



Tendering Law: Contract A or No Contract A, is that the Question?

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The Supreme Court of Canada decided the now infamous case of *R. v. Ron Engineering* in 1981. The principles that have consistently been extracted from that case are:

1. the bidder, by submitting a bid that complies with the tender call, creates Contract "A". Contract "A" exists between the owner and each of the bidders;
2. the terms of Contract "A" are that the bidder, if awarded the contract (contract "B"), agrees to enter into the contract, and the owner agrees that it will award the contract to the lowest qualified bidder subject to the terms and conditions of the call for tenders.

In *MJB Enterprises* (1999), the Supreme Court revisited this concept and held that Contract "A" does not automatically come into existence. Rather, the court must look at the intention of the parties to determine whether they intended to create a contractual relationship. While many counsel have taken the view in light of *MJB* that it is best to carefully define the parameters of the relationship between the owner and the bidders rather than have it left to the court's fancy, the alternative was to specifically indicate in the tender documents that no relationship exists between the owner and the bidders. The other important finding in *MJB* was that the owner was not, on the facts of that case, entitled to accept bids that did not comply with the tender call (non-compliant bids).



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Disclaiming the Existence of Contract "A"

In *Maple Ridge Towing v. Districts of Maple Ridge and Pitt Meadows* (2001), the BC Supreme Court was faced with a request for proposals ("RFP") that contained the following clause 9.1:

"[the requesting party] shall not be obligated in any manner to any Proponent whatsoever until a written agreement has been duly executed relating to an approved proposal".

The Corporation of the District of Maple Ridge and the Corporation of the District of Pitt Meadows (the "Districts") issued an RFP with respect to their towing work. In response to the RFP, Maple Ridge Towing ("MRT") and Aggressive Towing Ltd. ("Aggressive") submitted bids for the work. The Contract was awarded to Aggressive, and MRT sued the Districts for breach of contract and negligent misrepresentation.

MRT alleged that upon submission of its bid, a Contract "A" came into existence between MRT and the Districts requiring that the Districts act objectively, fairly and in good faith and that the Districts breached this contract by accepting a 'non-compliant' bid submitted by Aggressive. The Court considered whether, on the facts of this case, Contract "A" was formed between MRT and the Districts. The Court held, at paragraph 17, that "Clause 9.1 [quoted above] shows a clear intention on the part of the District of Maple Ridge and the District of Pitt Meadows not to be contractually bound as a result of the RFP process." As a result, no Contract "A" was formed, and MRT could not establish a breach of contract.

It would appear that a party preparing an RFP can avoid the formation of Contract "A" by the inclusion of the language referred to above. However, this decision only looks at half of the equation and does not consider the impact of such a provision on the tenderer's obligations. If no Contract "A" is formed, then is there any binding obligation on the bidders to leave their bids open for a



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specified period of time or can they withdraw their bid at any time before acceptance by the Owner?

The long term impact of this decision is uncertain, but it may be that in many cases the benefits to the requesting party will be outweighed by the loss of the current structure of the tendering process.

The Effect of Contract “A” on Subcontractors

In another tendering case of note, the Supreme Court of Canada held recently in *Naylor Group v. Ellis-Don* (2001) that a general contractor who carries a specifically named subcontractor in their bid was required to utilize that subcontractor for the work.

In *Naylor*, Ellis-Don submitted a tender for work that required use of the bid depository. *Naylor* submitted its bid in accordance with the bid depository rules. The bid depository rules were, according to the Court, intended to create the subcontract immediately upon the award of the prime contract.

Ellis-Don was aware, when it selected *Naylor* as its subcontractor, that a labour relations board hearing in respect of Ellis-Don was forthcoming and that such decision could have an impact on Ellis-Don’s ability to utilize *Naylor*. When the ruling came down against Ellis-Don, it tried to argue that this was an intervening event that frustrated the contract with *Naylor*. The Court held that the event was foreseeable and simply confirmed the situation. In other words, new law had not been created. Hence, the contract was not frustrated.

It is important to understand the impact of carrying a subcontractor when bid depository rules are utilized. The Court specifically rejected the general contractor’s view that the bid depository was simply a fancy name for someone collecting prices and held that it was contrary to the bid depository rules that a subcontractor’s bid would simply become leverage against other subcontractors. The Court held that the only ground for a general contractor to extricate itself from the contract when utilizing the bid depository was to demonstrate that, in all



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the circumstances, its objection was “reasonable”. It is suspected that this will be a difficult test to meet.

Conclusion

The rules of the tendering game are shifting. It is important to carefully consider the ramifications of including or not including specific language in tendering documents as it will significantly impact the rights and remedies available to the parties. As well, the impact of the bid depository rules must be accounted for and general contractors can no longer assume that subtrade bids are starting points rather than end points. While it is always useful to have the Supreme Court clarify the law, it remains to be seen whether MJB and Naylor will have that effect.

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