



BASICS

General legal principles governing calls for tenders and the awarding of contracts

MANAGING PROCUREMENT SERVICES in Canadian organizations is carried out within a juridical context. Making a call for tenders, awarding contracts and managing the resulting contractual agreements are activities subject to a complex legal framework.

To assist procurement services managers, we need to establish a methodology that will afford our organizations adequate legal protection. The aim is generally to avoid errors of law that can lead to costs and delays. The result should be an efficient procurement process.

Buyers (those announcing the call for tenders) regularly encounter questions of a legal nature. The contents of a given bid might differ, for instance, from the wording of a call for tenders. Evaluating bids also raises questions.

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This article uses as its source a recent judgement of the Supreme Court of Canada, *Double N Earthmovers Ltd. v. Edmonton (City)*, January 25, 2007 (hereinafter called *Double N*). In addition to the Court's decision (five to four), the analyses presented in the judgement are of specific interest to procurement services managers. This judgement relies on various other decisions, which together make up much of the legal framework relevant to us today (e.g., *Ron Engineering*

(1981), *M.J.B. Enterprises* (1999) and *Martel* (2000)).

It is of note that provincial laws and regulations govern several issues examined here. Since October 1, 2008, public and semi-public bodies in Quebec have been subject to *An Act Respecting Contracting by Public Bodies*. This law and its regulations influence procurement practices in public and semi-public organizations regarding the methods used to award contracts, the use of evaluation criteria, compliance of bids with the call for tenders, communication of the results to bidders, etc.

Contractual mechanism implied in the call for tenders

Definition of Contract A and Contract B
Issues relating to the "Contract A/ Contract B" framework have governed the tendering process in Canada since the decision in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

Contract A: A call for tenders involves a party's (often referred to as the "owner") requesting the submission of bids to complete a particular project. Where the parties intend to initiate contractual relations, a submission in response to a call for tenders can lead to the formation of Contract A. The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted. A bidder accepts that offer by submitting a bid that complies with the requirements set out in the tender documents. The contractual rights and obligations of the parties to Contract A are governed by the express or implied terms of the tender documents.

Contract B: A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought. Where a bid is accepted,

the terms of the tender and bid documents become the terms and conditions of Contract B (*Double N*, paragraphs 1- 3).

The bidding process represents a commitment to comply with what is bid [the requirements set out in the tender documents] (*Double N*, page 3).

Consequences of selecting a bid and equal and fair treatment of bids

...The express terms set out in the tender documents govern Contract A. However, Contract A may also contain certain implied terms. ...Implied terms can be based on the existence of any of: (1) custom; (2) the legal incidents of a particular class or kind of contract; or (3) the presumed intentions of the parties, where the term is necessary to give business efficacy to a contract (*Double N*, paragraph 30).

To hold the owner to the material terms of its tender call in awarding Contract B is a corollary to the duty to accept only a compliant bid and is necessary to ensure fairness throughout the process. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier on in the process. ...the parties are at liberty to amend the terms of Contract B after it has been entered into to address circumstances that may arise during the course of its performance (*Double N*, paragraph 125).

The owner's obligation to unsuccessful bidders, and its implied obligation to treat bidders fairly, does not survive the creation of Contract B with the successful bidder. Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed and any obligations on the part of the owner to unsuccessful bidders have been fully

discharged. Contract B is a distinct contract; the unsuccessful bidders are not privy to it (*Double N*, page 5).

Fairness and equality between suppliers

Treating suppliers fairly and on an equal footing

...The Court held that an owner also had a duty to treat all bidders fairly and equally. Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Such implication is necessary to give business efficacy to the tendering process (*Double N*, paragraph 107, citing *Martel, 2000*).

The duty of “fairness and equality” was recognized in *Martel* in part because it was thought to be “consistent with the goal of protecting and promoting the integrity of the bidding process.” (*Double N*, paragraph 52).

[There is an] implied obligation on the part of owners to treat all bids “fairly and equally.” This [obligation] had the necessary “obviousness” to meet, since contractors would not likely spend the requisite time and money on a bid without expecting that

each bid would be treated fairly. (*Double N*, paragraph 32 citing *Martel, 2000*).

Evaluation of bids on the basis of actual bid content

All bids must receive equal treatment to protect the bidding process and, to that end, an owner must weigh bids on the basis of what is actually in the bid and not on the basis of subsequently discovered information (*Double N*, pages 3 and 4).

The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information (*Double N*, paragraph 52).

Duty to accept only compliant bids

An implied duty to accept only a compliant bid was recognized by this Court in *M.J.B. Enterprises*. Speaking for the Court, Iacobucci found that this implied term was necessary to give “business efficacy” to the tendering process (*Double N*, paragraph 106).

[We are bound] to accept only a compliant bid and to treat all bidders equally and fairly. These implied terms are intended to ensure the integrity of the tendering process (*Double N*, paragraph 76).

Respecting the basic terms and conditions of the call for tenders: a) during the evaluation of bids, and b) while the contract is being carried out

Respecting the basic terms and conditions of call for tenders

By failing to insist on compliance with an essential term of the tender, the City of Edmonton breached its duty under Contract A to treat all bidders fairly and equally. The city cannot escape this fundamental obligation by postponing the fulfilment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier in the process (*Double N*, page 6).

Investigation in assessing bid submissions

There is no reason why the parties would expect an owner to investigate whether a

bidder will comply, when each bidder is legally obliged to comply in the event its bid is accepted (*Double N*, paragraph 51).

[There is no] implied duty requiring an owner to investigate to see if bidders will really do what they promised in their tender. To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties (*Double N*, page 4).

Duty to take reasonable measures to ensure bid compliance

The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant (*Double N*, page 6 and paragraph 116).

[We have] the duty to take reasonable care to accept only a compliant bid (*Double N*, paragraph 79).

[The] obligation to accept only a compliant bid requires that reasonable steps be taken to evaluate the bid for compliance before acceptance (*Double N*, paragraph 117).

I think that reasonable steps that should be taken during the bid evaluation process include:

- checking what is easy to check (*Double N*, paragraph 114);
- checking what was included in the call for tenders as an obligatory, essential or basic requirements; and
- clarifying ambiguities and imprecisions.

Mere irregularities

A bid is substantially compliant if any departures from the tender call concern mere irregularities (*Double N*, paragraph 110).

A promise to comply with the terms of the call for tenders

Nor is there any unfairness ... when an owner accepts only a compliant option offered by a bidder where that option amounts to no more than a promise to comply given, again, the owner’s right to “insist on compliance” with the terms of the tender (*Double N*, paragraph 80). 

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