

RESOLVING DISPUTES ARISING FROM THE BIDDING AND TENDERING PROCESS

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I. EXECUTIVE SUMMARY

This paper provides an overview of the bidding and tendering process, identifies key areas of dispute that arise during and after the process, and offers strategies for resolving these disputes. It should be noted at the outset that the outcome of any particular bidding and tendering dispute will turn on the facts of the case and the terms of the tender documents.¹

II. OVERVIEW

A. THE TENDERING PROCESS

The tendering process is legally distinct from an offer to begin contractual negotiations. To commence the tendering process, instead of simply making an offer, the owner of a project (or a general contractor on a project) will issue what is known as a “call for tenders”.

1. The Call for Tenders

The call for tenders replaces the typical contractual negotiating process with a competitive process whereby contracts are awarded to bidders (also referred to as “tenderers”). The bidding process is governed by tender documents typically entitled “Instructions to Bidders”, which are issued by the project owner. The Instructions to Bidders describes the project, sets out the rules for the tendering process and sets out the criterion that must be met in order for a bid (or tender) to be compliant with such rules.

2. Differences between the Call for Tenders and a Request for Proposals (“RFP”)

The difference between the call for tenders and an RFP is set out succinctly in the decision of Justice Vertes in *Socanav Inc. v. Northwest Territories (Commissioner)*, as follows:

If there is a distinction between the two forms of soliciting offers, it may be this. When the government knows what it wants done and how it should be done (such as a construction project), it will already have its plans and specifications and is looking simply for the best price. On the other hand, when the government knows what it wants done, but not how to go about doing it, it seeks proposals on methods, ability, [and] price. Then it can negotiate on the best method to achieve the best value.²

An RFP is simply an offer to negotiate and gives rise to no contractual obligations. This is contrasted with the tendering process, which creates a preliminary contractual relationship between the owner and the bidders, known as “Contract A” (discussed in more detail below).

The British Columbia Supreme Court in *Tercon Contractors Ltd. v. British Columbia* sets out six factors to be used to determine whether an RFP will give rise to the contractual obligations of the tendering process:

- (a) the formality of the RFP process;
- (b) whether there is a deadline for submissions;
- (c) whether bids/proposals are required to be irrevocable;

¹ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at paras. 18-19.
² [1993] N.W.T.R. 369, at para. 21.

- (d) whether there is a duty on the owner to award the project contract;
- (e) whether the project contract has specific conditions not open to negotiation; and
- (f) whether there is a statement within the RFP indicating that the RFP was not a call for tenders.³

3. Legal Obligations Created by the Tendering Process

The Supreme Court of Canada first recognized the legal relationship that arises between an owner and bidders on a contract in *R. in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd. [Ron Engineering]*.⁴ In this case, the Court established a framework for determining the nature of these relationships and when they will arise.

In *Ron Engineering*, after the call for tenders had gone out and bids had been submitted, the low bidder realized that it had made a mistake in its tender price calculation and immediately requested that it be permitted to withdraw its tender and that its tender bid deposit be refunded. The owner refused the request and, in turn, the contractor refused to sign the project contract. As a result, the owner was required to contract with the second lowest bidder and the contractor sued for the return of its deposit.

On appeal, the Court had to determine whether a contractual relationship had arisen between the lowest bidding contractor and the owner by virtue of the tendering process and, if so, whether that contractual relationship had been breached. The Court devised a two-step process to be employed in bidding and tendering situations, whereby two separate contracts will be created: "Contract A" and "Contract B".

According to the Court, Contract A will crystallize when an owner's call for tenders is responded to by a bidder through submission of a compliant bid. Individual contracts will be entered into between the owner and each compliant bidder, governed by the terms of the call for tenders.

Contract B will be the second contract in the two-step process, which a bidder is obliged to enter into when the owner accepts its (compliant) bid. The terms of Contract B will be governed by the tender documents, which will typically include a sample of the contract for the construction project.

In *Ron Engineering*, the Court found that the contractor, by refusing to sign the construction contract and unilaterally withdrawing its bid, had breached the terms of the Contract A between itself and the owner. As a result, the owner was entitled to retain the contractor's tender deposit, in accordance with the forfeiture conditions found in Contract A.

B. DEVELOPMENTS SINCE *RON ENGINEERING*

1. Effect of the Privilege Clause

Eighteen years after *Ron Engineering*, the Supreme Court of Canada revisited the Contract A/Contract B concept, in *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [*MJB*

³ 2006 BCSC 499 at para. 81.

⁴ [1981] 1 S.C.R. 111.

Enterprises]⁵. In *MJB Enterprises*, the Court was asked to weigh the owner's duty to treat participants in the bidding process equally against the inclusion of a clause in the tender documents that purported to give the owner discretion in awarding the contract, otherwise known as a "privilege clause". This question arose when the owner awarded the contract to a bidder who had included a qualification regarding alternate prices in its tender. The plaintiff, M.J.B. Enterprises, was the second lowest bidder and claimed that the owner had breached Contract A by awarding the contract to a non-compliant bidder. The owner relied on a standard privilege clause contained in the Instructions to Bidders, which stated that "the lowest or any tender shall not necessarily be accepted."⁶

Finding in favour of M.J.B. Enterprises, the Supreme Court of Canada held that the inclusion of the privilege clause in the tender documents did not allow the owner to accept a non-compliant bid. The Court further stated that the discretion granted by privilege clauses must be balanced against an owner's duty to treat bidders equally, such that owners cannot award contracts based on undisclosed or secret criterion. Nonetheless, the Court held that a privilege clause could allow an owner to accept a bid other than the lowest bid, as the clause will entitle the owner to "take a more nuanced view of cost than the prices quoted by the tenders".⁷

2. Privilege Clauses Post-*MJB Enterprises*

The decision of the Supreme Court of Canada in *MJB Enterprises* left open the question of what was meant by allowing the owner to take a "nuanced view" of costs where a privilege clause exists.

The British Columbia Court of Appeal in *Sound Contracting Ltd. v. Nanaimo (City)* [*Sound Contracting*] answered this question by confirming that, where a privilege clause is included in the terms of Contract A, the owner is not obligated to accept the lowest bid, but may take into account other relevant factors.⁸ However, the discretion granted to owners in this regard was not left unqualified; the Court clarified that the selection of a bid that does not present the lowest price will still require the existence of valid, objective reasons in order to satisfy the owner's duty of fairness and good faith. Furthermore, any additional factors taken into account in the decision to award the contract to a higher bid must be shown to be both reasonable and relevant.⁹

The British Columbia Court of Appeal in *Continental Steel Ltd. v. Mierau Contractors Ltd.* [*Mierau*], decided seven years after *Sound Contracting*, questioned the liberal interpretation of the duty of fairness that had been made in its earlier decision.¹⁰ The Court in *Mierau* held that the implied duty of fairness in the tendering process, when it arises, simply means that an owner must treat bids "fairly and equally". The Court further stated that the trial judge had erred in implying a duty of "good faith" into the relationship in reliance on *Sound Contracting*.

⁵ *MJB Enterprises*, *supra* note 1.

⁶ *Ibid*, at para. 31.

⁷ *Ibid*, at para. 46.

⁸ 2000 BCCA 312 at para. 17.

⁹ *Ibid*, at paras. 18-19.

¹⁰ 2007 BCCA 292 at para. 31.

3. Implied Duty of Fairness

Prior to *Mierau*, the Supreme Court of Canada had considered the implication of a duty of fairness in commercial tendering processes generally in *Martel Building Ltd. v. Canada [Martel]*.¹¹ With respect to the question of whether the defendant tender-calling authority owed a duty of care to tenderers, the Court answered in the affirmative, stating that the implication of a duty to treat all tenderers fairly and equally was in line with the ultimate goal set out in *Ron Engineering*, “of protecting and promoting the integrity of the bidding process”.¹²

The Court in *Martel* further stated that a privilege clause purporting to allow the owner to accept any bid does not relieve the owner of the duty of fairness, but that the extent of the fair and equal treatment must be defined “with due consideration to the express contractual terms of the tender.”¹³ The duty of fairness articulated by the Court in *Martel* therefore requires owners to treat all bidders equally and fairly, taking into consideration the express terms of the tender which may afford the owner certain privileges in the tendering process.

The recent decision of the Supreme Court of Canada in *Bhasin v. Hrynew [Bhasin]*¹⁴ has revived the question of what conduct will be expected of an owner in evaluating tenders. The Court in *Bhasin* established that an implied duty of good faith exists in all contractual dealings, requiring parties to a contract to perform their duties honestly and not arbitrarily.¹⁵ While the full impact of this decision in the context of bidding and tendering remains to be seen, it is already being applied by the lower courts of the provinces to reinforce the duty of fairness imposed on an owner in the tendering process.¹⁶

One such example is the decision of Justice Tilleman of the Alberta Court of Queen’s Bench in *Elan Construction Ltd. v. South Fish Creek Recreational Assn. [Elan]*.¹⁷ In finding in favour of the bidder in a tendering dispute, Justice Tilleman relied in part on the reasoning of the Supreme Court in *Bhasin* in support of the principle that an owner must disclose bid criterion and not act in an arbitrary manner in evaluating bids, lest the owner be found to have breached its duty of good faith. At issue in *Elan* was the points system used by the defendant owner to determine who should receive the contract, which created an arbitrary and unfair process that often awarded more points to bids that were less capable of meeting the tender requirements.

4. Compliance

¹¹ [2000] 2 S.C.R. 860.

¹² *Ibid*, at para. 88.

¹³ *Ibid*, at para. 89.

¹⁴ 2014 SCC 71.

¹⁵ *Ibid*, at para. 63.

¹⁶ See for example, *Combined Air Mechanical Services v. Computer Room Services Corp.*, 2015 ONSC 610. The defendant contractor breached its duty of good faith to the plaintiff subcontractor when the defendant included the plaintiff’s profile and quote in its bid with no intention of using the plaintiff on the project.

¹⁷ 2015 ABQB 330.

Most bidding and tendering disputes involve a question of compliance. Typically, the degree of compliance with the terms of the tender documents that will be required for a tender to be valid is substantial, as opposed to strict.¹⁸

In British Columbia, the Court of Appeal considered the question of whether compliance with the criterion in the tender call must be strict or merely substantial in *Graham Industrial Services Ltd. v. Greater Vancouver Water District* [*Graham*].¹⁹ In *Graham*, the Court held that the standard of non-compliance, at least where a discretion (or privilege) clause exists, is substantial compliance and not strict compliance. The Court framed the issue as a question of whether or not there has been “material compliance” with the terms of the call for tenders, which is to be assessed objectively.²⁰

The Court in *Graham* also held that submission of a non-compliant bid does not create a Contract A between the bidder and the owner, as it is not capable of acceptance by the owner regardless of whether or not a discretion clause is included in the call for tenders.²¹

5. Strategic Non-Compliance

Interestingly, the issue of compliance is not always raised by the second-lowest bidder; occasionally, the lowest bidder will attempt to argue that its own bid was non-compliant in order to avoid the formation of Contract B with the owner. Such use of non-compliance by a successful bidder as a shield was considered by the trial court in *Graham*, which held that whether a bid is compliant is not determined by the source of the challenge.²² In other words, a successful bidder may challenge the compliance of its own bid.

6. Owner Obligation to Investigate Bids

The Supreme Court of Canada in *Double N Earthmovers Ltd. v. Edmonton (City)* was asked to consider whether an owner has an obligation to investigate the compliance of a bid before it is accepted.²³ The question had been previously answered in the negative by the trial court and the Alberta Court of Appeal, the latter of which had also held that the obligations of an owner under Contract A with an unsuccessful bidder end upon the formation of Contract B with a compliant bidder.

In the result, the Supreme Court of Canada upheld the decisions of the lower courts, confirming that there is no positive duty on the owner to investigate the potential non-compliance of bidders.²⁴

7. Enforceability of Limitation and Exclusion Clauses

Similar to the privilege clauses discussed above, the Instructions to Bidders will often contain clauses purporting to limit or exclude the damages that a bidder may claim for a breach of Contract A.

¹⁸ *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 at para. 109.

¹⁹ (2004), 25 B.C.L.R. (4th) 214 (B.C.C.A.).

²⁰ *Ibid*, at para. 30.

²¹ *Ibid*, at para. 21.

²² *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, 2003 BCSC 1735 at para. 12.

²³ *Double N Earth Movers Ltd. v. Edmonton (City)*, *supra* note 18.

²⁴ *Ibid*, at paras. 51 and 53.

Limitation clauses providing that damages in relation to a breach of Contract A by the owner are limited to the costs of preparing a bid have been held to be enforceable in British Columbia.²⁵ Likewise, clauses in the Instructions to Bidders that attempt to exclude a claim for damages for breach of Contract A may be enforceable, depending on the facts of the case.

In *Tercon v. British Columbia* (“*Tercon*”),²⁶ the Supreme Court of Canada considered the applicability of an exclusion clause in an RFP issued by the Province that purported to exclude all claims by bidders for compensation based on participation in the RFP. The RFP had set out specific eligibility criteria which were not met by the successful bidder, and the other short-listed bidder, *Tercon*, brought an action against the Province for breach of Contract A. A narrow majority of the Court, agreeing with the analysis provided by one of the dissenting judges, held that three conditions must be met for an exclusion clause to be enforceable: (i) the clause must apply to the circumstances of the case; (ii) the clause must not have been unconscionable at the time the contract was made; and (iii) the exclusion clause must not be outweighed by public policy.²⁷

In the circumstances of the case, the Court agreed with the trial judge’s finding that the exclusion clause did not apply to the Province’s breach of contract, which was to award the contract to an ineligible bidder. In coming to its decision the Court held that, when determining whether an exclusion clause applies, the words of the clause must be “considered in harmony with the rest of the contract and in light of its purposes and commercial context... as well as of its overall terms.”²⁸

The exclusion clause was found to apply in the Ontario Superior Court of Justice case *Rankin Construction Inc. v. Ontario*.²⁹ This case involved in a tendering process for the widening of a highway in Ontario. Despite being the lowest bidder on the contract, the plaintiff’s bid was declared non-compliant after the Province investigated the bid and determined that the value of steel claimed by the plaintiff was inaccurate. The Court dismissed the plaintiff’s action for damages on the basis that precluding the Province from investigating bids would not promote the integrity of the bidding process. In the alternative, the Court stated that the Province was entitled to rely on an exclusion clause included in the Instructions to Bidders that purported to exclude claims for, amongst other things, damages suffered by any bidder “by reason of the acceptance or the non-acceptance by the Ministry of any Tender”.³⁰

Considering the section of the Instructions to Bidders in which the exclusion clause was found, which dealt with the acceptance or rejection of tenders, the Court held that the words “acceptance by the Ministry” in the clause meant the awarding of Contract B to the successful bidder.³¹ Given that the plaintiff’s claim arose from the Province’s award of the contract to

²⁵ *Elite Bailiff Services Ltd. v. British Columbia*, 2003 BCCA 102 at paras. 31-33.

²⁶ 2010 SCC 4.

²⁷ *Ibid*, at para. 122.

²⁸ *Ibid*, at paras. 64-65.

²⁹ 2013 ONSC 139, affirmed 2014 ONCA 636.

³⁰ *Ibid*, at para. 89.

³¹ *Ibid*, at para. 93.

another bidder, the Court found that the exclusion clause in this case was applicable and, as it was not unconscionable or against public policy, enforceable.³²

III. KEY ISSUES

1. Issues with Compliance

As discussed above, questions of compliance arise in most tendering disputes. In British Columbia, a contractor's bid is required to meet the standard of substantial compliance with the terms of the call for tenders, where the call for tenders includes a privilege clause. If a contractor submits a bid that does not substantially comply with the criterion set out in the call for tenders, the owner may reject that bid or, if the owner chooses to select the bid, unsuccessful bidders may challenge the owner's selection of a non-compliant bid.

If no compliant bids are submitted, no Contract A is formed, and it is open to the owner to refuse to select a bid, issue another call for tenders, or to enter into negotiations whomsoever it prefers. Submission of a compliant bid is therefore the first and most important step in avoiding a bidding dispute. As noted, if a non-compliant bid is submitted, Contract A will not be formed and the bidder will not be able to bring an action on that contract.

2. Where the First Bidder is Non-Compliant and You Are the Second-Lowest Bidder

Disputes also frequently arise where a non-compliant bid has been accepted by the owner and the second-lowest bidder wishes to challenge the compliance of the successful bidder. If the owner has accepted a non-compliant bid, it will have breached its obligations to all other compliant bidders under their respective Contract A's. In such situations, the second-lowest bidder will have to demonstrate that the successful bid was non-compliant, that its own bid was compliant, and that its bid would have been selected but for the owner's decision to accept the non-compliant bid.³³

3. Raising Issues after the Contract Has Been Awarded

As noted above, if a bid is non-compliant, Contract A is not formed with that bidder and the owner is obligated not to award it the contract. Where the successful bid is compliant however, the owner may still be in breach of its obligations to the other compliant bidders if it did not treat them fairly in awarding the contract. In this case, an unsuccessful bidder will have to show that the owner breached its duty to that unsuccessful bidder and that it would have been awarded the contract had the breach not occurred. As noted below, damages will be the amount of profit the bidder would have earned on the contract had its bid been accepted.

IV. HOW TO RESOLVE KEY ISSUES IN BIDDING AND TENDERING DISPUTES

1. Submission of a Compliant Bid

The first step toward resolving a tendering dispute successfully is to submit a compliant bid. In turn, the first step toward submitting a compliant bid is to ensure that all required

³² *Ibid*, at paras. 95-101.

³³ See *MJB Enterprises*, *supra* note 1.

information from subcontractors is received ahead of time. If an aspect of the bid plan or price relies on a subcontractor who has not provided the necessary information, the success of the entire bid may be compromised.

Setting a goal date for submission of the bid ahead of the bid deadline, while not always feasible given the time constraints inherent in the tendering process, is a simple way to ensure that compliance is not put at risk by a late submission. As noted above, preparing all aspects of the bid for submission in advance of the deadline also helps to ensure that the bid will not be derailed by unforeseeably delayed components.

Also critical to the compliance of a bid, and frequently overlooked, is the submission of all of the information requested in the call for tenders. Leaving out information from a bid, even where a privilege clause exists allowing the owner to accept incomplete bids, may result in non-compliance. While leaving out a non-substantial piece of information may not necessarily result in a non-compliant bid, there is no guarantee that the bid will not be rejected by the owner or challenged by an unsuccessful bidder on the basis of the absence of such information.

Finally, bidders must also take care to ensure that all aspects of the bid, particularly the bid price, are certain. Uncertainty in bid price may result in material non-compliance with the call for tenders.³⁴ Where one of the parties in the bidding process is unsure as to whether a bid submitted is compliant, or where an aspect of the bid appears uncertain, either party may apply to the court for a declaration as to the compliance of the bid or the certainty of the information in question.³⁵

Examples of Inadequate Compliance:

- (a) In *True Construction Ltd. v. Kamloops (City)*,³⁶ the plaintiff bidder brought an action against the defendant city for the alleged breach of Contract A. The plaintiff had submitted its bid in an envelope, which contained a bid form, Appendices A, D, and E, and two pages relating to a bid bond. Appendices B and an additional two pages of Appendix A were submitted one hour before the closing time for bids, attached to an Appendix F. As set out in the call for tenders, Appendix F was to be used to submit revisions to the bid, not to submit parts of the bid that had been left out. The Court held that the plaintiff's failure to submit the complete bid in the manner provided for in the call for tenders rendered the bid materially non-compliant, and that the non-compliance was not cured by the last minute submission of the remainder of the bid; the plaintiff's action was therefore dismissed.³⁷
- (b) In *M.G. Logging & Sons Ltd. v. British Columbia*,³⁸ the plaintiff contractor submitted a bid on a timber license auctioned by the defendant Province. After

³⁴ *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 24 B.C.L.R. (3d) 379 (C.A.) at paras. 20-21.

³⁵ See for example, *Whitehorse (City) v. Ketz Construction Corp.*, 2009 YKSC 51.

³⁶ 2015 BCSC 1059.

³⁷ *Ibid.*, at para. 111.

³⁸ 2015 BCCA 526.

initially accepting the bid, the defendant informed the plaintiff that its bid was ineligible as it was non-compliant and as such, it had been rejected. At issue was the fact that the bid listed the plaintiff's registration number alongside a different corporate name and omitted the plaintiff company's incorporation number. The court found in favour of the Province, stating that the failure to fill out the tender application with the full and consistent name and number of the plaintiff company, as required by the tender documents, resulted in the submission of an ambiguous and therefore non-compliant bid.³⁹ Important to the decision in this case is that the call for tenders did not contain a privilege clause, meaning that strict compliance with the terms of the tender documents was required.⁴⁰

- (c) It is worth keeping in mind that if a bidder who has realized that its bid contains an error does not want to enter into Contract B, that bidder may be able to challenge the compliance of its own bid, thereby avoiding the difficult choice between completing the project at a loss and breaching the contract.

2. Application for Declaration or Action for Breach of Contract

If a bidder submits the second-lowest bid on a project and the contract is awarded by the owner to a non-compliant bidder, the award may be challenged as a breach of the owner's Contract A obligations to the unsuccessful bidder. For practical reasons, this challenge must proceed rapidly if the challenger wishes to have its bid reconsidered by the owner. This may be accomplished by an application to court for a declaration that the successful bid was non-compliant.⁴¹ Alternatively, a challenger may bring an action in court for damages in the amount of the profits it would have realized had it been awarded the contract.⁴²

As noted above, if a bid is accepted and the bidder realizes that it has made an error in the bid, the bidder may bring an application for a declaration that its own bid is non-compliant. By the same token however, an owner may bring an application for declaration that an erroneous bid is compliant, thereby obligating the bidder to enter into Contract B.

Examples of Applications and Actions Where Non-Compliant Bidder:

- (a) In *Graham*, the successful bidder quickly brought a petition for a declaration that its own bid was non-compliant and, therefore, that it could not be compelled to enter into Contract B with the respondent owner. Both the trial judge and the Court of Appeal agreed with the bidder, finding that it was entitled to a declaration that Contract A was not formed and that its bid was not capable of acceptance.⁴³ Although the petition in this case was brought by the successful, lowest bidder, it is demonstrative of the use of a petition as a tool to have a successful bid declared invalid.

³⁹ *Ibid*, at para. 30.

⁴⁰ *Ibid*, at para. 26.

⁴¹ See for example, *Graham*, *supra* note 15. Note that in that case, the applicant was the successful bidder.

⁴² *MJB Enterprises*, *supra* note 1, at para. 55.

⁴³ *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, *supra* note 19, at paras. 46-47.

- (b) In *MJB Enterprises*, the owner awarded the contract to the lowest priced bid from the four bidders, which happened to be non-compliant. The plaintiff, who had submitted the second-lowest bid on the project, brought an action against the owner claiming damages for breach of contract. On appeal from the Court of Appeal of Alberta, the Supreme Court of Canada agreed with the plaintiff and found that the owner had breached its obligation to the plaintiff and other unsuccessful bidders not to accept a non-compliant bid. As the plaintiff was able to show, on a balance of probabilities, that it would have been awarded the contract had the non-compliant bid been disqualified, it was entitled to damages in the amount of the profit it would have made had it been awarded the contract.⁴⁴

3. After the Contract Has Been Awarded

Often, potential issues with the tendering process are not identified until after the contract has already been awarded. Where the contract has been awarded to a non-compliant bidder, an unsuccessful bidder may bring an action for breach of Contract A, claiming damages for the profit it would have realized had it been awarded the contract. Similarly, where the contract was awarded to a compliant bidder and an unsuccessful bidder believes it was not treated fairly in the bidding process, the unsuccessful bidder may bring an action for damages for lost profit. In either case, the unsuccessful bidder will have to prove that its bid would have been selected if the owner had not breached its obligations.

This option may be attractive to unsuccessful bidders in that it allows them to earn the profit they would have realized had they been awarded the contract, without engaging the time and risk involved in actually performing the contractual obligations. Nonetheless, unsuccessful bidders in this position should keep in mind the risk and expense inherent in litigation and the potentially adverse business consequences where the owner is a frequent source of work.

Examples of Actions Brought after the Contract is Awarded:

- (a) As discussed above, the plaintiff in *MJB Enterprises*, submitted the second-lowest bid on the defendant's project, the contract for which was awarded to a non-compliant bidder. The plaintiff's action for damages for breach of contract in that case, brought after Contract B had been entered into between the owner and the non-compliant bidder, was successful on appeal to the Supreme Court of Canada. As noted, the plaintiff was entitled to damages in the amount of the profit it would have made had it been awarded the contract.⁴⁵
- (b) Similarly, in *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*,⁴⁶ the plaintiff Stanco submitted the lowest compliant bid on a call for tenders issued by the defendant Province. After receiving the bid, the Province's consultant asked all bidders to re-bid, allowing other bidders to undercut Stanco's price. Stanco was not aware that the other bidders had been

⁴⁴ *Ibid*, at para. 60.

⁴⁵ *MJB Enterprises*, *supra* note 1, at para. 60.

⁴⁶ 2006 BCCA 246.

asked to re-bid on the project, and the contract was awarded to another bidder, whose revised bid was lower than Stanco's. Stanco brought an action against the Province and its consultant for breach of contract. Upholding the decision of the trial judge, the British Columbia Court of Appeal found that the Province had breached its duty to treat all bidders fairly when it allowed other bidders to undercut Stanco's bid price and awarded damages to Stanco.⁴⁷

4. Alternative Dispute Resolution

As with all civil disputes, several alternative dispute resolution options are available to parties engaged in a dispute about the bidding process. These options may include negotiation, mediation, arbitration, and any other dispute resolution mechanism that may be agreed upon between the parties. The ability of a party to unilaterally engage in alternative dispute resolution, however, usually requires the incorporation of such a term into the agreement between the parties. Under the *Notice to Mediate (General) Regulation*, B.C. Reg. 77/2013, any party to an action may initiate mediation by serving a Notice to Mediate on the other parties to the action. The parties will then be required to appoint a mediator and, within 60 days of the appointment and at least 7 days before trial, attend a mediation session.

The incorporation of alternative dispute resolution mechanisms, such as negotiation, mediation, or arbitration, into the Instructions to Bidders is not always done in British Columbia. One reason for this may be that the Owner wants to avoid facilitating the complaint making process to such a degree. In other words, under an alternative dispute resolution procedure, it may become relatively simple for any bidder to make a complaint without being required to resort to the procedures of court and as a result, the Owner may experience a higher number of complaints. On the other hand, if a bidder does bring an action in court, the tendering process could be significantly delayed. Further, as with any court action, there is an element of uncertainty with respect to the outcome of the action, which may impact the tendering process.

Where dispute resolution mechanisms are incorporated into Instructions to Bidders resolution of the dispute is more likely to be swift, depending on the terms of the agreement. The decision will usually be restricted to a single adjudicator whose decision can be made binding on every party to the tendering process by reference in the Instructions to Bidders.

It is also often preferable and beneficial to include alternative dispute resolution mechanisms in Contract B itself, or in agreements entered into among the owner and a number of short-listed bidders. These agreements allow for the resolution of the rights of all parties under one process quickly and inexpensively, the outcome of which will be binding on each of them.

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⁴⁷ *Ibid*, at paras. 53-54.