

Chapter 70

An Analysis of International Case Law for Process Contract in Public

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Abstract Traditionally, an ‘invitation to tender’ is no more than an invitation to treat which means that it is not an offer to make a contract with any person or organization which might act on the invitation. In other words, the owner is free to accept or reject any offer and no legal relationship is entered between tender parties during the tender pre-award period. However, developments in commonwealth jurisdiction since the 1980s have significantly changed the principle of offer and acceptance. The changes suggest that the traditional view of invitation to tender should not be regarded with complacency. This paper describes the major international court cases relating to tendering which would have significant impacts on the day-to-day running of public tendering processes. The aim of these legal case studies is to evaluate the legal implications when public tenders are invited. The analysis of ten selected court cases since the 1980s shows that process contract has become widely accepted as the legal basis of tendering. Furthermore, decisions by courts have also highlighted the principles of fairness and integrity within the tendering system, and these principles must be observed by all parties to the tendering system.

Keywords Public tendering • Commonwealth jurisdiction • Process contract

70.1 Introduction

A tendering arrangement is basically a contractor selection process, usually through competition by means of open invitation to selected or pre-qualified tenderers. Tendering is the traditional way of obtaining a competitive price for a one-off

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project. Cooke [3] stated that a tender is submitted by a contractor in response to an invitation by an owner to submit an offer for the execution of work described in tender documents issued by the owner. The tendering process, and the tender documentation and its effects on the contract formation, are regulated by contract law and by some other legislation. Under the principles of law of contract, a simple contract is a legally-binding agreement between two or more parties and is supported by consideration. Unless and until an offer is properly accepted by way of conduct or written confirmation, there will not be any contract between the parties. Accordingly, the tendering process has been regarded as no more than ‘an invitation to treat’. Owners can reject or accept tenders as they please, or they can negotiate with one or more tenderers to produce a satisfactory deal. The seminal case on offer and acceptance in the tendering situation was *Spencer v Harding (1870) LR5 CP 561* ([4], p. 186) which laid down the general principle that the invitation to tender was not an offer, but merely an invitation to treat. The vendor was not obliged to accept any tender. Therefore, traditionally, the owner was unrestricted in how tenders were assessed and how the subsequent contract was awarded. In fact, many conditions of tendering do not really contain any information about the tender assessment criteria.

This traditional position has been changed by decisions and rulings made in several international court cases since 1981. It is now held that a ‘Process (Tendering) Contract’ exists between the tenderer and the owner upon the submission of a tender. Under this relationship the owner has a general duty to treat all tenderers equally and fairly in the selection process. In his book on Procurement Law, Craig ([4], p. 221) defined a ‘process contract’ as “. . . a contract brought into being automatically upon the submission of a responsive tender.” This specific duty may be breached when an owner accepts an alternative tender which does not conform to the tender conditions. The principle behind the so called ‘process contract’ is that if the owner accepts an alternative tender which contains proposals which do not adhere to the original project stipulated in the tender documents, then it would be unfair to tenderers who only make submissions which conform to the tender requirements. Any departure from the conditions of tender by the owner risks allegation of unfairness to the tenderer(s), so bids that do not comply with the tender call should be rejected. Typically, procurement codes or conditions of tendering do not provide for an independent innovative solution from any one bidder in response to the tender call. However, the owner’s obligation to be fair to all tenderers should not be compromised by bad project management. If the owner does accept an alternative tender that was non-conforming, he/she may be liable in damages to the lowest conforming bidder.

This principle of fairness also extends to the dealing of tender validity period. It is usual for owners to state their requirements in their tender documentation regarding the length of time for which any tender received shall remain open for acceptance. Historic cases such as *Routledge v Grant (1828) 4 Bing 653* set the principle that a tenderer was free to withdraw his offer at any time before acceptance despite the existence of any period stipulated for the offer to remain open. Relying on such precedent, some tenderers find it expedient to submit bids first and

check their accuracy later, especially when the tender period is short. However, this practice has been criticised by owners as being too opportunistic in tendering. The landmark case was the Supreme Court of Canada in *The Queen in Right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd (1981) SCR 111*. The contractor (Ron) submitted a tender and made the deposit as per the conditions. The contractor's tender was the lowest, but soon after the opening of tenders the tenderers discovered a pricing error by omitted work and therefore requested in writing to withdraw the tender without penalty. The withdrawal was denied and Ron also refused to sign the contract for acceptance. The contract went to another tenderer and the deposit was not returned. Ron commenced proceedings to recover the deposit but the owner made a counter-claim on the contractor's refusal to carry out the terms of the tender. One of the conditions of tender was that the offer could not be withdrawn for 60 days after the opening of tenders. The point in question related to whether the submission of a tender in this situation would create a contractual obligation for both parties so that the contractor's revocation of offer would be a breach of contract and thus entitle the owner to damages. In the end, the owner successfully argued that the submission by the contractor of a tender created a contractual obligation so that the contractor must perform the tender conditions. As a result the deposit was not refunded.

The aim of this paper is to review and evaluate the implications of commonwealth case law upon the procurement processes when public tenders are invited. It is anticipated that sources of disputes in relation to tender-selection can be identified. Both owners and tenderers have to take extra care in tendering.

70.2 Summary of International Case Law for Process Contract

The implications of the 'process contract' have created some confusion as to when it actually occurs or when there is procedural unfairness during the process. The reason is that the detailed legal principles behind those judgements have yet to be fully investigated, developed and understood. In the case of *Cubic Transportation Systems Inc & Anor v State of New South Wales & 2 ors [2002] NSWSC 656*, the Judge did not conclude that there would always be a preliminary process contract in every government tender. Whether there is a pre-award contract depends on the conditions stipulated in the tender documents. It is not possible to describe all the relevant cases in details and the Table 70.1 [1, 2, 5–15] below comprises a summary of 10 court cases where process contract has been established.

The writer would like to stipulate that the legal cases examined in this enquiry came from Australia, New Zealand, Canada, Hong Kong, and the United Kingdom because each of these Commonwealth jurisdictions follows the common law system.

Table 70.1 Summary of 10 international court cases. Source: Various online legal websites and Australian Construction Law Newsletters

| Court cases | Issues/disputes in tendering process | Decision | Implications |
|--|--|---|--|
| 1. <i>The Queen in the Right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. [1981] 1 SCR 111</i> | Due to pricing error, Ron withdrew its tender and revoked its offer after opening of tenders | It was decided that the contract was brought into being automatically upon the submission of a tender | Tender conditions must be observed by both parties |
| | The owner successfully argued that the submission of a tender by the contractor created a contractual obligation so that the contractor must perform the tender conditions | The contract created by the submission of the tenderers is now known as Contract A; Contract A is now known as a Tendering Contract or a Process Contract | |
| 2. <i>Calgary (City of) v. Northern Construction Co [1987] 2 SCR 757</i> | This appeal raises the question of whether the appellant, a general contractor (Northern Construction) who made a tender, expressly agreed to be irrevocable for a stated period or until the acceptance of another tender, was entitled to refuse performance of the contract because of honest error in its preparation resulting in a lower price than intended | It was held that the appeal was dismissed with cost | Pricing mistake was irrelevant in this case |
| | | The owner (the City of Calgary) successfully claimed damages equal to the difference between the erroneous tender and the next lowest tender | This case could not be distinguished in any significant respect from the <i>Ron Engineering</i> case |

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Table 70.1 (continued)

| Court cases | Issues/disputes in tendering process | Decision | Implications |
|---|---|--|---|
| <p>3. <i>Health Care Developers Inc and Others v. The Queen in Right of Newfoundland (The Crown)</i> [1996] 136 DLR (4th) 609</p> | <p>The invitation asked for irrevocable proposals to design and build, and lease the required facilities to the government. Health Care was the preferred bidder but the government awarded the contract to a tenderer who provided a preferred design solution</p> | <p>The defendant (government) was held in breach of tendering contract. There was an obligation placed upon the owner to act fairly towards all tenderers</p> | <p>The court referred to “the emerging obligation of contracting parties to perform in <i>good faith</i>”. Failing to reject non-conforming tenders or awarding Contract B based on undisclosed criteria are examples of the owner not acting in good faith</p> |
| | <p>The tender evaluation criteria were not stipulated in the conditions of tendering. Usual owner’s privilege clause was included</p> | <p>Health Care was only entitled to loss of profits on those projects. Claims of tendering cost were rejected. Each party had to bear its own costs in the appeal</p> | |
| <p>4. <i>M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.</i> [1999], 1 SCR 619</p> | <p>The Supreme Court of Canada was to decide whether the inclusion of a ‘privilege clause’ in the tender documents allowed the respondent (Defence Construction) to disregard the lowest bid in favour of any other tender, including a non-compliant one</p> | <p>It was held that the appeal was allowed with cost</p> | <p>A privilege clause allows the owner to award Contract B to any tenderer if it is a complying tender. The owner has no absolute and unfettered discretion in awarding the contract</p> |
| | <p>The appellant (MJB), the second lowest tenderer, brought an action for breach of contract claiming that the winning tender should have been disqualified</p> | <p>Contract A was brought into being automatically upon the submission of a tender It was held that the note offered by the winning bid was a qualification and should be disqualified</p> | <p>Irrespective of the privilege clause, the owner has an obligation to award the tender to a tenderer that best meets the criteria stated in the tender documents</p> |

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| Court cases | Issues/disputes in tendering process | Decision | Implications |
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| 5. <i>Blackpool & Flyde Aero Club Ltd v. Blackpool Borough Council</i> [1990] 3 All ER 25 | The club claimed damages in respect of the council's failure to consider a tender received in accordance with its standing orders The council argued that "the Council does not bind themselves to accept all or any part of any tender" | The Court held that the council was under an implied term to consider the conforming or complying tender submitted by the club | The Court would not accept that an owner could invite tenders but at the same time ignored the stipulations detailed in the conditions of tender |
| 6. <i>City University of Hong Kong v. Blue Cross (Asia-Pacific) Insurance Ltd</i> [2001] HKCFI 218; HCA No. A10750 of 1993 | The main issue was whether a mistake as to the terms of a contract, if known to the other party, might void the process contract. Blue Cross withdrew its tender within the tender validity period due to a pricing mistake | The earlier trial indicated that Blue Cross (the defendant) was in breach of the implied contract and City University (the plaintiff) was entitled to seek damages. Blue Cross appealed It was decided that Blue Cross could void the contract because the plaintiff failed to exercise its right given in the Clause 8 of the conditions of tender relating to pricing errors | This case highlighted the importance of parties to observe the stipulations in the conditions of tender It reminds the owners that they must be careful to follow the said conditions and the failure of which will allow the tenderer to withdraw its tender without recourse |
| 7. <i>Pratt Contractor Ltd v. Palmerston North City Council</i> [1995] 1 NZLR 469 | Pratt submitted the lowest conforming tender and, on the basis of the tender requirements, expected to be awarded the contract. One tenderer submitted an alternative tender and was accepted | The court held that Pratt can successfully sue for breach of contract as there was a contractual relationship between the council and individual tenderer who submitted a conforming tender. Pratt was entitled to cost of tendering and loss of profit | Unless it is stipulated, the alternative tender is a non-conforming tender and cannot be accepted within the confines of the tendering contract The first case that the cost of tendering was compensated |

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Table 70.1 (continued)

| Court cases | Issues/disputes in tendering process | Decision | Implications |
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| 8. <i>Hughes Aircraft Systems International v. Air Services Australia</i> [1997] 146 ALR 1 | Hughes was the unsuccessful tenderer in a two-party bid for a project for Air Services Australia. Thomson was the successful tenderer on the basis of "its significant commitments to work with Australian industry". Subsequently Thomson also submitted a price reduction and an upgrade export commitment. Hughes argued for being treated unfairly in evaluation | The court held that Air Services had breached the process contract as follows: It did not evaluate the tender according to the priorities of the evaluation criteria It disclosed information to parties which were outside the scope of their evaluation role, i.e. information regarding price was released to the department undertaking the industry evaluation | Process contract was first recognised in Australia in the 1997 decision of Hughes case Fair dealing was of particular importance in tender process The judge asserted that "the integrity of the bidding system" must be protected. |
| 9. <i>Cubic Transportation Systems Inc & Anor v State of New South Wales & 2 ors</i> [2002] NSWSC 656 | Both Cubic and ITSL lodged detailed proposals for an integrated ticketing system. ITSL was the preferred and recommended proponent Cubic commenced proceedings and sought injunctive relief restraining the government from entering into a contract for the supply of the integrated ticketing system by ITSL on the basis that the tender evaluation process was unfair | Relying on the clause that "the Principal reserves its right to cancel, vary, supplement or supersede this Call" the court held that no unfairness or breach of any obligations owed by the government to Cubic with regard to the tender process was established The judge highlighted the fact that Cubic had engaged in reprehensible conduct during the course of the tender through breaches of confidentiality | A clearly drafted request for tender stating the actual undertakings and legal obligations will more likely avoid the consequence of the expensive litigation There is a growing recognition that all commercial players must also act in <i>good faith</i> (not just the governments) in their commercial dealings |

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Table 70.1 (continued)

| Court cases | Issues/disputes in tendering process | Decision | Implications |
|---|---|--|---|
| 10 <i>State Transit Authority (NSW) v Australian Jockey Club</i> [2003] NSWSC 726 | State Transit initiated a tender process for the sale of the busway for vehicles servicing Randwick race-course. The case involved an unsuccessful tender by Australian Jockey Club (AJC) which claimed that the process contract had been breached and its tender had not been fairly considered because of various conditions imposed upon it | The court held that in the light of clauses 6.2, 6.5 and 6.6 State Transit, was entitled to deal with individual tenderers differently and was under no obligation to follow any particular process. The call for tender was merely an invitation to treat | This case reinforces the principle that analysis of the terms of the invitation to tender is the starting point to see whether a request for tenders gives rise to a process contract |

70.3 Implications of Court Cases on Tender Procurement

Contracts for public capital works projects are generally procured through a tendering process. The documents issued usually comprise information necessary for the preparation of the bids. The information in the Conditions of Tender often includes a clause stating that “*the Owner is not bound to accept the lowest or any tender it may receive*”. It is this privilege clause that many owners rely on as a defence if they reject the lowest tender or any tender they receive. However, recent development in common law relating to tendering indicate that circumstances may arise where the owner is liable to the unsuccessful tenderers as a result of failing to comply with the stipulations prescribed in the tender documents. Failure to adhere to the stated assessment evaluation criteria, the acceptance of a non-conforming tender, and the assessment of tenders not in good faith are all issues which may give rise to legal liabilities. Moreover, owners should be aware of the implications of the judgements arising from the 10 cases cited here. The lessons learned from these cases include the following:

1. Tender conditions must be observed by both parties.
2. In nearly all cases in which a bid contract expressly or impliedly imports a term making the tender irrevocable for a stipulated period, a tenderer will be unable to withdraw its tender.

3. The general purpose of the so-called 'privilege clause' is to prevent the creation of any owner's duty to award a contract to the lowest tenderer, or to award any contract at all. It is not designed to negate the owner's duty of fairness to all tenderers.
4. The owner cannot award Contract on the basis of undisclosed criteria.
5. Courts would not accept that an owner could invite tenders but at the same time ignore those stipulations detailed in the conditions of tender.
6. The compensation might include the cost of tendering and loss of profit.
7. There is a need for all government departments to arrange and conduct procurement codes with maximum care and supervision.
8. There is a growing recognition that all commercial players (and not just governments) must also act in good faith in their commercial dealings.

70.4 Conclusions

It is evident from the literature review and, the examination of relevant legal cases that the tendering system for public works needs to be open and transparent. Government agencies must maintain the integrity of the tendering system and ensure that it is conducted with probity and fairness. Not only is this good practice, but it will avoid exposing the project owner to any form of litigation. As the *Hughes Aircraft* case showed, agencies must make sure that tender processes, particularly tender evaluations, are consistent with the stipulations contained in the tender documents, and that the basis of the evaluation is clearly stated in the tender documents. The owner is obliged to assess the tender according to the specified evaluation criteria, and failure to do so puts the owner at risk of breaching the process (tendering) contract.

The over-riding principle to which the owner must adhere is that all tenders must be treated equally and fairly, and all conforming tenders must be considered. On the other hand, tenderers should also comply with tender requirements as to the validity period of their bids. Breach of tendering contract entitles the injured party to the normal remedy of damages.

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