Reflections on the Evolution of Fairness in Public Procurement

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Editor's Note

It would be hard to imagine a more active area of interest in construction law than that of the law of public tendering. Within that body of law, the question of fairness predominates. On one hand one sees recognition in certain case law of the principle of party autonomy, while in other cases one sees courts reining back the parties from unfair conduct. We are proud to present our readers with the following contribution, which treats these issues in some detail. It is a tribute to the author's facility with this area of the law that he is able to seamlessly incorporate a quote from Oscar Wilde into an article on tendering.

The unfairness that concerns the author is not the obvious unfairness of a party not playing by the rules it has set. Unfairness has another aspect, where the rules themselves are the source of the perceived unfairness. Here we see a kind of tectonic collision between the principles of party autonomy and the rule of law and this is the area that interests the author. The article begins with three examples of uncertainty in the law: (1) a technical noncompliance not affecting price; (2) a re-tender on identical terms resulting in allegations of bid shopping; and (3) uncertainty arising from the bargained for "adjustment" or "correction" of bid prices. In each case the point is made that in the real world the need for certainty and predictability is not being met. The reader might at this stage flip to the interesting and creative solution proposed by Christopher Wu in his guest article at the end of this volume.

This article traces the evolution of concepts of fairness from the seminal decision in *Ron Engineering* to the controversial 2007 decision of the Supreme Court of Canada in *Double N*. The concept of fairness is explored and discussed as a contractual term alongside standard privilege clauses; as a judicial device to deal with non-compliance; as an implied term of contract; and most interestingly, perhaps, as a tort duty. The law as it applies to public tenders is also contrasted with the law applying to public requests for proposals (RFPs).

In the final section the author brings these concepts together in the context of what is now a much litigated and active area of construction law: the application of judicial review to public tendering decisions. The author's comments on this area represent some of the first published ideas on this aspect of this subject in Canada.

This article was submitted while *Tercon* was still under reserve in the Supreme Court of Canada. We were able to obtain a brief note updating this article just as it went to press. Please see the Author's Note at the end of this article.

Duncan Glaholt
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One should always play fairly when one has the winning cards.
Oscar Wilde

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