YOUNG ANDERSON
BARRISTERS & SOLICITORS

TENDERING LAW UPDATE

NOVEMBER 24, 2017

Gregg Cockrill and Joe Scafe

TENDERING LAW UPDATE

I. INTRODUCTION

Tendering is perhaps the most common method used by local governments to procure works and services. Unfortunately for local governments, the law of tendering has made the tender process fraught with uncertainty and liability.

In this paper, we outline the law of tendering and discuss ways in which local governments can reduce liability in tendering from the outset and after bid closing.

II. TENDER BASICS

A. Ron Engineering and the Contract A/B analysis

The key to managing procurement processes without incurring undue liability exposure rests in understanding the basic elements of a typical procurement lawsuit. Since those elements originated with the Supreme Court of Canada's judgment in *Ontario v. Ron Engineering & Construction (Eastern) Ltd.,* [1981] 1 S.C.R. 111, that is a good place to start.

The *Ron Engineering* case involved a tender process undertaken by the Province of Ontario (through a provincial commission) for a water and sewage treatment plant. The low bidder, Ron Engineering, bid $2,748,000, which was $632,000 lower than the next lowest bidder, but close to the Province's internal cost estimate. When the employee of Ron Engineering who attended the bid opening saw that the company's bid was so much lower than the next lowest bid, she suspected that a mistake had been made in the bid preparation process and immediately telephoned the company president. Internal investigations quickly revealed that, in their rush to compile figures, the employees preparing the bid had omitted to add the intended amount ($750,058) for the company's own forces and general conditions work. When the mistake was discovered, Ron Engineering advised the Owner that while it was not withdrawing its bid, the bid was, by reason of the law of mistake, "not capable in law of being accepted." The Owner disagreed and submitted the construction contract to Ron Engineering for signature. When Ron Engineering refused to sign, the Owner advised that it was retaining Ron Engineering's bid deposit of $150,000. Ron Engineering commenced an action to recover the amount of the forfeited deposit arguing that it was not obligated in law to enter the construction contract. The Supreme Court of Canada held otherwise, concluding that, in accordance with the terms of the tender instructions, Ron Engineering was *contractually* obligated to enter the construction contract when called upon to do so and that upon its failure to enter the contract the Province was entitled under the contract to retain Ron Engineering's bid security.

The tender instructions in Ron Engineering contained the following as paragraph 13:

> "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 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."

This clause clearly provided that the Commission could retain the tender deposit if a tenderer refused to execute the construction contract to which the tender process related after being called upon by the Commission to do so. What was not clear, however, is whether or why the clause should be considered *contractually* binding given that it was not contained in a formal contract executed by the bidder. If there was no contract between Ron Engineering and the Province (as represented by the Commission) of which paragraph 13 was a part, then paragraph 13 could not create legal rights or obligations and the Commission would not have the legal right to retain Ron Engineering's tender deposit. It was the Supreme Court's conclusion that paragraph 13 was contractually binding on the parties that was the groundbreaking conclusion in the case.

The Court held that the invitation was not only a call for offers for the contract to build the specified water and sewage treatment plant, but also itself an offer by the Province to enter a tender process contract with each bidder that submitted a bid in conformity with the tender instructions, an offer which could be accepted by bidders simply by submitting a conforming bid. The Court referred to this tender process contract formed with each bidder upon submission of conforming bids as "Contract A," to distinguish it from the construction contract for which bids were being sought, which it referred to as "Contract B." The Court noted that the terms of Contract A were to be determined by the terms of the particular tender instructions at issue. Those terms included the paragraph quoted above under which the Commission was entitled to retain Ron Engineering's bid security when it refused to sign the construction contract when called upon to do so.

Ron Engineering was a groundbreaking case in so far as it recognized the existence of a pre-award contract governing the procurement process itself (Contract A). Unfortunately for owners, the new Contract A/B analysis introduced in *Ron Engineering* would come to benefit bidders far more than owners.

B. The Aftermath of Ron Engineering

Since *Ron Engineering* there have been hundreds of cases grounded upon the Contract A/B analysis introduced by the Court in that case. Almost all of those cases are breach of contract cases brought by disappointed bidders or proponents, many of them against governmental owners, often including local governments. Of those, many have resulted in damages awards against owners for failure to properly comply with their obligations under Contract A. In addition, there are of course many, many more instances in which claims, whether formal or otherwise, have been advanced against owners that, while not necessarily proceeding to litigation or resulting in formal settlement, have effectively forced owners to avoid potential liability by choosing to award contracts to a bidder other than the one preferred by them.

The key question is why is this so? Why has the finding of the Court that a procurement invitation may constitute an offer leading to a Contract A with each bidder or proponent who submits a conforming response led to so much trouble for owners? The answer is in two parts. The first part consists of the fact that the courts have been willing to *infer* Contract A terms that are very difficult for owners to observe, making it difficult to avoid breach of contract allegations. The second and much more significant part of the answer is that many owners have not done a sufficient job of including provisions in their invitations to eliminate, or significantly mitigate, the risks created by the *Ron Engineering* analysis and the subsequent willingness of courts to infer difficult Contract A terms. We will discuss briefly the issue of implied terms before giving a brief outline of a number of liability avoidance options.

C. Implied Terms

The Court in *Ron Engineering* acknowledged that the terms of Contract A were dependent on the terms of the tender invitation. That invitation (by which we mean invitation and/or instructions) constitutes the "offer" by the owner to each potential bidder to enter Contract A and it is that offer, therefore, that determines the content of Contract A in any particular case. The invitation and instructions, once accepted by the submission of a bid, *is* the contract. The problem is that contracts are often held to contain not only the express terms written on the page of a document, but terms reasonably inferred from those express terms. In the case of Contract As, the courts have inferred terms very readily – including two in particular that have proved very difficult and costly for owners, namely:

- An implied obligation not to accept bids that fail in a material way to conform to the tender instructions; and,

- An implied obligation to treat bidders fairly and equally.

It is easy to say that owners should treat bidders "fairly" or should reject "materially" non-compliant bids, but when those are contractual obligations, the elastic nature of the concepts of fairness and materiality leaves oceans of room for courts to reach conclusions as to fairness or materiality that are different than the conclusions reached by the owner. Indeed, it is almost impossible to overestimate how much difficulty these two routinely implied terms have caused to owners, particularly the implied obligation to avoid accepting materially non-compliant bids.

Tenderers make mistakes with remarkable frequency, such that it is very common for bid responses to fail to conform in one or more respects with the tender documents. This creates for the procurement manager the very difficult task of trying to determine whether particular non-conformities are "material" and, if so, whether the courts will conclude that the owner is under a contractual obligation to reject a bid containing them in order to avoid liability to a bidder who submitted the next best conforming bid. Many, if not most, tender cases involve allegations that the owner has improperly accepted a materially non-conforming bid in breach of the *implied* contractual obligation not to do so. The obligation to treat bidders fairly and equally is also difficult to deal with given that what is seen as "fair" by one person may be seen as "unfair" by another. If the first person is the local government or its procurement manager and the second a judge, the difference can result in large damages awards against the local government.

Below, we will address many of the issues commonly dealt with by owners in the bid assessment process, including the difficult assessment of the materiality of non-conformities in bid submissions. At this point, we are simply noting that *Ron Engineering* established that owners may have entered Contract As with bidders (depending on the terms of the invitation) and that Contract A may (depending on the terms of the invitation) be found to contain not only the express terms of the invitation but also certain very dangerous implied terms, including the obligation to avoid accepting materially non-compliant bids and the obligation to treat bidders fairly and equally. This limited discussion of tender basics is enough to introduce our most common and basic procurement liability avoidance advice.

D. Liability Avoidance

In a previous seminar paper in 2009 titled Reducing Liability in Tendering: An Update we described certain suggested liability avoidance techniques. Those techniques have now been endorsed as acceptable by the courts and we repeat them briefly here, though we recommend review of that paper for a fuller discussion.

As noted above, there have been hundreds of reported cases following *Ron Engineering* in which a disappointed bidder has successfully sued an owner for breach of Contract A. By necessity, those claims always involve the same essential elements:

- Proof of the existence of a Contract A between the owner and the plaintiff bidder;

- Proof of breach of that contract by the owner;
- Proof of financial loss suffered by the bidder as a result of that breach (usually lost profits); and,
- The absence of any contractual provision limiting the bidder's right to recover damages to compensate for the financial loss suffered.

All an owner needs to do to fully defeat a claim is to eliminate the plaintiff's ability to prove one or more of elements (1) through (3). In the alternative, or in addition, the owner may include a provision in its tender documents limiting recoverable damages (implementing element (4)) so as to mitigate at least the consequences of such claims if not eliminate the prospect of them entirely. Following from that introduction, here are some liability avoidance options.

1. Exclude Contract A Entirely

An owner can expressly include a provision in its procurement documents declaring that it has no intention of entering Contract A with any bidder or proponent. The formation of contracts is an entirely voluntary matter and if an owner does not wish to be subject to contractual obligations to bidders in the conduct of the procurement processes, it can avoid all such contractual obligations by expressly declaring in the tender documents that it does not agree to enter Contract A with any bidder. Like all contracts, the formation of Contract A requires a mutual intention on the part of the parties to enter it. The owner holds the pen and can expressly deny such intention by an appropriately worded clause excluding Contract A. In case there is any doubt, the courts have confirmed that an owner may expressly exclude Contract A (see *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.,* [1999] 1 S.C.R. 619 and *Maple Ridge Towing (1981) Ltd.* v. *Maple Ridge (District)* (2001), 22 M.P.L.R. (3d) 297 (B.C.S.C.)). While we caution that sample clauses should not simply be inserted in procurement documents without ensuring they fit properly within them, the following is the type of language that could be used to expressly exclude Contract A:

> The City does not intend to enter a Contract A with any bidder and no such contract will be formed between the City and any bidder as a result of the submission of a bid in response to this tender invitation.

The only drawback to this approach (if indeed it is a drawback) is that all provisions in the invitation, including those of potential benefit to the owner, such as a provision requiring bidders to leave their bids open for acceptance for a specified period, will become non-contractual and thus unenforceable if Contract A is excluded entirely.

2. Exclude Specific Contract A Obligations

The second thing an owner can do is to draft the tender invitation so as to ensure that any resulting Contract A does not contain onerous terms. For example, as noted above it is common for courts to infer from tender instructions that the owner has voluntarily assumed a contractual obligation to avoid accepting bids that fail in a material way to conform to the tender instructions. This type of implied obligation is very difficult for owners because:

- It is often difficult to assess whether a particular non-conformity is material; and,
- Often the next lowest conforming bid is much higher than the one containing the non-conformity, thus requiring the owner to sacrifice significant funds to comply with the implied contractual obligation to reject materially non-compliant bids.

But this obligation can be removed simply by inserting a clause in the tender documents stating that the owner is entitled to accept any bid, whether or not it fails to conform in any respect, including any material respect, with the tender instructions. This right also flows directly from the fact that Contract A is created at the hands of the owner who controls the pen, but again in case of doubt we would point out that the courts have confirmed it will not infer an obligation to reject materially non-compliant bids in the face of an express clause saying otherwise (see, for example, *Kinetic Construction Ltd.* v. *Comox-Strathcona (Regional District),* [2004] B.C.J. No. 2247). Other typically inferred contractual obligations, such as duties of fairness or duties to avoid post-closing negotiations might also be expressly excluded. In this fashion, local governments can significantly reduce the potential liability associated with procurement processes.

3. Clauses Excluding or Limiting Damages

Another option we recommend be used in every case in which the owner has not expressly excluded Contract A (i.e. regardless of how broadly the discretion clauses are drafted under option (b)) is to include a clause in the tender documents either excluding damages altogether for breach of Contract A or limiting the amount of damages recoverable. Our preference in this regard is to include a limitation of damages clause rather than a total exclusion. The enforceability of limitation of damages clauses was confirmed in *B.A. Blacktop Kamloops v. British Columbia (Ministry of Transportation and Highways),* [1996] B.C.J. No. 1015.

While the courts have accepted even total exclusion clauses, they have also shown a willingness to interpret them narrowly so as not to constitute a total exclusion. In *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways),* [2010] 1. S.C.R. 69, the contractor argued that the Province had breached Contract A by awarding the work to an ineligible bidder. The Province relied on a clause in the tender documents which read:

> … no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP.

The minority judgment found that the clause applied and would have dismissed the claim. The majority interpreted the phrase "participating in this RFP" as limiting the application of the clause to claims arising from the RFP as conducted in accordance with its terms. The Court reasoned that because bidder eligibility was a foundational aspect of the RFP process and the Province permitted an ineligible bidder to participate, the parties were not participating in the RFP to which the exclusion clause applied. Thus, the limitation of liability clause was held inoperable and the contractor's claim succeeded.

Since *Tercon*, an exclusion of liability clause was considered in *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636. In *Rankin*, the appellant's bid was rejected as being materially non-compliant. The Ministry argued that the following exclusion clause operated as a complete bar to the claim:

> [t]he Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender…

The Court of Appeal held that the language of the clause was clear, that it would apply to bar a claim in relation to an alleged breach of Contract A by the owner, and that to interpret the clause as not applying in the circumstances would render it devoid of meaning. The Court noted that there could be circumstances in which an owner's conduct during the tendering process was so aberrant that would justify refusing to uphold such a clause, but that those circumstances did not exist in the case at hand.

An exclusion clause robs the bidder of its ability to enforce Contract A obligations by claiming damages, while the bidder remains liable to perform its contractual obligations, among them the obligation to not revoke its bid in most cases. Taking into consideration the lengths to which the Supreme Court of Canada went to find the exclusion clause inapplicable in *Tercon*, and the Court's comments in *Rankin* concerning owner conduct that could justify refusing to apply such a clause, the writers of this paper are hesitant to endorse exclusion of liability clauses.

We are much more confident that a limitation of damages clause would be upheld by the courts. Rather than ousting the bidder's ability to enforce Contract A obligations by claiming damages, it limits the utility of doing so, thereby retaining contractually enforceable rights in favour of both parties – a state of affairs we think a court is much more likely to respect. A limitation of damages clause usually limits the liability of an owner to any bidder to the costs of preparing the bid or to a specified amount. We provide the following example:

> The liability of [the owner] for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder by reason of the acceptance or the non-acceptance by [the owner] of any bidder's bid or arising in any way from this tender process shall be limited to $1000.

III. EVALUATION

The second part of this paper examines practices and pitfalls after tender closing. The difficulties faced by owners in the cases discussed below arise from the two key implied terms mentioned above: the obligation to accept only materially compliant bids and the duty of fairness, obligations that we suggest local governments avoid entirely through the techniques described above.

A. Material Compliance

The terms of most tender documents permit the bid calling party to waive defects and irregularities. The courts have interpreted such clauses to mean that an owner may accept a bid with defects, but not *material* defects. Accepting a bid that is materially non-compliant, in the absence of an express right to do so, is a breach of Contract A. Accordingly, assessing whether a bid is materially compliant with the terms of a tender call is a crucial step in evaluating bids in most tender processes.

1. Assessing Materiality

In *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, 2004 BCCA 5, the Court held that material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

In *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, the Court expanded on the second part of the materiality test. It held that in determining whether an omission would have been significant in the deliberations of the owner a court must consider the rationale that underlies the law of tendering, which is to "effect fair competition": *Silex Restorations Ltd. v. Strata Plan VR 2096*, 2004 BCCA 376; and the protection of the integrity of the tendering process: *Coco Paving (1990) Inc. v. Ontario (Transportation)*, 2009 ONCA 503. Other relevant considerations may include: whether the defect could impact the price or performance of Contract B: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3; whether the defect could expose the owner to a claim by a compliant bidder: *Silex Restorations*; and the reasonable expectations of the parties, including other bidders: *Cambridge Plumbing Systems Ltd. v. Owners, Strata Plan VR 1632*, 2009 BCSC 605.

Therefore, the materiality of a defect will depend on the tender documents and the surrounding circumstances that speak to the factors mentioned above. We now examine some common defects which may, depending on the tender process and in particular the terms of an owner's tender documents, render a bid materially non-compliant.

(a) Bid Bonds

Failure to provide a bid bond will almost always be viewed as a material defect because of the role the bond plays in the tendering process. That role was examined in *Cambridge Plumbing Systems Ltd. v. Strata Plan VR 1632*, 2009 BCSC 605, in which the Court described the bid bond as "critical during the tendering process because it provides for damages in the event that any contractor refuses to enter into the construction contract… the bid bond is material to the tendering process because it guarantees Contract A's irrevocability, which is a principal term of Contract A." The Court went on to state that the failure to provide a bid bond "undermines both the basic principle that bids are irrevocable, and the integrity of the tendering process…"

Even a bidder's failure to provide a bid bond of sufficient duration will render a bid materially non-compliant. In *Silex Restorations Ltd. v. Strata Plan VR 2096*, 2004 BCCA 376, the tender documents required that each bid be irrevocable for 90 days and that such obligation be secured by a bid bond, which the Court interpreted to require a bidder to furnish a 90 day bid bond. The low bidder provided a 60 day bid bond. When the owner rejected the low bidder's bid, the low bidder sued, alleging a breach of Contract A. The low bidder argued that obtaining a bid bond of longer duration was not difficult and that it was not uncommon for bid bonds to be valid for a shorter period than required. The Court held that the non-compliance was material because there was a cost to securing a bid bond proportionate to its duration and a bidder with shorter security would incur lower costs, providing it an advantage. Since the low bid was materially non-compliant, the owner had not breached any contractual obligations to them by rejecting their bid and the claim failed.

(b) Subcontractors

Where the tender documents require the bidder to furnish a list of subcontractors it proposes to use on the job, failure to list the subcontractors may render a bid materially non-compliant. In *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, the low bidder failed to submit a list of subcontractors with its bid. The City viewed the omission as a material defect and accepted the next lowest bid. The low bidder sued. Appendix A, on which bidders were to list subcontractors, was not expressly included in the list of bid documents. However, when considering the totality of the tender documents, the Court concluded that the list of contractors was a required part of the bid.

The Court held that where the tender documents require certain information to be provided and the information is an important or essential requirement of the tender, failure to include it is a material defect. The Court examined the tender documents and concluded that submission of the list of subcontractors fulfilled a material purpose; the City was entitled to reject bids based on price, qualifications, previous work experience and ability to meet schedule, and because much of the work on the project was to be completed by subcontractors, the bidder's choice of subcontractors was relevant in assessing those factors. The Court also considered the City's knowledge of the identity of the subcontractors would provide the City with confidence

that Contract B would be performed. Finally, the Court determined that there were no indications that the City considered the list immaterial. The Court held that the bidder's failure to include the list of subcontractors rendered the bid materially non-compliant and incapable of acceptance. The low bidder's claim failed.

(c) Addenda

A bidder's failure to acknowledge addenda may render the bid materially non-compliant. In *Derby Holdings Ltd. v. Wright Construction Western Inc.*, 2002 SKQB 247, a bidder that had significantly underbid the work and was awarded Contract B attempted to establish that its bid was materially non-compliant and incapable of acceptance on the basis that it had failed to acknowledge an addendum. The Court, although loathe to permit a bidder to escape its obligation to perform the contract for the price bid, reluctantly agreed that the failure to acknowledge the addenda constituted material non-compliance and rendered the bid incapable of acceptance.

In *North America Construction (1983) Ltd. v. York (Municipality)*, [2009] O.J. No. 3631, a municipality was sued for not rejecting a tender that failed to include attachments with an addendum. The terms of addenda issued during the tender process required bidders to sign and submit each addendum with its attachments with their bid. The low bidder had been informed by municipal staff that it was not required to submit the attachments with its bid and did not do so. The municipality's tender documents contained a clause that the Court found entitled the municipality to accept bids which were non-compliant in certain respects, and noted that the defect had no effect on the price, the work to be performed, the schedule, or any other matter that might give one bidder an advantage over the other or distort the level playing field intended to be ensured by the tendering process. The Court held that the owner was entitled to waive the defect and consider the bid. The contractor's claim failed.

(d) Errors in Price

Price is a fundamental component of every bid and in many, if not most, tenders is the most important consideration for owners. Accordingly, an uncertain price will likely render a bid materially non-compliant. It is important to note that standard tender documents, including the Master Municipal Construction Documents, contain provisions that may resolve uncertainties as to price. Where the tender documents do not resolve an uncertainty, a bid will very likely be materially non-compliant or not a valid bid at all, as was the case in *Vachon Construction Ltd. v. Cariboo (Regional District)*, [1996] B.C.J. No. 1409.

In *Vachon*, the Regional District awarded the work to a bidder whose bid expressed the overall price in numerals and letters. Unfortunately, the figures were not identical. The Regional District contacted the bidder to clarify which price governed and the bidder confirmed it was the lower of the two. The Regional District crossed out the higher price and subsequently

awarded the work to that bidder. The next lowest bidder sued. The Court of Appeal held that price was a fundamental and essential component of a bid, and that a bid containing any uncertainty as to price was incapable of acceptance. The Court also noted that the Regional District's post-closing inquiry amounted to bid repair, conduct which violates the duty of fairness that is discussed later in this paper.

(e) Unsigned bids

An unsigned bid is very likely materially non-compliant. In *Surespan Construction Ltd. v. Canada (Attorney General)*, 2008 FCA 57, the Federal Court of Appeal upheld a decision by the Canadian International Trade Tribunal that held that the Department of Public Works had properly rejected Surespan's bid. The tender documents required Surespan to submit a cover page with its bid signed by its authorized signatories. Surespan's bid did not contain the cover page. The Tribunal rejected Surespan's argument that the omission was a minor irregularity that could be waived, holding that the tender documents made it clear that the signed cover page was mandatory. The Federal Court of Appeal's ruling has been followed in three subsequent cases before the Tribunal.

The requirement that a corporation's intentions be evidenced by an authorized signatory's authority was also at issue in *Acquicon Construction Co. v. Vaughan (City)*, [2003] O.J. No. 2155. In *Acquicon*, the tender documents required that all strike-outs and erasures be initialed by the same authorized signatory that had signed the bid. The president of Acquicon signed the bid, but a staff person initialed changes to the bid form. The Court held that the City had properly rejected the bid as materially non-compliant.

However, in one case a missing signature was not held to render a bid materially non-compliant: *Mercier c. Raby*, 2008 QCCA 1830. *Mercier* is a decision of the Quebec Court of Appeal available in French only, which neither of the writers of this paper can read, but was mentioned by the Quebec Supreme Court in *Specs Audio (1990) Inc. v. Centre de services partages du Quebec*, 2009 QCCS 5705, which is available in English. In *Specs Audio*, the Court referred to *Mercier* and said "We must understand that the validity of the lowest bid must be favoured as much as possible in an effort to protect the public purse." Unfortunately for local governments, the approach to tendering law expressed in *Specs Audio* does not accord with the approach taken in the courts of English Canada.

The foregoing are some of the most common defects the writers of this paper have seen. It bears repeating that the materiality of these defects, or any other defect, must be assessed within the context of the tender process, and in particular the tender documents, from which they arise.

B. Post-Closing Inquiries, Bid Repair & Undisclosed Criteria

A local government may wish to contact a bidder to clarify components of a bid after tender closing. Be careful. A post-closing inquiry cannot be used to supply information missing in a bid so as to render a bid that was materially non-compliant capable of acceptance. This conduct is known as bid repair and in the absence of an express right to do so is a breach of the duty of fairness. However, a post-closing inquiry that seeks an explanation of some existing aspect of a bid and which does not amount to a substantive revision or modification of a bid is likely permissible, again, depending on the terms of the tender documents.

Information gathered from outside the tender process may be a source of impermissible undisclosed criteria and a potential source of unfairness. However, outside information relating to evaluation criteria specified in the tender documents, which commonly include bidder past performance, bidder references and bidder experience, is regarded by courts as properly considered by an owner.

In *Continental Steel Ltd. v. Mierau Contractors Ltd.*, 2007 BCCA 292, a head contractor was sued by the lowest bidding subcontractor. The head contractor's estimator had worked with the subcontractor on a previous job and was concerned about the subcontractor's propensity for delays and litigation. The estimator contacted the subcontractor's references, who confirmed these concerns. The subcontractor was the low bidder, but the head contractor considered that the potentially greater costs of addressing these concerns rendered the low bid the second-best value. The head contractor awarded the contract to the second lowest bidder, relying on a privilege clause that permitted the owner to accept not necessarily the lowest bid. At trial, the Court held that the use of the outside information was a breach of the duty of fairness. The Court of Appeal reversed the ruling, confirming that it is not a breach of the duty of fairness to gather information from outside the tender documents to inform oneself concerning the evaluation criteria stated within the tender documents.

Similarly, in *James A. Brown Ltd. v Caisse Populaire Welland Ltee*., [2009] O.J. No. 1089 (SC), the low bid was within 3% of the second and third lowest bidders. During the evaluation process, the owner created corporate profiles of the three bidders and visited their offices. The owner awarded the bid to the third lowest bidder based on its concerns about the dated work of the low bidder and its unprofessional offices, and the impressive work of the third lowest bidder. The Court concluded that the post-closing investigation was part of the owner's due-diligence investigations that it was entitled to make in arriving at a nuanced view of cost, which the privilege clause in the tender documents expressly entitled it to do: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

C. Privilege Clauses and Selecting a Bid

A privilege clause entitles an owner to consider factors other than cost as part of its due diligence investigations in arriving at a nuanced view of cost. It releases an owner from the obligation to award the work to the lowest bidder if there are valid and objective reasons for concluding that better value may be obtained by accepting a higher bid. An example:

> The owner reserves the full right to accept the tender that it deems in its sole discretion most advantageous and the right to reject any or all tenders without giving any notice or reasons. The tender having the lowest cost to the Owner or any tender will not necessarily be accepted. The Owner may take into account any criteria that it desires in its sole discretion including, without limitation, the following (not necessarily in order)
>
> ...

Privilege clauses have been successfully relied upon by owners in awarding contracts to bidders who, despite not offering the lowest price, are considered by the owner to provide the best value based on their experience, reputation, capacity and other factors. In *Sound Contracting*, based on prior experience with the low bidder, City staff determined that if they awarded to the low bidder they would likely need to hire an on-site supervisor and could face legal, staff, and arbitration expenses. Staff did not foresee these costs arising if the second lowest bidder were awarded the contract and on that basis the City determined that the second lowest bid offered the best overall value. The Court held that the discretion afforded by a privilege clause must be exercised fairly and objectively, and that in this case the City had made its decision on valid bases. The Court also commented that when it cannot be shown that the owner acted unfairly or other than in good faith, the Court should not substitute its judgment for that of the owner in deciding which bidder offers better value.

In *Cherubini Metal Works Ltd. v. New Brunswick Power Corp*., 2007 NBQB 157, the unsuccessful low bidder alleged that the owner had breached the implied duty of fairness by exhibiting an undisclosed preference for bidders with whom it had worked before. The owner did not deny that it had worked with the successful bidder on previous projects and was familiar with its work and capabilities, but said it had not given preference to any bidder. The owner submitted that it had evaluated the past experience of the unsuccessful bidder on similar work and, considering the tight schedule, concluded that the contractor might be unable to complete the work on time. The tender documents included a privilege clause and set out evaluation criteria, which included schedule and past experience concerning similar work. The Court concluded that the owner had made a valid and proper decision on the basis of past experience and schedule. The Court acknowledged that although someone else may have reached a different conclusion, absent bad faith, fraud, mistake or unconscionability, it was not the Court's place to interfere.

In a third case, *Continental Steel Ltd. v. Mierau Contractors Ltd.*, 2007 BCCA 292, discussed above, the privilege clause afforded the head contractor "the right to reject the lowest, or any tender, or all tenders, for any reason at its sole discretion." The Court held that the head contractor had based its selection decision on several factors, including the small difference in price between the lowest bids, the short construction schedule, past experience with the low bidder, their investigations of the subcontractor, and the subcontractor's legal posturing on prior occasions. On those bases, the head contractor concluded that the small initial savings gained by awarding to the low bidder would be more than negated by subsequent costs and possible delays, a conclusion the Court decided was a reasonable exercise of business judgment based on valid and objective criteria.

D. Assessing Risk – Who Has a Claim?

A claim from an aggrieved bidder is the same as any other breach of contract claim – to be awarded damages, the bidder must prove that they suffered damages arising from the breach. In a tender case, this means the bidder must prove that had the breach not occurred, they would have been awarded the contract for the work.

Only a compliant bidder will have a Contract A with an owner from which it can claim a breach of contract. However, to be awarded damages, a materially compliant bidder must have had a reasonable expectation of being awarded the work. In most tender processes, this means that only the lowest materially compliant bidder who was not selected will have a claim for damages.

However, if the lowest materially compliant bid exceeds the owner's budget by a significant amount, a court may hold that the bidder had no reasonable expectation of being awarded the work. This was the case in *Winbridge Construction Ltd. v. Halifax Regional Water Commission*, 2015 NSSC 275. In *Winbridge*, the owner awarded the work to a materially non-compliant bidder, thereby breaching its Contract A duty to only accept a materially compliant bid. However, the Court refused to award the plaintiff damages because the plaintiff's bid was 35% over the owner's budget, holding that the owner never would have awarded it the work.

E. Negotiating, Re-tendering and Bid Shopping

It is relatively common that all bids received for a project come in over budget. When this happens, a local government has a few options, the legality of which will depend on the terms of its tender documents and the implied duty of fairness:

- Cancel and re-tender a modified project;
- Cancel and re-tender the same project;
- Negotiate with the low bidder; or,
- Cancel and negotiate with the lowest bidder.

In *Provincial Fence Products Ltd. v. Conception Bay South (Town)*, [2013] N.J. No. 202, the Town cancelled a tender process for playground equipment because the lowest materially compliant bid was over its budget. It then issued a new tender invitation for a project of slightly modified scope. Following the second tender call, the Town awarded the contract to a bidder who had submitted a materially non-compliant bid in response to the first tender. The low bidder from the first process sued the Town, claiming that the Town had engaged in bid shopping in breach of its duty of fairness under the first tender call. The Court held that cancelling a tender process for budgetary reasons and then re-tendering a project of revised scope is not a breach of the duty of fairness owed by the owner to the low compliant bidder in the first tender process.

In *Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority*, 2013 NLTD(G) 4, the Court held that the owner had not engaged in bid shopping or otherwise breached its duty of fairness when it re-tendered a project, without changing the scope, although in this case the low compliant bid in the first tender process was not only substantially over budget but also substantially over market value as indicated by the bids submitted by non-compliant bidders in the first process. The Court said the following;

> Eastern Health had the legal right to re-tender even if there were no changes. Had they not re-tendered and awarded to Olympic it could be said that they were acting irresponsibly with public monies knowing at the tender opening that the market value for the project was much less than the Olympic tender even though Olympic was a compliant bidder.

When all the bids are over budget, an owner may cancel the tender and negotiate with the low bidder, or even a higher bidder if such negotiations are not fruitful, for a reduced scope of work: *Dolyn Developments Inc. v. Paradigm Properties Inc*., [2007] O.J. No. 63 (SC). In *Dolyn*, all bids came in over budget and the owner communicated its rejection of all bids. Then the owner negotiated with Dolyn, the low bidder. When Dolyn communicated it could not do the work for the owner's budget, the owner approached the next lowest bidder with the same result. The owner then contracted with another bidder, who offered the lowest adjusted price, although only $500 less than Dolyn's adjusted price. The Court held that because the owner had rejected all bids, the negotiations were held outside the tender process and therefore could not amount to a breach of Contract A. In addition, there was no evidence of bid shopping. Dolyn's claim was dismissed.

The risk that arises from proceeding with any of these options is an allegation of bid shopping. In *Stanco Projects Ltd. v. British Columbia*, 2004 BCSC 1038, Ballance J., found that the public body had engaged in bid shopping and awarded damages to the lowest materially compliant bidder, Stanco. Shortly after the tenders were opened, the owner decided to change the work, seeking one tank instead of two. The lowest materially compliant bidder was asked to break

down its tender bid to reflect one tank only. Unbeknownst to Stanco, the public body also asked one of the higher bidders to provide a quote for one tank. This bid was lower, and when Stanco refused to lower its bid, the contract was awarded to the other company, despite the fact that Stanco was the lowest bidder. The public body in *Stanco* never cancelled the tender, instead choosing to negotiate with other bidders after the tender closed.

The Court described bid shopping as the following:

> [C]onduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others.

The Court held that whether bid shopping has occurred will depend upon the Court's assessment of the owner's conduct in the circumstances of a particular tendering process. In *Stanco*, the Court was satisfied that the owner's conduct constituted bid shopping, thereby breaching its duty of fairness to the lowest materially compliant bidder.

To avoid an allegation of bid shopping, a local government should not use the prices of other bidders obtained through a tender process in negotiations with a bidder, even if the tender process has been cancelled.

IV. CONCLUSION

Procurement of infrastructure and services is an essential and costly component of a local government's mandate, but the cost need not be increased by liability arising from tendering. We strongly feel that local governments can avoid or reduce liability in tendering from the outset of a tender process by implementing the techniques for avoiding liability discussed in the first part of this paper and by governing their post-closing conduct in accordance with the practices and pitfalls discussed in the second part.

NOTES