

Understanding the nuts and bolts of requests for proposals (RFPs)

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Introduction: The general framework of construction tendering law

As recently stated by Justice Annis in *Envoy Relocation Services Inc. v. Canada (Attorney General)*², the Supreme Court of Canada has largely determined the principles of procurement law in Canada in four decisions, namely, *Ron Engineering*, *M.J.B. Enterprises*, *Martel*, and *Double N*, all of which will be referenced in this paper.

The seminal decision on competitive bidding and the tendering process in Canada is the Supreme Court of Canada decision in *Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.* (“*Ron Engineering*”),³ which revolutionized the modern law of tendering by introducing the Contract A/Contract B analysis into the construction law realm. Contract A is formed when a contractor submits a compliant bid in response to an invitation to tender. Contract B is the formal contract governing the legal obligations awarded by the owner to the successful tendering party in accordance with the tender documents.

Prior to *Ron Engineering*, a tenderer was free to withdraw its tender at any time prior to the acceptance by the owner.⁴ This placed the owner at great risk in attempting to find a replacement prepared to perform the work at the same price, should the original tenderer withdraw its bid at the last moment. *Ron Engineering* changed this approach to tendering. In a now oft-cited passage, Justice Estey remarked that the “integrity of the bidding system must be protected where under the law of contracts it is possible so to do”.⁵ With this goal in mind, *Ron Engineering* established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid by a tenderer, becomes a binding contract on the parties.

As the name of the doctrine implies, the Contract A/Contract B analysis involves the sequential creation of two distinct contracts – Contract A being the “tendering contract”, while Contract B is the “substantive construction contract”. A call for tenders constitutes an offer on the part of the owner to enter into Contract A. The submission of a compliant bid constitutes an acceptance of Contract A and an offer on the part of the tenderer to enter into Contract B. Contract A, which is referred to as a unilateral contract, arises automatically upon the submission of a valid tender, with its terms determined by the tender documents. The principal term of Contract A is the irrevocability of the bid, while the corollary term is the obligation on both parties to enter into Contract B upon acceptance of the tender. Significantly, Contract A imposes certain obligations upon the party who submits the tender as well as the owner. While every tenderer enters into a Contract A with the owner upon submission of a valid tender, upon acceptance of the tender by the owner, only one will enter into the construction contract, Contract B, with all other contracts being discharged. Upon acceptance of the tender, there is an obligation by both parties to enter into Contract B, which is the bilateral contract to perform the work.

Significant for the evolution of RFPs, Justice Estey in *Ron Engineering* noted that circumstances may exist where a tender is so lacking that it does not in law amount to an acceptance of the call for tenders. Similarly, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* (“*M.J.B. Enterprises*”),⁶ in applying the Contract A/Contract B analysis, Justice Iacobucci explained that the terms and conditions of the call for tenders govern whether Contract A comes into existence, and what its terms are. It was clarified that *Ron Engineering* does not stand for the universal proposition that Contract A is *always* formed upon the submission of a tender, or that a term of this contract is necessarily the irrevocability of the tender. Intention still governs the issue as in other aspects of

¹ The authors would like to acknowledge and thank Tom Sides and Joe Rosselli from Dentons Canada LLP for the helpful memos written on the subject, which were of assistance in the writing of this paper.

² *Envoy Relocation Services Inc. v. Canada (Attorney General)* (2013) ONSC 2034, (CanLII)

³ [1981] 1 S.C.R. 111 [*Ron Engineering*].

⁴ For the purpose of this paper and for simplicity, “owner” denotes the entity accepting tenders from tenderers, regardless of whether the entity is in fact an owner, a contractor, etc. Similarly, “tenderer” is used to denote the entity proffering tenders in response to a request.

⁵ *Ron Engineering*, *supra* note 2 at para. 14.

⁶ 1 S.C.R. 619 [*M.J.B. Enterprises*].

contract law, and this is dependent upon the terms of the tender documents. In other words, the submissions of a tender *can* give rise to contractual obligations, but whether such obligations *actually* arise will depend on the terms and conditions of the call for tenders. The paramount inquiry is whether the parties intended “to initiate contractual relations by the submission of a bid in response to the invitation to tender”.⁷ To that extent, and only if necessary, courts may look outside the terms of the four corners of the document and look to implied terms to determine the presumed intention of the parties.⁸

In *Martel Building Ltd. v. Canada (“Martel”)*⁹, the Supreme Court of Canada affirmed that Contract A contained an implied term that the owner must be fair and consistent in the assessment of tender bids (“duty of fair and equal treatment”). The Court concluded that an implied duty of fairness was necessary to give efficacy to the tendering process and is consistent with the goal of protecting and promoting the integrity of that process.

In *Double N Earthmovers Ltd. v. Edmonton (City of) (“Double N”)*¹⁰, the Court described the methodology to add content to the duty of fair and equal treatment, which it used to deny a new duty to investigate tender proposals as a component of implied fair treatment of bidders. The Court confirmed that the imposition of an implied term depends upon its obviousness, its materiality and its consistency with the goal of protecting and promoting the integrity of the procurement process.

This paper addresses a method of initiating procurement that does not attract a Contract A/Contract B analysis, such that the rights and obligations of the parties are different than in the situation envisioned by *Ron Engineering*. Requests for Proposals (RFPs) are a relatively recent phenomenon in the construction industry, evolving in response to *Ron Engineering* as a means to avoid the contractual obligations arising from tenders imposed on owners and tenderers alike. This paper provides an overview of RFPs in contradistinction to formal tender requests, and discusses the factors that courts will use in differentiating between an RFP and a call for tenders. This paper also provides practical drafting recommendations that owners and their lawyers can follow to avoid being caught under the *Ron Engineering* umbrella, and finally, discusses the potential for liability with properly constructed RFPs.

Understanding the evolution of RFPs

An owner who seeks submissions from interested parties for a construction project, but who does not wish to enter into a binding contract (Contract A) along with the obligations that such contract imposes may choose to issue an RFP. Legal commentators have recognized that “as the [construction] industry undertakes new mega projects and embraces new technologies, the industry’s stakeholders, and their lawyers, are set to explore the outer limits of the new tendering world created by *Ron Engineering*”.¹¹ While *Ron Engineering* may have established the initial tendering rules, owners today are constantly seeking novel and creative solutions to avoid the obligations of a formal tender call that *Ron Engineering* and its progeny have imposed.

Although the Contract A/Contract B model may have been the catalyst for the creation and use of RFPs in lieu of tenders, the focus on substance and contractual intention as the basis for Contract A in *M.J.B. Enterprises* expressly set out the rationale that allowed for their proliferation. In *M.J.B. Enterprises*, the Supreme Court of Canada clarified that Contract A does not arise in every instance, but that the rights and obligations flowing from Contract A only arise if it can be demonstrated from the bidding documents that it was the intention of the parties to create Contract A. After reviewing general tendering principles and the aftermath of *Ron Engineering*, Justice Iacobucci noted:

⁷ *Ibid.* at para. 23.

⁸ *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 at para. 81 [*Martel Building*].

⁹ *Ibid.*

¹⁰ *Double N Earthmovers Ltd. v. Edmonton (City of)*, 2007 SCC 3 (CanLII), 2007 SCC 3

¹¹ Paul Stocco, “Tendering and Construction Law Update” (Paper prepared for the Local Government Administration Association Workshop, May 2006) at 12.

What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, **depending upon whether the parties intend to initiate contractual relations by the submission of a bid**. If such a contract arises, its **terms are governed by the terms and conditions of the tender call** [emphasis added].¹²

M.J.B. Enterprises thus recast the emphasis of the analysis on the intention of the parties, paving the way for the use of RFPs as a method of procurement that is intended to be something less than a formal tender call. It has been noted that “since *MJB*, therefore, it is critical for issuers to be clear about their intentions as they draft their bidding documents. It is also critical that the actual language that is put down on paper reflects the intention of the issuer”.¹³

Properly drafted, the purpose of an RFP is to request expressions of interest from the parties, and sets out the owner’s intention to consider those expressions of interest and then to undertake negotiations with one or more parties whose proposal(s) appeal to the owner.¹⁴ As will be discussed more fully below, “the RFP process will not create contractual obligations but may create obligations of another kind”.¹⁵ For example, an owner may face misrepresentation claims if the RFP promises that the owner will select the tenderer from those that signify interest and will then proceed with the project. However, there are also mechanisms by which owners can protect themselves, also addressed below under drafting considerations, such as the use of disclaimer language which provides the owner the right to cancel the process at any time without repercussion, and which obliges tenderers to acknowledge that they are undertaking expenses entirely at their own risk.¹⁶ However, any meaningful discussion of RFPs must start with the leading authority on the subject, *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*.¹⁷

Tercon and its appeals

The *Tercon* decision is an exhaustive review of many of the guiding principles of the law relating to RFPs and tenders. Rather than coming to any novel conclusions or taking the law in new directions, however, the court in *Tercon* simply applied the legal propositions derived from past cases to the facts of the RFP process at issue. Although the status of *Tercon* as binding authority was jeopardized when the decision was appealed to the British Columbia Court of Appeal, and then ultimately to the Supreme Court of Canada in 2010, the higher courts have left the trial judge’s reasoning with respect to the RFP/tender distinction intact as binding law today.

In *Tercon*, the Province of British Columbia sought to find a contractor to construct a gravel highway. It first issued a Request for Expressions of Interest (RFEI) based on a design-build model that required the contractor to design and construct the highway at a fixed price. The RFEI was anticipated to culminate in the creation of a short list of three qualified contractors who would then proceed to the next round of submissions. Six tenderers, including the plaintiff (*Tercon*) and another company (*Brentwood*) responded to the RFEI; however, before the process continued, the Province decided to change the delivery model of the project from the design-build model to an “alliance” model, whereby the successful tenderer would enter into an alliance contract with the Province but remain responsible for any cost overruns. Instead of shortlisting the RFEI respondents, the Province allowed all of them to submit RFPs based on this new model and further established that no one except the initial RFEI respondents could submit proposals at the RFP stage.

¹² *M.J.B. Enterprises*, *supra* note 5 at para. 19.

¹³ Denis Chamberland, “Request for Proposals (RFP): Thou Shall Not Outsource Without One” (Paper presented at the Negotiating, Structuring & Drafting Outsource Agreements conference by The Canadian Institute, November 2003) at 8.

¹⁴ Paul Sandori & William Pigott, *Bidding and Tendering – What is the Law?*, 3rd ed. (Markham: LexisNexis Canada, 2004) at 232-234.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ 53 B.C.L.R. (4th) 138 (S.C.) [*Tercon*].

The RFP set out a detailed process that would ultimately lead to the selection of a contractor, including a ranking by an evaluation panel and interviews of shortlisted proponents. A form of alliance agreement between the successful contractor and the Province was attached to the RFP documents, and while the selection of the contractor did not automatically result in entrance into the agreement, it was the template for any ultimate construction contract. Tenderers had to provide security deposits with their submissions, and if the preferred tenderer failed to execute the alliance agreement, the security would be lost. The Province also reserved the right to cancel the RFP process at any time and initiate a new process. The RFP contained an exclusion clause which prohibited any tenderer from having a claim for any compensation as a result of participating in the “RFP”, and by submitting a proposal each tenderer was deemed to have agreed that it has no such claim.

The contract was ultimately awarded to an ineligible tenderer. As a result of the Province’s change in agreement model, Brentwood reached an agreement to enter into a joint venture with another company for the purposes of the project. The Brentwood joint venture was slightly cheaper and was ultimately awarded the contract, but when Tercon discovered the joint venture, it brought an action against the Province for damages, arguing that the Province breached Contract A by awarding it to a non-compliant tenderer. The Court ultimately agreed, holding that although the process was labeled as an RFP, it essentially amounted to Contract A, and the owner breached its duty of fairness pursuant to Contract A by awarding the contract to a non-compliant bidder.

The decision was appealed to the Court of Appeal, which allowed the appeal by the Province, finding that the trial judge erred in failing to give effect to the clear and unambiguous exclusion clause which was intended to “cover all defaults”.¹⁸ On further appeal, the Supreme Court of Canada was split on the effects of the exclusion clause, with the majority deferring to the trial judge’s holding that it was inoperative in this case, but the trial judge’s analysis of RFP versus tenders was accepted:

The trial judge did not mechanically impose the Contract A – Contract B framework, but considered whether contract A arose in light of her detailed analysis of the dealings between the parties. **That was the right approach.** She reviewed in detail the provisions of the RFP which supported her conclusion that there was intent to create contractual relations upon submission of a compliant bid...

...

There is, therefore, no basis to interfere with the judge’s finding that there was an intent to create contractual relations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A – Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into contract B on those terms if accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here [emphasis added].¹⁹

¹⁸ *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2007 BCCA 592 at para. 14.

¹⁹ *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, [2010] 1 S.C.R. 69 at paras. 19-21.

Lessons from *Tercon*: Substance over form (labels are not determinative)

First and foremost, *Tercon* serves as a sobering warning on the reliance of labels, and suggests that simply because one party to a transaction calls the transaction a tender does not make it so. The labels or names attached to the documents are not the determining factor. In each case, the factual situation must be examined to establish “whether there in fact existed a tender call or whether one party is in fact seeking a request for proposals or even simply attempting to sound out a potential market”.²⁰ This is consistent with *M.J.B. Enterprises*, where the court held that whether the tendering process creates a preliminary contract is dependent upon the terms and conditions of the tender call. This approach is also consistent with the policy goal of protecting the integrity of the formal bidding process by insisting on “conformity with the mandatory requirements of the call for tenders”.²¹

Post-*Tercon*, numerous decisions have held that a Contract A resulted, despite the fact that the process was labeled otherwise. In *Tercon*, the key issue to be decided was whether a contract was created between the parties when a proposal was submitted in response to the RFP – in other words, whether the defendant/owner intended to create a binding contractual relationship when it issued the RFP or whether the process was intended to be a non-binding invitation to tender into negotiations.²² The defendant unsuccessfully argued that the process was an RFP, with negotiation as the end result, rather than a formal tender call, and was ultimately found liable for accepting a proposal from an ineligible and non-compliant bidder. Other examples where the court found that Contract A was created, despite labels to the contrary, include *Wind Power Inc. v. Saskatchewan Power Corp.*,²³ *MRK Holdings Ltd. v. Newfoundland and Labrador Housing*,²⁴ and *Labrador Airways Ltd. v. Canada Post Corp.*²⁵ On the other hand, there have been cases where courts have held that the RFPs in question did not in fact create binding contractual relationships, including *Mellco Developments Ltd. v. Portage La Prairie (City)*,²⁶ *Buttcon Limited et al. v. Toronto Electric Commissioners*,²⁷ and *Powder Mountain Resorts Ltd. v. British Columbia*.²⁸ Thus, it is clear that Contract A will not necessarily arise in every case, and that this determination is ultimately governed by the intention of the parties.

This apparent inconsistency raises an important and glaring question – if a label is not determinative, what factor(s) or circumstance(s) will elevate an RFP to a Contract A/Contract B framework? Although this emerging area is still under development, *Tercon* provided an excellent summary of the factors used to assist in the determination.

²⁰ *Northway Aviation Ltd. v. Southeast Resource Development Council Corp.*, 2008 MBCA 93 at para. 14.

²¹ *Mellco Developments Ltd. v. Portage la Prairie (City)*, 2002 MBCA 125 at para. 38 [*Mellco*].

²² *Tercon*, *supra* note 14 at para. 78.

²³ 2002 SKCA 61.

²⁴ (2005), 245 Nfld. & P.E.I.R. 177 (S.C. (T.D.)).

²⁵ (2001), 198 Nfld. & P.E.I.R. 116 (S.C. (T.D.)).

²⁶ *Mellco*, *supra* note 18 at para. 74.

²⁷ [2003] O.J. No. 2796 (S.C.) at para. 49 [*Buttcon*].

²⁸ [2001] B.C.J. No. 2172 (C.A.) at para. 72 [*Powder Mountain Resorts*].

The *Tercon* factors – is it RFP or Contract A/Contract B?

The court in *Tercon* reviewed the caselaw and distilled the factors or terms that courts have recognized which are “indicative of an intent to form contract A”.²⁹ These factors include:

1. the irrevocability of the bid;
2. the formality of the procurement process;
3. whether tenders are solicited from selected parties;
4. whether there was anonymity of tenders;
5. whether there is a deadline for submissions and for performance of the work;
6. whether there is a requirement for a security deposit;
7. whether evaluation criteria are specified;
8. whether there was a right to reject proposals;
9. whether there was a statement that this was not a tender call;
10. whether there was a commitment to build;
11. whether compliance with specifications was a condition of the tender bid;
12. whether there is a duty to award contract B; and
13. whether contract B had specific conditions not open to negotiation [emphasis added].

Tercon held that no single factor is dispositive of the issue. For example, the court reinforced the general principle that labels are not determinative because a statement describing the procurement document is only one factor in the list. Further, the court specifically emphasized that even such indicia as a requirement for a security deposit or the existence of established timelines, which are generally associated with formal tender calls, are not absolutely determinative either.³⁰ Rather, the courts must look at all of the factors, viewed objectively, to determine the intention of the parties.

Applying these factors, the court concluded that the parties’ intention was to create contractual relations with the submission of a proposal, because “the overwhelming balance of terms of the RFP considered within the specific context of the circumstances, objectively viewed, support this conclusion”.³¹ These factors speak to the *objective intention* of the parties to enter into the tender process, which is the critical element in the RFP/tender distinction. In *Tercon*, the court held that there was no uncertainty in the process or in the owner’s commitment to it; the procurement process was formal with explicitly prescribed documentation required according to design specifications set out in the RFP; the nature of the work and materials were specific with no fundamental details awaiting input from tenderers; a tenderer was subject to failure if it did not comply with the specifications; although entitled an RFP, the documentation did not say that this was not a tender call; bids were irrevocable for 60 days; only parties selected from the RFEI process were invited to submit proposals; a security deposit was required according to a specific form; deadlines were imposed; evaluation criteria was specified which was not subjective in nature; a specific form of “alliance” agreement was attached to the procurement documents; a tenderer was required to accept this form of Contract B substantially in the form as attached; the security was lost if an agreement was not executed; the price and other essential terms of the alliance agreement were fixed and non-negotiable; it was not an open invitation to negotiate; there was a duty upon a tenderer selected to negotiate

²⁹ *Tercon*, *supra* note 14 at para. 81.

³⁰ *Ibid.* at para. 82.

³¹ *Ibid.* at para. 88.

the alliance agreement in good faith to reach and execute an agreement [the Court noted that this factor was clearly indicative of an intention to contract as the defendant could not have secured such a duty independent of an explicit contractual term i.e., the good faith requirement is antithetical to a true negotiation]; any negotiation contemplated within the RFP did not form the backbone of the procurement process; and the procurement process was competitive and not subject to negotiation. The importance of negotiation in this analysis bears further discussion.

The importance of negotiation

Although no single factor is determinative, commentators and practitioners recognize that a procurement process that does not provide for the possibility of negotiation is highly indicative of a formal tender and not an RFP. An offer to negotiate is generally not considered to give rise to contractual relations because a bare agreement to negotiate has no legal content.³² Thus, an RFP process that provides for extensive negotiation between the parties generally indicates something less than a legally binding contract, and this is consistent with the recognized rationale of the formal tendering process, which is to replace negotiation with competition.³³ Further, while some models of procurement have elements of both negotiation and competition, and a tender giving rise to Contract A may allow for a limited form of negotiation, the *final* form of contract must be *substantially non-negotiable* in the form specified in the tender.³⁴ Practically speaking, if the final terms of the contract are contained in the bid itself or a form of the final contract is attached to the RFP (i.e. there is no need for negotiation), courts will “readily find a valid tender and not a mere invitation to treat”.³⁵ However, if it is not possible to identify any of the Contract B terms in the RFP, and subsequent discussions and negotiations are required respecting fundamental detail, then these factors point towards an RFP situation.

In *Tercon*, any negotiation was constrained and did not go to the fundamental details of either the procurement process or an ultimate contract:

Although the plaintiff expressed the expectation in evidence that a broader negotiation was anticipated if it could get away with it and even a retort that this was not a tender process, this was commentary on the use of an alliance model as the proposed contract B and does not alter the terms of the RFP nor the fact that the plaintiff submitted a proposal indicating acceptance of the terms of the RFP.³⁶

On the other hand, in *Mellco*, the Court of Appeal held that the RFP did not create a binding contractual agreement, in part because it was clear to the court that the RFP conveyed an intent by the City to negotiate with the bidder that presented the “most attractive” proposal. Justice Scott differentiated this case from *M.J.B. Enterprises*, where Justice Iacobucci “stressed the importance ‘that the respondent did not invite negotiations over the terms of either Contract A or Contract B’; indeed, the instructions to tenderers made it clear that the bidder was ‘not at liberty to negotiate over the terms of the tender documents’ (at para 40)”.³⁷ In *Mellco*, the court referred to the provisions of the RFP which provided “many examples of the city’s intention to negotiate rather than to enter into a binding agreement with the successful proponent”.³⁸ One paragraph of the RFP provided that:

- “This is an invitation for proposals and not a tender call.” ...

³² *Ibid.* at para. 83.

³³ *Martel Building*, *supra* note 7 at para. 116.

³⁴ *Tercon*, *supra* note 14 at para. 83.

³⁵ *Mellco*, *supra* note 18 at para. 74.

³⁶ *Tercon*, *supra* note 14 at para. 95.

³⁷ *Mellco*, *supra* note 18 at para. 77.

³⁸ *Ibid.* at para. 73.

- The city would **negotiate** with the applicant that presented the “most attractive proposal.” In the event the sale transaction did not close, the city would then **negotiate** with the next most attractive applicant” [emphasis added].³⁹

Examining these provisions in the RFP, Justice Scott concluded that negotiations “formed the backbone of the process the city envisioned when they initiated the RFP process”, and ultimately concluded that this was not a formal tendering situation.

The issue in *Mellco* is akin to the *Powder Mountain Resorts* case, where the court also held that there was no intention by the parties to initiate contractual relations by the submissions of a proposal. The court noted:

Both *Ron Engineering* and *M.J.B. Enterprises* dealt with the tendering process which involves a very specific procedure and which, as noted in *M.J.B. Enterprises*, typically replaces negotiation of contract terms with a competition based on specified contractual provisions. **Except to the extent that the tender allows for a limited form of negotiation, it is not open to the successful tenderer to embark upon negotiations over the form of the contract because it is normally a term of the tender process that the bidder whose tender is accepted will enter into a contract in the form specified in the tender invitation** [emphasis added].³⁹

Similar to *Mellco*, the terms of a proposed contract were not specified in the invitation in *Powder Mountain Resorts*. Rather, the owner simply invited the submission of proposals, stating that it *may* grant development rights. The submission of a proposal did not obligate the tenderer to develop, nor did it obligate the owner to allow the development of the area. The court concluded:

The invitation for proposals appears to have been an invitation to negotiate or, in other words, an invitation to treat. It appears unlikely that the intention of the parties was that a submission of a proposal would initiate contractual relations between the parties. **It appears more likely that the intention was to initiate negotiations which, if mutually satisfactory, would lead to contractual relations** [emphasis added].⁴⁰

Thus, the cases seem to suggest that a significant factor in the *Tercon* matrix appears to be the degree to which subsequent negotiations are contemplated. If the material terms of the substantive contract are already decided upon, it is likely that the procurement method will fall into the Contract A/Contract B framework. However, if material considerations are still open for negotiation, an RFP process is likely at play.

Duties and obligations in the context of an RFP

In the formal tendering context involving Contract A/Contract B, bidders must be treated fairly, equitably, and in good faith. Implying these terms as part of the contractual obligations by the owner is justified based on the presumed intentions of the parties. Among other things, these expectations include the obligation of the owner to disclose any preferences that may affect the selection of a successful tenderer, to accept only conforming bids, and to refrain from the wording of a form of contract that is materially different from Contract B.⁴¹

Although these principles are now relatively well-established in the case of formal tenders, what about the case of RFPs? One would assume that since the duty of fairness is an implied contractual term of Contract A, it should not arise in an RFP which is merely an invitation to negotiate with tenderers. As *Tercon* noted, “any requirement to negotiate in good faith is repugnant to the adversarial position of parties in a negotiation”.⁴² Interestingly, with respect to RFPs, courts have found that in certain cases, the owner may be subject to a duty of fairness in considering the proposals, even though no Contract A exists.

³⁹ *Powder Mountain Resorts Ltd. v. British Columbia*, 47 C.L.R. (2d) 32 (B.C.S.C.) at para. 107.

⁴⁰ *Ibid.* at para. 112.

⁴¹ *Mellco*, *supra* note 18 at para. 83.

⁴² *Tercon*, *supra* note 14 at para. 87.

In *Khoury Real Estate Services Ltd. v. Canada (Minister of Public Works & Government Services)*,⁴³ the Ministry issued an RFP for a project, which contained and described a procedure for evaluation of the proposals submitted. The tenderer's proposal was not accepted, and the tenderer applied for judicial review for an order requiring the Ministry to provide the tenderer with written details of its evaluation of the tender proposals. With respect to the tenderer's entitlement to information on the other proposals, the court reasoned that an RFP situation was not comparable to a normal tender process where comparison with other bids is relatively easy, and because of this, "something more" was required to insure the integrity of the tender process. The court held:

While I am not prepared to order that the marks assigned to each of the defined criteria for all of the projects be revealed to the applicants or any other tenderer, **something more by way of explanation of the department's assessment of a tender should here be provided, in my opinion, to ensure integrity in the tender process for projects of the sort here in question, and to ensure that there is a rationally explicable basis for the departmental assessment of one project in relation to the others** [emphasis added].⁴⁴

The court further concluded:

...The applicants in an open tendering process which did not set out in the invitation to tender any limitation on the information to be provided by the respondents in regard to their evaluation of proposals, were **entitled to expect information about proposals generally that would demonstrate fairness in their evaluation**. In my opinion, by its refusal to provide to tenderers any information in relation to its evaluation, even in general terms, by marks assigned to the various proposals submitted, [the Ministry] failed in its responsibility to demonstrate that it acted fairly in evaluation of the proposals, **a demonstration that is a key element of the open tendering process** [emphasis added].⁴⁵

In *Mellco*, Justice Scott framed the question as, "can a bidding process that is something less than one intended to involve the formation of Contracts A and B invoke the obligation of fair bargaining in good faith that is now firmly established in formal tendering cases"?⁴⁶ In *Mellco*, Justice Scott framed the duty to negotiate in good faith as a continuum:

I agree with counsel for the plaintiffs that **the question of the duty to negotiate in good faith with respect to bids (be they a tender or proposal) is a form of continuum**. At one end are the formal tender cases invoking the principles of *Ron Engineering*. At the other end are cases where, for example, an owner requests a simple quote. There is obviously a lot of territory between these two extremes. The fact situation before us falls somewhere in between the two extremes. On the one hand, there is a detailed request for proposals mandating that they must contain a security deposit and remain open for a length of time. Conversely, the RFP does not create Contracts A or B and envisions continuing negotiations with the "lead proponent" that submits the most "attractive proposal".

Within the continuum, in the instant case there was, in my opinion, an obligation on the part of the city to **conduct itself fairly and in good faith. Without some fairness in the system proponents could incur significant expenses in preparing futile bids which could ultimately lead to a negation of the process. In circumstances such as those before us, there must be enough fairness and equality in the procedures to ensure its safety and openness**.

⁴³ 33 C.L.R. (2d) 294 (F.C.T.D.).

⁴⁴ *Ibid.* at para. 32.

⁴⁵ *Ibid.* at para. 36.

⁴⁶ *Mellco*, *supra* note 18 at para. 79.

...

But this is not a formal tendering situation. As we have seen, the principles of fairness and good faith are not determined in a vacuum, but rather are implied based on the intentions and expectations of the parties. In a *Ron Engineering* type of tendering process, the requirement of good faith and fairness is a term that is implied into Contract A. But there is no Contract A in this case. It is merely a request for proposals opening up a process of negotiation. Even if the absence of a Contract A is not an obstacle to finding some duty of good faith and fairness, I am not at all persuaded that the plaintiffs were treated unfairly or that the city acted in bad faith... **The duty to refrain from awarding a form of contract that is significantly different than Contract A has no application to the situation calling for proposals only** [emphasis added].⁴⁷

The court ultimately held that there was evidence to support the conclusion that the duty of fairness was not breached, especially given that the process under consideration called for “attractive proposals” followed by “negotiation”, which is in stark contrast to the formal bidding process in which bids are meticulously scrutinized. In passing, the court also suggested that not all negotiations will invariably contain a requirement for fairness and good faith.

Similarly, in *Buttcon*, the court concluded that Contract A did not arise in the RFP process. With respect to the owner’s obligations, the court held that the tenderers were only entitled to have their proposals considered fairly and to ensure that no one participant was favoured over another – i.e., to review each proposal using the same criteria for each.⁴⁸

In *Powder Mountain Resorts*, the RFP did not disclose the precise specifications for the project, as is often the case with RFPs, and the selection process involved the consideration of several factors beyond that of just price. Although the court found that no Contract A existed in that case, it concluded that even if there was such a contract, no terms of Contract A were breached. First, the court held that it was unlikely that Contract A would include an implied term to negotiate in good faith, since Canadian law has generally not recognized a duty to negotiate in good faith in commercial transactions.⁴⁹ With respect to a general duty of fairness however, the court held:

It is more arguable that Contract A contained an implied term of fairness. In the tendering cases, the duty of fairness has been described as a “duty to treat all bidders fairly and not to give any of them an unfair advantage over the others”. [*Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* at p. 350] In a tendering process, most of the specifications are typically set out in the tender call and the selection of the successful bidder is usually based on price alone. If the person initiating the process has other selection criteria, the duty of fairness requires the criteria to be disclosed to all of the bidders. **However, a request for proposals, such as the one in this case, may not contain many, if any, specifications and the selection process is much more subjective in nature because there are many factors other than price which must be considered. Hence, it is much more difficult to apply any duty of fairness to the selection process in a request for proposals and any subsequent negotiations.**

The case authorities dealing with tenders suggest that the rationale for Contract A is to preserve the integrity of the tender process. Based on this policy consideration and the presumed intentions of the parties, **a duty of fairness arising from a request for proposals, if it existed, would, in my view, consist of two aspects within the context of the present case. First, if the person requesting the proposals selects one proponent and embarks**

⁴⁷ *Ibid.* at paras. 80-84.

⁴⁸ *Buttcon*, *supra* note 24 at para. 60.

⁴⁹ *Powder Mountain Resorts*, *supra* note 37 at para. 116.

upon negotiations, it should not negotiate with another party until the negotiations with the successful proponent have come to an end. Second, the negotiations with the successful proponent should not be terminated solely because another party expresses interest in the project. This second aspect would coincide with the duty to negotiate in good faith with the successful proponent (if there is such a duty) because it would not be an act of good faith to terminate negotiations with the successful proponent solely to allow for negotiations with another interested party.⁵⁰

On appeal, Justice Newbury confirmed that the case did not give rise to a contract of the sort envisioned by *Ron Engineering*, and that “in the absence of contract, no free-standing enforceable duty of fairness arises”.⁵¹

Finally, in *Guysborough (District) v. Resource Recovery Fund Board Inc.*,⁵² the judge referred to both *Mellco* and *Powder Mountain Resorts* on the issue of a free-standing duty of fairness. Although the court accepted the *Mellco* proposition that a duty of fairness lies along a “continuum”, the court concluded that the tenderer was not in a situation warranting fairness as a non-contractual obligation, and accepted the *Powder Mountain Resorts* holding that no free-standing enforceable duty of fairness arises.⁵³

Therefore, the precise nature of an owner’s obligations in the non-Contract A context is unclear. *Mellco* and *Buttcon* both suggest that an owner should treat tenderers fairly, while *Powder Mountain Resorts* explicitly provides that no duty of fairness arises in an RFP. The issue of owner’s duties in the RFP context is still being developed, and it is likely that uncertainty will remain until a decision is before the court where, in an RFP context, an owner has been found to have actually breached the duty of fairness, such that the legal obligation regarding a duty of fairness, with its attendant consequences, can be fleshed out. However, to avoid being the test case, and to avoid claims of bias and potential litigation by unsuccessful tenderers, owners should err on the side of caution and strive to act fairly to all tenderers whenever possible, and to maintain records that reflect actions taken consistent with such duty.

Drafting considerations and avoiding contractual liability

When drafting and using procurement documents, the prudent drafter must be able to understand how to properly manage the extent of her legal relations and to avoid attracting the rights and liabilities of a formal tender call when she intended only to initiate an RFP process, and vice versa. A properly drafted RFP will not be considered to be a formal tender document and should escape the Contract A/Contract B analysis, such that the receipt of a proposal by the owner in response to the RFP will not initiate contractual relations between the owner and the tenderer, and would not impose on the owner obligations that go along with being a party to a contract.

Drafting the RFP carefully is crucial because the intention of the parties to initiate contractual relations depends primarily on how the relevant documentation structures those relations. As discussed previously, it is the substance and terms of the RFP that governs, rather than the labels attached to them. Additionally, the importance of a well-crafted privilege clause cannot be understated.

Irrevocability

Irrevocability is the hallmark of formal tenders. As recognized in *Ron Engineering*, “the principal term of Contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (Contract B) upon the acceptance of a tender”.⁵⁴ If a tenderer’s bid must remain open and may not be revoked

⁵⁰ *Ibid.* at paras. 117-118.

⁵¹ *Powder Mountain Resorts*, *supra* note 25 at para. 72.

⁵² 330 D.L.R. (4th) 521 (N.S.S.C.) [*Guysborough*].

⁵³ *Ibid.* at paras. 45-48.

⁵⁴ *Ron Engineering*, *supra* note 2 at para. 16.

for a certain period of time after being placed, this militates towards a finding that Contract A will be created upon the placement of the tender. On the other hand, if a bid may be revoked at any time by the tenderer, it is an argument supporting an RFP. The ability to revoke a tender provides a persuasive basis against imposing immediate contractual duties on the owner, since there is no corresponding obligation on the part of the tenderer. Thus, the owner should specify (if the project so allows) that the proposals are not irrevocable. Conversely, the tradeoff with open revocability is the increased risk the owner faces in tenderers backing out prior to acceptance.

Deposit/Security

If the RFP requires a tenderer to make a deposit or post security in conjunction with the tender, this is an indication that the bid may be a formal tender. As noted earlier, the court in *Tercon* held that a requirement for a security deposit is not a determinative factor in the RFP versus Contract A determination. Further, *Buttcon* correctly points out that established timelines and deposit requirements are common both to RFPs and formal tender situations, and that “they alone do not establish whether a particular situation is or is not a formal tender situation”.⁵⁵ Although a security deposit is but one factor in the list of *Tercon* indicia, if the RFP does not require a tenderer to post security, there will be a greater chance that Contract A will not come into existence, especially in the context of other factors that also suggest an RFP situation. As stated in *Ron Engineering*, the role of the deposit under Contract A is clear and simple – it is required in order to ensure the performance by the tenderer of its obligations under Contract A.⁵⁶ The prudent owner that wishes to engage in a formal bidding process will almost always require a deposit to ensure that tenderers are committed to their tenders, in order to induce competition and obtain the best price possible. Similar to irrevocability, the risk with no security deposit is that tenderers have less of an incentive to commit.

Negotiations

Negotiation is a key element of RFPs. As discussed in the aptly named heading “The Importance of Negotiation”, owners should leave room for meaningful negotiation in an RFP. If the ultimate reward for the chosen tenderer is an opportunity to negotiate the terms of a potential construction contract instead of the construction contract itself, this is highly suggestive of an RFP, whose goal is to request expressions of interest, and then undertake negotiations with appealing proposals. As the court in *Buttcon* noted, the prospect of extensive negotiation suggests a situation that is quite different from *Ron Engineering*. Indicators of intended negotiations in an RFP include a “tentative” schedule for an “extended period” (weeks or even months) to allow for “negotiation of final agreements”⁵⁷, as was the case in *Buttcon*. If the negotiation is the reward of the RFP process, it leaves open and makes clear the possibility that the final contract might not be rewarded to the winning tenderer should talks fall through, which ties closely with the subsequent point about the content of the RFP documents.

Lack of Finalized Plans

The lack of finalized plans within the RFP is closely related to the requirement for negotiation. If the RFP only sets out basic details of what the owner seeks and gives flexibility to the tenderers to fill in their submissions with their own plans or schemes, it suggests that the RFP will not give rise to Contract A. In contrast, an RFP that dictates the final terms of the ultimate construction contract will be seen as a formal tender, since there would be no need for negotiations between the owner and the successful tenderer on a final contract, making the contract itself the thing being bid on. Thus, for example, in *Buttcon*, the court held that there was no Contract A, partly because at the time the RFP was issued, the owner had not made any decision regarding the number of required projects or their locations, and those issues were not resolved until after all of the proposals were received.⁵⁸ In fact, the court held that the “most telling evidence” in the case were the four renderings submitted by the four

⁵⁵ *Buttcon*, *supra* note 24 at para. 48.

⁵⁶ *Ron Engineering*, *supra* note 2 at para. 17.

⁵⁷ *Buttcon*, *supra* note 24 at para. 34.

⁵⁸ *Ibid.* at para. 33.

tenderers, which were “as different as they could possibly be”,⁵⁹ and that had this been merely a tender call, the proposals could (and would) not have looked so very different.

In contrast, in *M.J.B. Enterprises*, it was held that Contract A arose because (i) the owner did not invite negotiations over the terms of either Contract A or Contract B; (ii) the only items to be added to the tender form by the tenderer included such standard information as dates, signatures and names of the parties that would be working on the project; and (iii) the Instruction to Tenderers suggested a special procedure for any negotiations, “presumably so that if a suggested amendment is accepted all tenderers may be notified so that they may also enter an alternate bid”.⁶⁰ Thus, owners should leave some of the essential specifications undefined and open to negotiation if the goal of the procurement is truly to win an opportunity to negotiate.

Evaluation Criteria

An RFP should make it abundantly clear that a wide range of criteria are being used to determine the winning proposal and that the owner has discretion to make its selection based on multiple criteria, rather than just price which is a purpose of the tendering process. The more criteria that are used in an RFP, the less the process appears like a mechanical cost comparison, and the less it resembles a structured tender call.⁶¹ The determination of specific evaluation criteria by which to evaluate proposals is necessarily the owner’s business decision, and will vary from owner to owner and from project to project. As an example, in *Buttcon*, the evaluation criteria suggested something “much more than a cost comparison”,⁶² and included the design quality and operation efficiency of the submission, the total net cost to the owner over a 50-year horizon, the financial capacity and stability of the tenderer, the proven expertise of the tenderer on projects of similar size and scope, the ability of the proponent to deliver the project on time, and the suitability of the site(s).⁶³

Other criteria for inclusion

Since the RFP documents are drafted by the owners, the owner is in a position to determine the scope of the legal relationship that it wishes to create with each tenderer. In addition to the above recommendations, an owner wishing to avoid formation of a preliminary contract by the submission of a proposal may:

- reserve the right to reject any or all proposals and to re-advertise or recommence the RFP process if it desires (this is known as “privilege clause” and is discussed further below);
- reserve the right to develop all, some or none of the land subject of the RFP;
- reserve the right to hold negotiations with multiple bidders and to request additional information or further clarification from multiple parties;
- reserve the right to waive any irregularities in the proposal (known as a “discretion clause”);
- reserve the right to accept the proposal, which in the sole opinion of the owner, is deemed “the most advantageous”;
- take no responsibility for the tenderer lacking information or for the accuracy of the information provided in the RFP documents; and
- take no responsibility for any expense incurred by a tenderer in preparing or submitting its proposal.

At the end of the day, the goal of the language in the RFP is to make it clear to both the parties reading the RFP and to the court, if need be, that the process contemplated by the owner bears little resemblance to a formal tender call. If done correctly, the owner will not incur contractual obligations when tenderers make their

⁵⁹ *Ibid.* at para. 41.

⁶⁰ *M.J.B. Enterprises*, *supra* note 5 at para. 38.

⁶¹ *Buttcon*, *supra* note 24 at para. 35.

⁶² *Ibid.*

⁶³ *Ibid.* at para. 34.

submissions to it and will not be liable for any breach of contract if it does not enter into a construction contract at the end of the process.

Special note on privilege clauses

Because *Tercon* affirms that tendering law can apply in situations that amount to a tendering process in substance, even if the owner may have “intended” to undergo an RFP process, courts will look at the facts in each situation and make a determination accordingly on the basis of the specific terms and conditions of the tender call. Thus, unless the procurement documents are unequivocally clear that only an RFP process was intended by both parties, owners realistically face some risk that a court will hold tendering law to apply. To further protect themselves, owners can and should include privilege clauses so that, even if tendering law is found to apply, an owner can argue that it treated all tenderers fairly and complied with the terms of Contract A. Procurement documents (both tenders and RFPs) usually contain privilege clauses, which typically state that the owner does not have to award the contract to the lowest tenderer, or even any tenderer. This gives the owner great flexibility to consider matters beyond just price.

In *M.J.B. Enterprises*, which involved a clear tender situation and not an RFP, the Supreme Court of Canada held that a privilege clause must be interpreted in accordance with the rest of the tender documents. Thus, although the privilege clause in the case did not override an obligation by the owner to accept only a *compliant* bid, it did grant the owner the flexibility to accept a compliant bid other than the lowest bid, allowing for the consideration of other factors besides price. Justice Iacobucci phrased this as taking a more “nuanced” view of costs:

Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. **The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of “cost” than the prices quoted in the tenders...**

The additional discretion not to award a contract is presumably important to cover unforeseen circumstances...[emphasis added]⁶⁴

Allowing an owner to take a more nuanced view of costs is important because the lowest tender will not always necessarily result in the least expensive price or the best contractor, and thus a privilege clause ensures that an owner has the option to consider other factors. Courts suggest that a decision by the owner not to accept the lowest tender in the face of a privilege clause must still be based on objective reasons and not on irrelevant factors,⁶⁵ but it appears that evaluating proposals on the basis of which provides the “best value” to the owner is entirely acceptable.⁶⁶ Conversely, engaging in bid shopping⁶⁷ or making decisions based on undisclosed criteria⁶⁸ are examples where courts have held an owner’s decision to award the ultimate contract was not in good faith.

Practically speaking, an owner clearly has an interest to draft as expansive of a privilege clause as possible to ensure the greatest flexibility possible. Since *M.J.B. Enterprises*, the law has evolved so that carefully worded privilege clauses have even allowed owners the ability to accept *non-compliant* bids, rather than merely higher compliant ones, although non-compliance concepts are not necessarily applicable in RFP situations.⁶⁹ However, such clauses may have the unintended effect of encouraging tenderers, who would normally spend significant resources to prepare thorough and complete tenders, to prepare non-compliant bids, assuming that the owners

⁶⁴ *M.J.B. Enterprises*, *supra* note 5 at paras. 46-47.

⁶⁵ *Sound Contracting Ltd. v. Nanaimo (City)*, 2000 BCCA 312.

⁶⁶ *Ibid.*

⁶⁷ *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land & Air Protection)*, 36 C.L.R. (3d) 85 (B.C. S.C.).

⁶⁸ *J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society*, 4 C.L.R. (3d) 295 (B.C.S.C.).

⁶⁹ *Guysborough*, *supra* note 50 at para. 36.

will negotiate with the tenderers regardless, and knowing that non-compliant tenders may be revoked by tenderers prior to acceptance. As Sandori & Pigott remark, “the owner is exposed to the risk that the proponent which looks so willing today may change its mind tomorrow – when the execution of a contract is at hand – and there is little the owner can do to prevent it”.⁷⁰

Potential for liability in RFPs

Assuming that the owner drafted a proper RFP, and a court determines that no Contract A arises in the particular situation, can a properly drafted RFP still result in liability for the owner? This final section of the paper addresses two potential areas of liability that an owner could face.

Breach of implied duty of good faith

As discussed previously, formal tenders are subject to an implied duty of good faith and fairness, which requires owners to accept only compliant bids and to treat all bidders fairly and equally. The scope of such a duty will be determined by the parties' intentions as set out in the tender documents.⁷¹

In *Envoy Relocation Services Inc. v. Canada (Attorney General)*⁷², the Court considered what it described as a “flawed” procurement process where the Crown re-tendered a contract for relocation services for armed forces and government personnel. The 2004 RFP came about as a result of the cancellation of the 2002 contract. Every bidder for the 2002 contract, except the incumbent contractor, Royal LePage Relocation Services (“RLRS”) was disqualified. The Court concluded that this was a contributing factor to the Crown’s decision to re-tender the bids. In addition, complaints were brought forward by certain losing bidders to the Canadian International Trade Tribunal (“CITT”) who determined that there was some impropriety in the manner in which bids were “scored” and recommended a revaluation be made using an appropriate scoring matrix. The Crown’s initial reaction was to proceed with the recommendation of a re-valuation, but the Crown changed its mind following conflict of interest allegations made by the Plaintiff and made the decision to conduct a full re-tender of the contracts. The Court concluded that the Crown’s decision to re-tender was a valid one finding that the 2002 tender was not conducted fairly, that there was insufficient time to properly conduct the process and that the non-incumbent parties suffered as a result of the Crown’s tardiness. However, the Court found that the Crown breached its duty of fairness in its handling of the new tender and noted that a duty of fair and equal treatment of bidders includes an obligation to ensure that bidders are not provided any unfair advantage or disadvantage by undisclosed preferences in tender documents or instructions to bidders during the bidding period.⁷³ The Court further noted that the implied duties include the duties to treat all bidders fairly and equally; to disclose relevant, accurate information; to avoid conflict of interest or reasonable apprehension of bias; to evaluate bids using disclosed criteria; to reject non-compliant bids; and to award Contract B on the terms set out in the tender documents.⁷⁴ The Court further noted that the incumbent contractor, RLRS commenced litigation against the Crown to claim for loss of profits from the cancellation of the 2002 contract. In this regard the Crown accepted responsibility for the cancellation, resulting in it being in an actual conflict of interest with the non-incumbent bidders. In addition, the Crown amended the selection criteria in response to complaints made by RLRS and misled the other bidders as to the reason for changing their method of selection to increase the weight of technical merit to three times that of price. The Court determined that the amendment of the method of selection was intended by the Crown to favour RLRS and was done in bad faith. In summary, the Court found that the Crown had acted intentionally to unfairly favour RLRS by repeating the 2002 Property Management Services provisions in the 2004 RFP and by modifying the selection formula to play to RLRS’ strengths. These findings had consequences in determining that RLRS’ bid was non-compliant and in declaring a breach of the Crown’s implied contractual duty of fair and equal treatment of tendering parties and awarded the Plaintiff damages of \$29,166,507.

⁷⁰ *Supra* note 11 at 293.

⁷¹ *Martel Building*, *supra* note 7 at para. 89.

⁷² *Envoy Relocation Services Inc. v. Canada (Attorney General)* (2013) ONSC 2034, (CanLII)

⁷³ *Ibid* at para. 1233

⁷⁴ *Ibid*, at para. 1246

In addition, we have seen that courts have not been consistent in finding that a duty of fairness arises in the RFP context. While *Powder Mountains* found that no duty arises, *Mellco* suggested a freestanding duty of fairness lies on a continuum. Until the judiciary brings greater clarity to the issue, there exists at least the potential for a court to find that an owner had a duty of fairness to the tenderers in its RFP. Thus, the more an RFP distances itself from a preliminary tender contract in its wording and in the obligations it imposes, the less of an implied duty of good faith it imposes on the *Mellco* continuum, since the duty is directly informed by the parties' contractual intentions. The duty of fairness is an implied term of the contract between the parties, so in the absence of such a contract it is difficult to see the judicial basis for imposing the duty.⁷⁵ In the cases where a duty of good faith has been held to exist, the duty generally only extended to ensuring that all tenderers were treated seriously, fairly and equally and ensuring that the bids were not evaluated based on unknown criteria, and even that latter obligation was construed liberally in the face of the parties' intention not to use a formal tendering process.⁷⁶ The implied duty of fairness varies based on the relationship that the parties structure for themselves in the RFP documents, which gives the owner significant control in determining its scope. If the RFP is drafted so as to minimize or eliminate this duty, it should not be a basis for liability, and as of the date of this paper, there have been no decisions where both a duty of fairness has been found to exist in the RFP context *and* where such a duty was breached.

Negligence or negligent misrepresentation

As discussed previously, formal tenders are subject to an implied duty of good faith and fairness, which requires owners to accept only compliant bids and to treat all bidders fairly and equally. The scope of such a duty will be determined by the parties' intentions as set out in the tender documents.⁷⁷

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⁷⁵ *Powder Mountain Resorts*, *supra* note 37 at para. 72.

⁷⁶ *Mellco*, *supra* note 18 at para. 84.

⁷⁷ *Martel Building*, *supra* note 7 at para. 89.

⁷⁸ *Envoy Relocation Services Inc. v. Canada (Attorney General)* (2013) ONSC 2034, (CanLII)

⁷⁹ *Ibid* at para. 1233

⁸⁰ *Ibid*, at para. 1246

selection criteria in response to complaints made by RLRS and misled the other bidders as to the reason for changing their method of selection to increase the weight of technical merit to three times that of price. The Court determined that the amendment of the method of selection was intended by the Crown to favour RLRS and was done in bad faith. In summary, the Court found that the Crown had acted intentionally to unfairly favour RLRS by repeating the 2002 Property Management Services provisions in the 2004 RFP and by modifying the selection formula to play to RLRS' strengths. These findings had consequences in determining that RLRS' bid was non-compliant and in declaring a breach of the Crown's implied contractual duty of fair and equal treatment of tendering parties and awarded the Plaintiff damages of \$29,166,507.

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I have no difficulty in finding that **the relationship between the person who invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person so as to render actionable an innocent but negligent misrepresentation** in the information which he conveys to those whom he intends to act upon it. I am further of the view that, where the information is clearly material and obviously very much in the mind of the party withholding it...the failure to disclose it is a breach of the duty owed [emphasis added].⁸³

Further, in the construction industry, tenderers reasonably expect that "the owner will not, having provided some information, withhold information which could materially affect the prospective tenderers' bids."⁸⁴ The court in *Opron* summed up its position concisely:

The special relationship of proximity existing between an owner and tenderer gives rise to a duty of care. This legal duty is to exercise reasonable care in the preparation and presentation of the tender documents...⁸⁵

The court proceeded to apply these principles of duty and standard of care to the framework for negligent representation adopted in Canada by *The Queen v. Cognos*⁸⁶. In *Cognos*, the Supreme Court of Canada set out five requirements to establish liability for negligent misrepresentation:

⁸¹ *Powder Mountain Resorts*, *supra* note 37 at para. 72.

⁸² *Mellco*, *supra* note 18 at para. 84.

⁸³ *Opron*, *supra* note 73 at para. 553.

⁸⁴ *Ibid.* at para. 620.

⁸⁵ *Ibid.* at para. 696.

⁸⁶ [1993] 1 S.C.R. 87 [*Cognos*].

1. there must be a duty of care based on a special relationship of proximity between the parties;
2. the representation made must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making the representation;
4. the representee must have reasonably relied on the misrepresentation; and
5. the representee must have suffered damages as a consequence of its reliance.

The court in *Opron* found that all five elements were present in that case. The owner owed a duty to tenderers to use reasonable care when preparing bid documents to ensure accuracy, it made an inaccurate or misleading statement in those documents when it gave erroneous information regarding land conditions, and it was negligent since its actions breached the duty of care it owed and did not live up to the applicable standard of care, which allowed tenderers to rely on tender documents as providing proper information. In this case, the plaintiff had relied on the information in the tender when placing its bid, and it suffered damages as a consequence in the form of a much more difficult and expensive project, so the owner was liable in negligent misrepresentation.

Significantly, *Opron* involved a preliminary contract created by a formal tender. This establishment of a contractual relationship created the proximity required for the creation of a duty of care; absent this kind of relationship, that proximity is likely absent. Because an RFP is tantamount to an invitation to negotiate,⁸⁷ the Supreme Court of Canada's comments in *Martel Building* are relevant, where the court addressed the possibility of a duty of care arising between parties to negotiations.

The Supreme Court in *Martel Building* conceded that it *may* be foreseeable that carelessness on the part of one negotiating party may cause an opposing negotiating party economic loss. However, that proximity is not automatically created in a negotiating context "absent some evidence of genuine and mutual contracting intent."⁸⁸ Further, even if the parties do evidence such an intent and a *prima facie* duty of care can be recognized, there are strong policy considerations that militate against the imposition of such a duty at law:

It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, which is incompatible with the activity of negotiating and bargaining [emphasis added].⁸⁹

For that reason, the Supreme Court concluded that, "as a general proposition, no duty of care arises in conducting negotiations...a duty to bargain in good faith has not been recognized to date in Canadian law".⁹⁰

Thus, it appears that absent further evidence of mutual contracting intent in an RFP process, an owner cannot be held liable for negligent misrepresentation, because there is insufficient proximity to found a duty of care in the negotiating context. This is consistent with *Opron*, where the Court found the requisite proximity for a duty of care to exist, since *Opron* involved a formal contractual tendering process, where the structure of the process itself and the wording of the tender documents was sufficient evidence of the contracting intent required for proximity. However, in the case of RFPs, *Martel Building* appears to be the applicable law.

Concluding words – you can't have your cake and eat it too

Although no two cases will be identical, the authorities reviewed in this paper should serve as a useful guide to the prudent owner and its counsel about managing expectations and reducing risk. If an owner is serious about

⁸⁷ *Powder Mountain Resorts*, *supra* note 37 at para. 112.

⁸⁸ *Martel Building*, *supra* note 7 at para. 52.

⁸⁹ *Ibid.* at para. 67.

⁹⁰ *Ibid.* at paras. 72-73.

getting competitive prices on a project the owner wishes to undertake, it may not make business sense to give up the benefits which Contract A provides. However, if the owner's plans are less certain, or the owner wishes to retain a degree of flexibility and wants to reserve the right to make the final decision, the owner may choose to avail himself of an RFP. In either case, the owner should be committed to a specific procurement process, and to draft the documents accordingly.

Any RFP analysis that employs the multiplicity of the *Tercon* factors is bound to be complex. However, motivating the comprehensive principles analyzed in the case law is the judicial endeavor to maintain the integrity of the tendering process in accordance with accepted industry practices. At the end of the day, the court may use the factors to give effect to its larger sense of fairness if the RFP attempts to set out duties while leaving the owner free from any corresponding obligations, or if the court feels that an owner is attempting to get something (i.e. binding obligations on the part of those submitting bids) for nothing (i.e. no procedural protection promised to bidders).

A good rule of thumb that owners who wish to avoid liability should keep in mind is that you can't have your cake and eat it too – the prudent owner cannot reap all of the benefits that Contract A generally provides, such as an irrevocable tender or a security deposit, without incurring any of its obligations. As David Percy notes, “because a contract creates obligations on both sides, owners cannot expect contractors to submit irrevocable tenders and at the same time be free of any duties themselves”.⁹¹ Before preparing the procurement documents, an owner should be absolutely clear in what its goals are under the process, whether the ultimate contract or merely an opportunity to negotiate, and draft the procurement document accordingly.

⁹¹ David Percy, “Continuing Developments in the Law of Tenders” (Paper prepared for the Project Management Conference, Northwest Territories Public Works and Services, November 2005) at 19.

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