

## **WHERE ARE WE WITH TENDERS?**

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The law of tendering in Canada sometimes seems to be a minefield in which the mines are constantly being moved around. The continuing evolution of case law, the differences in tender document wording and the unique aspects of individual disputes can leave both tendering authorities and bidders uncertain as to their legal rights and responsibilities.

The Contract A/Contract B analysis of the tendering and contracting process means that liability of either party can arise for breach of requirements of the tender documents - the invitation to bidders, the instructions to bidders and the bid form. From the owner's point of view, the concern is whether it has a contractual right under the terms of its own tender documents to accept or reject a given tender. To maximize their freedom of action in awarding contracts, owners fill the tender documents with "privilege clauses" intended to reserve a wide range of rights to accept or reject, to apply various criteria and self-interest to the evaluation of tenders and to waive minor "irregularities" in bid forms received.

That last entitlement can loom large, since it is common for more or less serious errors to be made in the preparation of a bid form, and the absence of such a saving provision could require the owner to reject a tender for any nonconformance with the requirements of the tender documents. A continuing issue for judicial consideration is where to place the dividing line between nonconformance which may, but need not necessarily, result in rejection of the tender and nonconformance which makes a tender completely incapable of acceptance.

The latest high court statement on this issue is the 2007 decision of the Supreme Court of Canada in Double N Earthmovers Ltd. v. Edmonton (City). The issue in that case was whether one bidder's failure to comply with the requirement in an earthmoving tender to confirm the use of equipment manufactured since 1980 was a fatal non-compliance or was merely an irregularity capable of being ignored by the owner.

In deciding in favor of the owner's entitlement to overlook that nonconformance and accept the bid, the Court relied on the tender documents' provisions which expressly reserved the owner's right to "waive any informality" and which warned bidders that not every failure to comply with the tender requirements would invalidate a bid. The Court adopted a standard of material non-compliance as the threshold between waivable and non-waivable nonconformance, stating that:

"Generally, an informality would be something that did not materially affect the price or performance of Contract B".

The Double N decision reconfirmed that not even the widest range of privilege clauses will empower an owner to overlook fundamental non-compliances with tender requirements. It also provided confirmation that, with the inclusion of sufficiently worded tender document provisions, an owner can reserve its discretion whether to reject tenders for minor shortcomings. It also gives important guidance as to the nature of what will be considered fundamental non-compliances. However, the case leaves the dividing line unclear, since almost any nonconformance can be assumed to affect a bidder's potential price for, or performance of, the proposed construction contract.

Previous case authority gives some indication as to the likely assessment of the significance of different types of tender form and content. Non-compliance which directly involves the tender price or failure to provide a bid bond or a consent to surety with respect to performance and labor and material payment bonding will definitely be considered to be material, as will the submission of conditions or qualifications to the tender. On the other hand, more extraneous or minor errors such as leaving the name of one subcontractor out of a required list of subcontractors would likely not be treated as being fundamental to the content of a tender.

While no decision can be treated as being the last word in tendering law, the Double N case arguably establishes a reasonable and workable formula for balancing the rights of owners and bidders with respect to the requirements set out in tender documents.