

## THE TENDERING PROCESS

**Andrew D. Ferguson,**  
**McBride Bond Christian LLP**  
**([www.mbclaw.ca](http://www.mbclaw.ca))**

### INTRODUCTION

The tendering process is a process where an owner, general contractor or subcontractor obtains competitive bids for a project with a view to obtaining the best possible price.

#### A Bid Depository

Tendering for contracts can take place with or without the services of a bid depository. If the tender is completed *without* the use of a bid depository, the tender is effectively a call by a contractor or owner for competitive prices from the industry, with the prices to be provided directly to the person calling for them. The structure of a bid depository and its rules and regulations are not invoked in this situation. The request for and provision of the tender is governed by the parties themselves. Qualifications on the request and on the actual tender submitted in response to the request are left open to the parties to determine.

The bid depository system was created to bring order to the construction industry and to preclude bid “shopping” or “peddling” thereby protecting the sanctity of the tender process. The bid depository system and the courts in general aim to prevent the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down among contractors with whom one does intend to deal. The tendering process is not to be used as a negotiating tool.

The bid depository functions as a “mailbox”. It establishes a method of receiving sealed tenders from trades in adequate time to allow contractors to compile their own bids.

In Ontario, there are a number of bid depositories servicing the various trades. Generally, there are two levels of bidding through the depository. The first phase requires the sub-subcontractors to tender prices which may ultimately be incorporated into the tenders of the subcontractor to

**McBride Bond Christian LLP Lawyers / Avocat(e)s**

T: 613.233.4474 ■ F: 613.233.8868 ■ 100-85, rue Plymouth Street Ottawa K1S 3E2

the general contractor. The tenders for the sub-subcontractors will usually close 24 hours prior to the closing of the tender for the subcontractors, which in turn will close 48 hours prior to the closing of tenders on the prime contract.

The purpose of the bid depository system, in addition to promoting the sanctity of the bidding process and to avoid bid shopping, is to ensure that all parties are tendering upon the same scope of work to allow for a comparison of bids. Standard rules and procedures have been adopted by the various bid depositories, to which its members and those using its facilities agree to adhere. These rules govern the procedures to be followed when calling for tenders and usually include terms requiring the contractor to employ the subcontractors it names in its tender to the owner (see for example, the rules and regulations of the Ottawa Valley Bid Depository and GC 3.8.2 of the Standard Construction Document CCDC2 1994).

### **BASIC CONTRACT LAW**

The basic law of contract applies to construction contracts. A contract is formed when there has been an “offer”, “acceptance”, and “consideration”.

Likewise, the law of contract applies to the tendering process. However, the basic law governing the formation of a contract has evolved to accommodate the special circumstances involved in the tendering process. Recent decisions of the Courts have clarified the obligations between owner and contractor, contractor and subcontractor and have imposed new obligations on the various parties participating in the tender process.

### **CONTRACT “A” AND CONTRACT “B”**

Under contract law, a contract is formed when a person makes an offer to do something or be bound by something under specified terms and a second person accepts, unequivocally, these terms and notifies the first person of this acceptance. Offer and acceptance are required in order to have the agreement.

Normally in contract law, the offering to do a particular thing is revocable at any time prior to acceptance. If revoked, it cannot be accepted and therefore an agreement or contract cannot be formed.

## Contract A

Under the tendering process, the traditional offer and acceptance to form a contract is split into two separate contracts. The first contract, Contract A, is formed when the offer, being the invitation to tender on a project, is “accepted” by the subsequent tendering or bid by a contractor or subcontractor. The offer (invitation to tender) and the bid provided (acceptance) results in the forming of Contract A, known as a unilateral contract because it comes into existence at the time the bid is presented. Prior to Contract A, no obligations as between owner or contractor have come into existence.

The bid provided must be in accordance with the tender documents. If it is not, the bid may not be “compliant” with the tender documents. The issue of “compliance” is important to determine whether or not a contractor or owner must, or even may, accept any particular bid offered. Contract A will not be formed if a submitted bid is not compliant. In *Double N Earthmovers Ltd. v. Edmonton (City)*<sup>1</sup>, the Supreme Court addressed the issue of compliance. The Court stated that generally, an “informality” would be something that did not materially affect the price or performance of Contract B. In that case, the contractor that was awarded the contract, had not included the serial numbers of the machines it was using, as was required by the tender documents. It was held that this was an informality, and that all parties would have known that this would not materially affect the bid.

In *Coco Paving (1990) Inc. v. Ontario (Transportation)*<sup>2</sup>, Coco Paving’s bid was electronically received 28 minutes late. It was held that this bid was non-compliant.

The terms of this first Contract A are that the contractor submitting the bid cannot withdraw the bid during the time stated in the tender documents in which bids are to be irrevocable. Contract A is known as the “bid contract”. This analysis comes from the Supreme Court of Canada decision *R. v. Ron Engineering and Construction (Eastern) Ltd.*<sup>3</sup>

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<sup>1</sup> *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 SCR 116  
(<http://www.canlii.org/en/ca/scc/doc/2007/2007scc3/2007scc3.html>)

<sup>2</sup> *Coco Paving (1990) Inc. v. Ontario (Transportation)*, 2009 ONCA 503  
(<http://www.canlii.org/en/on/onca/doc/2009/2009onca503/2009onca503.html>)

<sup>3</sup> *R. v. Ron Engineering and Construction (Eastern) Ltd.*, [1981] 1 SCR 111  
(<http://www.canlii.org/en/ca/scc/doc/1981/1981canlii17/1981canlii17.html>)

## Contract B

The creation of Contract A makes it available to the owner to accept the proposed bid at any time within the irrevocable period specified in the tender. If accepted, the parties must then enter into a formal construction contract (Contract B). Should the contractor fail to enter into a construction contract following acceptance of his bid, the contractor will be in breach of the bid contract (Contract A). The bidder may be liable for the damages suffered by the owner for this breach of Contract A, which usually consists of the difference between the bid of the contractor and the next best bid of another contractor to complete the work in question. Deposits (bid security) are often required to accompany contractor's bids, as bid security and these deposits can be used to off-set the damages suffered by the owner. A contractor may also be liable for other damages suffered by the owner for this breach of Contract A.

By submission of the tender, the contractor states he is prepared to perform certain identifiable work, generally defined by reference to the specifications, plans and/or drawings. Generally, the tender form or instructions to bidders will also stipulate that the contractor:

- a) has examined all drawings and specifications;
- b) knows the form of the construction contract required;
- c) has investigated the site;
- d) has examined all conditions affecting the work;
- e) agrees to undertake the supply of the labour and materials for the work commencing within a specified time frame, if notified of acceptance of his bid;
- f) agrees that the tender is irrevocable for a specified period of time; and
- g) once notified of the acceptance within a specified time, agrees to execute a contract in the form required and to furnish the necessary insurance policies, Performance and/or Labour and Material Payment Bonds.

Once an owner has reviewed a tender and determined that it wishes to accept that tender, communication of the acceptance of the tender must occur. It may be that the method by which this acceptance is communicated to the contractor is governed by the tender documents themselves. While acceptance should normally be conveyed in writing, this is not required in order for acceptance to be properly communicated to the contractor.

## **RIGHTS AND OBLIGATIONS OF THE CONTRACTOR**

As discussed above, tenders often close through a bid depository. The use of a bid depository by an owner or a contractor generally requires the owner or contractor to comply with the rules and regulations of the bid depository in question. These rules and regulations and the tender documents themselves usually require the contractor to employ the subcontractors it names in its tender to the owner (CGC 3.8.2 of the standard construction document CCDC2 1994 and the rules and regulations of the Ottawa Valley Bid Depository).

**Given the contractual obligation of the contractor to the owner to employ the named subcontractors, is there a contractual obligation that arises between the contractor and the subcontractors themselves? Do the subcontractors have a claim if they are not awarded the contract?**

The Courts addressed this issue in *Naylor Group v. Ellis Don Construction Ltd.*<sup>4</sup> The unilateral contract is accepted by the general contractor when it names the subcontractor and puts forward that subcontractor's price in its bid to the owner. The failure to communicate the acceptance of the bid to the subcontractor may be a breach of contract according to the *Naylor* case and may give rise to a claim for damages by the subcontractor against the contractor. The Court in *Naylor* does say that a prime contractor does not have to enter into Contract B with the subcontractor, so long as they have "reasonable" grounds for the objection.

### **What are the obligations of the subcontractor?**

The subcontractor is providing a price to the contractor based upon the explicit or implicit knowledge that the price is to be submitted to the owner in accordance with the tender documents. Accordingly, the subcontractor's bid is likewise irrevocable unless stated otherwise on the face of the bid.

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<sup>4</sup> *Naylor Group Inc. v. Ellis Don Construction Ltd.*, [2001] 2 SCR 943  
(<http://www.canlii.org/en/ca/scc/doc/2001/2001scc58/2001scc58.html>)

## RIGHTS AND OBLIGATIONS OF THE OWNER

Most tender packages contain a clause stating that the lowest or any tender need not necessarily be accepted. This is commonly called a “privilege clause”.

A privilege clause in the tender documents was thought to give the owner an “out” if it decided not to accept a particular low tender. The position of owners in the past has been that this decision can be made arbitrarily and without the giving of any reasons. This issue has been discussed in the Supreme Court of Canada cases of *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*<sup>5</sup> and *Martel Building Ltd. v. Canada.*<sup>6</sup>

These decisions have clarified the law governing privilege clauses and the rights and obligations of owners in the tendering process. Specifically, there are a number of implied terms in the tendering process which the Courts are freely applying in their decisions governing tender disputes. These include:

1. The obligation of an owner to accept a tender only if it is compliant with the request for tender (tender documents).
2. The owner can look at factors other than price when considering which bid to accept. However, the criteria for the acceptance of tenders must either be explicit or easily inferred from the call for tender.
3. The owner has an overall duty of fairness to the tenderers, which duty may include a duty to give reasons for its decision, if the lowest compliant bid is rejected in favour of another compliant bid.

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<sup>5</sup> *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [1999] 1 SCR 619  
(<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii677/1999canlii677.html>)

<sup>6</sup> *Martel Building Ltd. v. Canada*, [2000] 2 SCR 860  
(<http://www.canlii.org/en/ca/scc/doc/2000/2000scc60/2000scc60.html>)

## **DAMAGES**

The aggrieved party is typically entitled to more than just damages representing the costs of putting forth the tender. Because Contract B is not awarded, the aggrieved party has lost the profit it would have obtained from completing the contract.

### **What about the contractor or subcontractor whose bid is accepted but refuses to do the work? What is the owner entitled to?**

Often bid security is provided which is available to the owner in the event a contractor fails to enter into a contract following acceptance of the contractor's bid. This bid security, however, is not necessarily the measure of damages to which an owner is entitled. In *Ron Engineering*, it had submitted a tender that was \$632,000.00 less than the next lowest bidder. Ron Engineering had put forth a tender deposit of \$150,000.00. The tenders were opened and the contract was offered to Ron Engineering, which Ron Engineering declined. Ron Engineering had, just after tender opening, noticed a mistake in its tender and had attempted to withdraw its bid.

The owner kept the bid deposit of \$150,000.00. Ron Engineering sued for the \$150,000.00 and the owner counter-sued for the difference between the bid submitted by Ron Engineering and the next lowest bidder. Damages the owner could have collected were the \$632,000.00 and not just the tender deposit of \$150,000.00.

### **What if the bid security is higher than the difference in prices between the lowest and next lowest bid?**

The law would seem to limit the owner to recovering its actual losses, being the difference between the two bids, and not the bid security deposit. The actual wording of the tender surrounding the bid security is important to determining what the owner's entitlement would be. However, if the forfeiture of the bid security is considered a "penalty" by the Court, the Court is likely not to enforce this penalty clause in favour of the owner.

## **MISTAKES IN TENDERS**

The general principles of contract law require that the parties to a contract be “*ad idem*”, which means “of one mind”. This requires the contracting parties to agree on all of the fundamental terms of a contract before a binding agreement can be concluded.

### **But what about a “mistake” as to price?**

Price is a fundamental term of a contract. Ron Engineering argued that its price, being \$632,000.00 lower, was obviously a mistake and therefore the tender could not be accepted by the owner. However, the bid submitted by Ron Engineering was only \$3,300.00 more than the owner’s engineer’s estimate of the costs for the project, including profit. Accordingly, the Court did not find that the mistake was clear or obvious.

The general principle arising from this and subsequent decisions is that the tender, once submitted, cannot be withdrawn if a mistake has been made unless the mistake is obvious on the face of the tender itself. Rarely will this be the case.

## **CONCLUSION**

The Courts are striving to protect and uphold the tender process. Duties of fair dealing and openness in the process are being required of owners, contractors and subcontractors alike. Bid shopping is being frowned upon. Failure to comply with the rules and regulations governing tenders can give rise to substantial damages.

Care should be taken at the outset to ensure that all documents flowing between the owner, contractor and subcontractor are accurate. The tenders submitted must be compliant or they must be rejected if not compliant. If the lowest compliant tender is not accepted, reasons should be provided. Contractors must engage subcontractors that they have named in their tender to the owner, unless very good reason can be shown for not engaging a particular subcontractor. Mistakes in tenders, unless obvious on their face, will not invalidate an otherwise compliant tender and may leave the tender open for acceptance by the owner.