

Tendering

Competitive Advantage Through Tendering Innovation¹

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INTRODUCTION

THIS PAPER IS IN FOUR PARTS. Part One introduces the topic. Part Two highlights some legal issues which have arisen in common law courts in the context of tendering and ‘alternative tenders’. Part Three considers how procurement codes deal with ‘alternative tenders’. Part Four offers some conclusions drawn from the study and makes recommendations as to how owners and contractors might cooperate to secure both parties’ advantage.

PART 1 – TENDERING PROCESSES AND INNOVATION

1.1 Do tendering processes encourage innovation?

This is the wrong question. It is often said that innovation by the construction industry is necessary to secure that industry’s well-being. We generally accept that competitive advantage comes through innovation. We generally believe that tendering processes must maintain transparency and the highest standards of integrity. Are these two concepts mutually exclusive?

Tendering rules (or codes or ethics) were developed in order to put some ‘professionalism’ into the process, or as a Canadian court put it, to maintain the integrity of the bidding process. The essential basis of the tendering code is that all tenderers are to be treated equally and fairly, that contract award criteria are established in advance and known by all parties, thus creating a transparent award process. We might also add, that all parties are to play by the rules. An objective view is to be taken as to which is the winning tender. Individualism exhibited by any tenderer in departing from the owner’s agent’s design would disqualify that tender from consideration because it did not conform.

It appears that tendering rules were not then designed to encourage innovation but rather to produce direct price competition for a specified product. The question needs re-wording.

1.2 The question then becomes: can traditional tendering processes *permit* innovation?

The first tentative answer is ‘No’, but the writer changes position as this paper develops. The successful tenderer’s scope to be innovative is, at first glance, very limited. Perhaps the focus of most innovation is towards designing novel claims for extra cash and more time! The opportunity does normally exist to find novel ways of organising the work method to achieve maximum profit margin within the tender price. Opportunity also exists to go ‘bid shopping’ to drive down the subcontract prices. One tender might seek competitive advantage by offering to the owner a contract term more favourable than any from a competitor. But what scope is there, at tender stage, to offer the client novel design (which is the bidder’s intellectual property) at a saving, say, on the original design of \$250,000? Bidders were not asked to put forward design suggestions. No criteria have been set for evaluation of such a novel proposal. How can all tenderers be treated equally and fairly if one is to be preferred on an ‘alternative’ tender, which is a ‘non-conforming’ tender in terms of the original invitation? What if the ‘alternative tender’ is not actually an offer capable of acceptance, but merely put forward as a ‘saving in construction costs’ in relation to the conforming tender?

1.3 Does ‘design and build’ or ‘design and construct’ as a procurement system more easily permit innovation?

Now it is said that owners wish to procure their buildings by means of a ‘design and build’ or ‘design and construct’ process,

where the contractor bears single point responsibility for the complete product, like any other manufacturer. But buildings are not like any other product. A car purchaser makes the buying decision by description or by sample: a building purchaser, on the other hand, makes its decision through the tender process and that process must now be capable of evaluating design as well as production capability, time and price, all on a competitive basis. This is not easy. Competitive design is not easy to evaluate in the context of tendering. Traditionally it has been done by a two-stage process:

(1) a design competition on aesthetic rather than economic criteria; and

(2) production competition, on criteria of price and time.

Wrap this up in a single stage process and the objectivity appears to be replaced by subjectivity in picking the winner, and the apparent integrity of the bidding process is lost, unless very clear criteria are established at the outset for evaluation of competing designs. This aspect of procurement is developed further in Parts Two and Three below.

Owners frequently try to get the best of both worlds. They will employ the designer up to a certain stage in a scheme's progress, then by novation, seek to transfer the designer's design liability to the successful tender, who in turn becomes liable for design to the owner. How does this arrangement work in practice? The designer has made certain design commitments to the client in the early stages. But the client would also hold any design extravagances in check. When the contractor becomes responsible for design, the designer has lost the original client and gained a new one. The 'new' client wishes to reduce design and specification to the minimum so that profit can be maximised. The designer is compromised by a conflict of interest: he must pursue *maximum design* on behalf of the 'real' client, the owner, but *minimum design* on behalf of the contractor,

who pays the design fee and to whom legal obligation to use care and skill (or more) is owed. 'Novated design' is not a procurement process with much to recommend.

1.4 Procuring design services

Guidance is available to owners on how to select design consultants in competition, which competition includes, but is not limited to, fee competition.³ Many clients are obliged by law to procure design services on a competitive basis.⁴ One recommended process is to select first on technical ability, and then on price, by a process involving two envelopes. The technical 'tender' is opened and evaluated first, whilst the 'fee' envelope remains sealed. Therefore at the first stage there is no relevant commercial criteria. The technical assessment is scored by the 'tender panel'. The 'fee' tender is assessed separately and independently by the 'fee panel' who report back to the 'tender panel' to make an award.⁵ British Airways (BA) are reported to have used a variant of this process in their procurement of design, construction management and project management, which 'places emphasis on technical quality ahead of price'.⁶

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Consultants are first asked to make two competitive bids for each project, that is one technical bid and one commercial bid. BA first assesses the technical bids and selects two bids for further assessment in the second stage, which involves analysis of the commercial bid. An interview then follows. This scheme is intended to maximise technical value from consultants rather than merely taking the lowest price bid which may not offer technical competence. BA have noted that the cost of employing consultants is a small portion of the life-cycle costs of its buildings. But the function and value of buildings is greatly affected by the consultants involved in their procurement.

What sort of detail is provided within a technical bid? Much the same information which would be considered in any process

of prequalification: experience; resources; CVs; etc. All criteria are assessed and scored. The commercial bids from firms not short-listed on the technical appraisal are opened only after a contract has been awarded. This enables a check on what price is being paid (if any) to employ the most technically advanced consultants. BA's property and purchasing department claims also that the competitiveness of its consultants is appraised in relation to the market price for those services.

In a parallel UK initiative, the Construction Industry Council (CIC)⁷ published its guidance to public and private sectors on *The Procurement of Professional Services*.⁸ CIC emphasised that quality was an important element together with price in achieving best value for money, but that in promoting good practice it was necessary to demonstrate financial accountability and a competitive procurement process. Its recommended method of value assessment could be audited and seen to be open and free from favouritism and any other characteristic inconsistent with public policy. Above all, CIC's goal was to show how good quality could be procured, albeit tempered by considerations of price. More detailed comments follow, but suffice at this point to say that this guidance was endorsed by the National Audit Office and the Audit Commission, and has been well received by both consultants' bodies and public sector clients within the UK.

The next section considers legal issues arising in two cases where 'innovative' design proposals were submitted by building contractors in the context of competitive tendering.

PART 2 – LEGAL ISSUES OUT OF TENDERING

2.1 Background

For many years an invitation to tender was considered to be no more than an invitation to treat, creating obligations for neither party. The owner could reject or accept tenders as it pleased⁹, or could negotiate with one or more tenderers to produce a sat-

isfactory deal. Generally the owner was unrestrained in how tenders were assessed and the award of contracts made. But recent developments show the courts are much more prepared to regulate the tendering process.

2.2 The 'tendering contract'

The Supreme Court of Canada first established the principle of the 'tendering contract' in the *Ron Engineering* case. Giving

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the judgment of the court, Estey J said:

*There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner. . . . This contract is brought into being automatically upon the submission of a [conforming] tender.*¹⁰

It was necessary, thought the Canadian court, to find obligations in contract between the parties at this stage, prior to the formation of any construction contract, in order to maintain the integrity of the bidding system.¹¹

2.3 The *Pratt Contractors* case, New Zealand

*Pratt Contractors Ltd v Palmerston North City Council*¹² highlights the problems for owners associated with 'alternative tenders' and the 'tendering contract'. The plaintiff contractor sued the local Council for damages because it did not obtain the contract. The wide range of issues between the parties arising out of this case have been commented on previously.¹³ Here the issue is how to deal with 'alternative tenders' so as to permit contractor's innovation within a regulatory framework¹⁴ which demands fair and equal treatment for all bidders, whilst not unduly restricting the scope for any tenderer's innovative solutions to the owners'

requirements.

Four conforming tenders were received. Pratt Contractors submitted the lowest conforming tender and on the basis of the contract award criteria, set out above, expected to be awarded the contract. But another tenderer, Higgins, submitted an *alternative tender* in addition to its conforming tender. Tendering procedures had contemplated alternative tenders, which might be permitted as a means of encouraging or permitting innovation. Proposals for alternative construction methods or choice of materials could be considered but such proposals must not alter the scope of the final product. Higgins' alternative tender outlined a different design solution which would achieve the same product: 'the saving in the construction costs would be in the order of \$250,000.'¹⁵ Certain other claims were made for the alternative scheme and Higgins concluded: 'We would be happy to meet and discuss this proposal or forward any further information you may require.'¹⁶

The saving in price offered by the alternative tender was attractive to the Council. After some negotiation over the exact status of the alternative tender, the Council accepted the same and advised the other tenderers of the contract award decision. When matters were fully resolved a formal contract was executed between the Council and Higgins, the submitter of the alternative tender. Pratt commenced proceedings against the Council.

The New Zealand High Court held that there was a contractual relationship between the Council and Pratt Contractors formed when Pratt submitted a conforming tender in accordance with the Council's stipulations. This contract is described here as the 'tendering contract' to distinguish it from any construction or engineering contract that may result from the tendering process. The 'tendering contract' obliged the Council not only to treat all conforming tenders equally and fairly, but to abide by its own stipulations. But the Council was not in breach of the 'tendering contract' in failing to award the contract to Pratt because it had submitted the lowest conforming tender. The Council rightly relied on words which footed the tender form to avoid this obligation: *the Principal is not bound to accept the lowest or any tender he may receive.*¹⁷

The court then had to consider whether Higgins' alternative tender was a conforming tender capable of acceptance within the

Council's tender conditions. Pratt argued that the alternative tender was not a tender at all because it lacked certainty of price, and that it did not meet the specific requirements laid down in the tender conditions. The language used in the alternative tender was too vague on which to found a contract. A saving of \$250,000 was mentioned, but not as a price, merely as a 'saving in construction cost'. The figure was not given definitively, but put 'in the order of'.

The court agreed with Pratt's argument. If Higgins' conforming tender had been couched in the same vague terms as their alternative tender, it would not have been considered to be conforming: *in any event [the alternative tender letter] refers to a saving in construction costs and not to a price at all.*¹⁸ The alternative tender was therefore not a conforming tender. It was insufficiently precise to be capable of acceptance within the Council's tender conditions.¹⁹ The Council itself realised that the alternative tender could not be accepted in the form submitted, and sought clarification. The alternative tender did not therefore comply with the Council's tendering stipulations.²⁰ In purporting to accept the alternative tender the Council was in breach of the 'tendering contract'.²¹

The 'tendering contract' imposed a duty of fairness on the Council when dealing with tenders. That duty was breached by purporting to accept the alternative tender and thus destroying the business potential secured by the lowest tenderer. That was unfair and came close to negotiating with one of the tenderers on terms which do not apply to other tenderers.²²

The cost savings offered by the alternative tender did not appear to the court to be genuine. There was a real danger here of unfairness and tender abuse whereby an otherwise unsuccessful tenderer could reduce its tender by a sum sufficient to secure the contract by offering a 'saving' derived from a purported 'alternative' method of construction but which offered no real economy. Such an unscrupulous tenderer, could not only achieve success over other tenderers in this way, but if that tenderer was in fact the lowest tenderer, could avoid being held to the alternative if that proposal was insufficiently precise to give rise to contractual obligations. Gallen J said:

Those are all good reasons for insisting upon a precision in definition for alternative tenders, which gives not only the tendering

*authority adequate means of assessing what is proposed, but also does not disadvantage other tenderers who have submitted tenders as requested.*²³

The Council was in breach of its 'tendering contract' with Pratt Contractors, who were entitled to damages for wasted bid costs and loss of profit.

2.4 The Health Care case, Newfoundland²⁴

The Health Care case illustrates the problems caused by inviting tenders for design and construct projects without first setting design evaluation criteria. In the context of this paper, every tender now becomes 'alternative' in as much as a contract award to one party is likely to be a breach of contract with another, which was exactly the result achieved here!

Tenders were invited by the Government of Newfoundland and Labrador for the design, construction and lease-back of health care facilities. Tender documents included statements of functional requirements, preliminary plans and outline specifications for the various required facilities, but no detailed architectural or engineering drawings or specifications. The invitation asked for irrevocable proposals to design, build and lease the required facilities to the Government for a period of 30 years, with an option to purchase for a nominal payment at the end of this period.

Included among the tender documents was the ubiquitous 'privilege clause'. The Government reserved 'the right to accept or reject any or all of the proposals received' and that decision was to be final and at the sole discretion of the Government.²⁵ They would 'not necessarily accept the lowest or any of the Tender Proposals'.²⁶

Seven tenders were received, including tenders from Health Care, Dobbin and Trans City. Dobbin was lowest bidder (i.e. required lowest annual rent) on two sites. Health Care was lowest on one site. Officials decided that the schemes put forward by Dobbin and Trans City would need extensive redesign. Health Care became 'preferred bidder'²⁷ for all three sites. Its schemes provided a 'design, structure and layout [which] met the minimum code and engineering standards, and complied with the functional program'.²⁸

This was not a 'standard' tender evalua-

tion, but a tender evaluation made on the basis of 'best overall proposal'. The difficult question was: which proposal offered the highest standard of construction whilst satisfying the demands of the functional programs? To answer this question each proposal was examined against criteria developed by the Government but which had not been published in the invitation to tender or the tender documents. The 'preferred' but undisclosed design solution was a 'non-combustible type structure using brick cladding and steel'.²⁹ Only two tenderers offered such a design proposal, Trans City and one other. A committee of four Government Ministers controlled the evaluation and award process and recommended that Trans City's bids be accepted rather than the bids from Health Care. Cabinet authorised the award of the contract to Trans City as an 'exception' under s.8 of the *Public Tender Act*. Under that section, when it did not appear 'expedient' to award the contract to the preferred bidder, Cabinet might authorise rejection of the preferred bid and the award of the contract to another bidder. Under this provision, a decision was made not to award the contracts to Health Care, but to award the contracts to Trans City.

The *Tender Act* did not expressly require Government to award a contract to the preferred bidder. But it seemed clear to the trial judge that, taking the legislation as a whole and whilst maintaining the integrity of the public tendering system, it was the intention of the Act that public tenders should be awarded to the preferred bidder, unless the s. 8 'exception' was applied.

Health Care and Dobbin commenced actions against the Government claiming that in awarding the contract to Trans City, they had breached obligations founded both in contract and in legislation. The actions were not consolidated but heard together. The trial judge held in favour of Health Care and Dobbin and awarded damages based on lost profits to Health Care, but only nominal damages of \$1 to Dobbin. The Government appealed the finding of liability against it, Dobbin appealed against not being found to be preferred bidder and not being awarded either lost profits or wasted tendering costs. In the words of the Court of Appeal, the 'story is somewhat unusual'.³⁰

Several cases show that there is an obligation placed on the owner to act fairly towards all tenderers. Certain good practice principles have evolved. This fairness obli-

gation can be seen as a duty imposed on the owner to conduct the bidding process in good faith, or it can be treated as an implied term of the 'tendering contract'. English courts are reluctant to talk in terms of 'good faith' but Canadian, Australian and USA courts are increasingly doing so.³¹

Restricted space prevents consideration of the many interesting issues raised in this case. The issue for consideration here is whether the Government breached this duty of fairness in awarding contracts to Trans City rather than to Health Care and/or Dobbin. Was there sufficient evidence to show that Trans City's bid should have been rejected because it was conditional, failed to provide the purchase options, and failed to meet the functional programme on one site? Does the evidence show that the contract awarded was materially different from what was requested in the tender documents?

The court answered 'yes'. It held that Trans City's bid should have been rejected. There was sufficient evidence to support such a finding. Trans City's proposal for one of the sites was assessed as 'totally missing the intent'.³² There was no substantial compliance with the owner's requirements. It was not a small discrepancy nor a

poor'. The court concluded that these were indeed *bona fide* assessments and that there was no basis to reject those findings. 'In short, the Dobbin bid did not qualify. It did not meet the requirements of the call'.³⁴

Did any of the bids meet the requirements of the tender call? The nature of the tender invitation required tenderers to exercise judgment in their response to that invitation. It was not expected that bids would be rejected due to a minor departure from the functional programme. But errors of interpretation or bids that required substantial redesign should be rejected.

Is Health Care entitled to compensation? If so, on what basis? The court said 'yes'. As the trial judge had held that the Government was obliged to award all three contracts to Health Care, they were:

*entitled to loss of profits on those projects. Claims for the cost of preparing and submitting tenders were rejected, except insofar as those costs may be recovered in any assessment of loss of profits.*³⁵

The court awarded Dobbin only nominal damages of \$1.00. If the Government had properly performed the 'tendering contract', it would have awarded contracts to Health Care, not Dobbin. Dobbin's appeal failed.

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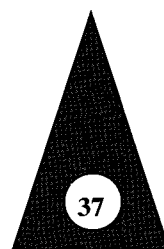
mere technical error. No purchase option was provided. This award amounted to 'something other than contract B': *a Cabinet paper had identified eight major variations between the contract with Trans City and the tender call.*³³

Was Dobbin truly the preferred bidder on two sites? The court answered 'no', declining to find in favour of Dobbin. Although the Dobbin bids were the lowest price for two sites, the assessors concluded that their proposals would require extensive reworking to make them 'functionally acceptable'. Their concepts were 'extremely

conforming tender. In *MJB Enterprises Ltd v Defence Construction (1951) Ltd*³⁶ the second lowest bidder successfully challenged the contract award to the lowest bidder who had included a proposed term of contract not contemplated by the invitation to tender. In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*³⁷ the lowest bidder successfully challenged the contract award to the second lowest bidder on similar grounds, when proposed terms of contract not contemplated in the invitation to tender materialised as the result of post-tender negotiations.

2.5 Supplementary 1999 judgments

The Supreme Court of Canada and the Technology and Construction Court (England) have recently considered the consequences of a public owner's acceptance of a non-



2.6 Alternative tenders

It can be seen from these cases that innovative proposals put forward by way of 'alternative tenders' must be handled carefully and in accordance with owner's obligations arising out of the 'tendering contract'. In all cases the owner was in breach of its obligation to treat tenderers equally and fairly and to award only a contract within the scope of the original tender invitation. In all cases an unsuccessful tenderer has received compensation for the owner's breach of duty in evaluating tenders and awarding contracts. Yet tenderers plead for more 'flexibility' to enable them to submit innovative proposals. No doubt owners will also look for more 'flexibility' in being able to pick and chose who should do the work. But more 'flexibility' is a dangerous thing for both parties. The tenderer needs 'certainty' rather than 'flexibility' about the evaluation and award process when investing large sums of money in preparing a bid. The owner must use the discretion which 'flexibility' bestows with judicial capacity. Large organisations and public bodies will find this difficult or even impossible to manage.

The next section reviews established tender codes to see how they provide (or do not provide) for innovative proposals from competing contractors.

PART 3 – ANALYSIS OF TENDER CODES³⁸

3.1 The Institution of Civil Engineers tender code (UK)³⁹

This code advises that tenderers should be instructed as to the acceptability or otherwise of qualified tenders and alternative proposals.⁴⁰ If the tender stipulations permit offers based on alternative designs, tenderers are advised to ascertain from the owner's agent any special design criteria which will apply to such an alternative. 'Alternative bids must always be treated in confidence'.⁴¹ In order to satisfy the need for fairness and equal treatment of all tenderers, it is imperative that a tenderer intent on submitting an alternative tender, must also submit a 'clean' or conforming tender as a condition precedent to consideration of the alternative.⁴²

The ICE guide notes the economic importance of alternative proposals from tenderers. The 'design specification should not

be an unreasonable constraint'.⁴³ The tender invitation should provide a minimum period of prior notice to be given to the owner of a tenderer's 'intention to submit an alternative'.⁴⁴ The alternative tender must provide adequate supporting detail 'in order that its technical acceptability, construction time and economics can be fully assessed'.

Although the ICE guide is out of date with respect to English procurement law, that part which has been examined above provides good advice on the point of alternative tenders. It can be seen that other tender codes provide less well on this point. It is submitted that an improvement would be to disclose the acceptable scope of any alternative proposal, and the criteria to be used in the contract award.

3.2 European Union

Public sector procurement of construction works is governed by Articles 6, 30 and 59-65 of the Treaty of Rome as amended by the Treaty on European Union and Council Directive 93/37/EEC⁴⁵ which consolidates and replaces earlier directives. The rules apply equally to all Member States of the European Union and are implemented within the UK by the Public Works Regulations (PWR, *see below*).⁴⁶ The purpose of a Directive is to supplement European Treaty provisions in opening up the internal market public sector to intra-Community tendering. Article 30 of Directive 93/37 deals with 'criteria for the award of contracts'. The directive says nothing on 'alternative tenders'. The contract is to be awarded on the basis of 'lowest price', or on the basis of 'most economically advantageous tender', but the latter only when relevant criteria are stated in the contract documents or the contract notice (as published in the *Official Journal*). Relevant criteria include, but are not limited to, 'price, period for completion, running costs, profitability, technical merit'. The PWR (*below*) give better guidance on how this should be done with respect to 'alternative tenders'.

3.3 The Public Works Contracts Regulations (PWR) 1991 (UK)

The PWR implement European procurement directives within the three jurisdictions of England & Wales, Scotland and Northern Ireland (collectively, the UK). Regulation 20 deals with the 'criteria for the award of a public works contract'. Following the pattern of Directive 93/37 (*above*) a contract can be awarded on the basis of lowest price

or on the basis of most economically advantageous offer, but in the latter case only when relevant criteria have been published. If no criteria are given, the award must be on the basis of lowest price.⁴⁷ When a public authority awards a contract on the basis of the 'most economically advantageous' offer (but not when 'lowest price' basis applies) it may take into account tenders (alternative tenders) which offer some *variation* on the requirements stipulated within the tender documents.⁴⁸ There are conditions precedent which must be satisfied if this system is to apply. The award criteria must be stated 'in the contract notice or in the contract documents'.⁴⁹ The examples given of appropriate criteria are of an economic character, for example 'price, period for completion, running costs, profitability and technical merit'.⁵⁰

To qualify under these regulations the alternative tender must, firstly, meet the minimum requirements of the public authority as set out in the tender documents with respect to a conforming tender; and, secondly, the authority must have stated in the contract notice that tenders offering variations would be considered. Thirdly, the contract documents must also state any requirements of the public body as to the presentation of an alternative tender.⁵¹

3.4 The State of Victoria's Public Sector tendering code

The State of Victoria published its code in January 1997.⁵² The tendering code is consistent with the *Code of Practice for the Building and Construction Industry*. Compliance with the tendering code is mandatory in all State projects. It seems clear that the code can and will form the basis of contractual obligations between the State as owner and each tenderer. Evaluation criteria must be disclosed to tenderers at the time of tender invitation. All these criteria, and only these criteria should be used for evaluation.⁵³ Alternative proposals from tenderers

can only be considered when such proposals accompany a conforming tender. That alternative proposal is the intellectual property of the tenderer and should remain confidential. 'Alternative proposals should be encouraged as they may lead to innovative or creative solutions. A comparable price for the alternative should not be obtained from other tenderers, *nor should the alternative be used as the basis for recalling tenders*'.⁵⁴

3.5 The NSW Code of Tendering for the Construction Industry (1996)

The NSW Code sets out 'to encourage the highest ethical standards in tendering practice by all participants in the construction industry'.⁵⁵ The Code declares that it 'imposes an obligation' on all parties involved in the construction industry, but does not make it clear on what legal basis such an imposition should be founded. We must suppose it is founded on contract. The Code applies to all NSW Government procurement within the construction industry.

Owners must treat tenderers fairly and equally. 'Bid shopping' is not allowed.⁵⁶

This advice is generally good but why is it placed under the heading of 'Negotiations'? It could only be applicable to 'evaluation'. How can one negotiate with several tenderers fairly and equally? And why does the Code refer to 'evaluation' under the heading of 'negotiation'? This is inconsistent. The two processes are quite separate and distinct and require their own criteria. It is submitted that negotiation can only take place between the owner and one tenderer, not the tenderers as a group, and any negotiation with an individual tenderer, and not with the others, would breach the obligation of fairness and equal treatment.

The Code rightly emphasises the need to treat the intellectual property of a tenderer in confidence.⁵⁷

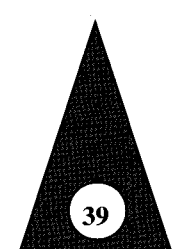
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*vised to tenderers in the tender documents. If criteria have not been included in the tender documents, the criteria must be determined prior to evaluation of tenders to ensure an objective and rational basis for the assessment. Weighting of selection criteria should be decided prior to the closing of tenders but should not be disclosed to tenderers.*⁵⁸

This statement is full of pitfalls. Yes, selection criteria must be settled in advance, or the equal and fair treatment obligation is likely to be breached. But the relevant criteria must be disclosed to tenderers at the time of invitation, or within the tender documents. They cannot be kept secret. Weighting of criteria should also be disclosed in order to maintain transparency of the selection process.

*Any tender which does not comply with the tender documents may be rejected.*⁵⁹

Again, this statement is flawed. The word *may* should be *must*. Acceptance of a nonconforming tender is likely to result in a breach of the owner's equal and fair treatment obligation owed to other tenderers.

*Tenderers may be encouraged to offer alternative, better value for money proposals. Clients should specify the conditions under which alternative proposals are to be submitted. Otherwise alternative proposals should only be considered when submitted with a conforming tender. Where a tenderer offers an alternative, a comparable price for the alternative should not be obtained from other tenderers nor should the detailed alternative be used as the basis for the recall of tenders.*⁶⁰

Innovation should be encouraged for the reasons discussed above. Positive statements should appear in the tender invitation, or in the tender documents, providing the scope for alternative proposals. Yes, alternative proposals should accompany a conforming tender. The last sentence is good advice, where tender stipulations do allow

'Unless the alternative tenderer charges a substantial fee for its 'written consent', any prospect of competitive advantage being obtained by a resourceful tenderer is flushed away!'

alternative tenders. But note that provision must be made in tender documents to properly enable the submission and consideration of alternative tenders.

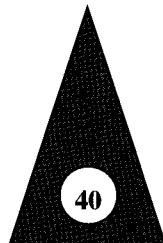
*Should none of the tenders be acceptable (or conforming), negotiations may be conducted preferably in the first instance with the least unacceptable with the aim of achieving a conforming tender.*⁶¹

What was the Code drafts-person thinking of here? Any owner who follows this advice breaches the equal and fair treatment obligation. It is impossible to render an unacceptable tender acceptable, or to render a nonconforming tender as conforming, by undertaking negotiations. *Pratt and Maintec* tells us why! The NSW Code does not appear to have been drafted with any understanding of the common law of tendering. In such circumstances, the tender round should be closed and a fresh round commenced.

3.6 The Australian Standard 4120 – Code of Tendering (31.12.1994)

AS4120: 1994 prescribes an ethical standard for tendering: *fairness to all parties and equal treatment of all tenderers by the owner.*⁶² Tender documents should provide 'positive encouragement to Tenderers to incorporate maximum innovation . . . by allowing them to submit options in addition to a conforming tender'.⁶³ But only 'where appropriate' should 'guidance' be given to tenderers on the 'process of evaluation'.⁶⁴ Under the heading of 'Evaluation of tenders'⁶⁵ there is further comment on the encouragement of alternative proposals. This must be the wrong position in the document for this statement: it is too late to think about alternative proposals at the time of evaluating tenders! 'Principals shall specify the conditions under which alternative proposals are to be submitted'. Clearly this must be done at tender invitation or within the tender documents to have effect, but the advice is good, if the timing is bad.

Where a Tenderer offers an alternative



*proposal, comparable prices for the alternative shall not be obtained by the Principal from other Tenderers nor shall the alternative be used as the basis for the re-call of tenders.*⁶⁶

Good advice: the alternative proposal is the intellectual property of that tenderer. The alternative may not be exploited to the advantage of the owner without the tenderer's consent. However the following provision is commercially flawed:

*However with the written consent of the tenderer submitting the original alternative design or method of construction, the Principal may re-tender or require re-pricing of tenders incorporating alternative designs or methods of construction.*⁶⁷

Unless the alternative tenderer charges a substantial fee for its 'written consent', any prospect of competitive advantage being obtained by a resourceful tenderer is flushed away!

All information exchanges between owner and tenderer are confidential. They agree to maintain that information as 'confidential and commercial in confidence'.⁶⁸

3.7 The American Bar Association Model Procurement Code for State and Local Governments (1979)⁶⁹

The Code is put forward as a model for adoption by any State of the USA. It states:

*This Code requires all parties involved in the negotiation, performance, or administration of [State] contracts to act in good faith.*⁷⁰

Contracts are normally to be awarded as the result of a competitive sealed bidding process.⁷¹ Bids must be opened *in public*⁷² and *shall be unconditionally accepted without alteration or correction* except as the Code might permit. Evaluation must be carried out using criteria as stated in the Invitation. The indicative criteria can be grouped as matters of *acceptability* and *economy*.⁷³ 'The contract shall be awarded [. . .] to the lowest responsible⁷⁴ and responsive bidder⁷⁵ whose bid meets the requirements and criteria set forth in the Invitation for Bids'.⁷⁶

There is another process termed 'Competitive Sealed Proposals' at S.3-203. The main distinction here is that 'Proposals

shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation'. Public scrutiny is confined to a 'Register of Proposals'.⁷⁷ The 'Request for Proposals' must 'state the relative importance of price and other evaluation factors'.⁷⁸

The crux of the Code for the purpose of this paper is the provision at S.3-203(6) that 'discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements'. There is a safeguard:

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

3.8 The CIC's guide to Procurement of Professional Services⁷⁹

The CIC's guidelines deal only with consultancy services, not the procurement of construction or engineering works, but it contains useful advice on the setting of 'quality' criteria and assessment of quality.⁸⁰ The value of the CIC's guidelines in the context of this paper lies in the area of design quality assessment of alternative tenders. CIC note that 'the essence of value assessment is the appropriate weighting of quality criteria against each other and against price'. Prior to invitation of tenders, the owner and its advisers must decide 'the weighting of the quality criteria against price within the bands' set out within the guidelines. It is suggested by CIC that a simple project is weighted 90% price and 10% quality, that a complex project such as an airport terminal is weighted 30% price and 70% quality, and that a highly personal service such as those of an arbitrator or value engineering consultant is weighted 10% price and 90% quality. Another promoter's decision is required: which quality criteria are important in the professional services required and what are their relative weightings? For example 'company organisation' might be weighted 25%; 'project team organisation' 15%; 'key personnel' 40%; and 'project administration' 20%. In good practice these decision would be made

by a tender board or evaluation panel and revealed to all tenderers within the tender documentation. A quality threshold should be set below which tenders will be rejected. Tenderers would be asked to complete a detailed breakdown of the 'quality criteria' against each of the headings used for illustration above.

To paraphrase CIC's guidelines, the objective of the design quality assessment, within the overall tender assessment, is to determine objectively that proposal which offers 'best value for money', or in Euro-speak, represents the 'most economically advantageous' offer. All tenderers' design proposals should be assessed individually by each member of the tender board by that member completing and signing an assessment report which is retained for audit purposes. Low quality proposals are immediately rejected in accordance with the criteria set. Price is not an issue at this stage. The quality assessors are blind to price when exercising judgment as to quality. Having completed its quality appraisal on an individual basis, the tender board might then confer and resolve any differences as to interpretation. 'Preferred bidders' might be called to interview by the tender board but always conscious of the need to treat tenderers equally and fairly. Assessment marks, but not weightings, might be revised at this stage. Only then are the tendered prices considered by the tender board and added to the assessment. Abnormally low prices are discarded.⁸¹ CIC suggests that price is scored as follows: 100 marks for lowest acceptable tender; 90 marks for the next lowest tender when its price is 10% above the lowest acceptable tender; and so on. Having scored both quality and price, the tenderer with the highest score is awarded the construction contract. The Overall Assessment file is retained and available for audit.

PART 4 – CONCLUSIONS

4.1 The traditional tendering process for building works was not intended to encourage design innovation by tenderers: in fact the very opposite was intended. But it has always been possible for tenderers to seek to pursue competitive advantage through

novel construction methods, to the extent permitted by the tender documents.

4.2 Processes are available in the procurement of separate design services which allow competition on innovative design. The answer appears to be to tender design/technical matters separately from price. This process could also be used for 'design and construct' procurement and could be adjusted to provide a basis for selection from alternative tenders.

'Tender conditions must define the scope of 'alternative tender'.

That scope must not be too tight so as to restrict innovation, but not too wide so as to result in a proposal for a scheme quite different to the one originally tendered for.'

4.3 Decisions of the courts show that the common law seeks to maintain some integrity in the tendering process. It does this frequently by recognising the existence of the parties' obligations to one another. It places those obligations on a contractual footing. Breach of tendering obligation entitles the injured party to the normal remedy of damages.

4.4 The owner is obliged to treat all tenders equally and fairly. All conforming tenders must be considered if any tenders are considered.

4.5 An effective 'privilege clause' will normally prevent an owner becoming obliged to accept any tender. All tenders may therefore be properly rejected. On the other hand, a term to the effect that a contract will be awarded to the lowest, or highest, bidder is enforceable. An owner cannot use the 'privilege clause' as an excuse for deviating from the contract evaluation and award criteria set down in the tender invitation/documents.

4.6 In *Pratt Contractors*, the objection to the Council's tendering process was that the Council did not reject *all* tenders, but attempted to negotiate with one tenderer within the tendering process, but contrary to the tender rules set down by the Council itself.

4.7 In the *Pratt* situation, there are only two courses of action open to the owner:

- (1) reject all tenders and start again; or
- (2) act in accordance with the tender conditions.

4.8 An 'alternative tender' must be put in terms which are sufficiently precise to enable acceptance by the owner. In *Pratt*, the 'alternative tender' was too vague to form the basis of a contract.

4.9 It would be a breach of the tendering obligation of equal and fair treatment for the owner to negotiate with one tenderer on terms which do not apply to other tenderers.

4.10 In *Pratt's* case it was argued that the tender conditions incorporated the Transit NZ tender manual. The issue was whether the whole of the manual applied to the tendering contract. The court held that the manual as a whole was not part of the tendering contract. It seems that the manual was not written or structured to form the basis of a contract. Whole sections of the manual would have no relevance to the *Pratt* case. The manual contains more than

'Some co-operation is required from owners and contractors to ensure that tender rules correctly and adequately reflect commercial needs, whilst maintaining the integrity of the tendering process.'

one basis of evaluating tenders. It deals with the relationship of the Council with Transit NZ, which has nothing to do with the tenderer. Much more clear wording in the tender conditions is needed to incorporate by reference the whole of Transit NZ's tender manual. It appears that the manual requires amendment if it is to become part of the 'tendering contract'.

4.11 Without the existence of the tender manual's terms within the 'tendering contract', there was no term which permitted the Council to consider an 'alternative tender'. There is no sufficiently identifiable established practice that would allow the court to imply a term to the 'tendering con-

tract' to make good this deficiency. Without clear words, 'alternative tenders' cannot be considered.

4.12 All tenderers are entitled to know the basis on which tenders will be evaluated and on which a contract award decision will be made.

4.13 If innovation from tenderers is required, an owner must expressly create the right for a tenderer to submit an 'alternative tender'. If this right then exists, the owner would be obliged to consider such proposals. Tenderers must be informed of criteria (and any weighting of criteria) for evaluation of such alternative proposals.

4.14 Tender conditions must define the scope of 'alternative tender'. That scope must be not too tight so as to restrict innovation, but not too wide so as to result in a proposal for a scheme quite different to the one originally tendered for. If it had been necessary, the court in *Pratt* would have accepted that the 'alternative tender' produced a solution within the scope of the original requirement.

4.15 Tender conditions for projects involving design must include criteria for evaluating that design, as well as criteria for evaluating performance. The criteria must be known to all tenderers. Without such criteria, every tender becomes 'alternative' in as much as a construction contract award to one party is likely to be a breach of tendering contract with another.

4.16 It is a breach of the 'tendering contract' for the owner to award a contract to a tenderer who offers something different to what was asked for in the invitation to tender. There must be substantial compliance with the owner's requirements before a bid can be considered as a conforming tender. A tender involving design is not a conforming tender because it offers the cheapest price at the expense of compliance with owner's requirements.

4.17 When tenders involve design, it is accepted that tenderers must exercise substantial judgment in formulating their proposals. Tenders should not be rejected be-

cause of some minor departure from owner's requirements. But errors in interpreting those requirements and the need for substantial redesign must result in rejection.

4.18 Of the examples of tender codes for procurement of construction which are examined above, the ICE code comes close to what is required in the context of this paper. But some provision must be added to disclose to tenderers the acceptable scope of any alternative proposal that tenderers might make, and the criteria to be used in evaluation of such proposals so as to lead to a contract award. Some provision as to the confidentiality of the alternative proposal in recognition of that tenderer's intellectual property right should also be added. The *State of Victoria's Public Sector Tendering Code* is consistent with this view, but the *NSW Code of Tendering for the Construction Industry* is criticised in many respects. There are grounds also to criticise *AS4120*.

4.19 The *ABA Model Procurement Code* is interesting in providing a positive 'good faith' obligation on all parties involved with tendering, and a framework for discussion and negotiation between owner and tenderer during the bidding process, when the responsiveness of a bid may be ascertained. This *Code* comes closest to recognising the complexities which can exist in the procurement process.

4.20 Since alternative tenders involve an element of design quality assessment in addition to price assessment, some provision along these lines must be made in the tender conditions. The CIC publication *The Procurement of Professional Services* offers useful guidance on the assessment of design quality. Some co-operation is required from owners and contractors to ensure that tender rules correctly and adequately reflect commercial needs, whilst maintaining the integrity of the tendering process. That co-operation could usefully take the form of a revised tender code written in the style of a standard form of contract.

References

1. An earlier version of this paper was published in *Proceedings of the Fourth Annual Conference of the Construction Industry Institute, Australia*, Melbourne, April 1997 (ISBN 1-876189-15-0); and at 16 *Australian Construction Law Reporter* 33 (ISSN 0726-1551).
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3. See Connaughton, John, (1994) *A Guide to the Competitive Procurement of Consultancy Services for Construction*, CIRIA, London.

4. For example, in the UK public bodies are so obliged under European Directive 92/50 (the 'Services Directive') which applies above a threshold of about £100,000. Competition is also implicit in the new 'best value' policies of local authorities under the *Local Government Act 1999*.

5. See CIRIA *Guide* at p.38.

6. *Building*, 21.2.97, p.11.

7. The CIC represents the design (in the widest sense) professions traditionally associated with construction and engineering.

8. Construction Industry Council, London, 1994. ISBN 1 898671 03 6. This guidance is said to be compatible with (but not exhaustive of) the Public Services Directive 92/50/EEC (1992) and *The Public Services Contracts Regulations 1993*. See also CIC's *Guidelines for the Application of Competitive Tendering*.

9. *Spenser v. Harding* (1870) LR 5 CP 561.

10. *The Queen in Right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd* (1981) 119 DLR (3d) 287, 272.

11. *Ibid.*, per Estey J at 273.

12. [1995] 1 NZLR 469, in the New Zealand High Court, Palmerston North.

13. See CIB-W65 Conference Proceedings, Glasgow 1996, vol.2, pp.391-402.

14. Both in statute and common law.

15. Reference to the alternative tender letter, [1995] 1 NZLR 469, 473/15-38.

16. *Ibid.* at 473/37-38.

17. This obligation disclaimer is frequently referred to in Canada as 'the privilege clause'.

18. *Ibid.* at 483/4.

19. *Ibid.* at 483/5-7.

20. *Ibid.* at 483/19-20.

21. *Ibid.* at 483/ 30-33.

22. See Gallen J at 483/34-41.

23. *Ibid.* at 484/10-19.

24. *Health Care Developers Inc. and others v The Queen in right of Newfoundland (the Crown)* (1996) 136 DLR (4th) 609.

25. Article 2.2 of the Tendering Instructions (1996) 136 DLR (4th) 609, 615.

26. Article 8.1, *ibid.*

27. The term 'preferred bidder' is used in the *Public Tender Act RSN 1990*.

28. (1996) 136 DLR (4th) 609 per Cameron JA at 616d. (A 'functional program' is a detailed written description of a facility and services to be provided. It includes: specific space, staff and equipment require-

ments and functional and operating relationships.) (at 616c).

29. *Ibid.*, at 616f. This was no doubt due to the fact that extensive design for steel and masonry structures had previously been commissioned at a cost to the Government of about \$400,000 (at 613c) prior to the decision to invite tenders on a “design/build/lease” basis.

30. *Ibid.*, at 611f.

31. It was said that in England there is no general doctrine of good faith: *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433 at 439 (CA). But a duty of fairness was imposed on the owner in the *Blackpool* case [1990] 1 WLR 1195, 3 All ER 25 (CA).

32. (1996) 136 DLR (4th) 609, 629b.

33. *Ibid.* at 629d.

34. *Ibid.* at 629f.

35. *Ibid.* at 630b.

36. [1999] 1 SCR 619; 170 DLR (4th) 577.

37. Unreported. Case 1996 ORB 1151, Technology and Construction Court, Judge Humphrey Lloyd QC, 28.10.99.

38. For further comment with respect to UK tender codes, see Craig (2000) *Re-engineering the tender code for construction works*, 18 *Construction Management and Economics*, 91.

39. (1983) *Guidance on the Preparation, Submission and Consideration of Tenders for Civil Engineering Contracts*, UK. It is understood that the tender code is currently being reviewed for a revised edition in late 1997.

40. *Ibid.*, clause 3.

41. *Ibid.*, clause 4.6.1.

42. *Ibid.*, clause 4.6.3(a)

43. *Ibid.*, clause 4.6.2.

44. *Ibid.*, clause 4.6.3(b).

45. [1993] OJ L199/ 54.

46. In the period 20.7.90 to 21.12.91 this directive had 'direct effect' in English law because the implementation date had passed and there had been no implementation: see *R v. Portsmouth City Council* (1996) 81 BLR 1 at 14F, and this author's commentary at (1999) 15 Const LJ 88 at 101.

47. See *Portsmouth* and *Harmon* cases.

48. Regulation 20(4).

49. Regulation 20(3).

50. Regulation 20(2).

51. See Regulation 20(4).

52. *Tendering for Public Construction and Related Consultancy Services. A Better Purchasing Guideline for the Victorian Public Sector*, January 1997, Office of Building and Development, Department of Infrastructure, Melbourne, Victoria, Australia (ISBN 0 7306 8691 4). See also *Code of Practice for the Building and Construction*

Industry (July 1994, ISBN 7306 0096 3) and *Making Choices: Qualification Criteria for Assessing Building and Construction Industry Suppliers* (1997, ISBN 0-7311-0855-8).

53. See p.38.

54. *Ibid.* Emphasis added.

55. *Code of Tendering for the Construction Industry*, July 1996, Department of Public Works and Services, New South Wales, (ISBN 0 7310 6897 1); section 1. See also *Code of Practice for the Construction Industry* (July 1996, ISBN 0 7310 6891 2) and *Implementation Guidelines* (July 1996, ISBN 0 7310 6802 5).

56. Section 4.2 Fair Dealing.

57. *Ibid.*

58. Section 4.3 Project Definition.

59. Section 4.4 Procedures for Invited Tenders, Evaluation of Tenders.

60. *Ibid.*

61. *Ibid.*, Negotiation.

62. AS 4120, clause 4.

63. Clause 6.1.2.

64. *Ibid.*

65. Clause 6.5

66. *Ibid.*

67. *Ibid.*

68. Clause 8. Note that an undertaking is given to this effect by both Principal and Tenderer, illustrating the contractual nature of their relationship, based on exchange of promises.

69. Recently published in the UK as an appendix to Odams, A.M. (ed.) (1995) *Comparative Studies in Construction Law: The Sweet Lectures*, Construction Law Press, King's College London.

70. S. 1-103.

71. S. 3-202(1).

72. S.3-202(4).

73. S.3-202(5).

74. i.e. a person who has qualified in accordance with s.3-101(6).

75. i.e. “a person who has submitted a bid which conforms in all material respects to the Invitation ...” (s.3-101(7)).

76. S.3-202(7).

77. S.3-203(4).

78. S.3-203(5).

79. (1994) noted above.

80. CIC notes John Ruskin's advice (1860): "It's unwise to pay too much, but it's worse to pay too little. When you pay too much, you loose a little money – that's all. When you pay too little, you sometimes lose everything." The cost of advice and design services represents a very small part of a project's full life costs.

81. See EC Directive 93/37, article 30 and PWR 20 for procedures in connection with abnormally low tenders. ■