



Hybrid Procurement and The Duty of Good Faith

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I. – Introduction

The hallmark of the tendering method of procurement is the substitution of competition for negotiation. The competitive rules are circumscribed by the tender documents, together with implied obligations determined by the Courts as necessary to maintain the integrity of the tendering process. In an effort to take the benefits of both competition and negotiation, owners and tendering authorities are developing procurement methods that contain elements of both. Whether tendering law principles, including the duty of good faith, are engaged, in these “hybrid” types of procurement is an emerging issue for the construction industry and its legal advisors. This article examines the common law framework within which the Courts are expected to deal with the issue, and the industry context in which they might arise. A brief overview of tendering law principles precedes the discussion.

II. -- The "Two Contract" Model of Tendering

The "two contract" model (Contract "A" and "B") was established by the Courts as an analytical framework for determining the legal rights and responsibilities of the parties in a tendering process. It provides that, upon the submission of a tender in compliance with the requirements of the tender call, a *process contract* ("bid contract") may come into existence between the tenderer and the party calling for tenders ("owner") if the parties intended to enter into contractual relations upon the submission of the tender. Individual bid contracts (Contract "A") come into existence between the owner and each compliant tenderer. Upon the acceptance of a tender, a second contract (Contract "B") arises with the successful tenderer (*R. v. Ron Engineering & Construction (Eastern) Ltd.*, [\[1981\] 1 S.C.R. 111](#) (S.C.C.)) *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [\(1999\), 44 C.L.R. \(2d\) 163](#) (S.C.C.) and *Martel Building Ltd. v. R.*, [\[2000\] 2 S.C.R. 860, 5 C.L.R. \(3d\) 161](#) (S.C.C.).

A. -- The Formation of the Bid Contract

Whether or not a bid contract arises upon the submission of a compliant tender, depends on whether, objectively viewed, the parties can be taken to have intended to enter into contractual relations upon its submission. Contractual intention will be determined on a contextual consideration of the terms and conditions upon which tenders were invited and submitted, i.e. principally with reference to the tender documents. It is the existence of contractual intention that distinguishes an invitation to tender from a mere "invitation to treat", which by definition does not give rise to a bid contract. Objective indicia of an intention to enter into bid contractual relations include (1) a formal procurement procedure; (2) requirements for the submission and evaluation of tenders; (3) the irrevocability of tenders; (4) the provision of bid security; and (5) procurement documents setting out terms and conditions for the submission, evaluation and acceptance of tenders, e.g. instruction to tenderers, the tender form, a model form of Contract "B", design documents.

The tender call is, in legal terms, the owner's offer to receive and consider tenders according to the terms and conditions of the tender call. The submission of a compliant tender is the act of acceptance of the offer and good consideration for the owner's offer (*M.J.B. Enterprises, supra*, at p. 173). This is distinguished from the "invitation to treat" by the owner where the only offer, in law, is that of the invitee, and only upon the invitor's acceptance of that offer does a contractual relationship (Contract "B") arise.

(1) -- *Substantial Compliance*

A tender, submitted other than in compliance with the terms and conditions of the tender call, does not give rise to a bid contract. The tender documents, including the instructions to tenderers, comprise the owner's offer to consider a tender, if the tender is valid, i.e. compliant. An invalid or non-compliant tender may be one which is (1) not submitted on time; (2) is conditional or contained qualifications; (3) fails to provide information required, e.g. list of trades; (4) fails to include the requisite bid security; (5) is not submitted on the required tender form, (6) contains material alterations in the tender form; or (7) is uncertain as to a material term, e.g. price (*M.J.B. Enterprises, supra*, at p.177; *Smith Bros. & Wilson (B.C.) Ltd. v. British Columbia Hydro & Power Authority* (1997), [33 C.L.R. \(2d\) 64](#) (B.C. S.C. [In Chambers]) *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), [28 C.L.R. \(2d\) 145](#) (B.C. C.A.) and *McMaster University v. Wilchar Construction Ltd.*, [1971] [3 O.R. 801](#) (Ont. H.C.); affirmed (1973), [12 O.R. \(2d\) 512n](#) (Ont. C.A.).

The dominant test applied by the Courts is one of "substantial" compliance. Thus, technical deficiencies which would not operate to undermine the integrity of the tendering process have been held not to invalidate a tender. Such deficiencies include the omission of a surety's seal on a bid bond (*M.J. Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), [32 B.C.L.R. 392](#) (B.C. S.C.) and the omission or misstatement of information otherwise incorporated by reference, or contained, in the tender documents (*British Columbia v. S.C.I. Shares & Constructors Inc.* (1993), [22 B.C.A.C. 89](#) (B.C. S.C.) *J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society* (2002), [16 C.L.R. \(3d\) 111](#) (B.C. C.A.) *Foundation Building West Inc. v. Vancouver (City)* (1995), [22 C.L.R. \(2d\) 94](#) (B.C. S.C.) and *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), [44 C.L.R. \(2d\) 1](#) (Ont. C.A.).

The issue of compliance and the existence of an enforceable bid contract may be challenged by either the owner or the tenderer (*Derby Holdings Ltd. v. Wright Construction Western Inc.* (2002), [17 C.L.R. \(3d\) 64](#) (Sask. Q.B.).

Typically, the instructions to tenderers will contain special terms which grant the owner a discretion to waive irregularities in a tender. Whether these terms can be lawfully applied to validate an otherwise non-compliant tender will depend upon the nature of the non-compliance and the particular language of the provision. The courts have so far demonstrated a reluctance to allow an owner to accept an irregular or non-compliant tender over another compliant one, in reliance upon such "discretion to waive" clauses (*Fullercon Ltd. v. Ottawa (City)* (September 26, 2002), Doc. 02-CV-19705, [2002] O.J. No. 3713 (Ont. S.C.J.) and see *Silex Restorations Ltd. v. Strata Plan VR 2096*, [2002] [B.C.J. No. 2898](#), [23 C.L.R. \(3d\) 36](#) (B.C. S.C.).

(2) -- *Mistaken Tenders*

Tenders which contain patent errors or omissions respecting an essential requirement of the tender call have been held to be invalid and incapable of lawful acceptance or unilateral "correction" by the owner (*Vachon Construction Ltd.*, *supra*; *McMaster University*, *supra*; *Best Cleaners & Contractors Ltd. v. Canada*, [\[1985\] 2 F.C. 293](#) (Fed. C.A.) and *Ottawa (City) Non-Profit Housing Corp. v. Canvar Construction (1991) Inc.* (2000), [131 O.A.C. 116](#) (Ont. C.A.) However, an error in the tender which is not patent, but merely relates to the underlying economics of the tender, will still yield an enforceable bid contract (*Ron Engineering*, *supra*; *Beaurivage & Methot Inc. c. Hôpital du St-Sacrement* (1986), [21 C.L.R. 263](#) (Que. C.A.) and *Pasedena (Town) v. MELB Enterprises Ltd.* (1992), [1 C.L.R. \(2d\) 251](#) (Nfld. T.D.).

B. -- The Terms of the Bid Contract

The terms of the bid contract are both express and implied.

(1) -- *Express Terms*

The express terms and conditions of the bid contract are generally contained in the tender documents, including (1) instructions to tenderers; (2) tender form; (3) the form of construction contract to be awarded; (4) drawings, specifications, consultants' reports (geotechnical, environmental, etc.); and (5) other information required to be provided with the tender.

The instructions to tenderers generally incorporate a form of "privilege clause" which provides that the owner is not required to accept the lowest or any tender. Further, in order to provide the owner with some flexibility in overlooking non-essential irregularities in the tender submittals, the instructions to tenderers typically provide that the owner may waive technical irregularities, omissions, etc. in the tender form. The case law has yet to fully develop on whether this latter type of clause may be resorted to in curing defects that otherwise would invalidate a tender.

(2) -- *Implied Terms*

A bid contract will, in most instances, be held to contain an implied term that the owner will only accept a compliant tender (*M.J.B. Enterprises*, *supra*, at p.175) and will invariably contain an implied term that the owner must act fairly and in good faith in the tendering process. The duty is one of procedural good faith (*Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), [35 C.L.R. 241](#) (B.C. C.A.) *Kencor Holdings Ltd. v. Saskatchewan*, [\[1991\] 6 W.W.R. 717](#) (Sask. Q.B.) and *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1999), [48 C.L.R. \(2d\) 236](#) (Ont. C.A.).

It is generally accepted that terms may be judicially implied in commercial contracts (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term is necessary to give business efficacy to the contract or which otherwise meets the "officious bystander" test (*Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [\[1987\] 1 S.C.R. 711](#) (S.C.C.).

In a standardized tendering context it has been recognized that there is a substantial overlap "involving custom or usage, the requirements of the tendering process, and the presumed intentions of the party" (*M.J.B. Enterprises, supra*, p.174). The Courts generally yield to the primacy of private ordering and will not imply terms merely because they are "reasonable", but instead seek to give effect to the presumed intentions of the parties themselves. Terms will not be implied which conflict with the express terms of the bid contract e.g. the privilege clause (*M.J.B. Enterprises, supra*, p. 179). As to the implication of terms based on "custom and use", or "custom in the trade", see *Hudson's Building and Engineering Contracts*, 10th ed. (London: Sweet & Maxwell, 1970) at p. 53, and *Law of Contracts*, Cheshire & Fifoot, 10th ed. (London: Butterworths, 1981) at p.106.

III. -- The Bid Contract -- Rights and Responsibilities

A. -- The Owner

(1) -- The Duty of Good Faith

The duty of procedural good faith, owed by the owner to tenderers, has its origins in the bid contract. The dominant view is that no "free standing" or nominate duty of good faith exists independent of the bid contract, however, this may not obtain in the case of a government or public authority calling for tenders (*Midwest Management (1987) Ltd. v. BC Gas Utility Ltd.* (2000), 5 C.L.R. (3d) 140 (B.C. C.A.) *Puddister Shipping Ltd. v. Newfoundland*, [2000] N.J. No. 193, 2000 CarswellNfld 87 (Nfld. T.D.) but see, *infra*, *Mellco Developments Ltd. v. Portage la Prairie (City)* (2002), 19 C.L.R. (3d) 1 (Man. C.A.); leave to appeal refused (2003), [2002] S.C.C.A. No. 502, 2003 CarswellMan 106 (S.C.C.)).

The law implies an obligation of fairness on the part of the owner to treat all tenderers fairly and equally, without the application of hidden preferences, undisclosed non-customary bid evaluation criteria, or conduct in the nature of bid shopping or which gives a tenderer an unfair competitive advantage over others (*Martel Building v. R.*, *supra*, at p. 194; *Chinook Aggregates Ltd.*, *supra*; *Fred Welsh Ltd. v. B.G.M. Construction Ltd.*, [1996] 10 W.W.R. 400, 27 C.L.R. (2d) 269 (B.C. S.C.) *George Wimpey Canada Ltd.*, *supra*; *Martselos Services Ltd. v. Arctic College* (1994), 12 C.L.R. (2d) 208 (N.W.T. C.A.) leave to appeal refused (1994), 17 C.L.R. (2d) 59n (S.C.C.) *Wind Power Inc. v. Saskatchewan Power Corp.* (2002), 15 C.L.R. (3d) 291 (Sask. C.A.) leave to appeal refused 2002 CarswellSask 793, 2002 CarswellSask 794 (S.C.C.) and *Kencor Holdings Ltd.*, *supra*).

Courts will not lightly substitute their own judgment on whether a tender ought to have been accepted for those of the owners, nor will they be inclined to find bad faith in the absence of convincing proof (*B.A. Blacktop Kamloops v. British Columbia (Ministry of Transportation & Highways)* (1988), 27 C.L.R. (2d) 230 (B.C. S.C. [In Chambers]) *Hughes Land Co. v. Manitoba (Minister of Government Services)* (1991), 72 Man. R. (2d) 215 (Man. Q.B.); affirmed (1991), 76 Man. R. (2d) 64 (Man. C.A.) and *Sound Contracting Ltd. v. Nanaimo (City)* (2000), 2 C.L.R. (3d) 1 (B.C. C.A.); leave to appeal refused 2001 CarswellBC 125 (S.C.C.) Courts have recognized that tenderers are willing to accept some of the risk of the process, provided that the "rules of the game" are spelled out (*Fred Welsh Ltd. v. B.G.M. Construction Ltd.*, [1996] 10 W.W.R. 400 (B.C. S.C.)).

Tendering law is evolving on the question of whether or not a government or public authority may owe a duty of procedural fairness absent concurrent bid contractual relations. The interfluence of administrative and tendering law principles has yielded the view that a public authority can owe an independent duty of fairness in the absence of Contract "A" (*Puddister Shipping Ltd. v. Newfoundland, supra*). The free-standing duty finds its origins in the administrative law principle that a duty of procedural fairness rests on every public authority making an administrative decision, which is not of a legislative nature, and which effects the rights, privileges or interests of an individual (*Cardinal v. Kent Institution* (1985), 24 D.L.R. (4th) 44 (S.C.C.) *Hughes Land Co. v. Manitoba* (1998), 167 D.L.R. (4th) 652 (Man. C.A.) and see *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.).

(2) -- Acceptance / Non-Acceptance of a Tender and the Privilege Clause

In evaluating and accepting or rejecting a tender, the owner is required to comply with the terms of its individual bid contracts and its overarching duty of procedural good faith. Where the privilege clause forms a term of the bid contract, the owner is under no contractual duty to award the construction contract to a particular tenderer (*M.J.B. Enterprises, supra*). The privilege clause will not, however, operate to permit an owner to act other than in accordance with the duty of good faith (*Chinook Aggregates Ltd., supra*), and neither will provisions giving the owner the discretion to waive irregularities. Some privilege clauses are drafted to enlarge the owner's discretion to accept a tender, whereas others seek to negate the bid contract entirely (*Ed. Brunet & Associates Inc. v. 154469 Ontario Inc.*, [2002] O.J. No. 4142, 19 C.L.R. (3d) 173 (Ont. S.C.J.) additional reasons at [2002 CarswellOnt 3605](#) (Ont. S.C.J.) and *Maple Ridge Towing (1981) Ltd. v. Maple Ridge (District)*, [2001] B.C.J. No. 1923, 2001 CarswellBC 2020 (B.C. S.C.).

The Court will not imply a term, based on custom and industry or otherwise, that the owner must accept the lowest tender, in the face of a privilege clause (*M.J.B. Enterprises, supra*). The privilege clause, *simpliciter*, will not permit an owner to accept other than a compliant tender (*M.J.B. Enterprises, supra*, at p. 179). There is no incompatibility between the privilege clause and an owner's duty not to accept non-compliant tenders.

The mere rejection of the lowest tender does not imply that the owner acted without good faith, or on the basis of some impermissible undisclosed bid evaluation criterion. The privilege clause operates to permit the owner to take a "nuanced view of 'cost' than the prices quoted in the tenders" (*M.J.B. Enterprises, supra*, at p. 46). Goldsmith in *Goldsmith on Canadian Building Contracts* (4th ed. 1988) at p.1-20, summarizes the importance to the owner of retaining a discretion not to accept the lowest nominal tender price:

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

Thus, if an owner acting in good faith concludes that the lowest tender price does not truly reflect the anticipated cost to the owner of the work, the owner will not be in breach of its bid contract by not accepting the lowest tender. The owner should be prepared, however, to justify its decision according to "objective reasons for concluding that better value may be obtained by accepting a higher bid" (*Sound Contracting Ltd. v. Nanaimo (City)*, *supra*, at p. 5). Some of the economic factors which an owner may properly take into account in rejecting the lowest tender, include:

(1) additional contract administration costs anticipated as a result of the tender's previous performance on other projects (*Sound Contracting Ltd. v. Nanaimo (City)*, *supra*);

(2) the tenderer's lack of actual direct experience in performance of the work (*Westport Construction Ltd. v. Burnaby (City)* (1997), 39 C.L.R. (2d) 106 (B.C. S.C.))

(3) the potential for cost increases (*J. Oviatt Contracting*, *supra*);

(4) the application of alternative unit pricing (*Sound Contracting Ltd. v. Campbell River (District)* (2001), 8 C.L.R. (3d) 75 (B.C. S.C.) and

(5) anticipated cost overruns due to past incidents of inadequate site supervision and construction errors (*W.I.B. Co. Construction Ltd. v. Central Okanagan School District No. 23* (1998), 41 C.L.R. (2d) 93 (B.C. S.C.) additional reasons at [1998 CarswellBC 2860](#) (B.C. S.C.))

Absent a breach of the duty of good faith, the Courts are reluctant to substitute their own analysis for that of the owner in determining which tender provided "the greatest value based on quality, service and price" to the owner (*Sound Contracting Ltd. v. Nanaimo (City)*, *supra*, at p.5). In most cases the owner is under no obligation to advise an unsuccessful tenderer of the reasons for its rejection (*Cegeco Construction Ltée. v. Ouimet* (1991), 50 C.L.R. 171 (Fed. T.D.) and *Westport Construction*, *supra*). In the presence of the privilege clause, the owner is under no contractual obligation to award the construction contract to the lowest or any tenderer (*Sound Contracting Ltd. v. Hood Point Improvement District* (2000), 1 C.L.R. (3d) 76 (B.C. Master))

(3) -- The Owner's Duty to Subcontractors

No bid contractual relations arise between an owner and a subcontractor whose bid is incorporated in the general contractor's tender to the owner (*Twin City Mechanical v. Bradsil (1967) Ltd.* (1999), 43 C.L.R. (2d) 275 (Ont. C.A.) leave to appeal refused [2000 CarswellOnt 520](#) (S.C.C.) and *Ken Toby Ltd. v. British Columbia Buildings Corp.* (1999), 45 C.L.R. (2d) 141 (B.C. C.A.) leave to appeal refused [2000 CarswellBC 433](#) (S.C.C.) However, in the context of a procurement process which stipulates for the obtaining of trade bids to the general contractor through the Bid Depository system, it has been suggested in *obiter* that "the owners duty to all subcontractors is to take reasonable steps to ensure the integrity of the Bid Depository process" (*Ken Toby Ltd.*, *supra*, at p.155). At present, the case authority has not gone so far as to recognize the existence of a tortious duty of care that is owed by the owner to a non-privy subcontractor (*Martel Building Ltd.*, *supra*, at p. 202). The existence of a legally recognized duty of care, owed by an owner to a non-privy subcontractor, awaits further judicial analysis. Presumably, the Courts will be reluctant to extend duties to non-privy subcontractors in order to avoid the prospect of redundant lost-profit claims by general contractors and subcontractors.

B. -- The Tenderer*(1) -- Duties Owed to the Owner*

The duties owed by a tenderer to the owner are circumscribed by the terms of the bid contract. Thus, for example, in the face of a clause providing that its tender remains irrevocable, the tenderer may not withdraw its tender during the period of irrevocability, and so long as its tender is capable of lawful acceptance by the owner, it will be liable for the owner's losses in the event it declines to enter into the construction contract following an award (*Ron Engineering, supra; Calgary (City) v. Northern Construction Co.* (1985), 19 C.L.R. 287 (Alta. C.A.); affirmed [1987] 2 S.C.R. 757 (S.C.C.) and *Derby Holdings Ltd., supra*). There would seem to be no policy reason that would militate against the recognition of a reciprocal duty of good faith owed by a tenderer to an owner, e.g. to refrain from collusion or "bid rigging".

(2) -- Duties Owed to Subcontract Tenderers

The two contract model has been applied in the context of the tendering relations between a general contractor and a subcontractor whose price is utilized, or who has been nominated, by the general contractor in its tender to the owner. The same approach to bid contract formation applies as between the subcontractor tenderer and the general contractor (*Naylor Group Inc. v. Ellis-Don Construction Ltd.* (2001), 10 C.L.R. (3d) 1 (S.C.C.) For example, a subcontractor's tender to the general contractor will remain irrevocable for the duration of the general contractor's tender acceptance period stipulated for in the tender documents (*Northern Construction Co. v. Gloge Heating & Plumbing Ltd.* (1986), 27 D.L.R. (4th) 264, 19 C.L.R. 281 (Alta. C.A.)

Where all that is carried in the general contractor's tender is the subcontractor's price, upon the award of the construction contract to the general contractor, the successful tender is under no obligation to award the subcontract to the subcontractor (*Vipond Automatic Sprinkler Co. v. E.S. Fox Ltd.* (1996), 27 C.L.R. (2d) 311 (Ont. Gen. Div.) *Ron Brown Ltd. v. Johanson* (August 10, 1990), Doc. Vernon 337/87 (B.C. S.C.) *Bate Equipment Ltd. v. Ellis-Don Ltd.* (1992), 2 C.L.R. (2d) 157 (Alta. Q.B.) affirmed (1994), 157 A.R. 274 (Alta. C.A.) leave to appeal refused [1995] 2 S.C.R. v (S.C.C.) and *Derrick Concrete Cutting & Coring Ltd. v. Central Oilfield Service Ltd.* (1994), 17 C.L.R. (2d) 120 (Alta. Q.B.) affirmed (1995), 25 C.L.R. (2d) 213 (Alta. C.A.) leave to appeal refused (1997), 211 N.R. 240 (note) (S.C.C.) Where the subcontractor is nominated in the general contractor's tender, the subcontractor may, or may not, be entitled to the award of the subcontract upon the acceptance of the general contractor's tender by the owner.

It has been held that a nominated subcontractor's tender will be deemed to have been accepted by the general contractor upon the owner's award of the construction contract to the latter (*M.J. Peddlesden Ltd., supra*). This is the "deemed acceptance" rule. However, modern form construction contracts which allow the owner to object "for reasonable cause" to a proposed subcontractor, lead to a different result. Where the form of construction contract incorporated in the tender documents provides for the substitution of a subcontractor at the instance of the owner based on "reasonable cause", the "deemed acceptance" rule is displaced. In such circumstances, a subcontractor-contractor bid contract may come into existence, a term of which requires the successful contractor to award the subcontract to a nominated subcontractor absent any "reasonable objection" by the owner (*Naylor Group Inc., supra*, at p.18; and *Scott Steel (Ottawa) Ltd. v. R.J. Nicol Construction (1975) Ltd.* (1993), 15 C.L.R. (2d) 10 (Ont. Div. Ct.)

Where the tender documents prescribe the use of the local Bid Depository rules, those requirements will be held to apply to the tendering process (*Moncton Plumbing & Supply Co. v. Brunswick Construction Ltd.* (1983), 3 C.L.R. 166 (N.B. Q.B.) affirmed (1985), 13 C.L.R. 52 (N.B. C.A.) Where a general contractor mistakenly carries a nominated subcontractor's price, which is different than that submitted by the subcontractor, no legal duties arise between them (*Co West Gypsum & Painting Ltd. v. Apacon Contracting (1981) Ltd.* (1992), 3 C.L.R. (2d) 107 (Alta. C.A.) However, the contractor will be held to be bound to perform the work according to the mistaken price which it carried in its tender (*Quantum Homes Ltd. v. Guarantee Co. of North America* (1991), 41 C.L.R. 70 (Ont. H.C.)

A subcontractor which refuses to perform its subcontract work in accordance with its tender will be liable to the general contractor for the additional costs incurred by the latter to perform that component of the work (*St. Lawrence Cement Inc. v. Farry Grading & Excavating Ltd.* (1989), 32 C.L.R. 185 (Ont. H.C.) varied 1992 CarswellOnt 2556 (Ont. C.A.)

C. -- The Consultant

Frequently, the owner's consultant will not only prepare the tender documents, but will play a central role in evaluating and making recommendations on the award of Contract "B". The consultant is often the instrumentality by which the owner acts in the procurement process and is relied upon by the owner to act in a manner consistent with the owner's legal duties to the tenderer. The owner can incur liability as a result of actions by its consultant which cause the owner to breach its legal duties to the tenderers.

There is no obligation on either the consultant or the owner to (1) advise the tenderer of any concerns with respect to the tender, the tenderer's qualifications, etc. (*Cegeco Construction Ltée, supra*); or (2) to indicate in the tender documents what weight will be attached to particular evaluation criteria (*Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308 (Ont. C.A.) leave to appeal refused (1993), 151 N.R. 394n (S.C.C.)

The consultant will not be held to be negligent at the instance of an unsuccessful tenderer for failing to exhaust all avenues of investigation into the tenderer's qualifications (*W.I.B. Co. Construction, supra*). No tort of inducing a breach of contract can be committed by a consultant in evaluating and recommending the award of a tender, where the consultant was under a legally recognized duty to provide such advice to its client (*Spectra Architectural Group Ltd. v. Eldred Sollows Consulting Ltd.* (1991), 7 C.C.L.T. (2d) 169 (Alta. Master) and *W.I.B. Construction, supra*).

A consultant, in preparing tender documents and acting throughout the procurement process, will assume legal duties to its client -- the owner or tendering authority. The nature and scope of those duties are generally circumscribed by its contractual arrangements with the client and any applicable professional standards and practices.

IV. -- Damages for Breach of the Bid Contract

A. -- The Owner's Liability

Having established a breach of its bid contract, the tenderer must establish its entitlement to damages by establishing a lost opportunity to obtain the construction contract. Whether, the unsuccessful tenderer would have been awarded the construction contract, had the owner not breached its bid contract, is a question of fact in each case (*Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)* (2000), 2 C.L.R. (3d) 84 (N.S. S.C.) and *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)* (1997), 205 A.R. 185, 34 C.L.R. (2d) 197 (Alta. Q.B.) See also *Chaplin v. Hicks*, [1911] 2 K.B. 786 (Eng. C.A.)

The proper assessment of damages requires a determination in each case of (1) the likelihood that the tenderer would have been awarded the construction contract had the owner fulfilled its bid contractual duties; and (2) the value of the loss of the benefit of the construction contract (*Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 49 D.L.R. (4th) 205 (B.C. C.A.) leave to appeal refused (1988), 37 B.C.L.R. (2d) 2n (S.C.C.)

In most, but not all, cases, the measure of the value of the tenderers' lost opportunity will be the difference between its tender price and its probable costs of completing the contract work, i.e. its "loss of profit" (*M.J.B. Enterprises Ltd.*, *supra*, at p.650; and *Naylor Group Inc.*, *supra*, at p.24). Evidence that the tender price was unreasonable, e.g. based on an erroneous bid estimate, may reduce the assessed damage where the evidence is relied upon to establish the contractor's likely costs to perform the work (*Knappett Construction Ltd. v. Axor Engineering Construction Group Inc.*, 2003 BCSC 73 (B.C. S.C.)

In determining the quantum of damages in each case the actual conditions and costs that would have been incurred by the unsuccessful tenderer (had it performed the work), will be inquired into in order to determine what its "lost profits" would have been had it performed the construction contract. This process involves an evaluation, in monetary terms, of future possibilities and chances (*Naylor Group Inc.*, *supra*, at p.25). The contractor will be required to mitigate its damages according to the normal principles governing recoverability of damages.

By appropriately drafted tender documents, the owner may exclude or limit its liability for damages for breach of the bid contract (*Elite Bailiff Services Ltd. v. British Columbia*, [2003] B.C.J. No. 376, 2003 CarswellBC 399 (B.C. C.A.) It is not uncommon for tender documents to contain terms and conditions exempting the owner from damages or losses arising directly or indirectly out of its breach of the bid contract, or other tortious acts or omissions by the owner, its consultant or employees. In some instances, damages are provided to be limited to the tenderers costs of preparing and submitting its tender.

These clauses will be applied *contra proferentem*, against the owner and must be carefully drafted by it to realize their intended legal effect. Their commercial result in most cases is to increase the cost of construction services due to the imbalanced allocation to the tenderer of procurement risk.

B. -- The Tenderer's Liability

Where a tenderer breaches its bid contract by refusing to enter into the construction contract following an award, it may become liable to the owner for the difference between its tender price and the next lowest tender price of a contractor which subsequently contracts to perform the work (*Calgary (City) v. Northern Construction Co.*, *supra*). Depending on the terms of the bid contract, the tender security or deposit may be forfeited to the owner as "liquidated damages". The provisions of a standard form Bid Bond provide that the surety will pay this amount up to the limit of the penal limit of the bond.

The owner's duty to mitigate its damages does not require it to accept a mistaken tender at a "corrected" amount even where the adjusted tender price remains lower than the next higher tender price (*Vaughan (Town) v. Alta Surety Co.* (1991), 42 C.L.R. 305 (Ont. H.C.) varied (1992), 3 C.L.R. (2d) 209 (Ont. C.A.) leave to appeal refused (1993), 147 N.R. 396 (S.C.C.))

V. – Hybrid Procurement and the Duty of Good Faith

Tendering law has evolved in the context of a "traditional" tendering process involving ascertained project work, a settled form of construction contract and a well defined competitive process. The "finish line" in the competition was ascertainable and common to all tenderers. It remains unanswered whether, and to what extent, established tendering law principles may be applied to "hybrid" procurement models involving elements of both competition and negotiation. These "hybrid" types of procurement methods are becoming more common, particularly in cases of staged construction projects and design-build project delivery models.

Normally, an owner will seek to avoid the legal constraints of a true tendering process, by characterizing the procurement as a "request for proposals" ("RFP"), a "request for quotations" ("RFQ") process or a "request for expressions of interests" ("RFEI"). It is not uncommon to find an owner expressly stipulating in these types of procurement documents that the process is "not a tendering process" and that no legal relations are intended to arise prior to the award of the construction contract. Whatever label the owner may seek to use in characterizing a procurement process, it is clear that the Courts will look to the substance of the transaction in the context of the terms and conditions of the procurement documents in order to determine whether tendering law principles are engaged (*Hughes Land Co. v. Manitoba* (1998), 131 Man. R. (2d) 202 (Man. C.A.))

For present purposes it is considered that a "true" RFP is one which invites proponents to enter into a non-binding process, typically involving some element of negotiation. There is, in such a case, no intention on the part of the owner to create binding contractual relations with one or more proponents at any time prior to entering into the construction contract. In tendering law terms, this "true" RFP does not give rise to a bid contract: (*Powder Mountain Resorts Ltd. v. British Columbia*, [1999] 11 W.W.R. 168, 47 C.L.R. (2d) 32 (B.C. S.C.); affirmed [2001] B.C.J. No. 2172, 2001 CarswellBC 2225 (B.C. 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.) affirmed (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.))

The legal principles which differentiate between a "true" RFP, and a tender call, have evolved out of cases in which the procurement process was readily characterizeable as one or the other. However, there are developing procurement procedures that fall within a continuum between these two extremes. Consider, for illustration purposes, a "hybrid" procurement process which includes the following elements:

(1) The issuance of an RFP document which includes Instructions to Proposers, providing for the irrevocability of proposals, milestones for the submission, opening and award of proposals, a form of "privilege clause", proposal evaluation criteria, a form of proposal, performance based (non-prescriptive) technical construction requirements, the essential articles of a form of construction contract, and, possibly, a proposal security requirement.

(2) A structured process for the delivery of two proposals by a proponent; firstly, a technical proposal in which the proponent describes its design approach, building size, layout and configurations, proposals for methods for the delivery of contract administration and construction services (including alternatives), etc; secondly, a price proposal.

(3) A formal proposal evaluation process in which the owner can deal individually with proponents to clarify deficiencies or non-conformities in the technical proposals, suspected mistakes, and alternatives.

(4) A formal process providing for the owner's option to accept an initial proposal, or alternatively, enter into negotiations with one or more of short-listed proponents falling within an owner-determined competitive range, with a view to obtaining changes in the terms of the technical and price proposal(s).

(5) Following negotiations with one or more of the proponents, provision for the submission by one or more of the short-listed proponents of a "Best and Final Offer" ("BAFO") on terms different than the initial proposal.

(6) Procedures for the owner's evaluation and selection of a BAFO which it considers in its discretion to be technically acceptable and financially achievable, without further negotiations with the preferred proponent.

(7) Provision for the award of the construction contract to a proponent submitting a BAFO and a corresponding requirement that, upon selection, that proponent must enter into the negotiated construction contract.

This "hybrid" procurement process combines elements which are both typical and atypical of a "true" tendering process. The question arises in the context of this kind of procurement process whether bid contractual relations, and a derivative duty of procedural fairness and good faith, ever come into existence and if so, at what stage.

In one decided case involving a similar “hybrid” procurement process, it was held that a bid contract arose only upon the submission of the BAFO, and not earlier in the negotiation stages of the process: (*Hughes Aircraft Systems International v. Airservices Australia* (1997), 146 A.L.R. 1 (Australia Full Ct.) ref'd to in *M.J.B. Enterprises, supra*, at p. 172). Prior to the BAFO stage, in the example above, it seems unlikely that traditional tendering law principles would become engaged during the negotiation phase. To begin with, the recognition of a pre-BAFO bid contract would require recognition of the owner's duty of good faith in dealing with all proponents in the context of multi-party negotiations antecedent to the BAFO.

The duty to bargain in good faith is not recognized in tendering law (*Mannpar Enterprises Ltd. v. Canada* (1999), 173 D.L.R. (4th) 243 (B.C. C.A.) *Martel Building Ltd. v. R.*, at p.191). The reasons of Lord Ackner in *Walford v. Miles*, [1992] 2 A.C. 128 (U.K. H.L.) approved in *Cedar Group Inc. v. Stelco Inc.* (1995), [1995] O.J. No. 3998, 1995 CarswellOnt 3896 (Ont. Gen. Div.) at para. 4, affirmed [1996] O.J. No. 3974, 1996 CarswellOnt 4335 (Ont. C.A.) illustrate the difficulties that would ensue if a duty to negotiate or bargain in good faith were impressed upon parties to a negotiated procurement process:

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 bare agreement to negotiate has no legal content.

The same policy considerations that animated the Supreme Court of Canada in *Martel Building Ltd. v. R.*, *supra*, to refuse to recognize the existence of a tortious duty of care owed by an "owner" in a negotiated procurement process, would militate against the recognition of pre-BAFO bid contractual relations in the above “hybrid” procurement because:

- (1) the primary goal of a party in negotiations is to achieve, at the expense of another, the most advantageous financial bargain;
- (2) extending a duty of good faith within the negotiation process would discourage economically efficient conduct and defeat the essence of negotiation;
- (3) extending the duty of good faith in negotiations would impress the Courts with a significant regulatory or oversight function, involving an examination of the minutiae of the bargaining process; and
- (4) extending the duty of good faith into the negotiation process would encourage a multiplicity of litigation.

It must be considered however that, in the context of a highly structured and well defined "hybrid" procurement process, it is possible that a Court might recognize the existence of a qualified legal obligation in the owner to act in a manner compatible with the integrity and openness of the process to prevent the owner from unilaterally and unfairly departing from the procedures it put in place.

To date, there have been only a few cases that have gone so far as to suggest, albeit in *obiter*, that a free-standing or nominate duty of good faith may arise in a procurement context. In *Mellco Developments, supra*, the Manitoba Court of Appeal posed and then answered in the affirmative this 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?" In *Mellco Developments, supra*, the Court decided on the facts before it that an RFP process which involved an element of negotiation fell within a "continuum" (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.

(Italics Added)

The Court in *Mellco Developments, supra*, found that the source of the duty of good faith and fairness lay in the parties' reasonable expectations of the procurement process, and that it was not necessary to the existence of an enforceable duty of fairness and good faith that Contract "A" ever came into existence. On this point, the decision of the Manitoba Court of Appeal contrasts sharply with that of the British Columbia Court of Appeal in *Midwest Management, supra*. Unless the quality and content of a duty of fairness and good faith were somehow substantially qualified, it is difficult to envision their application in the context of a negotiated procurement process without offending the policy considerations outlined in *Martel Building, supra*.

Following the reasoning in *Melco Developments, supra*, it was held in another case that, even in the absence of bid contractual relations, the proponent in an RFP procurement process was entitled to have its proposal "considered fairly" (*Buttcon Ltd. v. Toronto Electric Commissioners*, [2003 CarswellOnt 2606](#) (Ont. S.C.J.)) This limited duty can be contrasted with the duty to negotiate in good faith, however it is far from clear what the juridical basis is for this free standing duty to fairly consider a proposal.

While no broad duty of good faith, or duty to negotiate in good faith, may be legally recognized, nevertheless some more qualified duty to treat proponents fairly and equally -- from a procedural standpoint only -- may yet come to be generally accepted by the Courts as compatible with a "hybrid" procurement process. The trend in this direction appears to have started notwithstanding the analytical and practical difficulties involved.

For example, in the above "hybrid" procurement process, if qualified duties, akin to those in a true tendering context, were recognized, the assessment of damages for breach of a pre-BAFO contractual duty would entrain obvious difficulties in evaluating a proponent's lost opportunity to negotiate an agreement. Traditionally the Courts have declined to enforce agreements to enter into agreements, the terms of which are uncertain. At best (and this would by no means be free from analytical difficulties), the measure of damages in a claim by a disappointed proponent might be equated with (i) its costs incurred in the procurement process, or (ii) the heavily discounted value of its loss of opportunity to successfully negotiate a construction contract. (*Bate Equipment Ltd. v. Ellis-Don Ltd.* (1992), 2 C.L.R. (2d) 157 (Alta. Q.B.) affirmed (1994), 157 A.R. 274 (Alta. C.A.) leave to appeal refused [1995] 2 S.C.R. v (S.C.C.) see also, *Bowlay Logging Ltd. v. Domtar Ltd.* (1978), 87 D.L.R. (3d) 325 (B.C. S.C.) affirmed (1982), 37 B.C.L.R. 195 (B.C. C.A.) The former measure of damages recognizes the tenderer's "reliance interest" in the owner abiding by the process rules it established, and the latter recognizes the tenderers "expectation interest" -- the traditional approach to damages for breach of contract (*Hadley v. Baxendale* (1854), 156 E.R. 145 (Eng. Ex. Div.) *Langille v. Keneric Tractor Sales Ltd.*, [1987] 2 S.C.R. 440 (S.C.C.) *Webb & Knapp (Can.) Ltd. v. Edmonton (City)*, [1970] S.C.R. 588 (S.C.C.) and *Houweling Nurseries Ltd. v. Fisons Western Corp.*, *supra*).

Further, assessing an owner's damages (on the theory that a reciprocal duty of good faith was owed by the proponent to the owner, and was breached) would be correspondingly difficult. In either case, the Court is required to speculate as to the potential outcomes of an incomplete negotiation and undertake an "apples and oranges" cost comparison of different construction contracts -- the one actually awarded, and the one that might have been awarded to the proponent in breach.

VI. -- Conclusion

In principle, there is no legal impediment to a "hybrid" procurement process. However, the recognition of a duty of fairness and good faith in a "hybrid" procurement involving negotiation will no doubt lead to substantial uncertainty. It is arguable that the introduction of a free-standing, nominate, duty of fairness and good faith is neither compatible with existing legal principles, nor necessary. The "contractual intention" test articulated in *M.J.B. Enterprises, supra*, is compatible with a "reasonable expectations" approach and fully up to the task of differentiating between those types of procurement procedures which should attract the incidents of bid contractual relations and those which should not. Resort to an "expectations" based duty of good faith and fairness, independent of subsisting bid contractual relations, is

bound to lead to difficulties for the construction industry and is arguably an unnecessary extension of existing tendering law principles.

Although the legal framework for analyzing the rights and responsibilities of parties to a traditional tendering process are relatively settled in Canadian law, the application of tendering principles to new and evolving procurement methodologies will continue to be of keen interest to the construction industry and its legal advisors.