the Construction Contract was awarded to a local contractor. The principal officer of the Plaintiff testified that the competitive environment was such that the company would not have bid on the job if it had known of the preference, since it would have been impossible to bid 10% lower than the lowest bidder. The British Columbia Court of Appeal dismissed an appeal from a trial judgment allowing the claim. It found that there was an implied term of the Bid Contract that “in the absence of notice from the owner of preferential rules or criteria for the award of the contract...the low qualified bidder got the job.”<sup>77</sup>

The result reached by the court appears salutary, in light of the expense, inconvenience and legal liability attendant to submitting a Bid, and the apparent “hidden agenda” of the Owner in the case. Some commentators have taken issue with the analysis, however; an annotation of the decision, written by Steven Steiber states, “the need to imply terms into [Contract A] that appear to be contradicted by their express terms leads one to question the...premises...that Contract A was created.”<sup>78</sup> Those commentators have apparently not considered the view that there is a world of difference between choosing not to award to Bidder, and awarding to a non-compliant Bidder.

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<sup>76</sup> (1989), 35 C.L.R. 241 (B.C.C.A.); see also *Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 (Nfld. C.A.), *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 24 B.C.L.R. (3d) 379 (C.A.), *Martselos Services Ltd. v. Arctic College*, [1994] 3 W.W.R. 73 (N.W.T.C.A.)

<sup>77</sup> *Chinook Aggregates*, *ibid.* at 249.

<sup>78</sup> *Ibid.* at 243 (case headnote).

The case is often contrasted with *Acme Building & Construction Ltd. v. Newcastle (Town)*. Here, the Instructions to Bidders stated “owner shall have the right not to accept lowest or any other tender”<sup>79</sup>. The contract was awarded to a Bidder who committed to complete the work earlier (which would result in less cost and inconvenience to the Owner, and to use a greater percentage of local subcontractors than the low bidder). At trial, the Court found that there was no commonly accepted custom in the industry that the lowest Bid was to be accepted. The Ontario Court of Appeal held that even if there was such a local custom, it could not prevail over the express words of the Instructions to Bidders quoted above. The Court also noted that since each of the Bidders were asked to stipulate completion date and the identity of its subcontractors, each matter was obviously material to the Owner, and could be validly considered in awarding the contract.

It is useful to note that the Court of Appeal in *Acme* distinguished *Chinook Aggregates*, however it did not reject the reasoning. The Court’s reasons should give no comfort to those who would say that there is no duty on the part of Owners not to rely on undisclosed criteria, in light of the brief discussion therein of the “relevance” of contract time and percentage of local subcontractors.

In *Fred Welsh Ltd. v. B.G.M. Construction Ltd.*<sup>80</sup> the Defendant contractor, in preparing a Bid to be submitted to the Owner, sought bids from mechanical subcontractors, including the Plaintiff. A critical element of the Plaintiff’s bid was withheld from the Defendant until ten minutes before contractor bids closed, in an effort to prevent the Defendant from “bid shopping”. Bid shopping is the process by which a person calling for Bids uses the competitive bidding process to solicit a price, to be used as the basis for a negotiated price with a preferred contractor.

Prior to the bid closing in *Fred Welsh*, the contractor obtained a “quote” from one of the Plaintiff’s competitors. The quote was not a formal bid. The quote was for substantially less than the Plaintiff’s bid. The subcontract was ultimately awarded to the competitor, and the Court found that the Defendant contractor never intended to award the subcontract to the Plaintiff. The Plaintiff successfully sued the contractor for damages, the Court finding that bid shopping constitutes a breach of “Contract A” or the “Bid Contract” between Plaintiff and Defendant (as described in *Ron Engineering*) notwithstanding a clause in call for tenders stating that the “lowest or any bid will not necessarily be accepted” given the Defendant’s “deceit, secret intent, and unfair practices”.

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<sup>79</sup> (1992), 2 C.L.R. (2d) 308 (Ont. C.A.); see also *Elgin Construction Ltd. v. Russell (Twp.)* (1987), 24 C.L.R. 253 (Ont. H.C.J.).

<sup>80</sup> (1996), 24 B.C.L.R. (3d) 52 (S.C.).

In *Arrow Construction Products Ltd. v. Nova Scotia (Attorney General)*<sup>81</sup> the Owner issued a Call for a Construction Contract involving repairs to a roof. Blue PVC roofing material was preferred by the Owner because of its ability to withstand harsh weather better than EPDM, another roofing material, and because of the colour. The Plaintiff was a supplier of EPDM roofing material, but did not itself bid on the project. At the request of the Plaintiff, the Owner issued an addendum to the Instructions to Bidders, whereunder the materials offered by the Plaintiff would be considered, as would white or grey PVC (which was cheaper than the blue). EPDM only came in white, and was cheaper than either colour of PVC. The Plaintiff Bidders were asked to submit a “base bid” for Contract B, providing for the supply of Blue PVC, with alternate prices for white or grey PVC and white EPDM. The Contract was awarded to a Bidder (“Lindsay”) that submitted the low Bid for both blue and white/grey PVC, and the Owner directed it to supply white PVC, at a contract price of \$344,031. Another Bidder (“Atlantic”) was second lowest for both types of PVC, but its price for the EPDM roof was the lowest of all of the prices submitted.

The Plaintiff sued the Owner for breaching an alleged duty of fairness, as well as for negligently misrepresenting that the materials were to be considered as equals. The trial judge considered expert evidence that PVC and EPDM were technically equal, and found that in light of that fact, the Owner had a duty to award the contract to the lowest Bidder. He held that the Owner had exercised a “hidden preference” for PVC, and that it was negligent in not awarding the contract to the low Bidder for white EPDM.

The Nova Scotia Court of Appeal overturned the decision, holding that the Owner’s preference for PVC was clear, so there was no hidden preference, or representation that the materials would be considered as equals. The Court of Appeal said that although the two materials may, in fact, have been equals, “that judgment is not for the courts but for the party calling the tender.”<sup>82</sup>

The Court held that, assuming without deciding that there was a duty of fairness, there was no lack of fairness in the situation.<sup>83</sup> Furthermore, it seems to have suggested that fairness was a concept which applied to ‘judicial or *quasi judicial*’ decisions, with no application in the bidding and tendering context.<sup>84</sup> To this extent, the Court was swimming against

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<sup>81</sup> (1996), 27 C.L.R. (2d) 1 (N.S.C.A.).

<sup>82</sup> *Ibid.* at 13; but see the wholly unsatisfactory *Khoury Real Estate Services Ltd. v. Canada (Minister of Public Works & Government Services)* (1996), 33 C.L.R. (2d) 294 (F.C.T.D.).

<sup>83</sup> *Ibid.* at 19.

<sup>84</sup> *Ibid.* at 15.

the tide of recent jurisprudence.

In *Northern Chain Link Inc. v. Thunder Bay (City)*<sup>85</sup> the Plaintiff was a contractor that had been caught intentionally using substandard materials on earlier contracts for the Owner. It sought an injunction preventing the Owner from including language in its Calls preventing the Plaintiff to be considered as a contractor or subcontractor. The Court dismissed the Plaintiff's motion, on the basis that it did not come to court with clean hands. Although the *ratio* of the decision was couched in the language of equity, it is apparent from *obiter* contained in the judgment that a claim by the Plaintiff for damages might be expected to fail; in fact, the Court went as far as to say that the Owner had a "right" not to deal with a contractor "that was caught out in deceit if not in fraud."<sup>86</sup> In the author's view, an Owner ought to be completely free to reject a Bidder if the Owner has legitimate concerns about that Bidder's honesty, integrity or ability to perform Contract B; furthermore, this principle should apply even where, for instance, a Bidder has been pre-qualified, but the Owner subsequently comes into possession of information which leads it to disqualify that Bidder.

The Supreme Court of Canada dismissed Ellis-Don's appeal in *Naylor*.<sup>87</sup> The Supreme Court did not express an opinion on whether Ellis-Don engaged in bid shopping, or whether this was actionable.

The Defendants in *Chinook Aggregates, Fred Welsh*, and other "fairness" cases, clearly had "hidden agendas", which the Court felt were deserving of censure, and the courts may be moving away from the unsatisfactory "fairness" language, towards a recognition of an implied term that the Owner will not make an award based on undisclosed criteria,<sup>88</sup> or at least defining lack of fairness to mean "[awarding a] contract on the basis of considerations or criteria extraneous to those identified in the tender documents".<sup>89</sup>

The Supreme Court in *Martel Building Ltd. v. Canada*<sup>90</sup> held in the circumstances of the case that a term was implied in Contract A to treat bidders "fairly and equally" and to be "fair and consistent in assessment of the tender", due to the "presumed intention of the parties"; according to the Court in *Martel*, "Such implication is necessary to give business efficacy to the tendering process".<sup>91</sup> This reasoning followed the Court's

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<sup>85</sup> (1994), 15 C.L.R. (2d) 36 (Ont. Gen. Div.).

<sup>86</sup> *Ibid.* at para. 8.

<sup>87</sup> Below at note 98 (S.C.C.).

<sup>88</sup> *Emery Construction*, *supra* note 56.

<sup>89</sup> *Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)* (1999), 48 C.L.R. (2d) 236 (Ont. C.A.) at para. 9.

<sup>90</sup> [2000] 2 S.C.R. 860.

<sup>91</sup> *Ibid.* at para. 88.

reasoning in *Pacific Hotels Ltd. v. Bank of Montreal*,<sup>92</sup> in which the Court reasoned that an implied duty arises based on custom or usage, as the legal incident to a particular class or kind of contract, or where “necessary to give business efficacy to a contract or as otherwise meeting the “officious bystander” test as a term which the parties would say, if questioned, that they had obviously assumed.” The reasoning of the Court in *Pacific Hotels*, referred to in *M.J.B. Enterprises* makes it clear that the implied term must be necessary, as opposed to merely desirable; in *M.J.B. Enterprises* the Court stated that the focus is on the presumed intention of the *actual* parties, not *reasonable* parties, and stated that this is why the reasonableness of a term “must have a certain degree of obviousness to it, and why, if there is evidence of any contrary intention, on the part of either party, an implied term may not be found on this basis.”<sup>93</sup>

Happily for Owners, the court in *Martel Building*<sup>94</sup> allowed an appeal by the Owner where the call for tenders stated that the Owner would make its own estimates of certain ancillary costs for the purpose of evaluating bids. Finding no “colourable attempt to use [these costs] to achieve a desired result”, the Court refused to overturn the Owner’s decision.

The Court in *Martel Building*<sup>95</sup> implied a duty to treat Bidders “fairly and equally”, while begging the question as to what the concept of fairness adds to the *M.J.B. Enterprises*<sup>96</sup> implied term that a non-compliant Bid will not be accepted absent clear language to the contrary.

In this commentator’s view, the duty of fairness, if it exists, should be limited to that described in *Martselos Services* in which the Court stated that:

Practice and custom have been held to over-ride the privilege clause only in specific cases with special circumstances. Those circumstances have been where an owner has relied on undisclosed criteria, or where the owner takes into account irrelevant or extraneous considerations, or where there are specific provisions in the tender specifications that are inconsistent with the general privilege clause, or where the tendering process was a sham. The cases where these situations have arisen are *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* [*supra* note 75]; *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1992] F.C.J. No. 953 (T.D.); *Canamerican Auto Lease & Rental Ltd. V. Canada*, [1987] 3 F.C. 144 (C.A.); and *Best Cleaners & Contractors Ltd. v. Canada*, [1985] 2 F.C. 293 (C.A.).<sup>97</sup>

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<sup>92</sup> [1987] 1 S.C.R. 711 at para. 52.

<sup>93</sup> *Supra* note 46 (S.C.C.) at para. 29.

<sup>94</sup> *Supra* note 90.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Supra* note 46.

<sup>97</sup> *Supra* note 76 at para. 35.

The above definition, which is based strictly on the idea of preventing an Owner from exercising a “hidden agenda” reflects the broad thrust of all of the “good faith” cases. It certainly contemplates “bid shopping”, which is the process of soliciting bids for the purpose of utilizing them to negotiate a contract with a preferred supplier.<sup>98</sup>

In this regard, note that in *Kinetic Construction v. Comox-Strathcona (Reg. Dist.)*, the Instructions to Bidders contained the following clause:

The evaluation process will be conducted at the discretion of the Owner, and the Owner may decide to utilize other criteria and review of Tenderers, other than those set out above and, without limiting the generality of the forgoing, the price to complete the Work is not the only or primary criterion to be used by the Owner in awarding the Contract...Tenders which contain qualifying conditions or which otherwise fail to conform to the Instructions to Tenderers may be disqualified or rejected. The owner may, however, in its sole discretion, reject or retain for consideration Tenders which are nonconfirming...<sup>99</sup>

The Court found that the Owner was entitled, based on the clear language of the Call, to accept a non-conforming bid, and that there was no “independent free standing duty of fairness independent of contract” (at p. 139); as long as the Bidders are aware that criteria other than price will be considered, they do not have a right to know the precise weight of each factor. At least one court has found that there is no duty of fairness in an RFP (as opposed to a Tender) process.<sup>100</sup>

In light of the the foregoing, Owners are well advised to state in their Instructions to Bidders a “Modern Privilege Clause”, stating that the Owner may, in its sole discretion, waive informalities and defects in any Bid, and that the Owner may conduct such investigations of the Bidder as it sees fit and may consider any information whatsoever that may come into its possession in respect of any Bidder. A similar “Modern Privilege Clause” (not the Court’s term) was used to uphold the Owner’s exercise

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<sup>98</sup> *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (1999), 43 O.R. (3d) 325 (C.A.), var’d [2001] 2 S.C.R. 943. Note that the Court of Appeal in *Naylor* distinguishes *Scott Steel* (*infra* note 109) on the basis that in *Scott Steel* there was no evidence of “bid shopping or any other improper motive on the part of the prime contractor...” (at 62). See also *Vipond Automatic Sprinkler Co. v. E.S. Fox Ltd.* (1996), 27 C.L.R. (2d) 311 (Ont. Gen. Div.), in which mechanical subcontractor Bidders submitted Bids to prime contractor Bidders, all prime contractor Bids were rejected by owner due to “grossly over budget” mechanical prices, and “[b]y all accounts, after the initial tender, the bidding procedure degenerated into a “free for all” without discipline or any formalized retendering process” (at 316); the Court recognized a duty of good faith on the part of Defendant prime contractor Bidder, but found no breach of that duty.

<sup>99</sup> (2004), 29 C.L.R. 127 (BC.S.C.) at 134.

<sup>100</sup> *Powder Mountain Resorts*, note 114 below at para. 72.

of discretion in *Sound Contracting Ltd. v. Nanaimo (City)*.<sup>101</sup>

In addition, Owners are well advised to consider the following or similar precautions:

- spell out in the Instructions to Bidders a variety of criteria (other than cost) which may be used to select the Contractor from among all Bidders, or
- require Bidders to include information on which such a choice might rationally be made (such as price breakdown, schedule, construction means and methods, identities of key personnel, sub-contractors and suppliers, previous projects, financial health, ability to obtain bonds, schedule, local experience, etc.) in the Bid forms.

In this manner, Owners may reduce the likelihood of inadvertently breaching any of the duties inferred by the courts.

The court in *Gottardo*<sup>102</sup> rejected<sup>103</sup> (based on the proposition that “it was reasonable to infer that only a compliant tender would be accepted”) the submission that the following form of Modern Privilege Clause entitled the Owner to waive the requirement for submission of extensive corporate and financial information, as well as information about past experience, subcontractors, and union affiliations:

.7 The Commission’s right to accept or reject any or all Tenders or to accept a Tender, whether or not it confirms with the Tender Documents, or to cancel this request for Tenders at any time prior to the Notification of Award is expressly reserved without liability to the Commissions.

As such, it is an open question how explicitly an Owner must state its rights to waive irregularities in order to succeed to enforce a Modern Privilege Clause, and Owners are cautioned to use exceedingly clear language in this regard.

### 3. Duty of Disclosure

An Owner should be very careful about what factual information is provided in a Call. It is well established that an Owner may be held liable to a Bidder that relies, in preparing its Bid, on misrepresentations made by the Owner. In *BG Checo International Ltd. v. British Columbia Hydro &*

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<sup>101</sup> *Supra* note 68.

<sup>102</sup> *Supra* note 26.

<sup>103</sup> *Ibid.* at 373.

<sup>104</sup> [1993] 1 S.C.R. 12; see also *Cardinal Construction Ltd. v. Brockville (City)*

*Power Authority*,<sup>104</sup> the Defendant issued a call for tenders to erect transmission towers and string transmission lines along a hydro right of way. The tender documents and the contract which was ultimately signed between Plaintiff and Defendant contained the following provision: “Clearing of the right of way and foundation installation has been carried out by others and will not form part of this contract”. Prior to submitting a bid, a representative of the Plaintiff visited the site and observed that the right of way had been partially cleared and observed ongoing clearing activities. In fact, no further clearing ever took place. The result was that the Plaintiff was put to substantial additional expense. The Defendant had contracted out the work to another company but, to the Defendant’s knowledge, the work had not been done.

The trial judge made a finding of fraudulent misrepresentation and breach of contract. The Court of Appeal rejected the finding of fraud but found that there had been a negligent misrepresentation which induced the Plaintiff to enter into the contract. The Supreme Court of Canada upheld the finding against the Defendant in tort and in contract.

#### 4. *Owner’s Good Faith in Interpreting Terms of Call*

In *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board*<sup>105</sup> the stated deadline for Bids was “at 1:00PM”. Successful Bidder’s Tender was submitted at 1:00:30 (i.e. before 1:01PM). The Ontario Court of Appeal upheld a challenge by a Bidders whose bid, submitted before 1:00PM, would have been low but for that of the successful bidder. The Court held that the Owner could have successfully, in the circumstances, decided either to allow the successful Bidder’s Tender (i.e. interpret the deadline as being 1:00:59PM) or disallow it (i.e. interpret the deadline as being 1:01:00PM), as long as it acted in good faith. In doing so, the court took note of, and did not follow the decision of the British Columbia Supreme Court in *Smith Bros. And Wilson (B.C.) Ltd. v. British Columbia Hydro and Power Authority*,<sup>106</sup> concluding that there was no “right” interpretation of the words. Given the fact that it is typical for most or all tenders to be submitted within a small number of minutes prior to the stated deadline, it is respectfully submitted that the Bradscot decision comprises a disservice to the construction industry. Owners would be well advised to make sure that they identify in their

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(1984), 4 C.L.R. 149 (Ont. H.C.J.), *Advice Pipelines Ltd. v. Mississauga Golf and Country Club* (1989), 33 C.L.R. 280 (Ont. H.C.J.), *Brown & Huston Ltd. v. The Corporation of the City of York* (1985), 17 C.L.R. 192 (Ont. C.A.) aff’g (1983), 5 C.L.R. 240 (Ont. H.C.J.); but see *Auto Concrete Curb Ltd. v. South Nation River Conservation Authority*, [1993] 3 S.C.R. 201.

<sup>105</sup> (1999), 42 O.R. (3d) 723 (C.A.).

<sup>106</sup> (1997), 30 B.C.L.R. (3d) 334 (S.C.).

Calls a precise moment at which the Call closes, and, where possible, the clock which will be considered determinative for that purpose.

### 5. Oral Representations During Bidding Process

It is typical for the Owner to include a provision in a call for tenders, stating that Bidders may not rely on any oral representation by a representation of the Owner. Such a provision protects the Owner in two ways: by ensuring that the terms of Contract A are clear, and by giving the Owner means to ensure that any representation which might have the effect of amending Contract A is promulgated to all Bidders, ensuring equality of treatment for all.

Recently, the Ontario Superior Court of Justice held, in *George Robson Construction (Weston) Limited et al. v. The Regional Municipality of Hamilton-Wentworth*<sup>107</sup> that such a provision would not protect an Owner in a case where, despite a requirement in an addendum to the tender specification that a concrete liner be used, the Owner's engineer in charge verbally advised the Plaintiff Bidder that a steel liner was acceptable. The Plaintiff's price for certain tunnelling work was based on the use of a steel liner due to the relatively new technology that the Plaintiff intended to use to perform the work. The Court found that tunnelling contracts are generally of the design and build variety, and that "heavy reliance is placed on the contractor to devise a scheme and method for producing the tunnel"; and so, in the circumstances, the representation induced the plaintiff to enter into Contract A.

Although the general principal of law on which the decision was based is well established<sup>108</sup> – that a printed condition in a contract will not be enforced against a party where it is repugnant to an express oral promise or representation which induced that party to enter the contract in the first place – the effect in the bidding and tendering situation is troubling. In *George Robson*, the Owner purported to accept the Plaintiff's bid, however the parties declared each other to be in default prior to the commencement of the work, due to failure to resolve the liner issue. *Quare* what would have been the result if another bidder had challenged the award on the basis that the Owner had entertained a bid which did not comply with the requirements of the tender call.

In light of the overarching regard of the courts for the principle of treating all bidders equally, it is the view of this writer that an approach of strict formalism should be followed in cases of this sort; without an addendum stating that a steel liner was acceptable, the Bidder should not

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<sup>107</sup> (2001), 53 O.R. (3d) 357 per Dyson J. at para. 23 (S.C.J.).

<sup>108</sup> *Ibid.* citing at para. 44 *Mendelssohn v. Normand Ltd.*, [1969] 2 All E.R. 1215, (C.A.) at 183-84.

have relied upon the representation in submitting its bid.

### *E. Subcontractors*

It is typical for Bidders on a general contract to be required to submit the names of proposed subcontractors. Often, subcontracts will themselves be tendered. The decision of the Ontario Divisional Court in *Scott Steel (Ottawa) Ltd. v. R.J. Nichol Construction (1975) Ltd.*<sup>109</sup> is the leading case on the subject. Prior to *Scott Steel* it had been held that by including a subcontractor's name and price in its own bid, a general contractor was deemed to have accepted that subcontractor's bid upon acceptance of the general contractor's bid by the owner.<sup>110</sup> In *Scott Steel*, the Divisional Court rejected the "deemed acceptance rules" set out in *M.J. Peddlesden* and held that Contract B did not come into effect between a subcontractor Bidder and a general Contractor Bidder until communication of acceptance of the subcontractor's Bid by the general contractor. Notwithstanding *Scott Steel*, however, it would be possible for the terms of a particular Call to deem inclusion of a subcontractor's name in a contractor Bidder's Tender as an acceptance of the subcontractor's Tender. Furthermore, the prohibition against bid shopping will, as a practical matter, limit the benefit that many contractor Bidders will seek to obtain under *Scott Steel*.<sup>111</sup>

Note however, that the principle stated above may be modified by the terms of the Instructions to Bidders, and in particular, any Bid Depository Rules incorporated therein by reference.

### *V. Requests for Proposal Compared with Calls for Tenders*

There is a tremendous amount of confusion which has resulted from the use of the term "Request for Proposal" (or "RFP"). Unfortunately, Owners have frequently embarked on the process of soliciting Bids or Proposals without being clear on what it is they are attempting to elicit from interested contractors. Furthermore, in the past, Owners and courts have added to the confusion by often failing to distinguish between Calls for Tenders and RFPs. In *Rousseau Metal Inc. v. Canada*,<sup>112</sup> for instance, the Call was referred to as a Request for Proposals, but it contained a provision which stated "It is stressed that your proposal may be accepted without negotiation". The Court described the call as a "call for tenders...described in the document titled 'Request for Proposal'".

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<sup>109</sup> (1993), 15 C.L.R. (2d) 10 (Ont. Ct. (Gen. Div.)).

<sup>110</sup> See *M.J. Peddlesden Ltd. v. Liddell Construction Limited* (1981), 32 B.C.L.R. 392 (S.C.).

<sup>111</sup> See section IV(D)(2), above.

<sup>112</sup> [1987] F.C.J. No. 40 (C.A.).

The distinction between an RFP and a Call was described in *Socanav v. Northwest Territories (Commissioner)* as follows:

If there is a distinction between the two forms of soliciting offers, it may be this. When the government knows what it wants done and how it should be done (such as a construction project), it will already have its plans and specifications and is simply looking for the best price. On the other hand, when the government knows what it wants done, but not how to go about doing it, it seeks proposals on methods, ability [and] price. Then it can negotiate on the best method to achieve the best value... But I do not think, for the purposes of this case, that there is any legal effect of the distinction.<sup>113</sup>

Courts of Appeal in several provinces have now recognized the difference between a Call for Tenders and an RFP. The Manitoba Court of Appeal in *Mellco Developments Ltd. v. Portage La Prairie City* discussed many of the relevant principles to be considered in deciding whether a procurement process is Call or an RFP, including:

whether it is contemplated that negotiations will follow the submission;

whether all of the relevant terms of Contract B are set out in the call for submissions;

whether the submission by the Bidder/Proponent gives rise to enforceable legal obligations;

whether the request for submissions expressly draws the distinction between a Call and an RFP (in *Mellco* the Owner's request for submissions said "[T]his is an invitation for proposals and not a tender call").<sup>114</sup>

The name given to the process is *not* determinative. The trial judge in *Mellco Developments* referred to an RFP as a "beauty contest". The lawlessness of such pageants is outside the scope of this paper, but perhaps the term "blind date" is more apt.

Many Owners try to straddle the fence, in order to give themselves maximum flexibility (eg. by providing that all informalities may be waived, and expressly contemplating negotiations), while trying to impose Contract A duties on Bidders/Proponents (eg. by requiring bid security, purporting to secure an obligation on the part of the

<sup>113</sup> [1993] N.W.T.J. No. 91 at para. 21 (S.C.).

<sup>114</sup> (2002), 19 C.L.R. (3d) 1 (Man. C.A.), providing a survey of recent authority on the distinction, including *Powder Mountain Resorts Ltd. v. British Columbia* [1999] 11 W.W.R. 168 (B.C.S.C.), aff'd (2001), B.C.L.R. (3d) 14 (C.A.), *Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic Separate School Board* (2000), 1 C.L.R. (3d) 143 (Ont. S.C.J.), and *Saskatchewan v. Silver Lake Farms Inc.* (2001), 46 R.P.R. (3d) 66 (Sask. Q.B.).

Bidder/Proponent to “negotiate in good faith”). The Owner that engages in such tactics risks assuming enforceable obligations to Bidders, while not obtaining enforceable rights in return – as noted in *Mellco Developments*, “Canadian courts have consistently adopted the position that the law will not enforce a contract to enter into a contract, or an agreement to negotiate.”<sup>115</sup> As with any matter arising from the law of bidding and tendering, however, each case must be assessed on its facts – Proponents in *Mellco Developments*, for instance, were required to submit a security deposit, and to keep their proposal “open” for a period of 90 days, each of which is more consistent with a Call for Tenders.

In the view of this writer, the term “Call for Tenders” (or words to like effect) should be used by Owners where the intent of the process is to solicit an offer which, whether or not irrevocable prior to Contract B’s award, becomes binding on the chosen Bidder upon the making of the award. The term “RFP” should be reserved for situations in which the Owner seeks to obtain a non-binding proposal (a “Proposal”) which will form the basis of negotiations leading to a contract, but which does not entitle the Owner to require a chosen Bidder to enter into Contract B. The significance of the distinction is that, in the post-*Ron Engineering* period, an RFP may (unlike a Call) not impose contractual liability on either of the parties.

In any event, Owners are well advised to assume that any competitive procurement process in the post-*M.J.B. Enterprises*<sup>116</sup> era is presumed to be a Call for Tenders rather than an RFP, absent clear and unambiguous terms to the contrary.

It appears that there is no duty of fairness to Proponents who respond to an RFP. On the other hand, one can imagine that a court would find a way to fashion a remedy for unsuccessful proponents if an RFP process were found to be a sham, used for a purpose akin to bid shopping, for instance, since the courts have recognized (in *Wind Power*,<sup>117</sup> for instance) that going to the expense and trouble of preparing a Bid, for instance, is sufficient consideration to support Contract A.

In any event, Owners should draft Calls very carefully, so that there is no doubt as to whether any Bid is subject to being accepted without further negotiation, and whether the Owner does or does not have any obligation to award only to the low Bidder, a compliant Bidder, or a low compliant Bidder. Clear language will minimize the need for the court to find implied terms. Potential Bidders should read any document called a

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<sup>115</sup> *Mellco Developments*, *ibid.* at para. 60 echoing *Martel Building*, *supra* note 90 at para. 73.

<sup>116</sup> *Supra* note 46.

<sup>117</sup> *Supra* note 72.

Request for Proposals (and any court decisions in respect of same) with extreme caution – the title of the document is clearly not determinative.

#### *VI. Architects & Engineers Liability: Edgeworth and Auto Concrete Club*

In *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*<sup>118</sup> the Plaintiff was the successful bidder on a highway contract, and entered into a contract with the owner to perform the work. The contractor alleged that it lost money on the contract due to errors in the construction plans and specifications prepared by the engineering firm retained by the owner to prepare the same. It sued the engineers for negligent misrepresentation. It also sued the individual engineers who affixed their seals to the drawings. This decision of the Supreme Court of Canada was the result of a pre-trial motion to dismiss the action for failure to state a cause of action. The Court held that liability for negligent misrepresentation arises where a person makes a misrepresentation knowing that it may be relied on, and that it is, in fact, relied upon to the detriment of the Plaintiff. The engineers undertook to provide a tender package for use by Bidders on the project, with the knowledge that it would be used by those Bidders in preparing a price to be submitted for the Construction Contract work. Notwithstanding that it did not have any contractual relationship with the Bidders, the engineering firm knew or ought to have known that its work would be relied upon. The firm could be held liable notwithstanding a provision in the contract excluding claims against the owner. The claim of the Plaintiff against the individual engineers, however, was dismissed, the Court finding that the mere allegation that each of them affixed his seal to the design documents was insufficient to establish a duty of care.

Since *Edgeworth* is a pleadings case, it does not resolve the substantive issue of the professional liability for negligence of an individual engineer.

In *Auto Concrete Curb*<sup>119</sup> the Plaintiff entered into a contract for the dredging of a river. The contractor intended to do the work by means of a method which required large disposal sites in which water would be separated from sludge and returned to the river. When the contractor was unable to obtain the necessary permits for doing the work by this method, it was forced to adopt other procedures and lost a substantial amount of money. The contractor sued the engineering firm that had prepared the specifications, as well as the owner. The Plaintiff alleged that the engineering firm should have advised it about the need to get permits and should have warned that it might be difficult to do so. The Supreme Court of Canada allowed an appeal from a judgment of the Court of Appeal

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<sup>118</sup> [1993] 3 S.C.R. 206.

<sup>119</sup> *Supra* note 104.

upholding the trial judge's decision in favour the Plaintiff. In very brief Reasons, the Court held that construction means and methods were the responsibility of the contractor barring specific arrangements to the contrary. The failure of the engineer to warn of the difficulties with the proposed method was held not to be actionable.

Some observers have concluded, based on *Edgeworth* and *Auto Concrete Curb* that the law is different in British Columbia and Ontario. In fact, the cases are not incompatible. They both stand for the proposition that the negligence of an engineering firm is actionable by a contractor who has relied on the engineers' work. Unlike *Edgeworth*, however, *Auto Concrete Curb* was decided on the merits, and the result was that, on the facts of the case, there was no liability.

## *VII. Remedies*

### *A. To Bidder*

#### *1. No Contract B Awarded - Lost Profits Awarded*

Generally, courts will award as damages for a breach by the owner of Contract A, the Bidder's estimated lost profits on the job.<sup>120</sup>

#### *2. Contract B Not Awarded - Judicial Review*

In *Foulem Construction Ltée v. Balmoral (Village)* an unsuccessful bidder sought "judicial review or...a declaration of some sort". Although the court held that judicial review was not available, it noted that counsel for the applicant "failed to clearly set out exactly what [was] being sought as a remedy".<sup>121</sup> In the result, the case may not be an effective precedent for the proposition that judicial review is unavailable in a bidding and tendering case.

#### *3. Contract B Awarded - Damages for Losses Arising from the Bidding Process*

In *BG Checo International*<sup>122</sup> the damages recoverable were held to include acceleration costs incurred to meet the contract completion date. In *Gorlan Mechanical Ottawa Ltd. v. Paul Daoust Construction Ltd.*<sup>123</sup> the Bidder was advised by the bid depository that, notwithstanding the clear provisions of the plans and specifications for the Construction

<sup>120</sup> *MJB Enterprises*, *supra* note 46.

<sup>121</sup> (1996), 28 C.L.R. (2d) 157 (N.B.Q.B.) at para. 2.

<sup>122</sup> *Supra* note 104.

<sup>123</sup> (1991), 41 C.L.R. 119 (Ont. Dist. Ct.).

Contract, certain portions of the work were to be done by another trade, and so the cost of those items need not be included in its bid. After the contract was awarded, the Owner took the position that the Plaintiff was required to perform the said work. The Plaintiff sued the bid depository and recovered the cost of performing the disputed work.

In the author's view, an appropriate remedy to the plaintiff in BG Checo would have been rescission of Contract B, had it been requested by the Plaintiff.

#### 4. Contract B Awarded - Restitution

In *Defence Construction*<sup>124</sup> the contract was held to be void due to the failure of the Bid to comply with the applicable statute in respect of wage rates; the decision also seems to suggest that a material misrepresentation by the Owner during the bidding process as to those rates had the same effect. With the greatest respect, the Nova Scotia Court of Appeal appears to have been wrong as to the second ground of declaring the Contract to be void, although rescission is clearly available in such a case.<sup>125</sup> Nonetheless, the Court's award of restitution of the excess labour costs incurred as a result of the misrepresentation seems an appropriate remedy in the circumstances.

#### 5. Rescission

A misrepresentation by the Owner during the bidding process may give rise to a right to rescind Contract A, even if innocently (i.e. non-fraudulently) made.<sup>126</sup>

The Court in *Gottardo*<sup>127</sup> correctly found that, in the event that Contract A did come into effect, it was a proper case for rescission, on the basis that before the Bid was accepted, both Bidder and Owner were aware of an honest mistake in the Bid, as to a fundamental term of the Bid (namely price). It correctly rejected submissions that rescission ought to be refused because the Bidder was "a sophisticated contracting company" which posted a bid bond, all of the parties were "commercial entities", the Bidder "clearly understood" that it would "be bound by the terms of their tender as submitted, including the irrevocability of the price", and the Bidder developed a process whereby the Form of Tender was signed in blank then filled in at the last minute following advice by telephone; the court focused, among other factors, on the fact that the drafting of the Call

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<sup>124</sup> *Supra* note 59.

<sup>125</sup> See Fridman, *supra* note 5 at 853 ff.

<sup>126</sup> *Ibid.* at 857.

<sup>127</sup> *Supra* note 26.

was wholly within the control of the Owner, and the fact that the Owner “snapped at” the Bid without consideration of the contractual language of the Call compared to the legal position on which it relied. The court noted that the “brinkmanship with the sub-trades” described by the Supreme Court of Canada in *Ron Engineering* as being to the advantage of the Bidder, was ultimately to the benefit of the Owner, and should disentitle the Bidder from equitable relief.<sup>128</sup>

### 6. *Summary and Conclusion*

In the author’s view, lost profit ought to be awarded only where the Plaintiff Bidder can demonstrate that, but for the breach of the terms of Contract A, it would have been awarded Contract B. Where the Plaintiff can only show that it was one of a class of Bidders to which Contract B *might* have been awarded but for the breach, it should not recover damages, unless it can demonstrate that it was induced to submit a Bid by some wrongful misrepresentation or other wrongful act of the Owner. In such a case, the damages recoverable ought to be limited to the losses and expenses incurred as a result of taking part in the bidding process. Although the trial and appeal courts in the *Chinook Aggregates* did not deal with the quantum of damages payable, this is the basis on which the author would have awarded damages in that case.

The court in *Ron Engineering* was concerned only with the Plaintiff’s rights in law. Counsel are advised to consider equitable remedies to avoid the effect of the decision.

#### *B. To Owner*

The damages payable to an Owner for a breach of Contract A are typically specified in the Instructions to Bidders. Typically, they will involve forfeiture of the Bid Security in its entirety, or up to an amount equal to the difference between the defaulting Bidder’s Bid and the price of the Bidder that ultimately enters Contract B with the Owner.

In *Gottardo*<sup>129</sup> the court considered whether, if Contract A had come into existence, an Owner’s claim for damage against the Bidder, as well its claim against a Bid Bond could succeed. It found that the damages suffered by the Owner would be equivalent to the difference between the low Bidder’s price, and the price of the next lowest Bidder (despite the fact that both bids were below the Owner’s internal pre-Bid estimate of the cost of the work). The court also found that the claim could not succeed against the bonding company because (contrary to the language

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<sup>128</sup> *Ibid.* at 379-380.

<sup>129</sup> *Supra* note 26.

of the Call in *Ron Engineering*) nothing in Contract A entitled the Owner to call on the Bid Bond.<sup>130</sup> As such, an Owner is cautioned to clearly state in a Call such remedies for Breach of Contract A as it wishes to reserve to itself.

In that case, it should be noted that, were the court in that case to read into Contract A an implied term that the Owner could claim for the difference between Gottardo's bid and the next lowest "qualified" Bidder (as is typical in many Calls) it is not clear that the owner could show it is entitled to make such a claim. The contract was awarded to the next lowest bidder based on the provision of a parent company guarantee (a request not contemplated by the terms of the Call), since "based on the corporate financial statements" submitted in step two "the bidder had 'no previous revenues or equity and their Articles of Incorporation show they have only been in business since January 21, 1999'".<sup>131</sup> This suggests such a departure from the terms of the call, that it is doubtful whether, based on the principles of bidding and tendering law enunciated by the Courts from *Ron Engineering* to *M.J.B. Enterprises* the Owner ought to be entitled to any relief at all.

### VIII. Conclusion

There is a tremendous variation in the forms of Instructions to Bidders used in Calls. As such, there is wide latitude for courts to distinguish decided cases, and attempt to do justice to the parties.

Owners are well advised to ensure that their actions are not characterized by any hint of a hidden agenda, and that all potential criteria which might be used to decide on the preferred Bidder be stated expressly, or inferable by necessary implication based on the Call documents.

Legal counsel for Owners and Bidders involved in Tender disputes should carefully review the relevant Call documents, and all of the actions of the parties during the course of the call for tenders, as well as reviewing the relevant case law and applicable legislation, in order to assess their client's legal rights and obligations.

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<sup>130</sup> *Ibid.* at 378.

<sup>131</sup> *Ibid.* at 364-365.