

## WHEN IS A TENDER NOT A TENDER: A TALE OF TWO NON-COMPLIANCES

In 1981, the Supreme Court of Canada sought to provide commercial certainty to the law of tenders by introducing a strict formality in the now infamous case of *Ontario v. Ron Engineering*. Since that time, numerous decisions have interpreted and re-interpreted *Ron Engineering*, often creating greater uncertainty rather than clarity.

The principles that have consistently been extracted from *Ron Engineering* 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 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 tender documents will determine if Contract A exists. In *MJB*, the Court found an implied term of Contract A to be that only compliant bids were to be accepted by the owner.

The reaction by owners to *MJB* has been to add terms to the call for tenders in an attempt to circumvent *MJB* with varying degrees of success.

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

[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 Court held that the effect of this clause was that, as the owner had no liability under Contract A, no Contract A came into existence. The impact of this finding was that the owner owed no obligation to the bidders and the plaintiff, a disappointed bidder, could not succeed in an action for a breach of Contract A. However, it is likely that without Contract A it was open to a bidder to withdraw its bid prior to acceptance.

In *Kinetic Construction Ltd. v. Comox-Stathcona (Regional District)* (B.C.S.C., November 3, 2003), the tender documents purported to provide the owner with the sole discretion to reject or retain for consideration tenders that were nonconforming. The Court held that in light of this provision there was no room for the court to imply an obligation to only accept compliant tenders, as had been done in *MJB*. The Court determined that the submission of fully compliant bids resulted in the creation of individual Contract A's between the compliant tenderers and the owner, whereas non-compliant tenders were counter-offers that the owner could either accept or reject (because of the owner's reservation of the right to accept or reject non-compliant tenders). This creates the seemingly anomalous situation of having some bidders with a Contract A and some with a counter-offer. The Court went on to find that the owner's discretion, while stated to be a "sole discretion", was subject to the requirement to treat all of the bidders with "objective fairness and good faith", with the caveat that such obligations arise with respect to non-compliant tenders only where the owner "decides to consider the non-compliant bid." However, the Court accepted the owner's decision and agreed that a non-compliant bid could be accepted.

The implication in *Kinetic* is that compliant and non-compliant bids can be evaluated concurrently, but that such evaluation must be done with objective fairness and good faith. What remains unclear is the treatment of a non-compliant bidder who submits a "counter-offer". This issue is addressed in *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (B.C.S.C., November 17, 2003).

In *Graham*, the Greater Vancouver Water District issued a call for tenders to four potential bidders who had been pre-qualified. The call for tenders contained provisions that purported to provide the owner with broad discretion to accept or reject tenders that were non-compliant as long as the defects were, within the sole discretion of the owner, non-material. A separate clause purported to provide an even broader discretion to, among other things, accept or reject any tender.

The contractor determined immediately after tenders were opened that it had made a \$2,000,000 error and wrote to the owner asking that its tender not be considered. Subsequently, the contractor again wrote to the owner pointing out that its bid was incapable of acceptance in any event as the tender contained a number of non-compliant elements. Notwithstanding the correspondence from the con-

tractor, the owner purported to award it the contract. The contractor immediately brought a petition seeking a declaration that its bid was non-compliant and therefore incapable of acceptance. The owner responded that it had reviewed the various alleged non-compliances, determined that they were not material and therefore waived them.

The Court was concerned with the optics of a bidder attempting to have its mistaken bid rejected as non-compliant, but took solace from another case, *Derby Holdings Ltd. v. Wright Construction Western Inc.*, 2002 SKQB 247, where the Court held that a bid "...is non-compliant if it is uncertain or at odds with the terms of the invitation to tender" regardless of the source of the challenge. The Court in *Graham* determined that the test of materiality of the non-compliance was an objective, rather than a subjective, test, in part based upon the owner's internal policy statement in respect of tender review. After reviewing the various alleged non-compliances, the Court determined that, despite the owner's assertion to the contrary, mandatory informational requirements in respect of an environmental impact plan and an impact mitigation plan were materially non-compliant from an objective perspective and the contractor's tender was therefore incapable of acceptance.

The Greater Vancouver Water District appealed the *Graham* decision. The appeal was heard December 1, 2003, and the Court of Appeal dismissed the appeal with reasons to follow. A further update will be provided upon receipt of the reasons.

Based upon *Ron*, *MJB*, *Kinetic* and *Graham*, owners and bidders should be aware of the following principles:

1. In drafting calls for tenders and proposals, Owners should define whether or not contract A exists. If Contract A exists, its terms (including the scope of discretion to award to non-compliant bidders) should be clearly defined;
  2. All bidders should be treated fairly, in good faith, and consistent with the terms and conditions of the tender documents;
  3. Bids that do not fully comply with all requirements of the tender documents (i.e. incomplete, contain qualifications or additions to the tender form) should be rejected. Where Contract A permits tenders that have non-material non-compliances to be accepted, the determination of materiality must be objectively correct and the analysis done in good faith; and,
  4. Bidders can use their own non-compliance as a means of avoiding an erroneous bid.
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This document provides only general information, and does not constitute legal or other professional advice. Readers are encouraged to obtain legal advice from a competent professional regarding their particular circumstances.

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