

The Law of Tendering - Case Law Update

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INTRODUCTION

The ability of contractors to escape the downside of a bad bid and the liability of owners to disappointed bidders have been tested repeatedly in Canadian courtrooms since the seminal 1981 judgment of the Supreme Court of Canada in *Ron Engineering*¹.

In this discussion paper, I intend to summarize key principles and discuss recent developments in this important case law.

THE SUPREME COURT OF CANADA, PRIVILEGE CLAUSES AND FAIRNESS TO BIDDERS

Ron Engineering established the Contract A - Contract B framework. The submission of a compliant tender or bid is irrevocable during the time period the tender call stipulates that bids are irrevocable. This is the principal term of Contract A and why the Province of Ontario was entitled to keep Ron Engineering's \$150,000 deposit notwithstanding notice was given of the error in Ron Engineering's bid only an hour after bids were opened. Ron Engineering was bound to its promise to keep its bid open for acceptance by the Province and to enter into Contract B notwithstanding, arguably, the lack of consideration for that promise.

One peculiarity of the Contract A – Contract B framework is that, for a stipulated window of time, the owner may be privy to a number of Contract A's with a number of compliant bidders. The owner and the successful bidder are obliged to enter into a construction contract (Contract B) upon acceptance of the winning bid.

Tender documents usually include a form of clause allowing the owner to accept a bid that is not the lowest or not to award the contract to any bidders at all. These are known as "privilege" clauses.

In 1999, the Supreme Court in *MJB Enterprises*² recognized the implied obligation by issuers to accept only compliant tenders. If a bid is not compliant, then there is no Contract A with that bidder. *MJB* offered further guidance in the form of the caution that privilege clauses should not be read in isolation but should be considered a term of Contract A to be read in harmony with the rest of the

¹ *Ron Engineering & Construction Eastern Ltd. v. Ontario* (1981), 119 D.L.R. (3d) 267 (S.C.C.). According to WestlawNext, Canada as of January 16, 2015, *Ron Engineering* has been cited 360 times in the past 33 years as well as 72 times in secondary sources.

² *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1999), 170 D.L.R. 4577 (S.C.C.)