Tenders & Contract Formation

The principle reference for this section is:


**Review of Requirements For A Contract**

In our discussion of the elements of a contract we described the fundamental requirements for a contract:

a) Offer  
b) Acceptance  
c) Consideration

In addition, the parties must reach a consensus with respect to the terms of the contract and both parties must have the capacity to enter into the contract. In the construction industry one of the mechanisms used to establish contracts is the process of tendering. Typically, the process involves the following steps:

1. Prepare Tender Documents  
2. Identify potential population of bidders  
3. Possible pre-qualification of potential bidders  
4. Issue Invitation to Tender  
5. Obtain Tender Documents  
6. Submit Tender  
7. Receive Tender  
8. Review Tender  
9. Accept Tender/Award Contract

If one uses the normal meaning of the words, it is generally the case that the Tender or Bid is considered the Offer while the Acceptance of the Tender is the trigger for the contract formation.

**The Form of the Tender**

When a tendering authority is preparing the documentation associated with a formal tender, it will provide a form of tender that it is willing to consider.

Normally, it will include terms like:

I, {bidder’s name}, offer to perform the work defined in the tender documents for the sum of $xxxxxx

and

This tender is irrevocable for 30 days, or
This tender is open for acceptance for 30 days.

Sometimes, in the Instructions to Bidders, the tendering authority will state that it will not consider any tender unless it is accompanied by some form of security that will be forfeit if the bidder fails to enter into a contract when one is offer.

In addition, there may a term:

- Any or all tenders may be rejected. Or,
- The tendering authority reserves the right to accept any tender or no tenders

This is the so-called “privilege” clause.

**Historical Treatment of Tenders**

The wording in a tender regarding irrevocability and the time for keeping the tender open implies some obligation on a bidder. Prior to 1981, however, the nature of this obligation was not seen as binding under contract law. The tender was analyzed as shown in the following case:

*Dickinson v. Dodds* (1876), 2 Ch. D. 463 (Eng. Ch. Div.)

In this case, Dodds wrote Dickenson a letter stating: “I hereby agree to sell to Mr. George Dickinson [the house] for £800… I will keep this offer open until Friday…12th June 1874.” Later, Dickinson hear that Dodds had offered to sell the house to another person. Dickinson sent Dodds a letter accepting the offer; Dickinson sent the letter to Dodds by giving it Dodds’ mother-in-law. Unfortunately, she forgot to give the letter to Dodds. When Dodds received it, he advised Dickinson that he had already sold the house. Dickinson sued for breach of contract.

The court determined that the original letter was simply an offer. A contract is formed when both parties agree to the same terms as the same time. Since this situation did not exist at any time, there was no contract. With respect to the statement about keeping the tender open, the court stated that since no consideration was obtained by Dickenson from Dodds for keeping the offer open, there was no contract formed by this statement.

The courts until 1981 dealt with tenders primarily in the context of error in tender.

The series of cases that defined Canadian Law prior to 1981 were Imperial Glass, McMaster and Belle River.

*Imperial Glass Ltd. v. Consolidated Supplies Ltd. (1960)*

In October 1957, Imperial was invited by a subcontractor to bid on a project. Prior to submitting a bid, Imperial contacted Consolidated and asked for a quotation for glass. Subsequently, Consolidated prepared a price and transmitted it to Imperial. Unfortunately, the price contained a computational error which was unknown to both parties at the time. Imperial used the price in its bid to its subcontractor which was accepted. On December 11th, Consolidated, at the request of Imperial, confirmed their price in writing. On December 13th Imperial confirmed the order. On December 17th,
Consolidated found the error and advised Imperial that it would not accept the Purchase Order. The court found in favour of Imperial giving the following reasons.

A unilateral mistake by a party in the motive or reason for making an offer, e.g., where it uses the wrong figure in computing the price at which it would supply certain goods, does not prevent a valid contract from arising when the offer is accepted. Where the offeree is aware at the time of acceptance of the mistake made by the offeror, it does not necessarily follow that the offeree comes under a duty to reveal its knowledge or awareness or that failure to do so gives ground for rescission, unless the circumstances are such as to support an inference of fraud in concealing awareness of the mistake.

The Court held that there was no ground for setting aside the contract herein when the offeree, acting upon a price quotation from the offeror before any contract was made, bound himself to a contractor on the basis of the quoted price, even though the offeree became aware before a firm contract was made with its offeror that the latter had based its offer on a mistake in quantitative computations. The unilateral mistake had not been induced by any representation of the offeree; and while the offeree's conduct may not have been ethical the offeror could not be relieved from its own negligence or carelessness.

*McMaster University v. Wilchar Construction Ltd. et al. (1971)*

Wilchar submitted a tender to McMaster for the construction of a facility at the university. Wilchar was the second bidder and the only bidder, but one, who did not include a sheet containing an escalator clause recommended by the local construction association. Wilchar had intended to include the clause in its tender. Wilchar’s tender was accepted by McMaster. Wilchar refused to sign the contract. The court held that McMaster, knowing of the error, was not entitled to snap at the tender in the hopes of getting some easy money.

There is not the slightest doubt in my mind that the real reason the plaintiff purported to accept Wilchar’s tender was in the hope that it might be able to recover the penalty of the bid bond, knowing full well as early as October 3rd that Wilchar had made a mistake in its tender and that it would refuse to enter into a contract unless the mistake were remedied. To me this is patently a case where the offeree, for its own advantage, snapped at the offeror's offer well knowing that the offer as made was made by mistake.

Mr. Weatherston concedes that Wilchar had, by mistake, not included the escalator clause as a term of its tender, but he argues that this was not a mistake of a fundamental character such as to vitiate the tender and that it was a mistake merely in the motive or reason for making the offer.

I am not prepared to accede to such an argument. In a construction contract the price is always a fundamental term of the contract. In fact it is the very Quid pro quo of such a contract. In the instant case, for the contractor the mistake meant a loss of thousands of dollars as contrasted with a profit in its absence; for the contractee, it meant an advantage of some $16,000. …
If the mistake is as to a term of the contract and is known to the other party, it will avoid the contract: see Chitty on Contracts, 23rd ed. (1968), vol. 1, p.104, art.211. Mistake merely as to the quality or the substance of the thing contracted for must be distinguished from mistake as to a term of the contract, for in the former case it will be an error merely as to motive which will not avoid a contract: Chitty op.cit., p.104, art.212.

In the application of any particular decided authority relating to the topic of mistake as applied to contracts, one must exercise caution. Not only as it a difficult and elusive topic, but some confusion has arisen in the cases as to the distinction between the legal and equitable principles to be applied. Although the fusion of law and equity has to some extent alleviated this situation, there still is a tendency to apply the more narrow common law principles where justice could more readily be done by the discretionary use of equitable remedy. Thus, it is that the principles upon which the Courts will intervene and the circumstances in which they will do so have not been precisely settled and the decided cases are open to a number of varying interpretations and are difficult to reconcile.

The distinction between cases of common or mutual mistake and, on the other hand, unilateral mistake, must be kept in mind. In mutual or common mistake the error or mistake in order to avoid the contract at law, must have been based either upon a fundamental mistaken assumption as to the subject-matter of the contract or upon a mistake relating to a fundamental term of the contract. There, the law applies the objective test as to the validity of the contract. Its rigour in this aspect has been designed to protect innocent third parties who have acquired rights under the contract.

Normally a man is bound by an agreement to which he has expressed assent. If he exhibits all the outward signs of agreement, at law it will be held that he has agreed. The exception to this is the case where there has been fundamental mistake or error in the sense above stated. In such case, the contract is void ab initio. At law, in unilateral mistake, that is when a mistake of one party, the Courts will apply the subjective test and permit evidence of the intention of the mistaken party to be adduced. In such case, even if one party knows that the other is contracting under a misapprehension, there is, generally speaking, no duty cast upon him to disclose to the other circumstances which might affect the bargain known to him alone or to disillusion that other, unless the failure to do so under the circumstances would amount to fraud. This situation, of course, must be distinguished from the case in which the mistake is known to or realized by both parties prior to the acceptance of the offer.

The law also draws a distinction between mistake simply nullifying consent and mistake negativing consent. Error or mistake which negatives consent is really not mistake technically speaking in law at all, as it prevents the formation of contract due to the lack of consensus and the parties are never ad idem. It is rather an illustration of the fundamental principle that there can be no contract without consensus of all parties as to the terms intended. This is but another way of saying that the offer and the acceptance must be coincident or must exactly correspond before a valid contract results.
A promiser is not bound to fulfill a promise in a sense in which the promisee knew at the time that the promiser did not intend it. In considering this question, it matters not in what way the knowledge of the meaning is brought to the mind of the promisee, whether by express words, by conduct, previous dealings or other circumstances. If by any means he knows there was no real agreement between him and the promisee, he is not entitled to insist that the promise be fulfilled in a sense to which the mind of the promiser did not assent: see Colonial Investment Co. of Winnipeg v. Borland (1911), 1 W.W.R. 171, 5 Alta. L.R. at p.72; affirmed 6 D.L.R. 211, 2 W.W.R. 960, 5 Alta. L.R. 71; Smith v. Hughes (1971), L.R. 6Q.B.597.

*Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al. (1978)*

The defendant submitted a bid for a construction project that was, by reason of an error in the defendant's calculation, substantially lower than intended. The terms of the tender did not state that the offer was to remain open for any period of time, but the instructions to tenderers stated that tenders were to remain open for 60 days. The defendant's bid was the lowest submitted, and the plaintiff's architect recommended acceptance of it. Then the defendant discovered its error, informed the plaintiff of it, and purported to withdraw the bid. The plaintiff took the position that the bid had been accepted before revocation, and a month later purported to accept the tender formally. The plaintiff did not, however, demand execution of contract documents, but entered into a contract with the next lowest tenderer and sued for the difference between the amounts of the two tenders. The plaintiff's action was dismissed at trial.

On appeal to the Ontario Court of Appeal, held, dismissing the appeal, an offeree could not accept an offer that he knows to have been made under a mistake affecting a fundamental term of the contract. Consequently, whether or not the offer could be withdrawn before expiry of the 60-day period, it could not be accepted after the plaintiff had knowledge of the mistake.

I prefer the reasoning of Thompson, J., in the McMaster University case to that of the B.C. Court of Appeal. In my view, the authorities establish that an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract. (Price is obviously one such term, as Thompson, J., held: see p. 808 O.R., p. 16 D.L.R.) In substance, the purported offer, because of the mistake, is not the offer the offeror intended to make, and the offeree knows that.

The principle applies even if there is a provision binding the offeror to keep the offer open for acceptance for a given period. I refer to Thompson, J., in the McMaster University case at pp. 815-6 O.R., pp. 23-4 D.L.R.

The situation is quite different where the offeree does not know the offer is made by mistake, and accepts the offer, taking what it plainly says at its face value.
In the present case the plaintiff knew on January 12, 1973, that a serious and material error as to price had been made in Kaufmann's tender. From that time on, the plaintiff could not accept that tender, as a matter of law.

In 1981, with Ron Engineering, the law regarding tenders in Canada took a new turn.


Ron Engineering submitted a tender for $2,748,000 to the Ontario government. It was the lowest bid but Ron soon discovered that it had made an error. Ron requested that it be permitted to withdraw its tender.

The owner awarded the construction contract to Ron but Ron refused to sign, taking the position that the bid could not be accepted since the owner was aware that Ron had made an error.

The owner decided to retain the bid deposit, accepted the second lowest bid and sued Ron for damages. The case ended up at the Supreme Court.

Justice Estey, on behalf of the Court, stated that the bidding process involved 2 contracts, a bidding contract, Contract A, and the construction contract, Contract B.

The Bidding Contract, Contract A, was a unilateral contract and arose when the bid was submitted. If several contractors submitted bids, several contract A’s will arise. Estey J. said that the Invitation to Tender was a unilateral offer, which, when accepted, led to a contract. A term of this contract is that the bid is irrevocable. An additional term is that the bid is accepted, the parties must enter into Contract B.

The court noted that neither party was aware of the mistake until the bid was submitted and opened. Contract A was then in existence and the contractor submitted the bid that it intended to, including the price contained therein and including the error.

The consideration with respect to Contract A was that the contractor was able to bid the project and the owner received a bid according to the rules that it laid out.

Initially, Ron Engineering was considered a bit of an anomaly; its importance was not fully understood until another case, involving tender error, was considered by the Court.

*Calgary (City) v. Northern Construction Company Ltd. (1987)*

The contractor, Northern, submitted a bid to the City for $9,342,000 which was opened publicly. There was a spread of $395,000 between the bid of Northern and the next bidder. Northern immediately knew there was a problem and, shortly thereafter, advised the City that an error of $181,000 had been made in its tender due to a clerical error. Northern, in a subsequent meeting, requested that, either it should be allowed to withdraw its tender, or add $181,274 to its tender price. Calgary refused and accepted Northern’s bid. Northern refused to sign the
proffered contract. Calgary awarded the contract to the second bidder and sued Northern.

There was no disagreement with respect to the facts of the case. The trial judge found for Northern, citing dissimilarities from Ron Engineering and by applying the law of mistake. The Alberta Court of Appeal applied the Ron Engineering analysis and said that Contract A was formed.

The Supreme Court, reviewing the case, found that there were no significant differences from Ron Engineering.

This reinforcement of the Ron decision changed Canadian tender law. Since then, there has been little treatment of tender error, as such. The cases that follow Ron tend to define the responsibilities of the parties under the new Contract A.
**Owners’ Responsibilities**

Before Ron Engineering, the “privilege” clause was seen to give owners complete flexibility with respect to handling tenders. Once the concept of Contract A became known, various parties, both inside and outside the construction industry tested the responsibilities that fell on the owner.

*Best Cleaners and Contractors Ltd. v. R. (1985)*

In 1981, the Department of Transport (“DOT”) invited bids for the operation and maintenance of the airport at Frobisher Bay NWT. The bid documents offered a two-year contract but bidders were asked to quote on a further two years, for a total of a four-year contract. Best and Tower Arctic Limited bid on the work and Best was the low bid on the base contract. However, Tower was low when the four-year option was considered.

After the bids were opened, Tower was asked if it would enter into a four-year contract for the amount quoted. Tower agreed and DOT recommended that the contract be awarded to Tower. Best heard of this and complained. DOT then awarded the contract to Tower but for a two-year period. Best sued.

When the court dealt with the privilege clause, it said that the clause did not change the owner’s obligations; it could award no contract or a contract to Tower but its obligation under Contract A to Best was not to award a contract to Tower something other than Contract B.

The court ruled that the two-year contract to Tower was a sham and MOT was in breach of Contract A. The court said that there was an *implied term* to Contract A that the owner must treat all bidders fairly and not give any bidder an unfair advantage over others.

*Elgin Construction v. Russell Township (1987)*

Russell invited bids for water mains and sewers. The invitation to tender included a privilege clause: “The Township reserves the right to reject any and all tenders and the lowest or any tender will not necessarily be accepted.”

Elgin submitted the low bid but with a completion of 52 weeks. Atomik submitted a higher bid but with a completion of 28 weeks. The cost to Russell would be less with the Atomik bid since the supervision costs would be much less. Russell suggested to Elgin that it should qualify its bid by reducing the completion time to 28 weeks. Elgin complied but Russell awarded to Atomik. Elgin sued.

Elgin argued that Russell failed to follow a “custom of the trade” when it rejected Elgin’s bid and did not award to the lowest bidder. The court rejected that argument, stating that no “custom of the trade” can override the explicit words in the privilege clause.

Note that the owner was allowed to award the contract based on its evaluation of the benefit to it.
**Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1989)**

Abbotsford awarded a gravel-crushing contract to a local company even though Chinook was the lowest bidder. The invitation to tender contained a privilege clause. Chinook sued. The trial court stated that Contract A came into existence and an implied term of that contract that the lowest compliant bid would be accepted. Abbotsford appealed on the basis of the privilege clause. The Appeal Court stated that the privilege clause did not give the owner the right to exercise a local preference without revealing it in the bid documents. It would be inequitable to allow the owner to hide behind a disclaimer clause.


Acme submitted the lowest bid but the Town accepted the 2nd tender. The Town considered that the 2nd bid would do the project in less time and save the Town rent. In addition, more of the subcontractors would be local. Acme sued, relying on the “custom of the trade” argument. At trial, court rejected Acme’s arguments and concluded that the procedures were fair. On appeal, the court accepted the trial court’s reasoning.

Note, once again the privilege clause was upheld.

**Kencor Holdings Ltd. v. Saskatchewan (1991)**

Kencor was low bidder on a project. Graham Construction was second bidder. The contract was awarded to Graham in spite of a report that said that Kencor was more qualified. The reason given was that it was “expedient and in the public interest.” The bid documents contained a privilege clause. Kencor sued. The court ruled that the application of criteria unknown to the bidders would lead to great injustice. The judge stated that “this is a blatant case of unfair and unequal treatment…” and awarded Kencor $180,000 for lost profit.

Here the court determined that unfairness trumped the privilege clause.

**Power Agencies Co. Ltd. v Newfoundland Hospital and Nursing Home Association (1991)**

The Association, a government funded body, operates a group purchasing program for its members. The Association called for tenders for hospital supplies. After the closing, the bid of Power was deemed the preferred bid. Shortly thereafter, the Association was contacted by another bidder which complained that Power’s bid was qualified. The Association, after examining the bids and finding that all the bids were qualified, retendered. Power submitted a tender “without prejudice” and was awarded the work. Power sued for damages since it had not been awarded the contract the first time. Power’s claim was dismissed since the bidders were all aware of the method of evaluation of the tenders. Further, there is no obligation, in the face of a privilege clause, to award a contract to a bidder simply because it complied with the requirements of the tender package.

The Privilege Clause – The Supreme Court view.

The issue here was the question of fairness. Note that this case was one of the first considered by the Supreme Court dealing with fairness and Ron Engineering – ie: the obligations of the owner.

DCL invited bids for a pump house. The tender documents asked for prices for 3 types of backfill. The low bid was from Sorochan Enterprises Ltd. and contained wording in which stated that it based its tender on 1 type of backfill and if others were required, a unit price was provided. The other bidders complained but DCL replied that the note was only a clarification – not a qualification. The contract was awarded to Sorochan and MJB sued. The lower courts asserted that the privilege clause was a complete answer to MJB. The Supreme Court awarded MJB its lost profit and stated that the privilege clause cannot override the owner’s obligation to accept only compliant bids.

Here the Supreme Court reviewed the previous decisions and defined the role of the privilege clause. The Court decided that the privilege clause is compatible with the obligation to accept only a compliant tender but it is incompatible with an obligation to accept only the lowest compliant tender. The Court said, “The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of ‘cost’ than the prices quoted…”

The Court decided that there was no obligation to award a contract to the lowest compliant bidder but there is, definitely, an obligation not to award to a non-compliant bidder. This is quite serious for an owner. An acceptance of a non-compliant bid can result in the owner paying the bidder’s lost profit if a judge feels that the unsuccessful compliant bidder was disadvantaged.

_Tarmac Canada Inc. v. Hamilton Wentworth (1997)_

George Wimpey (later Tarmac Canada) submitted the low bid for roadwork. The tender documents included a privilege clause. The second bidder, by very little, was Dufferin, a local contractor. Dufferin pointed out to the municipality that it was a major supporter of the community and employed many local residents. The Region awarded the contract to Dufferin without giving any reasons. Tarmac sued. In _Acme_ the court had decided that the privilege clause allowed the owner to reject the low bid and accept another qualifying bid without giving any reasons. In this case the judge found that the owner, relying on the privilege clause, could accept or reject any bid without reasons, however, the judge found that the law implies an obligation of fairness when the owner exercises its rights under the fairness clause. The court found that the owner applied some other consideration which had the effect of making the evaluation unfair. _Ron Engineering_ stated that there was a need to protect the integrity of the bidding system. This meant that the owner must ensure that all bidders bid on the same basis without hidden preferences.

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1 Bidding and Tendering, p. 48
Apparently the privilege clause was not clear enough to override the implied duties of fairness and good faith. This did not strip the clause of all meaning – it allowed the owner to reject the bid in cases of force majeure or if it decides not to proceed with the project or unforeseen circumstances undermine the viability of the project. The appeal court upheld the decision. In commenting on the failure to give reasons, the court noted that the Region did not have to give reasons, but in doing so took a risk.

*Sound Contracting v City of Nanaimo (2000)*

Sound submitted a bid and was a low bidder. On a prior job, Sound had pursued a claim against Nanaimo and won the dispute involving changes to overhead and profit for credits on work. Nanaimo, when reviewing the current bid, assumed that Sound would be similarly aggressive and added additional engineering costs to the Sound bid. These costs were not entered into the second bid with the result that the effective price from Sound was higher than the original second bid. Nanaimo decided that the second bid was, overall, the most favourable to the city and awarded it. The trial court, finding a decision based on undisclosed criteria, decided for Sound but the Appeal Court reversed the decision. The Appeal Court found that previous dealings did not amount to an undisclosed criteria.

This seems strange since it appears that the court would allow the application of a yardstick to one bidder but not another – a breach of fairness or setting an uneven playing field.

*Midwest Management v B.C. Gas (2000)*

This is somewhat of a different twist on the privilege clause.

BC called for tenders and included a very extensive privilege clause that imposed a regime for contractors wishing to make comments on their bid. Midwest provided a covering letter with its bid stating that it did not provide for any dewatering costs and proposed that such work would be reimbursed on a cost-plus basis. Midwest did not comply with the Instructions to Tenderers when it included this letter. During the bid review, BC sent out requests for clarifications to some bidders, including Midwest. In a meeting BC noted that the letter from Midwest did not comply with the instructions. Later, BC sent a letter to Midwest advising that BC would not be awarding the contract to Midwest. Midwest sued based on a breach of contract A. BC defended on the basis that Midwest’s tender was non-compliant. Midwest responded, stating that the privilege clause gave BC the right to award to a non-compliant tender, noting that none of the bids was completely compliant. Midwest quoted the *Ron Engineering* statement “…where at that moment the tender is capable of acceptance in law, the rights of the parties under contract A have thereupon crystallized.” Midwest argued that the privilege clause made Midwest’s bid capable of acceptance; in fact, it was so general that any bid could be accepted.

The court denied Midwest’s claim for breach of contract A.

However, Midwest alleged a “free-standing” obligation of fairness – a duty, which if breached could result in liability. The trial court found no such duty.
On appeal, the court found no breach of contract A. When dealing with the fairness issue, the court found that no such duty existed and was inconsistent with the adversarial process in bidding.

**Martel Building v Canada (2000) SCC**

Martel was a landlord, having a Crown agency as a tenant. The lease was expiring and it attempted, without success, to negotiate a renewal. The circumstances surrounding the negotiations were somewhat unusual with the government making demands at the last minute.

Tenders were called – the bid documents included a privilege clause. When analyzing the bids, the government added $1,000,000 to Martel’s price for interior work and $60,000 for a security card system. It added the interior cost to the other bidders as well but did not add the security system. Martel was no longer the low bidder and lost the tenant. Martel sued for lost rent – a pure economic loss – alleging breaches of duty during negotiations, breach of contract with respect to fairness.

Martel lost at trial and won at appeal.

With respect to the pre-bid negotiations, the Supreme Court found that the government had negotiated negligently and breached a duty of care that arose because of the special relationship that existed between the parties. However, the Court decided, as policy, that it would not legally recognize this duty nor compensate Martel for its economic loss since “…it would defeat the essence of negotiation…”

With respect to the “unfairness” aspect of the bid process, while lower courts had implied a duty to treat all bidders fairly, the Supreme Court had previously not taken a position. The Court said, “While the …document…affords the Department wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify this duty…”

The Court did not deal further with alleged duty of care issues (ie: tort) since they were identical to the contract breach, thus avoiding any discussion of a free-standing duty of care.

Here the Supreme Court made the final decision – there is an implied duty of fairness that cannot be lightly overridden. It would appear that it would take very strong language to override this implied responsibility.

**Cable Assembly Systems v. Dufferin-Peel Roman Catholic School Board (2002)**

The Board issued an RFP requesting proposals for a computer-cabling project. The documentation contained two (2) privilege clauses as well as a clause stating that any proposal will be subject to further negotiation. The proposals were received and Cable was low. After negotiations with the 3 lowest bidders, the contract was awarded to Compucentre. Cable sued the Board for breach of the duty of fairness and good faith. The trial court found for the Board and was upheld on appeal.
The interesting part of this action was that the court accepted the idea that there was no real difference between a tender and an RFP. Owners should be aware that calling something an RFP will not prevent the formation of a Contract “A”.

*J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society (2002)*

Kitimat tendered the site preparation work for a local health centre. Oviatt submitted the low bid but the work was awarded to the second bidder, Boden. Oviatt sued for breach of contract and breach of the duty of fairness. At trial, testimony was given that Kitmat hired a consultant who reviewed the bids and recommended that the contract be awarded to Boden. Further, the recommendation was reviewed by an architect employed by the Province who also recommended the Boden bid. There were some errors in the Oviatt tender including the omission of 4 pages and the exclusion of a temporary road. The trial judge reviewed the case law to determine the criteria to be used to determine if the Oviatt bid was compliant. He concluded that the test was one of substantial compliance rather than strict compliance with the tender instructions. Based on this test, he concluded that Oviatt failed the test and the bid was non-compliant. On appeal the decision was upheld.

This establishes the rule that substantial compliance is the appropriate test with respect to the instructions of bidding.

*Wind Power Inc. v. Saskatchewan Power Corp. (2002)*

Saskpower requested proposals (via an RFP) for a wind power project and Wind Power responded. Saskpower determined that the proposal was within the budget and its Board approved the project. Saskpower then sought the approval of the Cabinet as required by the Power Corporation Act. The Cabinet decided not to pursue the project, citing economic considerations. Wind Power sued.

At trial, the court found against Wind Power. On appeal, Wind Power argued Saskpower was obliged, in fairness, to award the contract to Wind Power (or, implicitly, compensate Wind Power for not awarding it). The Appeal Court found for Saskpower stating that the evaluation and award criteria (namely review by Cabinet) was known to Wind Power. Further, forcing Saskpower to award the contract would, in effect, cause Saskpower to break the law – the requirement for Cabinet approval.

I find this case interesting because it is clear the bid was not capable of acceptance until there had been a review by cabinet. Does this mean that the contractor could withdraw its bid until then due to a serious error?

*Mellco Developments Ltd. v Portage La Prairie (2002)*

The City issued an RFP for the sale and development of certain city land. The document called for “concept plans” and said the City would negotiate with the applicant that presented the most attractive proposal. The RFP contained the following language:

This is an invitation for proposals and not a tender call
Two proposals were received; an unconditional offer from Mellco for $316,000 and another from the Lions for $425,000. The latter proposal varied from the RFP requirements in a number of ways but, the City accepted it anyway. Mellco sued. At trial the court found for the City and the matter was appealed.

Mellco argued that the City was in breach of Contract A by considering a non-compliant proposal for Lions. Further, the City was under an obligation to accept the best compliant proposal assessed within the terms of the criteria in the RFP.

The Appeal Court found that there was no Contract A. It quoted *Powder Mountain Resorts Ltd. v British Columbia*

> The invitation for proposals appears to have been an invitation to negotiate or, in other words, an invitation to treat. It appears likely that the intention of the parties was that a submission of a proposal would initiate contractual relations between the parties.

Further, the Court considered whether there was a breach of duty of fairness in the evaluation process and found that the City complied with its responsibilities. Here, an RFP was not a tender and the court refused to find a Contract A.

*Kinetic Construction Ltd. v. Comox-Strathcona (Regional District) (2004)*

The Region issued a RFP for construction of a project. Kinetic was the low bidder with a tender price of $1,494,790 and Robinson was second bidder by $210. The privilege clause reserved the right for the owner to reject bids “which are nonconforming because they do not contain the content or form required by the Instructions to Bidders” and even to use undisclosed evaluation criteria. The bids were analyzed by an independent engineer who found defects in Robinson’s bid but, in spite of these, recommended Robinson as being their preference. The District awarded to Robinson. Kinetic sued.

Kinetic argued at trial that the Robinson bid was non-compliant and not able to be accepted. The trial court found that the Instructions permitted the owner to consider non-compliant bids. Thus, a contract A was formed when the non-compliant bid was submitted and the owner had an obligation to treat the bidder fairly. The Robinson bid highlighted the areas of non-compliance and the District could have rejected it but chose not to. This is in marked contrast to the Graham case discussed later. The trial court decision which rejected Kinetic’s claim was upheld on appeal.

Here the BC Court of Appeal applied the exact wording of the Privilege Clause to find no breach of the Contract A.

**Summary of Duties of Owner**

- Contract A includes an implied duty of fairness unless excluded by the bid documents
- The privilege clause will not protect an owner from a breach of Contract A
- The privilege clause is (usually) incompatible with an award of Contract B to a non-compliant bidder.
• The privilege clause does not oblige an owner to award Contract B to a low compliant bidder.

• An owner will be held to an objective standard when it exercises its right under a discretion clause.

• Whether a procurement process gives rise to Contract A or not depends on the intentions of the parties as reflected in the bid documents issued.

• Outside Contract A, there is no free-standing duty of fairness\(^2\)

\(^2\) Bidding and Tendering p. 80
Subcontractors

Ron Engineering dramatically altered the landscape with regard to owners and contractors. It was not immediately apparent how this would affect the relationship between contractors and subcontractors or suppliers.

*Peddlesden Ltd. v Liddell Construction Ltd. BCSC 1981*

Peddlesden submitted a tender to Liddell through a bid depository for masonry work on a school. Liddell used Peddlesden’s bid when submitting its own bid and named Peddlesden as the trade contractor. Liddell was awarded the contract and advised Peddlesden that it was awarded the subcontract for the masonry work in a letter of intent. Peddlesden had filed a bid bond with its tender but had failed to seal the bond. When Liddell discovered this, it wrote to Peddlesden and stated that its bid was incomplete and Liddell could not use the tender. Liddell had another contractor do the work. Peddlesden sued claiming breach of contract.

Liddell pleaded that:

- The bid bond was invalid so the bid was invalid,
- The bid expired 2 days before Liddell purported to accept the tender in its letter of intent,
- Even if the bid had been accepted on time, it would still be necessary to sign a construction contract and, since there was no such contract, there were no contractual ties between the parties.

The judge noted that in Ron Engineering the court determined that the bidding contract was different from the construction contract. Based on that, he determined that they were different in nature. Thus, even though the acceptance had not been communicated to Peddlesden by Liddell, when the tender of Peddlesden was sent to Liddell a contract A was formed. In order to make this binding on Liddell, the owner must accept the contractor’s bid and the acceptance must be made within the period during which the bid is irrevocable. Thus, it is the owner’s acceptance of the general contractor’s bid that forms a binding contract A between the subcontractor and general contractor.

With respect to the bond, the court decided that it was a minor error and was easily remedied (as the subcontractor had offered to do). The court awarded Peddlesden its lost profit.

This seems to clarify the rules for the contracting hierarchy. The submission of the subcontractor tender does not create the formation of contract A. Rather, when the general contractor uses that tender as the basis of his tender to the owner, contract A is formed and it becomes binding on the general contractor when the owner accepts his tender.

The next case considers the situation where the owner and the low bidder - general contractor re-negotiate the price. The question to be determined is the status of the subcontractors who bid on the original contract.
Westgate Mechanical Contractors Ltd. v. PCL Construction Ltd.

Several general contractors submitted tenders for a building in Vancouver. PCL was low but the owner rejected all the bids. PCL had used Westgate’s price and named Westgate when it prepared its tender.

The architect, on behalf of the owner, negotiated with the low 3 bidders. PCL reduced its price by $285,000 and made other concessions which resulted in PCL being awarded the job.

PCL asked Westgate to reduce its price by $120,000; Westgate refused, saying that since PCL had used its price in the bid, PCL was obliged to award a contract to Westgate. PCL awarded the contract to another contractor and Westgate sued.

PCL alleged that the original bid was not in effect since the owner had rejected all the tenders and the resulting contract was separately negotiated.

The court found that the owner had not accepted PCL’s bid. Westgate’s claim was dismissed.

This decision appears to leave open the possibility of abuse by owners who could call tenders, reject all bids and use the results as pricing information for a subsequent negotiation.

Ron Brown Ltd. v Johanson

Ron Brown, a mechanical contractor, gave his price to several general contractors, including Johanson, bidding on a water treatment plant. Johanson bid the job and was low bidder. He did not name a mechanical subcontractor. After award, Johanson did the mechanical work with his own forces. Brown sued Johanson, alleging that Johanson had used Brown’s price and was, therefore, obliged to award the subcontract to him.

If Johanson had named Brown, both parties would have been obligated to each other. However, since Brown was not “named” by Johanson, no contract A was formed and Brown was unsuccessful. Note that there was an addition tort issue raised.

Bate Equipment Ltd. v. Ellis-Don Limited

An Edmonton school district called for bids through the bid depository with the tenders for the general contractors closing two days later. The general contract was awarded to Ellis Don while the elevator contract went to Dover Corp. When the 2nd lowest bidder, Bate, found that the low bidder had qualified its bid, Bate lodged a formal complaint. The bid depository upheld the complaint and disqualified Dover. Ellis Don then changed the name of its elevator subcontractor to Armor (Bate’s elevator company) and used Armor in its bid. Dover appealed to the architect to have its tender reinstated. The architect concurred and recommended that the owner request that Ellis Don show Dover as the elevator subcontractor. The subcontract was awarded to Dover. Bate sued alleging a breach of Contract A.
The issue at trial was what were the terms of the Contract A formed between Armor/Bate and Ellis Don when Armor submitted its bid. In Peddlesden the court found that Contract A became binding when the owner accepted the bid of the general contractor and no notification to the subcontractor was required. In this case the judge would not accept that and noted that normal rules of contract required notice to the bidder. Further, the instructions to bidders contained statements regarding the owner’s right to approve the subcontractors. The judge reviewed the tender documents and noted that they required the general contractor to list his “proposed subcontractors”. The judge concluded that although Ellis Don and Armor entered into a Contract A, since Ellis Don did not accept Armor’s bid either explicitly or implicitly, there was no obligation formed to enter into Contract B. The judge noted that simply carrying a subcontractor’s name and bid did not constitute acceptance of the bid.

The role of the bid depository was examined and the court found the priority of documents in the tender documents found that if the bid depository rule conflicted with other provisions of the tender documents, the tender documents would prevail. Thus, Ellis Don did not breach contract A.

*Scott Steel v R. J. Nicol Construction*

Nicol, a general contractor, requested that Scott provide bids for the supply of structural steel. Scott quoted his price by telephone. Nicol used Scott’s quotation and listed Scott as his subcontractor. Nicol was awarded the contract but decided to award the steel subcontract to another firm. There was no evidence of bid-shopping. The trial judge found that there was not contract A formed between the parties since the subcontractor’s bid was not complete, the general contractor could not use a subcontractor without the owners approval, and the schedule proposed by the subcontractor would not permit the entire project to be completed on schedule.

In Ron Engineering, Estey J. noted that there might be occasions when a Contract A might not be formed. Here, the judge noted that she did not see why the normal rules relating to acceptance should not apply. Further, Ron Engineering describes the bidding contract as a unilateral contract and, she said, it is the nature of a unilateral contract that the recipient of a bid is not obliged to accept it. The recipient of the bid is not obliged to enter into a Contract B unless he has accepted the bid and let the bidder know that he has accepted it.

Here and in Bate the court seems to take a step back from Peddlesden and requires that some form of formal acceptance take place and be communicated to the bidder before a contract A is deemed to have been formed.

*Vipond Automatic Sprinkler v E.S. Fox*

Vipond submitted a bid to Fox for the sprinkler installation on a project. The project was over budget and Fox, after changes and deletions, submitted a lower bid, which included Vipond’s price. Fox asked Vipond and 2 other sprinkler contractors for a revised price for cheaper pipe, as specified in an addendum. Vipond did not change its price, stating that it already used the cheaper pipe.
Another bidder submitted a price lower than Vipond and was awarded the contract. Vipond sued alleging breach of a verbal agreement to award the contract to Vipond and a breach of its duty of fairness.

The judge found that even though the owner accepts the contractor’s bid, it does not follow that the subcontractors bids are also accepted, accepting the Scott Steel decision. The court dismissed Vipond’s claim.

**Stuart Olson Constructors v. NAP Building Products**

NAP submitted the low window price to Stuart Olson and was sent a letter of intent. Subsequently, Stuart Olson sent NAP a subcontract which was modified slightly and returned after it had been signed by one of its officials. Subsequently, NAP changed its mind and repudiated the subcontract. Stuart Olson retendered the work and awarded it to another subcontractor.

NAP attempted to argue that no Contract A or B was formed. The judge rejected NAP’s claim and awarded Stuart Olson the difference between the NAP bid and the low bid on the retender.

**Naylor Group Inc. v. Ellis Don Construction Ltd.**

Ellis Don, bidding on a hospital extension, invited Naylor to bid on the Electrical work. At the time Ellis Don was having a dispute with the IBEW and the dispute had come before the Ontario Labour Relations Board. The ruling was reserved at the time of bidding.

Naylor had an in-house union but Ellis Don assured Naylor that this would not be a problem. Naylor submitted a bid and was low. Ellis Don carried Naylor in its bid, which was low. Had Ellis Don not carried Naylor, it would not have been low bidder.

The OLRB decision was released its decision confirming that Ellis Don could only use IBEW-associated electrical subcontactors. Shortly thereafter, the owner made some changes to the design and asked Ellis Don to modify its quotation. Ellis Don resubmitted its bid, again using Naylor as the electrical subcontractor.

The owner awarded the contract to Ellis Don. Ellis Don offered the contract to Naylor on the condition that it use IBEW workers; Naylor refused and Ellis Don awarded the electrical subcontract to another contractor. Naylor sued, claiming that Ellis Don had used Naylor’s price to get the main contract and shopped its bid to get a favourable price, undermining the bid process and breaching Contract A.

At trial the judge found that the award of the prime contract to Ellis Don did not automatically trigger a subcontract between Ellis Don and Naylor. There was no contract between the two until Ellis Don had communicated its acceptance to Naylor, which it never did.

Further, he noted that if such a contract had come into existence, it would have been frustrated by the OLRB decision which prevented Ellis Don from entering into a contract with a non-IBEW subcontractor. The trial judge awarded Naylor the costs of preparing his bid due to the tort claim of unjust enrichment. He also
noted that if he was wrong in finding no contract, his award for lost profits would have been $730,286.

On appeal, the court found that Naylor had acquired rights under contract A. Thus, unless reasonable objections were brought forward, Naylor was entitled to the contract. The court found that Ellis Don had not acted reasonably and awarded Naylor a discounted amount for lost profit.

The matter went to the supreme court. Here, the Supreme Court, for the first time dealt with subcontract matters and applied the Contract A, Contract B theory. The court considered 5 questions.

**Was Contract A formed between Naylor and Ellis Don?**

Naylor pleaded that when Ellis Don was awarded the general contact, there was an automatic obligation to enter into a subcontract. The court found that there was no such obligation. Further, he agreed with the lower court that there could be no Contract B unless Ellis Don communicated its acceptance to Naylor. However, under these circumstances there was a clear obligation to the subcontractor to enter into a contract with it when it used the subcontractor’s price in its tender unless it had some reasonable objection.

**Was Contract A frustrated by the OLRB Decision?**

In short, no. The OLRB decision was known when Ellis Don made its request for Naylor to confirm its bid. When Ellis Don sought out Naylor to bid the work, it was promising work that had already been contracted to IBEW.

**Did Ellis Don breach Contract A?**

Ellis Don carried the Naylor bid and, thus, assured itself of being the low bidder. Ellis Don affirmed the agreement to use Naylor after the OLRB decision. When Ellis Don signed the general contract, the agreement contained Naylor as the electrical subcontractor. Naylor believed that Ellis Don used its bid to become the low bidder and, once it had achieved this status, as a lever to negotiate a lower price from another contractor. The court found that Ellis Don was in breach of Contract A.

**What are the Damages?**

The court found Ellis Don liable for lost profit - $365,143.

**Summary of Subcontractor Bids**

The following general conclusions can be derived:

- Contract A between a contractor and subcontractor arises when the subcontractor submits an offer and the contractor carries that offer in his bid.

- When a contractor carries a subcontractor by list its name and incorporating its price in the prime bid, Contract A will oblige the contractor to communicate the acceptance of Contract B to that subtrade if the prime bid is accepted by the Owner and the Owner does not reject that particular subtrade.
• If the contractor carries the subtrade’s price but does not name the subtrade, the terms of Contract A may still oblige the contractor to communicate acceptance of Contract B to the subtrade if the owner accepts the prime bid without objection to the subtrade.

• Contract A between the prime and subcontractor ends if the owner does not accept the prime bid or does not accept it within the period of the bid’s irrevocability.

• The contractor is not obliged to nominate the lowest subcontract bidder.

• Bid shopping is a breach of Contract A.

• The offer of a subcontractor remains open and irrevocable for a reasonable time after the expiry of the period of irrevocability of the prime bid.

Mistaken Bids – Post-Ron

*Gloge Heating & Plumbing Ltd. V. Northern Construction*

Northern prepared and submitted a tender for work at the Edmonton International Airport. It used the mechanical price of Gloge, submitted by phone shortly before tender submission. Northern was the low bidder. Gloge advised Northern that it had made an error and Northern, in turn, advised the owner. The owner would not permit Northern to adjust its bid so as to use the second lowest mechanical tender. Northern was awarded the contract and Gloge refused to enter into the subcontract. Northern did the work using the services on another subcontractor and sued Gloge.

Gloge advanced the arguments that

Northern failed in its duty to warn Gloge that it was very low,

Northern could not award the contract to Gloge once it was aware of the error in Gloge’s tender, and

Gloge was free to withdraw its tender until Northern had accepted it, which it did.

The court found that Gloge, by delaying the submission of its tender until the last minute, deprived Northern of the opportunity of analyzing the mechanical prices and warning Gloge of the potential for error. The court then dealt with the analysis using Contract A-Contract B principles, finding that the Gloge bid was irrevocable for the time that the General Contractors’ bids were irrevocable since the subcontractors knew that the general contractors would rely on them.

*Town of Vaughn v Alta Surety Company*

This is the same case as Acme, described earlier. When the surety company defended on the basis of the town not taking effective action to mitigate its loss by accepted an amended offer from Acme, the court quoted Calgary v Northern and said any such action would turn the tendering process into an auction.
Forest Contract Management v C&M Elevator

Forest requested bids from several elevator contractors for an apartment building. C&M was the low bid. Forest submitted its tender to the owner and was awarded the contract. C&M confirmed its telephone quote by letter. Some of the conditions in the letter were not acceptable to Forest and were changed. The price was also reduced.

The general contract was signed and work commenced. C&M received the subcontract document and initiated work on the preliminary aspects of the work. Shortly thereafter, C&M was advised by one of its suppliers that it had missed one elevator. C&M advised Forest that it could not perform its contract and returned the subcontract, unsigned. Forest retendered the contract, awarded it to another contractor and sued C&M for the difference. The court found that a Contract A was in existence in spite of the representation from C&M that the changes to the original tender amounted to a counteroffer – nullifying the original bid. The court noted that the changes were insignificant, and, in any case, C&M had started work. This brought Contract B into being. The judge noted that once a subcontractor starts work on Contract B, it is bound by the terms of Contract B. If the terms of Contract B do not conform with Contract A, then the subcontractor should notify the general contractor immediately and not perform until all the terms are settled.

City of Ottawa Non Profit Housing v Canvar Construction

Canvar submitted a lump sum price to ONPH for the construction of a residential building. Along with the tender it submitted a 5% bid bond. Canvar intended to bid $2,989,000 and its bid bond was for $149,450 (5% of this amount). However, due to a clerical error, the price was written as $2,289,000 – an error of $700,000. At the tender opening, Canvar knew it had made a mistake and asked to withdraw its bid or adjust its price. ONPH rejected both options so Canvar refused to execute the contract. ONPH claimed damages.

At trial, the judge found no evidence that Canvar did not intend to submit the price that it did. He relied on Calgary v Northern when he refused to allow Canvar to change its bid. Canvar argued that the owner’s claim was unconscionable. The court found that the essential items for such a finding to be missing. The court assessed damages against Canvar of $841,000 of which the surety had to pay $149,450.

The court of appeal looked at this somewhat differently. It found that the wide disparity of the bids plus the calculation of the bid bond amount meant that the error was evident on the face of the tender and the bid was not open to acceptance.

Derby Holdings v Wright Construction

Here, the contractor used his error to escape from a larger error.

Derby invited bids for renovations to a shopping mall and four general contractors responded. The low bidder, Wright, reviewed its tender and determined that it had
made a significant error in compiling the electrical portion of the bid. The error amounted to $208,939 on a bid of $1,347,130. Wright informed the architect of the error but offered to negotiate the final price so that it would still be the low bidder. Derby refused to negotiate and attempted to accept Wright’s bid.

Derby awarded the work to the next bidder and sued Wright for the difference between the low and second bid.

During the bidding process, an employee of the architect sent out a memo to the bidders stating that the electrical work had been removed from the tender and would be bid separately. This memo was followed by Addendum #1 wherein the architect, himself, stated that the memo should be ignored and the electrical work was part of the bid. The addendum required that bidders should acknowledge its receipt. A clause of the instructions to bidders stated that no addenda would be issued within 3 days of the tender closing; addendum #1 was issued less than 3 days before the closing. The tender form had no provision for the bidders to acknowledge inclusion of any addenda. Neither of the low 2 bidders acknowledged receipt of addendum on its tender. The architect confirmed, by phone, that Wright had received the addendum but did not confirm that Wright had included the contents of the addendum in its tender.

The bidding process was very confused.

At the trial, Wright’s defence was that its bid could not be accepted because it was non-compliant – it did not include the work specified in addendum #1 and did not acknowledge the Addendum on the bid form as required in the Instructions to Bidders. Derby took the position that neither the memo nor the addendum had any legal effect since they were issued after the 3 day deadline. Furthermore, the phone call acknowledgment by Wright was a rectification of a non-compliant aspect of Wright’s bid.

The judge was quite sympathetic with Derby’s position and felt that Wright’s argument about non-compliance was a “smokescreen”. Nonetheless, he decided that Wright’s bid was non-compliant and could not be accepted. He acknowledged that finding a tender non-compliant at the behest of the contractor was new law but he couldn’t see why the application of this legal principle would depend on the source of the challenge.

**Review of Tender Form**

**Review of Tendering Procedure**