Tendering Contracts

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When a party (the *owner*) is interested in offering a contract for a reasonably large project, it is usual practice to make a request for bids on the project or, using the legal term, *tenders*. A *tender*, according to the Oxford English Dictionary [www.oed.com] is

> "a formal offer duly made by one party to another."

As you may suspect, the larger the project, the greater the effort it is for both the owner requesting tenders and the parties submitting them. In the late 1970s, Ron Engineering submitted a tender for a project by the Government of Ontario (referred to as *Regina* after the Latin word for her Majesty The Queen). Any request for tenders will normally be accompanied by a date on which the tenders will be *opened* and the winning tender will be selected. Until that date, a party offering a tender may revise or withdraw a tender; however, once the tenders are opened, it is assumed that all tenders are valid. In this case, the request for tenders came with a term whereby each party submitting tenders would be obligated to submit a deposit in the form of a certified cheque for $150,000 and if the party with the winning tender refuses to enter into the contract, they would forfeit the deposit.

In this case, Ron Engineering and Construction (Eastern) Ltd. (see www.roneng.com), submitted lowest bid by a substantial margin and therefore was the winning tender. At this point, Ron Engineering determined that there was a mistake in the tender: they had intended to submit a bid of approximately $3.5 million dollars but, due to an error in their calculations, they submitted a bid in the range of $2.7 million—accepting the contract would likely cost the company $750,058. When the Province of Ontario accepted the tender and Ron Engineering refused to enter into a contract, the Province Ontario held the deposit forfeited and the contract was awarded to the next lowest tender.

At this point, Ron Engineering sued in order to get its deposit back and the Ontario Court of Appeal determined that this was a *mistake* and therefore Ron Engineering was not liable for the deposit. The Province of Ontario took this to the Supreme Court of Canada where it was determined that in any such tendering process, there are two contacts:

1. There is the construction contract on which all those submitting a tender are vying for,
2. However, the tendering agreement has all the components of a contract in its own right—a contract that is separate from the project contract that would be awarded.

Thus, one of the terms of the *tendering contract* was that it would be irrevocable following the opening of the bids and there was an additional term obligating both parties to enter into the construction contract upon the acceptance of the tender.

> "Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents

> required herein, the Commission may retain the tender deposit for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable."

The purpose of the deposit was to ensure the performance by the contractor-tenderer of its obligations under the tendering contract. The mistake that had been made by Ron Engineering not been one that would have violated any of the terms of the tendering contract; the mistake was with respect to the subsequent—but not yet accepted—construction contract. Indeed, the best explanation for the judgment was given by the justices on the Supreme Court themselves:

> "Nothing in the tender documentation supported the contractor's position that the owner had not complied with the terms set out in the documentation because the owner did not execute the construction document before proffering it to the contractor.
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> "The revocability of the offer was to be determined in accordance with the "General Conditions" and "Information for Tenderers" and related documents. A unilateral contract, contract A, arose automatically upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a specified period of time, after which, if the tender had not been accepted, the deposit could be recovered by the tenderer. The principal term of contract A was the irrevocability of the bid and the corollary term was the obligation in both parties to enter into a construction contract, contract B, upon the acceptance of the tender. The deposit was required to ensure the performance by the contractor-tenderer of its obligations under [the tendering contract]. It is not correct to say that when a mistake was proven after the tenders were opened by the production of reasonable evidence, the person to whom the tender was made could neither accept the tender nor forfeit the deposit. The test was to be imposed when the tender was submitted, not at a later date, and at that time the rights of the parties under [the tendering contract] crystallized, at least in circumstances where the tender was capable of acceptance in law.
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> "There was no question of mistake on the part of either party before the moment when contract A came into existence. The tender, despite its being the product of a mistaken calculation, could be subject to the terms and conditions of [the tendering contract] so as to invoke forfeiture of the deposit. There was no error in the sense that the contractor did not intend to submit the tender in its form and substance. Then, too, there was no principle in law under which the tender was rendered incapable of acceptance by the appellant. No mistake existed which impeded the coming into being of [the tendering contract]. The effect of a mistake upon the formation, enforceability or interpretation of a subsequent construction contract need not be considered in this case.
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> "The issue did not concern the law of mistake but the application of the forfeiture provisions contained in the tender documents. The deposit was recoverable by the contractor under certain conditions, none of which was met, and also was subject to forfeiture under another term of the contract, the conditions of which had been met. The omission by the owner to insert the number of weeks specified by the tender in the appropriate blank in the contract had no bearing on the rights of the parties to the appeal and did not stand in the way of the owner's asserting its right to retain the deposit."

Please note that the public is welcome to read the decisions of the Supreme Court of Canada at the http://csc.lexum.org/ web site. In this case, the decision results in the owner entering into separate tendering contracts with each party that submits a tender; *e.g.*, five tenders will result in five tendering contracts.

Comparison

How was this mistake different from that of *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. et al.*? In the case of Belle River, the owner was aware of the mistake and, never-the-less, attempted to enrich itself knowing that a mistake had been made. In the case of Ron Engineering, the mistake was a mistake in the tender, but there was no mistake in the submission of the tender.

Note: this document refers to the *tendering contract* and the subsequent *construction contract*. When discussing the case of Ron Engineering, the justice indicated that he would refer to the first as contract A and the second as contract B. While this makes perfect sense for a single document, this has unfortunately spilled over into the literature and thus when discussing these two contracts, rather than using the appropriate terminology of the *tendering* and subsequent *construction* contracts, the literature will instead refer to contracts A and B. In this course, you should always refer to the tendering contract and the subsequent construction contract.

Since the decision of Ron Engineering, clarification has been made through a number of subsequent cases brought before the Supreme Court of Canada. The court has found that not only are there obligations on those submitting tenders, but there are also obligations on the owner requesting the tenders:

1. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, the court commented on the use of exclusion clauses in tenders and, as Marston points out, the inclusion of implied terms and obligations.
2. In *Martel Building Ltd. v. Regina*, the court rejected the existence of a tort of negligence in the conduct of commercial negotiations.
3. In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, the court described the formation of tender contracts between general contracts and subcontractors.
4. In *Double N Earthmovers Ltd. v. the City of Edmonton*, the court discussed the issue of compliance with the terms of a call for tenders.
5. Most recently, in *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, the court clarified on the distinctions between a request for proposal and a tender.

Aside

Is this a case of *the government v. the public*? One may argue that the request for tenders came from the Province of Ontario and the decision to hold Ron Engineering accountable for its mistake is also a decision rendered by the Supreme Court of Canada—another branch of the government. In order to support this argument, however, one must show that collusion between the branches of government. For example, the case against Ron Engineering has set a precedent that has aided all parties entering into tendering contracts since that seminal decision. In addition, the judiciary has a long history of defending its independence from the other branches of government and, in Canada, that independence is entrenched in the Constitution: the Constitution Act requires that judges for superior courts be selected from respective Bar Associations (a parallel to PEO for professional lawyers) and the Supreme Court Act specifies very strict criteria by which judges to that court may be chosen.

References

Donald L. Marston, B.Sc., P.Eng., LL.B., *Law for Professional Engineers*: *Canadian and Global Insights*, 4th Ed., McGraw-Hill Ryerson, Toronto, 2008.