



Side-stepping procurement traps

Since the 1981 decision of the Supreme Court of Canada in *R. (Ont.) v. Ron Engineering*, the law of tendering has developed into a legal minefield. Although the public sector is subject to layers of laws, regulations, trade agreements, bylaws, and policies affecting procurement, such as the Agreement on Internal Trade and Ontario's new broader public-sector procurement directive, the private sector is not free of legal responsibilities. On the contrary, the common law principles of tendering law apply equally to private-sector owners, and the rules create traps for the unwary. In this quiz, Tom has taken over the position of purchasing manager of Shiny Minerals Corp. and has to quickly get up to speed on procurement law principles. If you were Tom, how would you do?

- 1** Shiny Minerals is planning to develop a mine site and construct a processing facility. Tom decides to run a competitive procurement and ask interested contractors to provide a firm price, schedule, and bid security. Once he has received responses, he intends to sit down with the best three responses and negotiate with each to arrive at the best deal. Can he take this approach?

 - a) Not a problem.
 - b) Could be a problem.
 - c) Definitely a problem.

- 2** Goldbuild Contracting, one of the bidders, realizes that a portion of the scope of work for the project has been overlooked and Goldbuild's overall price is mistakenly too low, but Tom cannot tell there is a pricing error. What must Goldbuild do?

 - a) Can't do anything. Goldbuild is stuck with the price.
 - b) Write to Tom describing the error and withdraw the bid before Tom accepts it.
 - c) When presented with the contract for signature, simply refuse to sign it.
 - d) Try and find a flaw in the bid submission and point it out to Tom.

- 3** In an effort to prevent Goldbuild and other bidders from getting off the hook through flaws or problems with their respective bids and to allow Tom to accept any bid submitted, Tom adds a "discretion clause" to the bid documents that allows him to waive errors and omissions in any bid received. Tom can use this clause to accept Goldbuild's non-compliant bid.

 - a) True
 - b) False

- 4** Tom asks bidders to provide bid prices in both words and numbers. Diggum Engineering submits a bid but the bid price in words does not match the bid price written in numbers. Both prices are lower than any of the other bid prices received. What should Tom do?

 - a) Pick the lower price and award the contract.
 - b) Pick the higher of the two prices and award the contract.
 - c) Reject Diggum's bid.
 - d) Write to Diggum and ask Diggum to clarify which is the intended price.

- 5** To protect Shiny Minerals from lawsuits arising from tenders, Tom adds an "exclusion of liability" clause to the instructions to bidders. It states Shiny Minerals is free of any liability associated with the tender process. Shiny Minerals gets sued by Rich Contracting, the second-lowest bidder, for having chosen Diggum's non-compliant bid. Can Tom successfully defend the claim?

 - a) No. The courts will not enforce exclusion clauses.
 - b) Yes. The courts always enforce exclusion clauses.
 - c) Who knows?



1 (B) Tom’s obligations are determined in large part by the proper characterization of his procurement. Since the Ron Engineering case, the law of tender in Canada has been subject to the “Contract A/Contract B” framework, where “Contract A” refers to the mutual obligations owed between owners and bidders during the tender process and “Contract B” is the contract between the owner and the successful bidder. “Contract A” arises when the parties to the procurement intend to create legal obligations between them, and courts will look at various indicators to determine what that intent was. Tom’s process would probably be considered a true tender and, as a result, duties such as fair treatment would be owed to the bidders. Typically, little or no negotiation is to be carried out in a tender process, and the situation could be made worse if Tom goes “bid shopping” — using one bidder’s price to extract a better price from another bidder. The law of tender considers such behaviour to be a violation of the implied duty of fairness and of the goal of preserving the integrity of the bidding system. To avoid any problem, Tom should run a request for proposal — an RFP — process, which allows for more significant negotiation.

2 (D) If a bidder makes a price error, Ron Engineering says the bidder can’t revoke the bid unless the mistake itself is obvious on the face of the bid documents. Tom could accept Goldbuild’s artificially low bid price and force Goldbuild to enter into the contract. If Goldbuild refused, Tom could sue for damages based on the difference in cost between Goldbuild’s bid and the bid price of the next lowest bidder. However, if Goldbuild found a problem making its bid “non-compliant,” then no “Contract A” could arise and Goldbuild would be free to walk from its bid without obligation.

3 (B) The “discretion clause” is one of the terms and conditions of “Contract A” between Shiny Minerals and compliant bidders. Since Goldbuild’s bid submission was non-compliant (and no “Contract A” arose), such a discretion clause would be ineffective in allowing Tom to waive non-compliance. However, if Goldbuild was prepared to go ahead with the contract at its quoted price and

Shiny Minerals accepted its bid, such a clause may be a successful defence against the claim of a compliant bidder who complains about Shiny Minerals choosing a non-compliant bidder.

4 (C) A fundamental principle of tendering law is that the bid price must be certain. If the price is ambiguous or vague (like Diggum’s bid price), then the bid should be rejected as “non-compliant.” For this reason, owners often include language in the instructions to bidders that permits owners to resolve ambiguities in accordance with a predetermined rule, such as amounts written in words will take precedence over amounts in figures. That way, a bid like Diggum’s does not need to be disqualified.

5 (C) The Supreme Court of Canada recently examined the wording of an exclusion of liability clause in the Tercon Contractors Ltd. v. British Columbia (Transportation and Highways) case and, in a close 5-4 decision, the majority found the wording was not clear and broad enough to protect the owner from liability for having chosen an ineligible bidder as the successful bidder. While the court appeared to accept that a perfectly drafted exclusion clause would be enforceable in the absence of unconscionable circumstances, it remains open whether a subsequent court would still find such clauses offend public policy and knock them down.

YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two or Three correct:** *not bad, but some further work needed*
- **Four correct:** *very well done, but not perfect*
- **Five correct:** *impressive*



**A daily blog of
Canadian Legal News**

Powered by *Canadian Lawyer & Law Times*

canadianlawyermag.com/legalfeeds