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# Tendering & Procurement

*Legal Strategies for the Construction Industry*



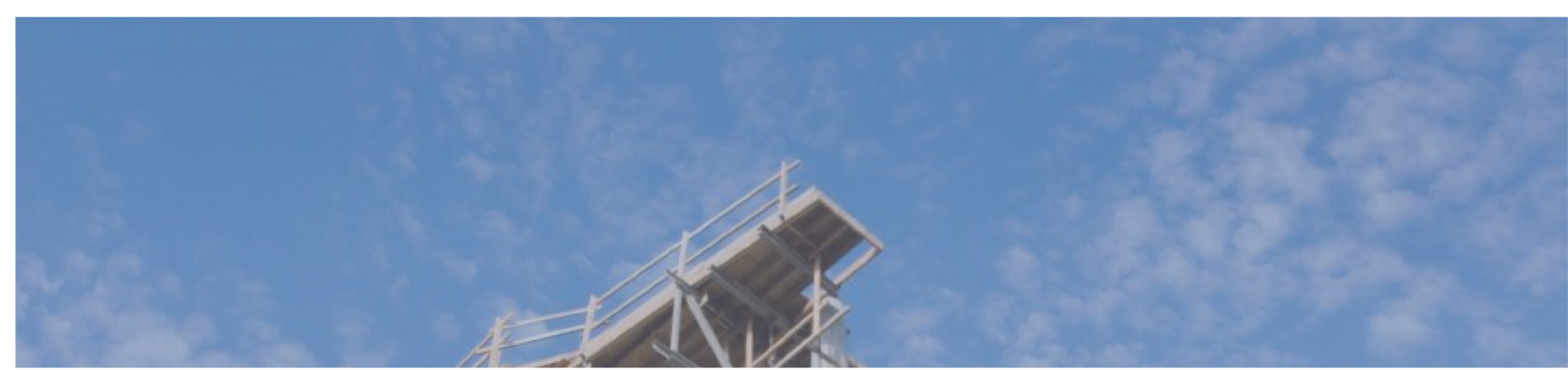
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Presented by  
Lisa J. Stiver



# Tendering & Procurement:

- I. Overview of the Law
- II. Best Practices and Strategies
- III. Role of Subcontractors
- IV. Update in the Law



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# I. Overview of Tendering Law



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# I. Overview of the Law

- Contract Law
  - offer and acceptance
- Tendering Law
  - offer and acceptance
  - Contract A
  - Contract B

## *Ron Engineering (1981)*

- tender was awarded to lowest bidder, bid contained an error in pricing
- bidder withdrew its bid
- Contract A was created
  - automatic
  - irrevocable

## *MJB Enterprises (1999)*

- tender awarded to “non-compliant” bidder
- unsuccessful bidder sued the government
- government relied on its privilege clause

## *MJB Enterprises (1999)*

- Privilege clause:

“the owner may reject or accept all or any part of a Proposal or any of the Proposals submitted in response to this RFP. The owner is under no obligation whatsoever to accept the Proposal with the lowest price, or any of the Proposals submitted”.

## *MJB Enterprises (1999)*

- Contract A - not automatic
- 4-part test:
  1. Was Contract A created?
  2. What are the terms of Contract A?
  3. Was there a breach of Contract A?
  4. Are there any damages flowing from the breach of Contract A?

## Contract A Test:

1. Was a Contract A created?
  - look at intent
2. Terms of Contract A?
  - express terms
  - implied terms
3. Breach?
4. Damages?
  - Contract B

## Contract A – Implied Duties

- *Wind Power v. Sask Power Corp.*:  
“the duty to treat all bidders fairly and equally is designed to ensure that the owner does not extend an unfair advantage to any particular tenderer in the bidding process. It is said that this policy promotes economic efficiency and discourages corrupt tendering practices.”

## Contract A – Implied Duties

- duty to provide proper disclosure
- duty to reject non-compliant tenders
- duty to conduct a fair competition
- duty to award to the winning bidder
- duty to award the contract as tendered



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## II. Best Practices and Strategies



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## II. Best Practices and Strategies

1. Duty to Reject Non-Compliant Bids
  - tender compliance v. contract performance
2. Duty to Disclose
  - material information
  - award criteria
3. Duty to Award the Contract as Tendered
  - bid repair
4. Duty to Award to the Winning Bidder

# Duty to Reject Non-Compliant Bids – Tender Compliance

- mandatory requirements
  - “shall”, “must”
  
- preferred or evaluated criteria
  - “should”, “may”

# Duty to Reject Non-Compliant Bids – Tender Compliance

- *Admiral Roofing Ltd. v. Prince George School Division (2010)*
  - late for site visit
  - disqualified due to non-compliance
  - “restrictive interpretation of mandatory requirements is necessary in order to...respect the mandatory requirements...to protect the tendering process.”

# Duty to Reject Non-Compliant Bids – Tender Compliance

- *Double N Earthmovers Ltd. v. Edmonton (City)* (2007, Supreme Court of Canada)
  - mandatory requirement on equipment to be used for contract performance
  - after award, the City was advised of false information

# Duty to Reject Non-Compliant Bids – Tender Compliance – *Double N*

- court found that the City had no duty to investigate
- long, protracted litigation – 20 years

# Duty to Reject Non-Compliant Bids

- *Cityscape Contracting v. Edmonton* (2007)
  - post-*Double N*
  - low bid was bypassed: insufficient certification
  - City has no duty to investigate (*Double N*)
  - key: information obtained prior to award
  - City has a right to investigate

# Duty to Reject Non-Compliant Bids

- bid cannot contain options other than what is requested in the tender = counteroffer
  - *R. Litz & Sons Co. v. MB Hydro* (2006)
- unfair to other bidders
- non-compliant and must be rejected

# Duty to Reject Non-Compliant Bids

- Tender compliance v. Contract Performance
  - LOC and bid bond security
  - *Thales Rail Signalling Solutions v. Toronto Transit Commission* (2009)
  - *GDC Gatineau Dev. Corp* (2009)
    - qualifications, revocable = deficient bid bond security
    - non-compliant

# Duty to Reject Non-Compliant Bids

- Bid Security v. Performance Security
  - bonds required for compliance with tender
  - bonds required for compliance under contract
- Contract A requirements vs. Contract B requirements
- if in doubt – ask for clarification

# Duty to Disclose

- material information
  - specifications, requirements, conditions, potential problems
- contract award criteria
  - evaluation criteria
  - weightings

# Duty to Disclose Material Information

- design specifications
  - *Coady Construction v. City of St. John's* (2005)
- potential problems with renovations/construction
  - *Inscan Contractors v. Halton Dist. School Board* (2005)

# Duty to Disclose Material Information

- there can be obligations placed on contractors
  - *Bianchi Grading Ltd. v. University of Guelph* (2007)
  - court: “submitted a bid in a careless and haphazard fashion”

## Duty to Disclose Material Information

- “It is of little solace to another contractor tendering on a construction project, after completing a proper inspection of the site, asking the proper questions, and submitting a tender at a price factoring in the necessary costs, to loose the project to a contractor that has performed an incomplete inspection and tendered a low bid, only to demand further payment later.”

– *Bianchi Grading Ltd. v. University of Guelph*

# Duty to Disclose Award Criteria

- evaluation criteria, weightings
- purchasers can not rely on undisclosed criteria
  - *Force Construction Ltd. v. Nova Scotia* (2008)
  - government requested confirmation of a requirement
  - court - “the Department breached Contract A...this obligation was not imposed on other bidders...and that the tender documents do not permit the Department to impose such a requirement on a single bidder nor does it permit a contract to be awarded on the basis of an undisclosed term.”

# Duty to Disclose Award Criteria

- low bid bypassed because of undisclosed criteria
  - *Continental Steel Ltd. (2007)*
  - GC and subcontractor issue
  - court found it was justified
- unrealistic costs

## Duty to Disclose Award Criteria

- bypass of low bidder for incumbent contractor
  - *Brunet & Associates* (2002)
- privilege clause:
  - “the lowest or any bid may not necessarily be accepted...reserves the right to make an award on an overall basis”.

# Duty to Disclose Award to Winning Bidder

- cannot rely on privilege clause
- “the expectation and standard within the construction industry is that, in the absence of any other disclosed criteria, price will be the sole award criterion and the contract award will be made to the pre-qualified bidder submitting the lowest compliant bid price...”  
– *Brunet & Associates* (2002)

# Duty to Award the Contract as Tendered

- Procurement Cycle:
  - tender documents (RFP, RFQ)
  - response from bidders (Proposals)
  - contract award
  - contract negotiation
- Outside of Procurement Cycle:
  - contract performance

## Duty to Award Contract as Tendered

- bid repair
- generally, purchasers cannot “correct” or “change” bids
  - *Jarlian Construction Inc. v. Waterloo* (2008),  
*Maystar General Contractors Inc.* (2009)
  - correcting bid = non-compliance and bid repair
- look at the bid terms very carefully



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## III. Role of Subcontractors



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# Subcontractors

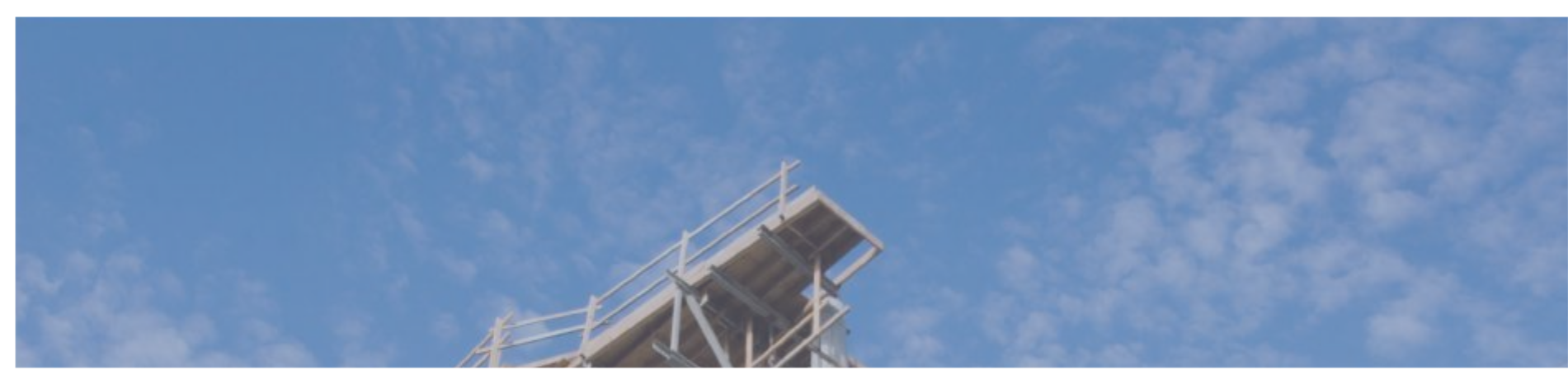
- Contract A – between GC and purchaser
  - *Force Construction Ltd. v. Queen Elizabeth II Health Sciences Centre (2008)*
- Result - Contract A implied rights do not extend to subcontractors

# Subcontractors

- *Design Services v. Canada* (SCC 2008)
  - pivotal case for subcontractors
  - SCC = no rights between the subcontractor and the purchaser
  - terms of bid permitted joint venture

# Subcontractors

- rights may arise between GCs and subcontractors
  - *Black Diamond Paving Ltd. (2008)* – the court enforced the contract between the GC and the sub in a bid
  - *G&S Electric v. Devlan Constructions Ltd. (2008)* – the court denied the GC the ability to substitute subcontractors after a bid was submitted
  
- Key: read the tender and bid appropriately



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# IV. Legal Update



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# Legal Update

- [Tercon Contractors Ltd. v. British Columbia \(2010\)](#)
  - 30 years after *Ron Engineering*
  - most significant case since *Ron Engineering*
  - Trial - \$3.5 million awarded in court
  - reversed at Appeal
  - BC: relied on privilege clause

## *Tercon (2010)*

- “no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that is has no claim.”

## *Tercon (2010)*

- ineligible bidder
- disclaimer does not apply
- New test: 3-part analysis to determine if privilege clauses/disclaimer will apply
- \$3.5 million awarded

## *Tercon* (2010)

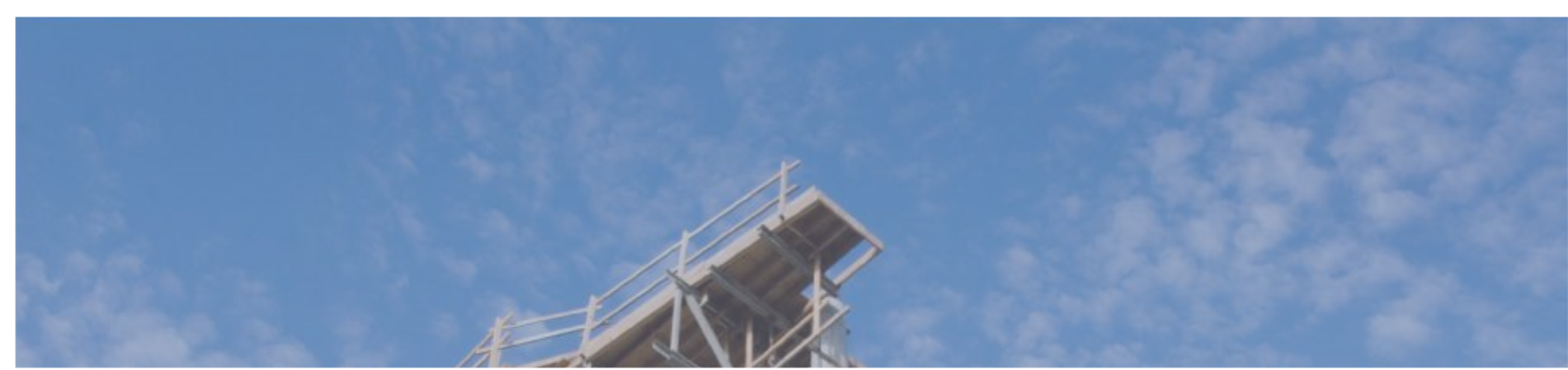
- New Test:
  1. Does the disclaimer apply to the facts
  2. Is the disclaimer itself unconscionable, and unenforceable?
  3. Should the disclaimer be voided for public policy reasons?
- New Test follows the 4-part test in *MJB*

## *MJB & Tercon Test*

1. Was Contract A created?
2. What are the terms of Contract A?
3. Was there a breach of Contract A?
4. Are there any damages flowing from the breach of Contract A?
  - is the breach saved by the privilege clause?  
(apply *Tercon* test)

## Post-*Tercon*

- purchasers are very concerned
- trying to make their disclaimers/privilege clauses more expansive
- clearer drafting = less risk
- more flexible processes (BAFO, negotiated RFPs)



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TIPS

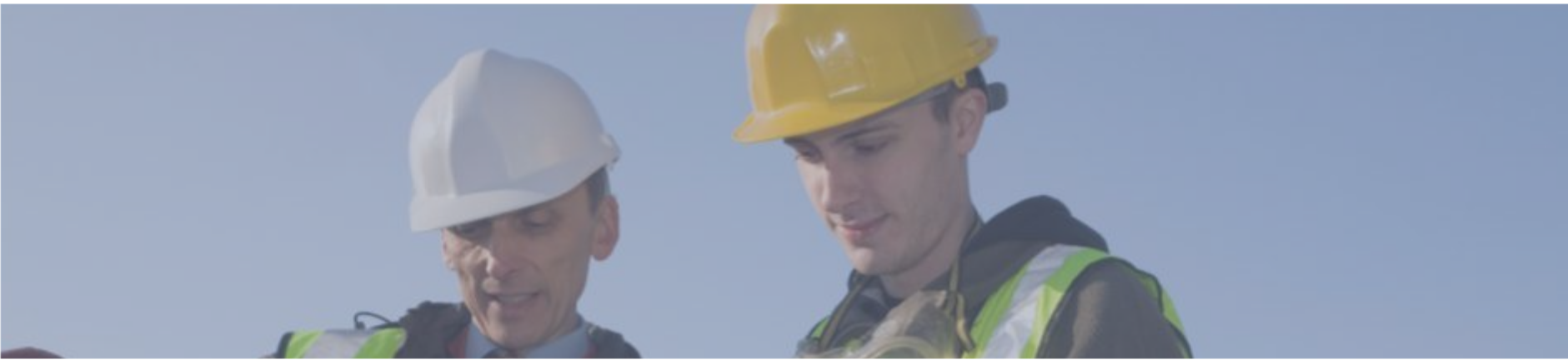


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# Tips

- review tender documents carefully
  - bid = contract
- bid compliance – seek clarification, ask questions
- understand the requirements (more than just mandatory requirements)
- weightings
- disclaimer – post-*Tercon*



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