



# Procurement Law Update

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## I. Introduction

A true tendering process engages the application of the "two contract" model first articulated in the leading case of *R v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.). This model holds that upon the submission of the compliant tender, a process contract (contract "A") arises between the tenderer and the party calling for tenders ("Owner"), provided those parties intended to enter into contractual relations upon the submission of the tender (*MJB Enterprises Ltd. v. Defence Construction (1951), Ltd.* (1999), 44 C.L.R. (2d) 163 (S.C.C.)). This process contract is referred to as the "bid contract." Upon the Owner's acceptance of a compliant tender the second contract (contract "B") comes into existence. This is the "construction contract." Whereas each compliant tenderer and the owner may enter into bid contractual relations, only one will enter into the second contract upon the acceptance of its tender.

Typically, tender documents are drafted in such a manner that the tenderer call can be characterized as the Owner's offer to consider a compliant tender. An Owner would not be bound to consider a noncompliant tender (i.e., one which does not meet the terms and conditions of the tender call as circumscribed by the tender documents). A non-compliant tender may be one that was submitted too late, was not submitted on the required tender form, alter the tender form or did not provide the information requested, omitted bid security, contained imbalanced prices or did not comply with the stipulated rules of the bid depository or otherwise conform with the plans and specifications (*MJB Enterprises, supra*, at para. 36).

The hallmark of a true tendering is the substitution of negotiation by competition. If the tender call invited negotiations over the terms of the construction contract, it is more likely that the tender call would not be taken to evince an intention by the parties to enter into bid contractual relations. Whether or not this actually follows will depend, however, on the terms and conditions of the tender call.

Other procurement methods may not give rise to bid contractual relations. Typically, these are described as a "request for proposals" ("RFP"), "request for quotations" ("RFQ"), or "request for expressions of interest" ("REFI"). Whatever label or description the parties themselves may use to describe the procurement process, whether tendering law principles are engaged depends upon an objective determination of whether the parties intended to enter into bid contractual relations. Further, the question of whether a duty of procedural fairness and good faith is owed by an Owner to the tenderers depends on whether a process contract is in existence.

## 11. Non-Compliant Tenders

In the absence of contrary terms (express or implied) in the tender documents, a bid contract will generally be held to contain an implied term that only compliant bids may be accepted (*MJB Enterprises, supra*). However, insofar as the terms of a bid contract are governed by the tender documents, it has recently been held that an Owner may lawfully accept a non-compliant tender if

expressly permitted by the tender documents (*Kinetic Construction Ltd. v. Regional District of Comox-Strathcona* (3 November 2003), unreported, 2003 (B.C.S.C.) 1673).

In *Kinetic Construction*, the plaintiff submitted the lowest tender on a project to upgrade a sewage treatment plant owned by the Regional District of Comox-Strathcona. The plaintiff was the lowest tenderer. The Regional District awarded the construction contract to a higher non-compliant tenderer, whereupon the plaintiff brought a Rule 18A application claiming damages for breach of an alleged bid contract. The Court dismissed the application, notwithstanding that the successful tenderers' bid was non-compliant. The decision turned upon the unique terms of the Instructions to Tenderers which included the following:

ACCEPTANCE. Tenderers which contain qualifying conditions or 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 its consideration Tenders which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers, or for failure to comply with the process for submissions set out in these Instructions to Tenderers.* (emphasis added)

The Court held that whereas the plaintiffs unqualified tender, gave rise to a bid contract, so too did the non-compliant tender of the successful tenderer, upon the Regional District's exercise of its discretion to consider the tender notwithstanding the non-compliance. The Regional District successfully relied upon the express provision in the Instructions to Tenderers, when it did so.

Unlike the case in *MJB Enterprises*, where the Court implied a bid contractual term that only compliant tenderers could lawfully be accepted, no such term could be implied by the Court in *Kinetic Construction*. The Court reasoned:

There is some jurisprudence on the issue of whether a privilege clause that includes the ability to retain non-compliant bids is valid.

In *Midwest Management (1987), Ltd. (C.O.B Midwest/Monad - a Joint Venture) v. British Columbia Gas Utility Ltd.*, [2000] B.C.J. No. 2204 (C.A.), tenders were requested for the construction of a gas pipeline. The tender documents contained a privilege clause similar to the one before this Court giving the owner discretion to "accept or reject" non-compliant bids. None of the tenders submitted were compliant and requests for clarification were held to address specific faults in the tenders. The plaintiff in that case argued that since the privilege clause allowed the acceptance of non-compliant bids, any serious bid would be capable of acceptance and would, therefore, give rise to a contract "A." *The defendant did not exercise its discretion to accept the bid for consideration.* The parties conducted unfruitful negotiations which were terminated by the defendant's notification to the plaintiff that it would not receive the contract.

The trial judge held that as the plaintiffs bid was non-compliant, no contract "A" ever arose. Furthermore, because no contract "A" arose, there was no implied duty of fairness and that, at best, the plaintiff's tender was a counter-offer to the defendant. The Court of Appeal agreed with the findings of the trial judge.

A privilege clause that allows the acceptance of non-compliant bids does not force a contract "A" upon the person calling for tenders. A non-compliant bid is merely a counter-offer that is incapable of creating contractual obligations upon the company calling for tenders unless it exercises the discretion reserved by the tender documents and considers the non-compliant tender.

In summary then, where there is no express clause allowing acceptance of non-compliant bids, it may be implied, as it was in *MJB, supra*, that only compliant bids will be accepted. If there is a clause allowing the acceptance of a non-compliant bid, then as in *Midwest, supra*, a non-compliant bid will not automatically give rise to a contract "A." *However, there is no principle of law requiring the rejection of a non-compliant bid in favour of a compliant bid if the tender documents expressly reserve to the person requesting tenders the right to treat with non-compliant tenders. In situations where the tender documents expressly provide for the ability to accept non-compliant bids, the person calling for tenders has the discretion to accept a non-compliant bid and thereby create a contract "A" with the non-compliant bidder.* (emphasis added)

In another recent case, *Graham Industrial v. GVWD, et al.* (17 November 2003), Unreported, 2003 (B.C.S.C.) 1735, the Court decided that, even where the tender documents expressly purported to reserve to the Owner a discretion to waive defects and accept a non-compliant tender, nevertheless that discretion is not absolute. It is bounded by the duty of good faith and must "withstand objective scrutiny." In *Graham Industrial, supra*, the Owner sought tenders on a major waterworks project. The tender documents contained both a discretion and a privilege clause, as follows:

[8] Part 10.1 CONDITIONS OF TENDER ("the Discretion clause")

If a Tender contains a defect or fails in some way to comply with the requirements of the Tender Documents, which in the sole discretion of the Corporation is not material, the Corporation may waive the defect and accept the Tender.

Part 15.1 ACCEPTANCE AND REJECTION OF TENDERS ("the Privilege clause") Notwithstanding any other provision in the Tender Documents, any practice or custom in the construction industry, or the procedures and guidelines recommended for use on publicly funded constructions projects, the Corporation, in its sole discretion, shall have the unfettered right to:

- (1) accept any Tender;
- (2) reject any Tender;
- (3) reject all Tenders;
- (4) accept a Tender which is not the lowest Tender;
- (5) reject a Tender even if it is the only Tender received by the Corporation;
- (6) accept all or any part of a tender; and
- (7) award all or a portion of the Work to any Tenderer.

Upon tender opening, the Petitioner, Graham Industrial, realized that its tender for the mechanical portion of the work was \$2 million too low, and it wrote to the GVWD to request that it be permitted to withdraw its tender as a result of its error. Its mistaken tender price was \$21,451,881, inclusive of GST. Notwithstanding this, the Owner purported to accept the tender. The tenderer then petitioned the Court for a declaration that its tender was not capable of lawful acceptance by the owner and that no bid contractual relations had come into existence.

The Court determined that the tender contained a number of deficiencies, some of which were not material. The Court first rejected the Petitioner's argument that no bid contractual relations came into existence "because the breadth of the privilege and discretion clauses negative(s) an intention to create contractual relations." The Court then rejected the tenderer's argument that the failure in the required Bond and Agreement to Bond to properly name the obligee (GVWD) was fatal to bid contractual relations because the evidence showed that surety would have provided the requisite bonds upon the Petitioner's request to do so.

However, certain Schedules to the Tender failed to include technical submissions expressly stipulated for in the tender documents, including (1) a three page discussion covering the management of the hauling operation and mitigation of impacts to the residents . . . , error omissions and road safety, (2) an outline of an environmental protection plan, and (3) a Statement of Qualifications. In each case, the petitioning tenderer's response was manifestly devoid of required content and, accordingly was held to be "unresponsive" to the express terms and conditions of the tender call.

The Court considered the defects in the tender against the backdrop of the Owner's Bylaw requirements that "the contract shall be awarded to that Responsible person who submits the lowest responsive bid," where "responsive" was defined as conforming "in all material respects to the Invitation to Tender." The Court concluded, as follows (at paras. 43, 44 and 46):

[43] I find that Graham's responses to Sections ".6" and ".7" of Schedule 8 of the Tender Form were so patently deficient they could not on an objective reading be said to "conform in all material respects to the Invitation to Tender."

[44] *The District's authority under the privilege and discretion clauses to determine non-compliance with Tender Form requirements is not material [sic] must be exercised both in good faith and in manner which can withstand objective scrutiny.*  
Otherwise those clauses could be used to deem a non-compliant

tender to be a compliant tender. That would undermine the fairness of the tendering process. Preservation of that fairness is the underlying rationale for the requirement for substantial or material compliance.

[46] In light of the material non-compliance I have found, it follows the District could not accept Graham's tendered offer and no Contract A was concluded. (emphasis added)

On this reasoning, an Owner's exercise of a discretion to accept a non-compliant tender, is subordinate to the overarching requirement for "objective fairness and good faith." Arguably, this leads to the somewhat paradoxical result that the duty of good faith, which owes its existence to an underlying bid Contract (*Midwest Management (1987), Ltd. v. B.C. Gas Utility Ltd.*, [2000] B.C.J. No. 2204 (C.A.)), is entrained in deciding whether a tender is capable of giving rise to bid contractual relations in the first place. The approach in *Graham Industrial, supra*, is best viewed as purposive, if not incompatible with the approach taken in *Kinetic Construction, supra*. It does not appear from the reasons in *Graham Industrial*, that the decision in *Kinetic Construction* decided two weeks earlier, was considered.

While the courts will be reluctant to substitute their own analysis with that of an owner in whom the discretion to award the contract ultimately resides and who have not been shown to have acted unfairly or other than in good faith, the court will readily undertake the task of determining whether a discretion was exercised "fairly and objectively" (*Sound Contracting Ltd. v. Nanaimo* (2000), 2 C.L.R. (3d) 1 (B.C.C.A.)). The mischief, were this approach not resorted to by the Courts, is succinctly described in the reasons in *Graham Industrial* (para. 44).

It is readily apparent from the facts in *Graham Industrial* that the defects in the Tender were "patent" on the face of the Tender, and not merely an underlying error with respect to the economics of the tender, as was the case in *Ron Engineering, supra*. Hence a different result obtained.

In general, courts will be reluctant to interpret terms and conditions of the tender call to enable the owner to consider and accept a non-compliant tender. Tender Documents drafted by the Owner are interpreted *contra proferentem*. The Bid Contract is a "contract of adhesion." For example, a term affording the owner the ability to waive an "irregularity" does not afford the Owner the right to create a compliant tender out of one that is not. In *Vachon Construction Ltd. v. Cariboo (Regional District)*, [1996] B.C.J. No. 1409, the B.C. Court of Appeal held that a term in the Instructions to Bidders that "tenders that . . . contain . . . irregularities of any kind, may be considered informal," did not grant the owner a discretion to treat as valid a tender that was invalid. The Court said with reference to the Instructions to Bidders (at paras. 15 to 17):

...The relevant words of para. 5.1. are:

Tenderers that . . . contain . . . irregularities of any kind, may be considered informal.

The learned chambers judge held that those words gave the owner a "discretion" "entitling the Regional District . . . to permit correction of the price of discrepancy at the time of the bid opening."

I respectfully agree that para. 5.1 does give the owner a "discretion," but it is a discretion limited to treating tenders which fall within its ambit as either "informal" or not. There is nothing in the language of para. 5.1 or elsewhere in the Instructions to Bidders, which would permit a bidder to alter or correct an irregularity in the tender documents, or which would permit the owner to participate in or accept the alteration or correction of the tender document after the close of tenders. Nor is there anything in para. 5.1, or elsewhere in the Instructions to Bidders, that would enable either the bidder or the owner to attempt to render valid after opening a bid that was invalid as submitted. (emphasis added)

In another case, *Fullercon Ltd. v. Ottawa (City)*, [2002] O.J. No. 3713, the Ontario Supreme Court considered whether the owner's power to "waive an irregularity where it considers it to be in (its) best interest," allowed it to accept a tender which, upon submission, failed to include a signed and sealed Agreement to Bond. Included in the Instructions to Tenderers was a Schedule "A" which provided that the owner could accept tenders which contained "minor irregularities." In considering the terms and conditions of the tender documents, the Court said (at paras. 9 to 11, 14 and 23):

The bid submitted by Dufferin did not, at that crucial time, demonstrably meet the tender requirements. The Agreement to Bond which is one of the three required documents, did not display the required corporate seal and signature.

...

In reviewing Schedule A, it is clear that irregularities that go to the essence of the tendering process are singled out for automatic rejection. As such, late bids, unsealed bids, and bids with improperly executed Agreements to Bond are identified as warranting automatic rejection.

...

Other irregularities which are clearly of a less central nature to the bid, such as minor clerical errors, are identified as correctable within 48 hours of notification.

...

In my view, the parties here clearly intended to initiate contractual relations by the submission of a bid. To paraphrase Iacobucci J. in *MJB (supra)*, I find it difficult to accept that the Applicant or any of the contractors would have submitted a tender if it had understood that a tender that did not include a properly executed Agreement to Bond at tender deadline would be accepted, if one was provided after the deadline. This would be tantamount to allowing a late bid to be accepted.

...

The ability to waive an irregularity does not include the ability to create a compliant tender out of one that is not ...

Absent the exercise of explicit discretion by the Owner, as was the case in *Kinetic Construction, supra*, a non-compliant tender is generally held to be incapable of giving rise to bid contractual relations. Accordingly, the non-compliant tenderer itself may avoid bid contractual relations on the basis of its own noncompliance. This was the case in *Graham Industrial, supra*, where the Court referred to *Derby Holdings Ltd. v. Wright Construction Western Inc. and London Guarantee Insurance Company* (2002), 17 C.L.R. (3d) 64 (Sask. Q.B.), in observing that "the unseemly spectacle of a winning tenderer seeking to avoid a contract to perform the work by taking the position that its own tender was not in compliance with the Instructions to Tenderers is not unprecedented" [para. 121].

The Saskatchewan Queen's Bench in *Derby Holdings* held that a tenderer could use a non-compliant bid as a shield rather than a sword. In a typical case, the plaintiff tenderer relies upon the acceptance of another's non-compliant tender to establish liability against the Owner. However, where the non-compliant tender is incapable of acceptance by the Owner, there was held to be no reason in principle why both the Owner *and the Tenderer* could not rely upon the non-compliance to avoid the imposition of bid contractual relations.

In *Derby Holdings*, the plaintiff owner of a shopping mall in Saskatoon invited tenders for renovations to its mall. Four tenders were submitted. The defendant's tender was \$309,230 lower than the next lowest tenderer. Upon opening tenders, the defendant realized that it had failed to include an electrical price component in its tender of approximately \$208,000. It notified the Owner of the mistake and offered to negotiate a price adjustment to reflect its mistake, and yet keep its tender price lower than that of the second lowest tenderer. The Owner refused to negotiate the adjustment and purported to accept the defendant's tender, whereupon the defendant refused to execute the construction contract "A." The Owner sued for the alleged breach of its bid contract.

On the facts, the defendant's tender form omitted to acknowledge receipt and compliance of tender addenda issued by the owner prior to the close of tenders. The tender requirements were explicit in this respect:

18. Addenda: Addenda may be issued during the tendering period, but not later than 3 days before the tender closing. Addenda issued become part of the Tender Documents, and instructions therein will be included in the Construction Contract. Each bidder must acknowledge the receipt of such addenda on the Tender Form.

The Court concluded that the error in the tender was honestly but negligently made. The Owner was aware of the error before it purported to accept the defendant's tender. Although "troubled that its decision "appears to have the potential of permitting a contractor to avoid its promises and obligations by its own negligence or by its failure to submit a tender that substantially complies with the invitation to tender package," the Court nevertheless concluded that there was "no valid reason why the application of this legal principle (that a non-compliant tender is not capable of

lawful acceptance) should depend upon the source of the challenge." The Court reasoned (at para. 47):

The case law has established that a bid is non-compliant if it is uncertain or is at odds with the terms of the invitation to tender. The issue of whether a bid is compliant is not determined by the source of the challenge. It is determined by its own terms and those of the invitation to tender package. The integrity of the tendering process would be undermined by the disparate application of this legal principle. The modern case law clearly holds that the submission of a bid or the acceptance of it does not always result in the formation of contract "A." The owner, not the contractor, is the one in control of the tendering process and the one who is able to define what constitutes a compliant bid. There is no justification for a rule of law that permits an owner to hold a tenderer to a bid that the owner itself has predetermined to be non-compliant.

### 111. The Duty of Good Faith

It is accepted that the owner's obligation of fair and equal treatment is an implied term of contract "A" (*Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860). This is sometimes referred to as the duty of good faith. In informing the content of the duty, the Court will give due consideration to the terms of the tender documents. In *Martel Building Ltd.*, *supra*, the Supreme Court of Canada said (at paras. 88-9):

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

A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority has "the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents" (*Colautti Brothers [Marble Tile & Carpet (1985), Inc. v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 2581, at para. 6).

As to the effect of a privilege clause, the Supreme Court of Canada in *MJB Enterprises* recognized that the lowest-priced tender may not provide the owner with the best value. By virtue of the privilege clause an owner is not restricted to a consideration of the nominal bid price, and instead is entitled to take a more "nuanced" view of costs. In *MJB Enterprises*, the following

passage in I. Goldsmith, *Goldsmith on Canadian Building Contracts*, 4th Ed. (Toronto: Carswell, 1988-) at 1-20, was cited with approval (at para. 46):

The purpose of the [tender] system is to provide competition, and thereby to reduce costs, although it by no means follows that the lowest tender will necessarily result in the cheapest job. Many a "low" bidder has found that his prices have been too low and has ended up in financial difficulties, which have inevitably resulted in additional costs to the owner, whose right to recover them from the defaulting contractor is usually academic. Accordingly, the prudent owner will consider not only the amount of the bid, but also the experience and capability of the contractor, and whether the bid is realistic in the circumstances of the case. In order to eliminate unrealistic tenders, some public authorities and corporate owners require tenderers to be pre-qualified.

In other words, the decision to reject the "low" bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

...

Therefore, even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of "cost" than the prices quoted in the tender

...

It is further accepted that, in taking a more "nuanced" view of cost, the Owner will not be deemed to have impermissibly applied an undisclosed condition or secret preference so long as in determining the matter of cost it acts with reference to the "essential requirements of objective fairness and good faith." In *Sound Contracting Ltd. v. Nanaimo (City)* (2000), 2 C.L.R. (3d) at 1, the B.C. Court of Appeal applied *MJB Enterprises, supra*, in deciding that the Owner's decision not to award contract "B" to the lowest tenderer was not in breach of its duty of good faith, and said (at paras. 17 to 19):

On the basis of the clarification of the law in *MJB* I am constrained to hold that in this case, the privilege clauses in the request for tenders releases Nanaimo from the obligation to award the work to the lowest bidder if there are valid, objective reasons for concluding that better value may be obtained by accepting a higher bid.

I confess that I find this somewhat worrisome as it creates an opportunity for arbitrariness in the operation of the bidding system. It must be recognized that a compliant tender

establishes a legal relationship between the parties conditioned only by the privilege clause. The privative clause gives the owner a discretion and that discretion must surely be exercised fairly and objectively. The legal relationship just described provides the basis for a court challenge by unsuccessful compliant bidders of an award to a higher bidder. *While I would not attempt to establish a comprehensive enumeration of salient factors that would support a successful action, it may possibly be summarized by reference to the essential requirements of objective fairness and good faith.*

. . . It is not for us to substitute our own analysis for that of the owner in whom the discretion to award the contract ultimately resides . . . I would caution, however, that this discretion must not be exercised in such a way as to punish or to get even for past differences. Whenever the low bidder is not the successful tenderer, any additional factors in the analysis will have to be shown to be *reasonable and relevant*. (emphasis added)

Recently, the B.C. Court of Appeal in *Elite Bailiff Services Ltd. v. British Columbia*, [2003] B.C.J. No. 376, considered the question: At what point does the owner's discretion to carry out a "nuanced" assessment of tenders received by it amount to the invalid attachment of an undisclosed condition or secret preference?

The decision in *Elite Bailiff* is interesting on a number of levels, not the least of which is the application of tendering law principles to an RFP process which provided for negotiation as to the terms of contract "B." Notwithstanding the hybrid nature of the procurement process, the Court nevertheless considered that it gave rise to bid contractual relations and upheld the decision of the summary trial judge, who awarded damages to the unsuccessful tenderer as a result of the Owner's breach of its obligation of fair and equal treatment under contract "A."

In *Elite Bailiff*, the defendant owner issued an RFP for the provision of Court bailiff services. The terms and conditions of the RFP set out evaluation criteria and assigned numerical values to those criteria. The unsuccessful proponent, alleged that the owner breached the terms of contract "A" by (i) failing to evaluate the proposals fairly and in accordance with the criteria set out in the RFP, and (ii) applied a secret preference in evaluating the proposals in favour of proponents who had prior civil execution experience under contract with the defendant. In the result, the plaintiff alleged that it was unfairly and unknowingly disadvantaged by the secret preference.

Upon the Owner's appeal, the Court of Appeal disagreed with the trial judge's finding that the Owner's evaluation committee had implemented a "secret preference" in breach of the Owner's duty of fairness. It did, however, uphold a second aspect of the trial judge's decision, in deciding that the defendant had breached its obligation of fair and equal treatment under contract "A":

I have no doubt this was done in an effort to be fair to all proponents and not to "skew" the process one way or the other, given the non-availability of references from government creditors concerning proponents who were not already court bailiffs. But by assigning the pre-determined number of points, the evaluation committee failed to assess the actual experience

of proponents who had not been court bailiffs. Effectively, the Ministry "closed its eyes" to whatever information was produced in response to the requests made in the RFP for information relating to the criteria at paras. 8.10, and 8.13. Every proponent was entitled to ask that its submission be fully considered. But because of the pre-determined number of points assigned to certain proponents (i.e., those without direct court experience), arbitrariness (in the sense of a "failure to direct one's mind to the merits of a matter": see *Rousseau v. B.L.E.* (1995), 28 C.L.R.B.R. (2d) 252), crept into the process, making it unfair. On this basis, I conclude that the trial judge was correct to conclude that the Ministry breached its obligation of fair and equal treatment under contract "A." [para. 30]

Thus, in a "hybrid" procurement, which contained elements both competition and negotiation as to the terms of contract "B," the B.C. Court of Appeal determined that (i) bid contractual relations came into existence upon the submission of a proposal in response to an RFP, and (ii) the Owner's duty of fairness- an implied term of contract "A"-arose.

In an earlier case, *Midwest Management (1987), Ltd. v. British Columbia Gas Utility Ltd.*, *supra*, the B.C. Court of Appeal rejected the proposition that an Owner owed a duty of fairness independent of bid contractual relations. The Court of Appeal agreed with the trial judge's dismissal of an unsuccessful tenderer's Rule 18A application for damages for breach of a "duty of fairness." There, the plaintiff's tender did not conform to the requirements of the tender documents and was "at best a counter-offer," which did not give rise to contract "A" or any implied duty of fairness. The plaintiff's assertion that the Owner owed a duty of fairness independent of bid contractual relations was summarily dealt with by the Court of Appeal as follows (at paras. 13 and 14):

Whether such an independent duty of fairness exists is a pure question of law. The learned trial judge said he knew of no "free-standing enforceable duty of fairness simpliciter." Counsel did not refer to us to any authority where such a duty has been held to exist. Such a duty is quite inconsistent with an adversarial, competitive tendering process. To find such a duty would cause great uncertainty in this area of the law.

In my respectful view, the learned trial judge erred in law in holding that this claim might possibly succeed. As no such duty exists in law, the claim based on its alleged breach was bound to fail.

The singularly interesting feature of the Court of Appeal's decision in *Elite Bailiff; supra*, was its finding that bid contractual relations arose in circumstances where the terms and conditions of the RFP provided for negotiations, with the successful proponent, as to the terms of contract "B." At best, what the "tenderer" had been deprived of by reason of the Owner's breach of the duty of fairness was an opportunity to fairly participate in the tendering process, including an opportunity to negotiate contract "B."

There is no tortious duty to negotiate in good faith (*Martel Building Ltd., supra*). Yet, it would appear from the decision in *Elite Bailiff; supra*, that, although the Owner could not be held to a duty of care, or duty of good faith in relation to negotiations with a successful proponent, nevertheless its breach of the duty of fairness in relation to a competitive process antecedent to the negotiation phase could give rise to a breach by the Owner of its duties to the Tenderer.

Certainly, there are many valid reasons why a duty to negotiate or bargain in good faith is not recognized in tendering law. The reasons of Lord Ackner in *Walford v. Miles*, [1992] 2 A.C. 128 (U.K. H.L.) are apposite:

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours . . . How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith." However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations . . . how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement"? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party . . . Accordingly a bar agreement to negotiate has no legal content.

Perhaps a distinction can be drawn between the duty of procedural fairness in relation to the competitive process leading up to negotiations, on the one hand, and the internal course of dealings between the Owner and a proponent in the course of bi-lateral negotiations, on the other. In such case, a failure by the Owner to adhere to a competitive protocol giving rise to negotiations as to the terms of contract "B," may attract liability based on a breach of the duty of fairness and good faith. This seems to have been, at least implicitly, contemplated in *Elite Bailiff, supra*. Jurisprudence in this area is likely to continue to evolve in the context of "hybrid" procurement methods.

Traditional tendering law principles have developed in the context of tender documents which fully describe contract "B," outline a well defined competitive process and involve ascertained work. Some times, an Owner will seek to avoid the legal strictures imposed by tendering law principles by characterizing a procurement process as an RFP, RFEI or RFQ. The Owner may well go so far in the procurement documents to expressly stipulate that the process is "not a tendering process" and that no legal relations are intended to arise prior to the award of contract "B."

A "true" RFP, for present purposes, is akin to an "invitation to treat." A "true" RFP invites proponents to enter into a non-binding process, typically involving negotiation as to the terms of contract "B." According to tendering law principles, such a "true" RFP does not give rise to bid contractual relations (*Powder Mountain Resorts Ltd. v. British Columbia*, [1999] 11 W.W.R. 168,47 C.L.R. (2d) 32 (B.C.S.C.), aff'd, [2001] B.C.J. No. 2172 (C.A.); *Mellco Developments Ltd. v. Portage la Prairie (City)*, *supra*; *Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic*

*Separate School Board* (2000), 1 C.L.R. (3d) 143 (Ont. S.C.J.), aff'd (2002), 13 C.L.R. (3d) 163 (Ont. C.A.); and *Silver Lake Farms Inc. v. Saskatchewan* (2001), 46 R.P.R. (3d) 66 (Sask. Q.B.).

Although no free-standing duty of care, independent of bid contractual relations, is recognized in B.C. law (*Midwest Management, supra*), courts in two other jurisdictions in Canada, have decided otherwise. In *Mellco Developments Ltd., supra*, the Manitoba Court of Appeal answered in the affirmative the question: "Can a bidding process that is something less than one intended to involve the formation of contracts " A and "B" invoke the obligation of fair bargaining in good faith that is now firmly established in formal tendering cases?" The source of the duty of good faith and fairness was held to lay in the parties' reasonable expectations of the procurement process, and it was not a condition of the existence of duty of fairness and good faith that bid contractual relations arise. In dealing with an RFP process which involved an element of negotiation, the Court in *Mellco Developments* said (at paras. 80 and 81):

I agree with counsel for the plaintiffs that the question of the duty to negotiation in good faith with respect to bids (be they a tender or proposal), is a form of continuum. At one end are the formal tender cases invoking the principles of *Ron Engineering*. At the other end are cases where, for example, an owner requests a simple quote. There is obviously a lot of territory between these two extremes. The fact situation before us falls somewhere in between the two extremes. On the one hand, there is a detailed request for proposals mandating that they must contain a security deposit and remain open for a length of time. Conversely, the RFP does not create contracts A or B and envisions continuing negotiations with the "lead proponent" that submits "the most attractive proposal."

*Within the continuum, in the instant case, there was, in my opinion, an obligation on the part of the city to conduct itself fairly and in good faith. Without some fairness in the system, proponents could incur significant expenses in preparing futile bids which could ultimately lead to a negation of the process. In circumstances such as those before us, there must be enough fairness and equality in the procedures to ensure its integrity and openness. (emphasis added)*

To the same effect, in Ontario, the Ontario Supreme Court of Justice has recently held that, even in the absence of bid contractual relations, the proponent in an RFP process was owed a duty by the Owner to fairly consider its proposal (*Buttcon Ltd. v. Toronto Electric Commissioners*, 2003, Carswell Ont. 2606).

#### **IV. Public Procurement and the Duty of Good Faith**

The proposition that no "free-standing" duty of good faith exists independent of bid contractual relations might arguably be subject to qualification in the case of procurement by government or public authorities and the application of administrative law principles. The extent to which administrative law principles may yield a free-standing duty of fairness in a procurement context has yet to be settled. In *Puddister Shipping Ltd. v. Newfoundland*, [2000] N.J. No. 193 (S.C.), an unsuccessful tenderer sought an order in the nature of certiorari, quashing the award by the

Government of Newfoundland of a ferry services contract, on the basis of an alleged breach of the duty of fairness and the apprehension of bias. In relation to the first aspect, the Newfoundland Supreme Court said (at paras. 23 to 25):

It is now well established that there is a duty of procedural fairness applying to administrative decisions of Government which affect the rights or interests of individuals.

This Court has affirmed that there is, as a general common law principle, duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interest of an individual (per LeDain J. in *Cardinal v. Kent Institution* (1985), 24 D.L.R. (4th) (S.C.C.); and see *Nicholson and Haldimand - Norfolk Regional Board of Commissioners of Police* (1978), 88 D.L.R. (3d) 671 (S.C.C.))

The existence of a duty of procedural fairness cannot be doubted. There remains the determination of what constitutes the duty of procedural fairness. Procedural fairness is a variable concept which must be decided on the specific context of each case, having regard to all of the circumstances of that particular case. See *Knight v. Indian Head School, District #19* (1990), 69 D.L.R. (4th) 489 (S.C.C.). In *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 the Supreme Court of Canada referred to several factors as relevant to determining what is required by the duty of procedural fairness in a given set of circumstances: the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute pursuant to which the decision maker operates, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the decision maker.

I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate the principle that the individual or individuals affected, should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional

and social context of the decision. (per L 'Heureux-Dube J. at par. 28)

The duty of procedural fairness to be followed in the award of public tenders has been considered in numerous recent cases- see the authorities cited in paragraph 19, *Health Care Developers v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 (Nfld. C.A.) and *MJB Enterprises Ltd. v. Defence Construction (1951), Ltd.*, [1999] 1 S.C.R. 619. From these authorities it can be stated that the duty includes:

- that the criteria for the tender be made available to all bidders.
- that each bidder be given a fair opportunity to bid on the tender.
- that only criteria disclosed in the Invitation to Tender be considered
- that non-compliant bids be rejected.

In *Puddister, supra*, the Court held on the facts that no unfairness or reasonable apprehension of biases had been established on the evidence. It must be considered that the question remains open as to whether, independent of strict tendering law principles, a Court might impress upon a government owner a free-standing duty of procedural fairness having regard to administrative law principles. Certiorari is not a remedy available to an unsuccessful tenderer in British Columbia (*Peter Kiewit & Sons Ltd. v. Richmond (City)* (1993), 22 B.C.A.C. 89).

## V. Conclusion

The law continues to evolve on the efficacy of the Owner's "discretion clause" and the duty of good faith in tendering. The courts have shown a willingness to exercise a supervisory function where deemed necessary to ensure the integrity of the tendering process, particularly with respect to the Owner's duty of procedural fairness. In this respect, although the cases do not always yield consistent approaches or results, the court's role has not changed significantly since *Ron Engineering, supra*, was decided.

For a more comprehensive discussion of modern tendering law and the duty of good faith in hybrid procurement procedures, see "Hybrid Procurement and The Duty of Good Faith" (2003), 25 C.L.R. (3d) 30.