The unsuccessful tenderer – legal rights and remedies

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Major construction contracts are usually preceded by an invitation to tender and a tender offer. In some situations the invitation may amount to nothing more than an invitation to treat. However, the tenderer often makes a major commitment by investing time and resources in providing a tender offer in accordance with the invitation and frequently by paying a tender deposit. The relationship between the invitor issuing the invitation and the tenderers responding to it may be a contractual one with rights for each party and remedies for breach. Invitors frequently attempt to exclude liability for breach. If the tender is unsuccessful the disgruntled tenderer may want to recoup its lost expenditure, or claim damages for loss of a chance to obtain the contract from the invitor or the successful tenderer. Recent cases in Australia and overseas (particularly Canada) have examined the tender situation in some detail and will repay closer examination.

THE PROCESS CONTRACT

Standard contract analysis – offer, acceptance, an intention to enter into contractual relationship and consideration – must be applied to identify whether the invitation to tender, when responded to by a tenderer, gives rise to a contractual relationship.[1] In Australia, this relationship arising from the tender itself is described as a "process contract" to differentiate it from a construction contract which may follow when the invitor accepts one of the tenders. "Process contract" is the terminology used by Finn J in 1997 in *Hughes Aircraft Systems International v Airservices Australia*,[2] to describe the preliminary contract between the organisation inviting tenders and any tenderer which submits a complying tender. Other jurisdictions often refer to the "Contract A – Contract B analysis", where Contract A is the tender process contract and Contract B is the ultimate construction contract. This article will refer to the contract which arises when the tenderer submits a complying tender as the "process contract".

A MERE INVITATION TO TREAT

A process contract will not come into existence where an uncomplicated request seeking, for example, the best price for a stated quantity of product delivered to a particular location on a specified date, is issued to tenderers and responded to by them. In such a case, the invitor is making an offer to consider the response that any tenderer may submit. The tenderers accept the offer by taking the trouble to submit a tender setting out the price at which each would be prepared to supply the product requested. However, the tenderers who respond do so after little investment; they treat the invitation merely as an enquiry about a price or a request for a quotation for services. Neither the invitor nor the responding tenderers ever consider whether the invitor is bound to accept the lowest price, or is legally obliged to treat the tenderers fairly and equally in its dealings. It is difficult to discern that the parties have any intention at this stage to enter into contractual relations. Although the actions of the parties may be similar to those giving rise to a process contract, in the absence of contractual intent on both sides the

[1] For an analysis of the legal implications of the tender process in Australia, see Bell M, "From an Invitation to Treat to an Invitation to Tread … Warily" (2003) 19 BCL 8.

[2] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151; 146 ALR 1.

invitation amounts to nothing more than a classic invitation to treat and the response of the tenderer is a contractual offer capable of acceptance by the invitor.[3]

IS THERE A PROCESS CONTRACT?

Where a major financial commitment is required to respond to the tender invitation, it may be easier to establish that, by submitting a tender, each tenderer intended to enter into a process contract with the invitor. Commonly then the central issue to establish the existence of a process contract between the parties is intention to enter into legal relations. Each of the parties must have that intention for a process contract to arise.[4] The more formal the invitation, the more specific the terms and conditions, the more detailed the requirements relating to the timing, manner and form of any response, and the more expense required to respond to the invitation, then the more likely it will be found that the parties intended to enter into a legally binding process contract. The invitor makes an offer to consider all bids which conform with its tender criteria. The submission of a bid by a tenderer (together in some instances with the payment of a tender deposit) is the acceptance of the invitor's offer. Thereupon both parties have mutual promissory obligations. This contractual analysis has been applied in many countries, including Canada,[5] the United Kingdom,[6] New Zealand[7] and in Australia.[8]

Le Miere J in *Dockpride*[9] referred to the preliminary enquiry to identify whether a process contract existed:

> [109] The existence of a pre-award or process contract in tenders is not automatic. Whether or not a process contract exists depends on the intention of the parties: *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656 at [31]-[44] per Adams J; *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 at [77]-[78]. In an appropriate case a bilateral contract is formed with each tenderer who submits a complying tender. The contents of this bilateral contract depend on the intentions of the parties. The terms, express or implied, of the request for tender will be an important factor in determining the intention of the parties.

This preliminary enquiry itself, in certain circumstances, can be an involved one, where the process contract is implied or inferred from the events. In *Dockpride*, for example, the party to whom the invitation to tender was issued did not submit any tender at all. However, it offered to guarantee the performance of another company, Dockpride, which did respond to the invitation to tender although not invited to do so. As explained by the trial judge:

> [120] The Invitation to Tender was issued to Westpoint. Westpoint did not submit a tender. No process contract was made between the Authority and Westpoint. Westpoint guaranteed Dockpride's performance of the contract, if it was awarded to Dockpride but that does not give rise to a contract between Westpoint or [and?] the Authority of the sort pleaded.
>
> [121] No Invitation to Tender was issued to Dockpride. Therefore, the submission by Dockpride of its tender did not constitute the acceptance of an offer by the Authority constituted by its Invitation to

[3] See *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478-479 (Gallen J), adopted by Barrett J in *St George Football Club Inc v Soccer NSW Ltd* [2005] NSWSC 1288 and upheld on appeal in *St George Football Club Inc v Soccer NSW Ltd* [2005] NSWCA 481 at [59] (Mason P).

[4] *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195; *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619; *St George Football Club Inc v Soccer NSW Ltd* [2005] NSWCA 481 at [46] (Mason P).

[5] *R v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 SCR 111; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69.

[6] For example, in *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207 (where Lord Diplock described the process contract as a "unilateral contract"); *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.

[7] *Shivas v BTR Nylex Holdings Ltd NZ Ltd* [1977] 1 NZLR 318 at 322 (Panckhurst J).

[8] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151 at 180-187; 146 ALR 1. See also *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211; *Wenzel v Australian Stock Exchange Ltd* (2002) 125 FCR 570; *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at 517-518 (Allsop J).

[9] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

> Tender. However, the subsequent conduct of the Authority may be construed as an acceptance by the Authority of an offer by Dockpride. Alternatively, a contract may be made without the formalities of offer and acceptance. A contract may be inferred from the acts and conduct of parties: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 per McHugh JA.
>
> [122] Dockpride and the Authority conducted themselves on the basis that there was a contract between Dockpride and the Authority. Dockpride submitted its tender together with a bank cheque in favour of the Authority's agent for the tender fee of $121,880, being one per cent of the tendered purchase price, in accordance with the terms of the Authority's Invitation to Tender. The Authority accepted, in the sense of receiving, Dockpride's tender. The Authority accepted and banked the bank cheque tendered by Dockpride. The Authority proceeded to consider Dockpride's tender and to hold meetings and communicate with Dockpride, or its representatives, in relation to Dockpride's tender.

The entry into the process contract was inferred in *Dockpride*:

> [127] It is to be inferred from the terms of the tender documents and the conduct of the Authority and Dockpride that they intended to enter into a process or preliminary contract. The tender form contains an offer by Dockpride to purchase the lots subject to the Conditions of Sale for the purchase price of $12,188,000. Dockpride agreed to pay a deposit of $1,096,920 within five business days of the Contract Date, that is the date on which the Authority executes the form of tender so as to accept the tender. Furthermore, the conduct of the Authority, particularly the letter of its agent, Chesterton, of 27 February 1998 seeking the agreement of Dockpride for an extension of the Acceptance Date, is an acknowledgement that the parties were in a contractual relationship.

The process contract may even be implied in circumstances where there are no express tender terms identified and no bid deposit payable. Such implication has been relied upon to identify and enforce a process contract between a contractor and a subcontractor in circumstances where the contractor includes the substance of the subcontractor's tender to it in its tender to the owner/invitor.[10]

In *Dynasty Roofing*,[11] the contractor (Marathon) sought prices and performance information in relation to certain roofing works comprising part of a tender it was compiling to respond to a tender invitation. It received tenders from two prospective roofing subcontractors, one for $198,000 from Dynasty Roofing and the other for $208,840 from Smith Peat. It submitted its tender to the invitor including within its figures the sum of $195,000 for the roofing element of the tender works. The Marathon tender was successful, whereupon Marathon sought to lock in a roofing subcontract at $195,000 by embarking on "bid shopping".[12] Dynasty Roofing refused to adjust its tender figure but, when approached, Smith Peat agreed to do so. Marathon then entered into the roofing subcontract with Smith Peat. Dynasty Roofing sued successfully for breach of an implied process contract and recovered damages for lost profit. The implied terms of the process contract in such situation were that the subcontractor allowed its tender to remain open and capable of acceptance for the duration of the head contractor's tender to the invitor or alternatively for a reasonable time, and correspondingly if the tender of the contractor to the invitor were successful, the contractor was obliged to proceed to enter into a construction subcontract with the lowest subtenderer[13] on its terms provided it had no reasonable grounds to reject that bid.[14]

[10] See *Northern Construction Co Ltd v Gloge Heating & Plumbing Ltd* (1986) 27 DLR (4th) 264.

[11] *Dynasty Roofing (Windsor) Ltd v Marathon Construction Services (1991) Inc* (2003) 27 CLR (3d) 5.

[12] "Bid shopping" was described by Ballance J in *Stanco Projects Ltd v British Columbia (Ministry of Water, Land & Air Protection)* (2007) 36 CLR (3d) 85 at [100]; 242 DLR (4th) 720 as "conduct 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."

[13] The conclusion in *Derrick Concrete Cutting & Coring Ltd v Central Oilfield Service Ltd* (1995) 25 CLR (2d) 213; 3 WWR 765 is at odds with this conclusion. However, the judge found that, although the name of the tendering subcontractor and its dollar figures for the work in question were used by the defendant as part of its tender to an invitor, it intended to undertake the work itself using a technique rejected by the tendering subcontractor. On the facts it was held that no process contract came into existence.

[14] *Dynasty Roofing (Windsor) Ltd v Marathon Construction Services (1991) Inc* (2003) 27 CLR (3d) 5 at [6] (Quinn J).

The existence of a process contract is merely the beginning of the legal enquiry. The terms of the process contract must then be determined. The terms may be extensive and complex. In *Dockpride*, the pleaded terms of the process contract were claimed to be:

> 14.1 the Authority would only consider with a view to accepting, and accept, a tender containing plans for a design for the redevelopment, which complied with the [the Rokeby Walk Guideline and the anchor tenancy entrance requirement].
>
> 14.1A the Authority would act fairly at all times in its dealings with each of the persons or companies or groups which it had invited to tender (collectively the Invitees) prior to selecting a tender for acceptance;
>
> 14.1B the Authority would not communicate to any of the Invitees material information as to any matters which a tender should or could address or omit unless it communicated that information to all the other Invitees;
>
> 14.1C the Authority would deal with each of the Invitees fairly and in good faith;
>
> 14.1D the Authority would accept for consideration a tender submitted by a company associated with an Invitee provided that the form of guarantee required in the Tender Document was also given by the Invitee concerned;
>
> 14.1E save as provided in 14.1B the Authority would not accept a tender which did not comply with a mandatory and/or material requirement in the Design Guidelines including, inter alia, the Rokeby Walk Guideline and the anchor tenancy entrance requirement.
>
> 14.1F the Authority and each respective Invitee would do all things necessary or reasonably necessary on its part to be done to give the other the benefit of the tender process contract;
>
> 14.2 the Authority would act fairly in considering competing tenders and, if the Authority decided (inter alia) that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline and the anchor tenancy entrance requirement it would inform each tenderer (including Dockpride) of that fact, and give each tenderer the opportunity to modify its design and plans comprised, or to be comprised, in its tender;
>
> 14.3 the Authority would accept the tender which –
>
> 14.3.1 contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement;
>
> 14.3.2 offered the highest price;
>
> 14.4 the Authority would not accept a tender which did not offer the highest price in preference to a tender which –
>
> 14.4.1 contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement.
>
> 14.4.2 offered a higher price.
>
> 14.5 the Authority would not, merely on the basis of a subjective preference for another design, fail to accept a tender which offered the highest price and which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement;
>
> 14.6 the Authority would assess competing tenders by reference to the criteria contained in the Design Guidelines in each of the Rokeby Walk Guideline and the anchor tenancy entrance requirement.[15]

The contractual obligations on the party issuing the tender invitation (if a process contract did come into existence) commonly include some or all of the following obligations to:

1. observe its own tender rules;[16]
2. reject any purported tender from a non-qualified party;[17]
3. reject any non-conforming tender;[18]
4. consider only conforming tenders
5. refuse to accept any tender lodged after the specified closing time for submission;
6. accept for consideration any tender lodged within the due time for submission;[19]

[15] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [98].

[16] *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85.

[17] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69.

[18] *Kinetic Construction Ltd v Comox-Strathcona (Regional District)* (2004) 245 DLR (4th) 262.

[19] *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.

7. accept the lowest tender (where the invitation seeks the lowest price for performance);[20]
8. accept the highest tender (where the invitation seeks the highest price for performance);[21]

Contractual obligations in the process contract on tenderers may include the obligation:

1. not to withdraw the tender within a specified time frame or (if no time is specified) within a reasonable time;
2. not to withdraw the tender even if after submission it finds that the tender is premised on an erroneous calculation or mistake.[22]

PRIVILEGE CLAUSES

A "privilege clause" is the name given to terms of the process contract intended to provide some flexibility for the invitor in its assessment and acceptance of tenders. Tender invitations frequently contain an express clause purporting to give the invitor the privilege of accepting a bid other than the lowest (or highest) tender when considered in purely financial terms and/or the right to refuse to accept any tender at all.

The existence of such a clause has been held to permit the invitor to consider non-financial issues, such as its knowledge of the tenderer's propensity to engage in litigation or to submit claims for contract variations in dubious circumstances. For example, in *Continental Steel*,[23] the assessor of the tenders took into account his prior experience of the tenderer, Continental Steel, in its dealings with Mierau, the general contractor, which he considered might lead to disputes and delays in performance. He also made enquiries of other like construction contractors of their dealings with Continental Steel and took those responses into account. He then evaluated the respective bids and rejected the Continental tender which, although the lowest, he regarded to be of worse value to Mierau than a competing but higher tender (in dollar terms) of a competitor. The court held that no breach of the process contract had been committed by Mierau.

Such privilege clauses, although they may permit the invitor to conclude, without fear of litigation, after consideration of all of the tenders, that none are sufficiently competitive to permit the project to proceed, do not protect the invitor if it ignores its process contract obligations. Thus a privilege clause will not protect an invitor who accepts a tender from a non-qualified tenderer from action brought by a disappointed tenderer that had qualified.[24] In *MJB Enterprises Ltd*,[25] the second lowest tenderer successfully claimed damages for lost profit on the construction contract which had been awarded to a non-qualified tenderer.

Further, privilege clauses are not to be construed as showing that the parties to the process contract had no intention to create legal relations. Such a proposition was rejected by Le Miere J in *Dockpride*:

> [129] The defendant submits that cl 6 of the Conditions of Tender is inconsistent with a process contract being intended. Clause 6 provides that the Authority is not obliged to accept the highest or any tender or precluded from accepting a tender which is not in strict conformity with the tender document.
>
> [130] Clauses of the kind being discussed are referred to by N C Seddon in *Government Contracts*, 3rd ed, as privilege or disclaimer clauses. Seddon writes (at p 301):
>
> > There has been a tendency to read such clauses, which provide that the lowest or any tenderer will not necessarily be accepted, against the government party (contra proferentem) so that their

[20] *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619; *Continental Steel Ltd v Mierau Contractors Ltd* (2007) 283 DLR (4th) 422.

[21] *Canamerican Auto Lease & Rental Ltd v Canada (Minister of Transport)* (1987) 37 DLR (4th) 591.

[22] *R v Ron Engineering & Construction (Eastern) Ltd* (1981) 1 SCR 111 at 123-124; *Toronto Transit Commission v Gottardo Construction Ltd* (2005) 257 DLR (4th) 539.

[23] *Continental Steel Ltd v Mierau Contractors Ltd* (2007) 283 DLR (4th) 422; see also *Sound Contracting Ltd v Nanaimo (City)* (1997) 42 MPLR (2d) 202; 42 BCLR (3d) 324.

[24] *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619.

[25] *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619.

> protective effect is minimised … The clause does not provide protection if a contract is awarded in breach of one of the express or implied obligations of the pre-award contract (see *M J B Enterprises Ltd v Defence Construction* (1951) Ltd [1999] 1 SCR 619; *Martel Building Ltd v Canada* [2000] 2 SCR 860 at [89].

[131] At 278 Seddon writes:

> Nor does the inclusion of a clause that states that the government is not obliged to award the contract to the lowest or any tenderer indicate a lack of intention to contract. There are plenty of cases that have held that this clause does not in any way excuse a breach of the process contract.

THE INVITOR'S GOOD FAITH OBLIGATION

It has been generally accepted that there is also a duty on the invitor to act fairly or in good faith towards the prospective tenderers.[26] This duty to act fairly to all tenderers will exist notwithstanding a privilege clause.[27] The essential element is that the actions of the invitor must not give any one tenderer an unfair advantage over the others. In the absence of an implied obligation to treat all bidders fairly and equally:

> [T]enderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.[28]

However, the duty to act fairly and treat all tenderers equally does not amount to an obligation on the invitor to act judicially.[29]

Finn J in *Hughes* found that process contracts generally, as a matter of law, and the relationship of the parties in the particular contract, in fact gave rise to an implied term that the Civil Aviation Authority (CAA) would conduct its tender evaluation fairly and that the CAA would deal fairly with a tenderer in the performance of its contract.[30]

> If the purpose of a tender process contract is to be accomplished, if contractor-tenderers are to be given an effective opportunity to enjoy the fruits of the bid and not to have that opportunity destroyed by the unfair dealing of the other party to the contract, a duty such as I have described would appear to me to be a presupposition of such a contract. In the tender process context such a duty seems little more than an appropriate adaptation of the duty to cooperate recognised in *Butt v McDonald* (1896) 7 QLJ 68 at 70-1.[31]

Finn J considered that the implied term was reinforced in *Hughes* by the fact that the CAA was a public body, with the various duties, obligations and responsibilities that such a body possessed.[32]

In *Dockpride*, Le Miere J found that there was such an implied duty in the process contract. It is instructive to consider his Honour's analysis in detail:

> **Implied term to act fairly**
>
> [151] The plaintiffs further submit that there should be implied in the process contract a term that the Authority would act fairly at all times in its dealings with each of the persons or companies or groups which it had invited to tender ("the invitees") prior to selecting a tender for acceptance. The plaintiffs also plead an implied term that the Authority would deal with each of the invitees fairly and in good faith.

[26] See *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 475-80 (Gallen J). This decision was referred to by Byrne J in *Willow Grange Pty Ltd v Yarra City Council* (unreported, VSC, 1 December 1997) in support of the conclusion that there was a triable issue as to the existence of an obligation on the invitor to act fairly to each tenderer.

[27] *Martel Building Ltd v Canada* (2000) 193 DLR (4th) 1; *Stanco Projects Ltd v British Columbia* (2006) 266 DLR (4th) 20; *Continental Steel Ltd v Mierau Contractors Ltd* (2007) 283 DLR (4th) 422.

[28] *Martel Building Ltd v Canada* (2000) 193 DLR (4th) 1 at [88] (Iacobucci and Major JJ).

[29] *Pratt Contractors v Transit New Zealand* [2005] 2 NZLR 433 at [47] (Lord Hoffman).

[30] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151 at 193, 260; 146 ALR 1.

[31] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151 at 194; 146 ALR 1.

[32] See *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151 at 195-196, 260; 146 ALR 1.

[152] Good faith has been recognised as implied in a contract in a number of cases in Australia: eg *Hughes* (supra); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.

[153] A duty to act in good faith in the performance of a contract is an emerging doctrine in Australian contract law: see N C Seddon and M P Ellinghous *Cheshire & Fifoot's Law of Contract*, 8th Australian ed, 2002 [10.43-10.46]. Seddon argues that not only can this duty apply to the performance of the pre-award contract but that the tendering procedure to be followed in awarding a government contract is a prime candidate for the imposition of such a duty. Seddon says that the milieu of tendering, with its attendant emphasis on conducting a fair competition and, in public contracts, the need to ensure the best use of public money, militates in favour of finding a duty to act in good faith: Seddon *Government Contracts*, at 7.21.

[154] In *Hughes* (supra), Finn J found that it was an implied term of the process contract that the CAA would conduct its evaluation of the tenders fairly and in a manner that would ensure equal opportunity to the two tenderers. Finn J also found that, as a matter of law, a term would be implied in any event that obliged the CAA to deal fairly with the tenderers in its performance of the process contract.

[155] In *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, the parties accepted that, in general terms, a duty to act fairly and in good faith existed in that case. Their Lordships said that the issue in that case was as to the specific content of that duty in relation to the particular acts required to be performed by Transit in evaluating the tenders. Their Lordships stated their agreement with Finn J in *Hughes* (supra) where his Honour had said that the implied term "does not as such impose on [the employer] under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action". Their Lordships then stated at [47]:

> … it is nevertheless necessary to identify exactly what standard of conduct was required of the TET in making its assessment. In their Lordships opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different … The obligation of good faith and fair dealing also did not mean that TET had to act judicially. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no doubt have been bad faith for a member of the TET to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all.

[156] I accept that it was an implied term of the process contract between the Authority and Dockpride that the Authority would deal with Dockpride fairly and in good faith.

In the opinion of Le Miere J, the existence of an implied term of good faith could not be considered separately from the content of such a term. He concluded that the process contract imposed a duty on the invitor to act in good faith:

> at least to the extent that the Authority is precluded from acting subjectively in bad faith and must treat all tenderers fairly: see eg *Chinook Aggregates Ltd v Abbotsford (Municipal District)* (1989) 40 BCLR (2D) 345.[33]

In *Chinook*, notwithstanding a clause stating that the invitor had no obligation to accept "the lowest or any tender", the Council had adopted a policy favouring local tenderers but had not made the policy public. Its decision to accept a local tenderer which was within 10% of the lowest tender was in breach of the process contract as the policy favouring local tenderers was not disclosed to those tenderers from more distant places. Had the criteria upon which the assessment was to be made been disclosed to all tenderers, they would have been treated equally so far as the assessment was concerned, and could not have successfully complained of any breach of the process contract.[34]

[33] Upholding *Chinook Aggregates Ltd v Abbotsford (Municipal District)* (1987) 28 CLR 290.

[34] *Continental Steel Ltd v Mierau Contractors Ltd* (2007) 283 DLR (4th) 422 at [25]-[26] (Quinn J).

In accordance with the principles governing implied terms,[35] there cannot be implied into the process contract a term which is directly contradicted by an express term. For example, the plaintiff in *Dockpride* pleaded an implied term that the invitor could only consider a tender which had observed all of the standards, principles, requirements or features of the design guidelines. However, such a term was contrary to a clause in the conditions of tender which expressly provided that the authority is not precluded from accepting a tender which "is not in strict conformity with this Document".[36]

The usual canons of contract construction will apply to process contracts as to other contracts. In *Canamerican*,[37] express terms of the process contract were in conflict. The published tender "Policy" issued by the invitor stated that the tenders (for car rental concessions at various airports) "will be awarded" to the highest tenderers. However, the specifications stated that the invitor "will not necessarily accept the highest offer, nor will it be bound to accept any tender submitted". At briefings with prospective tenderers, officers of the invitor stated that the highest tenderer for each location would be the winner. The process contract was construed so as to negate any claimed entitlement of the invitor to choose between tenderers in a completely arbitrary manner.[38] A similar conflict was discussed by Iacobucci J (delivering the judgment of the court) in *MJB Enterprises Ltd*[39] where the privilege clause in its context was construed not to permit acceptance of a non-conforming tender.

In *Gregory*,[40] however, where there were no positive statements in the process contract nor were any oral statements made in meetings with prospective tenderers that the highest tender would be accepted, the New Zealand High Court rejected the submission that the privilege clause must be read down to give contractual effect to the process contract.

It is not the obligation of the invitor under the evaluation of tenders submitted pursuant to process contracts to investigate the likelihood of any tenderer in fact having the ability to perform the obligations required of it if the construction contract were awarded to it. Nor is the invitor liable to an unsuccessful tenderer if, unbeknown to the invitor, the tenderer to whom the construction contract was to be awarded did not intend to perform that contract in strict conformity with the requirements contained in the invitation to tender.[41]

SUBSTANTIAL COMPLIANCE

In *Dockpride*, the plaintiffs submitted, in effect, that cl 6, upon its proper construction, permitted the authority to accept a tender not in strict conformity with the tender document but only if the tender was in substantial conformity with the tender document. This submission was described by the judge as "a flexible approach that allows consideration of tenders which are substantially compliant".[42] He adopted the approach of Estey J in the Canadian case of *Ron Engineering*[43] where a simple omission to fill in a blank at a particular point in the tender, where the information as to the intended content of the blank had been provided elsewhere, would not impede the entry into Contract B nor give rise to a claim under Contract A by the unsuccessful tenderer. Whereas, at the other extreme, "a bid might be so lacking as not to conform with the call for tenders and therefore would not amount in law to a tender and would not be capable of creating contract A (the preliminary or process contract)".[44] In

[35] As to which see *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.

[36] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [144].

[37] *Canamerican Auto Lease & Rental Ltd v Canada (Minister of Transport)* (1987) 37 DLR (4th) 591.

[38] *Canamerican Auto Lease & Rental Ltd v Canada (Minister of Transport)* (1987) 37 DLR (4th) 591 at 599-600.

[39] *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619 at [43-48].

[40] *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 at 220-221.

[41] *Double N Earthmovers v Edmonton* (2007) 275 DLR (4th) 577.

[42] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [147]. Substantial compliance was accepted in *Foundation Building West Inc v City of Vancouver* (1995) 22 CLR (2d) 94.

[43] *R v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 SCR 111 at 278; 119 DLR (3d) 267.

[44] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [147].

Canada, the weight of authority also favours the substantial compliance test,[45] rather than requiring strict compliance.[46] Following *MJB Enterprises Ltd*, substantial rather than strict compliance has been upheld in British Columbia,[47] Saskatchewan,[48] Newfoundland,[49] Nova Scotia[50] and Manitoba.[51]

The issue of what constitutes "substantial compliance" was considered in the British Columbia Court of Appeal in *Graham Industrial Services Ltd v Greater Vancouver Water District*.[52] The Court of Appeal agreed with the trial judge that the determination of whether a bid was non-compliant required an objective analysis. The court held that the "discretion clause" was simply a recognition that "the test for determining whether a tender is valid is one of substantial compliance rather than strict compliance".[53] The court continued:

> … in the context of the present case, 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.[54]

In *Dockpride*, Le Miere J held that:

> The process contract does not include an implied term that the Authority would only consider or accept a tender which complied with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. However, the process contract between Dockpride and the Authority includes an implied term that the Authority would not accept a bid that was unresponsive to the Design Guidelines. The implication of the latter but not the former term is consistent with the principles set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 and *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410. The implication of the latter but not the former term is not inconsistent with cl 6 of the Conditions of Tender.[55]

EXCLUSION OF LIABILITY CLAUSES

The Canadian Supreme Court recently had to consider the effect of a process contract with an exclusion of liability clause. In *Tercon*,[56] the exclusion clause stated:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever as a result of participating in this RFP and by submitting a proposal each Proponent shall be deemed to have agreed that it has no claim.

At first instance[57] the trial judge found that the invitor had breached the express provisions of the process contract by accepting a bid from a party not eligible to tender and that the invitor had breached its fairness obligation by acting "egregiously". In construing the exclusion clause, the judge

[45] The concept of "substantial compliance" was explained in the dissenting judgment of Charron J (on behalf of herself, the Chief Justice, Bastarache and Binnie JJ) in *Double N Earthmovers v Edmonton* (2007) 275 DLR (4th) 577 at [110] in these terms: "Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with: *Silex Restorations Ltd v Strata Plan VR 2096* (2004), 35 BCLR (4th) 387, 2004 BCCA 376, at paras 24 and 29; *Graham Industrial Services Ltd v Greater Vancouver Water District* (2004), 25 BCLR (4th) 214, 2004 BCCA 5, at para 15. A bid is substantially compliant if any departures from the tender call concern mere irregularities."

[46] A detailed discussion is to be found in Goodfellow WD, *Update on Tendering* [2004] ICLR 102 at 119-121.

[47] *J Oviatt Contracting Ltd v Kitimat General Hospital Society* (2000) 4 CLR (3d) 295.

[48] *Derby Holdings Ltd v Wright Construction Western Inc* (2002) 17 CLR (3d) 64.

[49] *Puddister Shipping Ltd v Newfoundland* [2000] NJ No 193.

[50] *Steelmac Ltd v Nova Scotia (AG)* (2007) 255 NSR (2d) 363 at [88]-[90].

[51] *Mellco Developments Ltd v Portage la Prairie (City)* (2002) 180 Man R (2d) 321.

[52] *Graham Industrial Services Ltd v Greater Vancouver Water District* (2004) 25 BCLR (4th) 214. See also *Silex Restorations Ltd v Strata Plan VR 2096* (2004) 35 BCLR (4th) 387.

[53] *Graham Industrial Services Ltd v Greater Vancouver Water District* (2004) 25 BCLR (4th) 214 at [30].

[54] *Graham Industrial Services Ltd v Greater Vancouver Water District* (2004) 25 BCLR (4th) 214 at [34].

[55] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [149].

[56] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69.

[57] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* (2006) 53 BCLR (4th) 138.

held that the clause was ineffective, it not being within the contemplation of the parties that it would be used to bar a remedy in damages which had arisen after the invitor, British Columbia, had dealt unfairly with an ineligible party. The British Columbia Court of Appeal reversed the trial judge, holding that the clear and unambiguous exclusion clause operated to bar the claim.[58] The Canadian Supreme Court clearly agonised over the appeal. Eventually, after reserving the case for almost a year, by a bare majority (5:4) the Supreme Court restored the original decision, holding that the exclusion clause did *not* exclude the liability of the invitor to the claim brought by the unsuccessful tenderer (Proponent) after a tender was accepted from an ineligible tenderer to which the construction contract (Contract B) was ultimately awarded. "Participating in this RFP", so the Supreme Court determined, was to be strictly construed as meaning "participating in a contest among those Proponents eligible to participate". In so holding, the court construed the exclusion clause in harmony with the other documents making up the process contract and consistently with the construction of privilege clauses in decisions such as *MJB Enterprises Ltd*.

REMEDIES

The remedies available to an unsuccessful tenderer which can establish a breach of the process contract may be wide-ranging. They may include damages for:

(a) breach of express or implied term of the process contract;
(b) breach of the *Trade Practices Act 1974* (Cth) or relevant Fair Trading Act;
(c) negligence;
(d) misrepresentation; or
(e) deceit.

Further, if the construction contract has not yet been awarded, the disappointed tenderer might claim relief under the relevant consumer protection legislation or in equity to prevent that contract being awarded to another tenderer and to require the invitor to award it to the plaintiff.

It may, of course, be difficult to establish a breach of a tortious duty when the parties have set out in detail the terms of the process contract to regulate their relationship as invitor and tenderer.[59] In *Design Services v Canada*,[60] the Canadian Supreme Court refused to recognise the existence of any tortious duty between an invitor and a subcontractor of an unsuccessful tenderer. In that case, the tenderer had sued the invitor for breach of the process contract and its subcontractors (having no contractual claims) had joined the proceedings claiming breach of tortious obligations to each of them owed by the invitor. It had been open to the tenderer to have tendered as a joint venture with its subcontractors but it had not taken that course. The tenderer settled its claim with the invitor but the subcontractors pursued their actions. The Supreme Court would not extend the boundaries of negligence to encompass this category of claimant. This is consistent with the likely approach of Australian court after *Woolcock*.[61]

The existence of a process contract will bind both parties to it. Thus, when, after submission of a tender together with a tender deposit of $150,000 pursuant to a tender invitation, Ron Engineering discovered a mistake in its submission and sought to withdraw or amend it, the Canadian Supreme Court held that the invitor was entitled to hold Ron Engineering to its tender and retain the deposit when the tender was rejected in favour of a tender from another party.[62] A like conclusion, namely the inability of the tenderer to withdraw a tender based upon a mistaken calculation, was reached in *Toronto Transit Commission v Gottardo Construction Ltd*.[63]

[58] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* (2007) 73 BCLR (4th) 201.

[59] See *Martel Building Ltd v Canada* (2000) 193 DLR (4th).

[60] *Design Services Ltd v Canada* [2008] 1 SCR 737.

[61] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

[62] *R v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 SCR 111; 119 DLR (3d) 267.

[63] *Toronto Transit Commission v Gottardo Construction Ltd* (2005) 257 DLR (4th) 539.

DAMAGES

The formulation of the damages claim will necessarily depend upon the cause of action upon which the unsuccessful tenderer relies. Damages in contract permit recovery on the basis of well-established principles found in *Hadley v Baxendale*.[64] The unsuccessful tenderer establishing a breach of the process contract will be entitled to its costs of preparing the tender and the expectation loss of (the chance of obtaining) profit had the contract been awarded to it[65] or such lost profit discounted by the profit earned on other work on which the employees were otherwise engaged.[66]

The appropriate methodology of calculating damages for breach of the process contract is discussed in *Maritime Excavators (1994) Ltd v Nova Scotia (AG)*.[67] The plaintiff must establish that it suffered damages – as a result of the breach of the process contract – which are not too remote. The loss of profits and offset of company overheads anticipated by reason of the award of the lost construction contract may be discounted by the risks of the invitor properly not awarding the contract to the plaintiff. Further the invitor may seek to establish a failure by the plaintiff to mitigate its loss by securing other work.

If the action is brought in tort, and the court holds that a duty is established, the damages for breach would be required to be established on the basis of foreseeable financial loss caused by the misleading representation. The better course in such circumstances in Australia might well be to endeavour to frame the action under the *Trade Practices Act 1974* (Cth) (or State equivalents) where the courts have more flexibility to frame the remedy to properly compensate the wronged party.

CONCLUSION

Tenderers preparing expensive tenders should look carefully at the conduct of the invitor if they are unsuccessful. They may have extensive legal rights notwithstanding the existence of privilege clauses or exclusion of liability clauses if their tender has been improperly rejected.

[64] *Hadley v Baxendale* (1854) 9 Exch 341.

[65] *MJB Enterprises Ltd v Defence Construction [1951] Ltd* [1999] 1 SCR 619.

[66] *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85 at [49], [101]-[105] (Sir Liam McCollum J). McCollum J, on the facts, rejected the proposition that there was any probability assessment required to recognise the chance that the Plaintiff might not have been awarded the substantive contract (Contract B) had the invitor played by the rules (at [102]-[103]).

[67] *Maritime Excavators (1994) Ltd v Nova Scotia (AG)* (2000) 2 CLR (3d) 84.