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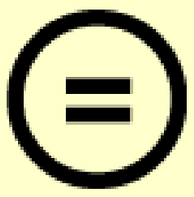

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Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

by

Ronald W. Craig

A Doctoral Thesis

Submitted in partial fulfilment of the requirements for the award of

Doctor of Philosophy of Loughborough University

December 2000

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Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

Ronald W. Craig

PREFACE

This thesis is submitted under Loughborough University's *Guidelines for the Submission of Published Papers for a Research Degree* as at January 1997.

The body of research undertaken by the author is contained primarily in *Procurement Law for Construction and Engineering Works and Services* published by Blackwell Science in 1999. Although the dissertation is in the main a collection of published journal and conference papers from the years 1996 - 2000 and drawn from the research conducted for the above textbook, supplementary material has been added to bring each sub-topic up to date. Conclusions and recommendations drawn from a re-appraisal of all the material are set out at the rear of the dissertation.

The format for the presentation of this dissertation has been influenced first by a textbook, namely *Construction Contracts: Principles and Policies in Tort and Contract* (Volume 2, 1996) by I.N. Duncan Wallace QC, and second by other dissertations held by the Pilkington Library at Loughborough University and submitted under the 'published papers' route, namely *Irrigation Water Requirements and Water Lifting Technology* by R.D. Faulkner PhD 1991, and *The Development of Intermediate Construction Enterprises* by D.W.J Miles PhD 1997.

ACKNOWLEDGEMENTS

The author acknowledged within his textbook the several institutions and individuals who had contributed to or in some way enabled the necessary research. The author now acknowledges the support and assistance given by Professor Andrew Price PhD of the Department of Civil and Building Engineering in the role of Director of Studies, and the continued support and availability of time given by the Department of Civil and Building Engineering, Loughborough University so as to enable this research to be continued and progressed over a period of two years since the book was completed.

R.W. Craig
December 2000

Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

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ABSTRACT

This research exposes to examination and understanding the law governing procurement of construction and engineering works and services. The thesis captures both development of common law and judicial determination of statutory law. It takes the form of published journal articles and conference papers which discuss legal issues relevant to construction procurement and conclude with recommendations for clients and construction project managers on how to better manage the procurement process. The work reveals, *inter alia*, the extent to which contract law regulates the tendering phase of construction procurement and places the client under an obligation to the tenderer characterised as 'fair dealing' or 'good faith'.

Chapter 1 is of an introductory nature. Chapter 2 sets the crime of manslaughter arising out of construction site fatality as a procurement issue. The author notes the UK government's intention to introduce the new offences of reckless killing, killing by gross carelessness and corporate killing. Chapter 3 discusses cases where disaffected parties to the tendering process have made private law challenges of that process seeking compensation for the other party's alleged irregularities. The client is generally obliged in law to treat all tenderers equally and fairly and to refrain from evaluating tenders and awarding contracts other than in accordance with the rules set down in the tender conditions. Chapter 4 addresses the question: do traditional tendering processes encourage, or merely permit, contractor innovation? Several tender codes are reviewed to establish whether these codes provide for, or encourage, innovative proposals from competing bidders. Chapter 5 provides updating case material for the period 1999-2000 which helps to underpin the conclusions and recommendations set out in Chapter 12.

Chapter 6 is a criticism of the NJCC's *Code of Procedure for Single Stage Selective Tendering* and the CIB's *Code of Practice for the Selection of Main Contractors*. Suggestions are made as to what a new tender code might include in the light of selected decisions of the common law courts. It is argued that a set of 'standard' tender rules should become the terms of a 'tender contract'. Those rules would properly reflect decisions of the courts and would be accepted by all parties to the process as a tender contract document. Chapter 7 discusses how the common law protects the integrity of construction procurement by imposed or assumed contractual obligations. Procurement of subcontract works is also considered. The author concludes that the tendering contract operates between main contractor and subcontractor as it does between owner/ developer and main

contractor, and that the 'two contract' analysis provides the best basis for upholding integrity of the bidding process. Chapter 8 sets out advice for quantity surveyors and project managers derived from the decisions of the common law courts. The author argues that practice should be shaped to reflect the obligations assumed by parties in common law so as to avoid claims from aggrieved bidders.

In Chapter 9 the focus shifts from private to public law. A Scottish court denied a remedy to the unsuccessful bidder on the grounds that the contract award process was unfair, unreasonable and in breach of natural justice. The author argues that a successful case might have been made out in private law and concludes with recommendations as to how the tender process might be better conducted. Chapter 10 deals with public procurement under the rules of the European Union (EU), noting a particularly important decision by the European Court of Justice that contracting authorities are obliged to treat all tenderers equally and fairly, a duty that parallels that found in common law and discussed in Chapters 2 through 8. Chapter 10 concludes with an article on *R v Portsmouth City Council* (1996), reviewing both decisions at first instance and in the English Court of Appeal.

Chapter 11 considers the risks of developers and contractors by examining the effectiveness of 'controls' imposed by common law when the usual statutory controls are temporarily withdrawn. It can be seen that the common law has not evolved to protect the interests of neighbours and local residents from the perils and hazards of property development which result in environmental degradation. This chapter concludes with recommendations as to how developer and constructors might minimise their impact on adjacent property owners. Chapter 12 presents a summary of the conclusions drawn from the completed research project and the author's recommendations for further research within the procurement topic.

Key words: Law, procurement, construction, engineering, tender, bid, offer, contract, public works

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Published papers included within this dissertation:

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Works, Services and Supplies Procurement: Obligations under the Tendering Contract, Fairness and Revocation of Offers	RICS Research Foundation, COBRA 1996	Chapter 3, Part 2, page 49
Competitive Advantage Through Tendering Innovation	(2000) 70 ACLN 32 Australian Construction Law Newsletter	Chapter 4, Part 2, page 82
How Innovative is the Common Law of Tendering?	(1999) 5 Journal of Construction Procurement 15	Chapter 4, Part 3, page 95
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Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations	[1999] ICLR 261 International Construction Law Review	Chapter 7, Part 2, page 203
Capital Works Procurement: Owner's Obligations under the 'tendering contract' (only part reproduced here) (written jointly with Philip Davenport of the University of NSW, Australia)	Proceedings of CIB W65 and W92 International Symposium 1996, The Organization and Management of Construction, Shaping Theory and Practice (ed Langford and Retik), volume 2. Managing the Construction Project and Managing Risk, pp. 397-401	Chapter 7, Part 3, page 219
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Judicial Review of Public Tender Decisions (part only)	(1999) Procurement Law for Construction and Engineering Works and Services, Chapter 11: pp. 524-525, 528-535, 598-602.	Chapter 9, Part 1, page 246
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Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

Chapter 1

Introduction

1.1 Author's Background

The author's initial experience of the construction industry was gained with a private consultancy and then in a public office. Having trained and qualified as a quantity surveyor (ARICS) in Edinburgh, the author moved to London to take up the post of project manager, responsible for managing a public works programme and the business aspects of a local authority's design office. During this period further management studies resulted the award of Membership of the Chartered Institute of Building (MCIOB). At this stage in his personal development the author's main interest was in managing the development process from a client's perspective. This brought him into contact with developers from the private sector resulting in a period of five years spent as a director of a small group of property owning and developing companies. During this period the author was admitted as a Member of the Institute of Management (MIMgt).

The second phase of the author's career involved the setting up and management of a small professional practice, based in Birmingham, offering services in quantity surveying, building surveying and expert witness work. This latter involvement led to a growing interest in construction law, an interest that was further stimulated and rewarded by taking up a teaching post in the Faculty of the Built Environment of Birmingham Polytechnic, which later became the University of Central England, and more recently, in the Department of Civil and Building Engineering at Loughborough University.

The third phase of the author's career is therefore as an academic, researching, writing and speaking on the subject of 'construction law'.[1] During this phase the author attended King's College London as a part-time student and gained a Masters in Construction Law and Arbitration. This is not the full qualification of a working lawyer, but the result of a study of the English legal system, the way that system impacts on construction and engineering activity, and the way private disputes are resolved by commercial arbitration. The author's dissertation for masters was entitled 'International Construction Contracts: Identification and Discussion of Potential Problems for English Contractors Working under Scots Law' (1993). The research looked at the legal consequences for construction and engineering contractors, sub-contractors and employers of crossing the border between England and Scotland to work, given two distinct legal jurisdictions and the fact that arbitration law is very different in Scotland from that of England. The research methodology followed the traditional route of literature search in both jurisdictions and structured interviews in Scotland. Spurred on by

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[1] The law relating to building and construction. See Uff (1999) *Construction Law*, Sweet & Maxwell, Preface, for explanation of how this term came about.

this experience, the author commenced in 1995 a study of the various laws which might affect or regulate the construction procurement process in England or in other like countries, mindful of the fact that little attention had been given to this sub-topic of construction law. The results are firstly the publication in 1999 of a textbook: *'Procurement Law for Construction and Engineering Works and Services'*; and secondly, this doctoral dissertation.

1.2 Background to the research

Every construction or engineering project requires the procurement of works, services and supplies and much activity involves the formation and administration of contracts. Much effort by owner, contractor and subcontractor goes into the tendering and contract formation process at all levels. Knowledge of procurement law is necessary for all persons involved in the preparation of contract documents, the pricing of construction and engineering risks, the selection and pre-qualification of contractors invited to tender, and the assessment and evaluation of tenders received. A wrong decision at this stage can be detrimental to the interests of at least one party and perhaps several parties, and can be avoided by a careful application of the relevant principles revealed in this research.

Procurement in this context means "... the framework within which construction is brought about, acquired or obtained." This definition was developed by CIB W92,[2] of which the author is a member, at its meeting in 1991. This statement provided the guidance system for the research needed in preparing the text. The research in its early stage was curiosity driven. The questions addressed were at first: what problems have arisen for consideration by the courts in the context of construction and engineering procurement, or in a general procurement context? How did the courts resolve the issues in dispute? Are there any principles being developed which might usefully be reproduced in another jurisdiction? As the extent of procurement law became more evident, questions were refined in pursuit of connecting principles. Would the courts in New Zealand follow the Supreme Court of Canada in recognising the existence of a 'tendering contract' or 'pre-award contract'? Yes, they did. Had the possibility of contractual relations arising out of the tendering process been considered prior to the Canadian decision? Yes, at the turn of the century, in Australia. And so on.

The English construction project manager, client or lawyer might be puzzled, even bewildered, by the number of cases considered in this text which were not decided in an English court. On the other hand the Scots are accustomed to having so many 'foreign' cases thrown at them! Readers of this text from the USA might be surprised to see a few US judgments within material produced in England. Readers from Australia, New Zealand and Canada will be used to the idea that legal analysis might start from English prototypes, flavoured with home grown and US varieties. What is the lay reader to make of this 'mixed bag' of judicial authority? The answer was succinctly put by Professor Michael Furmston, when he said:

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[2] CIB is the acronym of the Conseil International du Batiment, or International Council for Building. Supported by the United Nations, its purpose is to provide an international platform for exchange and collaboration in research and technology development in the construction sector. Working Commission W92 deals with Procurement Systems.

> "The formal position can be stated with reasonable brevity and simplicity. Decisions of United States and Commonwealth courts are not binding on English courts but may be cited to English courts and will, in principle, be treated by English courts as persuasive."[3]

The reason, as Professor Furmston explains, is that in a common law system only the judgments of the superior court within a jurisdiction establishes any binding authority within that jurisdiction. Decisions of foreign jurisdictions are not binding but may provide useful and even persuasive authority in novel circumstances. Even if the local court considers a foreign judgment but decides to take a different course, the citation of foreign authority has served a useful purpose in assisting the local court to formulate its own conclusion. But, English judges would no doubt weary of excessive reference to foreign cases. Echoing the words of Professor Furmston:

> "It would make no sense to search the world for other cases for propositions which are clear and well-settled in English law."[4]

It is submitted that the laws discussed here in the context of contractual or public law obligations arising out of the tendering process are not yet fully developed in England, Scotland, Australia and New Zealand and that much can be learned by examining each other's cases plus those from Canada and, possibly to a lesser extent, those of USA.

1.3 Reasons for research

1.3.1 The search for a recognised and identifiable body of law

Several years of study by the author of the British construction industry, its production methods and its forms of contract had failed in the years prior to 1995 to reveal anything in the way of a body of law which could be seen to govern the procurement of construction and engineering activity. It was generally known that the UK's participation in Europe had led to the implementation within domestic law of a set of rules governing public procurement. Regulations as to the procurement of public works, supplies and services and been introduced progressively in the years 1991 through 1995.[5] But recent development of the common law in England appeared almost non-existent: just one English case in 1990 in the Court of Appeal involving the local council and a concession awarded to a flying club to operate services at the local airport,[6] and one case in 1957 where at first instance an unsuccessful tenderer was awarded remuneration by the court for 'extra' services rendered during an otherwise unremarkable tendering process.[7] In fact there were a handful of other cases but the sum total of procurement cases did not appear to qualify for the description of 'a recognised and easily identifiable body of law'.

During the summer of 1995 the present author undertook to prepare two papers for a forthcoming CIB W92 International Procurement Systems Symposium to be held in Durban, South Africa in

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3 Furmston, Prof M, *Some Thoughts on the Uses of Commonwealth and United States Cases* [1995] Con L Yb 13.
4 *Ibid.*, 20.
5 The Public Works Contracts Regulations 1991, the Public Supply Contracts Regulations 1991 and 1995, and the Public Services Contracts Regulations 1993.
6 *Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195; 3 All ER 25 (CA).
7 *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; 2 All ER 712.

January 1996. Co-incidentally, the author at the same time embarked on the early stages of preparation for what later became a text book which was published in 1999 under the title *Procurement Law for Construction and Engineering Works and Services.*[8] But in 1995, the author was unaware of the extensive development in the common law of procurement which by then had taken place in the Canadian courts. It was the decision by the New Zealand High Court in December 1994, drawn to the author's attention during a visit to Australia and New Zealand in April 1995, which was the prime factor in motivating this research into procurement law. Here was a case, *Pratt Contractors v Palmerston North City Council,*[9] which seemed typical of the author's experience of the procurement of construction or engineering works, yet as a result of the competitive tendering process, the parties were in the High Court. Remarkably, as it seemed at the time, the court found that owner and tenderer were bound by a contract (later described by the author as a 'tendering contract' in order to distinguish this contract from the construction contract awarded at the conclusion of the tendering process) which regulated the tendering process. Even more remarkably some say, the complaining tenderer, who was not awarded the construction contract, received compensation from the public owner. That compensation amounted to the wasted costs in preparing the unsuccessful tender, plus the loss of the profit which the complaining tenderer would have earned if it had been awarded the contract in question. This was the first reported case of this nature in the New Zealand Law Reports since they were first published in 1881.[10] The *Pratt Contractors* case became central to the research conducted for this dissertation.[11] This decision controverts the traditional view that an invitation to tender does not amount to a legal offer capable of acceptance so as to form a contract.[12]

But the decision in the New Zealand High Court was not made in a vacuum. In coming to its decision the court applied not only the *Blackpool* case referred to above, but also the decision in the Supreme Court of Canada in *The Crown in Right of Ontario v Ron Engineering & Construction Eastern Ltd,*[13] a case much more closely identified with procurement of construction works. The Canadian judgment was notable, not only in being a judgment from the highest appellate court in Canada, but in the fact that the case was brought by the owner, not the injured tenderer. The court had held that a tendering contract had been formed which governed the relationship of the owner and each tenderer, and most significantly, between the owner and the lowest tenderer who withdrew on the ground of a mistake made in calculating its bid, despite its promise of an irrevocable bid. Since the low bidder had broken its agreement with the owner it was bound to compensate for the owner's extra expense in having the tendered work completed by a more expensive contractor. In this case it forfeited its bid deposit submitted with its tender.

1.3.2 The potential for research

The implications arising from *Pratt Contractors* and *Ron Engineering* for the construction procurement process seemed enormous and extensive. Here was an area for research which

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8 ISBN 0-632-04927-8. Blackwell Science Ltd, Oxford, England.
9 [1995] 1 NZLR 469.
10 Revealed by search of the index to the New Zealand Law Reports.
11 See FIG 1.
12 See discussion in Chapters 3, 4, 6, 7 and 8.
13 [1981] SCR 111; (1981) 119 DLR (3d) 267.

seemed relatively unexplored in the English literature of construction law yet of great potential in improving procurement efficiency and effectiveness. Reference to the index and content of *Hudson's Building and Engineering Contracts* indicated that *Ron Engineering* had been noted by the editor[14] but only in the contexts of the status of the tenderer's offer;[15] a tenderer's withdrawal of its offer and its consequent liability to forfeit its bid deposit;[16] as an example of a 'unilateral contract';[17] as an example of tender documentation not only designed to obtain a tender offer capable of immediate acceptance so as to form a contract, but which also contemplates the execution later of a formal agreement;[18] citation in the brief summary provided of *City of Calgary v Northern Construction Ltd*;[19] and lastly as an example of the court resisting the contractor's claim that it should avoid the consequences of its irrevocable tender by obtaining relief in the law of mistake.[20] *Pratt Contractors* was understandably not indexed as the Eleventh edition of *Hudson* was published at the same time as the *Pratt Contractors* judgment was handed down in New Zealand.

The omission of *Hudson* to deal more fully with the consequences of Ron Engineering was alarming as this textbook is the 'bible' of English (and Commonwealth) construction law. There is no development whatsoever of the wider aspects of the *Ron Engineering* decision and its application in the period 1981 through 1994; that not only might a tendering contract be formed but an implied term of that contract will generally be that the owner is obliged to treat all tenderers equally and fairly;[21] that, for example, a consequence of the fair and equal treatment obligation might be the owner's inability to accept an alternative non-compliant tender,[22] or give preference to a local tenderer on the basis of a hidden criterion;[23] that an owner might not legitimately delete priced items of work from a tender prior to its acceptance;[24] that whilst an owner is generally not obliged to award a contract to the lowest (highest) or to any bidder by virtue of the 'privilege clause' that appears in most procurement documentation, the owner is not entitled thereby to ignore or to misapply its own stipulations as to the contract evaluation and award process.[25] This short list of consequences for the owner of its breach of a fair dealing obligation in the procurement process sets the scene for what is to follow in the author's published journal articles, conference papers and text book.

Keating on Building Contracts describes the traditional tendering procedure which usually precedes the formation of a construction contract.[26] The law of building contracts is simply part of the general law of contract for which there is no codifying statute.[27] Chapter 2 deals with formation of contract,

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14 At §§ 1-019, 1-025, 1-030, 1-058, 1-108, 8-047, 8-048.
15 § 1-019.
16 § 1-025, where the editor provides a brief summary of the case.
17 § 1-030, in passing.
18 § 1-058.
19 § 1-108. *City of Calgary v Northern Construction* [1987] 2 SCR 757; affirming Alberta CA (1985) 42 Alta LR (2d) 1; 67 AR 95; [1986] 2 WWR 426
20 §§ 8-047 and 8-048.
21 *Martselos Services Ltd v Arctic College* (1994) 111 DLR (4th) 65.
22 *Pratt Contractors*, supra.
23 *Chinook Aggregates Ltd v District of Abbotsford* [1990] 1 WWR 624; *Kencor Holdings Ltd v Government of Saskatchewan* [1991] 6 WWR 717.
24 *Ben Bruinsma & Son Ltd v The Corporation of the City of Chatham, et al* (1984) 141 DLR (3d) 677.
25 *Best Cleaners and Contractors Ltd v The Queen in Right of Canada* [1985] 2 FC 293.
26 See p.5 of the 5th edition (1991). The sixth edition (1995) makes no changes to this part.
27 Page 1 of the 5th edition.

which arises from the owner's acceptance of a contractor's offer to carry out the works. This offer is usually termed a 'tender' and arises in response to the owner's invitation to tender. The invitation to tender is not normally in law an offer binding the owner to accept the lowest or any tender, but more comparable to an advertisement announcing the existence of goods for sale.[28] At this point *Keating* touches briefly on, but fails to develop in any detail, the circumstances that might arise which move the invitation to tender from the status of 'offer to receive offers' to 'offer to accept lowest tender'[29] or 'offer to consider all compliant bids, if any are considered'.[30] The implications which might follow this change in status of the tender are not considered in *Keating*. Chapter 6 of the author's *Procurement Law* and several of the published articles included within this dissertation seek to fill this void.

Keating includes a chapter on the European Economic Community[31] and within the chapter a section on 'procurement'.[32] This section was completely rewritten for the sixth edition, an indication of the pace and extent of development within this area of law.[33] Highlighted is the decision of the European Court of Justice in *Commission v Denmark* where it held that the equal treatment of tenderers "goes to the essence" of the public works procurement directive "which .... is aimed particularly at developing effective competition in the public procurement markets".[34] But *Keating* does not develop its discussion of the topic to reveal that the principle of fair dealing and equal treatment arises also in private law and might therefore affect procurement in the private sector. This hypothesis provides a central theme for the present author's research in procurement law.

In *The Law of Public and Utilities Procurement*,[35] the author, Professor Sue Arrowsmith provides a comprehensive analysis of the law relating to procurement by public bodies and utilities and covers not only the 'domestic' market and its rules on Compulsory Competitive Tendering, but the European market and the World Trade Organisation's Agreement on Government Procurement. The book is not, of course, construction specific but provides a commentary on the law covering procurement of any product or service. The author notes that the procurement contracts of public bodies and utilities are subject in principle to the ordinary private law of contract, but the book itself is concerned with public, not private, law of procurement.[36] Professor Arrowsmith notes that there are some cases where the court did not refer to any need for an element of public law to render a public procurement decision amenable to judicial review.[37] On the other hand the court has more recently insisted that judicial review is not possible unless there is a sufficient element of public law so as to enable a judicial review of the procurement process.[38] Arrowsmith argues that the approach of the court in *R v Lord Chancellor's Dept, ex p Hibbit and Saunders* is worthy of criticism:

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28 See pp. 11-14 of the fifth edition.

29 See *South Hetton Coal Co v Haswell Coal Co* [1898] 1 Ch 465 (CA) approved by HL in *Harvela Ltd v Royal Trust Co Ltd* [1986] AC 207.

30 See *Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 (CA).

31 Chapter 14, p. 347 of the 5th edition, p. 374 of the 6th.

32 5th edition at p.357, 6th edition at p. 376.

33 The 5th edition devoted four pages to European procurement law; the 6th edition expanded its provision on the same topic to seven pages.

34 Case C-243/89 [1993] ECR I – 3353 (Storebaelt).

35 (1996) Sweet & Maxwell, London.

36 Page 9.

37 *R v Lewisham LBC, ex p Shell (UK)* [1988] 1 All ER 938: see Arrowsmith at p. 34.

38 *R v Lord Chancellor's Dept , ex p Hibbit and Saunders,* The Times 12 March 1993: see Arrowsmith p. 35.

that the contract should be reviewable, in principle, as any other government power. The present author argues that the injured bidder would best bring its case in private law and seek compensation rather than attempt to stop or reverse the contract award process.

Arrowsmith also discusses the possibility for the injured bidder in the public procurement process securing a remedy in private law by "the implied '*Blackpool*' contract", a reference to the Court of Appeal's decision in *Blackpool & Fylde Aero Club v Blackpool Borough Council*.[39] The Canadian case of *R v Ron Engineering & Construction (Eastern) Ltd*[40] is referred to in a footnote as providing an example of an implied contract through the tendering process. It will be seen in the present author's work that the *Ron Engineering* case provides the foundation for many private law challenges to the tendering process, in England, Australia, New Zealand, and of course in Canada.

Arrowsmith speculates that an implied term of "the implied '*Blackpool*' contract" (described as the 'tendering contract' by the present author) might be that the owner, or purchaser, will adhere to legislation such as the Public Works Contracts Regulations (PWR). She then dismisses her own hypothesis, arguing that such a term cannot be implied because any intention to comply with the PWR arises not from an intention to incorporate PWR into a contract but from the status of the PWR as a statutory instrument.[41] Any term implied as a matter of fact must be necessary to give business efficacy to the contract in question.[42] In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*[43] the H of C argued that no tendering contract should be implied since the statutory scheme of the PWR provided not only a remedy but an *adequate* remedy for dissatisfied contractors and thus made it not only unnecessary to infer a contract but its very existence precluded any contract arising. But analysis of the Canadian cases showed that statutory obligations could also become contractual obligations arising in the tendering contract.[44] The H of C was in breach of its contractual and statutory obligations in failing to treat all tenderers equally and fairly when it considered an alternative design offer from one tenderer without giving any other an opportunity to compete with it on its terms.[45] It seems that Arrowsmith's hypothesis is supported by the decision in *Harmon* and that her own denial of the hypothesis should be treated as extremely doubtful in the light of the *Harmon* decision.

Without doubt Arrowsmith is extremely authoritative in its review of law from the European Union, but the same cannot be said about the developments in common law and in judicial review in administrative law.

From this brief review of the published literature on construction and procurement law it became clear that there existed much scope for research of the law governing procurement of construction and engineering works and services.

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39 [1990] 1 WLR 1195 (CA).
40 [1981] 1 SCR 111.
41 Arrowsmith, p.39.
42 See *Keating on Building Contracts* (6th ed) p.50. Terms implied as 'necessary' follow 'the *Moorcock*' approach (1889) 14 PD 64 (CA).
43 (1999) 67 Con LR 1.
44 See for example *Emery Construction v St John's (City) RC School Board* (1996) 28 CLR (2d) 1.
45 *Harmon* judgment, par. 217.

1.4 Use of the researched material

The following pattern of use is suggested for materials located in more than one jurisdiction. First, look for and identify the common law decisions which are closest in factual matrix to the user's problem or area of interest, regardless of which jurisdiction was responsible for that decision. Note any limiting features of the case from the text. Note whether any local statute(s) had changed the law within the relevant jurisdiction and strip out the effect of that legislation on the case reviewed. Apply the reported case, as adjusted, to the user's problem. Add in the effect of any local legislation. Consider other local relevant authorities. Speculate about what the outcome might be to the user's problem, taking both an optimistic view and a pessimistic view that the user's court might be persuaded, or not persuaded, by the 'foreign' authority. The user might then be close to the answer, but should of course confer with its own specialist legal adviser.

1.5 Aims and Objectives of the Research

1.5.1 Aims

The research aims to discover and expose to examination and understanding as much of the law governing procurement of construction and engineering works and services as is reasonably possible within a period of five years, and which could be said to represent a recognised and identifiable body of law. The wider aim was to capture both development of common law and judicial determination of statutory law from cases involving procurement. The narrow aim was to discover the extent (or otherwise) to which contract law had been held to regulate the bidding or tendering phase of construction procurement, and to determine to what extent the court had been prepared to find the owner or promoter of development under an obligation to the tenderer which might be characterised as 'fair dealing' or 'good faith'. Pursuit of the narrow aim revealed the 'controversial aspects' referred to in the title of this thesis.

The body of law so revealed is located within some of the common law jurisdictions of Commonwealth countries, predominantly the systems of England and Wales, Scotland, Australia, New Zealand, and Canada.[46] The relevant body of law also resides in the European Union. Some reference is also made to the USA. The result of the research is presented mainly by reproduction of journal and conference papers already published, plus some linking text freshly produced or taken from the candidate's textbook, *Procurement Law for Construction and Engineering Works and Services* published in 1999 by Blackwell Science, Oxford.

1.5.2 Objectives

The objectives of the research are listed as follows:

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[46] Collectively referred to in this dissertation as the 'Commonwealth'. Strictly speaking, the term 'Commonwealth' describes the association of the UK and the self-governing nations whose territories at one time formed part of the British Empire, but excluding notably South Africa, Ireland and Pakistan. Some Commonwealth countries are republics (eg India); some remain dominions of the Crown (eg Australia and Canada). The Queen is head of the Commonwealth. To a greater or lesser extent, the Commonwealth countries maintain a legal system generally consistent with English law, and have for many years referred to the Judicial Committee of the Privy Council as there ultimate court of appeal. Australia and Canada no longer refer cases to the Privy Council.

(a) to undertake sufficient research in the law governing procurement[47] of construction and engineering works and services as can reasonably be presented as a substantial body of procurement law; more particularly to:

(i) put health and safety law, and particularly the law relating to gross negligence manslaughter in the context of construction procurement;

(ii) reveal the changes taking place in the way that the common law regulates the procurement process, particularly in the process of competitive tendering for construction works;

(iii) reveal the part contract law has been found to play in regulating the procurement process by imposing obligations on both parties to the tendering process and the principles to be applied in compensating an injured bidder;

(iv) reveal to what extent common law regulation of the competitive procurement process encourages, permits or hinders innovation by competing tenderers;

(v) investigate consequences in common law for the owner/ developer in accepting unsolicited contractor's alternative proposals and to demonstrated the need for the owner to design a tender process that encourages innovative proposals;

(vi) criticise provisions of the existing codes of practice on competitive tendering and to make suggestions on what a new code might include in the light of decisions of the common law courts;

(vii) draw to the attention of owner's agents some decisions of the common law courts and to point out consequences for professional practice;

(viii) identify and evaluate environmental risks and their impact of construction procurement through analysis of the traditional environmental torts;

(ix) go beyond the private law, so as to reveal whether a public owner is bound in public law to procedural fairness when awarding a development or construction contract, and whether a public law bid challenge offers any advantage to an injured bidder seeking to right a civil wrong in public procurement;

(x) reveal relevant aspects of public procurement law of the European Union and to interpret consequent domestic legislation so as to formulate advice to industry on procurement of public construction works;

(b) to discover and examine as many court judgments as could reasonably be found within a period of five years that bear on some aspect of construction and engineering procurement;

(c) to concentrate the research in (b) above to the following jurisdictions: England and Wales, Scotland, Australia, New Zealand, Canada and the European Union. Some research is also made of judgments within the USA;

(c) to devise a means of writing up a series of case notes which is the output of (a), (b) and (c) above which describes sufficient of the factual matrix of a so as to isolate the issues between the parties to a procurement dispute;

(d) to set down the issues between the parties as a series of questions to be answered by the court, followed by the answers to those questions as are to be found within the judgments selected for analysis;

(e) to conclude each case note with some discussion on the merits of each case, some analysis of the decisions, some comparative studies of similar cases from several common law jurisdictions, so as to provide relevant guidance to industry and the professions;

(f) to rework the case notes into material suitable for publication in recognised legal and professional journals and research proceedings; and

(g) to conclude the work with a consolidated schedule of recommendations derived from this research for the better conduct of construction procurement, whilst cognisant of the fact that these

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[47] As defined below.

recommendations are drawn from judgments across several jurisdictions and that any one jurisdiction might take a different view of the common law.

1.6 Limitations of the research

Procurement in this context means "... the framework within which construction is brought about, acquired or obtained." This definition was developed by CIB W92,[48] of which the author is a member, at its meeting in 1991. This statement provided the guidance system for the research needed in preparing the text.

1.7 Geographical boundaries

The research is focused on the English speaking common law countries collectively labelled as 'Commonwealth', namely : England and Wales, Scotland, Australia, New Zealand, and Canada. Reference is made to the fast-developing laws of the European Union as determined by the European Court of Justice in Luxembourg but also increasingly within the domestic courts. Some limited research is also made of judgments within the USA, at state level in Georgia, and in the Federal jurisdiction. Some cases are noted from South Africa.

England and Wales, Scotland and New Zealand comprise three legal jurisdictions. England and Wales, and New Zealand are common law jurisdictions. Scotland is a hybrid, sourcing its law in the Roman-based civil law, but heavily anglicised since 1707 when Westminster became the site of the British Parliament and the House of Lords became the final court of appeal in civil matters.

Australia comprises nine jurisdictions all characterised as common law: the six states, namely Victoria, New South Wales, Queensland, Tasmania, South Australia and Western Australia; the two territories, the Northern Territory and the Australian Capital Territory; and the federal jurisdiction.

Canada comprises thirteen jurisdictions, that is the ten provinces, namely British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland, Nova Scotia, New Brunswick and Prince Edward Island; the two territories, Yukon and Northwest Territories; and the federal jurisdiction. Canada is characterised as a common law system, but it should be noted that the province of Quebec has a legal system based both on common law (public law) and on French law (private law) which in turn was based on Roman law. There are however no cases considered here from Quebec.

South Africa has a system of law based on Roman and Dutch law, sharing with Scotland, its Roman origins, plus the effect of some anglification. In the last fifty years there has developed a common law of South Africa.

The European Union's legal system is the creation of the Treaty of Rome, as amended by subsequent treaties, particularly the treaty on European Union, and the judgments of the European Court of Justice. That English courts are inferior to the European Court in Luxembourg is the result

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48 *supra.*

of the European Communities Act 1972, where s.2(1) provides for direct applicability of EU law in the United Kingdom, and s.2(4) provides, it is submitted, for the supremacy of EU law over domestic law.

1.8 Boundaries of time

There are no time boundaries set within which a case must fall in order to be suitable for analysis.

1.9 Research Population

The investigation relies fundamentally on data derived from the research of reported and unreported judgments of the courts. No argument is made that the population of cases from which the investigated cases were selected forms anything other than a random sample of cases which complete their way through the litigation process and resulted in a judgment which is subsequently reported, or remains unreported but in written and available form. The cases selected for investigation and analysis on the other hand were selected on the basis of their content as suitable for inclusion within a research of procurement law.

1.10 Legal Research

The skills of legal research are essential for the lawyer or would-be lawyer, or for any person seeking a reasonably full knowledge of the law on a particular topic. No one source of data will be complete, or the last word on the law, no matter how all-embracing its title or preface might suggest. Even LEXIS with its huge store of digital data[49] will generally lack the older judgments given before the days of word processing by computer, and will lack the judgments given today and yesterday because of the inevitable time delay in putting suitable materials into the database. The internet provides a useful source of data from around the world in judgments given, say in the last five years, but is unlikely ever to replace the need for volumes of bound paper reports from decades past.

Two consequences are identified as flowing from the lack of completeness in any one source of data:[50] that the researcher must be aware of the strengths and weaknesses of the resource under review, but equally aware of the degree of overlap in available resources. For example a strength of LEXIS is that it a full text database. A researcher can find any word or phrase in any document on the database simply by giving the correct instruction to the computer. The research is not then dependent on the skill of the indexer which has been sharpened over decades of indexing law reports. But on the other hand, and this is its weakness, skill must be used in the selection of words and/or phrases for a full text search. The researcher who does not know exactly what he or she is looking for will miss the help that a traditional printed index gives through its clues and selection of headings, sub-topics, key words and phrases.

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[49] About 200 million documents according to McKnight, Jean Sinclair (1995) *The Lexis Companion*, Addison Wesley, USA.

[50] Holborn, Guy (1993) *Butterworths Legal Research Guide, Butterworths*, England: p. 4.

LEXIS contains the full text of nearly all reported English judgments since 1945 and unreported judgments since 1980. Some specialist reports go further back.[51] In the light of this knowledge it is clear where LEXIS is useful and where it is useless. Research goes back further than 1945, into the LEXIS zone of weakness, and therefore traditional library skills were required.

The degree of overlap in available resources is obvious in the fact that many cases are reported in more than one series of law reports. There may be several available textbooks on a particular topic, all with a table of cases of which the core cases are common, but with the prospect that some extra insight or citation is given in one text but not the other. There is no 'one way', or 'right way', in finding the law on a particular issue. That flexibility is both a strength and a weakness: 'strong' because there is always the chance of finding another source that no-one else has previously revealed; 'weak' in the tedium and repetition in finding and searching all parallel sources but revealing no fresh source of law.

1.11 Research method adopted

Legal research is traditionally a library-based activity. Time in the law library was always at a premium for this researcher since the research was carried out part-time over several years, usually in the summer vacation period and using the resources of several libraries in several different countries. The following tactic was evolved and used throughout the research. As described above, this author 'discovered' the cases of *Ron Engineering* and *Pratt Contractors* in 1995. Law reports always reveal the earlier cases which were applied, approved, considered, disapproved, distinguished, doubted, explained, extended, followed, not followed or overruled by the court entering judgment.[52]

The sources of data used in this research are shown in FIG 1.[53] A flow chart is reproduced as FIG 2[54] and shows the research process adopted from initial case search to published works.

The report on *Pratt Contractors* pointed towards the following cases as of relevance in the research: *Ron Engineering* and *Blackpool*, which were applied by the court in reaching its decision. The following cases were considered by the court: *Markholm Construction Co Ltd v Wellington City Council*,[55] *Calgary v Northern Construction* [56]and *Canamerican Auto Lease & Rental Ltd v Canada (Min of Transport)*,[57] which was distinguished. The following cases were merely mentioned in the court's judgment: *Carlill v Carbolic Smoke Ball Co*,[58] *Chinook Aggregates*,[59] *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*,[60] *Harris v Nickerson*,[61] *Megatech Contracting Ltd v Ottawa-Carleton (Regional Municipality)*,[62] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*,[63] and

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51 *Reports of Tax Cases* go back to 1875.

52 This is a complete list of 'annotating terms' used by the *Digest* which provides in digested form the complete case Law of England and Wales, together with cases from other countries featured within this research.

53 Below.

54 Below

55 [1985] 2 NZLR 520.

56 *supra.*

57 (1987) 37 DLR (4th) 591.

58 [1893] 1 QB 256 (CA).

59 *supra.*

60 [1975] 1 WLR 297; 1 All ER 716 (CA).

61 (1873) LR 8 QB 286.

62 (1989) 68 OR (2d) 503.

Spencer v Harding.[64] This law report therefore revealed a dozen cases that had some bearing on the law of tendering for construction works. All of these law reports were obtained, the cases analysed and full case notes prepared for the textbook, or where thought appropriate, merely incorporated as lesser matters in the 'comment' section which follows each case study. The process was repeated for each new case discovered in each of the jurisdictions within the scope of the research.

A similar approach was adopted systematically through all the law reports available for each jurisdiction under review. The law reports of the following jurisdictions were relevant for this research: England; Scotland; The European Community; Federal Australia; New South Wales, Australia; Victoria, Australia; Queensland, Australia; South Australia, Australia Western Australia, Australia; Federal Canada; Ontario, Canada; Alberta, Canada; British Columbia, Canada; Newfoundland, Canada; Saskatchewan, Canada; Northwest Territories, Canada; Manitoba, Canada; and New Zealand. No attempt was made to investigate every published law report from all Commonwealth member states, but the decisions of the courts in Canada, Australia and New Zealand are thought to be representative of the Commonwealth as a whole. [65]

Staying with New Zealand as an example, the indexes of the New Zealand Law Reports were scanned for entries under 'tendering', 'procurement', 'building', 'construction', 'contract', etc. Although each series of law reports uses different words and phrases to categorise judgments, experience quickly leads the researcher to the most likely available material. This also produced list of cases to be tracked down, analysed and written-up for inclusion in the book. The same process was replicated for each of the jurisdictions considered within the research. As a general rule, the indexes of the relevant law reports will give access to the required cases, but a swifter and more modern approach would be to access the material through a CD-ROM version of the relevant series of reports. A LEXIS-type of search on keywords can be undertaken without the attendant search costs of using LEXIS. This type of search was undertaken on the All England Law Reports for the purposes of this research. A useful tip for future researchers following this path is that when time is short, track down the most recent case cited at the highest level of authority. That report will probably have most of the authorities required neatly assembled on page two of the report.

A parallel approach was to consult the indexes and tables of cases of the established textbooks in the fields of procurement, administrative law, contract and construction law. This also produced lists of cases for further analysis. A list of the main textbooks consulted is set out within the bibliography to this dissertation. Statutes and subordinate legislation were consulted as required in the analysis of the selected cases, except in the context of the European Union procurement regime, when directives, other relevant material from the *Official Journal* and statutory instruments were analysed as prime sources of law.

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63 [1974] 1 NZLR 505; [1975] AC 154 (PC).

64 (1870) LR 5 CP 561.

65 Refer to Furmston, Prof M, *Some Thoughts on the Uses of Commonwealth and United States* Cases [1995] Con L Yb 13, referred to above.

Without regular access to LEXIS, or to obtain access to the older English judgments and Commonwealth cases, reference was made to *The Digest*, volume 7(2) 'Building Contracts, Architects, Engineers and Surveyors', part 1(3)(i) 'Tenders and Estimates'. Cases 1027 through 1038 summarise English cases on tenders and estimates for building work. Cases 1039 through 1058 summarise cases from Scotland, Ireland and the Commonwealth on the same topic. Use of *The Digest* usually involves looking in two places: the main work (described above) and the cumulative supplement. Both volumes classify relevant material under the heading 'building contracts'. A separate Digest for Australian cases was consulted.

If the relevant law reports are consulted on a regular basis, it is possible to scan every volume to ensure over the period of research (in this case five years) that any new judgments are caught and brought into the research. This was done on a regular three, six or twelve month cycle, whenever access to the relevant law library was possible. For English court judgments and those from Scotland and the EU (but not those from the Commonwealth) the latest monthly volume of *Current Law* was consulted for the latest cases. Similar but separate publications exist within the Commonwealth jurisdictions. Checks were also made in the *Current Law* yearbooks which is an annual replacement for the monthly parts. The cumulative indexes were checked in the yearbooks for 1971 (covering 1945-71), 1986 and 1989, then annually thereafter.

The subject studied included material from the European Court of Justice in Luxembourg. The source used within the library was the official European Court Reports (ECR) and, as a secondary source, the Common Market Law Reports (CMLR). Nothing more sophisticated than the annual index published within ECR was used to find relevant cases on EU procurement law. Directives, and their amendments were traced to their original sources within the 'L' section of the Official Journal (OJ). It frequently proved extremely time consuming in tracing material in the OJ, and in one instance this researcher gave up in frustration and obtained the needed information directly from HM's Treasury. One would have thought that a relatively modern system of documentation could be readily and timeously produced with adequate indexes.

It is important in any legal research to know if a particular case has been cited in a later case. The case under study might have been overruled, or given weightier authority by its approval in a higher appellate court. The various gradations of citation between 'approved' and 'overruled' are set out above. The tool used to trace 'case history' was the Current Law Case Citators (not having regular access to LEXIS), using the 1947-76 volume, the 1977-88 volume and the annually updated volume for the period 1989-99.

Journals have not generally been used as a source of law reports (with the exception of the Construction Law Journal and the Australian Law Journal) but as a pointer as to what cases should be referred to in order to advance the research. The known journals to which access was readily available were checked by their own subject indexes. References to journals were followed up when cited in judgments. Otherwise journals were traced (since 1986) through the *Legal Journals Index* (also, since 1993, *European Legal Journals Index*), which not only is a useful source for published articles, but also through the indexes of cases reported and noted.

Last but not least is the use of the internet as a source of court judgments and statutory material. When the research started in 1995 the author had no access to such sources, and it is thought that few useful sources existed at that time. However, from 1996 to present day an increasing amount of materials are available, and have been accessed through the internet. English cases from the Technology and Construction Court (which replaced Official Referees' business during the period of research) are retrieved on a regular basis, as are cases from the Court of Appeal and the House of Lords. Access is also available to the Scottish courts. Australia was the first source used by this author for retrieval of reported judgments from the High Court, the Federal Court, and the state courts. Judgments have been similarly retrieved from the European Union, Canada and the USA. Tribunal decisions were downloaded from the Danish Competition Authority. A list of useful websites is included as an appendix to the dissertation. Statutory material also has been retrieved from web sites in England, Australia and the USA.

1.12 Contribution to knowledge

The additive element of the contribution to knowledge provided by PhD research might be classified as new or improved evidence, methodology or analysis. This research 'improves' the evidence by collecting and bringing together diverse court judgments from several jurisdictions and classifying those cases under strategic heads within a textbook on procurement law, for example 'bids and formation of contract', 'mistakes and rescission of bids', 'tenders – the traditional position', etc. The evidence is 'improved' because it is now possible to review a group of cases with common characteristics and to determine the nature and extent of each party's obligations to the other and to deduce certain propositions for the better conduct of the procurement process that will prevent a breach of obligation with consequent damaging results. This analysis is presented in the numerous 'comment' sections attached to the case studies reproduced in the textbook, and in the published papers. Each paper concludes with recommendations derived from the research which should lead to more effective and efficient procurement of construction and engineering works and services.

The method used is the comparative analysis of court judgments by qualitative process. The method is not new or novel; rather, traditional techniques are applied so the contribution to knowledge is not here in the method.

The understanding of the concepts and theories of construction and engineering procurement are 'improved' by the conduct and publication of this research. A new structure or framework can be seen for the construction procurement process built on the concept of 'fair dealing', and this framework is consistent for both private sector projects governed by private law and public sector projects governed by European Union procurement law. The only possible exception seems to be the public sector project which is not within the European procurement regime, and which gives no remedy in private law or in administrative law, such as is revealed in the *Stannifer Developments* case.[66] But with the better understanding of the private law obligations and remedies arising out of this analysis of the construction procurement process, injured parties might in future frame their

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[66] See Chapter 9.

claims in private law and recover monetary compensation rather then claim in public law for a halt to, or reversal of, the procurement process.

The new conceptual framework is underpinned by the argument for a 'standard form of tendering contract', or, put another way, a new Tender Code. The new concept requires that owner and tenderer accept that the procurement process is regulated in private law by a tendering contract, or a process contract, whereby each party is obliged to the other and entitled to compensation from the party who breaches its obligations. The new concept requires that representatives of the industry (the producers) and its customers collectively create the terms of a new Tender Code in much the same way as they have produced standard terms of construction contract. Those terms will reflect fully the principles established in the common law of procurement revealed in this research.

1.13 Structure and Organisation of this Dissertation

This dissertation is provided in twelve chapters as listed on the contents page. Each chapter includes at least one previously published paper, commentary on that paper and supplementary material to bring the presentation up to date.

Chapter 2 is the only chapter which deals with criminal law rather than civil law, putting the crime of manslaughter within the framework of health and safety law as an important element in the context of procurement of construction works. The author observes that it is necessary that the land owner or developer and principal contractor consider, *inter alia*, the risks which arise from the obligation to provide a safe and healthy working environment for all employees, subcontractors and visitors or trespassers to the construction site. The designer too is responsible under the Construction (Design and Management) Regulations 1994 for identification and minimisation of risks to health and safety in the design, production and future use of buildings. Against a background of increasing concern as to fatalities from railway disasters and as a result of construction operations it seems likely that the government will legislate as soon as possible in respect of the 'new' offences of reckless killing, killing by gross carelessness and corporate killing. The material in Chapter 3 provides an introductory platform for several cases and issues which are considered more fully in subsequent chapters. Procurement of construction and engineering works is normally by competitive tender: this chapter discusses cases where disaffected parties to the tendering process have made private law challenges of that process seeking compensation for the other party's alleged irregularities. Analysis of these cases show that in common law the owner/ developer is generally charged with a duty to treat all tenderers equally and fairly to refrain from evaluating tenders and awarding contracts other than in accordance with the rules set down by itself.

Chapter 4 addresses the question: do traditional tendering processes encourage, or merely permit, contractor innovation? The author first tackled this question in 1997 in response to decisions in the New Zealand and Canadian courts concerning the scope and acceptability of alternative tenders submitted by tenderers seeking competitive advantage in circumstances where bid evaluation processes had not anticipated such competition. Several tender codes are reviewed to establish how well (or not so well) these codes provide for, or encourage, innovative proposals from

competing bidders. Some more recent case material is added in a re-published version of the same paper. The same topic was addressed two years later when the author posed the following problem for discussion: how does the procurement process permit innovation by contractor-led proposals whilst maintaining appropriate control of the project? Chapter 4 concludes with 'best practice' points derived from this piece of research.

The common law does not stand still: several relevant cases have emerged since the research period for this work ended in 1998. Four judgments handed down during 1999 and 2000 are included in Chapter 5 and presented in the same style and format as was used in the author's work, *Procurement Law for Construction and Engineering Works and Services* published by Blackwell Science in 1999.

Chapter 6 provides firstly a criticism of the NJCC's *Code of Procedure for Single Stage Selective Tendering* and its successor, the CIB's *Code of Practice for the Selection of Main Contractors*, and secondly, suggestions as to what a new tender code might include in the light of selected decisions of the common law courts. The author argues that it is now time to draft a set of 'standard' tender rules that would become the terms of a 'tender contract'. Those rules would properly reflect decisions of the courts and would be accepted by all parties to the process as a tender contract document. Chapter 7 discusses how the common law protects the integrity of construction procurement by imposed or assumed contractual obligations, and, in the words of the Editors-in-Chief of *The International Construction Law Review*, amounts to "a watchful eye ... on the possible evolution of [owner's/ developer's] liability towards tenderers". Cases from Canada, England, New Zealand and Australia are reviewed in some detail. Procurement of subcontract works is also considered, particularly the problem for a main contractor when a subcontractor withdraws its bid after that main contractor has relied on same in formulating its offer to the owner/ developer and which has been accepted to form a binding contract. The author concludes that the tendering contract operates between main contractor and subcontractor as it does between owner/ developer and main contractor, and that two contract analysis provides the best basis for upholding integrity of the bidding process. Chapter 8 sets out advice for quantity surveyors and project managers derived from the decisions of the common law courts. Minimum legal background is given to underpin essentially procedural points for the client's agents in the evaluation of tenders received and the award of contracts. The author argues that practice should be shaped to reflect the obligations assumed by parties in common law so as to avoid claims from aggrieved bidders.

Form the private law discussed in Chapters 2 through 8, the focus shifts to public law in Chapter 9. This chapter includes case materials from the author's published text on procurement law, updated to provide reference to the Local Government Act 1999 and the 'best value' policies adopted by central government at the expense of the previous administration's compulsory competitive tendering policies for out-sourcing local services. Chapter 9 also includes analysis of a significant but unsuccessful bid challenge in Scotland where the court denied that the petitioner's challenge was unfair, unreasonable and in breach of natural justice. The author argues that a successful case might have been made out in private law and concludes with recommendations as to how the

tender process might be better conducted. This analysis, said the Editors-in-Chief of *The International Construction Law Review*, "deserve[s] careful study".

Chapter 10 deals with public procurement under the rules of the European Union (EU) which provide (or should provide) a uniform regime for awarding public contracts and for challenging that award process within the Member States. This chapter commences with an introduction to the laws of the EU with particular emphasis on procurement. The procurement directives lead to the Public Works Contracts Regulations 1991 which implements the directives within the UK. Alongside the directives and the Regulations sit the decisions of the European Court of Justice (ECJ) forming a body of European public procurement law that must be applied by any English court. Arguably the most important decision is that of *Commission v. Denmark* (1993) which held that contracting authorities are obliged to treat all tenderers equally and fairly, a duty that parallels that found in common law and discussed in Chapters 2 through 8. Chapter 10 includes material from the author's text on procurement law, then concludes with an article on *R v Portsmouth City Council* (1996) published in the *Construction Law Journal* published in the Spring of 1999. This article reviewed both the first instance decision and that of the Court of Appeal. The case dealt with several matters of importance to any future project procured under the EU public procurement regime. In the context of this case, the editors of the *Building Law Reports* noted a current trend in public procurement challenges: it was now more likely that a challenge would come from an aggrieved bidder rather than from the Commission itself. This author concludes his analysis of this case by suggesting that tenderers might have succeeded against the Council by arguing breach of a tendering contract when the Council used undisclosed contract award criteria when awarding the contracts.

Chapter 11 returns to the common law and examines the effect of the environmental torts on procurement of construction works. This chapter considers development risks of developers and contractors by examining the effectiveness of 'controls' imposed by common law when the usual statutory controls are temporarily withdrawn. It can be seen that the common law has not evolved to protect the interests of neighbours and local residents from the perils and hazards of property development which result in environmental degradation. This chapter concludes with recommendations as to how developer and constructors might minimise their impact on adjacent property owners. Chapter 12 presents the conclusions drawn from the completed research.

1.14 Citation by means of footnotes

Citation in this dissertation is generally by means of footnotes placed at the bottom of each page, in preference to parenthetical references[67] which tend to be preferred in the fields of natural and social sciences,[68] and preferred or required by the editors of several of the published papers contained herein and published within the realm of construction management. Footnotes are the generally

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67 In the style usually referred to as 'the Harvard system'.

68 Turabian, Kate L (1987) *A Manual for Writers of Term papers, Theses and Dissertations* (5th edition, paperback) The University of Chicago Press, USA: par.8.1.

preferred method of citation in legal journals and review pieces,[69] but citation in court documents and legal memoranda are usually made in citation sentences or in citation clauses.[70]

The use of footnotes is preferred to the use of endnotes or parenthetical references by this author because a paper might be read from beginning to end without the reader being required to search for a reference at the end of the paper or text.[71]

Notes have four main uses:
(a) to cite authority for statements made within the text;
(b) to make cross-references;
(c) to make incidental comments upon, to amplify, or to qualify discussion within the text; and
(d) to make acknowledgements.[72]

Convention in legal citation requires a 'signal' that indicates the degree of support for the proposition footnoted, suggests profitable comparison or indicates contradiction. Most commonly, signals indicate support for a proposition in varying degrees. The strongest support is manifest in the absence of such a signal ('no signal') and shows that the cited authority clearly states the proposition, identifies the source of a quotation or identifies an authority referred to in the text. The signal 'eg' cited before an authority shows that it is one of several authorities which state the proposition. The signal 'eg' might be preceded by 'see,' or 'but see'. The signal 'see' is used instead of no signal when the cited authority clearly supports the proposition, but the proposition is not directly stated by the cited authority but obviously follows from it. In other words, there is an inferential step to be taken between the authority cited and the proposition supported. The signal 'see also' is used to site an authority that supports a proposition when authorities that state or support a proposition already have been cited or discussed, perhaps followed by a perenthetical explanation of the source material's relevance. The signal 'cf' (abbreviated form of Latin word *confer* which means 'compare') is used where the cited authority supports a proposition that is different from the main proposition but is sufficiently analogous to provide support. The relevance of the citation is given by means of brief parenthetical explanation. The signal 'compare ... [and] ... with ... [and] ...' suggests that comparison of the authorities cited provides support for, or well illustrates, the proposition. Supplementary explanation is given in parenthesis. Were the cited authority contradicts the proposition, the signal 'contra' is used where 'no signal' would be used for support. The signal 'but see' also indicates contradiction, in that the cited authority contradicts the main proposition where 'see' would be used for support. Similarly, 'but see' signals a cited authority that supports a proposition analogous to the contrary of the main proposition. A parenthetical explanation of the source material's relevance should follow. The signal 'see generally' indicates the citation of helpful background material related to the proposition.[73]

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69 See (1991) *A Uniform System of Citation* (15th ed) The Harvard Law Review Association, USA: rule 1.1.
70 *Ibid.*, Practitioner Notes, P.2.
71 See Turabian, *supra*, par.9.1.
72 *Ibid.*, par.9.2.
73 See *Uniform System of Citation*, supra, rule 1.2.

FIG 1

SOURCES OF DATA

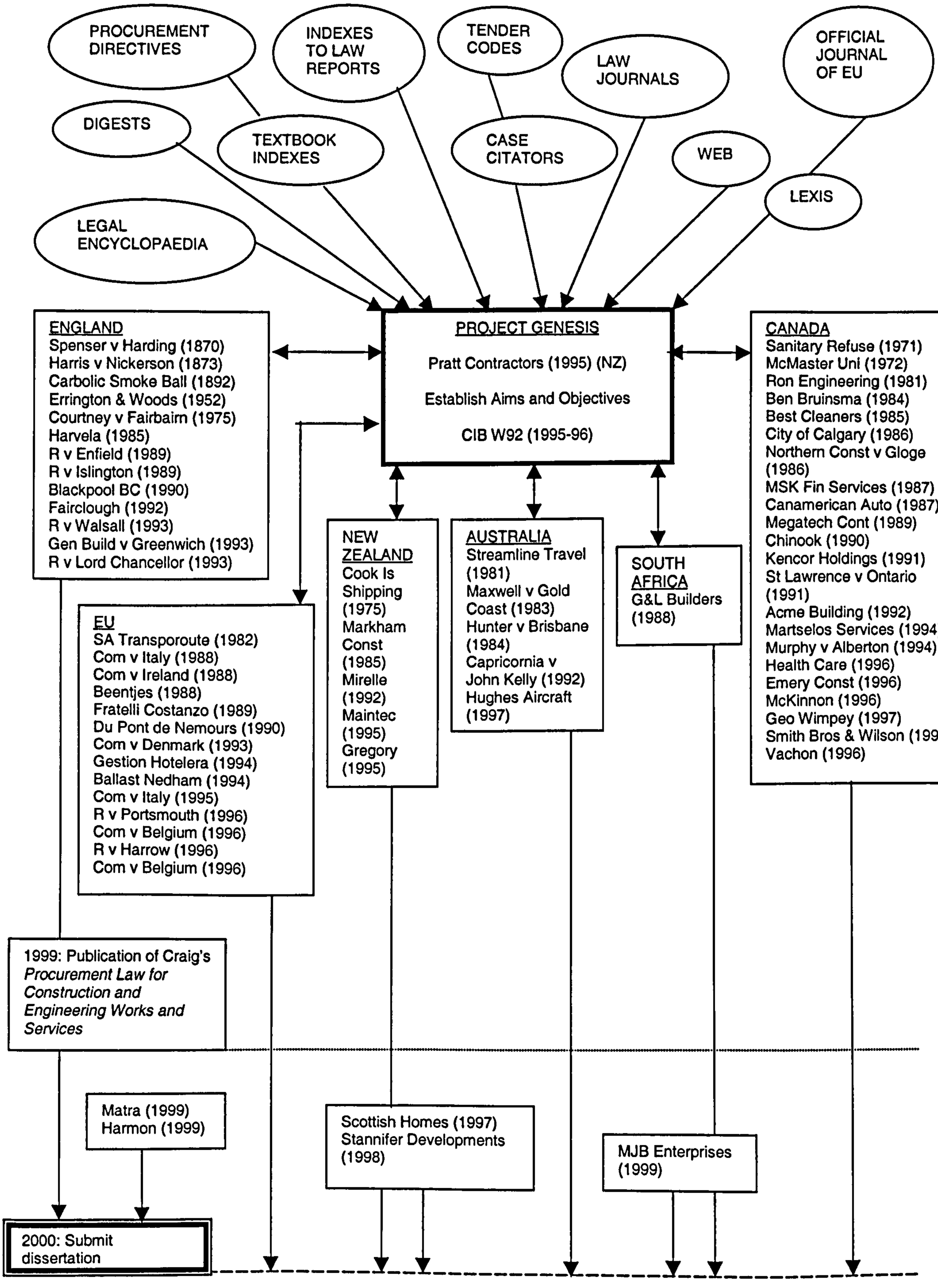
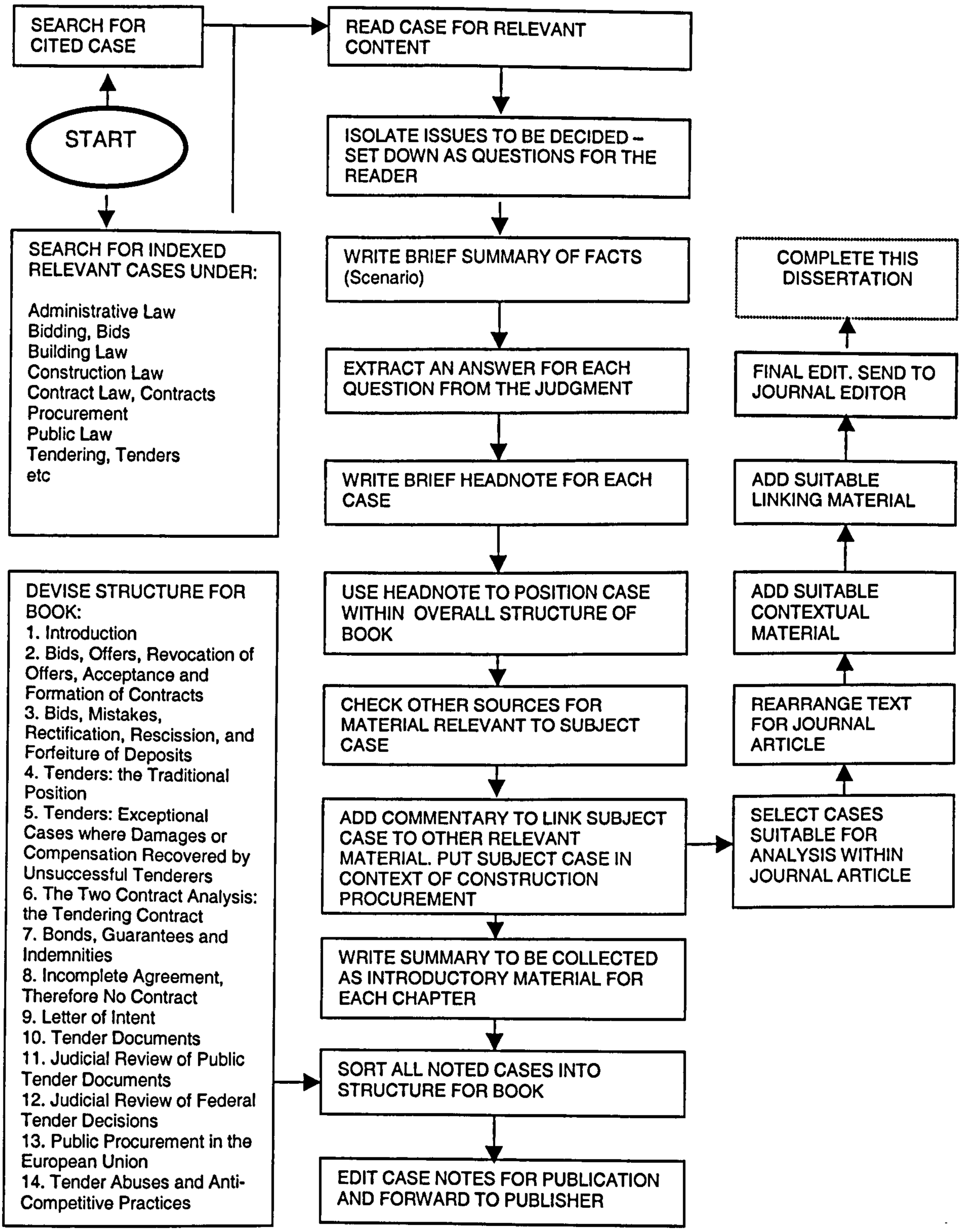


FIG 2

FLOW CHART: FROM INITIAL SEARCH TO PUBLISHED WORK



Chapter 2

Manslaughter as a Result of Construction Site Fatality

The aims of Chapter 2 are to present the author's published paper *Manslaughter as a Result of Construction Site Fatality* and to update the relevant legal material to August 2000.

This chapter is in two parts. Part 1 provides a preface and supplementary materials to Part 2. Part 1 aims to set manslaughter within the framework of health and safety law, and puts health and safety law into the context of procurement of construction works, and adds supplementary material to bring the law of health and safety and of gross negligence manslaughter up to date. Part 2 reproduces this author's paper published during 1998 in the *Construction Law Journal.*[74] The aim of that paper was to draw to the construction industry's attention the fact that the then recently in force Construction (Design and Management) Regulations 1994 represented only part of the relevant law pertaining to fatalities in the construction workplace and that, as part of the background to the new regulations, the common law also should have a part to play. The paper also sought to draw the reader's attention to proposed changes in the law which would make more likely the prosecution of the construction company for manslaughter in the event of construction site fatality.

Part 1

2.1.1 Background

This article had a long gestation period. In its original form it provided part of the supporting material for a lecture to industry practitioners in the context of the introduction of the Construction (Design and Management) Regulations 1994 which came into effect on 31 March 1995.[75] With industry's attention focused almost exclusively on the statutory material, it seemed a most opportune moment to draw attention to the developments (or the lack of them) in the common law, and particularly to the common law of manslaughter arising out of a workplace fatality.

Almost one year later the Law Commission published its proposals for changing the law on Involuntary Manslaughter.[76] Manslaughter and particularly the involuntary variety relevant to the construction and health and safety context is defined within the paper which follows. That paper was substantially revised and extended in the light of the Law Commission paper and was further developed, presented and published as a research paper by the Association of Researchers into Construction Management (ARCOM) in September 1996.

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74 (1998) 14 Const LJ 169.

75 RICS mid-career training course, 7 March 1995, held at the University of Central England in Birmingham.

76 *Legislating the Criminal Code: Involuntary Manslaughter.* Law Commission No 237, published as House of Commons paper HC 171, 4 March 1996.

Yet another year passed and the UK found itself with a new Labour government. Two events took place in September 1997 which resulted in the author returning to the subject of manslaughter and lack of concern for safety in construction and engineering activity. First, the Southall rail crash in which several people were killed; second the Labour Party annual conference resolved that government should bring manslaughter charges, if appropriate, against any directors of the relevant train operating company found to be putting the pursuit of profit before the safety of rail users. The outcome of the eventual prosecution is discussed below. The paper was reworked and published in the *Construction Law Journal* of the following year.

2.1.2 Manslaughter, health and safety and construction procurement

Since this paper forms part of a dissertation on the law of construction and engineering procurement, it is necessary to put health and safety law, manslaughter, and the general law, both civil and criminal, into the context of construction procurement. 'Procurement' is defined by CIB W92 as "the framework within which construction is brought about, acquired or obtained."[77] At the buying or acquiring stage, the land owner or developer must consider how obligations are to be created for others by means of contracts for the provision of services, work and materials or materials only. Procurement law usually concerns itself with the process of making contracts.

The contract is a tool for allocating obligations to the parties to a construction contract, namely the owner, or Employer, and Contractor. Any standard form of contract (or bespoke form) can be examined to determine what obligations are created for the Employer and for the Contractor. This is a more useful perspective than that of seeking to determine risk allocation.

The Contractor is generally obliged under the terms of a construction contract to carry out and complete the works. In so doing it must, either expressly or by implication, comply with the terms of the contract, the common law and any relevant statutory obligations. Therefore a Contractor is obliged, for example, under the express terms of the construction contract, to proceed regularly and diligently with the works, on pain of paying compensation for any breach of obligation; under established principles of common law, not to breach a duty of care so as to cause actionable injury to an employee or a third party, again, on pain of paying compensation for any breach of obligation; under section 2(1) of the Health and Safety at Work etc Act 1974, "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees", and under section 3(1) of the same Act, "to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety", on pain of criminal conviction for any breach of obligation. A work place injury to a member of the workforce, or a third party, might involve breaches of all three obligations: a breach of performance obligation owed to the Employer; breach of a duty of care to the injured employee or third party, and breach of the criminal code with possible punishment by the State. In this example there is described a mixture of civil and criminal obligations. It is not unusual for civil and criminal obligations to overlap and to arise separately but at the same time from the one event.

In addition the Contractor usually agrees to relieve the Employer of any obligations it might owe to the workforce or to third parties, except to the extent that the Employer, or its agent, is negligent. The Contractor at procurement stage must consider its risk burden and price accordingly. In practice many of these risks will be covered by insurance, usually in the joint names of Contractor and Employer. But any residual risk remains with the Contractor, to the extent of its assets, then reverts to the Employer to the extent of its insurance cover and its own assets. The Employer will wish therefore to be reassured that the Contractor has adequately priced for all risks to be borne and has insured those risks which the contract demands should be insured.

There is yet another aspect to the distribution of risk between Employer (who is not an owner/ occupier carrying out work on its private domestic premises) and Contractor, which needs to be considered during the procurement phase and that is the provisions of the Construction (Design and Management) Regulations 1994. The Regulations impose statutory duties for health and safety on clients[78], designers,[79] planning supervisors[80] and on all contractors,[81] employers, the self-employed and those controlling persons at work. The major shift in emphasis was to move some of the responsibility for health and safety towards the designer of the building. CDM requires "architects to consider the buildability of their designs instead of leaving it to the contractor. And architects will also have to ensure that the building has built-in safety systems for its future maintenance ...".[82] Another innovation in this legislation was to require the client (that is the landowner or developer) under regulation 6(1)(a) to appoint a *planning supervisor*,[83] and under regulation 6(1)(b) a *principal contractor* in respect of each project. As soon as the client is in a position[84] to make such an appointment, it must make the appointment of the planning supervisor.[85] The client must satisfy itself as to the competency and resourcing of the planning supervisor.[86] The principal contractor must only be appointed when it too passes the 'competency test'[87] and the 'adequacy of resources'[88] test.[89] The appointments of both planning supervisor and principal contractor can be made and terminated "as necessary to ensure that those appointments remain filled at all times until the end of the construction phase."[90]

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77 *supra*.
78 Defined reg. 2(1).
79 Defined, ibid.
80 Defined, ibid.
81 Defined, ibid.
82 Building 8/1/93, p. 36.
83 There was much debate on who is qualified to take on the role of planning supervisor: the regulations will allow any of the main players in the construction process to carry out the work provided the client considers them competent. As a result contractors, consultants, architects and even quantity surveyors have jockeyed for the position. (New Builder 17/6/94 p. 3) It was speculated that as many as 10,000 people could be involved in a CDM market worth £200m and that this activity would add about 2% to project costs. (Ibid.)
84 To make this appointment, the client must have sufficient information about his project and the construction work involved (reg. 6(3)), about the competency of the proposed planning supervisor (reg. 8(1)) and about the adequacy of the resources to be allocated to health and safety (reg. 9(1)).
85 Regulation 6(3).
86 See ACOP 20.
87 Regulation 8(3).
88 Regulation 9(3).
89 Regulation 6(4).
90 Regulation 6(5).

The appointments of planning supervisor and principal contractor must be *confirmed in writing* to the HSE.[91] The client must ensure the *competency* of the designer prior to the designer's appointment:[92] "no person shall arrange for a designer to prepare a design unless he is reasonably satisfied that the designer has the competence to prepare that design." There is a similar competency requirement of any appointment to the role of planning supervisor.[93] The client must satisfy itself that the planning supervisor has, or, "will allocate *adequate resources* to enable him to perform the functions of planning supervisor".[94] Likewise, the client must be satisfied that the designer also provides sufficient resources to enable it to comply with the requirements of regulation 13 (Requirements on designer).[95] The client is to ensure that all "relevant"[96] information is available to the planning supervisor "in any event before the commencement of the work".[97] On no account must work on site be allowed to "start unless a health and safety plan complying with regulation 15(4) has been prepared".[98] The client therefore has a crucial decision to make here and may need professional advice on the adequacy of the HSP before allowing the construction phase to start. The Regulations[99] require that the planning supervisor "be in a position to give adequate advice" at this point. The central question is: has the HSP prepared under regulation 15(1) been sufficiently developed by the principal contractor to the standard required by regulation 15(4)?

The duty imposed on the client by regulation 10 carries *civil liability* under regulation 21. The only defence provided is that the duty only extends "so far as is practicable". The client has no duty to check HSP compliance with regulation 15 after the construction phase has started.[100] The client is to "ensure that the ... *health and safety file* ... is kept available for inspection by any person who may need information in the file for the purpose of complying with the requirements and prohibitions imposed on him by or under the relevant statutory provisions."[101] If the client sells the property for which the H & S file has been prepared, the file should be delivered "to the person who acquires his interest in the property".[1] He must also ensure that the purchaser "is aware of the nature and purpose of the H & S file."[103] In view of the obligations imposed on the client, it seems advisable that a formal system to assess, and record, *competence* should be instigated. The regulations link 'competence' with 'resources'. It will surely fall to the lead consultant to make sure that the client is aware of these relatively new responsibilities.[104]

It might seem to the reader that with such extensive provisions as to health and safety within the statutory framework, there would be little scope left to the common law, but any such thought would be wrong, because statutory health and safety law is largely criminal law with sanctions imposed by the

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91 Regulation 7 and Schedule 1. See also ACOP 21-26 on the making of these appointments.
92 Regulation 8(2).
93 Regulation 8(1).
94 Regulation 9(1).
95 Regulation 9(2).
96 Regulation 11(2).
97 Regulation 11(1). See ACOP 50 for guidance on information to be supplied by the client.
98 Regulation 10.
99 Regulation 14(c)(ii).
100 See ACOP 49.
101 Regulation 12(1).
102 Regulation 12(2).
103 *Ibid.*
104 See ACOP 34-36 for assistance in assessing competence and resourcing.

State. The common law must be relied upon by an injured employee or third party for compensation. And the common law provides (so far) the criminal framework for a prosecution for unlawful killing, that is in this context, involuntary manslaughter by gross negligence.

The article *Manslaughter as a Result of Construction Site Fatality* listed four catastrophic events of the late 1980s which could be seen to have stimulated demands from the public for manslaughter prosecutions of both company and its officers. These were major events which caught the public attention. None were directly related to construction, yet the construction industry is responsible for a disproportionate number of fatalities in its workforce. In 1992 it was said that whilst the European construction industry employs about 10% of the working population, it is responsible for about 30% of industrial fatalities.[105] Recent statistics show an increase in the number of UK construction related fatalities and, as discussed below, some recent cases are revealed which show gross negligence on the part of construction management, yet no successful prosecution for manslaughter. The public's attention is not caught when two or three workers are killed on the jobsite, but it was when, on 5 October 1999, thirty one people were killed in a rail crash about two miles outside Paddington mainline station. Both events might have been cases of causing death by gross carelessness or corporate killing, but we will never know, because the Law Commission's proposal for changes in the law have not yet been implemented.

The following sections comprise: the most recent review by the Court of Appeal of the current (unsatisfactory) law of involuntary manslaughter pending changes suggested by the law Commission; a note describing the alternative successful prosecution of the offending train operator at Southall for breaches of the Health and Safety at Work etc Act 1974; a note of a case involving interpretation by the Court of Appeal of the designer's duties under the Construction (Design and Management) Regulations 1994 which may result in changes being made to the Regulations; details of the Ashford building collapse which caused the death of four workers and the (again) unsatisfactory state of the current law which prevented prosecution of any possible perpetrator(s) of this dirty deed; a note concerning the collapse of the Ramsgate walkway in which six passengers were killed and seven injured and the subsequent prosecutions for statutory health and safety offences; a note of the deteriorating statistics for jobsite fatalities and the collapse of a tower crane at Canada Square, Isle of Dogs (Canary Wharf) on 21 May 2000 killing three workers; a brief summary of the Government's new proposals, announced May 2000, that companies will face the prospect of conviction for corporate killing where "management failure" has resulted in death and the company's conduct is judged to have fallen far below the expected standard; that directors involved face disqualification from holding office or senior management positions, and might also be prosecuted individually for one of two new offences, namely, reckless killing or killing by gross carelessness; a note on the Kerrin Point gas explosion: another "appalling case of neglect"; a note on the Heathrow tunnel collapse, "one of the worst civil engineering disasters in the United Kingdom" although no person was killed or injured; a note on the conviction of three companies and a director for gross incompetence when a scaffold was overloaded whilst being dismantled; and some concluding discussion on whether the construction industry is putting profit before lives.

2.1.3 The case of Adomako: conviction for manslaughter by gross negligence is possible without evidence of the defendant's state of mind

The topic is still very much alive. The following article refers to "the recent Southall train crash" in which seven (not six as stated in the original article) people died, 139 people were injured and millions of pounds worth of damage was done. The collision occurred on 19 September 1997 when the high speed train (HST) from Swansea to London Paddington collided with a freight train which crossed the up line when switching from the down relief line to Southall Yard. The HST driver was experienced but had no assistant. The power car was fitted with two independent safety devices which were deliberately switched off. This fact was known to the driver. The movement of the HST was correctly signalled, that is signalled successively at green, double yellow, single yellow and red. The HST driver recalled passing through the green signal, but next saw only the red, then braked, but at 116 mph could not stop within the 3600 metres available. Three signals had been passed because the safety devices had been switched off and there was only one person in the cab. The HST operating company owed a duty to take reasonable care for the safety of its passengers and should not have permitted such a train to operate in such circumstances.

A prosecution for manslaughter of the HST operating company (and its driver) followed and commenced on 21 June 1999. On 30th June 1999 Mr Justice Scott Baker ruled that it was a condition precedent to a conviction for manslaughter by gross negligence that a guilty mind be proved, and that where the defendant is a non-human person (ie a corporation), a conviction required identification with the guilt of a human being. The Attorney-General appealed arguing that the judge was wrong on both points.[106] Charges against the train driver were withdrawn.

The Court of Appeal held firstly that a defendant could properly be convicted of manslaughter by gross negligence without evidence of the defendant's state of mind. Whilst there might be cases where the defendant's state of mind is relevant to the jury's consideration when assessing the grossness and criminality of the conduct in question, evidence of that state of mind is not a prerequisite to a conviction for manslaughter by gross negligence. The *Adomako* test[107] is an objective one, but the court might more readily find the necessary degree of criminal negligence in a case where the defendant has been "proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it."[108]

2.1.4 The theory of identification is alive and kicking

Secondly, and at more length, the Court of Appeal considered the question whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of the established guilt for the same crime of an identified human individual.

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105 EC Update, IPM, 11/92.
106 See *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182 (CA).
107 *R v Adomako* [1995] 1 AC 171; [1994] 3 WLR 288; 3 All ER 79 (HL).

For the Attorney General it was argued that policy considerations arose in addressing this issue. Large companies should be as susceptible to prosecution for manslaughter as one-man companies. Where the ingredients of a common law offence are identical to those of a statutory offence, it was argued that there is no justification for drawing a distinction as to liability between the two and the public interest requires the more emphatic denunciation of a company inherent in a conviction for manslaughter.[109] Of the three theories of corporate criminal liability, namely vicarious liability, identification and personal liability, it was personal liability which should here apply. In the present case, it would have been open to the jury to convict if they were satisfied that the deaths occurred by reason of gross breach by the defendant of its personal duty to have a safe system of train operation in place. The identification theory, attributing to the company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirety blameless: see amongst other cases,[110] *Tesco Supermarkets Ltd v Nattrass.*[111]

According to the Attorney General, there were several cases which pointed towards the possibility of personal liability for the company in this case, including *Meridian Global Funds Management Asia Ltd v Securities Commission*,[112] *R v British Steel plc*,[113] *In re Supply of Ready Mixed Concrete (No 2)*,[114] *R v Associated Octel Ltd*[115] and *R v Gateway Foodmarkets Ltd.*[116] Following the speech of Lord Hoffmann in *Meridian*, the choice of the appropriate theory depended on the ingredients of the offence itself, and the requirements of both retribution and deterrence pointed to corporate liability where death was caused through the company's gross negligence.[117]

For the train operating company it was submitted that *R v Adomako* was not concerned with corporate liability, and that after that case, the doctrine of identification still applied to gross negligence manslaughter. The *Tesco* case was still authoritative so it would be impossible to find a company guilty unless its alter ego could be identified. None of the cases relied upon by the Attorney General since Tesco supports the demise of the doctrine of identification. All of the cases referred to by the Attorney General were concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, that is whether Parliament intended companies to be liable.[118]

To the court it seemed that there was no sound basis for suggesting that, by their recent decisions, the courts had started a process of moving from identification to personal liability as a basis for corporate

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108 The words of Lord Lane CJ in *R v Stone, R v Dobinson* [1977] QB 354, 363; 2 All ER 341, 347. This passage was referred to in the article at p.173 and by the Court of Appeal in the *Attorney General's Reference (No 2 of 1999)* at [2000] 3 All ER 182, 185.

109 [2000] 3 All ER 182, 186c.

110 *Ibid.*, 186e-f.

111 [1972] AC 153, 169; [1971] 2 All ER 127, 130-131 (HL).

112 [1995] 2 AC 500; 3 All ER 918 (PC).

113 [1995] 1 WLR 1356 (CA).

114 [1995] 1 AC 456; 1 All ER 135 (HL).

115 [1996] 1 WLR 1543; 4 All ER 846 (HL).

116 [1997] 3 All ER 78; ICR 382 (CA).

117 [2000] 3 All ER 182, 189g.

118 *Ibid.*, 190c-e.

liability for manslaughter [119] In *R v Adomako*[120] the House of Lords was merely seeking to escape from the unnecessary complex accretions in relation to recklessness arising from *R v Lawrence*[121] and *R v Caldwell.*[122] In order to achieve simplification the ingredients of gross negligence manslaughter were re-stated in line with *R v Bateman.*[123] Corporate liability had not been mentioned. Unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter. Indeed, Lord Hoffmann's speech in the Meridian case, in fashioning an additional special rule of attribution geared to the purpose of the statute, proceeded on the basis that the primary "directing mind and will" rule still applied although it was not determinative in all cases. In other words, he was not departing from the identification theory but re-affirming its existence.[124]

That approach was, said the court, entirely consistent with the Law Commission's analysis of the present state of the law in its Report No 237 of 4 March 1996: *Legislating the Criminal Code: Involuntary Manslaughter* (HC 171). The Law Commission's conclusion was that, in the present state of the law, a corporation's liability for manslaughter was based solely on the principle of identification and they drafted a Bill to confer liability based on management failure not involving the principle of identification. If the Attorney General's submissions were correct there was no need for such a Bill. It followed that in their Lordships' opinion, the answer to the second question was "No".

But if their Lordships had been wrong as to the present state of the law, it would not have been appropriate for the Court of Appeal to propel the law in the direction which the Attorney General sought. That would be a matter for Parliament. For almost four years the law Commission's draft Bill has been to hand as a useful starting point for that purpose.

2.1.5 No manslaughter at Southall, but breaches of health and safety legislation lead to record fine imposed on careless train operator. Poor safety culture exposed

Following Scott Baker J's ruling, the HST operating company pleaded guilty to its failure to conduct an undertaking, namely the provision of transport by rail to members of the public, in such a way as to ensure that they were not exposed to risks to their health and safety, contrary to ss 3(1) and 33(1)(a) of the Health and Safety at Work Act 1974, and was fined £1.5m. The judge described the failure as a "serious fault of senior management".[125] The fine imposed was at the time "a record fine on an individual company for a health and safety offence",[126] topping the previous record of £1.2m imposed on Balfour Beatty on 15 February 1999 for the collapse of three tunnels at Heathrow Airport, discussed below.[127] The Health and Safety Commission ordered a public inquiry into the accident,

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119 *Ibid.*, 191b-c.
120 *supra.*
121 [1982] AC 510; [1981] 1 All ER 974.
122 [1982] AC 341; [1981] 1 All ER 961.
123 (1925) 19 Cr App R 8; [1925 All ER Rep 45.
124 [2000] 3 All ER 182, 191h-192c.
125 [2000] 3 All ER 182, 185a.
126 HSE's press release E144 of 27 July 1999.
127 On the matter of fines. HSE press release E151 of 30 July 1999 told of a "record of three big health and safety fines this week": the fine of £1.5m on Great Western Trains arising out of the Southall disaster; £600,000 on Friskies Petcare (UK) for breaking health and safety law when a worker was electrocuted in a factory also in Southall; and £300,000 on London

headed by Professor John Uff QC. The inquiry resulted in 93 recommendations to improve rail safety.[128] The recommendations were mainly of a technical nature, but of relevance to this discussion is that Professor Uff criticised the two years delay in conducting the inquiry as a result of the criminal prosecution discussed above. He made recommendations aimed at improving the inquiry process as well as the procedures for technical investigation undertaken by the British Transport Police. The HSE welcomed the enquiry report, and noted that the report highlighted not only technical matters which required remedial measures, but "more fundamental problems" which included "indications of a poor safety culture throughout the industry, the extent which industry fragmentation continues to hinder safety issues – from the development of safety products to day-to-day communications on safety issues, and the underlying weaknesses that it highlights in the training and resourcing of maintenance crews." This is very similar language as has been used to criticise (below) the poor safety culture within the construction industry.

In its follow-up to the Southall Rail Accident Inquiry Report the Health and Safety Commission (HSC) announced its intention to implement all 93 recommendations from Professor Uff's report.[129] The Chair of HSC acknowledged a debt to the relatives of those killed and to those injured in the Southall disaster "to make sure that safety on the railways is improved." Like the construction industry, it is clear that the railway industry has "a legacy of poor safety culture and fragmentation".

The events of Southall have been somewhat eclipsed by a further rail disaster which took place on 5 October 1999 at Ladbroke Grove Junction, about two miles outside Paddington mainline station. Thirty one people were killed when Thames Trains' '165' diesel unit (165) bound for Wiltshire collided with the inbound Great Western High Speed Train (HST) from Cheltenham Spa. According to the HSE's Third Interim Report on the crash, the initial cause of the accident was the 165's passing of a red signal (SN 109) and its continued progress at speed for some 700 metres before hitting the HST at a closing speed of 145 miles per hour. The report makes the key point that "the reasons why the 165 passed the red light are likely to be complex, and any action or omission on the part of the driver was only one such factor in a failure involving many contributory factors."[130] A public inquiry has been set up by the HSC under section 14(2)(b) of the Health and Safety at Work etc Act 1974 in the chairmanship of Lord Cullen. Hearings began on 10 May 2000.[131]

2.1.6 The Construction (Design and Management) Regulations 1994 (CDM): emphasising the role of clients and designers in improving health and safety

CDM came into force in March 1995. Five years after the arrival of CDM the HSC felt the need to raise client awareness of legal duties imposed on clients by CDM. Clients through their procurement policies have a key part to play in determining how projects are managed and how the unacceptable toll of fatalities and injuries can be reduced (against a background of increasing numbers of fatalities and injuries). The new advice is particularly targeted at designers who are usually the first port of call

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Underground following the death of a passenger at Eastcote Station in 1996. The Friskies' fine was later reduced on appeal to £250,000.

128 HSC's press release C003 of 24 February 2000.

129 HSC's press release C022 of 22 May 2000.

130 HSE's press release E065 of 14 April 2000.

when clients think about building. Clients of course set procurement strategies and need to be aware of their legal duties.[132]

Designer's duties under CDM have also recently come under scrutiny with the publication by HSC of a Consultation Document on the way designer's duties are defined, following the decision of the Court of Appeal in the case of Paul Wurth SA of Luxembourg. HSE brought proceedings against Paul Wurth SA alleging a contravention of CDM following a fatal accident on 8 September 1997 during the installation of a conveyor at British Steel's Port Talbot works. HSE alleged that Paul Wurth SA had failed in their duties as designers under Regulation 13(2)(a) which places a duty on a designer to ensure that any design he prepares and which he is aware will be used for the purposes of construction work includes among the design considerations adequate regard to the need to avoid foreseeable risks to the health and safety of people as a result of construction work and subsequent cleaning work. Regulation 2(1) provides a meaning for the term 'designer', who is a person who carries on a trade, business or other undertaking in connection with which he: a) prepares a design, or b) arranges for any person under his control (including, where he is an employer, any employee) to prepare a design, relating to a structure or part of a structure.

On 26 January 2000, the Court of Appeal upheld an appeal by Paul Wurth SA against conviction. The judgment made it clear that the wording of the Regulations meant that no designer duty arose when a designer arranged for *other persons*, including employees, to prepare designs. This, said the HSC, was quite contrary to what the original provisions of the Regulations were intended to achieve. Proposals are being developed to correct this anomaly.[133]

2.1.7 The Ashford building collapse which killed four workers: not only another case providing insufficient prospect of a successful manslaughter conviction, but also where the causal event pre-dated the Health and Safety at Work etc Act 1974 and thus beyond the reach of the HSE

On the 1st of August 1995 a three storey office block situated in Ashford Middlesex collapsed whilst undergoing refurbishment. Four construction workers died. Investigations revealed that the structure had originally been single story. It was extended in 1969/70 to three stories. Lightweight concrete blocks used to form the parapet of the single storey building were wrongfully retained and used to support load-bearing columns at first floor level. The fatal collapse was caused by the structural failure of one or more to these concrete blocks which were concealed by facing brickwork and plaster. The HSE's evidence was passed to the Metropolitan Police. An inquest returned verdicts of unlawful killing. The Coroner asked the police to conduct further enquiries, at the end of which the Crown prosecution Service decided, having examined all the evidence (and of course being mindful of the difficulties described in the published article and elsewhere of bringing a successful manslaughter prosecution in these circumstances) that there was insufficient evidence to provide a realistic prospect of a manslaughter conviction. Manslaughter proceedings were not therefore commenced, and it also proved impossible to bring charges under the Health and Safety at Work etc Act 1974. This was because the real blame lay with those who founded the extended brick columns on materials of

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131 HSC's press release C022 of 22 May 2000.
132 See HSC's press release C048 of 29 October 1999.

inadequate strength, and since this work was done in 1969/70, prior to the 1974 Act and creation of the HSE and its legal powers, there was no means by which such a prosecution could be brought.

Clearly the procurement of refurbishment works to existing structures needs to follow the HSE's recommendations following this tragic episode. The possibility must be considered that the existing structure may be insufficiently robust to withstand damage to, or failure of, a key structural element, and that progressive collapse might result.[134]

2.1.8 The collapse of the Ramsgate walkway in which six passengers were killed and seven injured

A passenger walkway collapsed whilst in use at Port Ramsgate in September 1994. Six people were killed and seven injured. Investigations established that the collapse was caused by the failure of a weld in a safely-critical support element of the structure. Further investigation revealed gross deficiencies in the design which would have ensured failure of safety-critical elements within a fairly short part of the structure's lifespan. HSE established that the collapsed walkway was of unique design and that similar risks of collapse did not exist at other British ferry ports.

The technical deficiencies arose, according to the HSE, from the failure of various parties involved in the procurement, design and installation of the walkway to manage the project effectively and in particular to carry out any reasonable risk assessment of the project.

Legal proceedings were brought against the operating company, Port Ramsgate; the designers/ installation contractors, Fartygsentreprenader AB (FEAB) Fartygskonstructioner AB (FKAB); and the independent approval organisation, Lloyds Register of Shipping. In 1997 all were convicted and record fines (£1.25m) and costs (£713.000) at the time were imposed. Fines and costs have not been recovered from the two Swedish firms that have since become insolvent.

Consideration was given by the Crown Prosecution Service to manslaughter proceedings, but responsibility for the failings which caused the incident was divided between so many individuals and organisations that no clear case could be established against any of them. Nonetheless, whilst nothing much was learned from this episode with respect to the technical causes of structural failure, lessons are there to be learned by those who procure, design and construct structural projects and those who verify code compliance of such projects. It must seem surprising that a large organisation with professionally and technically well qualified staff allowed a series of errors to lead to disaster.[135]

2.1.9 Canada Square tower crane collapse adds three more fatalities to a worsening record

The problem of fatality on the jobsite has not gone away. Far from it: fatalities on construction sites have increased by 20% in the year March 1999 to April 2000, when more than 80 construction

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133 See HSC's press release C014 of 6 April 2000.
134 See HSE's press release E164 of 26 August 1999.
135 See HSE's press release E013 of 28 January 2000. The new guidance (published by CIRIA) is titled: *'Safety in ports: ship to shore linkspans and walkways, a guide to procurement, operations and maintenance'*.

workers died (66 killed and 282 injured in the previous year).[136] This statistic was seen as a reflection on the lack of effectiveness of the Construction (Design and Management) Regulations 1994, introduced in March 1995, when the comparable statistic was 81 fatalities in the year to that date. Five years on the figures show no improvement, and on 21 May 2000 three workers were killed on the HSBC site at Canada Square, Isle of Dogs (Canary Wharf) when a tower crane collapsed. The accident occurred when the top of a Wolffkran 320 BF luffing jib tower crane, to which additional lower elements were being added with external climbing equipment, collapsed and fell more than 100 metres with the two erectors and the crane driver. Two other erectors managed to escape into the tower of the crane and survived.[137]

This tragic event attracted much media attention on the construction industry's poor safety record. Several new safety initiatives,[138] plus the heightened media attention resulting from this accident have reportedly "prompted contractor's generally to react defensively."[139] One other initiative bearing down on the industry "is the spectre of new legislation announced [again, during May 2000] by home secretary Jack Straw that will make it easier to prosecute company directors for health and safety breaches (Corporate Manslaughter)". Of course the technical press have not quite grasped this point quite correctly. The main significance of the proposed change in the law is to make it easier to convict the corporate body for manslaughter caused by gross negligence, rather than the controlling natural persons.

2.1.10 Government's new proposals announced May 2000

It has at last become clear to government that the current common law of corporate manslaughter is ineffective. Only three companies have so far been successfully prosecuted for corporate manslaughter, all of them small businesses. The Government now accepts in principle the Law Commission's Report No 237 of 4 March 1996: *Legislating the Criminal Code: Involuntary Manslaughter* (HC 171) (see 2.4 above). The Government accepts the Law Commissions proposals in respect of the offences of reckless killing and killing by gross carelessness, but remains undecided as to whether there should be an additional involuntary homicide offence which covers the situation where the wrongdoer intends to cause only minor injury but due to unforeseen circumstances causes death. Reckless killing is to be punished by a life sentence, killing by gross carelessness by 10 years imprisonment, and possibly 7 years for causing death by intentional or reckless minor injury.

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136 'Site deaths rise 20%, HSE figures reveal', *Building*, 2 June 2000, p.9. In the past 25 years, 2,800 people have been killed on construction sites or as a result of construction activity. Many more have been injured or made ill: see HSE's press release E082 of 22 May 2000.

137 HSE's press release E100:2000 of 14 June.

138 The construction minister's *Respect for People* campaign and the HSC's *Working Well Together* scheme (HSC's Construction Industry Advisory Committee (CONIAC) and the Construction Confederation). The *Working Well Together* scheme was launched by the health and safety minister in May 1999 and seeks to encourage all industry stakeholders (clients, designers, planners, suppliers, professional and trade bodies, unions, contractors, and individual workers) to commit publicly to reduce deaths, injuries and ill health on the jobsite: see HSE's press release E082 of 22 May 2000. The government also has an initiative launched on 7 June 2000 by deputy prime minister John Prescott under the banner Revitalising Health and Safety where the construction industry has been singled out for special attention. The declared objective is to reduce the number of deaths and serious injuries suffered in the workplace by 10% by 2010. The action plan includes proposals for tougher penalties, including imprisonment, for health and safety offences, removal of Crown immunity, and introduction of a new code of practice that provides for a named person to be responsible for health and safety: see '*Prescott's safety plan to target construction*, Building 9 June 2000, p.11.

139 "What now? The Canary Wharf tower crane tragedy has refocused attention on the industry's safety record.' *Building*, 2 June 2000, p.18.

The Home Secretary now proposes[140] that companies will be convicted of corporate killing where "management failure" has resulted in death and the company's conduct is judged to have fallen far below the expected standard. Companies so convicted face unlimited fines, plus an order from the court to put right the failings which caused the fatality. Not only might directors involved by disqualified from holding office or senior management positions, but they might also be prosecuted individually for one of two new offences, namely, reckless killing or killing by gross carelessness. Reckless killing is the offence which arises out of knowingly taking a risk that could have fatal consequences. The maximum sentence is life imprisonment. Killing by gross carelessness is the offence which arises out of performance far below that expected of such a person, when that person knows that such poor performance carries with it the risk of fatality.[141]

The risk of death arising from a particular construction operation does not need to have been obvious to the company or its management for a prosecution to succeed: and neither is it necessary to show that the company fully appreciated the risk. Death will have been caused by a company merely as a result of "management failure". The company will be responsible for such a fatality even when it can be shown that the immediate cause of death was the action of that company's employee.

It is thought that shareholders will carry the burden of a successful prosecution for corporate killing. Shareholders of a convicted company would of course pay the fine and the associated legal costs but in addition would lose business from the inevitable bad publicity. The latter effect may well be the more damaging and thus should help to focus minds: no business will want the label 'corporate killer' added to its CV. The Government has invited comments as to whether the crime of 'corporate' killing should also apply to unincorporated bodies by using the term "undertakings" which is defined in the Local Employment Act 1960. This change would broaden the base so that the offence of corporate killing would apply to all employing organisations, approximately 3.5 million enterprises. The government also seeks views on whether these new offences should be investigated and prosecuted by enforcement agencies such as HSE, in addition to the police and CPS.

2.1.11 Kerrin Point gas explosion: another "appalling case of neglect".

The HSE's Principal Engineering Inspector agreed with the judge sitting at Middlesex Crown Court who on 10 September 1999 convicted three defendants as a consequence of a gas explosion at a tower block in South London on 26 June 1997. The judge had said that this sorry episode presented an appalling case of neglect. Lambeth Council pleaded guilty to two charges respectively under sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and was fined a total of £75,000 and ordered to pay costs of £75,000. The contractor pleaded guilty under s. 3(1) and was fined £12,500 and ordered to pay costs of £10,000. The subcontractor pleaded guilty to breaches of regulations 3(1) and 3(3) of the Gas Safety (Installation and Use) Regulations 1994 having commissioned gas burners when not a competent person to do so and not being registered with CORGI; of having contravened regulations 5(3) and 33(2) in failing to carry out commissioning in accordance with appropriate

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140 At www.homeoffice.gov.uk/consult/invmans.pdf.

standards, failing to ensure that gas burners complied with the regulations and in failing to disconnect an appliance. The hapless subcontractor was fined £3000 and ordered to pay costs of £2000. This was clearly a case where the court imposed fines in accordance with the relevant parties' ability to pay. The court regretted that it could not impose a greater penalty on the negligent subcontractor. It seems therefore that even a Crown Court has little sanction against a grossly negligent but impoverished contractor.

This case is a good example of the link between procurement practice and health and safety. All parties involved failed to appreciate the scale of the risk in the operation of the boilers and the refurbishment work. The Council failed to retain sufficient expertise and thus failed to appreciate the work required in its refurbishment project which in turn led to poorly drafted contract documents which resulted in failure to monitor and control the work of its contractors. Major defects in the boilerhouse went undetected so that no repairs were carried out during the refurbishment works. It was clear to the HSE that the contractor and subcontractor had taken on work which was well beyond their capabilities, and the lack of monitoring and control by the Council allowed the contractors to take unauthorised and negligent shortcuts. The Inspector said:

> "The nub of the case is that responsibility for a job which had to be done to very high safety standards, because of the risks involved, was subcontracted twice, neither contractor being in a position to satisfy themselves that they had passed the job on to a competent party. In other words, if they had not got into a situation where they were over-reliant on others, the accident could have been avoided."[142]

2.1.12 The Heathrow tunnel collapse

The Health and Safety Executive published its report on "one of the worst civil engineering disasters in the United Kingdom" on 4th July 2000.[143] No person was killed or injured when tunnels collapsed in the course of construction work at the Central Terminal Area of Heathrow Airport on the night of 20-21 October 1994, but several days of disruption were experienced at the airport and the Heathrow Express Rail Link project was delayed. HSE brought legal proceedings against Balfour Beatty Civil Engineering, the principal contractor, and Geoconsult ZT GMBH of Austria, their expert advisers, alleging breaches of sections 2(l) and 3(1) of the Health and Safety at Work etc Act l974. Balfour Beatty pleaded guilty and were fined £1.2m, a record at that time. Following a trial, Geoconsult ZT GMBH of Austria were found guilty and fined £0.5m. Geoconsult failed in an appeal against conviction and sentence. It has since lodged a complaint with the European Court of Human Rights.

According to the HSE's Chief Inspector of Construction:

> "The report points out that although there were human errors, these were a consequence of foreseeable organisational failures. The collapses could have been prevented but for a cultural

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141 See *Reforming the Law of Involuntary Manslaughter: the Government Proposals*. Responses were to be made by 1.9.2000.

142 See HSE's press release E175 of 10 September 1999.

143 See HSE's press release E112 of 4 July 2000.

mind-set which focused attention on the apparent economies and the need for production rather than the particular risks."

Effective risk management should be at the core of robust health and safety systems. The potential for accidents which cause serious injury or death must be recognised and addressed at the procurement phase and sufficient resources provided to minimise identified risks. Only by the co-operation of the key players in the construction process will the industry create and foster a culture in which health and safety is paramount.

That health and safety issues are central to construction procurement is evident from the HSE's comment that "those involved in the construction industry must learn the wider lessons from this incident and put health and safety at the centre of all projects."

2.1.13 Three companies and director convicted after scaffold collapse: are the penalties sufficient for such gross incompetence?

On 15 July 1998 scaffolding to a riverside building near London Bridge collapsed into a public area injuring several workers, one seriously. Luckily, there was no fatality. The collapse was caused by gross overloading of the structure during its dismantling. Instead of taking materials down to ground level, they were progressively placed on a remaining tower section of the scaffold which eventually buckled and collapsed under the overload. The incident was no accident but gross mismanagement by the contractors concerned. The adoption of good practice would have avoided the collapse. According to HSE, the fines imposed by magistrates "show how seriously they took the matter, and that they considered that everyone involved in the incident had some responsibility for preventing it, including a company director. The Principal Contractor for the site was convicted on 4 April 2000 at the City of London Magistrates' Court of breaching Regulation 9(2) of the Construction (Health, Safety and Welfare) Regulations 1996 and fined £2500 and ordered to pay £2000 costs. The scaffolding subcontractor was convicted of breaching sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974 and fined £10,000 and £15,000 respectively for each breach, ordered to pay costs of £9000 and compensation to an injured person of £3000. The scaffolding sub-subcontractor who was primarily responsible for the dangerous scaffolding was convicted of the same offences and fined £6000 and £4000 respectively, with costs to pay of £3000 and compensation to pay of £2000. A director of the sub-subcontractor was convicted of the same offences by virtue of section 37 of the 1974 Act and fined £600 and £800 respectively and ordered to pay costs of £559 and compensation of £1000. There a total of £38,900 was extracted in fines as punishment for this example of gross incompetence, and the total costs to the industry as a result of these prosecutions amounted to almost £60,000.[144] Clearly from the point of view of the public such dangerous and corrupt practices need to be eliminated. From the construction industry's point of view such criminal incompetence and waste must be squeezed out of the industry in order to restore profitability and reputation.

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144 See HSE's press release E061 of 6 April 2000.

2.1.14 Is the construction industry is putting profit before lives?

The HSE's Chief Inspector of Construction has recently accused the industry of improving its efficiency at the expense of safety in the workplace. The industry's increasingly poor safety record (increased number of fatalities and serious injuries) was attacked in the trade press for paying "too much attention to production methods that improved profit" but with insufficient regard for the well-being of the workforce. The Chief Inspector noted the worsening statistics for work place fatalities and said:

> "Key performance indicators are showing improvement in profitability, time to build and quality, but it worries me to think these improvements are being made at the expense of health and safety."

The agenda set by the Egan Report called for a reduction of 10% in industrial accidents but so far no improvement has been recorded. The construction sector is of obvious concern to the HSE. Last year it served 2018 prohibition notices on construction companies, that is 47% of all notices served.[145]

The link between Egan's Construction Task Force recommendations and health and safety needs to be emphasised. Egan identified the industry's need to reduce its unacceptably high frequency of personal injuries. In order to prevent deaths and injuries to construction workers engaged in excavation work the HSE has recently published new guidance for this activity. In the five years from 1 April 1991 to 31 March 1996, 938 injuries to workers engaged in groundwork activities were reported to HSE, with an average of seven fatalities each year. This carnage cannot be acceptable and it is about time, said the HSE, that the industry organised itself to put a stop to it.[146]

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145 See *'HSE: industry is putting profit before lives'*, Building 30 June 2000, p.10.

146 The new guidance is titled *'Health and safety in excavations: be safe and shore'*. See HSE's press release E044 of 8 March 1999.

Part 2

Manslaughter as a Result of Construction Site Fatality

Introduction

The change of Government within the United Kingdom during the Spring of 1997 led to the introduction of new policies and some re-assessment of would-be policies left on the shelf by the out-going administration. One matter dusted down is the Law Commission's proposals for a review of the law of involuntary manslaughter.[147] The recent Southall train crash which claimed six lives raised once again public concern as to whether rail-safety has indeed been compromised by privatisation of the UK railway system.[148] The Labour Party annual conference resolved that charges should be brought against the directors of any companies involved in this fatal crash, if there is a good chance of establishing culpability. At the same time, the Home Secretary announced his intention to consider bringing into the UK jurisdictions "laws which provide for the conviction of company directors where it is claimed that dreadful negligence by the company as a whole has meant people have died".[149]

Against the background of imminent law reform, this article[150] outlines the events of a case involving a fatality on a construction site, then reviews the English common law of manslaughter[151] and more particularly gross negligence. Lesser offences seem more likely to be prosecuted, such as breach of a strict obligation imposed by statute or an employer's vicarious liability for an employee's statutory offence. Corporate bodies, as well as their officers, may be guilty of a crime:[152] recently a company and one of its directors was convicted of manslaughter. It is submitted that a combination of political pressure and law reform will result in increased likelihood of manslaughter prosecutions of construction companies and their senior managers.

Fatality on the construction site

In the course of steelwork erection one erector was required to move to a place of work about three metres along a girder which was about 75 mm wide and about six metres above ground level. There were no safety nets or safety belts. There was no handhold to provide support. There was evidence before the court that it was common practice to work in these circumstances and that 75 mm was sufficient for a steel erector to "walk it comfortably without fear". Scaffold boards or other staging could have been placed on the trimmers already in position to provide a working platform. One erector fell from this girder and was killed.[153]

The regulations at the time provided that "suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far is reasonably practicable be provided to every place at which any person has at any time to work."[154] Other regulations provided for covers over open joisting more than two metres above ground level[155] and for the provision of safety nets and belts in special circumstances.[156]

It was argued for the employer that as a steel erector this man was accustomed to working at heights and to keeping his balance on a narrow surface high above the ground. He had something of the life of an acrobat perhaps! Apparently it would never have occurred to anyone before the accident that a steel erector walking a 75 mm wide girder with no handhold might possibly slip and fall! The foreman saw no risk in this activity. The supervisor, with thirty years of experience claimed that he had never known boards to be used to provide an access platform in such circumstances. The employer's argument was, in sum, that there was no evidence of a comparable accident to a steel erector and that so far as could be foreseen, a 75 mm wide means of access was a safe means of access.

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147 *Legislating the Criminal Code - Involuntary Manslaughter* 1996 Law Commission No. 237, published as House of Commons Paper 171 (HMSO).

148 See *The Times*, 20 September 1997.

149 See *The Financial Times* and *The Daily Telegraph*, 3 October 1997.

150 An earlier version of this paper was given to the annual conference of the Association of Researchers into Construction Management (ARCOM), 1996.

151 The author acknowledges help given by Graham Wright, Lecturer in Law at the University of Central England in Birmingham. Any errors remain the responsibility of the author.

152 At common law and in breach of statutory obligations.

153 See *Trott v. WE Smith (Erectors) Ltd* [1957] 3 All ER 500 (CA).

154 Building (Safety, Health and Welfare) Regulations 1948, regulation 5.

155 Regulation 30.

156 Regulation 97.

Taking a contemporary look at this case, forty-one years after the event, it seems that there could be a civil claim for damages from the estate of the dead steel erector, and a prosecution by the State for breach of safety regulations. They may also be grounds for a prosecution of the employing company and its responsible officers for manslaughter out of gross negligence.

In fact the Court of Appeal dealt only with a civil claim for damages. The plaintiff's claim was based on two separate counts; breach by the employer of statutory duty, and in negligence by the employer at common law. The court held that the safety regulations placed a stricter duty on the employer than a general duty in common law to take reasonable care. Under the regulations the burden was on the employer "to show that the means of access was safe so far as it was reasonably practical to make it so".[157] The word *safe* here does not mean *absolutely safe* in the sense that no accident can occur: it must mean *safe for a person who is acting reasonably.* In the facts of this case the employer "provided no means of access in any ordinary sense of that expression"[158] and was therefore in breach of statutory duty under the regulations. Having found liability for breach of statutory duty there was no need to express a view on the negligence claim, but "the standard of care prescribed by [the regulations] approximated to the standard of care set by the common law with respect to the same matter ...".[159]

Nowadays the employer would be prosecuted under the Health and Safety at Work etc Act 1974 and subordinate regulations. The question at the core of this paper is whether there should be a prosecution for the crime of manslaughter.

Manslaughter

The common law deals with homicide (unlawful killing) as murder or manslaughter. If the crime does not amount to murder, then it is manslaughter. To put this in the construction idiom: "manslaughter ... is simply a sort of skip into which has been tipped liability for the vast majority of killings the law deems unlawful and which for some reason are not serious enough to be classified as murder."[160] In more judicial language, manslaughter covers such a wide range of situations that it can amount to "little more than pure inadvertence and sometimes to little less than murder".[161]

Manslaughter is a single offence, but is categorised as 'voluntary' or 'involuntary'. Voluntary manslaughter has the same ingredients as murder but some mitigating circumstance, for example, provocation, reduces the crime to that of manslaughter. In the context of workplace fatality, where there is no malice aforethought and therefore not the mental element needed to establish murder or voluntary manslaughter, only involuntary manslaughter is further discussed.

Involuntary manslaughter may be classified as (1) unlawful act manslaughter[162] or (2) manslaughter by gross negligence.[163] The maximum sentence (but not a mandatory sentence) upon conviction for manslaughter is life imprisonment.[164] A fine may be imposed as an alternative to, or as well as, imprisonment. Unlawful act manslaughter arises when a *criminal* act[165] or misconduct[166] which is both dangerous[167] and is likely to cause injury inadvertently causes death.[168] It is "unnecessary to prove that the accused knew that the act was unlawful or dangerous",[169] but the act must have been intentionally done.[170] There is a "clear distinction between an act of omission and an act of commission likely to cause harm".[171]

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157 [1957] 3 All ER 500 *per* Jenkins LJ at 504C.
158 *Ibid.* at 506F.
159 *Ibid.* at 507A.
160 All ER Rev 1994, p.134.
161 Per Lord Salmon, *DPP v. Newbury* [1977] AC 500. The dicta of Lord Salmon was applied in *R v. Dalby* [1982] 1 All ER 916. In *Newbury* the court said that the accused was guilty of manslaughter if it was proved that he had intentionally done the act which was unlawful and dangerous and that act inadvertently caused the victim's death. It was not necessary for the prosecution to prove that the accused *knew* that the act was unlawful and dangerous: the test was not whether the accused knew, but whether a sober and reasonable person would recognise the danger.
162 Frequently described as 'constructive' manslaughter.
163 Having dropped the term 'reckless manslaughter' after the HL decision in *Adomako* [1994] 3 All ER 79 (HL).
164 Offences Against the Person Act 1861, s.5, modified by s. 1(1) Criminal Justice Act 1948.
165 A civil wrong would be insufficient as grounds for manslaughter: *Franklin* (1883) 15 Cox CC 163 and *Andrews v. DPP* [1937] AC 576, 2 All ER 552, *per* Lord Atkin.
166 Lord Ellenborough spoke of "criminal misconduct" in *Williamson* (1807) 3 C&P 635.
167 The word 'dangerous' means "likely to cause some harm", not necessarily death or even serious injury. The "harm" must be categorised as 'physical' harm which any reasonable person would recognise as likely to result from the criminal act in question: *Dawson, Nolan and Walmsley* (1985) 81 Cr App Rep 150, Crim LR 383 (CA).
168 See *R v. Larkin* (1944) 29 Cr App R 18 *per* Humphreys J. The HL approved the definition in *Newbury, ibid.*
169 Lord Salmon, *Newbury*, ibid.
170 *Newbury*, ibid.
171 *R v. Lowe* [1973] QB 702; 2 WLR 481; 1 All ER 805; 57 Cr App Rep 365 (CA).

Gross negligence manslaughter, in contrast with unlawful act manslaughter, involves the doing of a *lawful* act "and in the course of doing that lawful act (the defendant) behaves so negligently as to cause the death of some other person".[172] Gross negligence, it is submitted, is the more likely circumstance in the carrying out of construction works to lead to a conviction for manslaughter An omission to perform some legal duty would also be prosecuted under this head. The duty to act may be prescribed by statute or recognised as a 'duty' situation at common law.[173]

Negligence in the civil law is understood to be a breach of a common law duty of care which causes actionable damage, but in criminal law "simple lack of care such as will constitute civil liability is not enough".[174] "Mere inadvertence is not enough."[175] The civil standard for negligence is a failure to do what a reasonable person in the circumstances would do, or doing something that such reasonable person would not do. In criminal gross negligence the conduct complained of is so extreme as to be far outside the range of behaviour expected from the reasonable person. In cases of criminal gross professional negligence the reference standard is that of a competent practitioner in that profession.

Gross negligence has been reviewed recently by the House of Lords in a case of medical negligence.[176] Ordinary negligence was conceded at trial. The issue was whether the conduct in question amounted to criminal gross negligence.

In Lord Mackay's opinion:

> "the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."[177]

Several words have been used by the courts to describe the amount and degree of negligence to be found by a jury to bring about a conviction.[178] "It is the element of 'unlawfulness' which is the illusive factor",[179] and with which judges have had difficulty in putting into words. Tests adopted and language used appear inconsistent. But the test for gross negligence may be tentatively stated as follows: applying an objective standard, is the defendant's conduct so gross as to justify a criminal, as opposed to merely civil, penalty? Lord Mackay in *Adomako*[180] referred to "a risk of death" as characteristic of gross negligence, but it is assumed that his reference was to a *significant* or *serious* risk.[181] But would a lesser risk be sufficient for a manslaughter conviction? In *Bateman* the court referred to "a disregard for life and safety"[182] and in *Stone and Dobinson*, Geoffrey Lane LJ said that the defendant "must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it."[183]

Finding liability for gross negligence manslaughter

Applying the law of gross negligence manslaughter to the facts outlined above, it is submitted that there ought to be a manslaughter prosecution. The defendant employer should be charged with manslaughter contrary to

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172 *R v. Larkin* [1943] 1 All ER 217.

173 Common law duties arise out of relationship (*R v. Gibbons and Proctor* (1918) 13 Cr App R 134); out of contract, expressed (*R v. Pittwood* (1902) 19 TLR 37) or implied (*Instan* [1893] 1 QB 450); out of a duty which is gratuitously undertaken (*Stone and Dobinson* ([1977] 2 All ER 341); and out of dangerous situations created by the defendant (*R v. Miller* [1983] 2 AC 161).

174 *Andrews v. DPP* [1937] AC 576, 583. A case of motor manslaughter.

175 *R v. Stone and Dobinson* [1977] 2 All ER 341.

176 *R v. Adomako, supra.*

177 *Ibid, per* Lord Mackay LC at 86j-87b.

178 For example Lord Hewart CJ in *R v. Bateman* (1925) 19 Cr App R 8, 10-12, used the words "culpable", "criminal", "gross", etc.

179 *Andrews, supra, per* Lord Atkin at 581-2.

180 *Supra.*

181 All ER Rev 1994, p.136. Whether the risk is significant or serious is for a jury to decide.

182 *Bateman* (1925) 94 LJKB 791. The gross negligence manslaughter test given in this case was approved in *Adomako, supra.*

183 *R v. Stone and Dobinson* [1977] 2 All ER 341 (CA) *per* Geoffrey Lane LJ.

common law. The employer unlawfully killed the employee.[184] The following questions and answers can usefully be considered:

(1) Does the defendant owe the victim a common law duty of care?
YES - In the common law an employer owes a duty to employees to take reasonable care so as to protect the employee from harm to his person and his other property

(2) Does the defendant owe a statutory duty as an employer to the victim?
YES - Statutory duties are placed on employers by the Health & Safety at Work etc Act 1974.

(3) Is an 'unlawful act' required in this category of manslaughter?
NO - The conduct complained of in gross negligence manslaughter need not be an act at all (in contrast to unlawful act manslaughter). A failure to perform a legal duty such as an obligation under the Health and Safety at Work etc Act 1974 could, it is submitted, be sufficient. An example would be a failure to provide a safe system of work.

(4) Is the defendant in breach of the common law duty or statutory duty?
YES - On the decision of the Court of Appeal in 1957.

(5) Did the defendant's breach of duty create a significant or serious risk of death?
YES - But this must be established by a jury.

(6) Did the defendant's breach of duty cause the victim's death?
YES - On the decision of the Court of Appeal in 1957.

(7) Should the defendant's breach be categorised as gross negligence and therefore be a crime?
YES - But this must be established by a jury.

Whether the defendant's breach of duty should be classified as gross negligence and therefore a crime is a question of fact (not law) to be determined by a jury. Culpability of a professional person or person with specialist expertise must be assessed by reference to the standard of a reasonably competent practitioner of that profession or expertise.

Workplace fatality in the construction context

Any death (or serious injury) arising out of construction works is unexpected and must be reported. The Crown appoints a coroner whose duty it is to inquire into the manner and cause of death of a person who is slain or who dies in suspicious circumstances. That inquiry is by means of an inquest or post-mortem. A coroner is not now able to bring charges of murder or manslaughter; these charges would be brought by the police. Where police enquiries are in progress with respect to the fatality the inquest is adjourned pending their outcome.

When a fatality is reported to the Health and Safety Executive, the inspector will form a view as to whether that fatality should be treated as a case of manslaughter, in which case the inspector will liase with the police. A charge of manslaughter would be made by the police. If no such charge is made, the HSE may prosecute a breach of the Health and Safety at Work Act 1974 and subordinate regulations. The level of duty prescribed by this Act is generally that of strict liability.

Increased evidence of manslaughter prosecution in the workplace

There is evidence of the Crown Prosecution Service's increasing willingness to instigate manslaughter proceedings against doctors or nurses whose alleged negligence results in the death of a patient. It was recently reported[185] that five cases were pending against medics, and that there had been five or six prosecutions per year since 1990. All cases involve the death of patients in unexpected circumstances. It appears that there is a more rigorous appraisal by the CPS of the evidence and the public interest when an unexpected death takes place, but the CPS deny that there is any change in policy. They maintain that a prosecution is brought only when there is evidence of gross negligence which goes beyond acceptable limits established by the medical profession. As outlined above, there seems ample scope within the construction industry for prosecution as a result of workplace fatality.

Strict liability

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184 Culpable homicide in Scotland.
185 The Times 5 March 1996.

It is relevant to discuss strict (criminal) liability here as it is the antithesis of the mental element in conventional criminal law. If there is no need to prove the mental element, that is the intention or negligence of an offence, that offence is said to be one of *strict liability*.[186] Strict liability is therefore the exception and contrary to the normal presumption in common law that a mental element must be proved to establish guilt of a criminal offence. With some exceptions,[187] strict liability arises for offences created by statute or subordinate legislation. For example, a regulation that "Every employer shall ensure that suitable and sufficient lighting ... is provided at any place where a person uses work equipment" is strict. Argument can only arise over what is "suitable and sufficient". There can be no argument that some form of lighting is required.[188] Wells[189] argues that regulatory offences are strict because they are not seen as being *real* crimes. Conviction of a regulatory offence is shrugged off - it is merely a *technical* offence!

Vicarious liability in criminal law

So far individual liability for causing death at the workplace has been discussed. This section discusses vicarious liability in criminal law: that is to what extent an employer may be liable for the crimes of an employee. The concept of vicarious liability is relevant here as a stepping stone from *individual* liability to the more problematic, but perhaps desirable, *corporate* liability. "It was only a short step from the idea of a master as a human person to the master as a corporate person."[190]

The civil law places on the employer liability for the torts of employees committed whilst in the course of their employment. There is no need to establish the fault of the employer: vicarious liability is strict and arises from the 'master-servant' relationship. But the criminal law does not follow this principle. The employer's liability for an employee's crime must generally be established on the basis of being an accessory.[191]

Corporate liability

For many years it was thought that a corporation could not be indicted for a crime.[192] But impediments[193] have now been removed. A corporate body is a legal person and may be criminally liable. A corporation derives criminal liability in two main ways:

> (1) under the vicarious liability principle, mainly in public nuisance at common law and when statutes impose liability (discussed above); and
> (2) under the principle of identification or attribution.

A corporation can be fixed with the actions and mental activity of a natural person; the result of that fiction is the principle of identification or attribution whereby a corporation is liable for its own offences.[194]These are the acts of natural persons who are identified with, or attributed to, the corporation.

The principles governing the attribution of a real person's knowledge to a company were recently reconsidered by the Privy Council.[195] The issue was whether an investment company had notice of its purchase of shares in another company such that it was obliged under statute to disclose the fact of purchase. The shares purchase had been made on behalf of the investment company by two senior personnel, acting improperly and fraudulently. The investment company would be obliged to disclose if it was deemed to have the requisite knowledge.

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186 For example, *Callow v. Tillstone* (1900 83 LT 411) where a butcher was convicted, despite having meat inspected by a vet, of exposing unsound meat for sale when the meat was unfit for human consumption. The defendant was blameless, but liable. He could only avoid liability by not offering the meat for sale. He was strictly liable.

187 Public nuisance, criminal libel, and blasphemous libel are said by Allen (1993) *Textbook on Criminal Law* (2nd ed.) at p. 85 to be exceptions in common law. See also Smith & Hogan (1978) *Criminal Law* (4th ed.) at p. 79.

188 See regulation 21 Provision and Use of Work Equipment Regulations 1992. These regulations implement EC Directive 89/655/EEC and are issued under the Health and Safety at Work etc Act 1974

189 Wells, Celia (1993) *Corporations and Criminal Responsibility* Clarendon Press, Oxford, England: at p. 8.

190 Pollock (1911) cited by Wells, *supra*, at p. 97.

191 See s. 8 of the Accessories and Abettors Act 1861, amended by the Criminal Law Act 1977.

192 *Anon* (1701) 12 Mod Rep 560, per Holt CJ: cited by Smith & Hogan, *supra*.

193 For example, that at one time personal appearance was required at assizes and quarter-sessions; and that at one time all felonies were punished by death; and the idea that a corporation as a creation in law could only do a legal act and so any crime must be ultra vires; and that a corporation had no body or mind: see Smith & Hogan, *supra*, p. 149.

194 As explained by Lord Reid in *Tesco v. Nattrass* [1972] AC 153, 170.

195 *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500; 3 All ER 918; 2 BCLC 116, on appeal from the New Zealand Court of Appeal.

In giving the decision of the Judicial Committee of the Privy Council, Lord Hoffmann observed[196] that although a company has the status of a legal person, it can only act and think through real persons. These actions and states of mind are then attributed to the company by the application of legal rules. Three *rules of attribution* were identified:

> (1) Primary rules of attribution: derived from a company's constitution, for example, that decisions of the board of directors are decisions of the company; or implied by company law, for example, that the unanimous decision of all shareholders in a solvent company, can be a decision of the company.
>
> (2) General rules of attribution which are equally applicable to real persons: derived from agency principles and primary rules of attribution (1. above) where, for example, an individual's action, purportedly on behalf of the company, is attributed to the company by the principles of agency: such as ostensible authority in contract, vicarious liability in tort or estoppel.
>
> (3) Special rules of attribution (to be used in exceptional circumstances): derived from the substantive rule in question (which might be a rule in criminal law which only imposes liability for the acts and mental state of the defendant as a real person) fashioned by the court itself, in circumstances where the primary and secondary rules cannot be applied.

Previous decisions of the courts have involved a search for the 'directing mind and will', the 'brains and nerve centre' or the 'soul' of the company. Where the substantive rule in question required a particular mental state or action, and where agency or vicarious liability did not apply, and that real person who had the required mental state or who acted could not be identified as the directing mind and will of the company, the attribution failed and the company avoided conviction.

In *Meridian* Lord Hoffmann abandoned the anatomical approach in favour of the rules of attribution discussed above. He tested previous decisions against these principles and gave plausible explanations. In this case it was not necessary to inquire into whether the individual who purchased the shares on behalf of Meridian was the 'directing mind and will' of the company. Knowledge of a servant's authorised acts will not always be attributed to the company.

> "It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company."[197]

English courts may now adopt Lord Hoffmann's formulation of the principles of attribution.[198] In certain circumstances it will then be easier for a court to convict a company of a crime where the criminal acts or thoughts of junior executives do not have to satisfy the criteria of the 'directing mind and will' test. But, "the fact that a company's employee is authorised to drive a lorry does not *in itself* lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter."[199] (emphasis added)

It has been noted[200] that one of the effects of the principle of identification under the 'directing mind and will' test is to make it more likely that a larger and more diverse company will escape liability. In such a case the real control is much further from the point were an offence is likely to be committed. Only a smaller company or less centralised management structure might create the conditions where controlling minds are placed at the sharp end of criminal liability.

In the *Zeebrugge* case[201] it was suggested that corporate liability for neglect of safety should be the aggregate of that of individual officers of the company, so that the individual officers must be liable for manslaughter before the company can be liable. The prosecution failed. Internal communications within the defendant company were so bad that no company officer had sufficient information to make him or her aware of an "obvious and serious" risk that the ferry would sail before doors were properly closed. There was no mental element within any individual company officer which could be attributed to the corporate body.

Conversely, if the company represents the sum total of the individuals' knowledge, it should be possible to convict the company of manslaughter, without first convicting all its officers, on the basis that by aggregation,

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196 [1995] 3 All ER 918, 922j-924b.
197 *Ibid.* at 928a.
198 A decision of the Privy Council is not binding on an English court, but will be very persuasive.
199 [1995] 3 All ER 918, 928c.
200 See Wells, C. *The decline and rise of the English murder: corporate crime and individual responsibility* [1988] Crim LR 788; *Manslaughter and corporate crime* (1989) 139 New LJ 931.
201 *R v. Coroner for East Kent, ex parte Spooner*, (1989) 88 Cr App R 10.

the mental element needed for conviction is only, and properly, present in the company. It is submitted that Lord Hoffmann's new formulation which abandons the search for directing minds may achieve this desirable end.

Intervention by the Law Commission

But judicial intervention may not be the only basis on which it becomes more likely that a construction company is convicted of manslaughter. The Law Commission has published proposals, including a draft Bill, which may hasten that event. They recommend codification of the law of involuntary manslaughter and the creation of two new offences in the context of individual liability: *reckless killing*, which is the more serious offence and carries a maximum sentence of life imprisonment, and *killing by gross carelessness* which would carry similar sentences as a court currently hands out for gross negligence manslaughter. If these proposals are implemented homicide would be classified as either murder, (voluntary) manslaughter, reckless killing or killing by gross carelessness. Specific offences would remain such as causing death be dangerous driving, infanticide and aiding and abetting suicide.[202]

In the context of corporate liability the Law Commission recommends the creation of a new offence of *corporate killing*, which broadly corresponds to the individual offence of killing by gross carelessness.[203] The corporate offence would avoid the attribution or identification problems by dispensing with the requirement that the risk be obvious or that the defendant is capable of appreciating the risk. A death would become the liability of the corporation if it is caused by a management failure to ensure the health and safety of employees or others affected by the corporation's activities. Even if the immediate cause of death is attributable to an employee's act or omission, the corporation could be convicted on the basis of its management failure. If the prosecution of corporate killing under these proposals should result in a verdict of not guilty, a jury should be able to convict the corporation of a lesser offence under s.2 or s.3 of the Health and Safety at Work etc. Act 1974.

Conclusion

Having established in principle that a construction company and its officers *can* be convicted of manslaughter, it may be necessary to indicate *why* criminal liability should be attached to a corporation's gross negligence which results in workplace fatality. Is prosecution under health and safety legislation not sufficient? Wells suggests that the very existence of a separate and specialist enforcement mechanism tends to marginalise any prosecution. It would not get the full glare of publicity that a murder or manslaughter trial would receive.[204]

Several recent events have stimulated demands from the public for manslaughter prosecutions of both company and officers, where they have been found responsible for resulting fatalities. Examples are

(1) the fire at Kings Cross underground station (1987);
(2) the capsizing of the Herald of Free Enterprise outside Zeebrugge (1987);
(3) the fire on Piper Alpha oil platform (1988); and
(4) the Clapham rail crash (1988).

The Law Commission has concluded that a person *ought* to be criminally liable for causing death by gross carelessness, and that a company *should* be liable for a similar offence to be termed corporate killing.

In all cases the reports and public or judicial enquiries severely criticised the activities of owners, managers and operators and held them responsible for the resulting fatalities. Why should those authorities responsible not be charged with manslaughter? Why should relatively junior employees face the full weight of the law as appeared to be the case in the Zeebrugge case? Why should junior employees be scapegoated for what are essentially the crimes of the corporation? Why should corporations benefit from incorporation without shouldering the corresponding responsibilities? Why should there be "a yawning chasm between the moral condemnation of P & O European ferries by the official enquiry and the legal position of the company"?[205]

Given the huge number of construction site fatalities, which could be prevented or at least should be preventable, would not the risk of a manslaughter prosecution of both company and its managers help those responsible to focus more intently and acutely on reducing such fatalities to zero? Why should the shareholders, who stand to profit from the output of those who die, not be collectively fined for their company's negligence? Is it right that there have been only four prosecutions for corporate manslaughter in the history of English law and only one recent conviction? None of the disasters listed above has resulted in a successful prosecution.

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202 See Law Commission Report No. 237, *supra*, at p. 3.
203 *Ibid.* pp. 7-9.
204 Wells (1993) *ibid.* p.795. See n. 43.
205 See The Law Commission Report No. 237, *supra*, at p.5. The quotation is attributed to Eric Colvin..

The counter argument to increasing the rate of conviction for corporate manslaughter is that corporate liability should not replace or detract from individual responsibility. But why not punish both when the circumstances suggest that punishment would be appropriate? Would not prosecution promote a culture of higher awareness of and interest in the reduction and elimination of fatalities in the construction workplace?

Chapter 3

Construction Works and Services Procurement: 'tendering contract', fairness and revocation of offers. No unfair preferences allowed.

The aims of Chapter 3 are to set the agenda for discussion which is to follow in subsequent Chapters, to present the author's published paper *Works, Services and Supplies Procurement: Obligations under the 'Tendering Contract', Fairness and Revocation of Offers* and to update the relevant legal material to August 2000.

Chapter 3 is in three parts. Part 1 provides an introduction and summary of the author's published papers reproduced in Part 2 and of the unpublished paper at Part 3. There is a common aim to the papers at Parts 2 and 3: that is to reveal the changes taking place in the way that the common law can now regulate the process of tendering for construction works.

Part 1

Part 2 of Chapter 3 reproduces a conference paper presented at, and published by, the RICS Research Foundation's annual COBRA building research conference, which was held in September 1996 at the University of Western England in Bristol. This paper is titled *Works, Services and Supplies Procurement: Obligations under the 'Tendering Contract', Fairness and Revocation of Offers* and is the oldest published paper within this collection. The contents were received with interest by those who attended the author's presentation in Bristol. Part 3 is an unpublished paper titled *Obligations arising out of the Procurement Process: No Unfair Preferences Allowed.* The Part 3 paper can be seen as a sequel or 'update' of the 1996 paper reproduced in Part 2. Taken together, Parts 2 and 3 create an introductory platform for several cases which will be considered again in subsequent papers, in more detail or in a different context.

Part 2 considers three Canadian cases involving private law challenges to the tendering process. Cases one and two arose out of a similar factual matrix. *Sanitary Refuse Collectors* (1971) and *Ron Engineering and Construction* (1981) submitted their respective tenders to a public body. In both cases the tender was accompanied by a bid deposit. In the first case the deposit was to be held as a guarantee that if awarded the contract the tenderer would accept and sign the formal contract documents. In the second case the deposit would be forfeited if the tenderer withdrew its offer before the public owner had fully considered all tenders submitted, or withdrew after receiving notification of having submitted a successful tender. In both cases it seems that the owner was attempting to protect itself from the inevitable expense and delay should it consider a tender, find it favourable, award the contract to that tenderer and find it withdraw before concluding a formal agreement. On the facts of both cases the successful tenderer withdrew and declined to conclude a formal agreement with the owner, but there the similarity ends. In the first case (*Sanitary*) the

court held that the irrevocable nature of the tender arose out of the promise not to withdraw given under seal and therefore avoiding any issue as to whether consideration was given for that promise. But the tenderer had relied to its detriment on certain representations made by the public owner in the tender documents and was therefore entitled to rescind its tender and recover its deposit. In the second case (*Ron Engineering*), a tendering contract was found to arise out of the submission of a tender which complied with the owner's invitation. That contract governed the conduct of both owner and tenderer, and as the tenderer had broken its irrevocable promise not to withdraw, it was liable to forfeit its bid deposit to the owner in lieu of paying damages for breach of contract.

In the third case presented in Part 2, *Martselos Services* (1994) challenged the award of a contract by a public owner to its only competitor in the bidding process. The court referred to the *Ron Engineering* case (second case above) and confirmed that this decision imposed a duty on the owner to treat all tenderers equally but with due regard to the contractual terms provided in the tender documents. The owner was not obliged to award a contract to any tenderer as a result of the decision in *Ron Engineering*. The paper concludes by putting forward answers to the questions derived from the study of the three cases identified above.

Part 3 introduces five cases decided since the judgments were given in the cases discussed in Part 2. The cases come from New Zealand, Canada and England which fact in itself demonstrates how the doctrine of contractual obligations arising out of the procurement process has circumnavigated the globe. The paper provides a background stage setting for the entrance of the first case, *Pratt Contractors* from New Zealand. The court held that a tendering contract did arise in the circumstances of that case, but that the public owner was not obliged by the terms of that contract to award its contract to the lowest bidder: it could instead award no contract at all, but if it awarded any contract it must do so in compliance with its own tender stipulations. The public owner was, however, held to be in breach of the tendering contract when it awarded the contract on the basis of an alternative tender which was not a conforming tender. Private law, said the New Zealand High Court, imposed a duty of procedural fairness on the owner and it was in breach of that duty. The aggrieved low bidder was therefore entitled to damages on account of its wasted bid costs and lost profits.

The stage setting is changed for the second act. Procurement is now to be based on non-traditional arrangements, requiring the successful bidder to *design* and construct. Enter the second case, *Health Care Developers* from Canada. The theme here is that since the decision in *Ron Engineering*, common law courts have struggled to reconcile freedom of contract with the notion of procedural fairness in the procurement process. From that struggle it is possible to catalogue certain accepted principles, that, for example, the owner is required to treat all bidders equally and fairly and prevented from considering competing bids on undisclosed terms and conditions, and that the owner cannot award a contract for something significantly different from that which tenders were invited. On a practical level, the decision in *Health Care Developers* shows that where design

is a component of competing bids, there are perfectly good reasons for taking a 'best value' approach rather than that of accepting 'lowest price'.

In the third act (*Chinook Aggregates*, Canada), the public owner finds itself in breach of an implied contractual obligation to treat all bidders equally and fairly when it awards the contract to a local contractor on the basis of an undisclosed local preference policy. In the fourth act (*Kencor Holdings*, Canada) the court also had to deal with an undisclosed preference in favour of local bidders. The public owner was expressly entitled to waive defects in a bid in the best interests of the local community, but this did not entitle it to unilaterally superimpose on the tender contract a new implied term for local preference. Bidders would be doomed in advance by secret policies and large sums would be wasted preparing futile bids.

Part 3 also announces the presence within this cast of a case from the English High Court (*Harmon Facades*). *Harmon* makes its entrance in the first act as a case based on, amongst other authorities, *Pratt Contractors*. In the English case the court held that a tendering contract arose, not when tenders were first submitted in response to the owner's invitation, but later when *subsequent* invitations were given to submit alternative tenders. It seems from this decision that in England the tendering contracts arises, if at all, somewhat later than in Canada or New Zealand. Another view might be that the presence of a public law regime delays the point in time when a tendering contract might be formed. *Harmon* appears later in the same act when the principle of awarding damages is discussed.

Chapter 3

Part 2

WORKS, SERVICES AND SUPPLIES PROCUREMENT: OBLIGATIONS UNDER THE 'TENDERING CONTRACT', FAIRNESS AND REVOCATION OF OFFERS

1. Summary

This paper reviews three Canadian decisions which examine the legal relationship between owner and tenderer and show that in the common law there are circumstances in which a tenderer may not be able to withdraw his tender without incurring liability for damages to the owner, and that the owner is obliged to treat all tenderers equally and fairly.

Keywords: Procurement, Tender, Offer, Contract, Obligation, Good faith

2. Introduction

For many years an invitation to tender was considered to be no more than an invitation to treat, creating no obligations for either party until the essential elements of a binding contract were present. The owner appeared to be free of any obligation and could reject *any* or *all* offers. There was in fact one restriction placed on the owner: there must be the *intention* to award a contract, otherwise the invitation to tender is a fraud giving a tenderer a cause of action to recover damages in the tort of deceit. The costs of tendering are normally borne by the tender, with expectation of recovery of those costs only through successful tenders which result in the award of contracts. But when the owner indicated to the lowest tenderer that a contract award was likely, asked for more information beyond the scope usually necessary for the consideration of tenders, then abandoned the project, the court held that the lowest tenderer was entitled to restitutionary recompense on the basis of a *quantum meruit.*[206]

3. The background scenario

Tenderers agree with the owner to forfeit a bid deposit or bond to the owner if their tender is withdrawn prior to award of contract. The bid is made under seal so that the offer is irrevocable except under its own terms. The owner is not obliged to accept the whole or any part of any tender nor the lowest tender. After tenders are opened the lowest tenderer discovers an error in pricing. The lowest tenderer withdraws and the owner seeks compensation

3.1 Variant

The bid is not under seal, but it is alleged that the offer is irrevocable by agreement.

3.2 Variant

The lowest tenderer does not withdraw and is awarded the contract. The second lowest tenderer alleges unfairness in the tender award process and sues to recover profits lost through not receiving the contract. The owner considers whether it is under any obligation to award *any* contract at all.

4. The questions to be answered

1. What is the legal relationship between tenderer and owner?
2. What status does the tender have?
3. What is the purpose of the bid deposit/ bond?
4. Is the lowest tenderer entitled to withdraw its tender?
5a. What is the effect of the owner's alleged misrepresentation?
5b. What is the effect of the contractor's alleged 'mistake' in pricing?
6. Is the owner entitled to compensation for the withdrawn tender?
7. Is the owner obliged to act fairly to all tenderers?
8. Is the owner obliged to award any contract at all?

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[206] See Craig and Davenport (1996) *Capital Works Procurement: A Comparative Analysis of Procurement in England and in New South Wales, Australia* presented to the CIB W92 Procurement Systems Symposium, Durban, South Africa, January 1996 at page 97.

9. Does the existence of industry practice or custom negate the effect of a 'privilege clause' whereby the owner expressly denies any obligation to accept the lowest or any tender?
10. Are there any exceptions to the unequivocal position taken under 9. above?

5. Sanitary Refuse Collectors Inc. v. City of Ottawa[207]

The Corporation of the City of Ottawa called for tenders for refuse collection over a five year period. The Corporation made several stipulations within the tender documents, including, *inter alia*, that tenderers must familiarise themselves with the site of the proposed works, and that the tender submitted would remain open for acceptance "until the formal contract is executed". It was also a requirement that

> "the tenderer hereby agrees that, if the tenderer withdraws this tender before the Corporation shall have considered the tenders and awarded a contract the amount of the deposit on this tender, if by cash or certified cheque, shall be forfeited to the Corporation of the City of Ottawa, and if bid bond, shall be forthwith payable to the Corporation."[208]

Clause 11 of the tendering conditions provided that

> "if this tender is accepted, the tenderer agrees to furnish an approved surety for the proper fulfilment of the contract ... and to execute the agreement and bond ... within seven days after being notified so to do ... In the event of default or failure on the tenderer's part so to do the tenderer agrees that the Corporation shall be at liberty to retain the money deposited by the tenderer to the use of the Corporation, and to accept the next lowest or any tender, or to advertise for new tenders ... and the tenderer also agrees to pay to the Corporation the difference between this tender and any greater sum which the Corporation may expend or incur by reason of such default or failure ...".[209]

Each tender was to be submitted with a cash deposit or certified cheque for $60,000 made payable to the Treasurer. The cash or cheques was to be held as a "guarantee that, if the tenderer is awarded the contract, he or they will sign the Contract Agreement".[210] Failure by a successful tenderer to sign the contract would result in forfeit of the cash or cheque, as would withdrawal of the tender after opening. There was provision for forfeiture of the contract on a variety of grounds, after a 24-hours written notice from the Engineer. In such circumstances the contractor would be liable for the Corporation's damages.

The usual privilege clause applied: the Corporation was not bound "to accept the whole or any part of any tender" nor to "accept the lowest tender".

When tenders were opened Sanitary was the lowest tenderer, but two weeks later Sanitary withdrew its tender, alleging misrepresentation by the Corporation's employees during the tender period. The Corporation replied to the effect that they were prepared to award the contract to Sanitary, but now had no choice but to accept Sanitary's withdrawal. They claimed Sanitary's tender deposit and accepted another tender.

Sanitary sought return of its $60,000 deposit from the Corporation on three grounds:
(1) There was no contract under which the deposit could be kept, or in the alternative, the Corporation voluntarily released Sanitary from its deposit.
(2) The tender was made, and therefore the deposit made in reliance upon several material misrepresentations made by the Corporation.
(3) In any event, the deposit on the present facts worked as a penalty and the court should provide relief to Sanitary against such penalty.

The Corporation defended on the grounds that:
(1) Sanitary were in breach of contract.
(2) There had been no representation, but if there had been, it was not false. If there had been a misrepresentation, it had not been relied upon, or was not material.
(3) The deposit was not a penalty, but a genuine pre-estimate of loss.

The Corporation also counter-claimed against Sanitary by analogy to a sale of goods contract, and also on clause 11 (above) of the conditions of tender.

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207 (1971) 23 DLR (3d) 27, Ontario HC, Lieff J 6.7.71.
208 *Ibid.* at 28.
209 *Ibid.* at 29.
210 *Ibid.* at 31.

5.1 Findings of fact

The trial judge found several facts from the evidence and testimony. The Corporation had misrepresented key tender information to Sanitary, with the intention of inducing Sanitary to bid and influencing the amount of that bid. The misrepresentation was material in Sanitary's submission of tender and bid deposit. Sanitary did not know of the misrepresentation until after the tenders were opened.[211]

5.2 The nature of the legal relationship

The nature of the legal relationship between the Corporation and Sanitary was explained as follows. Lieff J said:

> "There was no contract in the ordinary sense between the parties. The [Corporation's] calling for tenders was merely an offer to negotiate, and Sanitary's tender was the submission of an offer."[212]

Sanitary's bid was an offer under seal accompanied by a deposit. It was not an agreement to enter into contract.[213] The bid deposit had special characteristics because there was no executed contract between the Corporation and Sanitary, and Sanitary would not become the party obliged to *make* payment should a contract result. Sanitary would become the party to *receive* payment out of a contract, so the bid deposit was a guarantee *simpliciter* that if awarded the contract, Sanitary would indeed execute and perform the contract. The tender amounted to a irrevocable offer because it was made under seal. But Sanitary's letter was an attempt to revoke the offer. The Corporation's reply amounted to an election to accept the revocation as a breach of condition, rather than hold Sanitary to its offer. Lieff J said:

> "... the tender being under seal results in the offer having two special characteristics:
> (1) It is irrevocable. Any attempt to revoke it would be legally ineffective and the offeree could treat it as open until it lapses under its own terms.
> (2) Its irrevocability makes it a contract, the breach of which gives rise to a cause of action.
> The offeree may elect to treat any purported revocation as it sees fit, subject to the rights of innocent third parties."[214]

The Corporation had elected to accept the 'breach' by Sanitary and thought itself entitled to prove damages rather than to retain the deposit. However, the court did not decide this point, but proceeded on the assumed basis that breach by the tenderer of a tender under seal results in the forfeiture of the bid deposit. The tender and its deposit had been submitted in reliance upon several material misrepresentations by the Corporation. Sanitary was therefore entitled to rescind its tender and recover its deposit as the contract remained executory.[215] Having rescinded the contract, Sanitary was entitled to return of its deposit.[216] The Corporation's counter-claim failed because of the misrepresentation, but would have failed without a misrepresentation on the basis of their election of remedies.[217]

Lieff J explained the flaw in the Corporation's position as follows. If the Corporation cannot rely on the forfeit of the bid deposit, the Corporation's counterclaim is limited to an action in damages out of the unjustified revocation by Sanitary of its irrevocable tender. In making this claim the Corporation has put its position as analogous to a sale of goods transaction where the supplier repudiates and the purchaser buys elsewhere at a higher price. Lieff J said:

> "The measure of damages would be the difference in the two prices.
> [But] this analogy underlines the weakness in the [Corporation's] position. In the [above] situation there is a contract where breach is anticipated based on unilateral repudiation. Here there is no contract at all between the [Corporation] and Sanitary. The [Corporation] first anticipates the contract, or its own acceptance thereof, and then anticipates the breach of the anticipated contract. This it cannot do.
> It is not enough for the [Corporation] to say that it was prepared to accept Sanitary's bid. The only way to prove this is to accept and do all things necessary to execute a formal contract. This is especially so in this situation because:

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211 *Ibid.* at 36.

212 *Ibid.* at 39. Reference was made at this point to Rogers on *The Law of Canadian Municipal Corporations* (2nd ed.) p. 1063 and Hudson's *Building and Engineering Contracts* (10th ed.) c. 3

213 *Ibid.*

214 *Ibid.* at 40.

215 *Redgrave v. Hurd* (1881) 20 ChD 1 was cited as authority by the Canadian court.

216 The court cited *S. Pearson & Son Ltd v. Lord Mayor of Dublin* [1907] AC 351.

217 23 DLR (3d) 27, at 41.

(1) The [Corporation] was under no obligation to accept any tender and, therefore, unless it formally accepted Sanitary's bid, there is no other way in which this can be established.
(2) Even if the [Corporation] had resolved to accept Sanitary's bid, as in the form of resolution, there still would be no obligation upon the [Corporation] to execute the contract in question.[218] Thus until the [Corporation] has done all things necessary to the formal execution of the contract we cannot know that it would have executed such a contract, and unless it had actually executed such a contract it could not have suffered the damage complained of.

The [Corporation] cannot argue that to force it to formally accept Sanitary's bid in such a situation would be reducing it to a meaningless pantomime. The [Corporation] has chosen in its drafting to afford itself the greatest possible protection from inadvertently creating an enforceable obligation. Such drafting cuts two ways. Further, this does not weaken the [Corporation's] position vis-à-vis the other tenderers as their offers must remain open until the [Corporation] executes a formal contract.

The rights and obligations of parties cannot turn upon the 'ifs' and suppositions and 'would haves' as the [Corporation] claims. If it wishes damages it must enter a contract. A theoretical breach of a theoretical contract which by its own terms might never come into existence at all cannot be the basis of a $60,000 recovery."[219]

Sanitary succeeded in their claim for $60,000 plus interest.

6. The Queen in Right of Ontario et al v. Ron Engineering & Construction Eastern Ltd[220]

The Owners called for tenders and issued general conditions applicable to all tenderers. Paragraph 13 of those conditions required a tender deposit of $150,000 to accompany any tender. The Owners would be entitled to retain the tender deposit if a tenderer should withdraw before consideration by the Owners of tenders submitted or before or after receiving notification of a successful tender. The deposit would be forfeited if an agreement was not executed or performance bond or payment bond not produced. The Owners "may retain the tender deposit for the use of the [Owners] and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the [Owners] may deem advisable." The tender deposit would be returned to the successful tenderer when a formal agreement had been executed and the Owners had received any bonds required by the tender conditions.

The Contractors submitted a tender and tender deposit. The Contractors' tender ($2,748,000) was lowest of eight submitted: $632,000 lower than the second lowest offer. But within little more than an hour of the opening of tenders, the Contractors discovered an error in pricing and requested in writing "to withdraw the tender without penalty". Subsequently the Contractors maintained that their tender was **not** withdrawn, but by reason of its notice of error given to the Owners prior to acceptance, was merely not capable in law of acceptance, and that therefore the Contractors were entitled to return of the tender deposit. The Owners responded to the Contractors' position by asking them to sign contract documents in the tendered amount. The Contractors refused to sign on the grounds of the pricing error. The Owners then adopted the position that they were entitled to keep the tender deposit, and accepted the tender of the second lowest tenderer. The Contractors commenced an action to recover the tender deposit. The Owners counterclaimed damages caused by the Contractors' refusal "to carry out the terms of ... tender" and, as a consequence of this refusal, the acceptance of the higher tender.

The Contractors' core argument was that by making an error in pricing, the tender became revocable, or the deposit recoverable, despite paragraph 13 of the conditions of tender, providing that notice of the error is given prior to the Owners' acceptance of the Contractors' tender. The Contractors' position was that while its offer was not withdrawn, it was not capable of acceptance, and therefore its tender deposit should be returned. The Owners' argument was that the submission of a tender by the Contractors created a contractual obligation for the Contractors to perform the terms of their tender. The Contractors were in breach of those obligations, and the Owners had suffered damage as a consequence.

Estey J gave the judgment of the court:

"The revocability of the offer must, in my view, be determined in accordance with the 'General Conditions' and 'Information for Tenderers' and the related documents upon which the tender was submitted. There is no question when one reviews the terms and conditions under which the tender was

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218 *Bozson v. Altrincham Urban Council* (1903) 67JP 397; *Donnovan v. City of Belleville* [1931] 4 DLR 268.
219 *Ibid.* at 41-42.
220 (1981) 119 DLR (3d) 287; 4 Const LJ 241. Supreme Court of Canada. 27.1.81

made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of 60 days after the date of the opening of the tenders. ... ...

Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit 60 days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender."[221]

The court then referred to paragraph 13 of the tender conditions which stated:

"Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn . . . or if the Commission does not for any reason receive within the period of seven days . . . the Agreement executed by the tenderer . . . the Commission may retain the tender deposit . . ."[222]

Estey J continued:

I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do.[223] ...

The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, " I will pay you a dollar if you will cut my lawn." No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligation of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

The role of the deposit under contract A is clear and simple. The deposit was required in order to ensure the performance by the contractor-tenderer of its obligations under contract A. The deposit was recoverable by the contractor under certain conditions, none of which were met; and also was subject to forfeiture under another term of the contract, the provisions of which in my view have been met.

There is no question of a mistake on the part of either party up to the moment in time when contract A came into existence. The employee of the respondent intended to submit the very tender submitted, including the price therein stipulated. Indeed, the president, in instructing the respondent's employee, intended the tender to be as submitted. However, the contractor submits that as the tender was the product of a mistake in calculation, it cannot form the basis of a construction contract since it is not capable of acceptance and hence it cannot be subject to the terms and conditions of contract A so as to cause a forfeiture thereunder of the deposit. The fallacy in this argument is twofold. Firstly, there was no mistake in the sense that the contractor did not intend to submit the tender as in form and substance it was. Secondly, there is no principle in law under which the tender was rendered incapable of acceptance by the appellant.[224] ...

For a mutual contract ... there must of course be a meeting of minds ..., but when the contract in question is the product of other contractual arrangements,[225] different considerations apply. (Here) the rights of the parties fall to be decided according to the tender arrangements, contract A. At the point when the tender was submitted the owner had not been told about the mistake in calculation. ... there was nothing on the

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221 (1981) 119 DLR (3d) 287, 272.
222 *Ibid.* at 273.
223 *Ibid.*
224 *Ibid.* at 275.
225 ie. a unilateral contract.

face of the tender to reveal an error. There was no inference to be drawn by the quantum of the tender (bearing in mind the estimate [prepared by the Owner's agents and which was very close to the tendered amount] ...) that there had indeed been a miscalculation.[226] ...

On the facts as found by the learned trial Judge, no mistake existed which impeded or affected the coming into being of contract A. The "mistake" occurred in the calculations leading to the figures that the contractor admittedly intended to submit in his tender. Therefore, the issue in my view concerns not the law of mistake but the application of the forfeiture provisions contained in the tender documents.[227] ...

> Left to itself, therefore, the law of contract would result in a confirmation of a dismissal by the learned trial Judge of the claim by the contractor for the return of the tender deposit. The terms of contract A, already set out, clearly indicate a contractual right
> in the owner to forfeit this money. ... [228]
>
> For these reasons I would allow the appeal, set aside the order of the Court of Appeal, and restore the judgment of Holland J. at trial with costs, here and in all Courts below, to the appellant [Owners]."[229]

7. Martselos Services Ltd v. Arctic College[230]

Arctic College as owners invited tenders for janitorial services. Tender documents contained a privilege clause, that the lowest or any tender would not necessarily be accepted. The procurement was regulated by Government Contract Regulations[231] which provided that "a contract authority may refuse all tenders and award the contract to no one" and that "a contract authority shall only award a contract as a result of an invitation to tender to the tenderer who is responsive, responsible and has submitted a tender lower than that submitted by any other responsive and responsible tenderer."

Martselos and one other company submitted tenders. One of the directors of the other tendering company, who submitted the lowest tender, was also an employee of Arctic College. Martselos informed Arctic College of this fact and alleged that the other tenderer had breached the guidelines on conflicts of interest contained in collective bargaining agreements and in personnel policies. It was also alleged that this person could have exploited special 'inside' knowledge to assist in preparing the successful tender. The College investigated the allegation and sought internal legal advice, then decided that there was no conflict of interest, and awarded the janitorial contract to the lowest tenderer. Martselos commenced an action to recover loss of profits arising out of a breach of contract by Arctic College.

On appeal Vertes JA referred to the *Ron Engineering* case[232] and the statement by Estey J that "the integrity of the bidding system must be protected where under the law of contracts it is possible so to do".[233] He said:

> "In my opinion this should be considered as a duty to treat all bidders equally but still with due regard for the contractual terms incorporated into the tender call."[234]

If there had been any breach of the guidelines on conflict of interest, this would not amount to bad faith on the part of the owner towards Martselos. Any bad faith could only be on the part of the successful competitor, and the effect of such bad faith could only be to disqualify its bid. It could not create an obligation on the part of Arctic College towards Martselos. The conflict of interest issue was therefore irrelevant to a decision on the matter between Martselos and Arctic College.

The central question is whether Arctic College is under any obligation to award a contract to *any* bidder. The answer is in the negative, as the tender regulations make clear, and as stated in the privilege clause. The decision in *Ron Engineering* is not to be interpreted as imposing a positive obligation on an owner to award a contract. If there was such an obligation in cases where there are several bidders, the tendering contract would oblige the owner to enter into contract with each of them. That is not the result of the decision in *Ron Engineering*. The obligation of the owner to enter into a contract for works or services only arises upon

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226 *Ibid.* at 276.
227 *Ibid.*
228 *Ibid.* at 277.
229 *Ibid.* at 278-9.
230 (1994) 111 DLR (4th) 65. Northwest Territories Court of Appeal 19.1.94.
231 NWT Reg. 008-85 pursuant to the Financial Administration Act RSNWT 1988.
232 *Ron Engineering & Construction v. Ontario* (1981) 119 DLR (3rd) 267.
233 *Ibid. per* Estey J at 273.
234 (1994) 111 DLR (4th) 65, *per* Vertes JA at 71g.

acceptance of a tender. And the terms and conditions of the tender were quite clear in stating that the lowest or any tender would not necessarily be accepted.

It was argued that it was industry practice or custom to award contracts to the lowest bidder. But there was nothing in Canadian jurisprudence which "recognised any precedence of industry practice or custom over the privilege clause, where the privilege clause is an explicit term of a tender call, except in special circumstances."[235] Thus in the case of *Acme Building & Construction Ltd v. Newcastle (Town)* the Ontario Court of Appeal affirmed the first instance decision and said:

> "In our opinion, even if it there was acceptable evidence of custom and usage known to all tendering parties, it would not prevail over the express language of the tender documents which constituted an irrevocable bid once submitted, and a contract, when and if accepted ...".[236]

What are the 'special circumstances' in which custom and practice might be held to override the privilege clause?

> "Those circumstances have been where an owner has relied on undisclosed criteria, or where the owner takes into account irrelevant or extraneous considerations, or where there are specific provisions in the tender specifications that are inconsistent with the general privilege clause, or where the tendering process was a sham. ... In my opinion none of these situations arise in this case."[237]

Vertes JA continued:

> "The issue here is what was [Arctic College] obligated to do? Even if it had an obligation to eliminate the competing bidder, it does not follow that there was any obligation, either in law or according to industry practice, to award the contract to [Martselos]. This does not change simply because [Martselos] is the only eligible bidder. [Arctic College] could have decided not to award any contract. It is no different if the competing bidder is disqualified after awarding the contract. The privilege clause, in these circumstances, is a complete answer to [Martselos'] claim."[238]

8. The answers derived from the cases above

8.1 What is the legal relationship between tenderer and owner?

In the *Sanitary* case, a first instance decision, judge Lieff said that "there was no contract in the ordinary sense between the parties [at tender stage]. The [owner's] calling for tenders was merely an offer to negotiate, and [the] tender was the submission of an offer."[239] This is the traditional view: a contract does not come into existence until the offer is accepted, unless stipulations or the law require a particular formality to effect a binding agreement. But in *Ron Engineering*, a Supreme Court decision, Estey J said that "there is no question ... that a contract arose upon the submission of a tender between the contractor and the owner ...".[240] This is a dramatic turnaround. A contract (the 'tendering contract') is brought into life when the tenderer submits a tender. This is a unilateral contract, a contract which results here from the tenderer's act in response to an offer from the owner to consider tenders. This is similar to the reward cases, where an advertised is placed in the public domain offering a reward in return for a certain act, and the offer is accepted simply by any person doing the act, and a contract results.[241] The decision in *Martselos* followed *Ron Engineering* and was therefore based on the existence of a 'tendering contract'.

8.2 What status does the tender have?

In both the *Sanitary* case and in *Ron Engineering* the tender was in the form of an offer (under seal in the *Sanitary* case) accompanied by a deposit or bond.

In Sanitary, the fact that the tender was under seal made the offer irrevocable. The offer was open and would only lapse under its own terms. In *Ron Engineering* a different route was taken to the same end: here, the tender was an element of the 'tendering contract' and was irrevocable under the terms of that contract. In *Martselos* the tender had the same status as in *Ron Engineering*.

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235 *Ibid.* at 73f.
236 *Acme Building & Construction Ltd v. Newcastle (Town)* 2 CLR (2d) 308, at 309-310.
237 (1994) 111 DLR (4th) 65, *per* Vertes JA at 74h-75c. A list of authorities for these propositions are given.
238 *Ibid.* at 75h.
239 (1971) 23 DLR (3d) 27, *per* Lieff J at 39; quoted *supra* in context.
240 (1981) 119 DLR (3d) 287, *per* Estey J at 272; quoted *supra* in context.
241 *Carlill v. Carbolic Smoke Ball Co* [1893] 1 QB 256.

8.3 What is the purpose of the bid deposit/ bond?

In both *Sanitary* and *Ron Engineering* the purpose of the deposit or bond was to act as guarantee of the tenderers performance of the tender conditions (in *Ron Engineering*, the 'tendering contract'): that is, mainly, not to withdraw and if awarded the contract, to enter into a formal contract.

8.4 Is the lowest tenderer entitled to withdraw its tender?

No. The effect of the tender under seal (in *Sanitary's* case) and the tender as an element of the 'tendering contract' (in *Ron Engineering*) is that the offer is irrevocable in accordance with its own terms. Any breach of this obligation would lead to forfeit of the deposit or bond.

8.5a What is the effect of the owner's misrepresentation?

In Sanitary's case the owner had misrepresented material tender facts to the tenderer, with the intention of inducing a bid and influencing the amount of that bid. The tenderer had relied on the owner for that key information in submitting its tender and bid deposit, and was therefore entitled to rescind its tender and recover its deposit.

8.5b What is the effect of the contractor's alleged 'mistake' in pricing?

In *Ron Engineering* there was no mistake in the context of the 'tendering contract': the tenderer fully intended to submit the tender in the form and substance it had. In a unilateral contract, as in this example, the rights of the parties are stipulated by the tender conditions which are the terms of the 'tendering contract'. This contract was made at the time of submission of the tender. At that point in time the owner was not aware of any mistake, and neither was a mistake obvious on the face of the tender. There was therefore no mistake which affected the validity of the 'tendering contract'. Consequently its terms would apply: the tenderer forfeited its bid deposit/ bond.

8.6 Is the owner entitled to compensation for the withdrawn tender?

Yes, in principle, but in *Sanitary's* case there was no finding of a 'tendering contract', therefore there could be no breach. It followed that the owner was not entitled to damages. As explained above (answer 5a) the owner lost the right to retain the bid deposit/ bond. In *Ron Engineering* the owner was entitled under the 'tendering contract to retain the bid deposit/ bond as compensation for any losses suffered as a result of the withdrawal.

8.7 Is the owner obliged to act fairly to all tenderers?

Yes. In *Martselos*, judge Vertes said that the owner is obliged to treat all tenderers equally. On the facts of this case, there was no bad faith on the part of the owner towards the tenderer.

8.8 Is the owner obliged to award any contract at all?

No. The 'privilege clause' expressly prevents the creation of an obligation to award *any* contract. The obligation to enter into a contract only arises upon acceptance of the tender.

8.9 Does the existence of industry practice or custom negate the effect of a 'privilege clause' whereby the owner expressly denies any obligation to accept the lowest or any tender?

No. Even good evidence of custom and practice that contracts are always awarded to the lowest tenderer would not prevail over a clearly worded 'privilege clause'. But see 10. below.

8.10 Are there any exceptions to the unequivocal position taken under 9. above?

The court in *Martselos* outlined 'special circumstances' where custom and practice might override a privilege clause: (1) where owner has relied on undisclosed criteria; or (2) where the owner takes into account irrelevant or extraneous considerations; or (3) or where there are specific provisions in the tender specifications that are inconsistent with the general privilege clause; or (4) where the tendering process was a sham.

9. Reprise - Ron Engineering

The decision in *Ron Engineering* challenges two traditional principles of contract law; that an offer can be withdrawn without liability at any time prior to acceptance, and that a promise not to revoke an offer must be given for consideration or made by a deed (under seal). One hundred and twenty years ago Mellish LJ suggested that "the [English] law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by that promise to give that time".[242] But for most of this time the point at issue has been unquestionably maintained and applied.

However *Ron Engineering* established at the highest level in Canada that there are circumstances when the old rules cannot be blindly followed. The Owners' successfully argued that the submission by Contractors of a tender created a contractual obligation so that the Contractor must perform the tender conditions. One of the conditions was that the offer could not be withdrawn for 60 days after the opening of tenders. As this condition had been breached by the Contractors, the Owners were entitled to damages caused by the breach. They were entitled to retain the tender deposit.

But where is the consideration for the tenderer's obligation not to revoke its offer within 60 days? According to Professor Percy, "the court's explanation that consideration can be found in the 'qualified obligation of the owner to accept the lowest or any tender' is specious".[243] By express or implied qualification an owner is not normally obliged to accept any tender, not even the lowest. Percy suggests that "the only real benefit received by the contractor is the implied promise that the owner will consider its tender." Which is precisely the obligation of the owner found by the English Court of Appeal in *Blackpool & Fylde Aero Club v. Blackpool Borough Council.*[244] It is submitted that the common law has now developed to the point where the tendering contract creates an obligation for the owner to consider each conforming tender and for the contractor not to withdraw its offer within the stipulated period, or if no period is stipulated, a reasonable period.

10. Application of the decision in Ron Engineering

The decision in *Ron Engineering* has had major impact on the law of tendering. This case is now the settled law of Canada, and is likely to be persuasive elsewhere. The Alberta Court of Appeal has applied *Ron Engineering* in *City of Calgary v. Northern Construction Co.*[245] In this case the facts are similar to *Ron Engineering*. Following discovery of an error in the compilation of its bid, the lowest tenderer declined to sign a contract with the owner, who sued for the difference in price between the lowest and second lowest tenders. The tender conditions stipulated that such amount would be due in the eventuality of withdrawing a tender or failing to execute the construction contract. The Supreme Court of Canada affirmed the Court of Appeal and declined to review its earlier decision in *Ron Engineering*.

Since much of the argument in *Ron Engineering* had focused on the tenderer's alleged mistake in pricing, the two-contract analysis had been necessary to show that a pricing mistake is irrelevant with regard to the tendering contract. Any tenderer who has incorrectly calculated its bid must not breach the tendering contract by withdrawing its offer. But this creates a dilemma for the tenderer: if it executes the building contract based on a incorrect tender it cannot later raise the issue of mistake; if it raises the issue of mistake before executing the building contract and withdraws its offer, it is in breach of the tendering contract and must pay damages or forfeit its tender deposit. It seems that only a patently obvious error on the face of the tender, which might prevent the formation of the tendering contract from taking place, can provide any possible escape from liability for the tenderer who wishes to avoid the consequences of an error in pricing. Such an escape route was described by Estey J in consideration of *McMaster University v. Wilchar Construction Ltd.*[246]

The decision in *Ron Engineering* that a contract was formed by the submission of a conforming tender creates obligations for the recipients of tenders. In the past, it is submitted, that owners rarely undertook obligations set out within tender documents, but now they do. Public bodies, or any bodies with substantial public funding, are obliged to comply with exacting tender conditions which become incorporated into the tendering documentation. They are obliged to comply with certain rules as to selection of tenderers, evaluation of tenders and award of contracts. They too must strictly comply with these conditions or breach of the tendering contract will result. *In R v. Canamerican Auto Lease and Rental Ltd and Hertz Canada*

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242 *Dickinson v. Dodds* (1876) 2 Ch D 463, at 474.

243 Percy, DR *Radical Developments in the Law of Tenders: a Canadian Reformulation of Common Law Principles* (1988) 4 Const LJ 171. Professor Percy is Professor of Law, University of Alberta, Edmonton, Canada.

244 [1990] 1 WLR 1195; 3 All ER 25 (CA).

245 (1986) 2 WWR 426; 42 Alta. LR (2d) 1. Alberta Court of Appeal. See also affirming, the Supreme Court of Canada [1987] SCCD 980; Hudson (11) 1.108.

246 (1972) 22 DLR (3d) 9, affirmed (1977) 69 DLR (3d) 400.

Ltd[247] the owner could not rely on a general right to reject the lowest or any tender when failing to comply with its own stipulation as to how tenders should be evaluated. As a consequence the owner seems entitled to reject all tenders because they are too high, or reject the lowest tender when there is insufficient evidence of the capacity of the lowest tenderer to perform the contract, but such rejection must not breach obligations of the tendering contract.

Perhaps the high watermark in obligations for an owner out of the tendering contract is represented by the decision in *Ben Bruinsma & Sons Ltd v. Chatham*[248] where the court held that the owner was obliged under the terms of the tendering contract to accept or reject tenders as originally submitted, rather than after making budgetary savings by deleting sections of work from the scope of the tender. The tender rules did not allow the owner to make savings prior to acceptance or to award to other than the original lowest tenderer. The only option was to reject all tenders when prices were too high.

11. Tenders or Firm Offers - law reform in England

The Law Revision Committee in 1937 suggested that English law should be changed. It was thought "undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period. ... It may be noted here that according to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard."[249]

The Law Commission[250] has more recently reviewed English law with regard to what it terms "firm offers", that is an offer "backed by a gratuitous promise of non-revocation".[251] They considered whether a firm offer, unsupported by consideration, is any less revocable than an ordinary offer. It is of course well-established, and not questioned here, that where a firm offer is supported by consideration (usually an option to purchase or sell) that offer creates legal rights and obligations between offeror and offeree. The Commission concluded that under English law in 1975, "a promise to keep an offer open for a specified time may be broken and the firm offer revoked without liability on the offeror, except where the offeree has accepted the offer before revocation or where the promise is made under seal or the offeree has given consideration for it."[252]

The trend within common law jurisdictions over the last sixty years has been to move towards making firm offers of binding effect in some circumstances. The Law Commission formulated proposals:

> "(a) An offeror who has promised that he will not revoke his offer for a definite time should be bound by the terms of that promise for a period not exceeding six years, provided that the promise has been made 'in the course of a business' ... .
> (b) Such a promise need not be evidenced in writing ...
> (c) It should be capable of applying to land or interests in land ...
> (d) A firm offer to which (a) applies should be capable of acceptance by the offeree during the time that the offeror is bound by his promise, notwithstanding his purported revocation of it ...
> (e) An offeror who breaks a promise by which he is bound under (a) should be liable in damages to the offeree ...".[253]

It is submitted that the effect of the decision in cases like *Ron Engineering* and *Blackpool & Fylde Aero Club* may have reformed the law in the courts (rather than Parliament) to meet the commercial realities of the present day.

12. Tenders or Firm Offers in other jurisdiction

In countries which have legal systems developed from Roman law, rather than from common law, the firm offer is enforceable. Lord Dunedin explained the difference on this point between Scots law and English law:

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247 (1987) 37 DLR (4th) 591; [1987] 3 FC 144; 77 NR 141 (FCA).
248 (1984) 11 CLR 37 (Ontario HC).
249 Sixth Interim Report of the Law Revision Committee (1937) Cmd. 5449. The Committee proposed then a change to the law so that a firm offer "shall not be unenforceable by reason of the absence of consideration."
250 The Law Commission (1975) Working Paper No. 60: *Law of Contract - Firm Offers*.
251 *Ibid.* at p.2.
252 *Ibid.* at p.7.
253 Law Commission WP No. 60, *supra*, p.26.

> "If I offer my property to a certain person at a certain price and go on to say 'This offer is to be open up to a certain date' I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it. It would be different in England, for in the case supposed there would be no consideration for the promise to keep the offer open."[254]

Most European Union countries follow the same pattern as Scots law, as does the law of South Africa. But common law jurisdictions such as Australia, Canada, New Zealand and States within the USA take the English position, but subject to statutory and court-made law revision.

In the USA a claim by a main contractor against a subcontractor to enforce a firm offer was dismissed, since the offer relied on by the main contractor had been withdrawn before its acceptance.[255] But the development of the principle of "injurious reliance" has effectively made firm offers binding despite lack of consideration. Where an offeree has relied on a promise to hold an offer open, and acted on this promise to its detriment, a remedy is available in damages to the offeree against the offeror for breach of the promise. Cases are reported where a main contractor has obtained a remedy in damages against a subcontractor were that main contractor has relied on the subcontractor's firm offer in obtaining the main contract.[256] And the adoption of the Uniform Commercial Code by all States (except Louisiana, which follows French law and would therefore find firm offers to be revocable) has consolidated the position with regard to offers made by merchants in the context of the sale of goods. Section 2-205 states:

> "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

Certain States have made firm offers irrevocable on a wider basis.[257]

13. Conclusion

Research shows that the common law has adjusted to more appropriately reflect the needs of commerce and industry in the context of tendering and processing firm offers. Perhaps the laws of Canada and New Zealand have taken the lead to provide redress for owners who suffer loss when tenderers withdraw prior to acceptance, and to provide some protection for tenderers who invest substantial sums in reliance of fair treatment at the hands of owners. This work, of course, does not consider what statutory intervention has been introduced into the tendering process. Within the European Union, statutory regulation of public sector activity is substantial.

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254 *Paterson v. Highland Railway Co.* 1927 SC (HL) 32, *per* Lord Dunedin at 38.

255 *James Baird Co. v. Gimbel Bros. Inc.* (1933) 64 F. 344, *per* Judge Learned Hand.

256 *Northwestern Engineering Co v. Ellerman* (1943) 10 NW 2d 879 (S. Dakota) and *Drennan v. Star Paving Co* (1958) 333 P 2d 757 (Cal.).

257 See for example New York General Obligations, Article 5-1109 (1964) cited by the Law Commission WP No. 60, *supra*, at pp.11-12.

Part 3

OBLIGATIONS ARISING OUT OF THE PROCUREMENT PROCESS: NO UNFAIR PREFERENCES ALLOWED

INTRODUCTION

This author's paper to COBRA 1996 reviewed three Canadian cases which dealt with the legal relationship between owner and tenderer in the context of construction procurement. That paper highlighted circumstances when the owner and tenderer are together bound by a 'tendering contract' whereby the owner is obliged to treat all tenderers equally and fairly, and the tenderer becomes bound, say, not to withdraw its offer prior to contract award.

The present paper develops the same theme but deals with the owner's obligations to conforming tenderers. The paper is derived from further research of cases from New Zealand, Canada and England. All the examples discussed involve procurement in the public sector, but much of the development is in private law and will be relevant to private owners. *Pratt Contractors* is a seminal case from New Zealand., which demonstrates the existence of a tendering contract, and the consequences of its breach, in everyday procurement circumstances. *Health Care Developers* is a Canadian decision which reveals the significance of the equal and fair treatment obligation in the context of design evaluation. The decision of the Technology and Construction Court (England) in *Harmon v. The House of Commons* has many facets but this paper concentrates on the common law developments and the effect of the Public Works Contract Regulations (PWR). It can be seen that the latter case fits closely with the themes developed by the Commonwealth courts despite its main concern being with the European Union public procurement regime. The paper shows how the owner becomes liable to an aggrieved tenderer for wasted tendering costs and loss of profit on the contract wrongfully awarded elsewhere when obligations in common law or in statute are not fulfilled. The paper concludes with clear and specific recommendations designed to avoid breaches of obligation by the owner or client.

BACKGROUND SCENARIO

A public or private body [258] wishes to construct a major infrastructure project employing a traditional procurement process. Its technical staff have prepared contract documentation, which provides, amongst other details, provisions for the evaluation of tenders received. The tender documents also state: "Lowest or any tender not necessarily accepted." The evaluation scheme to be adopted is described as "lowest price conforming tender method". Under this scheme each tenderer is required firstly to provided information against six non-price attributes. Each tenderer is then to be assessed against all non-price attributes on a pass/fail basis. A 'fail' means rejection of that tenderer's bid. Only a 'pass' on every attribute permits a tender to be considered as 'conforming': then all conforming tenders are to be considered on price alone, and the lowest tender becomes the winning bid. But there is no obligation on the client to award a contract.

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[258] It makes no difference at this point in discussion. The term 'client' will henceforth be used.

Four conforming bids are received. Contractor A submits the lowest price conforming bid and expects to be awarded the contract. Contractor B submits an alternative tender in addition to its conforming bid. B's alternative tender proposes a different design solution which would satisfy the client's functional requirement, and offers "a saving in construction costs of about £1m." B's alternative tender concludes: "we would be pleased to meet with you and discuss this proposal and provide any further information you might require."

The client conducts several meetings with Contractor B on the basis of its alternative tender and negotiates what appears to it to be an acceptable 'best value' deal. The contract is awarded to, and accepted by, Contractor B on the basis of its alternative tender. In response, Contractor A commences proceedings against the client seeking compensation for breach of contract, arguing that by submitting its tender in compliance with the client's request for tenders, a preliminary contract (a 'tendering contract') is formed between it and the client, whereby the client becomes obliged only to consider tenders which comply with the tender stipulations. As the tender stipulations make no provisions as to 'alternatives' the client has no apparent power to consider same. Contractor A further argues that it is an implied term of the tendering contract that all conforming tenderers must be treated equally and fairly, and that the client is in breach of this obligation when it negotiates with one bidder, and not the other bidders, for a design option which is not the one for which tenders had been invited. Contractor A's final argument is that Contractor B's alternative tender is not an offer capable in law of acceptance, being void for uncertainty. Contractor A claims compensation under two heads: (1) wasted bid preparation costs; and (2) loss of profit on the contract that would, but for the client's breach of contract, have been awarded to, and the said profit earned by, Contractor A.

Issue 1: might a contract arise out of the submission by Contractor A of a conforming bid in response to the client's request for tenders?

Yes, a preliminary or tendering contract can arise out of such circumstances, following the decision of the New Zealand High Court in *Pratt Contractors v. Palmerston North City Council,*[259] where, relying on Canadian[260] and English[261] authority, it was held that a 'tendering contract' had been created between the Council and the lowest tenderer, Pratt Contractors. Gallen J gave the judgment of the court. He said:

> "Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into a preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract, along the lines of the analysis in the Canadian cases. Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or implicitly accepted."[262]

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259 [1995] 1 NZLR 469.
260 *The Crown v. Ron Engineering & Construction Eastern Ltd* [1981] 1 SCR 111; (1981) 119 DLR (3d) 267 (SCC).
261 *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council* [1990] 1 WLR 1195; 3 All ER 25 (CA).
262 [1995] 1 NZLR 469, at 478/51-479/5.

In His Lordship's opinion, the most convenient framework within which obligations may be said to arise and within which they can be considered is a contractual one, given the commercial setting and nature of the tendering process. Did the parties intend to create a contractual relationship with respect to the submission of the tender? The NZ court thought that there were several factors in this case pointing to the answer '*yes*'. This was a case where there was something more than a mere calling for tenders. Contractors were required first to register their interest for the construction of the project, then pay a non-refundable deposit before they received the tender documents for consideration. The actual submission of a tender was therefore contemplated as a second step and moreover, one which followed upon a declaration of interest backed by a non-refundable deposit. This was in the court's view a significant point. Its was at least as strong and maybe a stronger point than the suggestion in the *Blackpool* case[263] that the selection of tenderers was a significant factor. Secondly, the tender documents were extensive, detailed and substantial. They set out not only the nature of the project contemplated, supported by detailed specifications and drawings, but also set out the conditions of contract which would apply if a construction contract was entered into. Most significantly they included an addendum to the conditions of tendering which stated how tenders would be evaluated and set out the non-price attributes which would be scored on a pass/fail basis. Any attribute which scored a fail would exclude that tender from further consideration. Only at the second stage would price be considered for the non-excluded tenders. The Council could only enter into a contract for the non-excluded tender with the lowest price. Under these circumstances, said the court, if the Council was to attempt to deal with the tenders on any basis other than that contained in the tender documents, at least the elements for an estoppel argument would have been present, but that it was far preferable to deal with the matter in terms of contract.

There were distinguishable facts in the past tender cases, said the court, but the one thing they all had in common was that in order to give effect to the various stipulations contained within the tender documents it was necessary to recognise a contractual relationship. In the *Pratt Contractors* case, the court was satisfied that a contract was created by the act of submitting a conforming tender in accordance with the Council's requirements.

It is submitted that on the factual background set out above, the position is the same whether the client is a public or private body, because contract is a matter of private law, not public law, and impacts on both types of body in the same way. Turn now to consider on similar facts a recent judgment of the English High Court

In *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons*[264] the injured bidder based its case on *Blackpool*, a number of Canadian cases and *Pratt Contractors.*[265] The House of Commons (a public body bound by the *Public Works Contracts Regulations* (PWR)) argued that the statutory scheme for public works contracts, which includes remedial powers,

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263 [1990] 1 WLR 1195; 3 All ER 25 (CA).
264 (1999) 67 Con LR 1. Technology and Construction Court, His Honour Judge Humphrey Lloyd QC, 28.10.99.

precluded any contract arising (ie that public law had force, but not private law)[266] and that *Blackpool* could be distinguished since in that case there was no other remedy available to the tenderer. Surprisingly, given the weight and number of Commonwealth decisions to the contrary, His Honour Judge Lloyd QC agreed with the House of Commons (H of C) that as regards the *original* tender, no contract was formed. *Blackpool* was different because in that case the public body was not bound to proceed, but in this case the H of C was bound to accept a tender and proceed with the works.[267] The H of C would also have been bound to give reasons if it rejected the lowest tender.[268] From a review of some of the Canadian authorities, it was noteworthy, said the court, "that the key factor is the commitment of the tenderer to the person to whom the tender was submitted." It might also have been noted, that other cases were considered by Judge Lloyd where the judgments were more concerned with obligations owed by the client to each tenderer, for example, the obligation to act fairly. But it seemed clear to His Lordship from *Blackpool* and the other cases[269] "that there must be something more than a request for a tender which is to be submitted competitively along with others": there must be good reason why contractual obligations would arise out of a competitive tendering process when traditionally there are none, and it seems that, at least in Judge Lloyd's view, that the existence of the statutory regime points, at least at the outset, against the creation of an implied tendering contract.[270] But the 'something more' in this case lay in the fact that the procedures of PWR were not followed when it came to *subsequent* invitations to submit alternative tenders. There now arose by contractual implication obligations for the public owner that all alternatives would be considered, that any alternative submitted would be one of detail and would not amount to revised design, and that all tenderers would be treated equally and fairly in the tendering process.[271] Such a preliminary, or tendering, contract was to be derived from the European procurement regime. The decision in *Emery Construction Ltd v. St John's (City) Roman Catholic School Board*[272] showed that such a contract might exist at common law despite a statutory background that might otherwise be thought to provide the exclusive remedy.

Comparison of the decision in *Harmon* with that of *Pratt Contractors* suggests that in New Zealand (following decisions in Canada) the tendering contract was formed when each tenderer submitted a conforming tender in response to the client's detailed request for tenders, but in England the contract arose somewhat later, when a subsequent invitation was made to submit an alternative tender. In the *Harmon* case that was all that was necessary to permit the court to give judgment in private law in favour of the injured low bidder. In *Harmon* the client was bound to a particular approach in the evaluation and acceptance of tenders by detailed provisions of public law,[273] whereas in *Pratt Contractors* there was no argument that the client was similarly bound. If this

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265 See Paragraph 208 of the *Harmon* judgment.

266 Par 209.

267 'Bound to proceed' in the practical sense that the works for which tenders were invited were merely part of a greater scheme of works in actual progress, with completion an urgent imperative. In the legal sense, the House of Commons would have been entitled to reject all tenders received and start a fresh round of tendering.

268 Par 210 of the *Harmon* judgment.

269 Par 214.

270 Par 215.

271 Par 216.

272 (1996) 28 CLR (2d) 1 (Canada).

distinction is correct, then the presence of a public law regime has the effect of delaying the formation of a tendering contract, until the point is reached where a private law remedy is required to regulate the procurement process.

Issue 2: Is the client in breach of contract in failing to award the contract to contractor A?

No. The client is not in breach of contract in not awarding the contract to contractor A. The 'tendering contract' here does not oblige the local authority to award the contract to the lowest price tenderer.

Assume that it is established that a tendering contract exists. The terms are to be found within the policy and specifications upon which the tender was submitted, and that includes the promise to evaluate tenders in accordance with the tender conditions. But is it a term of that contract that the Council is obliged to award the contract to the lowest conforming tenderer? In the *Pratt Contractors* case, the tender conditions stated that: "The principal shall only enter into contract for the non-excluded tender with the lowest price."

A Canadian court held that a provision that "no tenders need necessarily be accepted" did not cancel an award provision which stated that the award "*will* be made on the basis of the highest offer made by that tenderer ...".[274] In *Pratt Contractors* the Council argued that where an invitation to tender is no more than an invitation to treat, it is unnecessary for a building owner or employer to state that there is no obligation to accept the lowest tender. However, this may not be the true position when there is a contractual relationship rather than a mere invitation to treat. Seeking to avoid any such obligation, the Council relied on words which footed the tender form: "We understand that the Principal is not bound to accept the lowest or any tender he may receive". They argued that it was of no consequence that Pratt Contractors won the competition: the Council was not obliged to accept Pratt's tender.

But the New Zealand court did not find any conflict in the several provisions within the tender documents. The Council's general powers of rejection were not compromised by the other provisions. The Canadian court's words had to be put into context. Gallen J said:

> "... that a Council could not be permitted to use the general power to reject tenders to make an arbitrary choice. In selecting a particular tender, the Council is in my view bound by the terms it has itself imposed, as well as the requirements of fairness and equity which may well have an application. To hold however that a Council retains a power to reject all tenders, is not the same as allowing it to use such power to select tenders."[275]

The court therefore rejected Pratt's claim that it was entitled to the contract award since it had submitted the lowest price conforming tender. The Council was not in breach for failing to award the contract to Pratt.

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273 The Public Works Contracts Regulations 1991 (PWR).

274 *Canamerican Auto Lease & Rental Ltd v. Canada (M of T)* 1987 77 NR 141 (Can.)

Issue 3: what options does the client have in concluding the tendering process?

The options available are governed by the terms of the tendering contract. The authority might award a contract in accordance with the tender conditions, or reject all tenders. In each case it will be necessary to demonstrate the existence if a tendering contract and reveal its terms. In *Maintec Limited v. Porirua City Council*[276] Gallen J observed that against the background of 19th century cases it was established that a request for tenders was no more than an invitation to treat. But now there is

> "a line of Canadian authority which accepts that in certain circumstances a contractual relationship can arise in respect of the tender, leading to a second contractual relationship which comes into being, if at all, when the tender is accepted. Such an analysis was accepted in New Zealand in *Markham Construction Co. Ltd v. Wellington City Council*[277] and I accepted it in the *Pratt Contractors* case. A similar position has also been accepted in England[278] ...".[279]

In argument, a number of observations were made of factors which may, or may not, lead to the existence of the 'tendering contract', as discussed under Issue 1, above. In some of the Canadian cases it was a substantial non-refundable deposit required with submission of a tender. In *Blackpool* it was significant that the tenderers were selected by the Council. In *Pratt*, it was significant that pre-registration and a non-refundable deposit were required . None of these factors existed in the *Maintec* case, but was there yet the basis for a 'tendering contract'? Gallen J said:

> "the strongest argument in favour of there being a preliminary [tendering] contract in this case is the defendant's acceptance of a particular approach to the evaluation and acceptance of tenders. The argument in favour of a preliminary contract is dependent upon the necessity of there being some relationship between the parties to support enforceable legal obligations as a preliminary to the award of the principal contract."[280]

He concluded that by placing emphasis on a means of evaluating tenders and awarding a contract, the Council was by implication binding its course of action and that therefore a relationship of a contractual nature was contemplated. Under the terms of that 'tendering contract' it was open to the Council to act in accordance with the tender conditions or to reject all tenders,[281] and the Council did reject all tenders. The doctrine of the two contracts (that is that a 'tendering contract' might arise *out of* the tendering process, prior to the award of a contract as a *result* of the tendering process) has developed out of the commercial realities of the tendering system. Would it not be contrary to those commercial realities to hold that the Council's reasoning and motivation could be called into question, before they had exercised their contractual right of rejection (without giving

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275 [1995] 1 NZLR 469 at 481/52-482/1.
276 Unreported. CP 189/95 High Court of New Zealand, Wellington, Gallen J, 19.10.95.
277 [1985] 2 NZLR 520.
278 See *Blackpool and Fylde Aero Club Ltd v. Blackpool BC* above.
279 *Maintec*, Transcript, p.10.
280 *Ibid.* pp.11-12.
281 In accordance with *Pratt Contractors*.

reasons) set out in the tender documents? This would result in the circumvention of that right of rejection "and the way would be open to extensive litigation in any tender situations".[282] As long as there was no fraud or impropriety, all tenders could properly be rejected by the Council. It was not inconsistent with the decision in *Pratt Contractors* to conclude that the Council could reject all tenders. In *Pratt* the objection was that the Council "endeavoured to negotiate within the tendering process in a way which the process itself did not allow":[283] Here the Council took the option of rejecting all tenders, which it was perfectly entitled to do.

Issue 4: Is the alternative tender of Contractor B properly considered to be 'conforming' and thus capable of acceptance, or is it non-conforming and thus not capable of legitimate acceptance?

Contractor B's alternative tender is a non-conforming tender and cannot be accepted within the confines of the 'tendering contract'.

In *Pratt Contractors* it had been argued that the alternative tender was not a tender at all because it lacked certainty of price (a 'saving in the order of ...'), and that it did not meet the specific requirements laid down in the tender conditions. The language used in the alternative tender was too vague on which to found a contract.[284] Gallen J agreed and said:

> "I do not see how that could possibly be regarded as having the certainty to found a contract, nor did the Council so see it. [The] Council's advisers sought additional information and also carried out there own cost assessment."[285]

If the conforming tender had been couched in such vague terms as the alternative tender, it would not have been considered to be conforming: "in any event [the alternative tender letter] refers to a saving in construction costs and not to a price at all."[286] The alternative tender is therefore not a conforming tender. It is insufficiently precise to be capable of acceptance within the Council's tender conditions. The Council themselves realised that the alternative tender could not be accepted in the form submitted, and sought clarification. The alternative tender did not therefore comply with the Council's tendering stipulations. In purporting to accept the alternative tender the Council was in breach of the 'tendering contract'.

In *Harmon*, the client was held to be in breach of the tendering contract when it considered an alternative tender for different design solutions without giving any other tenderer the same opportunity of competing with that tender on its terms.[287]

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282 Trans. p.16.
283 *Ibid.*
284 A saving of $250,000 was mentioned, but not as a price, merely as a 'saving in construction cost'. The figure was not given definitively, but put 'in the order of'.
285 [1995] 1 NZLR 469 at 482/33-35.
286 *Ibid.* at 483/4.
287 *Harmon*, par 217 and 218.

Issue 5: does common law impose a duty of procedural fairness on the local client, and if so was that duty breached?

Yes, private law imposes a duty of fairness or good faith. In *Pratt Contractors* the court held that the duty had been breached. Gallen J said:

> "There is also an aspect of fairness. It was conceded by ... [the Council], that the Council was obliged to proceed in a manner which met the general requirements of that indefinable term 'fairness'. To accept as an alternative tender and thus deprive the lowest conforming tenderer of such opportunity as that qualification gave it, a document which is indefinite in terms of price, which required elucidation and confirmation, was I think unfair. That comes close to negotiating with one of the tenderers within the tender process, but not on terms which apply to other tenderers."[288]

In *Harmon* the court held that the client conducted post-tender negotiations with one tenderer on terms different to that dictated to Harmon and the other tenderers and that this practice distorted competition and discriminated against Harmon. In all, it amounted to the client's failure to be transparent in the tender process, a failure to be open and to treat all tenderers equally.[289]

Issue 6: what is the danger to the client in accepting an alternative tender without precise definition within the tender conditions of what properly constitutes an 'alternative' and how it will be evaluated in comparison with conforming tenders?

It appeared from the evidence in the *Pratt Contractors* case that the cost savings offered by the alternative tender were not wholly due to more efficient design, but instead due to the omission of items which would be required in any event. Gallen J sensed not only unfairness, but danger. He said:

> "Effectively therefore, (the alternative tenderer) was indicating that it would be prepared to reduce its tendered amount by a substantial sum, which did not result from the proposed change. That could give rise to very real dangers in the contracting process and could easily enough be manipulated to ensure that an unsuccessful tenderer could reduce his or her tender, by a sum sufficient to secure the contract by a means which was disguised by reference to some form of alternative construction. ... [An] unscrupulous tenderer, could not only achieve success over other tenderers in the way already described, but if that tenderer was in fact the lowest tenderer, could avoid being held to the alternative if the proposal was insufficiently precise to give rise to contractual obligations."[290]

It is dangerous to consider alternative tenders without sufficient definition of the term. An adequate basis of assessment is needed for sound management and to avoid unfairness to tenderers. In *Pratt's* case, there was a breach of the Council's duty to treat all tenderers fairly.

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288 [1995] 1 NZLR 469 at 483/34-41.
289 *Harmon*, par 228.

Issue 7: given a decision in favour of Contractor B, on what principles should the quantum of damages be established against the client?

Pratt Contractors succeeded against the Council. It remained for the court to fix the quantum of damages. The general principle should be consistent in all breach of contract cases. The successful plaintiff is to be put, "so far as money can do it ... in the same situation ... as if the contract had been performed."[291] In fact what Gallen J said is that "the plaintiff is entitled to be *restored* to the position it would have been in had the Council complied with the obligations imposed upon it."[292] The significance of this restatement lies in the restitutionary approach taken by the New Zealand court in linking the lost profit of the injured low bidder to the unjustified gain made by the Council.

Pratt successfully recovered damages under two heads: the wasted expenditure in preparation of its tender and the loss of profit which would have been earned had it been awarded this contract. Firstly, Pratt tendered on the basis that tender costs would not be directly recoverable. But since the Council was in breach of the tender conditions, Pratt was entitled to recover its wasted costs of tendering. Pratt recovered $17,822 under this head of claim. Secondly, Pratt argued that it would have been awarded the contract had the alternative tender not been accepted, and that it would have made a profit in the amount claimed, based on a percentage of its tender submitted. The Council argued that, had it not been for the alternative tender, no contract would have been awarded due to the excess of tendered price over budget. The judge did not accept that the project would not have proceeded without the acceptance of the alternative tender. It represented a saving of only 6.7% on a budget of $3m. On the evidence, the judge concluded that had it not been for the alternative tender, Pratt would have been awarded the contract.

But what profit would have been earned by Pratt if it had been awarded this contract? Gallen J made his "overall assessment in the round", and awarded $200,000 to Pratt. This was the amount by which the successful tenderer had reduced the price to secure the contract. Gallen J said:

> "The $200,000 is not disproportionate to the savings that the Council made by adopting a practice which I do not consider was open to it. It bears some relationship to the sums which the successful contractor effectively wrote off its non-conforming tender and it is comparable to the savings which were identified by the Council's advisers."[293]

Pratt Contractors recovered $217,822 against the Council and were entitled to costs.

In *Harmon's* case as to damages recoverable by the injured low bidder, only matters of principle have so far been decided by the court. Precise quantification was left to a later hearing.[294] As a matter of general approach, Judge Lloyd said:

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290 [1995] 1 NZLR 469 at 483/47-53 and 484/10-13.
291 *Robinson v. Harman* (1848) 1 Ex 850, 855.
292 [1995] 1 NZLR 469 at 487/12-13.
293 *Ibid.* at 489/22-26.
294 *Harmon*, par 299.

"I consider that where compensation is sought by a tenderer for being deprived of an opportunity to be awarded the contract, the approach should be to award damages on a "contractual" basis rather than on a "tortious" basis, although the remedy [in this case] is a statutory remedy and usually the assessment of damages for breach of statutory duty is akin to those for a comparable tort."[295]

Harmon was entitled to recover its wasted bid preparation costs on the grounds that it ought to have been awarded the contract and would then have recovered its costs.[296] Harmon was in addition entitled to recover its loss of profit and contribution towards overhead costs on the contract which, if it was not for the client's breach, would have been awarded to it. It would on this second head of claim be necessary to take into account subsequent events in the performance of the contract. Judge Lloyd said:

" In assessing damages, all factors that have occurred since the breach and are in evidence at the time of the trial, are in principle relevant and may be relied on by the [injured bidder] or the [client]. Acts which would have occurred and which would affect either a determination of liability or causation, or quantum, cannot be ignored. In the case of future loss and future profits or contribution towards overheads, the question is clearly what future profits or contribution towards overheads would Harmon have actually achieved had it been awarded the contract *and* had it performed the contract. The approach of Gallen J. in *Pratt Contractors v. Palmerston North City Council* was in accordance with principle. He took into account what had occurred during the performance of the contract by the contractor who was awarded the contract in order to see whether or not the claimant contractor would or would not have made a profit of the order claimed. If a risk were to supervene which would erode Harmon's margin, then the effect of that risk would have to be taken into account."[297]

The principles behind the award of damages are complicated in the *Harmon* case because the cause of actions arose in both public and private law, that in breach of the PWR and in breach of contract. However, in practice, it seems that the same approach was taken by the court as it would have taken had the breach arisen merely in private law. For example, Judge Lloyd said that he could:

" ... see no reason why the special or general damages recoverable should vary depending on whether the breach or default is characterised as one for failure to comply with Treaty or like obligations (assuming that they fall outside Regulation 31(3)) of breach of contract or for misfeasance in public office provided of course that the underlying facts and results are the same, namely that the contractor has wrongfully been deprived of a contract or of a real and substantial chance of being awarded a contract ... and in consequence has wasted its costs of tendering or lost the chance of recovering them through the contract or has lost the net profit

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295 Par 259.
296 Par 266.

and contribution to overheads that it would have obtained or the chance of so doing. Indeed the objects of the Treaty [of Rome, as amended] and like obligations, of the implied contract and of the proper exercise of powers are precisely to avoid such situations."[298]

BACKGROUND SCENARIO - VARIANT ONE

Suppose tenders are invited on a non-traditional basis of procurement, say, design, construction and leaseback to a client of the said infrastructure. As above, the client owns the site, but in this scenario it will be leased to the successful developer and then leased back to the client for a period of forty years. At the end of forty years the site and its infrastructure revert to the client. Tender documents include statements of functional requirements, preliminary plans and outline specifications for the various required facilities, but no detailed architectural or engineering drawings or specifications. The tender also requires annual rentals to be stated and prices at which purchase options might be exercised by the client at the end of 10, 20 and 30 years. Developers are to provide a 10-years warranty on the exterior envelope of the building. Tender documents include the normal 'privilege clause': the client reserves "the right to accept or reject any or all of the proposals received". The client's decision is to be final and at its sole discretion .[299] It will "not necessarily accept the lowest or any of the Tender Proposals."[300]

Seven tenders are received, including tenders from H, D and T. D is lowest bidder (ie. requires lowest annual rent) on two sites. H is lowest on one site. Officials decide that the schemes put forward by D and T will need extensive redesign. H becomes 'preferred bidder'[301] for all three sites. Its schemes provided a "design, structure and layout [which] met the minimum code and engineering standards, and complied with the functional program."[302]

Tender evaluation is not made here on the basis of lowest price but on the basis of "best overall proposal" (best value). The difficult question is: which proposal offers the highest standard of construction whilst satisfying the demands of the functional programs? To answer this question each proposal must be examined against criteria developed by the client but which has not been published in the invitation to tender or the tender documents. The 'preferred' design solution is a "non-combustible type structure using brick cladding and steel."[303] Only two tenderers offer such a design proposal, T and one other. A committee of four client's representatives controlled the evaluation and award process and recommended that T's bids (not H's bids) be accepted. The client accepts this recommendation in favour of T's bids.

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297 Par 336.
298 Par 307.
299 Article 2.2 at (1996) 136 DLR (4th) 609, 615.
300 Article 8.1, *ibid.*
301 The term 'preferred bidder' is used in the Public Tender Act RSN 1990.
302 (1996) 136 DLR (4th) 609 *per* Cameron JA at 616d. (A 'functional program' is a detailed written description of a facility and services to be provided. It includes: specific space, staff and equipment requirements and functional and operating relationships.) (at 616c).
303 *Ibid.*, at 616f. This was no doubt due to the fact that extensive design for steel and masonry structures had previously been commissioned at a cost to the Government of about $400,000 (at 613c) prior to the decision to invite tenders on a "design/ build/ lease" basis.

The client is a public body. Legislation does not expressly require the contract to be awarded to the preferred bidder, but it seems clear that it is the intention that public contracts are awarded to the preferred bidder, unless it does not appear "expedient" to do so. Then the client might authorise rejection of the preferred bid and the award of the contract to another bidder. Under this provision, a decision is made not to award the contracts to H (who was preferred bidder), but to award the contracts to T.

H and D commence actions against the client claiming that in awarding the contract to T, it has breached obligations founded both in contract and in legislation. The actions are not consolidated but heard together. The trial judge holds in favour of H and D and awards damages based on lost profits to H, but only nominal damages to D. The authority appeals the finding of liability against it, D appeals against not being found to be preferred bidder, and not being awarded either lost profits or wasted tendering costs. In the words of the Court of Appeal, the "story is somewhat unusual".[304]

Issue 8: Assuming a tendering contract exists, what obligations arise for the client in this context?

In *Health Care Developers Inc and another v. R in the Right of Newfoundland*[305] the court observed that in cases which have considered the position of the owner under the tendering contract, the courts have struggled to reconcile freedom of contract with the notion of fairness. Despite this difficulty, it was possible to discern certain generally accepted principles from the cases decided since *Ron Engineering*. Upon the creation of the tendering contract (or contract A), certain rights and obligations come into being:

> "a. There arises at law rights and obligations of the parties that are consistent with the protection and promotion of the integrity of the bidding system where under the law of contracts it is possible to do so.
> b. The owner owes a general duty to treat all bidders fairly.
> c. An owner has the right to include in the tender documents stipulations and restrictions on the rights of bidders and to reserve privileges to the owner.
> d. An owner does not have the right on consideration of competing bids to rely upon undisclosed terms and conditions.
> e. "Lowest or any tender not necessarily accepted" reserves conditionally to the owner the privilege to decide not to proceed with the work at all, but does not allow the owner to: (i) choose comparatively among the bidders based on criteria that has not been disclosed to the bidders; or (ii) to award to another bidder or another person something other than contract B [or the construction contract].
> f. General custom in bidding, and particular local customs, can result in implied contractual rights.
> g. An owner does not have the right to pass over properly filed bids and enter into contract B [the construction contract] with a bidder whose bid is informal, or invalid.

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304 *Ibid.*, at 611f.
305 (1996) 136 DLR (4th) 609.

h. Where there is a breach of contract A [the 'tendering contract], the measure of damages can include (i) the cost of preparation of the bid; and (ii) upon the low bidder proving he would have obtained the contract, the estimated loss of profit on the work."[306]

Issue 9: Is it possible to impose an obligation on the client to act fairly when there are express terms of the tendering contract which provide powers, which if exercised, would be in conflict with such an obligation?

'Yes' said the court in the *Health Care* case. An obligation to act fairly is necessary to ensure that "every one is bidding on the same contract and that there are no hidden preferences."[307] It would require very clear and specific words to contract out of the fairness obligation. The privilege clause does not amount to such an opt out.

It was argued by Newfoundland that the general nature of the tender invitation and the privilege clause permitted it to award the contract to T rather than H. It had been clear to all tenderers that the lowest tender need not be accepted; that this was a "best proposal" (or best value) contest where a subjective evaluation would be made by Government officials. But even if the contest was a "wide open crap shoot"[308] it would not permit unfair treatment of tenderers. Cameron JA said:

"Even if that were true, it does not permit unfair treatment of bidders. The whole point of requiring fair treatment is to ensure that everyone is bidding on the same contract and that there are no hidden preferences. Even if the Crown were correct, that for qualified bidders the assessment was a subjective one, the Crown as owner was still obligated to reject improper tenders and prohibited from entering into anything other than the contract B anticipated by the call.

The privilege clauses raise the issue of whether one can contract out [of] the application of fairness or good faith. The cases, consistent with freedom of contract, would appear to acknowledge that one can. However, to contract out of good faith, and to agree that one can be as unreasonable as one wishes in the performance of a contract would require an opting out clause that is 'precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract and is not unconscionable or contrary to public policy."[309]

It was not that the Crown here claimed a right to treat tenderers unfairly, but that it was inappropriate to imply a term that runs counter to an express term such as the privilege clause. This clause is not a charter to permit the Crown to treat bidders unfairly nor does it permit breach of a duty to perform contractual obligations in good faith. Privilege clauses, or "rejection clauses" were

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306 Cameron JA and the trial judge adopted the words of Jenkins J of the Prince Edward Island Supreme Court in *Murphy v. Alberton (Town)* (1994) 114 Nfld & PEIR 34.

307 136 DLR (4th) at 627g.

308 The description of the tendering process by one witness: see 136 DLR (4th) 627g.

309 Refer to Shannon Kathleen O'Byrne (1995) *Good Faith in Contractual Performance: Recent Developments* 74 Can Bar Rev 70 at 96, cited by Cameron JA at 136 DLR (4th) 628b.

considered by Stone JA in *Northeast Marine Services Ltd v. Atlantic Pilotage Authority.*[310] He stated:

> "I am of the view for the reasons which I have already expressed for imposing an obligation of fair treatment, that the rejection clause was not intended to operate so as to nullify that obligation. If it were otherwise the obligation would fail to fulfil its true role of preserving the integrity of the tendering process by preventing the awarding of contract B on a basis other than as set forth in the tendering documents upon which contract A was based."[311]

For the Crown to grant other than contract B and to fail to reject tenders which did not comply with the tender invitation were breaches of contract in common law without reference to legislation.[312]

Issue 10: There was a potential conflict between a privilege clause which excluded any liability to accept the lowest tender, and legislation which in effect obliged the authority to award the contract to the lowest tenderer (in this case the preferred bidder). Which must prevail?

In the *Health Care* case the court held that the statute must prevail.[313] In any conflict between the provisions of the tender documents and terms implied in the 'tendering contract' by virtue of legislation, the legislation must prevail. Contracting out of the statutory regime would be permitted only as far as the statute permitted.[314] The effect of the Newfoundland legislation was to require any contract awarded to go to the preferred bidder, unless it was 'not expedient', at the government's discretion, to make such an award. This requirement became a term of the 'tendering contract',[315] and was not open for review as a question of breach of contract. 'Not expedient' was not to be interpreted so as to permit the government to act unfairly in its handling of the tender process.

Issue 11: The primary source of the problem in the evaluation of bids was the decision to include design in the call for tenders. How should design content have been considered and assessed so as to maintain equal and fair treatment of all tenderers?

In the *Health Care* case the court was satisfied with the tender assessment done by the officials who quite properly determined first if the bidders had met the basic requirements of the tender call. They then determined, from the qualified bidders, the preferred bidder on the basis of price. It was only when they went on to select the 'best overall proposal' that considerations of design and quality of materials were considered. It seemed to the court that the officials took a narrow view of their options in determining the preferred bidder. That approach is consistent with the prevailing legislation which was based on the assumption that officials would be comparing easily comparable items where price would be the only truly distinguishing feature. The determination of the preferred bidder is, using this approach, much more an objective than a subjective exercise. The whole

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310 (1995) 179 NR 17 (FCA).
311 (1995) 179 NR 17 *per* Stone JA at 39 (FCA), cited by Cameron JA at 136 DLR (4th) 628g.
312 136 DLR (4th) 609 per Cameron JA at 628 e-h. Reference is to the Newfoundland Public Tender Act 1990.
313 *Ibid.* at 631e.
314 *Ibid.* at 632f-g.

scheme of the legislation was clearly directed to emphasising the objective, impartial and mathematical exercise of discretion in awarding tenders and curbing to the extent possible subjective assessments which might be influenced by improper motives. Obviously, the more factors calling for subjective judgment the more room for improper decisions.

However, where design is a component of the competing bids there are perfectly valid reasons, said the court, for deciding to award a contract to other than the lowest bidder - reasons consistent with the spirit of the legislation but relating to design. For example, the acquisition of better value for money. If a comparison of the bids after the close of tenders demonstrated that brick and steel produced the better product, and analysis could demonstrate that the use of such a product would mean a longer life for the building or less maintenance or might favourably affect the cost of heating resulting in less costs in the long run these would, it seemed to the court, be legitimate grounds to award the contract to other than the lowest bidder. On one view these considerations would enter at an earlier stage, when the selection of the preferred bidder was being made, but the court did not think that the scheme of the relevant legislation permitted that approach. The officials were right in their approach when they first determined the preferred bidder from those bids meeting minimum qualifications.[316]

BACKGROUND SCENARIO - VARIANT TWO

Contractor A (who is not a local contractor) submits the lowest conforming bid, but the client awards the contract to local contractor C, on the basis that an undisclosed local policy prefers a local contractor providing its bid is not more than 10% greater than the lowest conforming bid. This local preference policy is not known to contractor A. The same privilege clause applies: "Lowest or any tender not necessarily accepted." Contractor A brings an action for compensation against the client who is a public body.

Issue 12: is the client in breach of its contractual obligation to treat all bidders equally and fairly in giving preference to a local contractor, or is the client protected by the privilege clause?

In *Chinook Aggregates Ltd v. District of Abbotsford*,[317] the local authority was in breach of an implied obligation to treat all tenderers equally and fairly. The privilege clause would allow the authority to reject all tenders or to reject a nonconforming tender, but it did not permit an owner to breach a term of the 'tendering contract' by giving an undeclared preference to a local tenderer over the lowest bidder.

The unfair practices of the local authority and their economic consequence were revealed by the evidence. It had made a considered decision prior to inviting lenders, not to give notice of its local preference policy to bidders in its instructions to bidders. Officials considered that if notice was given this might alert local contractors to the fact that they were afforded a preference. It seemed that the absence of notice would give the authority a price advantage. On the other hand, outside

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315 *Ibid.* at 633b.
316 *Ibid.* at 636b-638h.

contractors (such as contractor A) believed that they were on an equal footing with all bidders. Contractor A testified that if it had been aware that the authority might apply a local preference in favour of local contractors up to 10 per cent over the lowest bid, it would not have bid on the job because it would have been virtually impossible, in view of the competitive market, for it to bid 10 per cent lower than the lowest bidder.

The court gave effect to the evidence of two experts, both professional engineers. The first expert testified that if there were special qualifications which a bidder must meet, such as local content, use of local, native or union labour, or preference to a local contractor, it was standard practice in the construction industry that any such qualification be stated in the tender documents and instructions to bidders. The second expert gave similar evidence, saying that in the absence of notice from the owner of preferential rules or criteria for the award of a contract, then all participants in the industry acted on the principle that the low qualified bidder got the job. It was said that the words "lowest or any tender will not necessarily be accepted" were included in the tender documents to allow the owner to award the contract to another bidder if the low bidder was not qualified, that is, did not satisfy the conditions of tender such as the posting of a bond, or bid only on part of the work, or made a mistake in its bid and requested to be let out of the tender. The phrase was also included in the tender documents to allow the owner to cancel the entire project if circumstances beyond its control prevented the award of a contract.

The court held that when a bid was received by the appellant in response to tender documents, such as an advertisement to bidders or instructions to bidders, a tendering contract was constituted, as discussed above. The court was unable to accept that the privilege clause gave the local authority the right to exercise a local preference when that local preference was not revealed by, or stated in, the tender documents. By adopting a policy of preferring local contractors whose bids were within 10 per cent of the lowest bid, the local authority in effect incorporated an implied term without notice of that implied term to all bidders including Contractor A. In so doing, it was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others.

The court agreed with Contractor A that it is inherent in the tendering process that the owner is inviting bidders to put in their lowest bid (or in other circumstances, highest bid) and that the bidders will respond accordingly. If the owner attaches an undisclosed term that is inconsistent with that tendering process, a term that the lowest qualified bid will be accepted should be implied in order to give effect to that process.[318]

BACKGROUND SCENARIO - VARIANT THREE

The tender documentation provides that the client may waive defects in any bid and accept any bid which is in the best interests of the local community. A further provision enables the client's chairperson to award a contract to other than the lowest bidder when it is "deemed inexpedient" to

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317 [1990] 1 WWR 624. British Columbia Court of Appeal, Macdonald, Legg and Gibbs JJA, 10.11.1989.
318 [1990] 1 WWR 624, 628-630.

make an award to the lowest bidder. The client's technical officer recommends that the contract should be warded to Contractor A (not local) who submits the lowest tender, but against that advice, the order is placed with local contractor E at a price 5% higher than A's price. Contractor A brings an action for compensation against the client who is a public body.

Issue 12: Is the client entitled by its tender stipulations to give a local contractor preference over the lowest conforming bidder?

No. In *Kencor Holdings Ltd v. Government of Saskatchewan*,[319] the court held in similar circumstances that the Government was in breach of contract and liable in damages to the injured low bidder. The court noted that a body of law had developed in respect of tenders and consequent obligations. The starting point is *The Crown v. Ron Engineering & Construction (Eastern) Ltd.*[320] Here, the Supreme Court of Canada concluded that a contract can result when a bid is submitted in response to an invitation to tender. An implied term of the contract imposes "the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders".[321] There was nothing in the tender documentation which would render these observations inapplicable to the case at hand.

In *Kencor* the court found ample evidence at trial of an industry custom dictating acceptance of the lowest, qualified bid in a tendered project. It was an implied term of the contract which resulted upon submission of Kencor's bid in response to the government's invitation to tender. The term is implied in recognition of industry custom and on the authority of *Ron Engineering*.[322] To maintain the integrity of the tendering process it was imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will wane. The inevitable consequence will be higher costs to the taxpayer. Moreover, when governments, for reasons of patronage or otherwise, apply criteria unknown to the bidders, great injustice follows. Bidders, doomed in advance by secret standards, will waste large sums preparing futile bids.

Clearly, said the court, a provision in statute or contract that the enables a public body to waive defects in any bid and to accept any bid which is in the best interests of the local community, with a further provision enabling the public body's chairperson to award a contract to other than the lowest bidder when it is "deemed inexpedient" to make an award to the lowest bidder, is wider in scope than its counterpart in *Chinook*.[323] Still, the principles are the same. The government seeks to trigger the clause to shield itself from the ramifications of having unilaterally superimposed on its contract with the injured low bidder a new implied term of local preference.

If the government were allowed to succeed in its argument that such a clause is paramount and its discretion virtually unlimited, then practically speaking the government would never be liable for

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319 [1991] 6 WWR 717. Saskatchewan QB, Halvorson J, 19.9.1991.
320 Above.
321 119 DLR (3d) 267, 275.
322 *Supra.*
323 *Supra.*

damages in these situations. The government could always maintain it was "inexpedient" to accept the low bid and "in the best interests of the local community" to accept the higher bid. If such deliberations are kept secret, the public could never challenge an irrational or capricious exercise of this discretion.

This, said the court, was a blatant case of unfair and unequal treatment of the low bidder in order to benefit another contractor. The low bid was more than $95,000 lower than that of the successful tenderer; its commitment to local content, both labour and materials, was equal to or better than the successful tenderer; and low bidder had more experience for the job. The only factor appearing to favour the successful tenderer was the misleading description of it as a local contractor. The court found that the government had breached its contract with the low bidder and was responsible for the ensuing damages. These had been agreed upon at $180,000 which represented, among other things, the low bidder's loss of profit for not having been awarded the contract.[324] The low bidder (Kencor) was given judgment against the Government.

CONCLUSIONS

(1) A tendering contract might arise out of the tendering process which creates obligations for both client and tenderer. Generally the client becomes obliged to treat all tenderers equally and fairly.

(2) The tendering contract might arise from the submission of a tender conforming to the client's invitation, or later when the client requests and the tenderer submits an alternative tender.

(3) When a client is bound by statute, the court might be reluctant to impose contractual obligations as to the tendering process, but both public and private obligations can exist side-by-side.

(4) A privilege clause in the tender conditions will normally protect a client from any obligation to award a contract to any or the highest (lowest) bidder. But this privilege does not extend to permitting the client to ignore the tender conditions it has itself set, nor can the client ignore the requirements of fairness and equality. The power to reject all tenders is not the same as a power to select tenders.

(5) Client's options are contained within the terms of the tendering contract. Generally the client might award a contract in accordance with the tendering conditions or reject all tenders. A non-conforming bid cannot be accepted within the normal confines of the tendering contract.

(6) Private law generally imposes a duty of procedural fairness on the tendering process, as does the EU public procurement regime. This paper does not address the question whether English public law imposes such a duty.

(7) In a breach of contract/ breach of PWR case, the injured bidder is generally entitled to recover wasted bid costs and loss of profit on the contract which would have been awarded had there been no breach of duty.

(8) The client cannot rely on undisclosed preferences when assessing bids and awarding contracts. To do so would amount to a breach of the fair and equal treatment obligation.

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[324] [1991] 6 WWR 717, 719-721.

Chapter 4

Construction Works and Services Procurement: investigating the scope for innovative solutions to the client's requirements.

The aims of Chapter 4 are to present two papers published by the author's: the first titled *Competitive Advantage Through Tendering Innovation*, and the second titled *How Innovative is the Common Law of Tendering?* and to present supplementary material. The aim of the first paper was to reveal to what extent regulation of the tendering process encouraged or permitted innovation by competing tenderers. The aim of the second paper was to further that investigation by exploring more fully the implications in common law for the owner/ developer in considering and accepting contractor's alternative proposals and to establish a need for the owner and its advisers to design tender process rules that will encourage contractor-led innovation.

Chapter is in three parts. Part 1 provides an introduction and summary of the papers reproduced in Parts 2 and 3.

Part 1

Part 2 of Chapter 4 reproduces a paper titled *Competitive Advantage Through Tendering Innovation* published at three different locations and in two forms. The earliest version of this paper was published in the Proceedings of the Fourth Annual Conference of the Construction Industry Institute (CII), Australia at the invitation of conference organiser Professor Anthony Sidwell, then of the University of South Australia, now of Queensland University of Technology, Brisbane. The conference was held in Melbourne during April 1997. The paper stimulated much debate amongst those participating and was highly rated in the conference feedback survey conducted by CII. As a result the editors of the Australian Construction Law Reporter approached the author with a request to republish the paper, which appeared in volume 16, number 2 at page 33 that same year. In February 2000 the author was approached by the editor of Australian Construction Law Newsletter for an updated version of the paper, which was published in April 2000, Issue #70, page 32.

Part 2 addresses the question: do tendering processes encourage contractor innovation? This was the starting point set by Professor Sidwell for the CII conference proceedings. This author argues that the question should be re-worded as follows: can traditional tendering processes *permit* innovation? The paper introduces the 'alternative tender' problem highlighted by the judgment in the New Zealand case *of Pratt Contractors* (discussed in Chapter 3), then reflects on the 'design and build' procurement method and whether this method might more easily permit innovation. Systems are outlined whereby an owner might adopt a two-stage process to select a building designer on the merits of design but yet maintain an element of fee competition in the process.

Part 2 next explains the legal issues out of tendering by reference to *Ron Engineering* (1981), *Pratt Contractors* (1995) and *Health Care Developers* (1996), three cases that have been discussed in Chapter 3. Some degree of duplication in case content seems inevitable when each article must independently explain the legal theory of the tendering contract and discuss some of its effects and implications.[325] The updating material for the current year makes passing reference only to *MJB Enterprises Ltd v Defence Construction (1951) Ltd* and *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons.* These two cases are discussed in detail in Chapter 5 which follows. The author next reviews established tender codes to establish how well (or not so well) these codes provide for, or even encourage, alternative innovative proposals from competing bidders. Part 2 concludes with twenty four observations drawn from this study.

Supplementary material is added here on two procurement codes not mentioned in the published article of Part 2. The codes were examined as to whether, and if so, to what extent, the codes under review provided for alternative tenders. This material was extracted from the author's contribution to the symposium proceedings of CIB W92 in Montreal, Canada in May 1997,[326] and deals first, with the procurement rules of the Word Bank, and second, with the United Nations Model Law on Procurement of Goods and Construction.

The Word Bank (WB), publishes procurement rules[327] intended "to inform those carrying out a project that is financed in part by [the Bank[328] ...] of the arrangements to be made for procuring the goods and works (including related services) required for the project." Traditional procurement guidelines anticipate the possibility of 'alternative tenders': "The bidding documents should specify any factors which will be taken into account in addition to price in evaluating bids [...] If bids based on alternative designs, materials, completion schedules, payment terms etc are permitted, conditions for their acceptability and the method of their evaluation should be expressly stated."[329] This is sound advice. "Bids should be opened in public. [... The] total amount of each bid, and of any alternative bids if they have been requested or permitted should be read aloud and recorded when opened [...]".[330] "The [owner] should ask any bidder for clarification needed to evaluate his bid" but no changes to "the substance or price" of the bid is permitted after bid opening.[331] Once bids are opened, any further information disclosed by tenderers is kept private.[332] "If a bid is not substantially responsive[333][...] it should not be considered further. The bidder should not be permitted to correct or withdraw material deviations or reservations once bids have been

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325 Referees always asked for more lengthy and detailed explanations of the basic principles supporting the theory of the tendering contract, despite this author's attempts in more recent articles to refer the reader to other sources for the supporting background detail.

326 Davidson, Colin H and Meguid, Tarek A Abdel (editors) (1997) Procurement – a Key to Innovation, CIB W92 Symposium proceedings, Montreal, May 1997: *The Tendering Contract: Fairness, Equality and Innovation*, p.91.

327 *Guidelines for Procurement under IBRD Loans and Credits* published by IBRD/ World Bank in 1985, 1986, 1988 and (4th ed.) 1992 on which this text is based. It is understood that a (5th) revised edition was published in 1995.

328 The *Guidelines* refer to finance being provided by the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA) collectively referred to as "the Bank". Both organisations have the same procurement requirements. Reference to loans includes credits.

329 *Ibid.*, par. 2.16

330 *Ibid.*, par. 2.45.

331 *Ibid.*, par. 2.46.

332 *Ibid.*, par. 2.47.

opened."[334] The owner is required to submit a detailed report to the WB "on the evaluation and comparison of bids setting forth the specific reasons on which the recommendation is based for the award of the contract."[335]

The United Nations General Assembly created the United Nations Commission on International Trade Law (UNCITRAL)[336] which was mandated "to further the progressive harmonisation and unification of the law of international trade".[337] The Commission adopted the *Model Law on Procurement of Goods and Construction* in Vienna during 1993. Article 25 deals with "Contents of solicitation documents." It provides at 25(g): "if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared" must be stated. Article 31 provides for the opening of tenders in the presence of all tenderers and for the recording of results, but not for any public attendance. Article 32 states that "No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted." But arithmetical errors can be corrected.[338]A tender may be regarded as "responsive only if it conforms to all requirements set forth in the tender solicitation";[339] or alternatively, "responsive if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents".[340] An unresponsive tender cannot be accepted.[341] Only assessment criteria set out in the solicitation document may be used for the tender evaluation.[342] The successful tender is either the lowest price, or the lowest evaluated tender. [343] Criteria are set for deciding the lowest evaluated tender, for example operating costs, delivery time, functional characteristics, payment terms, effect on balance of payments and other non-price criteria to do with the local economy. The scope of economic matters is wide, but the criteria to be used must have been specified in the solicitation documents.[344] All tenders may be rejected without liability to tenderers.[345] Negotiations between owner and tenderer are prohibited.[346] There is no express provision here for dealing with alternative tenders.

Part 3 comprises a paper titled *How Innovative is the Common Law of Tendering?* published in 1999 by the Journal of Construction Procurement, volume 5 at page 15. This paper took a fresh look at the same topic area some two years after the drafting of the paper discussed above and

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333 ie. it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents.
334 WB Guidelines, par. 2.48.
335 *Ibid.*, par. 2.54.
336 By resolution 2205 (XXI) of 17 December 1966.
337 24th Report (1993) p.39.
338 Model Law Article 32(1)(b).
339 Article 32(2)(a).
340 Article 32(2)(b).
341 Article 32(3)(c).
342 Article 32(4)(a).
343 Article 32(4)(b).
344 Article 32(4) (a)-(c).
345 Article 33.
346 Article 34.

reproduced in Part 2. The author identifies the following problem for discussion: how does the procurement process permit innovation by contractor-led proposals whilst maintaining appropriate control of the project? The author submits that both employer-designed and contractor-designed procurement pose similar problems when the promoter seeks to stimulate innovation. In this paper the author likens the traditional competitive tendering process to a straitjacket which imposes a single design and technology solution so that competing bids were assessed only on price. The paper then reviews classical contract law principles, claims in tort and the two contract analysis. The author explains in more detail than is provided in Part 2 above how the theory of the unilateral contract applies to the tendering process so as to create the tendering contract. There follows discussion on the nature of the owner's compensation when the tenderer breaks its irrevocable promise not to withdraw, the owner's safeguard under the tendering contract contained within the privilege clause, the problems of alternative tenders, the owner's duty of procedural fairness and the need for published evaluation criteria when assessing design alternatives.

Part 3 concludes with a list of 'best practice' points extracted from the cases reviewed.

Part 2

COMPETITIVE ADVANTAGE THROUGH TENDERING INNOVATION[347]

INTRODUCTION

This paper is in four parts. Part One introduces the topic. Part Two highlights some legal issues which have arisen in common law courts in the context of tendering and 'alternative tenders'. Part Three considers how procurement codes deal with 'alternative tenders'. Part Four offers some conclusions drawn from the study and makes recommendations as to how owners and contractors might co-operate to secure both parties' advantage.

PART ONE - TENDERING PROCESSES AND INNOVATION

1.1 Do tendering processes encourage innovation?

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

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

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

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

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

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

Now it is said that owners wish to procure their buildings by means of a 'design and build' or 'design and construct' process, where the contractor bears single point responsibility for the complete product, like any other manufacturer. But buildings are not like any other product. A car purchaser makes the buying decision by description or by sample: a building purchaser, on the other hand, makes its decision through the tender process and that process must now be capable of evaluating design as well as production capability, time and price, all on a competitive basis. This is not easy. Competitive design is not easy to evaluate in the context of tendering. Traditionally it has been done by a two stage process: (1) a design competition on aesthetic rather than economic criteria; and (2) production competition, on criteria of price and time. Wrap this up in a single

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[347] An earlier version of this paper was published in *Proceedings of the Fourth Annual Conference of the Construction Industry Institute, Australia*, Melbourne, April 1997 (ISBN 1-876189-15-0); and at 16 ACLR 33 (ISSN 0726-1551).

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

Owners frequently try to get the best of both worlds. They will employ the designer up to a certain stage in a scheme's progress, then by novation, seek to transfer the designer's design liability to the successful tender, who in turn, becomes liable for design to the owner. How does this arrangement work in practice? The designer has made certain design commitments to the client in the early stages. But the client would also hold any design extravagances in check. When the contractor becomes responsible for design, the designer has lost the original client and gained a new one. The 'new' client wishes to reduce design and specification to the minimum so that profit can be maximised. The designer is compromised by a conflict of interest: he must pursue *maximum design* on behalf of the 'real' client, the owner, but *minimum design* on behalf of the contractor, who pays the design fee and to whom legal obligation to use care and skill (or more) is owed. 'Novated design' is not a procurement process with much to recommend.

1.4 Procuring design services

Guidance is available to owners on how to select design consultants in competition, which competition includes, but is not limited to, fee competition.[348] Many clients are obliged by law to procure design services on a competitive basis.[349] One recommended process is to select first on technical ability, and then on price, by a process involving two envelopes. The technical 'tender' is opened and evaluated first, whilst the 'fee' envelope remains sealed. Therefore at the first stage there is no relevant commercial criteria. The technical assessment is scored by the 'tender panel'. The 'fee' tender is assessed separately and independently by the 'fee panel' who report back to the 'tender panel' to make an award.[350] British Airways (BA) are reported to have used a variant of this process in their procurement of design, construction management and project management, which "places emphasis on technical quality ahead of price."[351]

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

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

In a parallel UK initiative, the Construction Industry Council (CIC)[352] published its guidance to public and private sectors on *The Procurement of Professional Services.*[353] CIC emphasised that quality was an important element together with price in achieving best value for money, but that in promoting good practice it was necessary to demonstrate financial accountability and a competitive procurement process. Its recommended method of value assessment could be audited and seen to be open and free from favouritism and any other characteristic inconsistent with public policy. Above all, CIC's goal was to show how good quality could be procured, albeit tempered by considerations of price. More detailed comments follow, but

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[348] See Connaughton, John (1994) *A Guide to the Competitive Procurement of Consultancy Services for Construction*, CIRIA, London.

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

[350] See CIRIA *Guide* at p.38.

[351] *Building*, 21.2.97, p.11.

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

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

suffice at this point to say that this guidance was endorsed by the National Audit Office and the Audit Commission, and has been well received by both consultants' bodies and public sector clients within the UK.

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

PART 2 - LEGAL ISSUES OUT OF TENDERING

2.1 Background

For many years an invitation to tender was considered to be no more than an invitation to treat, creating obligations for neither party. The owner could reject or accept tenders as it pleased,[354] or could negotiate with one or more tenderers to produce a satisfactory deal. Generally the owner was unrestrained in how tenders were assessed and the award of contracts made. But recent developments show the courts are much more prepared to regulate the tendering process.

2.2 The 'tendering contract'

The Supreme Court of Canada first established the principle of the 'tendering contract' in the *Ron Engineering* case. Giving the judgment of the court, Estey J said:

> "There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner. ... This contract is brought into being automatically upon the submission of a [conforming] tender"[355]

It was necessary, thought the Canadian court, to find obligations in contract between the parties at this stage, prior to the formation of any construction contract, in order to maintain the integrity of the bidding system.[356]

2.3 The Pratt Contractors case, New Zealand

Pratt Contractors Ltd v. Palmerston North City Council[357] highlights the problems for owners associated with 'alternative tenders' and the 'tendering contract'. The plaintiff contractor sued the local Council for damages because it did not obtain the contract. The wide range of issues between the parties arising out of this case have been commented on previously.[358] Here the issue is how to deal with 'alternative tenders' so as to permit contractor's innovation within a regulatory framework[359] which demands fair and equal treatment for all bidders, whilst not unduly restricting the scope for any tenderer's innovative solutions to the owners' requirements.

Four conforming tenders were received. Pratt Contractors submitted the lowest conforming tender and on the basis of the contract award criteria, set out above, expected to be awarded the contract. But another tenderer, Higgins, submitted an *alternative tender* in addition to its conforming tender. Tendering procedures had contemplated alternative tenders, which might be permitted as a means of encouraging or permitting innovation. Proposals for alternative construction methods or choice of materials could be considered but such proposals must not alter the scope of the final product. Higgins' alternative tender outlined a different design solution which would achieve the same product: "the saving in the construction costs would be in the order of $250,000."[360] Certain other claims were made for the alternative scheme and Higgins concluded: "We would be happy to meet and discuss this proposal or forward any further information you may require."[361]

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

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354 *Spenser v. Harding* (1870) LR 5 CP 561.
355 *The Queen in Right of Ontario et al v. Ron Engineering & Construction Eastern Ltd* (1981) 119 DLR (3d) 287, 272.
356 *Ibid., per* Estey J at 273.
357 [1995] 1 NZLR 469, in the New Zealand High Court, Palmerston North.
358 See CIB-W65 Conference Proceedings, Glasgow 1996, vol.2, pp.391-402.
359 Both in statute and common law.
360 Reference to the alternative tender letter, [1995] 1 NZLR 469, 473/15-38.
361 *Ibid.* at 473/37-38.

The New Zealand High Court held that there was a contractual relationship between the Council and Pratt Contractors formed when Pratt submitted a conforming tender in accordance with the Council's stipulations. This contract is described here as the 'tendering contract' to distinguish it from any construction or engineering contract that may result from the tendering process. The 'tendering contract' obliged the Council not only to treat all conforming tenders equally and fairly, but to abide by its own stipulations. But the Council was not in breach of the 'tendering contract' in failing to award the contract to Pratt because it had submitted the lowest conforming tender. The Council rightly relied on words which footed the tender form to avoid this obligation: "the Principal is not bound to accept the lowest or any tender he may receive".[362]

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

The court agreed with Pratt's argument. If Higgins' conforming tender had been couched in the same vague terms as their alternative tender, it would not have been considered to be conforming: "in any event [the alternative tender letter] refers to a saving in construction costs and not to a price at all."[363] The alternative tender was therefore not a conforming tender. It was insufficiently precise to be capable of acceptance within the Council's tender conditions.[364] The Council itself realised that the alternative tender could not be accepted in the form submitted, and sought clarification. The alternative tender did not therefore comply with the Council's tendering stipulations.[365] In purporting to accept the alternative tender the Council was in breach of the 'tendering contract'.[366]

The 'tendering contract' imposed a duty of fairness on the Council when dealing with tenders. That duty was breached by purporting to accept the alternative tender and thus destroying the business potential secured by the lowest tenderer. That was unfair and came close to negotiating with one of the tenderers on terms which do not apply to other tenderers.[367]

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

> Those are all good reasons for insisting upon a precision in definition for alternative tenders, which gives not only the tendering authority adequate means of assessing what is proposed, but also does not disadvantage other tenderers who have submitted tenders as requested."[368]

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

2.4 The Health Care case, Newfoundland[369]

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

Tenders were invited by the Government of Newfoundland and Labrador for the design, construction and lease-back of health care facilities. Tender documents included statements of functional requirements,

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362 This obligation disclaimer is frequently referred to in Canada as 'the privilege clause'.
363 *Ibid.* at 483/4.
364 *Ibid.* at 483/5-7.
365 *Ibid.* at 483/19-20.
366 *Ibid.* at 483/ 30-33.
367 See Gallen J at 483/34-41.
368 *Ibid.* at 484/10-19.
369 *Health Care Developers Inc. and others v. The Queen in right of Newfoundland (the Crown)* (1996) 136 DLR (4th) 609.

preliminary plans and outline specifications for the various required facilities, but no detailed architectural or engineering drawings or specifications. The invitation asked for irrevocable proposals to design, build and lease the required facilities to the Government for a period of 30 years, with an option to purchase for a nominal payment at the end of this period.

Included among the tender documents was the ubiquitous 'privilege clause'. The Government reserved "the right to accept or reject any or all of the proposals received" and that decision was to be final and at the sole discretion of the Government.[370] They would "not necessarily accept the lowest or any of the Tender Proposals."[371]

Seven tenders were received, including tenders from Health Care, Dobbin and Trans City. Dobbin was lowest bidder (ie. required lowest annual rent) on two sites. Health Care was lowest on one site. Officials decided that the schemes put forward by Dobbin and Trans City would need extensive redesign. Health Care became 'preferred bidder'[372] for all three sites. Its schemes provided a "design, structure and layout [which] met the minimum code and engineering standards, and complied with the functional program."[373]

This was not a "standard" tender evaluation, but a tender evaluation made on the basis of "best overall proposal". The difficult question was: which proposal offered the highest standard of construction whilst satisfying the demands of the functional programs? To answer this question each proposal was examined against criteria developed by the Government but which had not been published in the invitation to tender or the tender documents. The 'preferred' but undisclosed design solution was a "non-combustible type structure using brick cladding and steel."[374] Only two tenderers offered such a design proposal, Trans City and one other. A committee of four Government Ministers controlled the evaluation and award process and recommended that Trans City's bids be accepted rather than the bids from Health Care. Cabinet authorised the award of the contract to Trans City as an 'exception' under s.8 of the *Public Tender Act*. Under that section, when it did not appear "expedient" to award the contract to the preferred bidder, Cabinet might authorise rejection of the preferred bid and the award of the contract to another bidder. Under this provision, a decision was made not to award the contracts to Health Care, but to award the contracts to Trans City.

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

Health Care and Dobbin commenced actions against the Government claiming that in awarding the contract to Trans City, they had breached obligations founded both in contract and in legislation. The actions were not consolidated but heard together. The trial judge held in favour of Health Care and Dobbin and awarded damages based on lost profits to Health Care, but only nominal damages of $1 to Dobbin. The Government appealed the finding of liability against it, Dobbin appealed against not being found to be preferred bidder and not being awarded either lost profits or wasted tendering costs. In the words of the Court of Appeal, the "story is somewhat unusual".[375]

Several cases show that there is an obligation placed on the owner to act fairly towards all tenderers. Certain good practice principles have evolved. This fairness obligation can be seen as a duty imposed on the owner to conduct the bidding process in good faith, or it can be treated as an implied term of the 'tendering contract'. English courts are reluctant to talk in terms of 'good faith' but Canadian, Australian and USA courts are increasingly doing so.[376]

Restricted space prevents consideration of the many interesting issues raised in this case. The issue for consideration here is whether the Government breached this duty of fairness in awarding contracts to Trans

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

371 Article 8.1, *ibid.*

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

373 (1996) 136 DLR (4th) 609 *per* Cameron JA at 616d. (A 'functional program' is a detailed written description of a facility and services to be provided. It includes: specific space, staff and equipment requirements and functional and operating relationships.) (at 616c).

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

375 *Ibid.*, at 611f.

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

City rather than to Health Care and/or Dobbin. Was there sufficient evidence to show that Trans City's bid should have been rejected because it was conditional, failed to provide the purchase options and failed to meet the functional programme on one site? Does the evidence show that the contract awarded was materially different from what was requested in the tender documents?

The court answered 'yes'. It held that Trans City's bid should have been rejected. There was sufficient evidence to support such a finding. Trans City's proposal for one of the sites was assessed as "totally missing the intent".[377] There was no substantial compliance with the owner's requirements. It was not a small discrepancy nor a mere technical error. No purchase option was provided. This award amounted to "something other than contract B": "a Cabinet paper had identified eight major variations between the contract with Trans city and the tender call".[378]

Was Dobbin truly the preferred bidder on two sites? The court answered, 'no', declining to find in favour of Dobbin. Although the Dobbin bids were the lowest price for two sites, the assessors concluded that their proposals would require extensive reworking to make them "functionally acceptable". Their concepts were "extremely poor". The court concluded that these were indeed *bona fide* assessments and that there was no basis to reject those findings. "In short, the Dobbin bid did not qualify. It did not meet the requirements of the call."[379]

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

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

> "entitled to loss of profits on those projects. Claims for the cost of preparing and submitting tenders were rejected, except insofar as those costs may be recovered in any assessment of loss of profits."[380]

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

2.5 Supplementary 1999 judgments

The Supreme Court of Canada and the Technology and Construction Court (England) have recently considered the consequences of a public owner's acceptance of a non-conforming tender. In *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*[381] the second lowest bidder successfully challenged the contract award to the lowest bidder who had included a proposed term of contract not contemplated by the invitation to tender. In *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons*[382] the lowest bidder successfully challenged the contract award to the second lowest bidder on similar ground, when proposed terms of contract not contemplated in the invitation to tender materialised as the result of post-tender negotiations

2.6 Alternative tenders

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

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377 (1996) 136 DLR (4th) 609, 629b.
378 *Ibid.* at 629d.
379 *Ibid.* at 629f.
380 *Ibid.* at 630b.
381 [1999] 1 SCR 619; 170 DLR (4th) 577.
382 Unreported. Case 1996 ORB 1151, Technology and Construction Court, Judge Humphrey Lloyd QC, 28.10.99.

which 'flexibility' bestows with judicial capacity. Large organisations and public bodies will find this difficult or even impossible to manage.

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

PART 3 - ANALYSIS OF TENDER CODES[383]

3.1 The Institution of Civil Engineers tender code (UK) [384]

This code advises that tenderers should be instructed as to the acceptability or otherwise of qualified tenders and alternative proposals.[385] If the tender stipulations permit offers based on alternative designs, tenderers are advised to ascertain from the owner's agent about any special design criteria which will apply to such an alternative. "Alternative bids must always be treated in confidence."[386] In order to satisfy the need for fairness and equal treatment of all tenderers, it is imperative that a tenderer intent on submitting an alternative tender, must also submit a "clean" or conforming tender as a condition precedent to consideration of the alternative.[387]

The ICE guide notes the economic importance of alternative proposals from tenderers. The "design specification should not be an unreasonable constraint."[388] The tender invitation should provide a minimum period of prior notice to be given to the owner of a tenderer's "intention to submit an alternative."[389] The alternative tender must provide adequate supporting detail "in order that its technical acceptability, construction time and economics can be fully assessed."

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

3.2 European Union

Public sector procurement of construction works is governed by Articles 6, 30 and 59-65 of the Treaty of Rome as amended by the Treaty on European Union and Council Directive 93/37/EEC[390] which consolidates and replaces earlier directives. The rules apply equally to all Member States of the European Union and are implemented within the UK by the Public Works Regulations (PWR, see below).[391] The purpose of a Directive is to supplement European Treaty provisions in opening up the internal market public sector to intra-Community tendering. Article 30 of Directive 93/37 deals with "criteria for the award of contracts". The directive says nothing on 'alternative tenders'. The contract is to be awarded on the basis of "lowest price", or on the basis of "most economically advantageous tender", but the latter only when relevant criteria are stated in the contract documents or the contract notice (as published in the *Official Journal*). Relevant criteria include, but are not limited to, "price, period for completion, running costs, profitability, technical merit". The PWR (below) give better guidance on how this should be done with respect to 'alternative tenders'.

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

PWR implement European procurement directives within the three jurisdictions of England and Wales, Scotland and Northern Ireland (collectively, the UK). Regulation 20 deals with the "criteria for the award of a public works contract". Following the pattern of Directive 93/37 (above) a contract can be awarded on the basis of lowest price or on the basis of most economically advantageous offer, but in the latter case only

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

384 (1983) *Guidance on the Preparation, Submission and Consideration of Tenders for Civil Engineering Contracts*, UK. It is understood that the tender code is currently being reviewed for a revised edition in late 1997.

385 *Ibid.*, clause 3.

386 *Ibid.*, clause 4.6.1.

387 *Ibid.*, clause 4.6.3(a)

388 *Ibid.*, clause 4.6.2.

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

390 [1993] OJ L199/ 54.

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

when relevant criteria have been published. If no criteria are given, the award must be on the basis of lowest price.[392] When a public authority awards a contract on the basis of the "most economically advantageous" offer (but not when "lowest price" basis applies) it may take into account tenders (alternative tenders) which offer some *variation* on the requirements stipulated within the tender documents.[393] There are conditions precedent which must be satisfied if this system is to apply. The award criteria must be stated "in the contract notice or in the contract documents".[394] The examples given of appropriate criteria are of an economic character, for example "price, period for completion, running costs, profitability and technical merit".[395]

To qualify under these regulations the alternative tender must, firstly, meet the minimum requirements of the public authority as set out in the tender documents with respect to a conforming tender, and, secondly, the authority must have stated in the contract notice that tenders offering variations would be considered. Thirdly, the contract documents must also state any requirements of the public body as to the presentation of an alternative tender.[396]

3.4 The State of Victoria's Public Sector tendering code

The State of Victoria published its code in January 1997.[397] The tendering code is consistent with the *Code of Practice for the Building and Construction Industry*. Compliance with the tendering code is mandatory in all State projects. It seems clear that the code can and will form the basis of contractual obligations between the State as owner and each tenderer. Evaluation criteria must be disclosed to tenderers at the time of tender invitation. All these criteria, and only these criteria should be used for evaluation.[398] Alternative proposals from tenderers can only be considered when such proposals accompany a conforming tender. That alternative proposal is the intellectual property of the tenderer and should remain confidential. "Alternative proposals should be encouraged as they may lead to innovative or creative solutions. A comparable price for the alternative should not be obtained from other tenderers, *nor should the alternative be used as the basis for recalling tenders.*"[399]

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

The NSW Code sets out "to encourage the highest ethical standards in tendering practice by all participants in the construction industry".[400] The Code declares that it "imposes an obligation" on all parties involved in the construction industry, but does not make it clear on what legal basis such an imposition should be founded. We must suppose it is founded on contract. The Code applies to all NSW Government procurement within the construction industry.

Owners must treat tenderers fairly and equally. "Bid shopping" is not allowed.[401] This advice is generally good but why is it placed under the heading of "Negotiations"? It could only be applicable to "evaluation". How can one negotiate with several tenderers fairly and equally? And why does the Code refer to "evaluation" under the heading of "negotiation"? This is inconsistent. The two processes are quite separate and distinct and require their own criteria. It is submitted that negotiation can only take place between the owner and one tenderer, not the tenderers as a group, and any negotiation with an individual tenderer, and not with the others, would breach the obligation of fairness and equal treatment.

The Code rightly emphasises the need to treat the intellectual property of a tenderer in confidence.[402]

> "Selection criteria must be clearly advised to tenderers in the tender documents. If criteria have not been included in the tender documents, the criteria must be determined prior to evaluation of tenders to ensure

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392 See *Portsmouth* and *Harmon* cases, noted above.
393 Regulation 20(4).
394 Regulation 20(3).
395 Regulation 20(2).
396 See Regulation 20(4).
397 *Tendering for Public Construction and Related Consultancy Services. A Better Purchasing Guideline for the Victorian Public Sector*, January 1997, Office of Building and Development, Department of Infrastructure, Melbourne, Victoria, Australia (ISBN 0 7306 8691 4). See also *Code of Practice for the Building and Construction Industry* (July 1994, ISBN 7306 0096 3) and *Making Choices: Qualification Criteria for Assessing Building and Construction Industry Suppliers* (1997, ISBN 0-7311-0855-8).
398 See p.38.
399 *Ibid.* Emphasis added.
400 *Code of Tendering for the Construction Industry*, July 1996, Department of Public Works and Services, New South Wales, Australia, (ISBN 0 7310 6897 1); section 1. See also *Code of Practice for the Construction Industry* (July 1996, ISBN 0 7310 6891 2) and *Implementation Guidelines* (July 1996, ISBN 0 7310 6802 5).
401 Section 4.2 Fair Dealing.
402 *Ibid.*

> an objective and rational basis for the assessment. Weighting of selection criteria should be decided prior to the closing of tenders but should not be disclosed to tenderers."[403]

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

> "Any tender which does not comply with the tender documents *may* be rejected."[404]

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

> "Tenderers may be encouraged to offer alternative, better value for money proposals. Clients should specify the conditions under which alternative proposals are to be submitted. Otherwise alternative proposals should only be considered when submitted with a conforming tender. Where a tenderer offers an alternative, a comparable price for the alternative should not be obtained from other tenderers nor should the detailed alternative be used as the basis for the recall of tenders."[405]

Innovation should be encouraged for the reasons discussed above. Positive statements should appear in the tender invitation, or in the tender documents, providing the scope for alternative proposals. Yes, alternative proposals should accompany a conforming tender. The last sentence is good advice, where tender stipulations do allow alternative tenders. But note that provision must be made in tender documents to properly enable the submission and consideration of alternative tenders.

> "Should none of the tenders be acceptable (or conforming), negotiations may be conducted preferably in the first instance with the least unacceptable with the aim of achieving a conforming tender."[406]

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

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

AS4120: 1994 prescribes an ethical standard for tendering: fairness to all parties and equal treatment of all tenderers by the owner.[407] Tender documents should provide "positive encouragement to Tenderers to incorporate maximum innovation ... by allowing them to submit options in addition to a conforming tender."[408] But only "where appropriate" should "guidance" be given to tenderers on the "process of evaluation".[409] Under the heading of "Evaluation of tenders"[410] there is further comment on the encouragement of alternative proposals. This must be the wrong position in the document for this statement: it is too late to think about alternative proposals at the time of evaluating tenders! "Principals shall specify the conditions under which alternative proposals are to be submitted." Clearly this must be done at tender invitation or within the tender documents to have effect, but the advice is good, if the timing is bad.

> "Where a Tenderer offers an alternative proposal, comparable prices for the alternative shall not be obtained by the Principal from other Tenderers nor shall the alternative be used as the basis for the re-call of tenders."[411]

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

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403 Section 4.3 Project Definition.
404 Section 4.4 Procedures for Invited Tenders, Evaluation of Tenders. Emphasis added.
405 *Ibid.*
406 *Ibid.*, Negotiation.
407 AS 4120, clause 4.
408 Clause 6.1.2.
409 *Ibid.*
410 Clause 6.5
411 *Ibid.*

> "However with the written consent of the tenderer submitting the original alternative design or method of construction, the Principal may re-tender or require re-pricing of tenders incorporating alternative designs or methods of construction."[412]

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

All information exchanges between owner and tenderer are confidential. They agree to maintain that information as "confidential and commercial in confidence."[413]

3.7 The American Bar Association Model Procurement Code for State and Local Governments (1979)[414]

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

> "This Code requires all parties involved in the negotiation, performance, or administration of [State] contracts to act in good faith."[415]

Contracts are normally to be awarded as the result of a competitive sealed bidding process.[416] Bids must be opened in public[417] and "shall be unconditionally accepted without alteration or correction" except as the Code might permit. Evaluation must be carried out using criteria as stated in the Invitation. The indicative criteria can be grouped as matters of "acceptability" and "economy".[418] "The contract shall be awarded [...] to the lowest responsible[419] and responsive bidder[420] whose bid meets the requirements and criteria set forth in the Invitation for Bids."[421]

There is another process termed "Competitive Sealed Proposals" at S.3-203. The main distinction here is that "Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation." Public scrutiny is confined to a "Register of Proposals".[422] The "Request for Proposals" must "state the relative importance of price and other evaluation factors."[423]

The crux of the Code for the purpose of this paper is the provision at S.3-203(6) that "discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." There is a safeguard: "Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors."

3.8 The CIC's guide to Procurement of Professional Services[424]

The CIC's guidelines deal only with consultancy services, not the procurement of construction or engineering works, but it contains useful advice on the setting of 'quality' criteria and assessment of quality.[425] The value of the CIC's guidelines in the context of this paper lies in the area of design quality assessment of alternative tenders. CIC note that "the essence of value assessment is the appropriate weighting of quality criteria against each other and against price". Prior to invitation of tenders, the owner and its advisers must decide "the weighting of the quality criteria against price within the bands" set out within the guidelines. It is suggested

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412 *Ibid.*

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

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

415 S. 1-103.

416 S. 3-202(1).

417 S.3-202(4).

418 S.3-202(5).

419 ie. a person who has qualified in accordance with s.3-101(6).

420 ie. "a person who has submitted a bid which conforms in all material respects to the Invitation ..." (s.3-101(7).

421 S.3-202(7).

422 S.3-203(4).

423 S.3-203(5).

424 (1994) noted above.

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

by CIC that a simple project is weighted 90% price and 10% quality, that a complex project such as an airport terminal is weighted 30% price and 70% quality, and that a highly personal service such as those of an arbitrator or value engineering consultant is weighted 10% price and 90% quality. Another promoter's decision is required: which quality criteria are important in the professional services required and what are their relative weightings? For example 'company organisation' might be weighted 25%; 'project team organisation' 15%; 'key personnel' 40%; and 'project administration' 20%. In good practice these decision would be made by a tender board or evaluation panel and revealed to all tenderers within the tender documentation. A quality threshold should be set below which tenders will be rejected. Tenderers would be asked to complete a detailed breakdown of the 'quality criteria' against each of the headings used for illustration above.

To paraphrase CIC's guidelines, the objective of the design quality assessment, within the overall tender assessment, is to determine objectively that proposal which offers 'best value for money', or in Euro-speak, represents the 'most economically advantageous' offer. All tenderers' design proposals should be assessed individually by each member of the tender board by that member completing and signing an assessment report which is retained for audit purposes. Low quality proposals are immediately rejected in accordance with the criteria set. Price is not an issue at this stage. The quality assessors are blind to price when exercising judgment as to quality. Having completed its quality appraisal on an individual basis, the tender board might then confer and resolve any differences as to interpretation. Preferred bidders' might be called to interview by the tender board but always conscious of the need to treat tenderers equally and fairly. Assessment marks, but not weightings, might be revised at this stage. Only then are the tendered prices considered by the tender board and added to the assessment. Abnormally low prices are discarded.[426] CIC suggests that price is scored as follows: 100 marks for lowest acceptable tender; 90 marks for the next lowest tender when its price is 10% above the lowest acceptable tender; and so on. Having scored both quality and price, the tenderer with the highest score is awarded the construction contract. The Overall Assessment file is retained and available for audit.

PART 4 - CONCLUSIONS

4.1 The traditional tendering process for building works was not intended to encourage design innovation by tenderers: in fact the very opposite was intended! But it has always been possible for tenderers to seek to pursue competitive advantage through novel construction methods, to the extent permitted by the tender documents.

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

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

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

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

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

4.7 In the *Pratt* situation, there are only two courses of action open to the owner: (1) reject all tenders and start again; or (2) act in accordance with the tender conditions.

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

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

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

4.10 In *Pratt's* case it was argued that the tender conditions incorporated the Transit NZ tender manual. The issue was whether the whole of the manual applied to the tendering contract. The court held that the manual as a whole was not part of the tendering contract. It seems that the manual was not written or structured to form the basis of a contract. Whole sections of the manual would have no relevance to the *Pratt* case. The manual contains more than one basis of evaluating tenders. It deals with the relationship of the Council with Transit NZ, which has nothing to do with the tenderer. Much more clear wording in the tender conditions is needed to incorporate by reference the whole of Transit NZ's tender manual. It appears that the manual requires amendment if it is to become part of the 'tendering contract'.

4.11 Without the existence of the tender manual's terms within the 'tendering contract', there was no term which permitted the Council to consider an 'alternative tender'. There is no sufficiently identifiable established practice that would allow the court to imply a term to the 'tendering contract' to make good this deficiency. Without clear words, 'alternative tenders' cannot be considered.

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

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

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

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

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

4.17 When tenders involve design, it is accepted that tenderers must exercise substantial judgment in formulating their proposals. Tenders should not be rejected because of some minor departure from owner's requirements. But errors in interpreting those requirements and the need for substantial redesign must result in rejection.

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

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

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

Chapter 4

Part 3

How Innovative Is The Common Law Of Tendering?

Abstract

Traditional design-by-owner remains an important procurement option despite the advances made by design-build in recent years. Contractor-led innovation is important and desirable in both procurement options, yet traditional design-by-owner procurement processes prevent, restrict or even discourage such innovation. Developments in common law result in contractual obligations for the procurer which might further inhibit innovation, as the procurer becomes obliged to treat all tenderers equally and fairly.

The theory of the 'tendering contract' is introduced and the problems for the procurer discussed when presented with a non-conforming alternative tender that offers a significant cost-saving against conforming tenders. However, if accepted, it puts the procurer in breach of contract to at least one aggrieved tenderer. The conclusion is reached that in order to properly consider alternative tenders without failing in its obligation to treat all conforming tenderers equally and fairly, the owner must make specific provisions within tender conditions which create the power to consider alternative proposals. The owner must also define the permitted scope of such alternatives, and set evaluation criteria and any relevant weighting of criteria which will be applied in a contract evaluation and award process. The owner needs to strike a balance between, on the one hand, restricting or inhibiting innovation, and on the other, permitting such a wide scope of innovative proposals that the solution adopted bears no relationship to the original project for which tenders were invited.

It therefore becomes important for the procurer to design the tender process rules so as to encourage contractor-led innovation, yet at the same time place some limit on the scope for such innovation. The limits must be such that the project delivered is still the project for which tenders were invited. A contract awarded to one tenderer for a product quite different from that which was tendered for probably results in the procurer's breach of the 'tendering contract' and consequent liability to pay damages to the other injured tenderer(s).

Keywords: Design innovation, traditional competitive procurement, tenders, obligations

Introduction

No-one seems to doubt that competition drives innovation in construction design and production. The goal is improved efficiency and lower prices. Latham (1994:v) sought the prize of "enhanced performance in a healthier atmosphere". Latham (1994:36) noted that contracts drafted on the basis that "all design work will be fully planned by ... the client and not subject to change once tender information has been sent out ... do not ... relate to reality on modern construction sites and may require revision or replacement by other contractual approaches." Albeit in the context of specialist engineering works, Latham (1994:65) observed that contractors believe that a costs saving of 20% could be achieved by improved collaboration between consultant and producer. Subsequently Latham (1994:80) proposed a 30% cost reduction target for the year 2000.

Songer and Ibbs (1995) believed that use of the design and build procurement would encourage innovation in the building process. They were alert to the problem identified by this author: how does the procurement process permit innovation by contractor-led proposals whilst maintaining appropriate control of the project? They identified the double challenge for the procurer in attempting to create an appropriate balance of innovation and control and to communicate this balance to tenderers. Songer and Ibbs discussed design and build procurement, whereas this paper discusses traditional design-by-owner procurement. It is submitted that both procurement systems pose similar problems when the promoter seeks to stimulate innovation.

Taken together these introductory remarks suggest that traditional construction procurement arrangements need to evolve so as to become responsive to contractor-led innovation. Only then will the potential cost-savings and productivity gains be achieved. Another truism (but not a platitude) is that procurement processes must maintain transparency, probity and the highest standards of integrity. It is submitted, without further discussion here, that this is true in both the public and private sectors.

Tendering codes were developed in order to provide a platform of 'professionalism' for the procurement process. The common law has responded to maintain the integrity of the bidding process. Some jurisdictions

have legislated to similar effect. The common thread is that all conforming tenderers are to be treated equally and fairly in a probative process administered by the owner where the contract award criteria are established and published in advance and all parties play by the rules. This paper addresses the question: to what extent does the common law permit innovative solutions to be put forward by tenderers operating in the traditional competitive procurement process? The paper is written in the context of only partial design liability passing to the contractor appointed as a result of the tender process.

The Tender Straitjacket

The traditional tendering process for building and engineering works was designed as a straitjacket for competing tenderers. The straitjacket was formed by the tender documents. The owner's advisers actively sought competition on price alone. Evaluation could only be confined to price alone by creating a system were design and technical content would be identical for each competing bid and only the price tendered could vary. Time for performance was another element of a tender that might be expected to vary from one tenderer to another but the proposed contract period was always given by the owner as a constant. Adventurous owners might ask for a second tender from each tenderer which encouraged the submission of an alternative tender price for an alternative contract period selected by the tenderer. The theory was that each tenderer would rework its tender programme, find the optimum contract period, and adjust the tender price accordingly. Experience, albeit subjective, indicated little evidence of tenderers taking any competitive advantage from the opportunity given to submit an alternative tender based on that tenderer's optimum contract period.

The traditional tendering process was not intended to encourage, or permit, design innovation by competing parties. Yet somewhere below the surface each tenderer competed to find the most efficient and effective construction method which would allow the minimum construction cost, but always hampered by the straitjacket of the owner's design. Any individualism exhibited on the part of a tenderer outside the permitted scope of price and time would disqualify that tender from the owner's consideration because it did not conform to the invitation.

Classical Contract Law Principles

The common law of tendering evolved from classical contract law principles. The owner published an 'invitation to tender' or a 'request for tenders' but this action created no obligations for the owner. It was merely an invitation to treat, an indication that the owner was ready to do business: *Spencer v Harding* (1870); *Harris v Nickerson* (1873); *Sanitary Refuse Collectors Inc v City of Ottawa* (1971); *G & L Builders CC v McCarthy Contractors (Pty) Ltd* (1988); *Gregory v Rangitikei DC* (1995). An invitation to treat was not an offer to make a contract with any person who might act on the invitation, but merely a first step in negotiation which may, or may not, lead to a contract: *Harris v Nickerson*; *Fisher v Bell* (1960); *Pharmaceutical Society of GB v Boots Cash Chemists Ltd* (1953). Each tenderer submitted an offer within the owner's design straitjacket. Tenderers were threatened: wriggle free from the straitjacket and your tender will/ may not be considered. Each tenderer submitted its tender in the prescribed form. This amounted to an offer which could be regarded as an offer to make a contract. If the offer met with unequivocal acceptance, a binding contract was formed. This is the model of the classical bilateral, or synallagmatic, contract (the term used by Lord Diplock in *Harvela* [1985] 2 All ER 966, 969e).

Claims in Tort

Obligations may also arise in the law of torts, intended to provide compensation to injured parties for civil wrongs. The owner was generally unrestrained in the tendering process, subject to a rule that there must be an intention (but no more than an intention) to award a contract to one of the tenderers. Without such intention, the owner might be liable in the tort of deceit for the tenderer's wasted costs: *Richardson v Silvester* (1873).

A supplier who tendered a price, then withdrew prior to any acceptance of that offer, was under no tortious duty of care under the *Hedley Byrne* principle that required the supplier to keep its offer open for any specified period of time and not to withdraw it. The tort of negligence did not provide a remedy which would circumvent the traditional contract rules. The supplier was entitled to withdraw at any time prior to acceptance of its offer: *Holman Construction v Delta Timber Co* (1972). On the other hand, a builder was held liable in the tort of negligence for failing to warn its client of a steep increase in price for works in progress. This decision did not amount to judicial criticism of the original estimate, but of the builder's failure to bring the escalating costs to the owner's notice in good time, so as to allow the owner an opportunity to modify its course of action: *J & JC Abrams v Ancliffe* (1981). In other cases the court has preferred to find remedies in contract for injured parties to the procurement process, rather than in tort.

The Two Contract Analysis - The 'Tendering Contract'

Arguably the most important revelations in the development of procurement law are the cases involving the two contract analysis and the emergence of the 'tendering contract'. In contrast to the traditional position, stated above, that an invitation to tender was no more than an invitation to treat, the modern view turns this theory upside down. The invitation to tender is now in some circumstances to be treated as an offer to make a contract which a tenderer accepts when it submits a conforming tender. This describes the unilateral contract model: *Carlill v Carbolic Smoke Ball Co* (1892); *Errington v Errington and Woods* (1952); *Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd* (1985). The "unilateral or 'if' contract" (the phrase used by Lord Diplock in *Harvela* at [1985] 2 All ER 966, 969c) arises out of the invitation to tender which is in law an offer to consider all conforming tenders. The offer is accepted, not necessarily by any formal communication to the owner of acceptance, but by performance of the condition, in this case the submission of a conforming tender. A contract is then formed which has been described here as the 'tendering contract' (but also described elsewhere as a 'pre-award' or 'process' contract).

The position may be stated as follows: the submission of a tender in response to an invitation can create contractual obligations for both parties. The obligations created for the owner will be found within the tender conditions, and other relevant material such as correspondence. A term may be implied to the effect that the owner must consider all conforming tenders, must treat all tenderers equally and fairly, and must award only a contract for the project tendered for and not for something different. This is not to say that the owner becomes obliged generally to award a contract, to the lowest bidder or any other bidder. The owner will be protected by the ubiquitous 'privilege clause' discussed below.

The successful tenderer's revocation of offer could be a breach of contract enabling the owner to claim damages against that tenderer. The owner's failure to apply the evaluation criteria as set down in the tender conditions could amount to breach of contract enabling the injured tenderer(s) to obtain damages from the owner. In *Ontario (The Crown) v Ron Engineering & Construction Eastern Ltd* (1981) a contract was brought into being automatically upon the submission of a responsive tender.

Applying the principles of the *Ron Engineering* case, in *Calgary v Northern Construction Company* (1986) the court held that a 'tendering contract' was formed between Calgary and each tenderer, when the latter submitted a conforming tender. Each tenderer, by its tender, expressly agreed not to revoke its offer within a stated period or prior to acceptance of a tender by the owner. Northern Construction's tender was accepted by Calgary and it was unable therefore, within the terms of the 'tendering contract', to refuse performance of the contract resulting from that acceptance (the construction contract) merely because it had made a latent error in the preparation of its tender which resulted in a price lower than it intended. Northern Construction's mistake was not relevant to the formation of the 'tendering contract' within the 'two contract' analysis of *Ron Engineering*. The owner's general remedy against the tenderer in such circumstances is damages for the withdrawal of the tender, the amount being the difference between the revoked tender and next lowest tender.

Bid or Tender Bonds and Deposits

Both *Ron Engineering* and *Calgary* involved irrevocable tenders which were wrongfully revoked. In *Ron Engineering* the tender conditions required a deposit of $150,000 to accompany each tender. The owner would be entitled, according to the tender conditions, to retain that deposit should the tenderer, amongst other things, withdraw its tender during the evaluation process. As a consequence of Ron Engineering's failure to sign a construction contract, the owner retained the tender deposit of $150,000, but its true loss (being the difference between the lowest and second lowest tenders) would have amounted to $632,000. Ron Engineering unsuccessfully sued for return of its deposit. There was no issue in that case as to the owner's actual loss.

In Calgary the tender was submitted under seal, as the tenderer's deed, in accordance with the tender conditions. Such an arrangement would render the tenderer's promises binding without consideration. A bid bond or deposit was required with each tender in an amount equal to 10% of the tender sum. The tender conditions provided for forfeiture of the deposit, as liquidated damages, for any breach of the tender conditions, or, alternatively, for the tenderer to pay to the owner its actual loss represented by the difference between lowest and second lowest tender.

Taking the two cases together, it seems that the owner's damages is properly represented by the difference between lowest and second lowest tender, despite the fact that the owner's loss might be less if it 'corrected' the mistaken tender. The owner might cap the tenderer's liability for breach of the tendering contract by providing in that contract for the deposit to be treated as liquidated damages. In *Ron Engineering* the owner

retained the deposit of $150,000 instead of damages of $632,000. In *Calgary* the owner claimed damages of $395,000 rather than forfeiture of the deposit of $934,200. The owner was not failing in any duty to mitigate its loss by 'correcting' Northern Construction's mistaken tender, as such 'correction' would result in a sealed tender system becoming a public auction. Any devious low bidder could then seek to adjust its price upwards to an amount just less than that of the second lowest bidder by arguing owner's failure to mitigate its loss.

By providing that a bid deposit, if forfeited, is to be treated as liquidated damages for certain breaches of obligations arising out of the tendering contract, it seems likely that the sum expressed, if forfeited, is an exhaustive remedy for those breaches. Therefore, in that situation the sum expressed represents a cap on the tenderer's liability for breach: *Cellulose Acetate v Widnes Foundry* (1933); *Temloc v Errill Properties* (1987). General damages greater than the expressed sum cannot be claimed instead. But when Calgary sued for the lesser sum which represented its actual loss, it properly exercised its option as expressed in the tender conditions, and in that circumstance the bid deposit does not have the status of liquidated damages, and therefore does not have the effect of capping liability. The option provided for the owner to sue for damages rather than retain the deposit is a valuable provision within the tender conditions from the owner's perspective. It avoids the potential argument that a sum stipulated to be liquidated damages, but which is arrived at by applying a fixed percentage to the tender sum, is in law a penalty, and as such is unenforceable.

The English Contribution to the Theory of the Tendering Contract

The English contribution to the modern theory of the 'tendering contract' is *Blackpool & Fylde Aero Club v Blackpool Borough Council* (1990). In that case the Court of Appeal held that in exceptional circumstances, the tenderer is given some protection in private law. Provided a tender is submitted prior to the deadline, the tenderer is entitled as a matter of contractual right to have its tender opened and considered together with other conforming tenders, if other tenders are considered. This contractual right to consider all tenders timeously submitted need not be expressed in the invitation to tender: in certain circumstances it arises by implication. Since the Council was in breach of contract, the Aero Club was entitled to damages. It is submitted that the 'exceptional' circumstances of this case are in fact but common features of the tendering procedures for all but the most minor of construction works, and that the 'tendering contract' found in *Blackpool* and in *Ron Engineering* will be a feature of most building and engineering procurement.

Breach of the Tendering Contract

There is a breach of the 'tendering contract' when an owner accepts a non-conforming tender. The owner is liable in damages to injured tenderers. Recoverable damages might extend to wasted tendering costs and loss of profit on a contract, which but for the owner's breach, would have been awarded to the plaintiff tenderer: *Pratt Contractors v Palmerston North City Council* (1995). The judgment in this New Zealand case is very instructive to all parties involved in construction and engineering procurement. It highlights the problems for all building owners associated with 'alternative tenders' and the 'tendering contract'. The 'tendering contract' limits the scope of the owner, but it can legitimately reject all tenders and start again: *Maintec Limited v Porirua City Council* (1995).

Safeguard for Owners: the 'Privilege Clause'

Owners frequently absolve themselves from any obligation to place an order as a result of the tender process. In *Martselos Services v Arctic College* (1994) the court established that the owner's duty was to treat all bidders equally and fairly but with due regard for the terms of the 'tendering contract'. But those terms cannot override the terms of a privilege clause which permits the inviter to make no contract award. Even evidence of industry practice that contracts are awarded to the lowest bidder cannot override a clearly worded privilege clause, unless the tender process is a sham or is flawed by procedural irregularities.

Where a privilege clause stated: "Lowest or any tender not necessarily accepted", there is no breach of the 'tendering contract' when the Council accepted the second lowest bid: *McKinnon v Dauphin (Rural Municipality of Manitoba)* (1996). Even if there was acceptable evidence of custom and usage known to all the tendering parties that the contract would be awarded to the lowest bidder, it could not prevail over the express terms of the 'tendering contract'. The 'privilege clause' thus avoided an obligation for the owner to accept any offer. The owner acted within its rights and there was no breach of the duty of fairness to tenderers by awarding the contract to the second lowest tenderer.

It may be that a court would be prepared to imply the terms of the privilege clause as a matter of custom and practice but it is better that the words are expressed clearly in the tender invitation and on the tender form itself. But owners should not think that the 'privilege clause' gives them unfettered discretion to treat tenderers as they please. In *Chinook Aggregates v District of Abbotsford* (1990) the court held that despite the

owner's power to reject all tenders or to reject a non-conforming tender, it was not entitled to breach the equal and fair treatment term of the tendering contract and to give preference to a local tenderer over the lowest tenderer, when that preference was not stated in, or revealed by, the tender documents. In *Best Cleaners v The Queen* (1985) the majority of the court held that the owner's obligation under the tendering contract was not to award a contract otherwise than in accordance with the terms of the tendering contract and that the existence of a privilege clause did not alter that. The owner might therefore award no contract, or it might award a contract, but only a contract award consistent with the tender invitation.

Problems for Owners Dealing with Alternative Tender under the 'Tendering Contract'

In *Pratt Contractors v Palmerston North City Council* the Council required tenders for the construction of a flyover interchange. Detailed tender documentation included provisions for the evaluation of tenders received by a process described as "lowest price conforming tender method". This process involved each tenderer submitting information against six non-price attributes. The Council was then required to assess each tenderer's responses against each of these attributes on a pass-fail basis. A fail on any of the attributes meant that the relevant tender was not a *conforming tender* and would not therefore be considered. Only a pass on each attribute permitted a tender to be considered on price alone: the lowest tender would then be the successful tender.

Four conforming tenders were received by the Council. Pratt Contractors submitted the lowest conforming tender and on that basis expected to be awarded the contract. But one tenderer submitted an *alternative tender* in addition to its conforming tender. The tendering conditions had contemplated alternative tenders, which might be permitted as a means of encouraging or permitting innovation. Proposals for alternative construction methods or choice of materials could be considered but such proposals must not alter the scope of the final product. This alternative tender outlined a more economical design solution which it was said would achieve the same product: "the saving in the construction costs would be in the order of $250,000." Certain other claims were made for the alternative scheme and the tender concluded: "We would be happy to meet and discuss this proposal or forward any further information you may require."

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

Aware that its tender was lower than the successful tenderer, and in the full knowledge that it had passed the attributes test, Pratt was aggrieved with the Council's decision and commenced proceedings for damages. Pratt contended, *inter alia*, that by submitting its tender a 'tendering contract' (not to be confused with the building contract) was created between Pratt and the Council, whereby the Council became obliged to consider only tenders which complied with the tender stipulations. Pratt further argued that this contract had an implied term obliging the Council to treat Pratt fairly and equally with other tenderers, and that should another design option be put forward by the Council, Pratt would be given the opportunity of pricing that option, and that there would be no negotiation with another tenderer. Pratt argued that the construction contract awarded in response to the alternative tender was in breach of the 'tendering contract' and was void for uncertainty. Pratt alleged that implied and express terms of the contract documents had not been complied with, and as a result they had lost (i) the cost of preparing the tender; and (ii) the profit on the contract which should have been awarded to Pratt.

In defence, the Council argued that its request for tenders was no more than an invitation to treat, and that therefore no contractual obligations arose. The Council denied the alleged failures catalogued by Pratt, and argued that, even if this was not correct, Pratt had no basis for recovery. It was contended that the contract had been properly awarded on the basis of the alternative tender, properly submitted in accordance with the tender documents, and that Pratt had no right to damages.

The New Zealand High Court held that the Council and Pratt had formed a contractual relationship arising out of the submission by Pratt of its conforming tender. The court first restated the classical contract principles outlined above. On the other hand, persons might enter into a preliminary contract with the expectation that it will lead in certain circumstances to a second or principal contract, along the lines of the analysis in the *Ron Engineering* and *Calgary* cases outlined above. Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or implicitly accepted.

Several factors pointed to the parties' intention to create a contractual relationship with respect to the submission of the tender. This situation was more than a mere calling for tenders. The invitation requested

contractors to register their interest for the construction of the project and pay a non-refundable deposit in order to receive the tender documents. The actual submission of a tender was therefore contemplated as a second step and moreover, one which followed upon a declaration of interest backed by a second non-refundable deposit. This was a significant point to the court, stronger than the suggestion in the *Blackpool* case, that the selection of tenderers was a significant factor in establishing the existence of a tendering contract. Secondly, the tender documents were extensive, detailed and substantial. They set out not only the nature of the project contemplated, supported by detailed specifications and drawings, but also set out the conditions of contract which would apply if a construction contract was entered into. Whilst such documentation would be typical of the tender process for a construction project, the complexity of documentation was firm indicator to the court that the owner intended more by its tender invitation than a mere invitation to submit an offer.

The court drew particular attention to the tendering conditions with respect to the Council's evaluation of tenders received. Tenders would be evaluated by the 'Lowest Price Conforming Tender Method' (as prescribed in the Transit New Zealand Manual of Competitive Pricing Procedures). Non-price attributes were listed as follows: Relative Experience, Track Record, Technical Skills (personnel), Resources (plant, equipment, material), Management skills, and Methodology. Then, and only then, was Price to be considered, on the basis that lowest price determined success. ([1975] 1 NZLR 469, 472)

This tender evaluation process was to be conducted in two stages. The first stage required determination of tender acceptability to be assessed only against each of the six non-price attributes on a pass/ fail basis. Any attribute which scored a fail would exclude that tender from further consideration. Any tender which altered the scope of the end result would be excluded from further consideration. The second stage consisted of determining which of the remaining (non-excluded) tenders had the lowest price. The Council could only enter into a contract for the non-excluded tender with the lowest price, whilst protected from an obligation to award any contract at all.

The Council had thus set out precisely how they would evaluate tenders and on what terms a contract would be entered into. If the Council was to become obliged to act in accordance with its indicated intention, the court found it most convenient to treat these obligations as arising in contract, given the commercial setting within which the tendering process was conducted. The Council had sought interested tenderers who were required to express their interest in obtaining the tender documents, by paying a non-refundable deposit. The basis upon which tenders were sought was detailed. Tenders were required to be accompanied by a second substantial non-refundable deposit. Under those circumstances, said the court, if the Council had attempted to deal with the tenders on any basis other than that contained in the tender documents, at least the elements for an estoppel argument could have been present but it seemed preferable to deal with the matter in terms of contract.

It was true that there were distinguishable facts in the previous tender cases, but the one thing they all had in common was that in order to give effect to the various stipulations contained within the tender documents it was necessary to recognise a contractual relationship. The court was satisfied that a contract was created by the act of submitting a tender in accordance with the Council's requirements.

The Terms of the 'Tendering Contract'

Having established that a 'tendering contract' existed, it was necessary then to establish what were the terms of that contract. The terms were to be found within the policy and specifications upon which the tender was submitted. And that included the promise to evaluate tenders in accordance with the tender conditions. But was it a term of that contract that the Council was obliged to award the contract to the lowest conforming tenderer? The tender conditions stated that: "The principal shall only enter into contract for the non-excluded tender with the lowest price." The New Zealand court looked to Canada for guidance. A court there had held that a provision that "no tenders need necessarily be accepted" did not cancel a contract award provision which stated that the award "*will* be made on the basis of the highest [or if relevant, lowest] offer made by that tenderer ...": *Canamerican Auto Lease & Rental Ltd v Canada (M of T)* (1987). But here the Council had argued that where an invitation to tender was no more than an invitation to treat, it was unnecessary for a building owner or employer to state that there was no obligation to accept the lowest tender. But this did not appear to be the correct position when there was a contractual relationship rather than a mere invitation to treat. Seeking to avoid any obligation, the Council then relied on words which footed the tender form: "We understand that the Principal is not bound to accept the lowest or any tender he may receive". The Council argued that it was of no consequence that Pratt Contractors won the competition because it was not obliged to accept Pratt's tender.

But the NZ court found that the Council's general powers to reject tenders were not compromised by other provisions within the tender documents. The Council would not be permitted to use its general power to reject tenders so as to make an arbitrary choice of successful tender. In selecting a particular tender, the Council was in the court's view bound by the terms it had itself imposed, as well as the requirements of fairness and equity which may well have had an application to the tender process. However, to hold that the Council retained a power to reject all tenders, as it did under the privilege clause, was not the same as allowing it to use such power to select tenders. The Council was bound to apply the rules expressed in the tender conditions if awarding a contract, but it was not required to award any contract at all. Therefore the Council was not in breach of the 'tendering contract' by failing to award the contract to Pratt. The 'tendering contract' did not oblige the Council to award the contract to the lowest price tenderer. Pratt's first claim was rejected. The Council was not in breach for failing to award the contract to Pratt.

The 'Alternative Tender'

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

In such terms the 'alternative tender' could not possibly be regarded as having the certainty to found a contract. The Council was aware of that uncertainty because its advisers sought additional information and also carried out their own cost assessment. If the conforming tender had been couched in such vague terms as the alternative tender, it would not have been considered to be conforming. It was clear that the alternative tender letter referred to a saving in construction costs and not to a price. The alternative tender was therefore not a conforming tender. It was insufficiently precise to be capable of acceptance within the Council's tender conditions. In purporting to accept the alternative tender the Council was in breach of the 'tendering contract'.

A Duty of Procedural Fairness

The NZ court said that there was also an aspect of fairness to this case. It was conceded by the Council that it was obliged to proceed in a manner which met the general requirements of 'fairness'. It was unfair, concluded the court, when the Council purported to accept as an alternative tender, thus depriving the lowest conforming tenderer of such opportunity as that qualification gave it, a document which was indefinite in terms of price and which required elucidation and confirmation. That came close, said the court, to negotiating with one of the tenderers within the tender process, but not on terms which applied to other tenderers.

But there was an even more alarming prospect. It appeared to the court from the evidence that the cost savings offered by the alternative tender were not wholly due to more efficient design, but instead due to the omission of items which would be required in any event. The court here sensed not only unfairness, but danger to the integrity of the tender process.

It seemed that the alternative tenderer had indicated that it would be prepared to reduce its tendered amount by a substantial sum, but offered 'savings' which did not result from the proposed design change. That, said the court, could give rise to very real dangers in the contracting process and could easily enough be manipulated to ensure that an unsuccessful tenderer could 'reduce' its tender by a sum sufficient to secure the contract by a means which was disguised by reference to some form of alternative construction. This would mean that an unscrupulous tenderer could not only achieve success over other tenderers in the way already described, but if that tenderer was in fact the lowest tenderer, could avoid being held to the alternative if the proposal was insufficiently precise to give rise to contractual obligations.

In law a duty of procedural fairness was imposed as a term of contract on the Council when dealing with conforming tenders. That duty was broken when the Council considered (and eventually accepted) the 'alternative tender'. Furthermore, it is dangerous to consider alternative tenders without sufficient definition of the term. An adequate basis of assessment is needed for sound management and to avoid unfairness to tenderers. In this case there was a breach of the Council's duty to treat all tenderers fairly.

The Need for Evaluation Criteria when Considering Design Alternatives

Health Care Developers Inc v The Crown (Newfoundland) (1996) illustrates the difficulty for an owner in meeting its obligation of fair and equal treatment when evaluating tenders, in circumstances where there is no

design brief or design evaluation criteria set out in the tender conditions, yet the tender call invites design proposals. Minor departures by tenderers from the owner's stated requirements may be overlooked when evaluating tenders, but bids which misinterpret those requirements and which would require substantial redesign should be rejected. The owner would be in breach of its equal treatment and fairness obligation under the tendering contract if it was to award a contract the functional requirements of which bear no relationship to that for which tenders were invited.

By analogy, not only must an owner create power within tender conditions to consider alternative tenders, but it must also define the scope of permissible alternatives, provide a design brief and design evaluation criteria and any weighting of criteria, so as to enable a tenderer to be aware of how alternative proposals will be evaluated. The scope definition should not be so strict as will prevent or inhibit innovation, but neither should it be so flexible as to permit the owner's acceptance of a proposal quite different from that for which tenders were originally invited. In *Pratt Contractors*, the successful alternative bid offered a saving of about $250,000 and several detail design changes in the construction of a flyover. If it had been necessary for the purpose of giving judgment, the court would have ruled that the alternative design adopted by the Council was within the scope of the original project requirements, and that its acceptance by the Council would not, of itself, amount to a breach of the tendering contract. Had the alternative proposal amounted to a tunnel instead of a flyover, it is submitted that such a project would be outside the scope of permitted alternatives, and that acceptance of same by the council would have amounted to a breach of contract.

Conclusion

Design innovation by tenderers was never encouraged in the traditional competitive tendering process: in fact the very opposite effect was intended. But tenderers have always competed on the basis of their own novel construction methods to the extent permitted by the tender documents. The decisions in *Ron Engineering* and *Pratt Contractors* show the common law seeking to maintain integrity in the bidding process by means of established contract theory. The invitation to tender is now seen as a qualified offer by the owner to make a contract. The owner's 'standing offer' is accepted by any tenderer who submits a conforming bid. The contract so formed is referred to here as the 'tendering contract'.

Tender conditions may provide for a tender deposit or bond which is to be forfeited to the owner should the tenderer default on an obligation under the tendering contract The sum of the bid deposit may be said to represent liquidated damages but the owner should expressly provide its option to claim damages rather than the forfeit of the deposit

An owner breaches the tendering contract when accepting a non-conforming tender and becomes liable in damages to the other injured tenderers, unless the terms of the tendering contract provide otherwise. Under the privilege clause the owner is usually empowered to reject all tenders and to start the procurement process again, but the privilege clause does not empower an owner to award a contract other than in accordance with the tender conditions.

A breach of the 'tendering contract' entitles the injured party to the normal remedy of damages. The owner becomes obliged to consider all conforming tenders and to treat each tenderer equally and fairly, but the owner is not generally obliged to award a contract to any tenderer by virtue of a 'privilege clause' which provides that the owner is not obliged to accept the lowest (highest) or any tender. All tenders might be properly rejected and the tender process recommenced in order to produce a tender which is acceptable to the owner. But a tender condition to the effect that a contract will be awarded to the lowest, or highest bidder, is enforceable. The privilege clause does not entitle the owner to disregard its own tender conditions.

In *Pratt Contractors* the court's objection to the way the Council handled the tender process was that the Council did not reject *all* tenders, but attempted to negotiate with *one* tenderer on the basis of its non-conforming 'alternative tender'. That negotiation was conducted within a tender process that demanded equal and fair treatment of all tenderers and therefore did not permit consideration of alternative tenders and did not permit negotiation with only one contractor. There were only two legitimate courses for the Council to take: (1) reject all tenders and restart the tender process; or (2) conduct itself in accordance with the tender conditions.

It is a consequence of the transparent tender process and the equal and fair treatment obligation imposed on the owner that all tenderers are entitled to know the basis on which tenders will be evaluated and on which a contract award decision is to be made. Tenderers must be informed of the evaluation criteria to be applied and of any weighting to be applied to that criteria.

If a tender process is intended to permit consideration of 'alternative tenders' (or even to encourage submission of alternatives) clear words are required to create such a power. There was no sufficiently identifiable established practice in New Zealand that would allow the court to imply a term to the 'tendering contract' to make good this deficiency, and without an operative provision, alternatives cannot be properly considered. If a right to submit alternative tenders exists, the owner also becomes obliged to consider any such alternatives that are properly submitted.

Evaluation criteria must be set for processing the alternative submissions. Tender conditions must also define the scope of acceptable alternatives and, where appropriate, also provide a clear design brief. The specified scope must not be too tight or restrictive so as to inhibit innovation, but at the same time the scope must not be too wide so as to result in an alternative proposal for a scheme or design solution which is quite different to the one for which tenders were originally invited. If it had been necessary, the Court in *Pratt Contractors* would have ruled that the alternative design solution was within the scope of the original project requirement and would thus have been capable of acceptance by the owner.

References

Latham, Sir M (1994) *Constructing the Team*, London: HMSO.
Songer, Anthony D and Ibbs, C William (1995) Managing Request for Proposal Development in Public Sector Design-Build. *Journal of Construction Procurement* **1**, 64-80.

Cases cited

Best Cleaners v The Crown [1985] FC 293 (Canada, Federal court of Appeal)
Blackpool & Fylde Aero Club v Blackpool Borough Council [1990] 1 WLR 1195; 3 All ER 25 (England, CA)
Calgary v Northern Construction Company [1986] 2 WWR 426, affirmed [1987] 2 SCR 757 (Canada, Supreme Court)
Canamerican Auto Lease & Rental Ltd v Canada (M of T) (1987) 37 DLR (4th) 591; 77 NR 141 (Canada, Federal Court of Appeal)
Carlill v Carbolic Smoke Ball Co [1892] 2 QB 484; [1891-94] All ER Rep 127 (England, CA)
Cellulose Acetate Silk Co v Widnes Foundry (1925) Ltd [1933] AC 20 (England, HL)
Chinook Aggregates v District of Abbotsford [1990] 1 WWR 624 (British Columbia CA, Canada)
Errington v Errington and Woods [1952] 1 KB 290; 1 All ER 149 (England, CA)
Fisher v Bell [1961] 1 QB 394; [1960] 3 All ER 731 (England)
G & L Builders CC v McCarthy Contractors (Pty) Ltd 1988 (2) SA 243 (SE) (South Africa, South East Cape Local Division)
Gregory v Rangitikei DC [1995] 2 NZLR 208 (New Zealand)
Harris v Nickerson (1873) LR 8 QB 286 (England)
Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd [1986] AC 207; [1985] 2 All ER 966 (England, HL)
Health Care Developers Inc v The Crown (Newfoundland) (1996) 136 DLR (4th) 609 (Canada, Newfoundland Court of Appeal)
Hedley Byrne & Co v Heller & Partners [1964] AC 465; [1963] 2 All ER 575 (England, HL)
Holman Construction v Delta Timber Co [1972] NZLR 1081 (New Zealand)
J & JC Abrams v Ancliffe [1981] 1 NZLR 244 (New Zealand, CA)
McKinnon v Dauphin (Rural Municipality of Manitoba) [1996] 3 WWR 127 (Manitoba, Canada)
Maintec Limited v Porirua City Council (1995) Unreported, High Court of New Zealand
Martselos Services v Arctic College (1994) 111 DLR (4th) 65 (Northwest Territories, Canada, CA)
Ontario (The Crown) v Ron Engineering & Construction Eastern Ltd [1981] 1 SCR 111; (1981) 119 DLR (3d) 287; 4 Const LJ 241 (Canada, Supreme Court)
Pharmaceutical Society of GB v Boots Cash Chemists Ltd [1953] 1 QB 401; 1 All ER 482 (England, CA)
Pratt Contractors v Palmerston North City Council [1995] 1 NZLR 469 (New Zealand)
Richardson v Silvester (1873) LR 9 QB 34 (England)
Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 30 (England, CA)
Sanitary Refuse Collectors Inc v City of Ottawa (1971) 23 DLR (3d) 27 (Ontario, Canada)
Spencer v Harding (1870) LR 5 CP 561 (England)

Chapter 5

Construction Works and Services Procurement: recent cases which are not discussed in any other material within this dissertation

The aim of chapter 5 is to provide updating case materials supplementary to those cases discussed elsewhere in this dissertation so as to bring research up to date and to underpin conclusions. The cases selected are representative of recent development in procurement law within the jurisdictions of Canada, England and Scotland, and within the European Union public procurement rules.

Chapter 5 comprises five parts. Part 1 provides an introduction and summary of the cases introduced in Parts 2, 3, 4 and 5.

Part 1

This collection of new cases should be seen as supplementary material to that published by the author in *Procurement Law for Construction and Engineering Works and Services.* Part 2 discusses the case of *MJB Enterprises Ltd v Defence Construction (1951) Ltd*[427] which is an important decision in a long sequence of tendering contract cases from the Canadian jurisdiction. Eighteen years after the decision in *Ron Engineering* the Supreme Court of Canada has revisited the case and provided some further insight into the nature and circumstances of the tendering contract (Contract A). It was revealed for the first time in the Canadian jurisdiction that a tendering contract had been held to exist in England, Australia and New Zealand and the Commonwealth cases noted in the author's *Procurement Law* were cited to the Canadian court. It may be no more than co-incidence that the author met the plaintiff's counsel in May 1997, when MJB's claim had just been rejected by the provincial appellate court, and outlined the extent to which the *Ron Engineering* case had been influential in Australia and New Zealand.

Defence Construction invited tenders for work on the Canadian Forces Base at Suffield, Alberta. Four tenders were received including one from MJB Enterprises Ltd. Defence Construction awarded the works contract to Sorochan Enterprises Ltd who had submitted what appeared to be the lowest tender. Sorochan completed the work. MJB claimed that Sorochan's bid was invalid and should therefore have been disqualified, and that Defence Construction should have accepted its bid as lowest compliant bidder. Defence Construction rejected MJB's claim on the basis that its privilege clause avoided any possible obligation owed by Defence Construction to MJB. The court held that on the facts of this case a tendering contract arose because the parties intended to enter a contractual relationship by the submission of a bid in the response to the invitation to tender.

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[427] [1999] 1 SCR 619; 170 DLR (4th) 577, Supreme Court of Canada.

However, Defence Construction was not obliged to award the contract to the lowest compliant bidder, but it was obliged to award the contract only to a compliant bidder, notwithstanding the effect of the privilege clause. Defence Construction was in breach of the tendering contract when it awarded the contract to Sorochan because Sorochan was not a compliant bidder. MJB Enterprises was entitled to damages in the amount of profits it would have earned, having been awarded the contract, which would have been the situtation had there been no breach of the tendering contract by the owner.

Scottish Homes v Inverclyde District Council[428] is discussed in Part 3. Scottish Homes, a statutory body, contracted to Inverclyde to undertake repair and maintenance of the latter's housing stock for a period of six years. Tenders had been invited for the contract under the restricted procedure laid down in the Public Works Contracts Regulations (PWR) 1991. Scottish Homes subsequently sold its building division and sought to transfer its business with Inverclyde by means of an assignation (assignment) of its contract. Inverclyde was not consulted by Scottish Homes with respect to the assignment: nor was consent sought. Scottish Homes merely announced its intention to assign and later confirmed that an assignation had been executed. Inverclyde argued that its consent was required to such an assignation and its consent had not and would not be given, and consequently Scottish Homes, having disposed of its workforce, was not now in a position to fulfil its contractual obligations and that therefore the contract was terminated as a consequence of Scottish Homes' repudiatory breach. Scottish Homes sought a declaration from the court that an effective assignation had been made, but if such a declaration was to be made, it would be necessary to show that the repair and maintenance contract did not involve an element of *delectus personae* (a personal quality), and therefore was capable of assignation without consent.

The Scottish court held that the work content of the maintenance contract was of a character that might well contain an element of a *delectus personae* character, but that terms of the contract and its surrounding circumstances must be considered. The exclusion of the right to subcontract pointed towards an intention that delegation of a performance obligation was unacceptable. The exclusion of delegation pointed to *delectus personae* being a feature of the contract. The provisions of PWR 10(2)(e) did not readily equate to any Scottish definition of *delectus personae*, but it clearly related to the same field of law and provided a limited scope for the selection of candidates for the work. PWR 20 permitted consideration of factors other than price in the award of a contract, for example economic advantage derived from technical merit, and did not exclude *per se* the operation of *delectus personae* in a maintenance contract. The regulations as a whole would have been subverted by one party's assignation freely given without the consent of the other, and that in all the circumstances the contract was unassignable by virtue of the *delectus personae* element being an essential element in its structure.

The note concludes with a list of factors that support the proposition that a contract for local authority maintenance work is of a personal nature and therefore cannot be assigned without consent. PWR 10 and 20 allowed selection of a public works contractor, not merely on price but on

the merits of its personal qualities. The note also identifies differences in the law of assignation in Scotland with that of assignment in England.

Part 4 deals with Regulation 32(4)(b) of Public Services Contracts Regulations 1993 (PSR) and the time limit of 3 months for bringing a bid challenge, as reviewed in the case of *Matra Communications SAS v The Home Office.*[429] The court held that Matra was late in bringing its action against the Home Office and that no ground existed for extending time. The strict time limit for commencing an action was held to be consistent with Community law despite the fact that in domestic law six years is generally available to bring a claim in contract or in tort. Comparison was made with the ss. 17 and 18 of the Local Government Act 1988 which permits 6 years to make a claim, but limits compensation to wasted bid costs. The author concludes with comment on the bringing of claims under the Public Works Contracts Regulations 1991 (PWR) and the *Portsmouth* case.[430]

The case of *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons (1999)*[431] is reviewed at Part 5. This judgment arose out of a bid challenge by an aggrieved bidder for the works or trade contract for the fenestration at the New Parliamentary Building (NPB) now known as 'Portcullis House'.[432] Among other matters, the court held that the public owner's requests for the submission of tenders and Harmon's response thereto created an implied contract as regards the requests made on three occasions. As a consequence the court held that there were express or implied terms of that agreement. The owner was under the following implied obligations: (a) that the alternative submitted by a tenderer would be considered alongside a compliant revised tender from that tenderer; (b) that any alternative would be one of detail and not of design; (c) that tenderers who responded to that invitation would be treated equally and fairly. The public owner was held also to be in breach of the Public Works Contract Regulations 1991, particularly in breach of Regulation 20 in: (a) seeking tenders on the basis of "best overall value for money"; (b) awarding the contract for the Fenestration package on the basis of "best overall value for money" (c) awarding the contract for the fenestration package on the basis of the most economically advantageous tender. Because the public owner had failed to properly set out its criteria for a contract award on the basis of the most economically advantageous tender, it should have awarded the contract only on the basis of the lowest price, but failed to do so. The public owner was held liable to compensate the injured low bidder for its wasted tender costs and for its lost profit or margin. This case represents the first opportunity given to an English judge of the High Court to review the Canadian, Australian and New Zealand authorities in the common law regulating procurement of construction and engineering works and services and is an important addition to the material contained in the author's *Procurement Law.*

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428 1997 SLT 829. Outer House, Court of Session, Lord Penrose, 25.1.1996.
429 [1999] BLR 112. Court of Appeal, Hirst, Mummery and Buxton LJJ.
430 See article at Chapter 10, Part 2.
431 (1999) 67 Con LR 1. Technology and Construction Court, England, Judge Humphrey Lloyd QC, 29 10 1999.
432 New offices constructed for Members of Parliament, known as 'Portcullis House', situated over and adjacent to Westminster underground station in Bridge Street, Westminster, London SW1.

Part 2

§ 6.22 Public works tender. Tendering contract. Non-compliant tender. Whether privilege clause obliged owner to accept lowest compliant bid. Whether privilege clause permitted owner to accept non-compliant bid. Compensation of injured compliant bidder.

MJB Enterprises Ltd v. Defence Construction (1951) Ltd et al[433]

SCENARIO

Defence Construction invited tenders for work on the Canadian Forces Base at Suffield, Alberta. The work comprised demolition of a water tank and the construction of a pump house and installation of a water distribution system. Four tenders were received including one from MJB Enterprises Ltd. Defence Construction awarded the works contract to Sorochan Enterprises Ltd who had submitted what appeared to be the lowest tender. Sorochan completed the work.

The tender documents contained a privilege clause: "The lowest or any tender shall not necessarily be accepted." Defence issued amendments to the tender documents during the tender period. As originally drafted the specification required a unit rate per lineal metre for water pipework. Three different pipe bedding and backfill materials had been itemised and approximately quantified: Type 2, large gravel; Type 3, native backfill; and Type 4, lean mix concrete. The engineer would decide which Type should be used in the conditions exposed. The published amendment deleted the approximate quantities and required tenderers to insert one rate only for all types of bed and backfill, irrespective of quantities actually executed. In other words the amendment required each tenderer to accept the 'design' risk of providing whatever Type of bed and fill was required, at an undifferentiated rate per lineal metre.

Sorochan's tender contained a hand-written qualification, or 'tag', to the effect that its unit price for bed and fill was based on Type 3, native fill, and that if Type 2 was required an extra over price of $60 per metre would apply. Despite the tenderers' complaints that such qualification invalidated Sorochan's bid, Defence accepted Sorochan's bid arguing that the price change was merely a 'clarification' and not a qualification. MJB sued Defence for breach of contract, arguing that Sorochan's bid should have been disqualified and its own bid accepted as lowest valid bid.

MJB had argued that the owner was obliged to accept the lowest valid tender. Defence argued that the privilege clause precluded the finding of such an obligation.

The Alberta Court of Appeal had dismissed the appeal and confirmed the result of the trial judgment.[434] Sorochan's hand written note attached to its tender did amount to a qualification, but given the presence of the privilege clause, Defence Construction was under no obligation to award

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433 [1999] 1 SCR 619; 170 DLR (4th) 577. Supreme Court of Canada, reversing Alberta Court of Appeal, 22.4. 1999.
434 (1997) 33 CLR (2d) 1; 196 AR 124;141 WAC 124; 69 ACWS (3d) 844; 33 CLR (2d) 1.

the contract to MJB as the next lowest bidder.[435] The privilege clause was therefore a complete answer to MJB's action.[436]

Iacobucci J gave the judgment of the Supreme Court of Canada, making essential reference to the leading case in Canada on the law of tenders, *Ontario v. Ron Engineering*.[437] In that case the court had held that a tendering contract (Contract A) arose between the parties out of the tendering process. Contract A was distinguished from the construction contract (Contract B). The *Ron Engineering* case dealt with the obligations of the *contractor* under Contract A, whereas the instant case considered not only whether such a contract did arise, but what the obligations of the *owner* might be. The terms of Contract A were governed by the terms and conditions of the tender call, which included that the contractor submit a deposit that could only be recovered under certain conditions. Estey J stated:

> 'The revocability of the offer must, in my view, be determined in accordance with the "General Conditions" and "Information for Tenderers" and the related documents upon which the tender was submitted. There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender.'[438]

As Ontario's tender call conditions were not met, the deposit was not recoverable by Ron Engineering.

The Supreme Court therefore held that *it is possible for a contract to arise* upon the submission of a tender and that the terms of such a contract are specified in the tender documents. The submissions of the parties in the MJB Enterprises appeal appeared to this court to suggest that *Ron Engineering* stood for the proposition *that Contract A is always formed* upon the submission of a tender and that a term of this contract is the irrevocability of the tender; indeed, most lower courts have interpreted *Ron Engineering* in this manner. There are, said the court, many statements in *Ron Engineering* that support this view. However, other passages within the judgment suggested that Estey J did not hold that a bid is irrevocable in *all* tendering contexts and that his analysis was in fact rooted in the terms and conditions of the tender call at issue in that case.

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435 (1994) 164 AR 399; 18 CLR (2d) 120; 52 ACWS (3d) 311. Alberta Court of Queen's Bench, Rowbotham J.
436 at p. 127.
437 [1981] 1 SCR 111; 119 DLR (3d) 267. See Craig, RW (1999) *Procurement Law for Construction Works and Services*, Blackwell Science, Oxford, England: § 6.2.
438 [1981] 1 SCR 111, 119. Emphasis added by Iacobucci J.

Therefore, said the court in the present appeal, it would always be possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that *Ron Engineering* suggested otherwise, Iacobucci J declined to follow.

Iacobucci J was cticial too on another aspect of Estey J's judgment. He did not wish to be taken to endorse Estey J's characterization of Contract A as a 'unilateral contract' in *Ron Engineering*.[439] However, each case turned on its facts and since the revocability of the tender was not at issue in the MJ Enterpises appeal, he could see no reason to revisit the analysis of the facts in *Ron Engineering*. What was important, therefore, was that the submission of a tender in response to an invitation to tender *may* give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intended to initiate contractual relations by the submission of a bid. If such a contract arose, its terms were governed by the terms and conditions of the tender invitation.

The court noted that the jurisprudence in other common law jurisdictions supported the approach that, depending upon the intentions of the parties, an invitation to tender can give rise to contractual obligations upon the submission of a bid.[440]

QUESTION

(1) Did Contract A (the tendering contract) arise on the facts of the MJB Enterprises case?

RESPONSE

Yes. The parties intended to enter a contractual relationship by the submission of a bid in response to the invitation to tender.

Both parties in this appeal agreed with the Contract A/Contract B analysis outlined in *Ron Engineering* and that the terms of Contract A, if any, were to be determined through an examination of the terms and conditions of the tender call. In particular, they agreed that Contract A arose, but disagreed as to its terms. However, this agreement was influenced by an interpretation of *Ron Engineering* that Iacobucci J had rejected. Because of this, Iacobucci J said it was important to discuss whether Contract A arose in this case.

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[439] Estey J's analysis has been strongly criticized: see R S Nozick, Comment on *The Province of Ontario and the Water Resources Commission v Ron Engineering and Construction (Eastern) Ltd* (1982) 60 *Can Bar Rev* 345, at p. 350; J Swan, Comment on *The Queen v. Ron Engineering & Construction (Eastern) Ltd* (1981) 15 *UBC L Rev* 447, at p. 455; G H L Fridman, "Tendering Problems" (1987) 66 *Can Bar Rev* 582, at p. 591; J Blom, "Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd" (1981-82) 6 *Can Bus LJ* 80, at p. 91; S M Waddams, *The Law of Contracts* (3rd ed 1993), at par. 159.

[440] See *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*, [1990] 3 All ER 25 (C.A.); *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 (FC); and *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 (HC). It should be noted that in all cases but the *Blackpool* case, the judgment in *Ron Engineering* had been cited to the court and had been persausive in forming the court's view of the relevant law.

Whether or not Contract A arose depended upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. Iacobucci J was persuaded that in this case that was the intention of the parties. At a minimum, Defence Construction offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, MJB Enterprises accepted this offer. The submission of the tender was good consideration for Defence Construction's promise, as the tender was a benefit to it, prepared at a not insignificant cost to MJB, and accompanied by the Bid Security.

QUESTION

(2) In the face of the privilege clause, was the owner obliged to accept the lowest compliant tender?

RESPONSE

No. The court was unable to find any support for the proposition that, in the face of the owner's privilege clause, the *lowest* compliant tender was to be accepted.

QUESTION

(3) Was there an implied term in Contract A that the owner was to accept only compliant bids?

RESPONSE

Yes, the court was able to find an implied obligation of the owner to accept only a compliant tender, based on the presumed intentions of the parties.

The main contention of MJB had been that Defence Construction was under an obligation to award Contract B to the lowest compliant tender. As the Sorochan bid was invalid, it had argued, Contract B should have been awarded to MJB. In this regard, MJB put two sub-arguments: first, that it was an explicit term of Contract A that the construction contract be awarded to the lowest compliant bidder and second, that even if such a term was not expressly incorporated into the tender package it was an implied term of Contract A.

1. Explicit Term of Contract A

With respect to the first argument, there was a difference of opinion as to what tender rules applied, but the court found that there was no explicit term in Contract A imposing an obligation to award contract B to the lowest valid tender.

2. Implied Term of Contract A

MJB's second argument was that there was an implied term in Contract A to the effect that the lowest compliant bid must be accepted.

The general principles for finding an implied contractual term were outlined by the Supreme Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal.*[441] Terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties. While in the case of a contract arising in the context of a standardized tendering process there may be substantial overlap involving custom or usage, the requirements of the tendering process, and the presumed intentions of the party, Iacobucci J concluded that, in the circumstances of the present case, it was appropriate to find an implied term according to the presumed intentions of the parties.

LeDain J stated in *Canadian Pacific Hotels Ltd* that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It was unclear to Iacobucci J whether these were to be understood as two separate tests but there was no need to determine that in this case. What was important in both formulations was to focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This was why the implication of the term must have had a certain degree of obviousness to it, and why, if there was evidence of a contrary intention, on the part of either party, an implied term could not have been found on this basis. In this respect, Iacobucci J found it difficult to accept that MJB, or any of the other tenderers, would have submitted a tender unless it had been understood by all involved that only a compliant tender would be accepted. However, he could find no support for the proposition that, in the face of a privilege clause such as the one at issue in this case, the lowest compliant tender was to be accepted. A review of the tender documents, including the privilege clause, and the testimony of the Defence Construction's witnesses at trial, indicated that, on the basis of the presumed intentions of the parties, it was reasonable to find an implied obligation to accept only a compliant tender, but was such an implied term consistent with the parties' presumed intentions?

The Instructions to Tenderers and the Tender Form were the crucial documents for determining the terms and conditions of the tendering contract (Contract A). The two main features of the parties' agreement, as revealed to the court by an examination of these documents, are: (1) the tenderer must submit a compliant bid; and (2) the tenderer could not negotiate over the terms of the tendering contract.

It was clear to the court from the foregoing description of the Instructions to Tenderers and the Tender Form that the invitation for tenders could have been characterized as an offer to consider a tender if that tender was valid. The Instructions to Tenderers included eight important provisions outlining the conditions under which a tender might be found to be invalid. These were: (a) a tender that had been submitted too late; (b) a tender that had not been submitted on the required Tender Form; (c) a tender submitted on an altered Tender Form ; (d) a tender that had not provided the information requested; (e) had not included the required bid security; (f) had an imbalance in

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[441] [1987] 1 SCR 711 per Le Dain J.

prices; (g) had not complied with the Rules of Practice for sub-trades; or (h) had not conformed to the plans and specifications.

Iacobucci J said that a tender, in addition to responding to an invitation for tenders, is also an offer to perform the work outlined in the plans and specifications for a particular price. The invitation for tenders is therefore an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the tendering contractor. The goal for contractors is to make their bid as competitive as possible while still complying with the plans and specifications outlined in the tender documents.

In this regard, it was important, said the judge, to note that Defence Construction did not invite negotiations over the terms of either Contract A or Contract B. The only items that could have been added to the Tender Form by the tenderer, in addition to the tenderer's name and its prices were: (a) GST registration number; (b) the names of sub-contractors; (c) its structural steel fabricator and erector, (d) the number of days it would have started work after notification of the contract award; (e) signature, (f) witness to signature; and (g) address, date, telephone and fax number. Furthermore, paragraph 12(b) of the Instructions to Tenderers provided:

> 'Tenderers are advised that requests for suggested amendments to the tender documents should be received by the Manager, Tender Call Section, at least fourteen calendar days before the specified tender closing time.'

This request indicated to the court that any negotiations were to follow a special procedure, presumably so that if a suggested amendment had been accepted, all tenderers would have been notified so that they might also have entered an alternate bid.

According to the Instructions to Tenderers and the Tender Form, a contractor submitting a tender must have submitted a valid tender and, in submitting its tender, was not at liberty to negotiate over the terms of the tender documents. Given this, it was reasonable to infer that Defence Construction would have only considered valid tenders. For Defence Construction to have accepted a non-compliant bid would have been contrary to the express indication in the Instructions to Tenderers that any negotiation of an amendment would have had to take place according to the provisions of paragraph 12(b). It would also have been contrary to the entire tenor of the Tender Form, which had been the only form required to be submitted in addition to the bid security, and which did not allow for any modification of the plans and specifications in the tender documents.

In Iacobucci J's view, the rationale for the tendering process, on the bases of these documents, was to replace negotiation with competition. This competition entailed certain risks for MJB, who was required to expend effort and incur expense in preparing its tender in accordance with strict specifications and who might nonetheless not be awarded Contract B. It was required to submit its bid security which, although it would have been returned if the tender had not been accepted, was a significant amount of money to raise and would have been tied up for the period of time between

the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd*,[442] with respect to a similar tendering process, this procedure was "heavily weighted in favour of the invitor". It appeared obvious to the court that to have exposed oneself to such risks would have made little sense if the owner (invitor) was allowed, in effect, to circumscribe this process and accept a non-compliant bid. Therefore it was reasonable, on the basis of the presumed intentions of the parties, for the court to find an implied term within the tendering contract that only a compliant bid would have been accepted.

QUESTION

(4) Having found that there was an implied term in the tendering contract (Contract A) that the owner could accept only compliant bids, did the privilege clause override this implied term?

RESPONSE

No. The privilege clause was compatible with the owner's obligation to accept only a compliant bid, but incompatible with an obligation to accept only the *lowest* compliant bid. Under the terms of the privilege clause, the owner was under no obligation to award a contract to the lowest compliant bidder.

The privilege clause provided: "The lowest or any tender shall not necessarily be accepted". Although Defence Construction had not disputed the trial judge's finding that the Sorochan tender was non-compliant, it had argued that the privilege clause gave it the discretion to award the contract to *anyone*, including a non-compliant bidder, or to not award the contract at all, subject only to a duty to treat all tenderers fairly. Defence Construction had also argued that because it had accepted the Sorochan tender with the good faith belief that it was a compliant bid, it had not breached its duty of fairness.

The words of the privilege clause were, said the court, clear and unambiguous. As the Supreme Court had stated previously,[443] "there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail". However, the privilege clause was only one term of the tendering contract and must be read in harmony with the rest of the tender documents. To have done otherwise would have undermined the rest of the agreement between the parties.

It was not that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, the court found a compatibility between the privilege clause and this obligation. Iacobucci J believed that the comments in *Goldsmith on Canadian Building Contracts*,[444] regarding the importance of discretion in accepting a tender were particularly helpful in elucidating this compatibility:

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442 *supra*, at p. 30.
443 In *Cartwright & Crickmore Ltd v MacInnes*, [1931] SCR 425, 431.
444 4th ed. (loose-leaf), p. 1-20.

'The purpose of the [tender] system is to provide competition, and thereby to reduce costs, although it by no means follows that the lowest tender will necessarily result in the cheapest job. Many a "low" bidder has found that his prices have been too low and has ended up in financial difficulties, which have inevitably resulted in additional costs to the owner, whose right to recover them from the defaulting contractor is usually academic. Accordingly, the prudent owner will consider not only the amount of the bid, but also the experience and capability of the contractor, and whether the bid is realistic in the circumstances of the case. In order to eliminate unrealistic tenders, some public authorities and corporate owners require tenderers to be prequalified.'

In other words, the decision to reject the "low" bid might in fact have been governed by the consideration of factors that impact upon the ultimate cost of the project.

Therefore even where, as in this case, almost nothing separated the tenderers except the different prices they had submitted, the rejection of the lowest bid would not have implied that a tender could have been accepteded on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, was a discretion to take a more nuanced[445] view of "cost" than the prices quoted in the tenders. In this respect, I agree with the result in *Acme Building & Construction Ltd. v. Newcastle (Town)*[446]. In that case, the construction contract was awarded to the second lowest bidder because it would have completed the project in a shorter period than the lowest bidder, and would have resulted in a large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It might also have been the case that the owner might have included other criteria in the tender package that would have been weighed in addition to cost. However, the need to consider "cost" in this manner did not require or indicate that there needed to be a discretion to accept a non-compliant bid.

The additional discretion not to award a contract was presumed to have been important to cover unforeseen circumstances not at issue in this appeal. For example, *Glenview Corp. v. Canada*,[447] concerned an invitation to tender whose specifications were found to be inadequate after the bids were submitted and opened by the Department of Public Works. Instead of awarding a contract on the basis of inadequate specifications, the department re-tendered on the basis of improved specifications. Nonetheless, this discretion was not affected by holding that, in so far as Defence Construction decided to accept a tender, it must accept a compliant tender.

Therefore, concluded the court, the privilege clause was compatible with the obligation to accept only a compliant bid. As should have been clear from this discussion, however, the privilege clause was incompatible with an obligation to accept only the lowest compliant bid. The privilege clause prevailed over this latter proposition.

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445 ie take a wider view of costs, taking into account all types of cost likely to be incurred.
446 (1992) 2 CLR (2d) 308 (Ont CA).

MJB disagreed with this conclusion and submitted that the majority of Canadian jurisprudence supported the proposition that the person calling for tenders should award Contract B to the lowest valid tender despite the presence of a privilege clause like the one in issue in this appeal. To the extent that these decisions supported MJB's contention and were incompatible with the analysis outlined above, Iacobucci J declined to follow them. However, he had reviewed the cases submitted to the Supreme Court but had found that they did not stand for the proposition that the lowest valid tender must be accepted. In Iacobucci J's opinion, those cases that had dealt with the interpretation of the privilege clause in the context of a finding that a tendering contract arose between the parties were instead generally consistent with the analysis he had outlined above. For example, a number of lower court decisions have held that an owner cannot rely on a privilege clause when it has not made express all the operative terms of the invitation to tender.[448] Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping.[449] Furthermore, Iacobucci J's conclusion regarding the intention of the parties demonstrating an obligation to accept only a compliant bid was supported by the trial testimony of the owner's own witnesses.

QUESTION

(5) Was the tendering contract breached?

RESPONSE

Yes. Applying the foregoing analysis, the court found that Defence Construction was under no contractual obligation to award the contract to MJB, who the parties agreed had been the lowest compliant bidder. However, this did not mean that the tendering contract (Contract A) had not been breached.

Sorochan was only the lowest bidder because it failed to accept, and incorporate into its bid, the risk of knowing how much of Type 2, Type 3 and Type 4 fill would be required. As the Court of Appeal for Alberta had noted, this risk had been assigned to the contractor. Therefore Sorochan's bid had been based upon different specifications. Indeed, it had been conceded that the Sorochan bid was non-compliant. Therefore, in awarding the contract to Sorochan, the public owner breached its obligation to the injured bidder and the other tenderers that it would accept only a compliant tender.

The public owner's argument of good faith in considering the non-compliant bid to be compliant was no defence to a claim for breach of contract: it amounted to an argument that, because it thought it had interpreted the contract properly, it could not have been in breach. Acting in good

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447 (1990) 34 FTR 292.

448 See *Chinook Aggregates Ltd. v Abbotsford (Municipal District)* (1987) 28 CLR 290 (BC Co Ct), aff'd (1989) 35 CLR 241 (BCCA); *Kencor Holdings Ltd v Saskatchewan* [1991] 6 WWR 717 (Sask QB); *Fred Welsh Ltd v BGM Construction Ltd* [1996] 10 WWR 400 (BCSC); *George Wimpey Canada Ltd v Hamilton-Wentworth (Regional Municipality)* (1997) 34 CLR (2d) 123 (Ont Ct (Gen Div)); *Martselos Services Ltd* [1994] 3 WWR 73.

449 See *Twin City Mechanical v Bradsil* (1967) Ltd (1996) 31 CLR (2d) 210 (Ont HC), and *Thompson Bros (Const) Ltd v Wetaskiwin (City)* (1997) 34 CLR (2d) 197 (Alta QB).

faith or thinking that one has interpreted the contract correctly were not valid defences to an action for breach of contract, said the court.

QUESTION

(6) Was the injured compliant bidder entitled to compensation for lost profits?

RESPONSE

Yes. The court held that MJB Enterprises was entitled to damages in the amount of profits it would have earned, having been awarded the contract, which would have been the situtation had there been to breach of the tendering contract by the owner.

Having established that the tendering contract had been breached, the next question for the Supreme Court to determine was the question of damages. The general measure of damages for breach of contract is, of course, expectation damages. Here, the court had been aware that the public owner had intended to award Contract B, as it in fact did award this contract, albeit improperly, to the non-compliant bidder. Therefore, there was no uncertainty as to whether the owner would have exercised its discretion not to award the construction contract. Moreover, the award of the contract to the non-compliant bidder was made on the basis that it was the lowest bid. The question was whether the injured compliant bidder could claim that, had the construction contract not been awarded to the non-compliant bidder, it would have been awarded to it for submitting the lowest valid bid.

In the court's opinion, on a balance of probabilities, the record supported the injured compliant bidder's contention that, as a matter of fact, it would have been awarded the construction contract had the the non-compliant bid been disqualified. The owner's testimnony supported this conclusion. But even so, it still had to be determined whether the loss of Contract B, although caused by the breach of Contract A, was nonetheless too remote. The classical test regarding the remoteness of damages is that provided in *Hadley v. Baxendale*,[450] *per* Alderson B.:

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.'

In the present case, said Iacobucci J, the owner may be taken to have known that if it decided to award Contract B and awarded it to a non-compliant bidder, then one of the tenderers who submitted a compliant bid would have suffered the loss of Contract B. In this context, it was sufficient that the owner knew that this tenderer could be the appellant injured compliant bidder.

This finding was consistent, said the court, with the decision of *Cornwall Gravel Co Ltd v Purolator Courier Ltd.*[451]. In that decision, Cornwall Gravel was awarded damages for breach of contract against Purolator owing to the late delivery of a tender prepared by the plaintiff. It was admitted that had the tender been delivered in time, Cornwall Gravel would have been awarded a contract for which it would have realized a profit of $70,000. Holland J held[452] that since Purolator knew that it was delivering a tender which had to be delivered by a particular time, it "must have realized that if delivered late the tender would be worthless and a contract could well be lost" (emphasis added by Iacobucci J). The lost profits on the contract therefore fell within the rule laid out in *Hadley v Baxendale*. An appeal to the Supreme Court was dismissed, with Laskin C.J. stating[453] that "[w]e are not persuaded that there was any error in the disposition made by the Courts below". If the lost profits were reasonably foreseeable to the courier delivering the tender, then Iacobucci J believed that lost profits must be found to have been reasonably foreseeable by the owner in the present instance.

MJB was therefore entitled to damages in the amount of the profits it would have realized had it been awarded Contract B. Subject to the determination of liability, the parties had agreed to damages in the amount of $398,121.27, with two further amounts in dispute. The first issue in dispute was whether MJB was entitled to $21,600.00 for the cost of a supervisor and the second issue was whether it was entitled to $229, 456.89, being the amount of money that MJB stated that it had included in its tender to purchase Type 2 backfill that, had it been awarded the construction contract, it would not have been required by the engineer to purchase and place. Defence Construction submitted that the entire issue of damages should be referred back to the Court of Queen's Bench of Alberta for assessment.

The court therefore enforced the agreement of the parties as to damages and remitted only the two issues in dispute to trial for assessment. For the foregoing reasons, the Supreme Court allowed MJB's appeal with costs, set aside the judgment of the Court of Appeal for Alberta, set aside the order of Rowbotham J at trial, and substituted judgment for MJB in the amount of $398,121.27, together with costs here and in the courts below. The matter of the two remaining issues in dispute regarding damages, described above, was remanded to the Court of Queen's Bench of Alberta for determination.

COMMENT

Surprisingly, in view of the substantial jurisprudence available in Canada on this subject, the trial judge held that the submission of a tender did not create a contract and that therefore there could be no breach that could entitle MJB to damages. In reaching that decision, the trial judge relied on *Megatech Contracting Ltd v Ottawa-Carleton (Regional Municipality).*[454] The present writer has

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450 (1854) 9 Ex 341, 156 ER 145, 151.
451 (1978), 83 DLR (3d) 267 (Ont HC), aff'd (1979) 115 DLR (3d) 511 (Ont CA) and [1980] 2 SCR 118.
452 at p. 274.
453 at p. 118.
454 (1989) 34 CLR 35; 68 OR (2d) 503; 15 ACWS (3d) 69; Craig's *Procurement Law* § 6.14

criticised this decision of Maloney J of the Ontario High Court elsewhere.[455] Maloney J's understanding of the Supreme Court of Canada's judgment in *Ron Engineering* was, it is submitted, flawed. Its application in the instant case was no less flawed, a point effectively endorsed by the trial judge himself, when he refused an application for Leave to Reargue, but admitted during the hearing that he had been mistaken in holding that no contract A had been formed upon the submission of a tender.[456]

Eighteen years after the decision in *Ron Engineering* the Supreme Court of Canada has revisited the case and provided some further insight into the nature and circumstances of the tendering contract (Contract A). The following points of conclusion are extracted from the judgment of Iacobucci J:

(1) Any discussion or analysis of contractual obligations and the law of tendering must begin at *Ron Engineering* (1981).
(2) A tendering contract *might* arise from the invitation to tender and the reciprocal act of submitting a compliant bid, but also, it might not arise. Whether a tendering contract arises depends on an objective view of the parties intentions, which might be determined from the tender invitation and tender documents (and presumably other circumstances surrounding the call for tenders).
(3) A tendering contract need not always include a term providing for the irrevocability of the bid. This just happened to be a term of the tendering contract in *Ron Engineering*, but a bid may not be irrevocable in all tendering contracts.
(4) It is arguable as to whether the tendering contract is properly characterised as a 'unilateral contract'. Iacobucci did not wish to appear to have endorsed Estey J's view on this point but offered no argument to the contrary.
(5) At a minimum level, when the owner invites bids through a formal process involving complex documentation and terms, that owner is also making an offer to consider bids for Contract B (for example a construction contract). (See the *Blackpool* case (1990).) In submitting its bid (which must be compliant) each tenderer accepts the owner's offer. Consideration (necessary in English law to establish a simple contract) exists for the owner in that the tender is of benefit to it and of detriment to each tenderer.
(6) A privilege clause which provides that the owner need not accept the lowest (or highest) or any tender is commonplace and will generally avoid any obligation arising for the owner to accept the lowest compliant tender. The presence of such a privilege clause leaves no room for the implication to the tendering contract of a term which requires the owner to accept the lowest compliant tender.
(7) However, on the facts of the *MJB Enterprises* case, the court was prepared to imply a term to the tendering contract that only a compliant tender would be considered and accepted by the owner.

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455 *Ibid.*, p.294-296.
456 170 DLR (4th) 577, 582.

(8) The rationale of the tendering process is to replace negotiation with competition. The competitive process is heavily weighted in favour of the owner and requires major investment by each tenderer. The rationale is destroyed if the owner is permitted to circumscribe the rules for the conduct of the tender process by accepting a non-compliant bid. It is then reasonable on the basis of the presumed intention of the parties that a term should be implied to the tendering contract that only a compliant bid can be accepted.

(9) The privilege clause represents part of the tendering contract between the parties. No custom and practice, no matter how well recognised, can stand in opposition to the words of a clear and unambiguous privilege clause.

(10) However, the privilege clause is only one term of the tendering contract and must be read in harmony with the rest of the tender documentation. For example the privilege clause was in harmony with the owner's obligation to accept only compliant bids.

(11) By the privilege clause the owner has maintained the discretion to accept other than the lowest compliant bid. This is important because a decision to reject the lowest compliant bid might be governed by a consideration of factors other than the amount of the low bid that impact upon the ultimate cost of the project. The discretion retained by the owner is a discretion to take a more nuanced view of what constitutes 'cost' beyond the price quoted in the tender.

(12) The liability of the owner to the injured compliant low-bidder, given the presence of a privilege clause, is not founded on breach of a duty to award the contract to the lowest compliant bidder, but founded on breach of obligation not to award the contract to a non-compliant bidder. Where, on the balance of probabilities, the injured compliant low bidder can show that the owner would have awarded to it the contract that was in fact awarded illegally to the non-compliant bidder, the injured compliant low bidder is entitled to expectation damages for the owner's breach. The claimant is assisted in establishing the probability of its loss by the fact that the contract has been awarded, rather than cancelled.

(13) The loss of Contract B was caused by the loss of Contract A and the loss was not too remote under the principles of *Hadley v Baxendale* (1854). The owner can be taken to know that if it awards Contract B to a non-compliant bidder, one of the compliant bidders suffers the loss of Contract B. It was sufficient that the owner knew the injured compliant bidder *could* be the complainant. Profit lost to a compliant bidder was reasonably foreseeable by the owner as the probable result of the owner's breach of tendering contract. The injured compliant low bidder was entitled recover the lost profit it would have realised had it been awarded Contract B.

Part 3

§13.15 Public works contract for maintenance of local authority housing stock. Whether contract assignable in Scots law by contractor without authority's consent. Relevancy of Public Works Contract Regulations 1991 (PWR) and contract award criteria in determining *delectus personae* character of contract.

Scottish Homes v Inverclyde District Council[457]

SCENARIO

Scottish Homes, a statutory body, contracted to a local authority in October 1994 to undertake services for repair and maintenance of its housing stock for a period of six years. Tenders had been invited for the contract under the restricted procedure laid down in the Public Works Contracts Regulations (PWR) 1991. Scottish Homes subsequently sold its building division to Mowlem Scotland Ltd, and sought to transfer its business with Inverclyde by means of an assignation (assignment) of its contract to Mowlem. Under the terms of the contract of sale, all employees of Scottish Homes Building Division were to be transferred to Mowlem. The Council was not consulted by Scottish Homes with respect to the assignment: nor was consent sought. Scottish Homes merely announced its intention to assign to Mowlem and later confirmed that an assignation had been executed. The Council replied that its consent would be required to such an assignation and its consent would not be available. The Council further intimated that Scottish Homes was now not in a position to fulfil its contractual obligations and that therefore the contract was terminated as a consequence of Scottish Homes repudiatory breach. Scottish Homes sought a declaration from the court that an effective assignation had been made.

Scottish Homes argued that if a contract in Scotland did not involve delectus personae, it was necessary to provide expressly against assignation if it was intended to exclude freedom to assign without consent.

The Council responded that as the contract involved an element of *delectus personae*, assignation was impossible. The maintenance contract prohibited delegation of performance by subcontracting, and the Council argued, if delegation was not possible, so was assignation not possible. Scottish Homes replied that the contractual obligations could be performed by any contractor capable of carrying out the work.

QUESTION

Does the local authority maintenance contract involve an element of *delectus personae* (a personal quality) so that it cannot be assigned under Scots law without the local authority's consent?

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[457] 1997 SLT 829. Outer House, Court of Session, Lord Penrose, 25.1.1996.

RESPONSE

Yes. The Court of Session held that the work content of the maintenance contract was of a character that might well be of a *delectus personae* character, but that terms of the contract and its surrounding circumstances must be considered. The exclusion of the right to subcontract pointed towards an intention that delegation of a performance obligation was unacceptable. The exclusion of delegation pointed to *delectus personae* being a feature of the contract. The provisions of PWR 10(2)(e) did not readily equate to any Scottish definition of *delectus personae*, but it clearly related to the same field of law and provided a limited scope for the selection of candidates for the work. PWR 20 permitted consideration of factors other than price in the award of a contract, for example economic advantage derived from technical merit, and did not exclude *per se* the operation of *delectus personae* in a maintenance contract. The regulations as a whole would have been subverted by one party's assignation freely given without the consent of the other, and that in all the circumstances the contract was unassignable by virtue of the *delectus personae* element being an essential element in its structure.

Lord Penrose expressed the following proposition of Scots law:

> "If on a sound construction of its terms, express or implied, a contract entitles a contracting party to substitute another in his place both as regards performance and the benefits of the contract, there is ... no rule of Scots law which would prevent that from having effect. [However] if ... the present contract involves *delectus personae*,[458] decree or declarator must be refused ...". [459]

In *Cole v C.H. Handasyde & Co*[460] the Lord President said of *delectus personae*:

> "The principle ... applies when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable by him to a third person who may or may not be competent for the work."

Lord Penrose added:

> "... there has to be a certain quality in the services to be performed as well as identification of the person to perform them before *delectus personae* can be relied upon to resist assignation."

In the search for clear authority in Scots law it was clear to Lord Penrose that narrow distinctions had been drawn between contracts that were of a personal nature and those that were not. He found it difficult to find any single expression that reconciled all of the expressions of opinion reflected in all the decisions. The language of the contract in question was capable of different interpretations, but impression must, in his Lordship's view, play a part in such a question of

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458 Choice of a specific person due to personal considerations. The person selected cannot delegate or assign its imposed duties.

459 1997 SLT 829, 834A and F.

460 1910 SC 68; 1909 2 SLT 358.

interpretation. Lord Penrose then catalogued features of the contract which pointed towards its personal nature:

> "In the contract provision was made for timetabling requirements for emergency and other works. The contractor was obliged to employ directly and to provide for the works a sufficient number of properly qualified workmen for both ordinary and hazardous work The contractor was obliged to take steps to minimise inconvenience to the occupiers of the houses, and to provide for the safety of occupiers and visitors to the houses and adjacent areas. Work was to be carried out without unreasonable disturbance or nuisance to occupiers. The work generally was to be carried out in and around the houses comprised in the housing stock of the local authority currently in occupation by the authority's tenants and their families and associates, and extended to operations on the fabric of the property and to the provision of essential services such as water and power. One would have thought that the work of skilled craftsmen or experienced tradesmen would be likely to be perceived by an employer to be a matter of sufficient significance to require selection in the engaging of a contractor for the performance of works on a home, whether occupied by himself or by a tenant for whose welfare he has an interest. So far as the work content of the contract is concerned, in my opinion, it is of a character which might well be the subject of *delectus personae*. Insofar as the quality of the work is a relevant consideration, accordingly, I consider that this case is distinguishable from *Asphaltic Limestone Concrete Co Ltd v Corporation of the City of Glasgow*[461] and from other cases in which *delectus personae* was excluded on the basis that only manual operations were involved. In a passage which has frequently been referred to, in *British Wagon Co v Lea & Co.*,[462] Cockburn CJ warned against the risks involved in pushing too far the doctrine or principle of *delectus personae*. That case involved the repair of wagons and the owners were said to be indifferent as who provided the service so long, no doubt, as it was performed to a reasonable standard. It does not appear to me to be pushing the principle beyond acceptable limits to consider that repair work on and in residential properties of the character involved in this case might involve *delectus personae*.
>
> However while the work may be of that character, it is necessary to have regard to the stipulations of the contract and to the other circumstances in which the contract was let. The exclusion of subcontracting in my opinion indicates that the parties to the maintenance contract must be held to have intended the view to be taken that delegation of the work was unacceptable. Condition 19 of the conditions of contract was clearly expressive of the importance attached by the employer to the exclusion of delegation. It is no doubt the case, as was submitted by [Scottish Homes], that one might speculate that one reason for the employer's anxiety would be to ensure that there was no extension of the chain of communication from contractor to subcontractor such as might inhibit the due and expeditious performance of the work, especially in emergency circumstances. I am less sure that one can properly infer that there is a greater degree of control over direct employees than over self employed labour only

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[461] 1907 SC 463; (1907) 14 SLT 706. *Asphaltic Limestone* was distinguished from *British Wagon* within this passage quoted.

subcontractors who receive no payment unless they work. However it does not appear to me to be proper to confine the scope of clause 19 to any one aspect of the obligations of the contractor. There is, in my view, nothing to elevate the time of performance over the other aspects of performance regulated by the conditions themselves and the obligation to have regard to the interests of occupiers, visitors and others in the vicinity of the works. In my opinion in the context of the present case the exclusion of delegation also points to *delectus personae* being a factor in the contract.

The final consideration that has to be taken into account relates to the 1991 Regulations [PWR]. The regulations were made in pursuance of powers conferred by the European Communities Act 1972. It was not submitted to me that there was any element of Community law that bore upon assignability. In their terms the regulations provide by [PWR] 10 (2) (e) that where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the works to be carried out under a contract may only be carried out by a particular person, the contracting authority may adopt negotiated procedure rather than competitive tendering in letting the contract. In my view the scope of the paragraph does not equate readily with any of the definitions of *delectus personae* us understood in the law of Scotland. However it clearly relates to the same field of law and to define for the purposes of local authorities' contracting procedures a limited definition of the scope for particular and personal selection of candidates for contract work. In contradistinction to that provision the regulations make provision for open and for restricted contract letting procedures. Regulation 12 sets out the provisions relating to restricted procedure adopted in this case. The publication in the *Official Journal* of the intention to let the contract was made in pursuance of that regulation. Regulation 12 (5) obliged the local authority in making the selection of contractors to be invited to tender, to apply [PWR] 14, 15, 16 and 17. Specific provision was made to exclude discrimination on the grounds of nationality. Not fewer than five nor more than 20 contractors were to be determined and the range of contractors to be invited to tender was to be determined in the light of the nature of the work to be carried out and to be specified in the notice. In the particular case the specification was of five to 10 service providers for each tender. The criteria set out in Pt IV of the Regulations, "Selection of Contractors", entitled the contracting authority to make inquiries as to a range of information relating to the tenderers which may generally be characterised as requiring objective information on factors likely to be relevant to the identification of appropriate tenderers having regard to their capacity to carry out work of the class in question rather than the personal suitability of any particular contractor to be awarded the contract. That in my opinion, is consistent with Pt V which sets out the criteria which must he applied in the award of a public works contract. Regulation 20 provides that subject to specific exceptions a contracting authority "shall award a public works contract on the basis of the offer which — (a) offers the lowest price, or (b) is the most economically advantageous to the contracting authority.

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462 (1880) 5 QBD 149, 152.

It is further provided in [PWR] 20 (2) that: "The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include price, period for completion, running costs, profitability and technical merit"

If price had been the only relevant consideration, it might have been difficult to maintain that the criterion then applicable would have been consistent with any notion of *delectus personae* recognised in Scots law. Selection on price alone might have excluded those characteristics which have been thought to be associated with *delectus personae*. The alternative criterion of economic advantage does introduce the idea of technical merit. And that appears to be to me considerably wider. As interpreted in the award criteria specified above it extends to the necessary skills, experience, resources and reliability required and the degree of quality control to be provided by the tenderer. In my opinion the application of the regulations does not, per se, exclude the operation of *delectus personae*. It appears to me that [Inverclyde DC] was correct in arguing that the regulations as a whole would be subverted by the notion that one could assign freely a contract let in pursuance of such restricted provisions without the consent of the contracting authority.

In the whole circumstances I am of opinion that the contract in question was unassignable by virtue of the *delectus personae* involved as an essential element in its structure. In these circumstances it is unnecessary to express any view on the more fundamental proposition for which [Inverclyde DC] contended, that the contractor's obligations of performance could not in any event be assigned under an executorial contract."[463]

Scottish Homes's action was dismissed. The assignation was ineffective.

COMMENT

The following factors may be summarised as supporting the proposition that a contract for local authority maintenance work is of a personal nature and is therefore cannot be assigned:

(1) Exclusion of any right to subcontract work. This provision pointed to the unacceptability of delegation.

(2) PWR 10(2)(e) provided limited scope for selection of public works contractors on their particular and personal qualities.

(3) PWR 20 did not require selection on price alone but permitted selection on much wider criteria, including technical merit. The PWR as a whole would be undermined if contracts let by such restricted procedures could be assigned without the consent of the other contracting party.

Delectus personae was therefore involved as an essential element of the contractual structure.

The Public Works Contracts Regulations 1991 provide:

"10.—(1) For the purpose of seeking offers in relation to a proposed public works contract (but in the case of a public housing scheme works contract, subject to regulation 24), a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

(2) A contracting authority may use the negotiated procedure in the following circumstances— . . . (e) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the work or works to be carried out under the contract may only be carried out by a particular person. . .

20 — (1) Subject to paragraphs (6) and (7) below, a contracting authority shall award a public works contract on the basis of the offer which — (a) offers , the lowest price, or (b) is the most economically advantageous to the contracting authority.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include price, period for completion, running costs, profitability and technical merit."

It seems that there might be some significant difference between the law of assignment in England and that of assignation in Scotland in the context of building contracts. The law of England was fully set out by Bingham LJ in *Southway Group Ltd v Wolff*,[464] when he said:

"It is in general permissible for A, who has entered into a contract with B, to assign the benefit of that contract to C. This does not require the consent of B, since in the ordinary way it does not matter to B whether the benefit of the contract is enjoyed by A or by a third party of A's choice such as C. But it is elementary law that A cannot without the consent of B assign the burden of the contract to C, because B has contracted for performance by A and he cannot be required against his will to accept performance by C or anyone other than A. If A wishes to assign the burden of the contract to C he must obtain the consent of B, upon which the contract is novated by the substitution of C for A as a contracting party."[465]

The English approach can be detected also in the following words of Lord Browne-Wilkinson in *Linden Gardens Ltd v Lenesta Sludge Disposals Ltd*,[466] when he said:

"Although it is true that the phrase 'assign this contract'[467] is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned".[468]

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463 1997 SLT 829, 835H-836L.
464 (1991) 57 BLR 33, 52-53.
465 Cited at 1997 SLT 829, 833I.
466 [1994] 1 AC 85; [1993] 3 WLR 408; 3 All ER 417 (HL).
467 For an example of this wording, see JCT98, clause 19.1.1.

However, in the opinion of the Scottish court, the English approach was inconsistent with the Scottish approach exemplified in Gloag's analysis of the degrees of assignability of a contractual obligation.[469] It was possible under Scots law that in appropriate circumstances the whole rights and obligations of a party under a contract might be assigned to a third party without the consent of the other original contracting party.[470] Such assignation is, in Scotland, distinguishable from novation where a new contract is substituted, with the consent of the parties, for the contract previously made. This distinction, said the court, was soundly based in theory and indicated a difference in attitude in Scots law to that which underlies the English rule. It would not therefore, in the court's opinion, be appropriate to support the general proposition put forward by Inverclyde DC that there was a fundamental objection to assignation without consent of the contractor's obligations in an executory contract of the kind in question in this case.[471]

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[468] Cited at 1997 SLT 829, 833H.

[469] See Gloag on *Contract* (2d ed, p. 416) for discussion on the scope for degrees of assignability of contractual rights and obligations. Scottish Homes's case, if it was to be a good case, would have to fit within the most demanding category where the "contract may be so completely assignable that the original party may not only transfer his contractual rights to the assignee, but also free himself from his contractual liabilities." Anything less would not meet the requirements of Scottish Homes's position since it retained no means of performing its contract with Inverclyde DC (1997 SLT 829, 832B).

[470] Lord Penrose, 1997 SLT 829, 833J.

[471] *Ibid.*, 833L-834A.

Part 4

§13.16 Public services procurement. Articles 1 and 2 of 'review procedures' Directive 89/665/EEC. Regulation 32(4)(b) of Public Services Contracts Regulations 1993. Time limit of 3 months for bringing a bid challenge not against Community law. The effect of ss 17 and 18 of Local Government Act 1988 which permits 6 years to make a claim, but limits compensation to wasted bid costs.

Matra Communications SAS v The Home Office[472]

SCENARIO

Matra Communications SAS (Matra) is a French company expert in the field of mobile radio telecommunications used by limited groups on a secure basis. Its product was called TETRAPOL. A rival based on similar technology was called TETRA. In July 1995 the Home Office (HO) announced a project called PSRCS to procure a new secure radio system based on the TETRA system. That excluded Matra from the project, a fact which Matra pointed out to the HO in a letter on 29.9.95. The project was formally intimated to the *Official Journal* in accordance with Article 15 of EU Public Service Contracts Directive 92/50/EEC[473] on 23.1.96 and the notice confirmed that TETRA was required. The notice set out the terms of the project and invited expressions of interest from interested potential contractors who would take part in a more detailed definition of the project. The notice provided that

> "Subject to its adoption by the EU, TETRA will be the technical standard specified for the mobile radio service."[474]

Matra responded to HO's notice by urging a change of policy, but without success. HO formally invited tenders based on TETRA on 9 August 1996. Some ten months later, in June 1997, Matra raised the matter again with HO, but it declined to interfere with the procurement process. On 12 September 1997, Matra threatened legal proceedings. On 10 October 1997 the contract was awarded to Quadrant, and on 13 October 1997, Matra issued proceedings against HO.

Matra maintained that the specification of TETRA prevented Matra from selling its product within the UK and thus breached Articles 30 and 59 of the directly applicable EU Treaty. Matra also claimed that the specification of TETRA amounted to discrimination between potential service providers and thus constituted a breach of Article 3.2 of Directive 92/50/EEC, relating to the co-ordination of procedures for the award of public service contracts.

HO denied Matra's claims on the ground that EU procurement rules required stipulation of TETRA as being the approved standard. But the appeal was confined to the question whether Matra's

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472 [1999] BLR 112. Court of Appeal, Hirst, Mummery and Buxton LJJ.

473 [1992] OJ L 209/1, amending 71/305, 77/62 and 89/665. Directive 92/50 was amended by Directive 97/52, [1997] OJ L 328/1.

474 [1999] BLR 112, 114.

proceedings were commenced too late, that is brought later than three months after "the date when the grounds for the bringing of the proceedings first arose".[475]

The relevant legislative provisions on 'review procedures' are to be found firstly in EU Directive 89/665.[476] Article 1 provides:

> "(1) The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and. in particular, as rapidly as possible in accordance with the conditions set out in the following Articles . . . on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law . . .
>
> (3) The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."

Article 2 provides:

> "(1) The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or any other document relating to contract award procedure;
>
> (c) award damages to persons harmed by an infringement."

Secondly, relevant legislation is found in Regulation 32 of the Public Services Contracts Regulations 1993 (PSR), which in this case both parties agreed properly implemented EU law. Regulation 32 provides:[477]

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475 Public Services Contracts Regulations 1993 (PSR), regulation 32(4)(b), cited at [1999] BLR 112, 115.
476 [1989] OJ L 395/33.

"32(3) Proceedings under this regulation shall be brought in England and Wales and in Northern Ireland in the High Court and, in Scotland, before the Court of Session.

32(4) Proceedings under this regulation may not be brought unless—

(a) the services provider bringing the proceedings has informed the contracting authority of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) above by the contracting authority and of his intention to bring proceedings under this regulation in respect of it; and

(b) they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

32(5) Subject to paragraph (6) below, but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—

(a) by interim order suspend the procedure leading to the award of the contract in relation to which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure; and

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed pursuant to paragraph (1) above—

(i) order the setting aside of the decision or action or order the contracting authority to amend any documents; or

(ii) award damages to a services provider who has suffered loss or damage as a consequence of the breach, or

(iii) do both of those things."

The case proceeded on a series of preliminary issues as to whether the claim was made in accordance with regulation 32(4)(b)[478] which "is in effect a limitation provision".[479] Rattee J had held that the action could not proceed further since it had not been brought within the time limit set by regulation 32(4)(b) and that no grounds existed for extending time. Matra appealed. The general issue which affected all the numbered questions which follow was the effect and status of Directive 89/665/EEC.[480]

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477 See [1999] BLR 112, 115.
478 Above.
479 [1999] BLR 112, 116.
480 Above.

QUESTION

(1) Was this action brought promptly and in any event within three months from the date when grounds for the bringing of the action first arose, as required by regulation 32(4)(b)?

RESPONSE

No. Matra was late in bringing its action because HO's liability arose when, as Matra had itself pleaded, it had first specified TETRA in the Official Journal (January 1996). Proceedings began in October 1997, some 21 months later. Alternatively, Matra was aware of its loss by June 1996, 15 months before taking legal action.

It was necessary for the court to decide when "grounds for the bringing of the proceedings first arose".[481] The court said that under PSR regulation 32(2) the breaches of duty under PSR are actionable by any services provider (for example Matra) who in consequence of the breach "suffers or risks suffering" loss or damage. Matra had pleaded that breach occurred by publication of the notice in the *Official Journal* on 23 January 1996, then argued that uncertainty remained as to whether TETRA was to be adopted as a EU standard. Even so, it was clear to Matra in June 1996, said the court, that it had been excluded from the PSRCS project.[482] It was therefore plain to the court that Matra had been aware that it was suffering, or at risk of suffering, loss by reason of the configuration of the PSRCS project some 15 months prior to it issuing a writ against the Home Office.

In answer to Matra's argument, the court observed that its claim was for loss of a chance to obtain the PSRCS contract.[483] That chance was lost when it was excluded from the project, irrespective of whether the contract was awarded to another firm. HO's liability arose when Matra in its pleadings said it did, that is at least 15 months prior to it issuing a writ against the HO.

Secondly, questions of limitation are determined, in English practice, according to when proceedings are brought. There is no single limitation period which commences at different times depending on the nature of the remedy sought. As to Directive 89/665, its whole range of remedies must be provided rapidly and no distinction is made between damages and other remedies. Whilst Matra's case was about the construction of the 1993 PSR, the approach of the PSR, said the court, in submitting all remedies to the same rules was consistent with the approach of the Directive.[484]

QUESTION

(2) Is that strict requirement as to time for bringing proceedings of regulation 32(4)(b) in conformity with Community law?

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481 PSR, regulation 32(4)(b).

482 Matra had said so in its letter of 30 May 1996. The same position had been maintained in Matra's solicitor's letter before action of 12 September 1997.

483 Matra had in fact pleaded as much: [1999] BLR 112, 118.

484 [1999] BLR 112, 118.

RESPONSE

Yes. This had to be the central issue to be considered because if regulation 32(4)(b)[485] is not in conformity with Community law, it must be disapplied or ignored, and the answer to question 1 would become irrelevant. But the matters of question 2 overlap with those of question 1. Rattee J had answered in the affirmative: the strict time period was in accordance with Community law. The Court of Appeal agreed but its answers were put on different grounds than had been put in the trial judgment.

It had been agreed by the parties to this dispute that the provisions of Article 2 of Directive 89/665[486] had been properly transposed into Regulation 32 of the PSR. But the Directive did not lay down particular periods of limitation. The question then is: does the limitation period provided for the remedies by the PSR cause the whole scheme of those remedies, including their limitation period, to breach the UK's obligation to provide remedies for breach of Community law in accordance with the requirements of EU jurisprudence?

The European Court of Justice had developed the relevant principle[487] applied by the trial judge. The principle had since been expanded.[488] The ECJ said:

> "... it follows from consistent case law since *Francovich* that ... it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused; further, the conditions, in particular time-limits, for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness)."[489]

It was accepted before the Court of Appeal that the domestic remedies, including the limitation period, must be scrutinised according to those two tests. The court dealt first with the principle of equivalence, and second with the principle of effectiveness.

1 the principle of equivalence

The operation and effect of this principle was, said the Court of Appeal, of crucial importance in this case. Two principles could be drawn from the *Palmisani* case.[490]

First, the principle of "equivalence" really does mean what it says. The domestic court, in applying the principle, must look not merely for a domestic action that is similar to the claim asserting Community rights, but for one that is in juristic structure very close to the Community claim. It does that by considering "the purpose and the essential characteristics of allegedly similar domestic

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485 Above.
486 Above.
487 In Joined Cases C-6/90 *Francovich* and C-9/90 *Bonifaci* [1991] ECR I-5357 at par. 43.
488 In Case C-261/95 *Palmisani* [1997] ECR I-4025, par. 27.
489 Reproduced at [1999] BLR 112, 118.

actions".[491] That approach was twice demonstrated in *Palmisani*: (a) by rejecting a claim for specific payments, as opposed to compensation, as a relevant comparison; (b) by the need to find in the domestic law more than merely a cause of action for reparation, but an action for reparation for conduct of a public body in the exercise of its powers. That comparison's "narrowness" was underlined in *Palmisani*.[492]

Secondly, said the CA, if there is no action in the domestic system that fulfils the requirements set out above, then the national system is at liberty (subject always to the further principle of effectiveness) to set whatever limitation period seems best to it for the claim in relation to Community rights. That was accepted by Matra, as was the nature of the court's task, which was to seek to identify a "comparator" in its domestic procedure which met the *Palmisani* criteria. If there was such a valid comparator, the Community claimant was entitled to the limitation period that applied to that comparator. If there was no such comparator, the limitation period provided by regulation 32(4)(b) was not, on this ground at least, open to objection in Community law.

The Court of Appeal then surveyed in turn, and dismissed, the various limitation comparators put before it and before the trial judge: action for breach of statutory duty (usually 6 years, but too wide a category); action for breach of other directly effective Community right (not a wholly domestic comparator); judicial review (not a private law remedy, whereas the regulation 32 claim is such a remedy); and, apparently the closest comparator, an action under sections 17 and 19 of the Local Government Act 1988 (different and more narrow purpose; different structure and approach; compensation restricted to wasted tendering costs). The court could find no such comparator for the claim under PSR regulations. Application of the second rule in *Palmisani* therefore provided no basis for attack in Community law on the limitation period of three months provided by regulation 32(4)(b).[493]

2 the principle of effectiveness.

This principle, according to the Court of Appeal, has a very limited criterion: the remedy provided by a Member State must not make the Community right "virtually impossible or excessively difficult" to exercise.[494] Matra in effect accepted that no attack was possible on this basis when the court explained the fallacy in Matra's contention that a requirement to instigate proceedings for a remedy in damages many months before a contractual award meant that time could expire before the right accrued. It was a mistake to think that damage is suffered only when it is quantifiable or potentially quantifiable. The remedies granted by PSR must therefore be considered to be effective.[495]

Having held that PSR were not invalid, it was necessary for the Court of Appeal to consider the third issue.

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490 Case C-261/95, above.
491 See Case C-326/96 *Levez* [1999] IRLR 36 at par. 43.
492 See Advocate General's opinion, par. 38 and 39.
493 [1999] BLR 112, 121.
494 See Case C-312/93 [1995] ECR I-4599 (12).

QUESTION

3 Given the answer to question 2 is 'yes', was the judge correct in refusing to extend the time limited by regulation 32(4)(b)?

RESPONSE

Yes, the judge had been justified, said the Court of Appeal, in refusing to extend time to bring a claim. Matra accepted that this was a matter for the judge's discretion. For the Court of Appeal to disturb the trial judge's finding that the time limit should not be extended required demonstration of error in principle. Matra's argument was that the judge was in error to adopt an approach based on public law[496] rather than based on a private law claim in damages, where the balance of prejudice should be taken into account. But the Court of Appeal disagreed. Since the Regulations used the language of RSC Order 53 (and that was lawful use of such language) the judge could not be criticised for confining himself to principles found in public law.

If prejudice was to be taken into account by the court, the Court of Appeal was quite satisfied that the effect even of a damages claim would in a case such as this have an unsettling and disrupting effect on the procurement process. A damages claim could only succeed if Matra could show that the use of TETRA technology (the basis of the whole PSRCS project) was unlawful. There was every reason in the public interest why such claims should be made promptly and this aspect was underlined by the emphasis on speedy recourse in the 'review procedures' Directive 89/665. The judge had rejected all of Matra's considerations and was fully justified in that course. Matra had been well-aware of its rights and had taken a conscious decision not to assert them at the appropriate time. There was no grounds for criticising the judge's conclusions on this point.

In conclusion, the Court of Appeal dismissed Matra's appeal and unanimously declared that:

(1) The requirements of Regulation 32(4)(b) of the Public Services Contracts Regulations (PSR) 1993 are not unlawful as being in breach of community law.

(2) Matra did not bring its proceedings within the time limit set by Regulation 32(4)(b).

(3) There were no grounds for displacing the judge's refusal to extend that time for bringing proceedings.

COMMENT

The court was not referred to *R v Portsmouth City Council, ex parte Peter Coles, Colwick Builders Ltd and George Austin (Builders) Ltd.*[497] In that case the Court of Appeal considered the effect of regulation 31(5) of the Public Works Contracts Regulations 1991 (PWR) which creates the same framework of conditions precedent to the bringing of proceedings under the regulations, as those set out above as regulation 32(4) of the Public Services Contracts Regulations 1993 (PSR). In *Portsmouth* the trial judge held that the injured bidder's claim was defeated as it had not given

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495 [1999] BLR 112, 122.

496 Under Rules of the Supreme Court (RSC) Order 53, now effectively obsolete, see Civil Procedure Rules (CPR) Schedule 2.

497 (1996) 81 BLR 1 (CA); Craig's *Procurement Law*, pp. 746-779.

notice as required by PWR 31(5)(a)[498] of intention to bring proceedings and of what breach of duty was being relied upon to found its claim. The Court of Appeal however reversed on this point. The injured bidder's correspondence with the City Council had after all identified the Council's breach sufficiently to satisfy PWR 31(5)(a) since the complaint had been with the substance rather than form of the Council's decision making.

Taking into account the Court of Appeal's decisions in *Portsmouth* and *Matra*, injured bidders seeking a remedy under PWR or PSR must give prior notice of intention to bring proceedings and set out the breach of duty which is thought to found its claim. In addition the proceedings must be commenced "within three months from the date when grounds for the bringing of the proceedings first arose". In *Matra*, where the claim was for the loss of a chance to be awarded the contract, the three months limitation period started to run when the Home Office specified a proprietary product which necessarily excluded Matra from participation in the procurement process, and not from the later date when a contract was awarded to a rival supplier.

There was no issue as to time of commencing proceedings in *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*,[499] but the court did hold that Harmon (the injured bidder) was entitled in principle to recover loss of margin or loss of profit on the basis of its lost chance of success, and to recover its wasted bid costs, pursuant to PWR 31(3). Harmon knew in April 1996 that it would not be awarded the contract for the fenestration package at Portcullis House.[500] The contract was awarded to another party on 8 May 1996.[501] Harmon's notice required by PWR 31(5)(a) was issued at the same time as its writ, on 13 August 1996.[502] There was no issue taken in the judgment with regard to whether Harmon's proceedings had been begun "within three months from the date when grounds for the bringing of the proceedings first arose". It seems at least arguable from the dates set out above that Harmon was *outside* the period of three months when it commenced proceedings on 13 August 1996. Had it been established that Harmon was out of time under PWR, its claims would then have rested on breach of contract, breach of duties under the Treaty of Rome, and misfeasance in public office. Breach of contract seems a more attractive option since full expectation losses should be compensated. It is unclear whether anything beyond status quo losses could be recovered for breach of statutory duty, although the 'lost chance' or 'lost opportunity' approach might result in some degree of recovery in tort for a loss of profit or business margin.[503]

It could be thought that the difficulty in quantifying such an apparently speculative claim as Matra's claim against HO might inhibit a party from commencing proceedings, but issues of quantification must not be confused with issues of liability. The potential liability of HO for Matra's loss or damage arose when Matra lost its chance to obtain the PSRCS contract. That chance was lost, and damage suffered, whether or not the contract was awarded to another bidder. Quantification might

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498 Equivalent provision to PSR 32(4)(a).
499 (1999) 67 Con LR 1.
500 (1999) 67 Con LR 1, par 131-134.
501 (1999) 67 Con LR 1, par 135.
502 (1999) 67 Con LR 1, par 142.

be affected by the eventual outturn, but not the issue of liability. Matra was too late in issuing proceedings a mere three days after the contract was awarded to a rival because it delayed action beyond the three months deadline from when it could first have brought proceedings. Three months is a very short limitation period within which to commence an action and seems to follow the text of RSC Order 53, rule 4(1), which required a party seeking judicial review to apply "promptly and in the event within 3 months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period".

Buxton LJ thought that the damages claim permitted by Directive 89/665 and enabled by PWR 31 and PSR 32 "must necessarily be a claim in private law".[504] Judicial review does not in itself provide a remedy in damages but a damages claim could be joined in an Order 53 (now CPR Schedule 2) application but only where there is a separate though linked right to damages.[505] Therefore PWR 31 and PSR 32 claims seek a private, not public, law remedy, yet the wording of the regulations follows the wording of Order 53 which sets the rules for judicial review in public law, and the court when asked to construe the regulations confined itself "to principles to be found in public law".[506] That seems to be inconsistent, to deal with an acknowledged private law claim as if it was a claim in public law. An action for breach of the tendering contract could be started at any time within a period of "six years from the date on which the cause of action accrued",[507] that is six years from the date of the owner's breach of contract. However, on the facts given in *Matra's* case it is difficult to see any clear basis for a contractual claim, but it is equally difficult to see any good reason why a claim for compensation (not a claim to halt the procurement process, which would indeed "have an unsettling and disrupting effect")[508] should be denied after a period of only three months. Surely the result of such a draconian measure is extremely prejudicial to the interests of the bidders and heavily outweighs any prejudicial effect on the public's interest in having such claims dealt with speedily. Surely there should be a distinction between cases where the injured bidder seeks an injunction and any delay would be prejudicial to the public interest, and claims for compensation where the normal time limits would apply and where no public interest is harmed in having a claim for compensation made during a period of six years from when the cause of action accrued.

The Court of Appeal considered sections 17 and 19 of the Local Government Act 1988 as a possible 'comparator' in domestic procedure that could be tested against the *Palmisani* criteria. If these statutory provisions were true comparators, Matra would have been entitled to a limitation period which applied to the comparator (which would have permitted six years to commence proceedings). The Court of Appeal confirmed that the trial judge was right in holding that the 1988 Act was not an equivalent comparator for the purposes of the *Palmisani* rule. There are some useful points as to the application of these sections of the 1988 Act, but it should be noted that

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503 See discussion at Craig's *Procurement Law*, pp. 718-724.

504 [1999] BLR 112, 120.

505 Buxton LJ at [1999] BLR 112, 120. RSC Order 53, rule 7(1) permitted a joinder of claims for damages for a tort or breach of contract, as a matter of procedural reform to save multiplicity of proceedings, but the rule stood, that there was no right to damages for an unlawful administrative act: see De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed) par. 19-010.

506 Buxton LJ at [1999] BLR 112, 122.

507 Section 5, Limitation Act 1980.

508 *Ibid.*

changes were introduced by s.19 of the Local Government Act 1999. The Secretary of State now has the power to amend the list of factors that a local authority can take into account when inviting tenders and awarding contracts.

By the 1988 Act local and other public authorities are forbidden to select the persons with whom they contract on the basis of 'non-commercial considerations'. Such considerations include, by section 17(4), such matters as the composition of and the terms of employment enjoyed by the contractors' workforce; and the country of origin of supplies used by the contractors. By section 19(7)(b) a failure to comply with that duty is actionable in damages by any person who in consequence suffers loss or damage, though by section 19(8)

> "... any action by a person who has submitted a tender for a proposed public supply or works contract arising out of the exercise of functions in relation to the proposed contract the damages shall be limited to damages in respect of expenditure reasonably incurred by him for the purpose of submitting the tender . . ."

The Court of Appeal agreed that the 1988 Act came closer as a comparator than any of the other candidates surveyed, but it fell well short of satisfying the principle of equivalence set out in Palmisani and Levez. First, the purpose of the two legislative provisions, and thus of the actions that they support, is different. The Regulations enforce the objectives of Directive 92/50/EEC, which is aimed at the establishment of the internal Community market and the general elimination of discrimination between nationals of different Member States.

By contrast, the 1988 Act had much more limited objectives. It did not address competition in public supply in general, or indeed at all: that latter objective was pursued by different provisions in Part I of the 1988 Act. Rather, it prohibited very specific conditions in the procurement policy of public authorities. The contrast was seen by the Court of Appeal in *Gebroeders Beentjes BV v Netherlands*,[509] where a condition of invitations to tender issued by the Dutch Ministry of Agriculture was that contractors should employ long-term unemployed persons. A complaint was raised under the then current procurement directive.[510] The ECJ held that:

> "... the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice."[511]

The contrast with the 1988 Act was very striking, said the Court of Appeal. Under section 17(5)(a) such a condition would be absolutely prohibited as a condition relating to the composition of the contractor's workforce. It would not be saved by any publication of a specific notice; nor by appeal to an absence of actual discriminatory effect, and much less to the absence of any discrimination against nationals of other Member States of the Community. And on the other side of the coin,

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509 Case 31/87, [1988] ECR 4635; [1990] 1 CMLR 287.
510 71/305/EEC, predecessor of public services directive 92/50/EEC.

many contractual requirements prohibited under directive 89/665 and the Regulations would not be open to objection under the 1988 Act: including, significantly enough, as Matra agreed, the specification of TETRA that is complained of in this case.

Second, the whole structure and approach of the two regimes was found by the Court of Appeal to be different. Directive 92/50, and thus the Regulations, laid down a very detailed code for the whole tendering process: the 1988 Act merely prohibited certain specific conditions from being included in invitations to tender that were otherwise not regulated by it at all. And the essential conditions of the two actions that are generated by those regimes are different. Damages under the Regulations are at large, indeed in this case alleged to amount to loss of profits of £100,000.000; under the 1988 Act they are confined to the tendering expenses of persons who do submit tenders That is not merely a cap on the damages, but a limitation to a particular type of damages, to one head of loss suffered by one class of plaintiff. Mr Flint summed up this part of the case by pointing out that on the facts of the instant case Matra would, mutatis mutandis, simply have had no claim under the 1988 Act, because its complaint was thing to do with irrelevant conditions. but rather with the form of invitation to tender: its claim was for loss of a chance of profit and loss of reputation and not for tendering expenses; and it could not claim in any event because it had not been a tenderer.

All these considerations confirmed to the Court of Appeal that the judge was right in holding the 1988 Act not to be an equivalent comparator under the *Palmisani* rule, and that there was no such comparator for Matra's claim under the regulations. Therefore under the second rule in *Palmisani*, the limitation period under PWR 31 and PSR 32 was not open to attack under Community law.

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511 Case 31/87, [1988] ECR 4635, 4661 par 37.

§13.17 Public works contract. Challenge by injured low compliant bidder. Breach of Public Works Contracts Regulations 1991, public works procurement directives and the Treaty on European Union. Breach of obligations arising under a tendering contract. Misfeasance in public office in the course of the tender procedures.

Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons (1999)[512]

This judgment arose out of a bid challenge by an aggrieved bidder for the works or trade contract for the fenestration at the New Parliamentary Building (NPB) now known as 'Portcullis House'.[513] The fenestration was not merely a cladding or curtain wall system but an integral component of the building's engineered protection against bomb blast and terrorist attack. Laing Management Ltd (LML) was Construction Manager appointed under the Construction Management Agreement (CMA). The Parliamentary Works Directorate (PWD) effectively fulfilled the role of client although it was sued as a corporate body established by statute. MHP was architect appointed by the client.[514] AFE was design engineer of the facade for the fenestration package. G&T was client's quantity surveyor (QS) and TBV Consult acted as client's agent. The client acted through a project sponsor who was a civil servant.[515] The project team had no express authority from the client to apply a "Buy British" policy: in fact the House of Commons, as a public owner, was under enforceable obligations to comply with Council Directive 93/37 and Articles 6, 30 and/or 59-65 of the Treaty of Rome.[516]

The plaintiff, Harmon, sought damages and made several claims against the public owner: that PWD had failed to observe the Public Works Contracts Regulations 1991 (PWR); was in breach of obligations under the Treaty on European Union (TEU);[517] was in breach of obligations arising from European Procurement Directives;[518] was in breach of obligations in private law arising from an implied tendering contract; and was liable for misfeasance in public office. The European obligations, Harmon contended, required H of C not to discriminate on the grounds of nationality (article 6); not to treat tenderers unequally (articles 6, 30, 59-65); and not to restrict intra-community trade (articles 30 and 59). The preliminary issues for decision by the court included questions as to whether Harmon had been treated equally, openly and fairly, whether there had been discrimination of a "Buy British" nature in favour of the successful contractor and as to the

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512 (1999) 67 Con LR 1. Technology and Construction Court, England, Judge Humphrey Lloyd QC, 29 10 1999.

513 New offices constructed for Members of Parliament, known as 'Portcullis House', situated over and adjacent to Westminster underground station in Bridge Street, Westminster, London SW1.

514 The Corporate Officer of the House of Commons (defendant) is a corporation established by the Parliamentary Corporate Bodies Act 1992 with power to make contracts on behalf of the House of Commons. The post of Corporate Officer is held by the Clerk of the House of Commons who as head of his department is accountable to the House of Commons Commission by an Act of 1978. The two Houses of Parliament established the Parliamentary Works Directorate (PWD), successor to the Parliamentary Works Office (PWO), which was had procured the construction of the NPB.

515 Who had absolute authority to conclude contracts on behalf of the House of Commons within the financial limits set.

516 Issue 3.

517 Articles 6, 30, 59 and 65.

518 Eg, 71/305 and 89/665.

damages or compensation recoverable, such as exemplary or aggravated damages. The issues were mainly answered in favour of the contractor Harmon.

Harmon[519] was a sub-sub-subsidiary of a holding company based in the USA which designs, manufactures and installs cladding systems for buildings all over the world. The 'CFEM' component came from a French cladding company acquired by the holding company in 1993. That company had undertaken major cladding contracts in France and was the main source of experience and expertise within the group's European operations.[520]

Under the CMA, LML was required to advise the House of Commons on effective tendering procedures and on compliance with European Union (EU) procurement directives.[521] That advice would include pre-qualification, invitations to tender, evaluation of tenders received and the management of trade contracts. LML took the lead in preparing the relevant tender documents, although there was input from both client (PWD) and architect (MHP). A Notice inviting applications for prequalification appeared in the *Official Journal of the European Communities* (OJ) on 23 December 1993 on the basis of a design and construct package. The estimated value of the trade contract works was at that time £17m. The award criteria was said to be "overall value for money". Alternative tenders could be submitted "but must be accompanied by a compliant offer".[522]

A pre-qualification meeting was held on 18 April 1994. The interested bidders had been informed of the changes that had been made to the scheme (such as design by AFE rather than design by trade contractor) and of the five fundamental requirements governing its design of the fenestration package namely (1) a long design life (120 years); (2) the aesthetic appearance of the facade; (3) blast resistance; (4) integration with the ventilation system; (5) pressure equalisation. On 25 April 1994 Harmon CFEM Façades sent a letter to LML confirming Harmon's willingness to submit a tender on the new basis. House of Commons relied on these requirements as being the criteria made known to all bidders upon which the House of Commons would base its assessment of tenders. By this time, it was clear that the appointed contractor would not be undertaking a design responsibility for the fenestration package. Accordingly these design requirements might not have been regarded unless compliant tenders had been accompanied by alternative tenders which offered novel proposals.[523]

A fresh notice was published in the OJ on 26.4.94 which invited pre-qualification for the project. Some details had by then changed: a designer (AFE) had been appointed by PWD for the package, thus relieving the tenderers of the design burden. Provision was made for the novation of supply packages. The original award criteria remained, "overall value for money", as did the

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519 Incorporated in England in August 1990.
520 Par. 6-7.
521 See par 4 of judgment and par 1.33 of Schedule 1 CMA between LML and House of Commons.
522 Par. 33.
523 Par. 43.

provisions on alternative tenders. At that time thirteen potential tenderers had expressed interest in the project. [524]

A further pre-qualification presentation was held on 15 November 1994. Literature was handed out which outlined the design criteria being employed (now by AFE) which would be used by AFE to assess any proposals from tenderers. Harmon's sales director was present. He agreed in evidence that the project team emphasised quality and that it was clear that the package would not be awarded solely on the basis of the lowest price. Pre-qualification inquiry documents were sent on the same day. On 25 November Alvis returned the completed documents to LML, followed by Harmon on 29 November 1994, and Seele on 1 December 1994.[525] In Harmon's documents, the name of the company responding was stated to be Harmon Contract (UK) Ltd, although the documents were presented by Harmon CFEM Façades SA. There court was in no doubt that Harmon intended to fabricate the material in France and to run the contract from that country.[526]

On 3 April 1995 the list of interested tenderers had shrunk to just four, including Harmon and Seele/ Alvis.[527] 67. The four companies selected were then invited to tender. In its letter of invitation of 19 May 1995 LML informed the tenderers:

> "If you wish to submit a tender which differs from the strict requirements of the tender invitations or to use materials or sub-contractors other than those specified you must clearly identify your proposal and its effect on the Tender Price or submit an additional, alternative, tender; otherwise the Authority will be entitled to assume that your offer is entirely in accordance with the stated requirements. Any initiative by an individual tenderer will be treated in confidence, but where it is a matter of clarification rather than initiative we will advise the other tenderers".

So far as LML's purchasing manager was concerned there were no discussions about the implications of the last sentence. In the pricing notes there were standard provisions to price the tender as a lump sum contract notwithstanding the use of quantities and also provided both fixed and fluctuating prices. The General Preliminaries within the contract documents also included the following:

> "4.10.2 The tenderer, after consideration of all the criteria which in his specialist knowledge are relevant to the design and construction of the Works, may wish to make proposals for changes to details, dimensions and materials shown on the drawings or referred to in the Specification. Such proposals should be incorporated as alternatives to be returned with the compliant Tender. In no way shall any proposal fail to meet the minimum requirements specified in the Tender Documents and Specification".

The Special Preliminaries provided:

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524 Par. 44 – 45.
525 Seele and Alvis later combined to form a joint venture, known as Seele/ Alvis (par. 60).
526 Par. 56.
527 Par. 64.

"2.2 Any proposed changes to the existing fenestration design, required by the Trade Contractor, shall be raised at Tender stage for discussion, as the scope for change after the award of the Trade Contract is limited due to design programme constraints on other packages."[528]

The tenders were submitted and opened on 31 July. The tenders were all well above the amount previously budgeted: £20,000,000 on a fluctuating basis; £22,000,000 on a fixed price basis. The project QS reported that the difference was 'horrifying', even though it was the most expensive fenestration system that the QS had known of. The cost/m^2 was reported as £3500 as against estimated cost of £1000/m^2. The tender figures were:

Harmon:	£40,479,469 (fixed price)	(H3)
Seele/Alvis:	£45,532,269.82 which was corrected following Seele/Alvis' discovery of an error[529] within their calculations and became £41,152,738.82 (fluctuating);	(H1)
MBM Metallbau Möckmühl:	£56,246,122.96 (fluctuating);	
Joseph Gartner & Co. (UK) Ltd:	£59,125,345.00 (fixed price).	

The prices were higher than expected in part because those advising H of C had not appreciated that it would be regarded as a high risk project which would attract a high margin. Harmon had decided that its margin should be about 60%. There was undoubtedly room, said the court, for substantial reductions in all the tenders (a subject covered at some length in the evidence.) Meetings of the project team was called to deal with this potential cost overrun. A Task force was set up by the project team to reduce the costs of the tenders, whilst maintaining: "(a) security requirements as previously specified; (b) concept of a long life building; (c) use of bronze; (d) environmental requirements and design philosophy; (e) project programme."[530] LML's procurement manager confirmed to the court that Harmon's initial tender was not compliant and that other tenders were similarly deficient, but that these matters played no part in the evaluation of Harmon's tender. It was, said the court, quite usual for such tenders to be subject to numerous reservations.[531] A meeting took place at Harmon's French office, Harmon having been assured by LML that any information disclosed by Harmon would be kept confidential. The costs of alternatives were discussed, and Harmon was told that the revised budget would be about £35m after savings. Harmon was at that time preferred choice of the project team and had given figures for three of the technical alternatives. For Option B (the bronze anodised aluminium system) potential savings

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528 Other relevant parts of the tender documentation are to be found in Appendix B to the judgment. Par. 67.
529 Seele/Alvis's error of £4.2 million was apparently a genuine error and it had no bearing on matters before the court (par. 69).
530 Par. 73.
531 Par. 74.

between £6 million to £20 million were forecast; for Option C (structural aluminium system with bronze castings and cover caps) savings of between £12 million to £20 million were suggested. For Option D (float glass in lieu of low iron glass) a saving of £1 million was offered. After the meeting Harmon also indicated that the removal of a weld and its replacement by a silicone weather seal (Option A) could result in a saving of about up to £2 million. Options B and C were however difficult to pursue since they would require a change of supplier. Gartner had also made a proposal for an aluminium solution which was similarly not viable. Harmon's tender also contained a number of "clarifications". The court returned later to consider the effect of these reservations although they were not thought to be significant at the time.[532]

Alternative design solutions and prices were needed. LML were advised that:

> "The regulations [PWR] do not address how to handle change in technical specification, however, I would suggest that unless it is a major change that you do not readvertise rather that you re-tender with a new specification to all the list of tenderers even though you know some may not be able to bid as a result of the change. *This ensures fairness and openness...* ".[533]

A design report of 22 August 1995 suggested that the design should be altered in order to reduce costs, such as by abandoning welding as a weather seal and using instead a wet silicone sealant on the lines suggested by Harmon (above) as one of its technical alternatives in its tender. The specification was altered to produce what was known as Option A and on 30 August 1995 LML invited re-tenders. Harmon had been told of this beforehand. However it must not be forgotten that other changes were made as part of the redesign which reduced the cost of the scheme and are not the subject of this action.[534] On 7 September LML met Harmon and Seele/Alvis to explain the design changes. The drawings had been sent on the same day. The possibility of further alternatives was raised. On 11 September 1995 LML invited Harmon to submit a revised tender. Harmon was told that it might again put forward other alternatives (which obviously had to meet the basic principles) in the following letter:

> "As Construction Managers for the above Project and on behalf of the [owner], we invite you, in accordance with the Briefing Meeting to revise your submission for the above mentioned package of works. As previously stated our aim is to effect significant cost savings on this package and to enable you to make these savings we enclose the following:....
>
> .....
>
> (iv) Pricing Schedule (Revised Submission)
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> All other Tender Documents remain as previously issued ..., or, as revised during the Tender period.
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> ....

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532 Par. 69-78.

533 This advice was given by the 'Euro Information Centre', see par. 79.

You must not tell anyone else what the Tender Price is, or will be, even approximately, before the expiry of the time limit for the delivery of tenders. The only exception is if you need an insurance quotation to calculate the Tender Price, you may give your insurance company or broker any essential information they ask for so long as you do so in strict confidence. You must not try to obtain information about anyone else's tender or proposed tender before the time limit for delivery of tenders. You must not make any arrangements with anyone else about whether or not he should tender, or about his or your Tender Price.

The Authority at its sole discretion may refuse to consider any tender which is incomplete or qualified. If you wish to submit a Tender which differs from the strict requirements of the tender invitations or to use materials or subcontractors other than those specified you must clearly identify your proposal and its effect on the Tender Price or submit an additional alternative Tender, otherwise the Authority will be entitled to assume that your offer is entirely in accordance with the stated requirements. Any initiative and any individual Tenderer will be treated in confidence, but where it is a matter of clarification rather than initiative we will advise the other tenderers.

Would you please confirm to the undersigned that it is your intention to submit a bona fide tender in accordance with these instructions and that you can comply with the return date of Monday 25 September 1995."

This further invitation to tender became an important element of Harmon's claim for compensation for the public owner's breach of the tendering contract.[535]

Harmon's representative, said the court, was absolutely right when he said when cross-examined that at the time this letter was received it was clear from his meetings with the project team that the emphasis had shifted to cost as the dominant factor:

> "Well, the project team was, if you will, moving the goal posts. They were changing the design. They were changing what we were tendering for. They were trying to achieve a budget and they were doing everything that they could think of to achieve that budget, and that was the emphasis that was expressed to us at every meeting."

This subtle change in the contract award criteria will become another important element in Harmon's claim against the owner.

When Harmon's representative was asked about other considerations being still in play and effective considerations in the tender process he replied:

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534 Par. 80.

"Well, they had been examined, I would say, from our meetings in terms of what the project team and the client was willing to compromise on in order to achieve cost savings."

The letter was, said the court, plainly telling tenderers that the owner was now interested in the tender which was the cheapest, as evidenced by the following words: "As previously stated our aim is to effect significant cost savings on this package.... ", with a reference back to earlier discussions in which this had been made plain. Harmon submitted that a second tender was not sought, merely a revised submission and not an offer capable of acceptance, but the court did not agree. The terms of LML's letter were clear to the court: a tender or offer was being requested. In addition the phraseology had changed so that, if anything, it was clearer that a tenderer was not entitled to put forward a new design. This was also the view of the expert in curtain walling called by Harmon. Furthermore tenders were being sought for a revised design which was to replace the "base scheme" and which was to be the basis for evaluating all tenders. H of C was avoiding having to re-advertise the fenestration package. The new design was thereafter treated as if it had been advertised. Therefore, in the court's judgment this second request for tenders was more than simply a pricing exercise; it was a request for a tender capable of acceptance.[536]

Seele/ Alvis's quotation of 22 September offered an option, referred to as Option B2, and a saving of £4,085,593.25 compared to its original tender. It concluded with the words "COMMERCIAL IN CONFIDENCE" which words, the court thought, had prevented H of C obtaining comparable bids from the other tenderers. Option B2 offered two important and technically attractive features: first, Options A1 and A2 involved the use of wet silicone seals to provide weatherproofing whereas Option B2 offered a welded seal which was preferred by AFE on the grounds that they had two main advantages: longevity and certainty, ie ease of maintenance; secondly, it was similar to Option A1 and would therefore would have taken less time to modify the detail design drawings, as compared with Option A2; thirdly, it avoided the need to weld aluminium bronze to brass.[537]

On 25 September 1995 the results of the second round became known when four re-tenders were opened. Harmon offered a fixed price of £37,875,746 for option A. It was presented in the form of a modification of the original tender (ie as stipulated by LML) and purported to be a "fully compliant submission". It was just as much an offer capable of acceptance as the first tender. This second tender was £2,589,634 lower than the first tender. The adjustments were to be found in Harmon's internal documents. Seele/Alvis's tenders were: for Option A on a fixed price basis £38,522,053; with fluctuations £34,889,393. It offered Option B at a fixed price of £37,237,447, with fluctuations at £33,604,787 and the variant option (B2) for the sum of £36,246,705. In summary therefore the position was:

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535 See par. 216. This was the first of three re-invitations to tender which created a tendering contract when Harmon submitted its tender. The others took place on 2 and 30 October 1995.

536 Par. 81.

537 Par. 82 – 84.

	Option A	Option B1	Option B2 (variant)[538]
Harmon	(fixed) £37,875,746.00 [Later reduced to £33,969,939] £31,448,354 used in cost comparison	No Tender	
	(fluctuating) No Tender [Later submitted at £30,969,968]	No Tender	
Seele/Alvis	(fixed) £38,522,053.00 £37,211,679 used for cost comparison	£37,237,447.31	(Fixed) £36,246,705.00 £34,559.127 used in cost comparison
Seele/Alvis	(fluctuating) £34,889,393.96	£33,604,787.31	
Gartner	(fixed) - £44,945,131.00	£44,635,780.00	
	(fluctuating) £39,082,722.00	£38,773,371.00	
MBM	(fixed) £49,808,526.00	No Tender	
	(fluctuating) £37,875,746.00	No Tender	

Seele/Alvis's fixed price tender for Option B was fractionally lower than Harmon's tender for Option A. Harmon then thought that Option B would result in a higher price. (MBM was thereafter excluded from further consideration.)[539]

Harmon's representatives met LML on 29 September 1995. The purpose of the meeting was to investigate Harmon's pricing. Harmon was asked for savings and for a price for Option B. LML had telephoned Harmon to inform it of the other prices that had been received. Harmon was told that all other tenderers were being asked to put in lower prices and alternatives. LML wrote to Harmon on 2 October 1995 confirming its requirements for re-tender.[540] Accordingly Harmon replied on 10 October reducing its fixed price for Option A1 to £33,969,939 (by reconsidering certain elements so as to arrive at £35,287,626, and then making a commercial reduction of £1,317,687. In its letter of

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538 "Option B2 is an Alvis Seele option which has been presented and developed solely by Alvis Seele and other tenderers have not been given the option to price" (Noted at a meeting by Ove Arup's Project Manager, Par. 90).

539 Par. 85.

540 This was the second of three re-invitations to tender which created a tendering contract when Harmon submitted its tender. The others took place on 11 September and 30 October 1995. See par. 87 and par. 216.

10 October 1995 Harmon asked for a meeting to discuss further reductions. Two days later Harmon put forward a price on a fluctuations basis of £30,969,968. This reduction was about £3m less than the second tender. Harmon also offered a further saving of £970,000 if it were awarded the roof light package as well as the fenestration package. These letters were presented as revisions of the tender of 25 September and in the court's judgment each was a further offer which replaced the previous tender and offer.[541]

Judge Lloyd found it surprising that both Gartner and Harmon were encouraged to submit a revised price on either Options A or B1 since both the architect and the fenestration engineer thought that Option B2 was so technically superior to the engineer's own design. The expert evidence made it clear that B2 was technically superior to Options A1 and A2 and was buildable. The engineer agreed that from a simple, narrow technical perspective there was no point in asking for a re-tender on Option A1. However by this stage there was an increasing awareness of the need to comply with the PWR so in Judge Lloyd's view the reason was to generate the appearance of a competitive process whereby Option B2 would be eligible for selection. The pressure became even greater by the end of the month. Judge Lloyd did not consider that Harmon was to be criticised for not submitting a price for Option B. It was not obliged to offer one.[542]

The task force met on 10 October and worked on producing a report throughout October 1995. Notes were made of the meeting. The engineer was said to have expressed "preference ... to go British if possible." However as there was a split view amongst the project team they might suggest proceeding with both solutions which would give "the Committee [ie the AWC] the option to steer towards Alvis (UK based company)". The architect confirmed that the project team knew that Parliament and the AWC would have liked to have seen as many British companies awarded contracts on this package as possible. The architect was seen as advocating "Buy British" and, when questioned about it, did not deny that the AWC was told that not only was Seele/Alvis's proposal technically better but that it was put forward by a British company which was in its favour. The AWC had expressed a preference, if possible, to have a British contractor appointed. On 13 October 1995 LML sent to the engineer's project manager a cost comparison of all the options for the fenestration package submitted by each tenderer. This showed that Harmon's tender for Option A1 was the cheapest at £31,448,354. By comparison Seele/Alvis' tender on the same basis was £37,211,679. Option B2 was only offered by Seele/Alvis at £34,559,127 (fixed) and other tenderers had not been asked to price for same.[543]

A few days after 12 October a meeting of the project team took place at which it was accepted that Harmon was the front runner, and the architect said that options A1 and B2 were technically very similar, but LML felt that nevertheless since the package was over budget it was necessary to see whether pursuit of the others might reduce the cost. A "Cost Saving Review" was produced dated 18 October. Two packages had been retained for further programme and management appraisal. The first Harmon whose estimate was priced at £29.7m for Option A1 and the second from Seele-

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541 Par. 87.

542 The letter of 11 September asked only for a revision of its previous submission. Par. 88.

Alvis was priced at £32.4m for Option B2. These tenders compare with the budget of £20m and the earlier lowest tender of £40m. This conclusion was reached, said the report, because Options A1 and B2 estimated respectively by Harmon and Seele-Alvis offered optimum combinations of capital cost, maintenance cost, risk of price escalation and designs that were technically superior to Option A2. The designs favoured by the two contractors differed in their manufacturing method and consequently in their maintenance requirement. The designs also imposed different magnitudes of risk to the total project. The Task Force attempted to quantify the risks with reference to technical, commercial and maintenance parameters and the design development. They concluded that the risk of cost escalation through design development should be included in the project budget and this meant allocating a budget of £32.7m for Harmon/CFEM and £34.8m for Seele-Alvis. The committee [ie the AWC] was asked to endorse the increase in budget including design development contingency from £21m to £34.8m (i.e. the highest acceptable option plus a 7.5% design development risk). The committee was also asked to endorse the Task Force's next actions i.e. to test the management and programme capabilities of Harmon/CFEM and Seele/Alvis and to technically audit the Gartner proposal.

The report concluded that Option A1 by Harmon at £29.7 million and B2 by Seele/Alvis at £32.4 million represented the most advantageous solutions and a substantial improvement on the tenders received in July 1995. Vigorous discussions should proceed with both contractors to test their project programmes and management.[544]

The project team's inquiry into Harmon's managerial and technical abilities was expected by Harmon to have been used in the evaluation of its tenders. The project team met on 25 October. By this time, according to the court, the project team realised that they were heading for a breach of PWR. They noted the need for clear reasons to reject any of the tenders. The problem was: how could they get a comparative offer for option B2 so as to avoid Seele/ Alvis's alternative bid standing out as a single offer? The project QS was concerned about the decision that the task force should attempt to quantify the risk involved in placing the order for the fenestration package with each individual tenderer, by the addition of a percentage allowance to the tender price. The percentages would be used to weight the prices of the tenderers to indicate the differential in the team's assessment of risk as between the different tenderers. The project QS accepted that the team should deal with differences in technical and management capabilities of the three tenderers, but he saw that as a matter of subjective judgment which could not be converted into money which is not subjective. He thought that the team was "straying into a very dangerous area". The QS warned of its misgivings at a meeting on 26 October.[545]

Both the architect and construction manager made independent assessments of the tenders received, each adopting a points scoring system that had in fact been dropped by the project team some time earlier. The court criticised the architect's subjective assessment efforts as being biased against Harmon. The court was also critical of the lack of any technical appraisals of completed

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543 Par. 89-90.
544 Par. 91-92.

projects done at the pre-qualification stage. This should have been done so that the short list was properly compiled, and the fact that such an appraisal was not done could only mean that Harmon's good reputation had preceded it. It was therefore all the more surprising that the project team maintained at trial that Harmon was not capable of organising the requisite teams and facilities.[546]

H of C's project sponsor noted on 25 October that the project team had recommended that further work should be concentrated on Harmon's A1 tender, being the lowest of the three for the revised tendered option, and Alvis' B2 option. He had instructed, however, that Gartner should not yet be ruled out. He had agreed that the A2 (bolted "shorter life" version) should not be pursued further. Similarly Option B1 had been dropped because it involved more redesign. He had been concerned that there was no competitive price for the Alvis B2 option. The advice had been that the project team could not have put this proposal direct to the other two companies because it had been made as a 'commercial offer'. However, it had been agreed that Gartner and Harmon should be asked if there was any savings still to be achieved on the original tender figures. On the basis that there was little between the original scheme and the B2 option it would have meant that, if H of C was eventually to accept Alvis's offer, it would have been as a result of competition. When questioned in court about this memorandum, the H of C's project sponsor agreed that single tender packages were not permitted under PWR. From that point it became clear to the court that the H of C's project sponsor thought that Option B2 was so different from the others that it could not be treated as a permissible alternative or variant but as a new proposal which under the PWR required competition. He had at one time thought the way out might have been to obtain revised prices for the base scheme but decided against that route.[547]

Following the meeting of 25 October the team decided that in order to ensure competition all three remaining tenderers would be asked to tender again on both Options A1 and B2, but for the latter the engineer was to produce a scheme that embodied the design concept of B2 without infringing Seele/Alvis' rights protected by the "commercial in confidence" tag. However the project sponsor got cold feet, changed his mind and ultimately decided that the tenderers were all to be asked to re-tender with Seele/Alvis being asked to reprice Option B2, and Harmon and Gartner Option A1. The effect of the project sponsor's instruction was that H of C had no basis upon which there could be a "like for like" comparison of the revised tenders of Harmon and Gartner for Option A1 and of Seele/Alvis for Option B2. This was recognised by the construction manager to be like comparing "apples with pears". It was hard, said the court, not to accept Harmon's submission that the tendering process was by now a charade. The project team had already decided that Option B2 was technically superior to Option A1 and that accordingly Seele/Alvis would be recommended as the successful tenderer. Nonetheless they went through the motion of asking for Harmon's best price for Option A1 knowing that it was not going to be accepted.

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545 Par. 96-98
546 Par. 99.
547 Par. 100-101.

The H of C's project sponsor wrote to the construction manager on 3 November seeking to justify his decision as to the basis of re-tendering. It was acknowledged that it was not possible to obtain tenders comparable to Seele/Alvis' tender from either Harmon or Gartner. In the court's view the letter also plainly gave clearance to the task force not to make cost the dominant factor as the key issue had then become whether the package would be completed in time. (At this time Westminster Underground station was to be handed back by LUL in January 1997 - a date that was missed by a year.) The project sponsor confirmed that but for the time factor the package might have been retendered. Thus "management capabilities" had become of great importance and were to be an important criterion.[548]

In accordance with the H of C's project sponsor's instruction LML on 30 October requested Harmon and Gartner to submit their current prices for Option A1 (the welded solution as opposed to the silicone sealant solution) and Seele/Alvis was similarly asked for its latest price for Option B2 (discounting any bolted alternative).[549] Each tenderer was requested to formally submit to the Parliamentary Works Directorate by 11:00 hours on Friday 3rd November 1995 its current offer (with detailed financial and programme breakdown). Seele/Alvis was asked to price for Alternative Option (B2). The reference to the bolted alternative was highly relevant said the court. Again the letters clearly sought a tender or offer, and in the case of Seele/Alvis without reference to another design.[550]

Harmon's prices for Option A1 were £31,262,154 (fixed price) and £29,562,154 (fluctuating),[551] which was in the court's judgment an offer which replaced the previous tender of 12 October as it was presented in a form of a revision or amendment to that offer. Therefore as a result of the fourth round H of C then had in law only two offers available to accept from Harmon: Option A1 with either a fixed or a fluctuating price. Seele/Alvis's prices for Option B2 were £34,153,276 (fixed) and £32,363,375 (fluctuating). They similarly replaced the earlier offers. Subsequently LML told Harmon that it was on the short list with Seele/Alvis. LML said that the feedback was that the facade engineer and the architect thought that Harmon's system would ultimately cost more because it would involve countless drawings on the part of the engineer. LML told Harmon that Seele/Alvis was higher but did not explain the differences between the options. Harmon's sales manager tried to get the architect, engineer and LML to confirm that its bid was compliant and that it would be awarded the contract, but without success. When questioned in court about its letter to Harmon, LML agreed that Harmon's tender was competitive and that although it might not have been fully compliant any non-compliance in its final tender was not a factor which the task force had taken into account in preferring the Seele/Alvis offer. This was undoubtedly the case as every tenderer had not complied strictly with the invitation in some respects but none was rejected or even the subject of material criticism at the time for non-compliance (nor indeed was it a reason for rejecting Harmon's tender). Harmon immediately asked LML to explain why it was not accepted. The only

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548 Par. 105.

549 This was the third of three re-invitations to tender which created a tendering contract when Harmon submitted its tender. The others took place on 11 September and 2 October 1995. See par. 106 and par. 216.

550 Par. 106.

551 See its letter of 2 November.

answer that Harmon received was a letter dated 22 November 1995 from LML offering a response "in due course", but no response was ever forthcoming despite a further letter from Harmon.[552]

The tenders now stood as follows:

	Option A1	Option B2
Harmon	Fixed: £31,262,154 Fluctuating: £29,562,154	
Seele/ Alvis		Fixed: £34,153,276 Fluctuating: £32,363,375

Discussions with Seele/Alvis started on 23 November as soon as H of C's project sponsor had formally decided in its favour. The court was sure that the project team had evaded giving Harmon an answer to what had without doubt taken place as it would have revealed that although Harmon's tender was competitive on price it was being compared with a materially different proposal which Harmon had not been asked to price.[553] The task force report was in its final stages. On 9 November 1995 the task force leader drafted a report as follows. Against an item for "maintenance costs" the engineers had inserted £400,000 for Seele/Alvis (B2) and £2,090,000 for Harmon (A1) and for Gartner (A1). These figures which were produced by the engineers (not the QS) and were questioned by LML. LML annotated its copy: "How is this calculated? In 19 Oct '95 report the difference in maintenance cost was £90,000. It is now £1600000." The adjustments for Risks had not been agreed. LML's view was that "all risks are to be controlled by the project team". LML were unhappy with the course of action being taken. On 10 November they wrote to OAP observing that some small doubt existed as to the precise figures which should be included as the Base Offer, but that these figures did represent Tendered values with limited adjustment/ assessment. What these figures showed was that the most competitive submission by a considerable margin was that of Harmon. In other words Harmon was lowest bidder. The QS report at that time also indicated that Harmon was lowest on a comparison of fluctuating prices.

Harmon	Seele/ Alvis	Gartner
£33,857,000	£35,364,000	£39,401,000

It can be seen from the notes revealed in court that the project team was at this stage dividing over the issue of who should be awarded the contract. The architect and engineer wanted the contract to be awarded to Seele/ Alvis. The construction manager was willing to support the architect and engineer but was concerned that the 'risk assessment' was either inauditable or was not compelling in the superiority of the Seele/ Alvis tender. The QS would not accept the 'risk figures', insisting that the true tender amounts should be shown in the final report. From the task force leader's viewpoint, it seemed that there was a divided position: A/E on one side; the QS and CM on

552 Par. 107-108.
553 Par. 108.

the other. He sided with the A/E who were adamant that the Seele /Alvis Option B2 was the preferred technical solution.[554]

The task force report recommended on 20 November that the Seele/ Alvis tender for Option B2 should be accepted. The report made financial comparisons of the bids as follows:

	Harmon		Seele/ Alvis
	£29,562,154	Fluctuating Price (3/11/95)	£32,363,375
	N/A	OMIT Extra for change to secondary glazing in Seele/Alvis submission C.2.2	(£62,804)
		OMIT Extra for change to hinges in Seele/Alvis submission C.E.3	(£199,506)
	(£682,000)	LESS Changes to novated packages	(£701,000)
		LESS Saving for 10% advance payment Seele/Alvis fax 7/11/95	(£323,634)
	£28,880,154		£31,076,431
	£16,063 £883	ADD Savings not taken as discussed 6/11/95 Low E Coatings D.1.2.a D.1.2.b	£83,273 £64,536
	£22,488	Argon filling D.1.4.	£10,756
	£68,625	Machining B.1.4.	Not priced
	Included	Add Revised Interlayer A/11/H	£136,000
	£28,988,213		£31,370,996

The report observed that the Harmon and Gartner offers were for the same product. As the Gartner offer was significantly higher than Harmon it was discounted from further discussion. The product offered by Seele-Alvis, said the report, was an alternative and of a superior quality to that priced by Harmon. 'Value for Money' aspects would be dealt with later in the report. However, the report was at pains to point out that the figures stated in the above table were for tender comparison purposes only. In due course it would be necessary to recalculate the budget for these packages to include

[554] Par. 109-113.

or exclude certain specific items, contingencies, fees and any additional management costs which might have been appropriate. These extra costs had not been fully assessed at the time of the report but the Task Force agreed that they should not affect the choice of trade contractor.

The report went on the deal with the quality issue. It had been stated in the report of 16 October 1995 that the quality of the technical option priced by Seele-Alvis was superior to that proposed by Harmon. Functionally, said the report, the Seele-Alvis option very closely resembled the Base Scheme tendered in August 1995. The Task Force considered the design life of this facade system to be 120 years as was stated in the original brief. The offer by Harmon was to a design conceived in the Task Force to provide a cheaper solution using a less robust silicone sealing system which would also have brought a greater maintenance liability. The Seele-Alvis option demonstrated its advantage in maintenance costs. For Seele-Alvis the major maintenance interval for the facade system would be 50 years. For the Harmon priced option major maintenance would be required every twenty five years with further inspections needed every twelve and a half years. The cost of this work would have been significantly greater than that required for the Seele-Alvis alternative and was likely to outweigh the capital cost advantage of the lower bid. In addition to cost, the maintenance requirement of the Harmon solution would have meant a severe disruption with the probable loss of use of each room for a period of two weeks once every twenty-five years.

The Task Force had appraised and compared the technical and managerial capabilities of Seele-Alvis and Harmon. The output from this appraisal was that Seele-Alvis were ranked equal first in technical capability and second in managerial capability. Harmon were rated third in technical quality and third in management capability. The supply and erection of the facade was one of the elements which were critical to completion of the project on time and therefore the ranking of the facade contractor was an important criterion in the selection process. The cost implication of delaying the project was in the order of £250,000 per week. Preventions of delay through good performance would obviate the severe impact of such a cost penalty wherever it fell.

The report concluded that the Gartner solution could be discounted on grounds of cost. The final conclusion therefore rested on balancing issues of the superior quality of the Seele-Alvis option with the lesser capital cost option priced by Harmon. The task force believed that those issues weighed in favour of Seele-Alvis being the offer which gave best value for money on long term maintenance and performance grounds. They therefore recommended that the facade engineers should proceed with drawings for the Seele-Alvis solution. They had also asked LML to enter into talks with the material suppliers and Seele-Alvis to satisfy the task force that the project could proceed without further programme delay. The client's endorsement was sought for these actions.[555]

The events leading to the preparation of the task force report left the court in no doubt that the objective or "game" as understood and endorsed by the task force leader, architect and engineer was to ensure that Seele/Alvis was presented as the preferred tenderer largely by "fudging the

figures", both by introducing elements of "soft costs" which had previously not been considered either at all or as material and by the substitution of figures where they could or would not be supported by the QS or which were highly subjective. The effect was marked as the difference between Harmon and Seele/Alvis widened to about £2.4 million. The task force leader obviously wanted the task force to recommend the acceptance of Seele/Alvis and when faced with the prospect of lack of unanimity sought clearance from the client's project sponsor to produce a majority report. It was clear to Judge Lloyd that the task force leader had been appointed for this very purpose, as the only member of the task force who was thought by LML's procurement manager as possibly in favour of a British contractor. The court did not accept that the task force leader was the only party so biased. The architect was plainly biased towards a UK contractor and towards Alvis and the facade engineer wanted Alvis for its skills. In Judge Lloyd's view Harmon was entirely right to have put to LML's procurement officer that the task force leader's original draft was "a travesty of the truth", and to describe this part of the tender process in November 1995 as "a charade". Judge Lloyd said that both descriptions were apt and accurate. Harmon's contention was accepted: the final report was slanted towards Seele/Alvis, and, on the evidence before the court, the task force leader was determined that the tender of Seele/Alvis would be recommended. H of C did not call the task force leader to explain what he had done or why he had done it. Thus the project team recommended Seele/Alvis even though its tender was about £2.4 million higher than Harmon's price of £31,370,996 without any calculation to support its conclusion that it represented "best value for money".[556]

The client's project sponsor reported to the Director of Works for PWD, noting that the task force recommended proceeding with the Alvis/ Seele bid for its better value for money and lower risk. There remained matters for negotiation with Alvis/ Seele. Harmon had made sure that all members of the project team were aware of their continuing interest and they had undoubtedly invested considerably, including in the mock-up. However, said the report, the EU advertisement for the project set "overall value for money" as the criteria for award and allowed alternative tenders. LML had suggested taking legal advice, but the project sponsor thought such advice was unnecessary since, at this stage, they were not actually rejecting Harmon's offer. The Alvis/ Seele product was thought to be superior. When the cost comparison was made with Harmon's original bid of £40.5m, to which it was analogous, it was much less expensive. These last few words particularly caught the court's attention. It was a further example of the client not comparing like with like and was very misleading. The H of C's project sponsor's report put a "remarkable gloss on the facts".[557]

The project team was asked to "improve" its report, which it did on 19 December. The figures had been re-manipulated as follows:

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555 Par. 114.
556 Par. 115.
557 Par. 117-118.

	Harmon/CFEM	Seele/Alvis
5.1 Tendered Figure (3 November 1995. Tenders, Fluctuating Prices and acceptance of all possible saving items.)	£29,562,154	£32,363,375
5.2. Adjusted Tender Figure	£29,562,154	£32,363,375
Changes		
[Secondary glazing]		£(62,804)
Hinges change		£(199,506)
Novated Adjustment	£(682,000)	£(701,000)
Advanced Payment (20%) Included		£(679,631)
Low "E" Coating	£16,063	£83,273
	£883	£64,536
Argon Filling	£22,488	£10,756
Machining	£68,625	Not Available
Interlayer Included (Estimate)		£136,000
Facetting	£218,750	£98,597
	£46,875	£82,014
Lightshelf	£953,125	£167,349
Total Adjusted Tender	£30,206,963	£31,362,959
5.3. Likely Order Value		
Adjusted Tender Figure	£30,206,963	£31,362,959
Price Risk/Negotiation[558]	£500,000	£500,000
Likely Order Value	£30,706,963	£31,862,959
5.4. Total Capital Spend		
Likely Order Value	£30,706,963	£31,862,959
Contract Escalation up to:		
Const. Issue Drawings	(5%) £1,535,348	(2,5%) £796,574
Contingency Post Contract	(5%) £1,535,348	(5%) £1,593,148*
	£33,777,659	£34,252,681
5.5. Risks/Soft Costs		
Total Capital Spend	£33,777,659	£34,252,681
Travel Costs (differential)	£50,000	
Additional Contingency (2.5%)	£767,674	£796,574
Supervision (differential)	£100,000	
Total with risk/soft costs	£35,553,333	£35,443,255

The project QS was required to give evidence in connection with this report in the light of his previous contribution to the work of the task force. He said that the figure of £679,631 which had been deducted from the Seele/Alvis price on account of advanced payment had been calculated on an assumption of 20% whereas previously he had assumed that 10% had been included in Harmon's tender. The addition of £150,000 for the interlayer had been reduced to £136,000 although he did not know of any good reason to do so. Furthermore although he had allowed an addition of £273,000 for the lightshelf this had become £167,000. The QS had used £300,000 for the lightshelf in adjusting Harmon's price which he had thought sufficient. He thought that the Seele/Alvis allowance should be £273,713. It was now £953,125. He said that he would have asked that the original figures should be retained.

The incoming replacement project QS had also been unhappy about the favourable treatment of the Seele/Alvis tender in the case of the advanced payment and the lightshelf. Had the items for the lightshelf and the advance payment been so stated, the balance in favour of Harmon would have been about £1 million. In this report the differential for maintenance had reverted to £424,000, as compared to £1.6 million in the November report.

The report prepare by Harmon's expert witness (a QS) contained what the court thought to be a useful summary and discussion of the changes. He said that from beginning to end the tender process conducted by the project team was unusual at all stages and that he had not seen the like before. He had seen nothing in the documents that he identified as a traditional tender evaluation process. Judge Lloyd entirely agreed with these views. Although there were naturally various ways in which tender evaluations could be carried out and reported never had Judge Lloyd seen one such as this. Even if it had not been slanted it would have been unusual. Judge Lloyd would have expected something like a rating or scoring system such as that proposed by LML (and partially used by it) which would have been aligned to the ranking of the criteria (and carefully weighted) and published alongside them so its operation could not override the ranking and so that the tenderers could see that it had been operated fairly. To try to put sums of money on subjective judgments, as was proposed on 25 October, was not sensible, as LML's procurement manager had said when he confirmed that the team had not agreed in advance the criteria that were to be used to assess the tenders.[559]

Effectively, the decision was made to award the contract to Seele/ Alvis on the basis of its tender option B2 by the task force report of 20 November 1995.[560] However, the court was given important evidence of events during the period December 1995 to July 1996 which showed the task force's intention to "bridge any gap between the Seele/ Alvis tender and that of Harmon"[561] so that the Seele/ Alvis bid appeared to be the more competitive of the two.

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[558] This figure covers the commercial issues which will be addressed in the Post Tender dialogue, such as Terms and Conditions qualification/clarification included in their original submissions.
[559] Par 122.-123.
[560] See par. 114.
[561] Judge Lloyd, par. 124.

The task force report was further revised in January 1996. At the same time Harmon, prompted by LML, made overtures to LML in an attempt to keep negotiations open but LML declined to respond.[562] Meanwhile H of C altered its policy on the terms upon which tenders had been invited.[563] During the tender period it had been made very clear to all tenderers that alterations to the terms would not be entertained. Once it became clear to Seele/Alvis that it had been successful and that the contract was virtually in the bag and that H of C could not have afforded further delay, it took a hard line in the negotiations. Seele/Alvis was able to exploit the fact that the preferred Option B2 was its proprietary product to which changes would not be allowed. LML was so concerned about Seele/ Alvis's stance that it seriously considered the risky alternative of re-inviting tenders based on contractor's design.

Two changes were made at this time in the basic tender conditions: Seele/ Alvis was allowed a limited degree of negotiating rights with the supply contracts novated by H of C; and its liability to H of C in respect of suppliers under the trade contract was limited.[564] The client's project sponsor thought it necessary to take legal advice on these points and on the possible implications of awarding the contract to Seele/ Alvis (contrast with earlier decision not to obtain legal advice). Soon after an assessment was made of what Harmon's wasted bid costs might have been, prompted, in the court's opinion, by the belief that Harmon might be entitled to compensation.[565] Harmon complained again to LML about its lack of response to Harmon's approaches and confirming that it had expected the tendering process to "have been on a fair and equitable basis".[566] It was clear from the documentary evidence that the project team stalled in advising Harmon of the position of its bid in relation to Seele/ Alvis's bid, all in response to legal advice given at the time. LML wrote to Harmon in terms which appeared to the court to be untrue. The project team was not at that time truly assessing tenders because it had already been instructed by the client to follow the recommendations of the task force, ie to award the project to Seele/ Alvis.

By April 1996 Harmon was now too receiving legal advice having noted a speculative article in *Building* magazine that the contract was to be awarded to Seele/ Alvis In fact Seele/ Alvis received two letters of intent dated 4.4.96 and 16.4.96, but Harmon, on legal advice, was not informed until the contract had been signed. The court concluded that this delay in advising Harmon of its failure to secure the contract was designed to prevent Harmon seeking to enjoin the contract award process. It seemed that H of C was well aware that it had not, through its project sponsor, followed the correct procedures.[567]

There was evidence of collusion too between the client's design engineers and a parliamentary trade lobby to secure Alvis as the UK-based contractor for the fenestration package in the material

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562 Par. 126.
563 Par. 127.
564 Par. 127.
565 Par. 128.
566 Par. 129.
567 Par. 133.

which was provided for a Ministerial statement (although this was a Parliamentary not Governmental project).[568]

The contract sum was £33,686,066.95 and was signed by the Clerk to the House of Commons on 8 May 1996. Notice of the contract was given on 14 May 1986.[569] The criterion for the contract award to Seele/ Alvis was "overall value for money". Harmon was informed by LML of its failure to win the contract on 16 May 1996. On 24 July 1996 Harmon requested reasons for its lack of success as required by PWR 22(1).

LML set out its understanding of the basis of the decision to award the contract to Seele/Alvis in a draft letter which was forwarded for advice from H of C's solicitors. The salient factors listed by Laing were:

> "(1) The alternative tender from Seele/Alvis was technically and commercially superior to the base scheme design.
> (2) The alternative design also offered significant improvements in respect of long-term maintenance when compared with Harmon's submission.
> (3) Seele/Alvis' modern factory and manufacturing techniques were superior to those of Harmon.
> (4) Seele/Alvis' welding proposals and facilities were of particular interest compared with those of Harmon.
> (5) Seele/Alvis' staff were thought to possess the best technical and managerial skills of all those tenderers interviewed.
> (6) Although Harmon's pricing submission was competitive, when other costs including long-term maintenance and optional items were added, Harmon's submission proved to be uncompetitive."[570]

The eventual reply to Harmon suppressed factors (1) and (2) above (which in the court's opinion were the decisive reasons - as well as factors such as (4)) and introduced reasons which the court considered never formed part of the decision. The client's project sponsor, who took and was responsible for both the decision and for the letter, characteristically in the court's view, gave no satisfactory explanation for not telling Harmon the true reasons for his decision why they were not awarded the contract. The court was in no doubt that the client's project sponsor had been patently evasive in answering questions and had deliberately decided:

> "(a) not to mention the fundamental reasons for not awarding the contract to Harmon;
> (b) to remove references in the letter which might lead back to "overall value for money" since by then he knew that he had been wrong not to follow [colleague's] advice and to give proper criteria and that those words did not comply with the law (I deal later with whether they do or do not comply with the law);

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568 Par. 134.
569 Par. 135.

(c) not to state that the successful tenderer had won with an option which he had decided should not be available to any other tenderer even though it was materially different so that there was no tender comparable to it;
(d) not to express the reasons in the terms of the OJ notice or (if it were the case) of identified selection criteria or minimum requirements."[571]

Even the reasons given, said the court, did not stand up to scrutiny. Harmon was not creating a new manufacturing facility but re-activating one that had been still in use. It had a worldwide reputation for cladding, curtain walling and fenestration systems, and as Harmon's expert had said in evidence, its skills lay in project management and in starting from scratch so it was well able to revive a dormant factory. As for engaging "subcontract support for significant elements of the manufacturing process", LML's procurement manager admitted that this was untrue. Harmon had proposed to do no more than the successful contractor: each was a company that was the vehicle which would not be carrying out anything other than administration (and in the case of Seele Alvis Fenestration Ltd even that was going to be handled by other companies) and which would subcontract to other associated companies all manufacturing, assembly and installation operations. Seele Alvis even subcontracted the machining of all the aluminium bronze components. Harmon's expert had rightly said that it was common for welders to be acquired and, the court was sure that Harmon would have had no difficulty in securing sufficient competent welders who could if necessary be brought to the standards required.

Accordingly, said the court, H of C did not comply with Regulation 22(1) of the PWR either in giving the true reasons or in giving the reasons by reference to the basis upon which it was purporting to award the contract to Seele/Alvis and in so doing, once again, failed to treat Harmon fairly and openly. This is not an example of a semantic dispute about the expression of reasons. One has only to look at the successive reports of the task force to see that there never was any clear basis and that the reasons varied. The first report of 18 October had said:

"Options A1 and B2 estimated by Harmon/CFEM and Seele-Alvis offer optimum combinations of capital cost, maintenance cost, risk of price escalation and designs that are technically superior to Option A2."[572]

The report had proposed that the next stage was "to test the management and programme capabilities of Harmon/CFEM and Seele/Alvis...". So at that time both A1 and B2 were thought level in terms of capital cost (including the so-called "soft costs") and maintenance costs but the second report of 20 November had fastened on to the superior quality of option B2, its low maintenance requirements and less risk of cost escalation in design development, and like the third report had rated Seele/Alvis more highly for technical and managerial abilities. It was therefore, or ought to

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570 Par. 139.
571 Par. 141.
572 Par. 141.

have been, essential, said the court, for there to have been some record of the decision and the reasons for it, as indeed LML had advised.[573]

Harmon issued its writ against H of C on 13 August 1996 together with the notice required by PWR 31(5)(a). LML had tried hard to persuade Harmon not to commence action against its client, threatening to "do irrepairable (sic) damage to Harmon" and make it impossible for Harmon to work in the UK again. Laing's apparent power over Harmon lay in the fact that Harmon had at that time unresolved claims on other projects with which LML was involved.[574]

Seele/ Alvis's alternative design soon proved to be unfeasible. During July 1996 design changes were permitted by the client's representatives so that the claimed superiority of Seele/ Alvis's Option B2 disappeared and the fenestration package reverted effectively to Option A1. It was the court's conclusion that Seele/ Alvis found that it would be in trouble in attempting to implement its alternative Option B2 and had put forward its suggested changes so as to avoid losing substantial sums of money.[575]

The Judgment—The existence and terms of the alleged tendering contract

QUESTION

(1) Did the requests for the submission of tenders and Harmon's response thereto create an implied contract?[576]

RESPONSE

Yes, as regards the requests by LML for revised tenders on 11 September, 2 October and 30 October 1995,[577] but in this case not as a consequence of the initial invitation to tender and Harmon's first response.[578] In Judge Lloyd's opinion there had to be something more than a request for a competitive tender in order to create a tendering contract. If Harmon's argument had substance there had to be some other good reason.

QUESTION

(2) What were the implied terms of that agreement in the circumstances of this case?

RESPONSE

There were implied terms as follows:

(a) that the alternative submitted by any tenderer would be considered alongside a compliant revised tender from that tenderer; and

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573 Par 134-141.
574 Par. 142.
575 Par. 143.
576 Issue 6.
577 Par. 218.

(b) that any alternative would be one of detail and not design; and

(c) that tenderers who responded to that invitation would be treated equally and fairly.[579]

QUESTION

(3) Was H of C in breach of contract ?

RESPONSE

Yes, in the respect of awarding the contract to Seele/Alvis and in not awarding it to Harmon; by reason of breaches of implied terms (a) (b) and (c) above; and of the implied duty to treat all tenderers fairly and equally, by considering an alternative design without giving any other tenderer the opportunity of competing with it on its terms.[580]

Harmon's case had been that a unilateral preliminary contract came into existence since by issuing invitations to tender, H of C had made an offer to the respective tenderers that by submitting a tender it would treat that as acceptance of an offer whereby it was under the following obligations:

(a) H of C or its agents would open each of the tenders and consider each of them alongside any other tender;
(b) H of C or its agents would act fairly in considering each of the tenders submitted;
(c) H of C would award the contract for the fenestration package to the tenderer who submitted the offer that represented the best overall value for money;
(d) H of C and its agents would comply in all respects with the provisions of the Public Works Regulations 1991 in considering the tenders submitted to it.[581]

Harmon submitted that this approach was consistent with that of the House of Lords in *Harvela Investments Limited -v- Royal Trust* [582]in which Lord Templeman said:

"The task of the court is to construe the invitation and to ascertain whether the provisions of the invitation, read as a whole, relate a fixed bidding sale or an auction sale. I am content to reach a conclusion which reeks of simplicity, which does not require a draftsman to indulge in prohibitions, but which obliges a vendor to specify and control any form of auction which he seeks to combine with confidential bidding. The invitation required Sir Leonard to name his price and required Harvela to name their price and bound the defenders to accept the higher price. The invitation was not difficult to understand and the result was bound to be certain and to accord with the presumed intentions of the vendors, discernible for the express provisions of the

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578 Par. 210 – 215.
579 Issue 7, par. 218.
580 Issue 10, par. 218. See also par. 360, for complete list of answers to the issues.
581 Par. 207.
582 [1986] AC 207 (HL).

invitation. Harvela had named the price of $2,175,000; Sir Leonard failed to name any price except $2,100,000, which was less than the price named by Harvela. The vendors were bound to accept Harvela's offer."[583]

Harmon based its case upon the judgment of Bingham LJ in *Blackpool and Fylde Aero Club -v- Blackpool Borough Council.*[584] Reliance was also placed upon the decision of the Court of Appeal in *Fairclough Building Limited -v- The Borough Council of Port Talbot,*[585] particularly the judgment of Parker LJ.[586] Counsel also relied on Commonwealth cases: a number of Canadian cases including in particular *Emery Construction Limited -v- St John's (City) Roman Catholic School Board*[587] and *George Wimpey Canada -v- Hamilton-Wentworth (Regional Municipality);*[588] from New Zealand, *Pratt Contractors Limited -v- Palmerston North City Council;*[589] and from the Federal Court of Australia, *Hughes Aircraft Systems International -v- Air Services Australia.*[590] Harmon submitted that as regards the contents of the implied contract, obligation (a) was supported by *Blackpool Aero*; obligation (b) was supported by *Fairclough, Hughes Aircraft*, and *Pratt Contractors*; obligation (c) required no authority; and obligation (d) was supported by *Emery* which also showed that such a contract might exist even though there was a statutory context.[591]

H of C had argued that no contract should be implied since the statutory scheme of the PWR provided not only a remedy but an adequate remedy for dissatisfied contractors and thus made it not only unnecessary to infer a contract but its very existence precluded any contract arising. *Blackpool* was distinguishable since there was no other remedy available to the tenderer and there were special circumstances including the tenderer's prior history of having successfully tendered for the contract which was the subject of the procedure. Even in the special circumstances of *Blackpool* the implied contract was limited to one in which a tenderer was entitled, as a matter of contractual right, "to be sure that his tender w[ould] after the deadline [for submitting tenders] be opened and considered in conjunction with all other conforming tenders....".[592] In *Hughes Aircraft* it was also claimed that the parties intended to form a contract.

Judge Lloyd agreed with H of C as regards the original tender. In *Blackpool* the plaintiff had delivered its tender before the expiry of the deadline but it was never considered since the Town Clerk's staff failed to put it before the committee. In fact the successful tender was lower than that submitted by the plaintiff but the council had made it clear that they would not be bound to accept the lowest tender. Accordingly, the plaintiff commenced proceedings maintaining that the express request for tenders gave rise to an implied obligation on the part of the council to consider all tenders duly received. It was on that basis that the Court of Appeal dismissed the defendant's

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583 *Ibid.*, at 233.
584 [1990] 1 WLR 1195 at pages 1201-1202.
585 (1992) 62 BLR 82.
586 *Ibid.*, at 90-91.
587 (1996) 28 CLR (2d) 1.
588 (1997) 34 CLR (2d) 123.
589 [1995] 1 NZLR 469.
590 (1997) 146 ALR 1; [1997] 558 FCA.
591 Par. 208.
592 See Bingham LJ at page 1202C-D.

appeal against the trial judge's decision to accede to the plaintiff's contentions. The case is perhaps no more than authority for the proposition that a contracting authority undertakes to consider all tenders received. As the judgment of Bingham LJ makes clear,[593] that is the least to what a tenderer is entitled "not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders, or at least that his tender will be considered if others are." The background for the decision included, in part, the following passage:

> "The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he may not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest, or, as the case may be, lowest."

However here the facts were that H of C was bound to proceed with the project; it had to accept some tender; and it had to give reasons if it rejected a tender. In *Fairclough Building* the issue was whether the defendant was in breach of contract in removing the plaintiff from the tender list because of a connection between the tenderer and the wife of its construction director who was a senior assistant architect employed by the council. In deciding that the council had acted properly and not in breach of contract, the Court of Appeal held that the defendant council was under a duty "honestly to consider the tenders of those whom they had placed on the short list, unless there were reasonable grounds for not doing so." That passage was held to be consistent with *Blackpool*, see Parker LJ[594] and Nolan LJ.[595] The only issue before the court therefore was whether the council had acted reasonably.

In examining the Canadian cases, Judge Lloyd thought that it was at first necessary to bear in mind that the key factor was the commitment of the tenderer to the person to whom the tender was submitted. In *The Queen in the Right of Ontario -v- Ron Engineering & Construction (Eastern) Limited* [596] the tender had been supported by a tender bond. Estey J said:[597] "The principal term of Contract A is the irrevocability of the bid...". In a later case (*Northern Construction -v- Gloge Heating & Plumbing*)[598] a sub-contractor was not able to withdraw a tender on the strength of which the main contractor had, to the sub-contractor's knowledge, submitted its own tender to an owner. However, a more generous approach was applied in *Best Cleaners & Contractors Limited -v- R. in Right of Canada*[599] and in *Chinook Aggregates Limited -v- Abbotsford (Municipal Districts)*[600] In the former case, after the tenders had been submitted, discussions took place with one tenderer about the possibility of awarding the contract for a longer period than that originally sought. The plaintiff

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593 *Ibid.*, at 1202.
594 at page 92.
595 at pages 93-94.
596 [1981] 1 SCR 111.
597 at page 122-123.
598 (1986) 27 DLR (4th) 265.
599 [1985] 2 FCR 293.

was not consulted. In the event, the contract was awarded to the other tenderer but on the original basis. The decision turned on whether there should or should not be a new trial. The dissenting judgment of Pratt C.J. shows that he thought that there was an obligation to treat the tenderers fairly and equally, so the division of opinion was largely as to whether that had in fact occurred. In *Chinook* the plaintiff had not been informed that the defendant had a policy whereby if any local bidder was within 10% of the lowest price, then the local bidder would get the contract. By failing to communicate the policy to all tenderers, it was held that the defendant was in breach of its duty to treat all tenderers fairly. The decision was that of the British Columbia Court of Appeal. The judgment of the Court was delivered by Legg JA who said:[601]

"By adopting a policy of preferring local contractors whose bids were within 10% of the lowest bid, the appellant in effect incorporated an implied term without notice of that implied term to all bidders, including the respondent. In so doing, it was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others. This duty was recognised in *Best Cleaners & Contractors Limited -v- R* ... where Mahoney J. said:

> "In *Ron Engineering*, the Supreme Court had to deal with rights and obligations that were clearly stipulated in the tender document. Here, the situation is different. The tender documents contained no express provision prohibiting the Crown from entering into negotiations with the bidders and changing the terms of the proposed contract. If the Crown was nevertheless prohibited from doing those things, the source of that prohibition could only be found in some implied terms of the unilateral contract resulting in the making of the tender. Those implied terms were not the subject of the Supreme Court's decision. In my opinion, they do nevertheless exist. I would not however describe them in the same manner as counsel for the appellant. In my view, they simply impose on the owner calling the tenders the obligation to treat all bidders fairly and not to give any of them an unfair advantage over the others."

Emery Construction -v- St. John's (City) Roman Catholic School Board was, in the sense, the reverse. There the local policy was to be found in statute, which required preference to be given to local content. The plaintiff's tender was based upon the price of structural steel from a New Brunswick company, whereas its competitor had used the price from a local Newfoundland company. Its competitor was awarded the contract but if the plaintiff had used a Newfoundland sub-contractor its tender would have been higher than its competitor. The plaintiff lost. The Newfoundland Court of Appeal held that the statutory obligations had also become contractual obligations in the process of seeking tenders. *Chinook* and *Emery* therefore provide some useful guidance.

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600 (1989) 35 CLR 241.
601 at page 248.

Judge Lloyd found the views of other courts of these cases to be instructive. In *Pratt Contractors* the contracting authority had its own specific procedure which it had publicised and incorporated as part of the tender documents. Gallen J. said:[602]

> "In selecting a particular tenderer, the council is in my view bound by the terms it has itself imposed, as well as the requirements of fairness and equity which may well have an application."

He later said:[603]

> "There is also an aspect of fairness. It was conceded by counsel for the defendant, that the council was obliged to proceed in a manner which meant the general requirements of that rather indefinable term 'fairness'. To accept as an alternative tender and thus deprive the lowest conforming tenderer of such opportunity as that qualification gave it, a document which is indefinite in terms of price, which required elucidation and confirmation, was I think unfair. That comes close to negotiating with one of the tenderers within the tender process, but not on terms which apply to other tenderers."

As there had been a concession, Judge Lloyd did not find that decision of direct assistance. (This decision was relevant to some of the issues on damages and was considered again later.)

Similarly, whilst the judgment of Finn J. in *Hughes Aircraft Systems* was in Judge Lloyd's opinion a valuable analysis of the law, it did not really assist him. Under the heading "Good faith and fair dealing"[604] Finn J. felt obliged not to depart from the judgment of Gummow J., then of the Federal Court of Australia, in *Service Station Association -v- Berg Bennett & Associates Pty Limited*[605] in which, having considered North American jurisprudence, that judge said:[606]

> "Anglo-Australian contract law as to the implication of terms has heretofore developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms. Equity has intervened in matters of contractual formation by the remedy of rescission, upon the grounds mentioned earlier. It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive release. In some, but not all, of this, notions of good conscience play a part. But it requires a leap of faith to translate these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."

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602 at page 481.
603 at page 483.
604 at page 41.
605 (1993) 45 SCR 84.
606 at page 96.

Finn J. went on to say that his own view inclined to that of Priestley JA in *Renard Constructions (ME) Pty Limited -v- Minister of Public Works*[607] in which he had said :

> "People generally, including judges and other lawyers, from all strands of the community have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view, this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

Finn J. went on to say:

> "Fair dealing is a major (if not openly articulated) organising idea in Australian law. It is unnecessary to enlarge upon that here. More germane to the present question, the implied duty is, as is well known, an accepted idea in the contract law of the United States and, probably, of Canada: see E A Farnsworth '*Good Faith in Contract Performance*' in J. Beatson and D Friedmann (Eds) '*Good Faith and Fault in Contract Law*' ... [He cited many other sources.]

Finn J. also referred to the remarks of Gallen J. in *Pratt Contractors*:[608]

> "Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into a preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract, along the lines of the analysis in the Canadian cases. Whether or not a particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or impliedly accepted."

It was clear to Judge Lloyd from *Blackpool* and from the other authorities that there must be something more than a request for a tender which is to be submitted competitively along with others. An invitation to tender is by its nature not normally an offer; it solicits offers. It does not carry with it an obligation to accept any offer that is made in response to it, even if the customary disclaimer is not made. It would be quite a change, said Judge Lloyd, if the very fact that tenderers were informed that competitive tenders being were sought was treated in law as an offer that any tenderer who submitted a tender would accept that to be treated fairly. It would intrude into the ordinary commercial freedom or discretion to accept or reject a tender or to negotiate with whoever seemed best in the eyes of the person seeking tenders. There must therefore be some good reason why obligations of the kind suggested by Harmon can arise.

In this instance tenders were sought using the restricted procedure under the PWR which provides tenderers with some protection in as much as they should not be tendering along with any one who

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607 (1992) 26 NSWLR 234.
608 at pages 478 – 479.

was not considered to be qualified to carry out the work in question and had satisfied other requirements. The restricted procedure is intended both to provide the contracting authority with a mechanism whereby tenders are only sought from a selected short list and to provide the tenderers with the knowledge that the competition will come from true competitors. In addition tenderers who had not been selected can challenge that decision. The PWR are seemingly comprehensive. They give disappointed tenderers rights to prevent the procedure from being abused and to obtain reasons and to question the award. The requirement to give reasons itself imports an obligation of fairness even if it were not grafted on by the decisions of the European Court of Justice governing the interpretation of the parent legislation. Judge Lloyd therefore considered that H of C was right in its primary submission.

On the other hand, the procedure of the PWR was not followed. H of C did not inform the other tenderers it would be considering the Seele/Alvis option B2 alongside tenders based on the new specification. If His Honour was right in concluding that H of C only sought alternative details, could Harmon then complain of the decision to consider Seele/Alvis's tender on the basis that it offered an alternative design? The discussions in the autumn of 1995 deviated from the PWR procedures in that they went beyond mere negotiations and clarifications. They entertained an alternative design, of which the other tenderers were unaware (at least formally). If Harmon cannot complain of the result under the PWR does this not mean that the PWR are not as comprehensive as they might first appear - or that they do not effectively control deviations of the kind adopted by H of C? It was Judge Lloyd's judgment that by repeating the offer to consider alternatives, on 11 September and on 2 and 30 October 1995, it was to be implied in that offer that by submitting a tender any alternatives would be equivalent to the schemes or schemes for which revised tenders were being sought and would be options only in terms of refinements of detail design which would reduce cost, albeit confidential to the tenderer but falling short of different proposals which were more than matters of detail but ones of changes of design, of which tenderers were not informed and therefore were entitled to assume were not matters which they needed to take into account. It was His Honour's judgment that even though all tenderers accepted that they would not be entitled to see alternatives of detail which were considered to be commercially confidential to a given tenderer, H of C in soliciting new or revised tenders under the European public works regime (to which effect is given by the PWR) impliedly undertook towards any tenderer which submitted a tender that its submission would be treated as an acceptance of that offer or undertaking and:

(a) that the alternative submitted by any tenderer would be considered alongside a compliant revised tender from that tenderer; and

(b) that any alternative would be one of detail and not design;

(c) that tenderers who responded to that invitation would be treated equally and fairly.

These contractual obligations derive from a contract to be implied from the procurement regime required by the European directives, as interpreted by the European Court, whereby the principles

of fairness and equality form part of a preliminary contract of the kind that I have indicated. *Emery* shows that such a contract may exist at common law against a statutory background which might otherwise provide the exclusive remedy. Judge Lloyd considered that it was now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly: see *Blackpool* and *Fairclough*.

Judge Lloyd held that H of C was in breach of all these obligations. It also broke the implied duty to treat all tenderers fairly and equally by considering an alternative design without giving any other tenderer the opportunity of competing with it on its terms.[609]

The Judgment—Breach of Public Works Contracts Regulations 1991

SCENARIO

Harmon's complaint was that H of C did not comply with the requirements of the PWR but specified "overall value for money" as the criterion by which tenders were to be assessed and in not specifying standards by which "overall value for money" was to be determined. Judge Lloyd recalled that H of C's project sponsor had been explicitly warned that words such as "overall value for money" were contrary to PWR 20 and that LML had unsuccessfully put forward a system of scoring or rating by which tenders might be assessed.

Harmon's case was that the provisions of PWR 20(1) were mandatory and that by stating the award criteria in the OJ notices as "(other than price): overall value for money", H of C had elected for wording which was nebulous and imprecise, capable of different interpretations, not referable to either of the tests set out in PWR 20(1)(a) and (b) and which was therefore not permitted by PWR 20.

H of C's case was that Harmon had construed the PWR too narrowly (both PWR 12 and 20). It submitted that the term "overall value for money" which had been used in both notices on December 1993 and April 1994 did not in itself constitute a breach of the PWR since PWR 20(1) did not require a contracting authority to identify in the advertisement whether it intended to award a contract on the basis of lowest price (PWR 20(1)) or "most economically advantageous to the contracting authority" (PWR 20(1)(b)).[610]

QUESTION

(4) Was the H of C in breach of the Public Works Contracts Regulations 1991 (PWR), particularly in:

(a) seeking tenders on the basis of "best overall value for money";

(b) awarding the contract for the fenestration package on the basis of "best over all value for money";

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609 Par. 207 – 217.

610 Par. 172 - 173.

(c) awarding the contract for the fenestration package on the basis of the most economically advantageous tender.

RESPONSE

Yes, on all points but the contract was not awarded on the basis of (b) or (c).

QUESTION

(5) In the circumstances, should H of C have only awarded the contract on the basis of the lowest price?[611]

Yes. H of C was bound to award the contract on the basis of price alone.[612]

Judge Lloyd rejected H of C's submission since the words of PWR 12(2) and 20(1) were in his view mandatory. It was true, said the judge, that the statutory notice required by PWR 12(2) is loose in that item 11 in Part C of Schedule 2 only requires "The criteria for the award of the contract where they are not mentioned in the invitation to tender" when at that time those interested will not have access to the invitation to tender. However here the notices purported to state the criteria so PWR 12(10)(e) and the invitation to tender therefore did not come into play. (The court dealt later with the argument that nevertheless the requirements of the PWR were satisfied by the tender documents.) Secondly, in His Honour's opinion, the words of PWR 20 meant that a contracting authority should not award a public works contract unless a tender either offered the lowest price or was the most economically advantageous to the contracting authority, and the contracting authority had stated which of those two options it intended to use.[613]

H of C had argued that a reader of the notices published in the OJ would have understood that H of C intended to award the contract to a contractor who had submitted the most economically advantageous tender. Reliance was placed on the evidence of Harmon's expert QS in which, naturally, he had agreed that the advertisements conveyed to the reader that the award was not to be based on the lowest price. He also accepted that if "most economically advantageous" meant the same as "overall value for money" then he would have read the advertisement as an election for the second option. However, he also said, in answer to a question from Judge Lloyd, that the terms were elastic and that they were "both fairly loose terms that need definition". H of C also relied upon evidence from two of Harmon's employees although neither of them in fact accepted that the advertisement was to be read as referring to the second option.

H of C submitted that, as a matter of law, wording such as "overall value for money" could comply with PWR 20. In *Gebroeders Beentjes BV v State of Netherlands*[614] the criterion had been whether the tender "appears the most acceptable to the awarding authority". The ECJ held that the compatibility of such provision with the requirements of Article 29 of Directive 71/305 which is not

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611 Issue 8.
612 Par. 187.
613 Par. 173.
614 Case 31/87, [1988] ECR 4635; [1990] 1 CMLR 287.

materially dissimilar to the wording of PWR 20 is a matter for interpretation by the National Courts. The ECJ said:[615]

> "... If it is to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most economically and advantageous on the basis of objective criteria, such as those listed by way of example in Article 29(2) of the Directive."

Similarly, H of C referred to *R v. Portsmouth ex parte Coles*[616] in which the criterion had been "best value for money". Tenders had been received from a number of private contractors and from the council's own in-house contractor. Although the latter had not submitted the lowest tender, it was awarded 40% of the value of one contract (the maintenance contract) and 60% of the value of another (the improvement contract). Keene J. held at first instance that the decision to award a proportion of the contract was made on the sole basis of the additional cost to the council for redundancy payments if its own contractor had not been awarded this proportion of the work. He held that it was important that the tenderers should have been told about the consequences that an award would have on its liability to make redundancy payments. However, he held that although the council had broken the requirements of PWR 20(2) it did not mean it was obliged to award the contracts to the lowest tenderers. On appeal the Court of Appeal reached a different conclusion. It held that the council ought to have identified the criteria which it was going to apply to choose or select contractors and, having failed to do so, it could only award the contract on the basis of lowest price. Leggatt LJ referred to *Beentjes v The Netherlands*[617] and *Commission v Kingdom of Belgium.*[618] He said:[619]

> "[11] It follows that since the Council had not mentioned in the contract documents the criteria which it applied, it was not entitled to take account of them as award criteria. Since it was not entitled to take account of them, it was unable to award the contracts on the economically advantageous basis. It was therefore obliged to adopt the lowest price basis."

Hobhouse LJ said:[620]

> "[20] This, in turn, leads on to the Public Works Contracts Regulations 1991.[621] The Regulations state that they have been made under the European Communities Act 1972 and have the clear intention of giving effect to the Public Works Directives. But they go somewhat further. Regulation 31 contains additional provisions relating to the enforcement of obligations relating to public works contracts: it is under this regulation that the question of the adequacy of the notice of claim of Colwick Builders arises. Regulation 20 which deals with the award of public works contracts expressly provides in paragraph (8) that:

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615 at page 4659.
616 [1997] 1 CMLR 1135; (1996) 81 BLR 1; Times 13.11.96. See also the author's article at (1999) 15 Const LJ 88 ('The Portsmouth case').
617 Case 31/37, supra..
618 Case C87/94, [1996] ECR 2043 (Walloon Buses).
619 at page 1142.
620 at page 1146.

> 'For the purposes of this regulation an "offer" includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.'

Thus, the fictional feature of the [Local Government] 1980 Act has been carried through into the 1991 Regulations and has consequently been included in a scheme where a breach can give a disappointed tenderer a civil remedy.

[21] The Appellants accept the decision of the Judge that the 1991 Regulations cannot apply to anything done in relation to the 'maintenance' contract. It follows that, if Mr Coles and George Austin Ltd are to recover more substantial damages, they must make out that right under the Directives. Colwick Builders on the other hand, subject to the notice of claim point, can rely upon the Regulations.

[22] It is convenient to take first the question whether the obligations of the Local Authority and the rights of the tenderers involve only the stages which precede the placing of any contract or extend to the actual decision making process itself. The Judge held that neither the Directives nor the Regulations imposed any relevant obligation upon the County Council as to what it could and could not properly take into account in deciding between tenders. Neither party before us submitted that different answers to this question should be given under the Directives and the Regulations: like Leggatt LJ, I consider that this is clearly correct. I also agree with him that the Judge was in error in adopting the approach which he did.

[23] Article 20 of the 1971 Directive states that 'contracts shall be awarded on the basis of the criteria laid down in chapter 2...'. This word clearly imposes an obligation in relation to the actual award of any contract. Chapter 2, Article 29, provides:

> 1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:
> - either the lowest price only
> - or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.
>
> 2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.

Regulation 20(1) to (4) of the 1991 Regulations repeats these provisions. In my judgment they impose the obligation upon the awarding authority to award the contract only by reference to

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621 SI 1991/2680.

certain criteria. The authority is at liberty to award the contract on the basis of which is most economically advantageous only if the criteria it is going to use have been stated beforehand. It follows that, unless the authority has in advance stated other criteria, it can only use the criterion the lowest price and that if it should do anything else it will be in breach of the Directive and the Regulation. This was the submission of Miss Boswell and it was in my judgment correct.

[24] The same conclusion follows from the Judgment of the European Court in *Case C-87/94, Walloon Buses*. A contract for the supply of buses had been awarded after tenders had been invited and submitted. The successful tenderer, EMI, had made certain cost-saving suggestions to the authority which went beyond the scope of the invitations to tender. The other tenderers had not been give the opportunity to match them or make counter-offers. The Court held that whilst some latitude in the tendering procedure could be accepted, 'the principles of equal treatment of tenderers and of transparency of procedure' must be observed. This has not been done. The Court concluded:

> 'It must be concluded that, by taking into account, in its comparison of tenders for lots Nos 4, 5 and 6, the cost saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences in the tenders in the first place and those of EMI placed second and by accepting some of EMI's tenders as a result of taking those features into account, Belgium failed to fulfil its obligations under the Directive.'

The same applies to the present case. By using, when deciding upon the award of contracts, criteria which had not been spelt out in the invitations to tender (nor at any other stage), the County Council was in breach not only of its obligations in relation to inviting tenders but also in relation to the award of contracts.

[25] Miss Boswell had an additional point that certain of the criteria which the County Council had used were in any even impermissible since they related to certain secondary consequences of the failure to award any of the relevant contracts to its direct labour department. These criteria concerned whether, if work was not given to it, the remainder of the department's activities would be sufficient to support its managerial and fixed costs - a criterion which did not relate to the cost of carrying out, or not carrying out, the relevant work but to other separate activities. Before the Judge, Miss Boswell argued this point on the basis that such a criterion was not 'objective'.[622] The Judge not surprisingly declined to accept this submission since such criteria can be as objective as any other. Before us the argument was put on the basis that it was implicit in Article 29 and Regulation 20 that the criteria must be germane to the contracts to be awarded and not extraneous to them. In this form the submission has force but, as pointed out by Leggatt LJ, it is not necessary for this Court to decide it.

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622 e.g. see the preamble of the 1971 Directive and Case C-31,87, *Gebroeders Beentjes*.

[26] In view of our decision on the scope of the duty imposed by Regulation 20 and the County Council's breach, it follows that the ground on which the Judge decided against Colwick Builders on the time limit point falls away: the notice they served was sufficient. The appeal succeeds."

H of C argued that the judgment of Hobhouse LJ (above) showed that a failure to comply with the PWR in not spelling out criteria in the invitation to tender might have been made good at a later stage. Both the *Portsmouth* decision and the decisions of the ECJ referred to in it[623] showed that compliance in substance was required rather than in form. In *Walloon Buses* the Court had held that there ought to be 'observance of the principles of equality of tenderers and of transparency'[624] and that there had been a breach of Article 27(2) of Directive 90/531 in that the contracting authority had taken account of the contents of letters submitted by one of the tenderers *after* the date for receipt of tenders.[625] In *Beentjes* tenderers had been assessed on the basis of three criteria: experience for the work in question; ability to employ long term unemployed; and whether the tender 'appears the most acceptable to the awarding authority'. The ECJ held that the first was a legitimate criterion but did not require to be specifically publicised, and that the second criterion had been included in the notice requirements. However, the third criterion ought to have been set out in the contract documents or the contract notice. The ECJ said:[626]

"21. Finally, in order to meet the Directives' aim of ensuring development of effective competition in the award of public works' contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts."

....

34. Nevertheless, in order for the notice to fulfil its role of enabling contractors in the community to determine whether a contract is of interest to them, it must contain at least some mention of specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question ..."

H of C therefore argued that the test was whether the tenderers would know of the basis upon which the tenders were to be assessed. It was submitted that the tender documents were understood by Harmon to set out the criteria by which its tenders would be judged, namely:

(a) Price;

(b) Technical superiority of the products;

(c) Quality;

(d) Manufacturing and Technical Capabilities of Contractors;

(e) Programming and Organisational Abilities of Contractors;

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623 eg *Walloon Buses* and *Beentjes*.
624 see paragraph 88.
625 Emphasis added.
626 [1988] ECR 4635 at 4658 and 4660.

(f) Maintenance.[627]

The criteria were made known to Harmon at the presentations in April 1994 and November 1994; at the meetings in June and July 1995; at the meeting in August 1995; at the meeting in September 1995; and at the meeting on 23 October 1995. In addition, on 18 October 1995 all tenderers were sent letters in identical terms asking for further information concerning their manufacturing, technical, programming and organisational capabilities. That letter stated (amongst other things):

"It is our intention to visit your works... and the purpose of this visit is to assess your capability to perform the above-mentioned package of work. This assessment will be made with regard to your facilities, equipment, staff and organisation to achieve the revised programme of works discussed and subsequently agreed by yourselves as a basis for the contract programme."

Harmon's representatives had known that such matters would be used and could determine the outcome of the tenders. Therefore H of C contended that it had met the substantive if not the formal requirements of PWR 20(3).

H of C also submitted that the criteria had been set out sufficiently since PWR 20(3) stated that the criteria on which contracting authority intended to base its decision should "where possible [be set out] in descending order of importance in the contract notice or in the contract documents". PWR 2(1) defines "contract documents" as including

" ... the invitation to tender for or negotiate the contract, the proposed conditions of contract, the specifications or description of the work or works required by the contracting authority and of the materials or goods to be used in or for it or them, and all documents supplementary thereto;"

"Contract notice" means of course the notice sent to the OJ in accordance with PWR 12. It was therefore submitted that, given the wide definition of "contract documents" in PWR 2(1), all that was required was that the criteria should be identified and publicised so that tenderers had a sufficient opportunity of meeting them. This would be both consistent with the PWR and compliant with the principles of equality and transparency. H of C submitted that each of the criteria were known to Harmon, setting out details of where in the tender documents this information was to be found.

Harmon submitted that H of C's case was wrong. The decisive criterion for selection which was actually used by H of C, namely, technical superiority of the proposed option was not stated in any of the documents, nor was it brought out at any of the meetings by H of C. A distinction had to be made between the criteria set out in the tender documents and those which would be "the selection criteria". The Schedule of Deliverables could not contain the relevant selection criteria: LML's procurement manager accepted that it was no more than a guide and that for example it did not even state "price" as a criterion, and further added that LML was not even aware at the time of the need to state selection criteria, so that they were not stated. Meetings could not be relied on.

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627 These are the criteria stated in paragraph 38 of the defence.

Harmon's sales director had said that criteria were not in fact identified at the meetings and the notes of the meetings did not support H of C's case. In any event, notification at meetings would be insufficient since there had to be some documentary evidence in order to comply with the PWR 20(1) and (3). Finally, PWR 20(3) required that the criteria should be stated "where possible in descending order of importance". There was no ranking whatsoever in the documents relied upon by the defendant. Moreover, by the time of the second invitation to tender of August 1995, the dominant motivation of H of C was to reduce cost (see the invitation to tender itself and Harmon's sales director's evidence). Price was therefore dominant, at least superficially.

Harmon criticised H of C's submission that "overall value for money" was more comprehensible than "most economically advantageous" and submitted that the former although in common currency in English, did not have any precise meaning, whereas "economically most advantageous" was a term of art, with a precise meaning in each Community language as there is a direct equivalent phrase in each language. Thus in French the two selection criteria are "le prix le plus bas" or "l'offre économiquement la plus avantageuse". Judge Lloyd did not think that the latter was precise in either language, although it may have had meaning as a term of art.

The court accepted H of C's general submission that one should not be too concerned about the form but rather look to the substance. First, the words "overall value for money" were, in His Honour's judgment to be equated to "most economically advantageous" since a contracting authority, such as H of C, has only one of two options, as provided by the PWR. The notices were prepared carelessly and H of C's project sponsor deliberately ignored the advice which was given to him. Nevertheless it was to be presumed that a contracting authority such as H of C for such a project as this was likely to have intended to have complied with the PWR rather than to have intended to deviate from them. However both terms, said the court, required further definition - a view confirmed by the practical experience of Harmon's expert in curtain walling. This could only be achieved, said Judge Lloyd, by a statement of the criteria that the contracting authority considered applicable to the tender and project in question. He continued:

> "Neither 'overall value for money', nor 'most economically advantageous' are concepts which have any real meaning except in their context. They are not terms which mean the same whatever the subject-matter of the contract. Both require guidance as to how the subjective judgments implicit in them will be made. Both require criteria to make them meaningful.[628] 'Overall value' implies that value will be assessed in a number of different ways, all of which will have to be taken into account before an 'overall' value is found which in turn is seemingly refined by the pleonastic words 'for money'. 'Most economically advantageous to the contracting authority' requires even more information since a tenderer preparing a tender or, more probably, one or more variants has to be given clear and precise guidance as to what from the point of view of the contracting authority may be the '<u>most</u> economically advantageous <u>to</u>' it. Unless a tenderer knows something about the economics of the contracting authority (not just its annual finances which are only part of the picture, although they might be determinative of running

costs if that criterion were included) it will be impossible to work out what might be thought to be most economically advantageous in terms of maintenance or running costs or in terms of the elusive concept of technical merit. Assuming that such a concept is a proper element, which in my judgment it is not, technical merit is an intrinsically separate consideration which needs to be specifically identified. Price is the starting point for the exercise and it hardly needs to be stated. 'Overall value for money' begs the question; how far is the contracting authority prepared to pay 'more' to get something which is 'better'?. One tenderer might well regard its proposal as providing excellent 'overall value for money' and would challenge a competitor, for example, on the grounds that although its proposal might require higher running costs by way of maintenance, over the long term, the costs of maintenance would be lower than the costs that the competitor's product would incur in requiring replacements at short intervals. Ease of access for, and the duration of maintenance works could be decisive. Therefore it seems to me the real question is whether H of C provided selection criteria."[629]

Judge Lloyd rejected H of C's case that the selection criteria were to be found in the extraneous contract documents. They might have been found there but they were not. (He left aside, for the moment, Harmon's case that the criterion actually applied was not that stated.) The approach, said Judge Lloyd, must be that set out by the European Court in *Walloon Buses* and *Beentjes* and applied by the Court of Appeal in England in *R -v- Portsmouth*. The principles of transparency and fairness required a tenderer to know, without doubt, what objective criteria were going to be applied and, as PWR 20 made clear, their order of importance. All the criteria had to be stated - this was obvious but it was now made clear by Article 30(2) of Directive 93/97 - and to be identifiable as such, either because they were grouped in the same place or because they were clearly marked out. Indeed, the requirement that they should be stated in descending order of importance was perhaps the most significant pointer to the need for the criteria to be clearly identifiable as such and not merely requirements which must be complied with before the tender can be considered as a qualifying or compliant tender. Judge Lloyd said that all the references relied on by H of C in the general preliminaries, the special preliminaries and the specification were no more than standard requirements so that the tenderer presented the prospective client with the information which the client and his advisers wanted. Listed together or separately they did not in themselves convey to the tenderer the basis of the award, leaving the tenderer to suppose that the basis must be the lowest price. They were no more than the general information which is called for on most tenders. They were not placed in any order of ranking, even (or especially) in the Schedule of Deliverables which formed an important part of H of C's case. The Schedule was, as LML's purchasing manager had rightly said, no more than an "aide-memoire". It was headed:

"These documents call for a number of items to be submitted at Tender to support your proposals. The following schedule highlights the information which must be returned with your Tender."

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628 See *Beentjes* at paras 34 and 37.
629 Par. 182.

Particularly when compared with the post tender Schedule it was clear that both were provided to remind the tenderer (or contractor) of what was needed to be submitted and when. That relied on by H of C did not state the criteria by which the information was to be assessed, still less any order of importance. Obviously this information (and the other requirements relied on by H of C) might also have been used in the assessment of tenders for the purposes of the award of the contract, as the experts and Harmon's sales director naturally agreed. But precisely how it would have been used would have depended upon the criteria which were to have been employed. It was verging on the naive, said Judge Lloyd to have suggested that price was stated to be a criterion: money was never out of the picture. However, the question was: if a tender was to be assessed on the basis of "overall value for money" or, "most economically advantageous to the contracting authority", what is the place that the money was to play in the order of assessment? In this instance it had become clear from July 1995 onwards that it was *the* criterion.

Even if cost had not become *the* criterion, the architect had admitted that the criteria that were ultimately taken into account were very different from the ones he had thought the team was dealing with at the beginning:

> "At the beginning we were dealing with one design and price and also technical ability of the contractors, which we had identified as a concern, would be the two main factors. We had to alter the criteria as the content of the package changed, or the performance of the package, you know, of the options that would be considered, came into play.
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> Q. So, what then, Mr Pringle [architect's representative], were the criteria that you eventually had to judge the tenders by which you had not anticipated at the beginning you would have to use?
>
> A. The long-term life cycle costs of the product, essentially. That was the main one. Maintenance costs."

The architect had also identified six additional criteria beyond those listed in his witness statement as the key criteria: experience of the contractors; manufacturing facilities and experience; price; programming ability; if a variant was proposed, the technical quality of the variant; samples. Some of these overlapped or were repetitive which in itself provided further evidence of lack of agreement on meaningful criteria. The architect's evidence typically established that not only had there never been any real agreement amongst the project team about the criteria which were to be applied and that they had changed over the period, but also by the same token, that the tenderers could not have known of them. They had never been set out in any definable manner. Only cost or price had been clearly brought home to the tenderers after July 1995.

H of C plainly never complied with the requirements of the PWR in its original notices in the OJ and that default was not made good by the invitation to tender and the tender documentation. It was, said Judge Lloyd, frankly absurd to suggest that a contractor had to sift through hundreds of pages

of what were, in the main, routine documents to identify those requirements which would have been used to decide whether one tender was more appealing than another. A tenderer if treated fairly, which these tenderers were not, would have been told at the outset of the documents: (a) here are the relevant criteria and (b) they are arranged in descending order of importance. Without the latter the former cannot be used to determine what might be "most economically advantageous to the contracting authority". They had also to be objective criteria - see *Beentjes*, which emphasised that they were needed so as not to involve "an element of arbitrary choice". PWR20 following the Public Works Directive also referred to "objective grounds". So as regards selection criteria the matters contained within the Schedule of Deliverables and contract documents did not constitute compliance with PWR20, and were neither "selection criteria" nor "minimum requirements" for the purposes of PWR20(3) or 20(4) respectively.[630]

Did the situation change after July 1995? In His Honour's judgment it did not get any better since although criteria such as those proposed by H of C had been bandied about they had not been presented either as the determinative criteria (as opposed to extensions of the pre-qualification process) or in any order of importance. Furthermore, it was impossible to see, said Judge Lloyd, how Harmon or Gartner could have been treated fairly or equally along with Seele/Alvis if they had not been told of the proposal with which their tenders were to be compared. All that they had been told (repeatedly) was that they had to bring their prices down. Harmon had done so. Furthermore, Harmon had not then been told that some trimming exercise would be carried out in order to factor in costs to increase the value of its tender over which it would have had little or no control given that it had been required to price only one or two options.

The court held that H of C was bound in law to award the contract on the basis of price alone. First, it had failed to comply with the obligation to set out criteria in descending order of importance. H of C was, said the court, in exactly the same position as the contracting authority in *R v Portsmouth* which was directly applicable. Should the PWR not have been applicable the result would have been the same on the same authority and applying *Beentjes* and *Walloon Buses*. In *Beentjes* the Court held that Directive 71/305 required that if criteria other than price were to be relied upon in awarding a contract, they must be stated in the contract notice or contract documents and if they were not stated, the sole criterion for the award of a contract was the lowest price.[631] Secondly, the fresh invitations to tender, in themselves (but particularly having regard to numerous contacts between LML, including other members of the project team, and Harmon) had made it clear that price was the dominant factor. Unless therefore there was something untoward (for example as mentioned in PWR 20(6)) H of C was bound to accept the lowest tender. On the facts there was no doubt Harmon was the lowest if like had been compared with like.

In conclusion, H of C was held to be in breach of PWR20 in (a) seeking tenders on the basis of "best overall value for money"; (b) awarding the contract for the fenestration package on the basis of "best over all value for money"; and (c) awarding the contract for the fenestration package on the

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630 The answer to Issue 5(1) was 'No'.

631 See paragraphs 18, 19, 21, 22, 31, 32, 33, 34, 35, 37 (ii) of the judgment.

basis of the most economically advantageous tender. But the court noted that the contract for the fenestration package had not been awarded on the basis of "best value for money" or "most economically advantageous tender".[632]

Neither H of C nor its project team had ever agreed among themselves any common selection criterion other than price, and had never applied any common selection criteria other than price that had been stated in advance.[633] Furthermore, H of C and its project team had failed to make it clear to Harmon that the sole or dominant selection criterion was price before submission of its first tender on 31 July 1995 but had in fact made it clear thereafter. In the circumstances, H of C should have awarded the contract on the basis of lowest price.[634]

Although H of C might have considered tenders and awarded a contract on the basis of the tender that was most economically advantageous, H of C was in breach of PWR20 in failing to identify the criteria, or to rank the criteria, that would be applied in identifying such a tender. There were two possible breaches (i) in seeking tenders; and (ii) in awarding a contract.[635]

SCENARIO

PWR20(4) states:

> "Where a contracting authority awards a Public Works Contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if the offer meets the minimum requirements of the contracting authority and it has indicated in the contract notice that offers offering variations will be considered and has stated in the contract documents the minimum requirements which the offer must meet and any specific requirements for the presentation of an offer offering variations."

This Regulation might profitably have been re-considered in its transition from Article 19 of the Directive. In essence it appears to permit an authority which intends to award a contract on the basis of "most economically advantageous" to award it to a tenderer who submits an alternative proposal provided that such a tender complies with certain specified minimum requirements. In the OJ notices, under the heading "Prohibition on Variants" (where applicable), H of C had stated that:

> "Alternative tender proposals may be submitted but must be accompanied by a compliant offer."

Clause 4.10.2 of the General Preliminaries stated:

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632 Issue 8(1). The answer to Issue 8(1) overall was 'Yes', and to each of questions (a), (b) and (c) it was 'Yes' (but the contract was not so awarded).

633 Issue 8(1A)-"of the selection criterion"? Is this an error?

634 Issue 8(1A).

635 Issue 8(2). The answer to Issue 8(2) was 'Yes' to both parts. Issue 8, main part, par. 170 – 187.

"The tenderer, after consideration of all the criteria which in his specialist knowledge are relevant to the design and construction of the works, may wish to make proposals for changes to details, dimensions and materials shown on the drawings or referred to in the Specification. Such proposals should be incorporated as alternatives to be returned with the compliant tender. In no way shall any proposal fail to meet the minimum requirements specified in the Tender Document and Specification."

Clause 2.2 of the Special Preliminaries stated:

"Any proposed changes to the existing fenestration design, required by the Trade Contractor, shall be raised at Tender stage for discussion, as a scope for change after the award of the Trade Contract is limited due to a design programme constraints on other packages."

Harmon contended that the effect of PWR 20(4) was that an alternative or variant could not be considered unless the tenderer had, at the same time, submitted a compliant tender. Harmon also submitted that just as no selection criteria were ever stated so too there were no minimum requirements set out in the documentation as required by PWR 20(4).

H of C submitted that even if it had not complied with PWR 20(1) and was not entitled to make an award other than on the basis of the lowest price, it could nevertheless award the contract to a tenderer who put in a variant provided that it complied with the five basic principles or requirements to be found in the Specification and otherwise met the other requirements of the contractual documents. The award to Seele/Alvis could therefore be justified even if Harmon was the lowest tenderer.

QUESTION

(6) Were any of the tenderers entitled to submit alternative tenders based upon alternative designs and if so, whether such an alternative tender had to be additional to and accompanied by a compliant tender?[636]

RESPONSE

No.[637]

QUESTION

(7) If H of C had not been in breach of PWR20 in failing to identify or rank criteria for economic evaluation, would H of C have been entitled to consider alternative or variant tenders pursuant to PWR 20(4) ((ie did the defendant comply with the requirements of PWR 20(4)).[638]

RESPONSE

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636 Issue 5(7).
637 See par. 360 'answers to the issues'.
638 First part of issue 8(3).

No, because the H of C had not set out the minimum requirements for the purposes of PWR 20(4), because the variant permitted was of detail only and not a change of design and for the independent reason that PWR 20(4) requires the tenderer of a variant to submit a compliant tender capable of being compared with the tenders of those who had not submitted such a variant. [639]

QUESTION

(8) If H of C had not been in breach of PWR20 in failing to identify or rank criteria for economic evaluation, did H of C in fact apply the identified criteria when assessing tenders (ie those criteria identified in the contract documents and/ or made known to tenderers in the manner particularised below)?[640]

RESPONSE

No.[641]

QUESTION

(9) If H of C had been entitled to consider variants or alternative tenders, were Harmon's tenders the most economically advantageous/or represent best overall value for money when compared with the tenders of Seele Alvis for option B2?[642]

RESPONSE

Although a hypothetical question, given the decision above that H of C was not entitled to consider variants or alternative tenders, but Judge Lloyd answered that "obviously yes" Harmon's tenders were the most economically advantageous/or represented the best overall value for money when compared with the tenders of Seele Alvis for option B2.

Harmon had contended that the effect of PWR 20(4) was that an alternative or variant could not be considered unless the tenderer had, at the same time, submitted a compliant tender. In Judge Lloyd's opinion, this was a correct reading although, on the facts, it might not have ultimately been material. The reference to variants implied that in addition to the tender that was sought an alternative might have been submitted. In any event, said Judge Lloyd, the OJ notice followed that interpretation and accordingly it would not have been fair to other tenderers to have considered a variant unless it had been accompanied by a compliant tender. Harmon also submitted that just as no selection criteria were ever stated so too there were no minimum requirements set out in the documentation as required by PWR 20(4).

In practical terms the evidence given by Harmon's technical expert brought out an additional reason for requiring a tender which conformed to the invitation to tender to be submitted as well as any alternative tender. If this had not been the case then a contracting authority could not accept the alternative without first giving the other tenderers the opportunity of considering it, for otherwise

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639 Par. 197 and par. 360 'answers to the issues'.
640 Issue 8(4)
641 Par. 197 and par. 360 'answers to the issues'.
642 Issue 8(5).

the tenderer would not have competed with the other tenderers which would contravene the principles of transparency fairness and equality. It was clear to the court that tenderers were only expected to submit alternatives on matters of detail relating to the execution of the basic design for the implementation of which tenders were being submitted and that the tenderers were not expected to submit alternative designs. Harmon's technical expert, for example, was of the same opinion, which Judge Lloyd accepted. For convenience His Honour repeated what the expert had said in his report (and when cross-examined he had adhered to this opinion):

> "As set out in paragraph 3.6 above, following the pre-tender briefing sessions, the design team decided to permit tenderers to submit their own alternative details or specifications. The design team placed themselves under no obligation to adopt any alternative details, but accepted that if they did so, design responsibility would be retained by AFE. This was not an unusual arrangement where normal procurement procedures were being adopted.
>
> The question as to what constitutes an alternative detail arises. In this instance, the contract was in relation to fabrication and installation works. It excluded design and the supply of copper-based alloys from which the chassis and framing were to be fabricated. Consequently, an alternative detail would be one which related to the fabrication and installation, and not one which significantly affected the design or the supply of the materials. An alternative detail would be of the sort suggested by Harmon. They proposed omitting weatherseal welds between inner glazing clamps and chassis framing. This was an alternative detail. It did not affect the appearance of the building, significantly affect the drawn details or affect the supply of specialist materials."

H of C had submitted that even if it had not complied with PWR 20(1) and was not entitled to make an award other than on the basis of the lowest price, it could nevertheless award the contract to a tenderer who put in a variant provided that it complied with the five basic principles or requirements to be found in the Specification and otherwise met the other requirements of the contractual documents. The award to Seele/Alvis could therefore be justified even if Harmon was the lowest tenderer.

It was the court's judgment, that the contract did not indicate that these requirements relied on as selection criteria were the minimum requirements for the purposes of PWR 20(4), which was contrary to H of C's case. In addition PWR 20(4) only applied if the authority was seeking the "most economically advantageous" tender. This must have meant, in the court's opinion, that it was entitled to do so, ie that it had complied with the PWR by specifying criteria in descending order of importance. It did not apply if the authority was bound to accept the lowest price. In Judge Lloyd's opinion, an authority which had not complied with the PWR so that it was not entitled to award the contract on a "most economically advantageous" basis could not still bring itself within PWR 20(4) simply because it purported to comply with it. That would have meant that an authority could have pretended to elect for "most economically advantageous" and then have contracted on a basis which would not have been open to it.

The PWR, said Judge Lloyd, had been framed to cover a wide variety of situations, such as the situation where the contracting authority will simply set out its requirements and then see how the tenderers propose to meet those requirements. This might lead to the need to compare a variety of different ways or designs. Here, however, H of C had retained designers and did not set out the requirements which their design was to attain so even if PWR 20(4) had been available to it the statements made in the documents fell far short of a performance specification, which is what "minimum requirements" in this context connoted. It was not to be expected that the tenderers were to re-consider the consultants' fundamental design which had been considered by them and which had resulted in the schemes shown on the drawings and in the specification. The most obvious example was, said the court, the basic principle of "blast loading". Even if a tenderer had wished to submit a radically different design it could not have done so without obtaining the information which was not to be found in the tender documentation, which was only known to the designers and which was subject to important security restrictions, since a vital part of the design had to take into account explosive forces which might be encountered in the event of a terrorist attack.

Accordingly, although H of C pointed to the evidence of Harmon's representatives in which there were acknowledgements that alternative proposals could be submitted, Judge Lloyd did not consider these acknowledgements did any more than show a recognition of the obvious: that in relation to the detailed implementation of the design, it was open to tenderers to put forward alternatives, particularly bearing in mind that the tenderers might have skills and experience which had not been available to the design engineers. However, the skills and experience would, in His Honour's view, be largely concerned with questions of fabrication and installation even though the tenderers were no doubt all well capable of carrying out the design work, which had been entrusted to the engineer as indeed most of them had originally been treated as pre-qualified for that very purpose (before the decision was taken to use the consultant engineer as the designer).

Thus Judge Lloyd did not consider that H of C complied with its obligation to set out the minimum requirements by which any variant could be assessed, whether under PWR 20(4) or pursuant to the invitation to tender, other than matters of detail, in that they were not identified in the documents either as such or recognisably as such amongst a mass of other requirements. Accordingly since no other documents could have been relied on, it must follow that there were no other requirements stated by which any alternative tenders could have been assessed - at least requirements publicised and known to the tenderers. It was part of H of C's case that it was nevertheless open to the contracting authority to consider variations or alternative tenders. Reliance was placed upon some observations of Professor Sue Arrowsmith in her treatise *The Law of Public Utilities' Procurement*:[643]

> "It is not clear what is the position where the required information is not given to bidders. In particular, if variations are not mentioned in the contract notice and no minimum requirements are specified, is the purchaser permitted, or required, to accept such variations?
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> ...

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643 At page 619.

> One possibility is neither to require nor to permit variations in any case where minimum requirements are not specified. Another is to permit providers to request or seek a remedy, for amendment of the documents to require the purchaser to include its minimum requirements and to require variations to be considered where this has been done, but not otherwise. A third approach is to require the authority to consider variations but on the basis that there are no minimum requirements. It is not clear which interpretation is correct."

It was submitted that the third approach was permissible and would have been consistent with the principles of transparency and equality of treatment in that all tenderers would have known that they could submit alternative offers. But in Judge Lloyd's opinion, the principles of transparency and equality pointed in precisely the opposite direction. He said:

> "First, I do not consider that tenderers can be treated equally or fairly if they are not given the criteria by which any variants are to be assessed. Obviously, if no criteria or minimum requirements are stated, then all tenderers are necessarily equally in the dark. However, the principles that have emerged from the decisions of the Court of Justice and applied by the courts of this country show in my judgment that that was not a fair or correct way in which tenderers are to be treated. In addition to the authorities to which I referred above, in the *Storebælt* case,[644] the Court made it clear that if variants were to be considered, then they had to comply with the requirements set out in the invitation to tender. That means that such requirements must there be stated clearly for otherwise the principle of fairness and equality will not be observed. Secondly, there can be no transparency if the contracting authority keeps to itself the criteria or requirements and does not reveal it to the tenderers. The only possible circumstance in which the third option might be permissible would be if the contracting authority not only did not state the requirements, but also said expressly that there were no requirements by which the variants would be assessed. Even that approach would have its difficulties. It might only be appropriate where the very nature of the project required the tenderers to ascertain the authorities' requirements, eg to carry out a feasibility study where apart from price each tenderer might have different ways of tackling the tasks. Even then it seems to me to run completely counter to the fundamental principles set out in the PWR and in the Directives.

Therefore, Judge Lloyd concluded, even if H of C had not been in breach of PWR 20 it would not have been entitled to consider alternatives or variants pursuant to PWR20(4) because it had not complied with the requirements of PWR20(4)[645] because H of C had not set out the minimum requirements for the purposes of PWR 20(4), because the variant permitted was of detail only and not a change of design and for the independent reason that PWR 20(4) requires the tenderer of a variant to submit a compliant tender capable of being compared with the tenders of those who had not submitted such a variant. The second part of issue 8(3) was not answered, even hypothetically. As to Issue 8(4) it did not arise, but even if H of C had not been in breach (Issue 8(2) it had not in fact applied the criteria which it had identified in contract documents or otherwise made known to tenderers.[646] Issue 8(5) similarly did not arise but the first part would not have been answered although the answers to the two questions in the second part were obviously: 'Yes'. Therefore, if H of C had been entitled to consider variants or alternative tenders, Harmon's tenders were the most

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644 *Commission v Denmark* Case 243/89.

645 Par. 197: " if issue 8(2) had been answered: 'No', then the answer to the first part of Issue 8(3) would have been: 'No'."

646 "Issue 8(4) does not arise but the answer would have been 'No'."

economically advantageous or represented the best overall value for money when compared to Seele/ Alvis for option B2. If issue 8(5) had arisen for decision and if it had not been common ground then Judge Lloyd did not consider that it raised issues that were not justiciable for it could have been shown that the project team's assessments were not reasonable.[647]

COMMENT

This note deals only with Issues 6, 7 and 10 with respect to the existence of a tendering contract, and its breach,[648] and Issue 8, as to whether H of C had properly complied with PWR 20 in its invitation to tender and its award of the resulting contract.[649] There are several other important issues with respect to procurement of construction works which are worthy of study within the construction and engineering industries, for example:

(1) That H of C was under enforceable obligations to comply with Council Directive 93/37, and Articles 6, 30 and/ or 59-65 TEU (Issue 3). On the facts of this case it was in breach only of Article 6 (Issue 9).

(2) That items contained generally within the contract documents did not meet the requirements of PWR 20 (Issue 5(1))

(3) That H of C was a public authority or person holding public office so that it was capable of committing the tort of misfeasance, and that on the facts of this case, H of C did commit that tort in certain identified respects (Issue 8A).

(4) That H of C's breaches of PWR 20, TEU Article 6, the tendering contract, and its misfeasance in public office caused Harmon, not only wasted bid costs, but also loss of gross margin or profit (Issue 11).

(5) That as a matter of law H of C was obliged to award Harmon the fenestration package and without more, this entitled Harmon to the margin that it would have earned on the tender which should have been accepted and/or its tender costs (Issue 11(1)). It was sufficient for Harmon to show that it ought to have been awarded the contract in question in order to recover its wasted bid costs and its loss of margin or profit (Issues 11(2) and (3)).

(6) That any recovery of damages for wasted bid costs or lost profit or margin is recoverable under one or several heads on the facts of this case, namely (1) as damages for breach of the Treaty of Rome; or (2) pursuant to PWR 31(3) of PWR; or (3) as damages for breach of the tendering contract; or (4) as damages for misfeasance in public office (Issues 18, 22 and 23).

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647 For tender variants, see par 188 – 197 of the judgment.
648 Par. 207 – 218.
649 Par. 170 – 197.

Chapter 6

Re-engineering the Tender Code for Construction Works.

The aim of Chapter 6 is to present the author's published paper *Re-engineering the tender code for construction works*. This paper had two main objectives: to criticise provisions of the NJCC *Code of Procedure for Single Stage Selective Tendering* and its successor, the CIB's *Code of Practice for the Selection of Main Contractors*; and to make some suggestions as to what a new tender code might include, in the light of selected decisions of the common law courts.

Chapter 6 is in two parts. Part 1 provides an introduction and summary of the paper reproduced in Part 2.

Part 1

Part 2 reproduces the author's published paper titled *Re-engineering the tender code for construction works*, published in Construction Management and Economics (2000) volume 18, pp. 91-100. In pursuing the two main objectives set out above, the author had in mind that a new tender code should be produced by the construction industry and its customers in the style of a standard form of contract, similar in concept to JCT and ICE forms. This would be a departure from traditional practice and experience as previous tender codes were thought to be no more than statements of good industry practice, but not the source of legal obligations. It was necessary once again to explain, using the *Ron Engineering* case (1981, Canada), how a tendering contract might be formed between owner and tenderer giving contractual force to the conditions of tender, which would include the provisions of any tender code incorporated by reference into the tendering contract.

The implications of a tendering contract were then explored in the following areas: dealing with errors and irregularities in tenders after the time for opening; dealing with qualified tenders or tender 'tags'; withdrawal of tenders before acceptance; making time provisions for return of tenders and dealing with late tenders; receipt of tenders by fax or other electronic means; evaluation of tenders received; and price reductions or 'savings' imposed or negotiated with owner. The present author concludes that decisions of the courts should be reflected in the drafting of a new tender code which would be recognised by all parties to construction and engineering activity as a contract document. Such a tender code must be more prescriptive and robust in dealing with the topics listed above and more. It should be recognised generally that breach of the tender code is a breach of contract where the normal remedies in law are available to the injured party. All parties, and the community in general would benefit from the understanding and application of an obligation of fair dealing in the construction procurement process.

The paper was written during the first half of 1998. There are no subsequent decisions of the courts of which the author is aware that would lead to amended presentation of the arguments. The subject of receiving tenders by fax or other electronic means was introduced in the paper with respect to changes in traditional tendering practice needed to properly accommodate the new technologies. There is little recorded experience of dealing with faxed tenders, and publisher's space restrictions prevented inclusion of the following further points on faxed tenders.

A practical problem arises for the owner desirous of receiving tenders by fax: how many fax lines and dedicated fax machines are required so as to avoid a 'log jam' of faxed tenders in the minutes before the tender deadline? Only experience and knowledge of particular circumstances will provide an answer to this question, but it seems likely that in a large public authority or other frequent commissioner of building works careful allocation of tender submission times is required so as to smooth demand for fax lines and machines.

The State of Victoria, Australia, has been taking faxed tenders for about fifteen years.[650] The designated fax machines provide a report that shows the time when the transmission commenced (by the receiving machine's time), the number of pages transmitted and the duration of the transmission. The report also shows the time recorded by the sending machine but this has been found to be unreliable, having in many instances never been reset since the day of installation. The State has introduced the process of checking the accuracy of the fax clock one hour before tenders close on each tender day. They found that even new machines lost about five seconds a week. By recalibrating the time the system inaccuracy was reduced to less than one second in a week. The time was checked against the Telecom clock on a loud speaker. Records are maintained of who did the check, what time the check was made and the degree of inaccuracy discovered. In the light of dispute between tenderer and public owner in *Smith Bros & Wilson (BC) Ltd v British Columbia Hydro & Power Authority and Kingston Construction Ltd*[651] it becomes very important to establish accurately by reference to the 'tender reference clock' whether a tender is received by the owner in good time. A tender out of time is generally an invalid tender and should be discarded.

Confidentiality of faxed tenders also presents a problem which must be resolved by the owner. The fax machines used by the State of Victoria for receipt of tenders under are dedicated only to tendering and are kept in a locked cupboard (previously a locked room). The cupboard is opened just before the time of tender closing. There is usually a pile of faxes already in the output tray. The confidentiality of a faxed tender may be compromised when it is found during calibration of machines, or when a fax has arrived ahead of tender closing time. The State tender rules require that faxes discovered in these ways are to be placed in the adjacent tender box for future recording. This system relies on the honesty of the staff involved, but the probity of the tendering process is assisted by the fact that staff closing or recording tenders are independent of the Government agency seeking tenders.

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650 See generally *Tendering for Public Construction and Related Consultancy Services*, 1997, Office of Building, Department of Infrastructure, Melbourne 3000, Victoria, Australia.

A fax gridlock, or log jam, is avoided by having two fax machines in tandem so that if one is busy the message goes to the second machine. This system has worked well in Victoria where tenderers submit only a tender form with, say, two pages attached. Linking a third machine situated outside the tender room has been considered as an emergency measure but this machine would not be secured and so far has not proved necessary. If a fax machine becomes jammed the fax will be retained in the memory of the machine. The State's machines can store up to forty pages of fax in memory.

As the time recorded on the machine is the time of commencing transmission, or the time that print out started, the State implements the following policy: if the recorded time is on or before the tender closing time, the tender is valid, otherwise the tender is invalid. It is acknowledged that some critical information such as price may not arrive until the end of the transmission and this may be after the time of closing. If there was evidence that this situation arose out of a deliberate attempt to gain some advantage, the tender would be declared invalid. This situation had not arisen at the time of the author's investigation (April 1998).

When a tender is sent to the wrong fax machine, ie one that is not secured, the State has required evidence that the fax arrived on time (by testing the receiving machine's clock as soon as possible after receipt of tenders) and of an acceptable reason for the tenderer's error. In one case the tender documents contained the fax numbers of both secured and unsecured machines and it was judged that the tenderer's mistake in sending its tender to the wrong fax number was due to the State and not the tenderer.

On the topic of 'evaluation of tenders received' one point was removed from the text of the printed article in Part 2. In England, the NJCC *Code* required only the *lowest* tenderer to submit its priced bill(s) of quantities within four days of tender submission[652] but in Scotland *all* tenderers were obliged to supply the priced bill(s) with the tender. The CIB Code suggests that priced bills or other priced documents 'should only be required from preferred bidders'[653] A 'preferred bidder' is 'a tenderer selected to proceed towards a contract, subject to discussion', which 'might include negotiation of the scope of the pricing of the contract, or collaboration in the development of the final design'.[654] Under the 'tendering contract' a tender is generally irrevocable for the period stated therein, and whatever the examination of priced bills reveals, tenders cannot be 'corrected' for the reasons explained in Part 2. If the tender process includes prequalification, then it is submitted, only the priced bill in support of the lowest or most advantageous offer needs be examined. This is because all relevant criteria except price have already been duly assessed and evaluated on an equal and fair basis. Only price (the proposed contract sum) need now be considered. On the other hand, if qualification is part of the tender evaluation process, priced bills from *all* tenderers must be scrutinised, so that equal and fair treatment is given to all tenderers.

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651 (1997) 30 BCLR (3d) 334 (Canada).
652 See NJCC *Code of Procedure for Single Stage Selective Tendering*, clause 5.2
653 CIB *Code* par. 3.15, p.18.
654 *Ibid.*, 'Key Players', p.4.

The NJCC *Code* made no provision for tenders not based on bills of quantities. This was clearly out of touch with the current market. The CIB Code does not suffer from this defect. It caters, it claims, for both traditional (works only) and design and construct procurement routes, or any other route.

Chapter 6

Part 2

Re-engineering the tender code for construction works

The UK's NJCC *Code of Procedure for Single Stage Selective Tendering* (now withdrawn) and its successor, the CIB's *Code of Practice for the Selection of Main Contractors* are criticized in the light of decisions of the common law courts with regard to regulation of the tendering process. It is argued that a new 'Tendering Code' should be produced in the style and format of a contract document which reflects not only the statutory regulation imposed on public bodies, but common law decisions of the courts. The nature of this tendering contract is explained as a means of regulating the tendering process. Issues discussed are: dealing with errors and irregularities found in tenders; dealing with non-compliant tenders; dealing with tender withdrawal prior to its acceptance or rejection; making provisions as to time for submission of tenders and dealing with late tenders; making provision for submission of tender by fax or other electronic means; making provision for evaluation of tenders received; and imposing or negotiating reductions in price with tenderers prior to acceptance. The paper concludes that the common law obligations placed on the owner to treat all tenderers equally and fairly and to apply the tender conditions when evaluating tenders and awarding contracts seems to be good common sense and of commercial advantage, not only to the immediate parties concerned but also to the wider community.

Keywords: Tendering, contract, fair-dealing, equality of opportunity, law

Introduction

The purpose of this paper is to criticize constructively some provisions made in both the Code of Procedure for Single Stage Selective Tendering (NJCC, 1959-1996) (the NJCC Code) and the Code of Practice for the Selection of Main Contractors (CIB, 1997) (the CIB Code), then demonstrate the need to re-engineer tendering codes in the light of recent decisions of common law courts that the tendering process is frequently governed by a tendering contract, and that the contents of a 'tendering code' as well as other tender stipulations contained in the tender invitation and conditions will provide the terms of that contract. The paper concludes that the 'tendering code' should be reproduced as a contract document which shows clearly each party's contractual obligations, rather than as administrative guidance notes or statements of best practice which are thought to have no contractual effect.

The NJCC *Tendering Code* and the CIB *Code of Practice*

The National Joint Consultative Committee for Building (NJCC) was set up in 1954 and published its best-known product, the *Code of Procedure for Single Stage Selective Tendering* in 1959. In the course of its near forty years life, the *Code* has gone through several revisions and sold tens of thousands of copies. The NJCC claimed (see notes inside rear cover) that its *Code* "transformed tendering practices [and for] the first time recommended procedures which were easily comprehensible, obviously ethical and clearly designed to prevent undesirable practices". The NJCC comprised, like the Joint Contracts Tribunal (JCT), the representative bodies of consultants and contractors involved in construction and engineering. Unlike JCT, there were no owner/ employer representatives on NJCC, but the *Code* produced by NJCC were endorsed by government and widely used in the public sector, but perhaps less enthusiastically adopted by the private sector. The Institution of Civil Engineers (ICE) took no part in the NJCC's work but published its own advice on tendering in 1983 as *Guidance on the Preparation, Submission and Consideration of Tenders for Civil Engineering Contracts* and known as the 'black book' (ICE, 1983).

There was for most of the NJCC *Code's* life no statutory control of tendering in the United Kingdom and the *Code* did not have the status, for example, of the Australian *Code of Tendering* published as Australian Standard AS 4120-1994 (SAA, 1994). The NJCC merely operated through its Good Practice Panel and adopted the position of 'custodian of good practice'. Nonetheless, the Panel and the NJCC *Code* occupied positions of influence and authority within the industry and its professions. The opinions expressed were widely respected and generally accepted on a voluntary basis.

The NJCC was wound up in 1996 and its role was taken over by the Construction Industry Board (CIB), which was formed to implement the recommendations of Sir Michael Latham's 1994 Report, *Constructing the Team*. 'The CIB is a partnership between the representative bodies of the industry, its clients and government for the improvement of UK construction' (CIB, 1997, p. 28). Its *Code of Practice for the Selection of Main Contractors*, published in 1997, is 'designed to improve the quality, effectiveness and efficiency of the construction industry' (CIB, 1997, p. 5). The CIB *Code* too rakes the form of a 'good

practice' guide and emphasizes the need for fairness and openness in the tendering process (CIB, 1997, p. 5). Several 'key principles of good practice' are identified including, for example, 'sufficient information should be provided to enable the preparation of tenders' and 'there should be a commitment to teamwork from all parties'. The CIB *Code's* objective 'is to improve the efficiency of the construction industry through good practice' (CIB, 1997, p. 7). It is not intended to form the basis of a legal agreement between owner and tenderer.

In the context of public procurement, any new 'tender code' for the United Kingdom must take account of the European Union (EU) procurement directives 93/37/EEC and 89/665/EEC and *The Public Works Contracts Regulations* (1991). The CIB *Code* acknowledges the existence of EU procurement rules, but side-steps any detail on the basis that public sector clients are 'experienced' and that the detail need not be 'repeated in this code' (CIB, 1997, p.9). Therefore, in converting the CIB *Code* to a contract document, the missing detail needs to be added. Procurement advice for both public and private sectors must also reflect developments in the common law of tendering, some of which are revealed in this paper.

Farrow and Main (1996) criticised the NJCC *Code* as containing 'faults both in principle and application.' The NJCC *Code* was thought to be at fault in catering only for clients and not producers, in accommodating only projects where bills of quantities were to be used and not 'without quantities' projects, and in placing too much discretion in the hands of the client or its agent. The CIB *Code* does address these criticisms. First, industry producers are now well represented on the CIB. Second, the CIB *Code* is not prescriptive of procurement process, catering for both 'works only or design and construct' options, or 'other procurement routes' (CIB, 1997, p. 7). Third, the issue of discretion in the hands of the client or its agent is more difficult to address in few words, but the CIB *Code* does answer to the extent of stating quite clearly that 'tenders should only be invited if there is a genuine intention to select a contractor on that basis' (CIB, 1997, p. 7), that any 'selection process requires fair dealing between parties', that assessment criteria . . . should be notified during the selection process and stated in the tender enquiry documents' (p. 9) and that where selection criteria are to be weighted, this too must be disclosed in the tender documents (p. 9) It will be seen later in this paper that unreasonable exercise of discretion by the owner provides fertile ground for a legal challenge by an aggrieved tenderer.

Recent developments in the common law of tendering — the 'tendering contract'

Arguably the most important developments in tendering law are to be found in the cases where the court has held that the owner is bound to each conforming tenderer by a 'tendering contract' which arises out of the owner's invitation to tender and the tenderer's conforming response to that invitation. The tendering contract is quite separate from any construction contract that might arise if the owner accepts a tender.

Traditionally, the owner's invitation to tender was no more than an invitation to treat, or an invitation to do business, but the courts have in some recent cases adopted the opposite position. The invitation to tender is now in some circumstances to be treated as an offer to make a contract which a tenderer accepts when it submits a compliant tender. This arrangement has been described as a 'unilateral contract' or, perhaps more descriptively, an 'if contract'. The owner makes an offer to each tenderer which might be worded as follows: 'if you submit a tender in response to my invitation and which conforms to the stipulations made, I will consider that tender ...'. Tenderers at this point are not obliged to do anything in response to the owner's offer, but if a compliant tender is submitted, a contract is formed (the tendering contract) between owner and tenderer, and the owner becomes obliged to each tenderer to perform its side of the bargain, which at this stage is an obligation to consider all compliant tenders. There are several cases which illustrate the nature of the 'if contract': see for example, *Carlill v. Carbolic Smoke Ball Co* (1892); *Errington v. Errington and Woods* (1952). The 'if contract' formed in the context of tendering has been described here as the 'tendering contract' (but also described elsewhere as a 'pre-award' or 'process' contract).

In the interests of clarity, the proposition is restated as follows: the submission of a compliant tender in response to an invitation to tender *can* create contractual obligations for both parties. The obligations created will be found within the tender conditions, the 'tender code', and other relevant material such as legislation and correspondence. All or some of the provisions of the 'tender code' may be incorporated in the 'tendering contract' by reference and/or by implication. A term will usually be implied to the effect that the owner *must* consider all conforming tenders if it considers any (*Blackpool & Fylde Aero Club v. Blackpool Borough Council* (1990)); the owner *must* treat all tenderers equally and fairly (*Martselos Services Ltd v. Arctic College* (1994), *Pratt Contractors Ltd v. Palmerston North City Council* (1995)); and the owner *must* award only a contract for the project tendered for and not for something different (*Pratt Contractors*; *Health Care Developers Inc and others v. The Queen in right of Newfoundland* (1996)). This is not to say that the owner becomes obliged generally to award a contract, to the lowest bidder or any other bidder, because the owner will be protected by the ubiquitous 'privilege clause' (e.g. *Martselos*, *Pratt Contractors*, *McKinnon and*

another v. Dauphin (Rural Municipality of Manitoba) (1996)). The effect of a privilege clause is found in the NJCC *Code* at clause 1.1, which states: "Nothing in this Code should be taken to suggest that the employer is obliged to accept the lowest or any tender".

The obligations placed on the tenderer by the tendering contract depend on what is promised by the tenderer. A typical example would be a promise by the tenderer not to withdraw its offer for a specific period or prior to acceptance by the owner of a tender. The following case shows the effect under the tendering contract of a tenderer's promise of an irrevocable tender.

The *Ron Engineering* case

In *Ontario (The Crown) v Ron Engineering & Construction Eastern Ltd* (1981) the Supreme Court of Canada held that a contract was brought into being automatically upon the submission of a responsive tender by each tenderer. The owner called for tenders and issued general conditions applicable to all tenderers. Paragraph 13 of those conditions required a tender deposit of $150,000 to accompany any tender. The owner would be entitled to retain the tender deposit if a tenderer withdrew before consideration by the owner of tenders submitted or before or after receiving notification of a successful tender. The deposit would be forfeited if a construction agreement was not executed and a performance bond or payment bond not produced. The owner might "retain the tender deposit for the use of the [owner] and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the [owner] may deem advisable." The tender deposit would be returned to the successful tenderer when a formal agreement had been executed and the owner had received any bonds required by the tender conditions.

Ron Engineering submitted a tender and tender deposit. Its tender ($2,748,000) was lowest of eight submitted: $632,000 lower than the second lowest offer. But within little more than an hour of the opening of tenders, Ron Engineering discovered an error in pricing and requested in writing "to withdraw the tender without penalty". Subsequently it maintained that its tender was not withdrawn, but by reason of its notice of error given to the owner prior to acceptance, was merely not capable in law of acceptance, and that therefore it was entitled to return of the tender deposit. The owner responded to Ron Engineering's position by asking it to sign contract documents in the tendered amount. Ron Engineering refused to sign on the grounds of the pricing error. The owner then argued that it was entitled to keep the tender deposit, and accepted the tender of the second lowest tenderer. Ron Engineering commenced an action against the owner to recover its tender deposit. The owner counterclaimed damages caused by Ron Engineering's refusal "to carry out the terms of ... tender" and, as a consequence of this refusal, the acceptance of the higher tender.

Ron Engineering's core argument was that by making an error in its pricing, the tender became revocable, or the deposit recoverable, despite paragraph 13 of the conditions of tender, providing that notice of the error was given prior to the owner's acceptance of the tender. Ron Engineering's position was that whilst its offer was not withdrawn, it was not capable of acceptance, and therefore its tender deposit should be returned. The owner's argument was that the submission of a tender by Ron Engineering created a contractual obligation to perform the terms of its tender: Ron Engineering was in breach, the owner had suffered damage as a consequence and was entitled to retain the tender deposit.

Does the submission of a tender in these circumstances create a contractual obligation for both parties, so that the tenderer's revocation of its offer would be a breach of contract thus enabling the owner to claim damages (or retention of the tender deposit) against the tenderer?

The court held that a contract between tenderer and owner arose upon the submission of a tender. It was a term of that contract that the tenderer could not withdraw its tender for a period of 60 days after the date of the opening of tenders. This contract was brought into being automatically upon the submission of the tender in response to the owner's invitation. This 'tendering contract' incorporated paragraph 13 of the tender conditions which stated:

> "Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn ... or if the Commission does not for any reason receive within the period of seven days ... the Agreement executed by the tenderer ... the Commission may retain the tender deposit ..."

The court was of the view that integrity of the bidding system must be protected where under the law of contracts it was possible so to do. The tender submitted by Ron Engineering brought 'contract A' (the 'tendering contract') into life under the principle described above. The significance of Ron Engineering's tender in law was that it at once became irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms did so provide. There was no disagreement between the parties here about the form and procedure in which the tender was submitted by Ron

Engineering and that it complied with the terms and conditions of the call for tenders. Consequently, 'contract A' came into being.

The terms of contract A (the 'tendering contract') indicated clearly a contractual right in the owner to forfeit Ron Engineering's tender deposit of $150,000. The owner's remedy could have been more disadvantageous to Ron Engineering. In *Calgary v Northern Construction Company* (1986) the court held that the owner's remedy amounted to the difference between the revoked tender and the next lowest tender, which would have been $632,000 in this case.

The *Ron Engineering* case establishes clearly the existence of a tendering contract in the common law in Canada, and has been followed by courts in Australia (*Hughes Aircraft Systems International v Air Services Australia* (1997)) and New Zealand (*Pratt Contractors Ltd v Palmerston North City Council* (1995)). Although the *Ron Engineering* case was not cited to the English Court of Appeal, it is submitted that *Blackpool & Fylde Aero Club v Blackpool Borough Council* (1990) was decided on grounds consistent with the Canadian decision. The factors which led the Court of Appeal to find a tendering contract exist in the bulk of construction procurement. More detailed analysis of these cases is available in Craig (1999).

The effect of the *Ron Engineering* case with respect to the 'tendering code'

Having established in circumstances typical of modern construction procurement that a 'tendering contract' is formed between the owner inviting tenders and a tenderer who submits a compliant tender, the question then is: what are the terms of that contract? If the owner by its conditions of tender makes reference to a 'tender code' it seems likely that the code is incorporated within the tendering contract. The following observations are made in the novel context of the 'tender code's' contractual status.

Dealing with errors and irregularities in tenders after the time for opening

The NJCC *Code* provided at clause 2.4 'that the contractor's tendered price should not be altered without justification.' The CIB Code states as a 'key principle of good practice' that 'tender prices should not change on an unaltered scope of works' (CIB, 1997, pp. 5, 19)

It is submitted that there is no justification or basis on which the owner can properly alter the price tendered by any tenderer. The owner would be in breach of its equal and fair treatment obligation to check and 'correct' one tender when it did not provide the same services to all conforming tenderers. In *Vachon Construction Ltd v Cariboo Regional District* (1996) the owner took it upon itself to 'correct' a discrepancy between the tendered figure and amount in words. The correction was done after asking the relevant tenderer which sum was the correct tender amount. The tenderer, keen to secure the contract from the owner, replied to the effect that the lower amount was 'correct'. The second lowest contractor, Vachon, successfully challenged the contract award on the basis of the 'corrected' bid and the court upheld the challenge. An offer which is uncertain as to price cannot form the basis of an enforceable contract, nor can it form the basis of a 'tendering contract'. The tender conditions provided that 'tenders that ... contain irregularities of any kind may be considered informal'. The court held that such words created no power for a tenderer to alter or correct an irregularity in the tender document, and no power for the owner to participate in or accept such alteration or correction after the closing of tenders. There was no power for the tenderer or the owner to render valid that which was invalid at time of submission of tenders. Vachon, as second lowest tenderer, but lowest responsible (or compliant) tenderer, was entitled under the 'tendering contract' to not have its bid rejected in favour of a non-compliant bid that was incapable of acceptance. It was entitled to fair treatment and damages for the owner's breach of obligation. The owner could not circumvent its own tender conditions by pleading the 'privilege clause'.

There are some further point which arise from the judgment in the *Vachon* case lest it be thought that the problem disappears with revised contract drafting. If owners are to be allowed to change, correct or amend the prices submitted by tenderers, when and on what basis should this take place? In this case the tender was 'corrected' before other tenders were opened, but only due to the chance that it was opened first. And on what basis was the lower price deemed to be the 'correct' one? What would be the position if the 'irregularity' was in the second tender opened? Could it be 'corrected' to be lower than the first bid opened? What if the second tender fell between the 'wrong' and 'right' prices contained in the 'irregular' first bid opened, but the first bid had not yet been 'corrected'? As the court said (at 136 DLR (4th) 307, 318):

> "The ramifications from correcting a bid are endless, and may explain why it is that any changes to the tender document must be made prior to tender closing in order to insure that the process is, and is seen to be, fair to all bidders."

It seems absolutely clear that in no circumstances should bids be changed after tender opening. Amendments are required to the 'tender code'. The NJCC *Code* provided at clause 6.4.1 that the tenderer 'should be given an opportunity of confirming his [sic] offer or of amending it to correct genuine errors'. The CIB *Code* recommends that 'the arithmetic of compliant tenders should be checked' and that if price rates are dominant, as opposed to 'overall price', 'the client may request an amended tender price to accord with the rates given by the tenderer' (CIB, 1997, par. 4.7, p. 21). This provision seems to be inconsistent with the principle 'that tender prices on an unaltered scope of works should not change' (CIB, 1997, par. 4.13, p. 22).

This practice of amending the tender amount so as to 'correct' errors must be considered doubtful in light of the above case and its associated comment. It is submitted that the 'tender code' should state clearly that no changes may be made to the tender after its submission, or after its opening by the owner, and that any purported change renders the tender invalid. Invalid tenders are incapable of acceptance. The CIB *Code* requires rejection of non-compliant tenders (CIB, 1997, par. 4.2, p. 21)

Dealing with qualified tenders or tender 'tags'

As the 'tendering contract' comes into effect by the submission of a compliant tender in response to the owner's invitation, it follows that a tender which does not properly respond to the owner's request and stipulations is not 'responsive' (not compliant) and therefore cannot form the basis of a tendering contract. The owner is not entitled, nor obliged, to consider a non-conforming tender: see *Pratt Contractors Ltd v Palmerston North City Council* (1995).

Clause 4.4 of the NJCC *Code* dealt with "Qualified Tenders". The *Code* correctly emphasised that fair competitive tendering required 'each tender to be based on identical tender documents and that the tenderers should not attempt to vary that basis by qualifying their tenders'. But, and this is where the NJCC *Code* was deficient, under clause 4.4.3 a tenderer who had qualified its bid was to be given the opportunity to withdraw the qualifications. Surely such action would amount to 'correcting' the bid as discussed above. The NJCC *Code* continued: if the qualifications have not been removed, the 'whole tender should be rejected if it is considered [by the owner] that such qualifications afford the tenderers an unfair advantage over other tenderers.' The CIB *Code* is more direct: 'Any non-compliant tenders not received in conjunction with a compliant tender should be rejected' (CIB, 1997, par. 4.2, p. 21)

As Farrow and Main (1996) observed, there are two reasons why tenders are qualified. Firstly, the tenderer qualifies its tender because it has discovered an error in, or absence of, essential information in the tender documents. Secondly, the tenderer's qualification arises out of some individual initiative designed to secure competitive advantage. The first situation should be dealt with by drawing all tenderers' attention to the errors, allowing extra time for return, or re-submission, of tenders as necessary. This was provided within clause 4.4.2 of the NJCC *Code*, and now at paragraph 3.9 of the CIB *Code*. However, the second situation amounts to an 'alternative tender' and should be processed as such. It is submitted that, without appropriate stipulation in the tender conditions, there are no circumstances where the owner can do anything other than reject qualified (non-compliant) tenders. To consider, or even accept, a qualified tender would amount to a breach of the equal and fair treatment obligation: again see *Pratt Contractors Ltd v Palmerston North City Council* (1995). The NJCC *Code* was deficient on that point. The CIB *Code* requires (CIB, 1997, par. 4.2, p.21) rejection of 'non-compliant tenders not received in conjunction with a compliant tender'. Clearly the CIB *Code* is right in removing any discretion for the owner on this point.

Withdrawal of tender before acceptance

The NJCC *Code* provided a draft form of tender at Appendix C. The CIB *Code* gives no specific guidance on drafting a tender form, but (CIB, 1997, par.3.3, p. 17) recommends use of standard forms of tender.

The NJCC model form of tender stated that the 'tender remains open for consideration for [recommended 28, not normally more than 56] days from the date fixed for the submission or lodgement of tenders'. Clause 4.5.1 of the NJCC *Code* provided that 'under English law a tender may be withdrawn at any time before its acceptance'. The position is slightly different under Scots law. In that jurisdiction the promise to hold an offer open is enforceable without consideration or the execution of a deed. The position under Scots law is similar to that under other civil systems. For example, Article 1390 of the Civil Code of Quebec (CCQ, 1996-97, 4th Edn) provides: "Where a term [for acceptance] is attached, the offer may not be revoked before the term expires". The NJCC *Code* suggested at clause 4.5.1 that under Scots law the equivalent promise should be worded: 'this tender remains open for consideration unless previously withdrawn for [period] ...'. This style of wording would maintain parity with the effect of the standard wording in England.

It seems then that under the traditional view of English law the promise, as drafted, to hold the tender open is unenforceable. The tenderer may withdraw before acceptance. Any withdrawal of a tender under consideration causes damage to the owner. Surely the 'tender code' should provide consideration for the tenderer's promise to hold its offer open for the period specified, so the tenderer grants an enforceable option to the owner. One pound sterling would be sufficient! Alternatively, the tender could be executed as a deed.

But under the regime of the 'tendering contract' the tenderer is now bound to hold its offer open as promised, both in England and in Scotland. The tenderer receives consideration in the form of the owner's obligation to consider the tender, and to treat all tenderers equally and fairly. The tenderer is so bound without any sum of money stated on the tender form: it is the effect of forming contractual relations at the tender stage. It can be seen from the Canadian cases that the owner's claim for breach against a defaulting tenderer might be the difference in price between the lowest tender, now withdrawn, and the second lowest tender. Alternatively the owner's compensation might be retention of a bid bond or deposit, with the right to chose between damages and forfeiture of the bond or deposit.

Time for tendering and late tenders

Clause 4.3 of the *Code* suggested that a specified hour of the day be established as the deadline for submission of tenders, rather than vague expressions such as 'close of business' and that 'tenders received after time should not be admitted to the competition.' The CIB Code also recommends a time and date deadline for return of tenders: 'tenders received after that time should not be considered' (CIB, 1997, par. 3.16, p. 18). This is good advice but does not go far enough, for reasons highlighted in the following case.

Litigation took place before the Supreme Court of British Columbia in *Smith Bros & Wilson (BC) Ltd v British Columbia Hydro & Power Authority and Kingston Construction Ltd (1997)* over the accuracy of time for delivery of tenders for public works. The degree of accuracy (or inaccuracy) was discussed in court by reference to an atomic clock which was itself accurate to better than one second in 1.6 million years. The court held that stipulated time meant actual time, that a late tender is not a qualifying tender, (i.e. is not compliant) and that therefore the owner could not accept a late tender without attracting liability to compensate a disappointed qualified tenderer. One lesson here for owners is that time for submission of tenders needs to be stipulated by reference to a specific clock (the owner's clock), and that its time is the reference time, despite any inaccuracy, when judging timeous delivery of tenders. No such provision was made in the *Smith Bros* case. Obviously it would reduce disputes on this point if owners maintain the 'tender reference clocks' to accurate local time, and institute a probative system of reliability checks. Owners should also stipulate clearly *where* the tender must be at the stated time. Must the tender be time-cancelled by the deadline, as in this case, or merely 'deposited' in a certain, or even unspecified, box, to meet the deadline? Would delivery at some other point of entry to the owner's premises suffice? It can be seen that there is great scope for misunderstanding and dispute if matters of this nature are not expressed clearly and fully within the tender conditions.

Receipt of tenders by fax or other electronic means

Understandably, the NJCC *Code* made no provision for submission of tenders by fax. Surprisingly, the CIB *Code* makes no specific reference to faxed tenders, but it does suggest that in 'the interests of efficiency and overall cost reduction, appropriate use should be made of new technologies as they develop' (CIB, 1997, par. 1.11, p. 8) Owners may wish to retain the traditional arrangements for receipt of tenders and exclude submission of faxed tenders. A faxed tender would in such circumstances be declared non-compliant and invalid and this result should be indicated in the tender conditions.

Alternatively provision should be made within the 'tender code' to accept submission of tenders by fax (or by other electronic means). New procedures must be set to deal with, for example, time of receipt of faxed tenders. It will be necessary to calibrate each fax machine so that an accurate time-check is provided for each faxed tender received. It will be necessary to maintain a record of calibrations so as to counter any allegations of unfair or unequal treatment. Tender conditions should expressly reference the time for receipt of tenders to the 'fax clock' and indicate whether a further 'hard-copy' of the tender is required by traditional delivery.

In *Anson v Trump* (1998) the Court of Appeal had to decide when a faxed pleading was effectively transmitted to the other side. Transmission by fax is permitted by the Rules of the Supreme Court. The court said that 'transmission' was to be given a meaning consonant with modern communications technology and commercial practice. 'Transmission' is the process which starts when one party despatches the relevant document and ends when the complete document has been received by the recipient's fax machine. The process of transmission might take seconds or even nanoseconds, or it might take longer if the recipient's machine was busy or the document long. The transmission might remain some time in memory before being

printed out, but that, said the court, was irrelevant. In the absence of evidence to the contrary, and on the assumption that the clock on the transmitter's machine was set accurately, the pleading, say three pages in length, was transmitted and received at the time recorded by the recipient's fax machine.

This decision emphasises the point made above concerning the need for accuracy in setting and checking fax clocks for receipt of tenders. By analogy with the *Anson* case, the sending and receipt of a tender submission takes place instantaneously at the time recorded by the recipient. It would of course be possible to submit evidence to the contrary, to show, for example that the tender had been sent fifteen minutes before the time recorded by the recipient's fax clock and that the data had been stored in memory within the recipient's machine prior to printing and time stamping. It would also of course be open to demonstrate that the recipient's fax clock was 'fast' by fifteen minutes. Tender conditions must specify that timeliness of faxed tenders is determined only by the time stamp of the recipient's fax clock for the reasons explained above. Regular and frequent recalibration of the fax clock is required to maintain reasonable accuracy.

Another 'fax point' arose in *Galaxy Energy International Ltd v Novorossiysk Shipping Co* (1998). The Court of Appeal held that the giving of a notice of readiness to load or discharge a cargo, which was given by fax or Telex *outside* (prior to) the hours prescribed in the contract was not invalid, and thus rendered a nullity, because the notice was given effectively for the purpose of the contract when the prescribed period began. Applying this example in the tendering context, where for example tender documents specified 0800 hours to 1800 hours for the delivery by fax of a tender on a given date, and the tender was sent out of hours, say at 0600 hours on the correct date, the tender could not be rejected as invalid. The faxed tender would simply sit in the memory of the recipient's machine, or as a paper printout in the output tray, awaiting effective delivery when staff commenced work at 0800 or soon after. The tender would therefore be delivered in good time. By analogy, a tender received at the fax machine after 1800 hours is effectively received on the following day at 0800 and is invalid for lateness.

Evaluation of tenders received

Clause 5.1 of the NJCC *Code* provided that 'Tenders should be opened as soon as possible after the time for receipt of tenders.' The CIB *Code* provides only that tenders should not be 'opened before the date and time stated for receipt of tenders' (CIB, 1997, par. 3.13, p. 18).

Farrow and Main (1996) found considerable delay in the evaluation of tenders and the notification of results. Both transparency of the tender process and commercial needs would be assisted if there was a return to the practice of inviting all tenderers to the opening of tenders, to take place immediately, say, after time for submission. Opening should take place in public for public sector projects and in private for private sector projects. The CIB *Code* advocates confidentiality of tender prices before contract award (CIB, 1997, par. 3.12, p. 18) but there are some obvious advantages in disclosure to interested parties. All tenderers would know which bids were under consideration. They could see at first hand the degree of competition and obtain immediate feedback of 'results'. Such early and immediate impression is necessary, it is submitted, for the economic well-being of the industry. Unsuccessful tenderers can quickly respond in the market place.

Tender appraisals are conducted in confidence, although the results may eventually arrive in the public domain. Under clause 6.2 of the NJCC *Code* 'the object of examining priced bills [was] to detect errors in computation of the tender'. The CIB *Code* makes no such policy statement, but does require checking of compliant tenders for arithmetical accuracy (CIB, 1997, par. 4.7, p. 21). Tenderers are to be advised of mistakes. Depending on priority of (1) overall price, or (2) pricing document, the mistaken tenderer is to be asked to (1) stand by or withdraw its tender, or (2) at owner's discretion, amend tender price to accord with tender rates.

In other words, a regime similar to that of the NJCC *Code* is operated by the CIB *Code* in respect of arithmetical mistakes in tenders, except that the owner is now given discretion in the second category (priority of pricing document) as to whether the tender price is 'corrected' to agree with 'corrected' tender rates and prices. There is no guidance as to how the owner should operate this discretion. Presumably it acts in its own best interest, requiring only downward adjustment of tender price and otherwise requesting the tenderer to stand by its mistaken price. The CIB *Code* may be more flexible in dealing with errors but lacks the certainty created by the arrangements of the NJCC *Code*.

As explained above, the owner cannot correct a tender deficiency. Neither the NJCC Code 'alternative 1, alternative 2' option for dealing with errors, nor the CIB Code par. 4.7 provisions, it is submitted, reflects the true status of the tender in common law. The tenderer merely should be informed of its apparent error and asked to amend its priced bill or other pricing document accordingly: the tender cannot be withdrawn unless with the consent of the owner, and cannot be 'corrected'.

Clause 6.5 of the NJCC *Code* required only slight amendment: 'When a pricing document submitted in support of a tender is found to be free of error, or when adjustment has been made to make the pricing document consistent with its supported tender, that tender may be recommended to the owner for acceptance'.

Negotiations conducted with tenderers

The NJCC *Code's* basic rationale was that a 'tendered price should not be altered without justification' (see clauses 2.4 and 7.1). The CIB *Code* declares, as a principle, that 'tender prices on an unaltered scope of works should not change' (CIB, 1997, par. 4.13, p. 22). The 'altered scope' arises out of 'exceptional circumstances' such as changes to 'specification, quantities or programme, or if more complete information becomes available' (CIB, 1997, par. 4.12, p. 22).

The purported 'justification' (NJCC terminology) or 'exceptional circumstances' (CIB terminology) might arise from the fact that the tender under consideration exceeds the owner's budget. Clauses 7.2 of the NJCC *Code* suggested that a reduced price might be negotiated with the tenderer based on reductions in work content and specification. The same negotiations might be conducted with the second and third lowest tenderers, then new tenders called for (see clause 7.3 and 7.4). The CIB *Code* makes similar recommendations. Recent case law shows that this process is flawed.

In *Ben Bruinsma & Son Ltd v The Corporation of the City of Chatham et al* (1984) the owner decided to make savings on its project by deleting certain highly priced items of work after tenders were opened but before a contract was awarded. The frustrated lowest bidder complained. Conflicting expert evidence was presented to the court as to whether the owner's method of making savings was common practice. Under the terms of the construction contract major items could not be deleted from the contract without compensation becoming due to the contractor. Viewing the tender and contract documents as a whole, and relying on *Ontario (The Crown) v Ron Engineering & Construction (Eastern) Ltd* (1981) it was the court's view that the tender and contractual documents did not permit the owner to delete items from the tender before acceptance. The owner was obliged to accept or reject tender as submitted. Its right to delete major items of the tender will arise only after the construction contract is made, and then only upon payment of compensation for deletion of any major items.

Any other interpretation, said the court, would lead to unfairness in tendering. The practice adopted here by the owner could permit public bodies to accept items from a tender that appeared to them to be favourable and reject the balance, and then to call for new tenders on the items deleted — all without compensation to the tenderers and without consent. This, said the court, was a serious interference with the tendering process and one not permitted by the tender and contract documents.

This was another example of a unilateral contractual relationship existing between the tenderer and the owner. The owner's obligation to the tenderers, arising out of the 'tendering contract' in these circumstances, can be put as follows: a duty was owed to accept one of the tenders as submitted, or in the circumstances, to reject all of them if it was of the opinion that the work in question was too costly. Instead of that it purported to accept the second lowest tender, which by virtue of the deduction had become lowest tender, as the basis of a construction contract.

The main significance in this case is the restricted power available to owners and their advisers to vary the scope and/or extent of tendered work prior to the award of a works contract. The courts at both the interlocutory hearing and the full trial were critical of the owner's manipulation of tendered rates and prices for budgetary purposes. Justice Read said (at 29 BLR 148, 156; 141 DLR (3d) 677, 678):

> "If the recipient of tenders can unilaterally make a substantial deletion without notifying the tenderers and giving them an opportunity to revise their tenders to take it into account, then there would not appear to be any reason why the recipient could not go further and delete other items and this practice, in my opinion, could easily make a mockery of customary tendering procedure."

And at full trial Justice Craig said (at 29 BLR 148, 160-161; 11 CLR 37, 51):

> "Any other interpretation would lead to unfairness in tendering. The practice adopted by [the owner] could permit public bodies to extract items from a tender that appear to them to be favourable and reject the balance and then to call for new tenders on the items deleted — all without compensation for tenderers and without consent. In my opinion, this was a serious interference with the tendering process and one not permitted by the tender and contract documents."

There is an important lesson here for all clients, architects, engineers and quantity surveyors. If savings are to be made after receipt of tenders, some system must be thought out and set down within the 'tender code'. If the proposed reductions are substantial, tenders must be reinvited for the reduced scope of work. If provided for within the 'tender code', it may be possible to reinvite tenders only from a short list, say the three lowest tenderers. If reductions are not substantial, the reductions might be negotiated with the lowest tenderer, but this process must also be devised and set down in the 'tender code' so that all tenderers are aware and cannot bring claims for unfair and unequal treatment.

Conclusion

Criticism has been made of both NJCC *Code* and the CIB *Code* in that they are both inconsistent and incomplete in providing a basis for contractual regulation of the tendering process. This finding is not in itself surprising, since the *Codes* under consideration were not drafted as standard forms of tendering contract, but that is what is now needed.

A 'tender code' should take the form of a standard contract form because common law courts around the world have held that in certain circumstances (typical of construction procurement) the tendering process is regulated by a tendering contract. That contract arises automatically out of the owner's invitation to tender and the tenderer's compliant response to that invitation. The obligations created by the tendering contract will be found from the tender invitation, the tender conditions, correspondence and legislation. The next step is to set out those obligations in a 'tender code' which must be drafted as a contract document.

There are many common law decisions of the courts that must be considered and reflected in any new or redrafted 'tender code'. This paper discusses only a few of the relevant cases. Examination of the cases suggests that the 'tender code' must be more prescriptive and robust in: providing mechanisms for dealing with errors and irregularities found in tenders; dealing with non-compliant tenders; dealing with tender withdrawal prior to its acceptance or rejection; making provisions as to time for submission of tenders and dealing with late tenders; making provision for submission of tender by fax or other electronic means; making provision for evaluation of tenders received; and imposing or negotiating price reductions with tenderers prior to acceptance of a tender. It is clear from this examination that some dubious practices require to be changed.

It should be accepted generally that the 'tender code' will become a contract document, not merely a 'good practice' statement. Breach of the 'tender code' will entitle the injured party to damages (and possibly an injunction) under the normal rules of contract.

The 'tender code' must be drafted to be consistent with the common law, or clear words used to express any departure from the common law which is agreed by the parties to the tendering contract. The obligations placed on the owner to treat all tenderers equally and fairly and to apply the tender conditions when evaluating tenders and awarding contracts seems to be good common sense and of commercial advantage not only to the immediate parties concerned, but also to the wider community.

References

CCQ (1996-97) *Civil Code of Quebec* (4th Edn), Article 1390, Quebec (Province).
CIB (1997) *Code of Practice for the Selection of Main Contractors*, Construction Industry Board, Thomas Telford, London.
Craig, R.W. (1999) *Procurement Law for Construction and Engineering Works and Services*, Blackwell Science, Oxford.
European Council Directives 93/37/EEC ('Works' OJ 9.8.1993 L 199/54) and 89/665/EEC ('Remedies' OJ 30.12.1989 L395/33).
Farrow, JJ and Main, FR (1996) *Use and Abuse of the Code of Procedure for Single Stage Selective Tendering*, Construction Papers No.70, Chartered Institute of Building (CIOB).
(ICE) (1983) *Guidance on the Preparation, Submission and Consideration of Tenders for Civil Engineering Contracts*, Institution of Civil Engineers.
Latham, Sir Michael (1994) *Constructing the Team*, HMSO, London.
(NJCC) (1959-1996) *Code of Procedure for Single Stage Selective Tendering*, National Joint Consultative Committee for Building.
SAA (1994) *Code of Tendering*, AS 4120-1994, Standards Association of Australia.
The Public Works Contracts Regulations (1991) (UK) SI 1991/2680.

Cases cited

Anson v Trump (The Times 8 May 1998) (CA).
Ben Bruinsma & Son Ltd v The Corporation of the City of Chatham et al (1984) 141 DLR (3d) 677 (Canada).
Blackpool & Fylde Aero Club v Blackpool Borough Council [1990]1 WLR 1195 (CA).
Calgary v Northern Construction Company [1986] 2 WWR 426 (Canada).
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA).
Errington v Errington and Woods [1952] 1 KB 290 (CA).
Galaxy Energy International Ltd v Novorossiysk Shipping Co (The Times 26 March 1998) (CA).
Health Care Developers Inc v Newfoundland (1996) 136 DLR (4th) 609 (Canada).
Hughes Aircraft Systems International v Air Services Australia (1997) 146 ALR 1 (Australia).
Martselos Services Ltd v Arctic College (1994) 111 DLR (4th) 65 (Canada).
McKinnon v Dauphin (Rural Municipality of Manitoba) [1996] 3 WWR 127 (Canada).
Ontario (The Crown) v Ron Engineering & Construction Eastern Ltd (1981) 119 DLR (3d) 287 (Canada).
Pratt Contractors v Palmerston North City Council [1995] 1 NZLR 469 (New Zealand).
Smith Bros & Wilson (BC) Ltd v British Columbia Hydro & Power Authority and Kingston Construction Ltd (1997) 30 BCLR (3d) 334 (Canada).
Vachon Construction Ltd v Cariboo Regional District (1996) 136 DLR (4th) 307 (Canada).

Chapter 7

Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations

The aims of Chapter 7 are to present the author's published paper titled *Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations* and to present supplementary associated materials taken from the author's published conference papers in connection with the International Council for Building Research Studies and Documentation (CIB). The objectives of the published paper in Part 2 was to demonstrate parallel but consistent development in several Commonwealth jurisdictions of the part to be played by the common law in regulating the procurement process, and to show that despite the apparent width of the Canadian proposition that contract law would necessarily step in to provide such regulation, the other jurisdictions reviewed have narrowed the application of contract law to that which was manifestly intended by the relevant parties. The objective of the research paper in Part 3 was to reveal the common law principles relevant to compensating an injured low-bidder deprived by the contract-breaking owner of its entitlement to a contract award. The objective of the research paper in Part 4 was to demonstrate application of the principles discussed in Part 2 to the head-contractor sub-contractor relationship.

Chapter 7 is in four parts. Part 1 provides an introduction and summary of the paper reproduced in Part 2. Part 2 reproduces the author's paper titled *Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations* which was published in *The International Construction Law Review*, (ICLR) volume 16, part 2, page 261, written in the Summer of 1998 and published in April 1999. The Editors-in-Chief of ICLR are David Wightman, a solicitor in London, and His Honour Judge Humphrey Lloyd QC, a Judge of the Technology and Construction Court, part of the High Court of Justice in London. Judge Lloyd is a past editor of the Building Law Reports and well known in construction law circles. Part 3 contains material from the published proceedings of a CIB W65 International Symposium on the Organization and Management of Construction held in Glasgow in 1996. The author's paper was titled *Capital Works Procurement: Owner's obligations under the Tendering Contract*. Part 4 reproduces the author's contribution to the proceedings in 1997 of the CIB W92 Procurement Symposium in Montreal, titled *Procuring Subcontract Works: Head Contractor's Right to Rely on Irrevocable Subcontract Quotation*.

Part 1

In their introduction to part 2 of volume 16 of *The International Construction Law Review*, (ICLR), the editors comment with regard to the present author's article that "within the world of the common

law a watchful eye is being kept on the possible evolution of liability towards tenderers".[655] In the editors' words, the author's paper "provides a full review of the present position and argues for the existence of a tendering contract ...".

The paper in Part 2 establishes early its international credentials, by announcing a review of cases from Canada, England, New Zealand and Australia. It commences with a brief review of the Canadian *Ron Engineering* case[656] (which is also discussed and referred to in chapters 3-6 as the leading case in the context of private law challenge to the competitive bidding process in the construction and engineering context). *Ron Engineering* shows that in some circumstances the submission of a compliant bid by a tenderer in response to the owner's invitation can create contractual obligations (in a tendering contract) for both owner and tenderer, with the effect in Ron Engineering's case, that it could not withdraw its offer to the owner with impunity, despite the alleged presence of an error in the compilation of its bid. It is worth pausing to reflect at this point that this case arose out of the owner's challenge in response to the tenderer's action of withdrawal, whereas the great majority of cases considered after *Ron Engineering* involve challenges made by bidders claiming injury suffered by the owner's breach of obligation under the tendering contract. Owners who suggest that the existence of binding contractual obligations in favour of tenderers is 'uncommercial' should recall this significant point.

Part 2 continues with an analysis of the Court of Appeal's decision in *Blackpool & Fylde Aero Club v Blackpool Borough Council.* This was an important case establishing that in England and Wales contractual obligations could arise out the tendering process before, or without, any contract awarded as a consequence of that process. *Ron Engineering* was not cited to the Court of Appeal, but, the present author argues, its decision was remarkably consistent with the Canadian court's decision. On the case's own facts and circumstances the parties intended a limited contractual relationship, in which the owner cannot set out detailed stipulations for the conduct of bidding then simply ignore its own rules to any compliant bidder's disadvantage. Any other interpretation would be contrary to the confident assumption of the parties involved in the procurement process. The English cases is followed by the New Zealand case of *Pratt Contractors*, reviewed and discussed above in chapters 3 and 4. Part 2 explains again the basis and nature of contractual obligation placed on the owner in the tendering process, and how it was breached in his case context. The article did not discuss the court's reasoning on the quantum of damages awarded to the injured bidder for the owner's breach, but this aspect of *Pratt Contractors* was reviewed in a conference paper (jointly authored with Philip Davenport) presented to a CIB W65 (in conjunction with W92) International Symposium held in Glasgow, September 1996.[657] The relevant extract is reproduced in Part 3.

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655 [1999] ICLR 146.

656 Citations are given within parts 2 and 3.

657 Craig and Davenport (1996) *Capital Works Procurement: owner's obligations under the 'tendering contract*, in The Organization and Management of Construction, Shaping Theory and Practice (ed Langford and Retik) p. 391 (pp. 397-401 only reproduced).

Part 2 next devotes its consideration to the important Australian case of *Hughes Aircraft Systems International v Air Services Australia*, decided in the Federal Court in June 1997. In that case the Federal Court followed Canada, England and New Zealand and accepted that in certain circumstances the procurement process is regulated by a process or tendering contract. The case can only be explained and understood by a fairly lengthy examination of the factual background to the procurement by government of a new air traffic control system. In essence the government made certain representations as to how the competing tenders would be assessed and a contract awarded but failed to honour its promises when it preferred the tender of Hughes' competitor rather than that of Hughes itself. On the facts of this case it was clear to the court that the government agency responsible for the procurement in question had taken positive steps to procure the participation of the two contenders. Those steps included a reassurance of the integrity and fairness of procurement procedures that would be followed, which would have conveyed to any reasonable person in Hughes' position the necessary contractual intent to bind itself in law; the writing of a letter to each tenderer on 9 March 1993 whereby the government agency bound itself to evaluate best and final offers with reference to specific weighted criteria; and the issuing on 19 July 1993 of a request for tenders with some terms at variance with the letter of 9 March. The government was not only in breach of contract to Hughes when it misapplied the criteria in favour of its competitor, but was also held to be in breach of Australian legislation when it indulged in unfair and misleading conduct. There were other issues in the case not discussed in Part 2 which are provided in more detail in Craig's *Procurement Law.*[658]

All the cases discussed in Part 2 were considered by His Honour Judge Humphrey Lloyd QC, Technology and Construction Court, when giving judgment in the case of *Harmon CFEM Facades (UK) Ltd and The Corporate Officer of the House of Commons* on 28 October 1999.[659] Co-incidentally, the hearings in this case had taken place during 1998 including the period when the article was written. Could it be that Judge Lloyd had not only the article in mind, but also his experience of the then pending *Harmon* case, when he said:

> "The article is rooted in practical considerations and concludes with a valuable list of the aspects which might be relevant in finding the existence of a tendering contract. This is a contribution which anybody disappointed with the results of tender in a common law country would do well to read and equally, it provides food for thought for those responsible for obtaining and negotiating contracts. A tendering contract is not yet found as a matter of law and thus should not arise if a sufficient contrary intention is expressed and maintained."[660]

The source of Part 3 is noted above. Part 4 reproduces a CIB W92 symposium contribution titled *Procuring Subcontract Works: Head Contractor's Right to Rely on Irrevocable Subcontract*

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658 See Craig (1999) *Procurement Law*, pp. 631-670.
659 Now reported at (1999) 67 Con LR 1, and discussed in Chapter 5.
660 [1999] ICLR 146-147.

Quotation.[661] This article examines the condition caused by the revocation of a subcontract offer after the head contractor has relied on that offer in the formulation of the main contract tender. Authorities from England, New Zealand, US A and Canada are reviewed in search of a commercial solution which will uphold the integrity of the bidding process at subcontract level.

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661 Davidson, Colin H and Meguid, Tarek A Abdel (editors) (1997) Procurement – a Key to Innovation, CIB W92 Symposium proceedings, Montreal, May 1997: *Procuring Subcontract Works: Head Contractor's Right to Rely on Irrevocable Subcontract Quotation*; p.101.

Chapter 7

Part 2

PROTECTING THE INTEGRITY OF CONSTRUCTION PROCUREMENT BY IMPOSED OR ASSUMED CONTRACTUAL OBLIGATIONS

INTRODUCTION

In 1981 the Supreme Court of Canada held that in certain circumstances the procurement process for construction and engineering work was regulated by contract law. The classical nineteenth century procurement model was at a stroke re-formed. Owners now make an offer to bidders that conforming bids will be considered. That offer is accepted by the conduct of submitting a conforming bid. Mutual promissory obligations are created for owner and bidder. The nature of those obligations is shaped by the bidding documents and surrounding circumstances. The contract created has been referred to as a tendering or process contract. Despite the increase in speed of world-wide communications, it has taken fourteen and sixteen years respectively for the Canadian judgment in *Ontario v. Ron Engineering* to take root in New Zealand and Australia. England too, would be receptive, it is submitted, if the Commonwealth authorities were argued persuasively before the English court. But parallel development in England has reached the same conclusion as to the role played by contract law in protecting the integrity of the bidding process.

This article reviews the decisions of the Canadian court in *Ontario (The Crown) v. Ron Engineering & Construction Eastern Ltd*,[662] the English court in *Blackpool & Fylde Aero Club v. Blackpool Borough Council*,[663] the New Zealand court in *Pratt Contractors Ltd v. Palmerston North City Council*,[664] and most recently, the Australian court in *Hughes Aircraft Systems International v. Air Services Australia*.[665] Despite some cautious words used by the courts, they have been remarkably consistent in revealing the part played by contract law in regulating the procurement process.

The existence of a tendering or process contract, was first argued by a public sector owner against a recalcitrant bidder intent on withdrawing its irrevocable bid. The subsequent cases described here show injured low bidders using the same sword to attack public owners who had departed from the rules they themselves had set down to control the procurement process. It is concluded that despite the wide view taken by the Canadian court that contract law would impose control of the procurement process whenever possible, courts in England, New Zealand and Australia have narrowed the application of contract law in this context to the manifest intentions of the particular parties.

CANADA

Ontario v. Ron Engineering & Construction Eastern Ltd (1981)[666]

The government of Ontario called for bids and issued general conditions applicable to all bidders. Those conditions required a deposit of $150,000 to accompany any bid. The owner would be entitled to retain that deposit if a bid should be withdrawn before consideration by the owner of all bids submitted or before or after receiving notification of a successful bid. The deposit would be forfeited by a successful bidder if a formal agreement was not executed and a performance bond or payment bond not produced. The owner was then entitled by the bid conditions to retain the bid deposit for its own use and was empowered to accept any other bid, to advertise for new bids, to negotiate a contract or not to accept any bid as the owner itself deemed advisable. The bid deposit would be returned to the successful bidder when a formal agreement had been executed and the owner had received any bonds required by the conditions.

Ron Engineering submitted a bid and deposit. Its bid ($2,748,000) was lowest of eight submitted: $632,000 lower than the second lowest offer. But within little more than an hour of bid opening, Ron Engineering discovered an error in pricing and requested in writing to the owner to withdraw its bid without penalty. Subsequently Ron Engineering maintained that its tender was not withdrawn, but by reason of its notice of

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662 [1981] 1 SCR 111; (1981) 119 DLR (3d) 267; 4 Const LJ 241 (SCC)
663 [1990] 1 WLR 1195; 3 All ER 25 (CA)
664 [1995] 1 NZLR 469 (HCNZ)
665 (1997) 146 ALR 1 (FCAust)
666 *Supra*.

error given to the owner prior to the bid's acceptance, was merely not capable in law of acceptance, and that therefore it was entitled to return of its deposit. The owner responded by merely asking Ron Engineering to sign contract documents in the bid amount, which it refused on the ground of the pricing error.

The owner then took the position that it was entitled to keep the bid deposit. The second lowest bid was accepted. Ron Engineering commenced an action against the owner to recover its deposit. The owner counterclaimed damages caused by Ron Engineering's refusal to carry out the terms of its bid and, as a consequence of this refusal, the acceptance by the owner of the higher bid.

Ron Engineering's argument was that by making an error in pricing, its bid became revocable, or the deposit recoverable, despite the irrevocability of the bid under the bid conditions, providing that notice of the bid error was given prior to the owner's acceptance of that bid. Ron Engineering maintained that whilst its bid was not withdrawn, it was not capable of acceptance, and therefore its bid deposit should be returned. The owner's argument was that the submission of a bid created a contractual obligation for each bidder to perform the terms of its bid. Ron Engineering was in breach of its bid obligations, and the owner had suffered damage as a consequence.

Issue:

Does the submission of a bid in these circumstances create a contractual obligation for both parties, so that the Ron Engineering's revocation of offer would be a breach of contract thus enabling the Crown to claim damages against it?

Yes. A contract between the bidder and the owner arose whereby the bidder could not withdraw its bid for a period of 60 days after the date of the opening of bids. This contract was brought into being, said the court, automatically upon the submission of a bid. It is submitted that in order to create a contract, the bid must be a conforming bid, that is fully responsive to the owner's invitation to bid.[667]

The court was in no doubt that a contract arose between the contractor and the owner upon the submission of a bid whereby the bidder could not withdraw its bid for a period of 60 days after the date of the opening of bids. The irrevocability of the offer was to be determined in accordance with the 'General Conditions' and 'Information for Tenderers' and the related documents upon which the bid was submitted. This unilateral contract comprised other terms which included the bidder's right to recover the bid deposit 60 days after the opening of bids if the bid had not been accepted by the owner.

Estey J gave the judgment of the court and explained the principle of the bidding or tendering contract:

> "I share the view expressed by the [Ontario] Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do...
>
> The tender submitted by [Ron Engineering] brought contract A [tendering contract] into life. This is sometimes described in law as a unilateral contract [or perhaps better termed a collateral contract], that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, " I will pay you a dollar if you will cut my lawn." No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in [Ron Engineering] or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as [Ron Engineering] has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by [Ron Engineering] and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A [in this case] is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a [construction] contract (contract B) upon the acceptance of the tender."[668]

The decision in *Ron Engineering* superficially seems to challenge at least two traditional principles of contract law; that an offer, without more, can be withdrawn without liability at any time prior to acceptance, and that a promise not to revoke an offer must be given for consideration or made by a deed (under seal). One hundred and twenty years ago Mellish LJ suggested that "the [English] law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by that

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667 See Bingham LJ's judgment in *Blackpool*, *post*, as to the need for the bid to conform.

668 119 DLR (3d) 267, 273-275.

promise to give that time".[669] But for most of this time the point at issue has been unquestionably maintained and applied.

However the owner successfully argued here that the submission of a bid created a collateral contract that required both parties to perform the bid conditions. No exception was made for mistake. One of the conditions was that the offer could not be withdrawn for 60 days after the opening of bids. As this condition had been breached by the lowest bidder, the owner was entitled to retention of the bid deposit (or in other cases, damages).

The tendering contract was described by the court as a unilateral contract; that is a contract which results from an act made in response to an offer, or put another way, an offer of a promise in exchange for an act.[670] Unlike the common bilateral contract model, performance, acceptance of the offer and consideration provided by the offeree are one and the same thing. The analogy was given: "I will pay you a dollar if you will cut my lawn." The contract, and any obligations, only exist when the invitation is acted upon - the grass is cut, or in the context of the 'tendering contract', the tender is submitted. But where is the consideration for the tenderer's obligation not to revoke its offer within 60 days? According to Professor Percy, "the court's explanation that consideration can be found in the 'qualified obligation of the owner to accept the lowest or any tender' is specious".[671] By express or implied qualification an owner is not normally obliged to accept any tender, not even the lowest (or highest). Percy suggests that "the only real benefit received by the contractor is the implied promise that the owner will consider its tender." Which is precisely the obligation of the owner found by the English Court of Appeal in the *Blackpool* case.[672] It is submitted that the common law has now developed to the point where, without contrary provision, the bidding contract creates an obligation for the owner to consider each conforming bid and for the bidder not to withdraw its offer within the stipulated period, or if no period is stipulated, a reasonable period.

Ron Engineering has had major impact on the law of bidding and tendering. This case is now the settled law of Canada, and is likely to be persuasive elsewhere. The Alberta Court of Appeal has applied *Ron Engineering* in the *City of Calgary v. Northern Construction Co.*[673] In this case the facts are similar to *Ron Eng.* Following discovery of an error in the compilation of its bid, the lowest bidder declined to sign a contract with the owner, who sued for the difference in price between the lowest and second lowest bids. The bid conditions stipulated that such amount would be due in the eventuality of withdrawing a bid or failing to execute the construction contract. The Supreme Court of Canada affirmed the Court of Appeal and declined to review its earlier decision in *Ron Engineering*. Since much of the argument in *Ron Engineering* had focused on the contractor's alleged mistake in pricing, the two-contract analysis had been necessary to show that a pricing mistake is irrelevant with regard to the bidding or tendering contract. Any tenderer who has incorrectly calculated its bid must not breach the tendering contract by withdrawing its offer. But this creates a dilemma for the tenderer: if it executes the building contract based on a incorrect tender it cannot later raise the issue of mistake; if it raises the issue of mistake before executing the building contract and withdraws its offer, it is in breach of the tendering contract and must pay damages or forfeit its tender deposit. It seems that only a patently obvious error on the face of the tender, which might prevent the formation of the tendering contract from taking place, can provide any possible escape from liability for the tenderer who wishes to avoid the consequences of an error in pricing. Such an escape route was described by Estey J in consideration of *McMaster University v. Wilchar Construction Ltd.*[674]

The position between general contractor and subcontractor is dealt with on a similar basis in *Northern Construction Co Ltd v. Gloge Heating and Plumbing Ltd.*[675] There was no express restriction of the subcontractor's right of withdrawal prior to acceptance by general contractor, but here the court was prepared to imply such a restriction on the basis of industry practice and the subcontractor's knowledge that the general contractor's tender could not be withdrawn from the owner. It was held that the subcontractor's offer was irrevocable to the extent of the general contractor's offer. The mistake argument again foundered because the general contractor was not aware of any error on the part of the subcontractor when it relied on that party's offer to submit the main tender to the owner. But on the other hand, the irrevocability of the subcontract bid is not reciprocated by an obligation of the general contractor under this theory. The general

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669 *Dickinson v. Dodds* (1876) 2 Ch D 463, 474.

670 Nozick, RS (1982) 60 *Canadian Bar Review* 345, 349.

671 Percy, DR *Radical Developments in the Law of Tenders: a Canadian Reformulation of Common Law Principles* (1988) 4 Const LJ 171.

672 *Supra.*

673 (1985) 42 Alta LR (2d) 1; 67 AR 95; [1986] 2 WWR 426. Alberta Court of Appeal. See also the Supreme Court of Canada, affirming [1987] 2 SCR 757.

674 (1972) 22 DLR (3d) 9, affirmed (1977) 69 DLR (3d) 400n.

675 (1986) 27 DLR (4th) 264; [1986] 2 WWR 649 (Alberta Court of Appeal); (1984) 1 Const LJ 144 (Alberta Court of QB).

contractor is not generally obliged to accept the subcontract bid despite having used it in the prime bid to the owner.[676]

The decision in *Ron Engineering* that a contract was formed by the submission of a conforming tender creates obligations for the recipients of tenders. Years ago owners would rarely undertake obligations within tender documents, but now they do. They are obliged to treat all tenderers equally and fairly and to comply with exacting tender conditions which become incorporated into the tendering contract. They are obliged to comply with any rules as to selection of tenderers, evaluation of tenders and award of contracts, or breach of the tendering contract will result. In *R v. Canamerican Auto Lease and Rental Ltd and Hertz Canada Ltd,*[677] the owner could not rely on a general right to reject the lowest or any tender when failing to comply with its own stipulation as to how tenders should be evaluated. As a consequence the owner seems entitled to reject all tenders because they are too high, or reject the lowest tender when there is insufficient evidence of the capacity of the lowest tenderer to perform the construction contract, but such rejection must not breach obligations of the tendering contract.[678]

ENGLAND

Blackpool & Fylde Aero Club v. Blackpool Borough Council (1990).[679]

Blackpool Borough Council invited tenders for the right to operate a concession at the local airport. The form of tender stated: "The Council do not bind themselves to accept all or any part of any tender. No tender which is received after the last date and time specified shall be admitted for consideration." The invitation continued: "This form of tender, fully completed and enclosed in the envelope provided endorsed "TENDER FOR ... " and not bearing any name or mark indicating the identity of the sender, is to be received by ...". There followed instructions as to time and place for delivery of tenders, and reference to the Council's standing orders which provided a detailed procedure for submission of tenders. Late tenders would not be accepted.

Blackpool & Fylde Aero Club's tender was delivered by hand to the Council post box well before the stipulated deadline. But the Council staff did not empty the letter box on the tender deadline. The box was emptied the next day, and consequently the Club's tender was date-stamped and endorsed "late" and was not considered by the Council. The Council then accepted another tender. These events were reported to the Club, who replied that their tender had in fact been delivered on time. The Council investigated matters and established the true facts.

The Club argued that the Council had warranted that if a tender was submitted by the tender deadline it would be considered along with other tenders duly submitted when the decision to grant the concession was made; and that the Council was in breach of this warranty, having failed to consider the Club's tender. The Club claimed damages against the Council for breach of contract.

The Council argued that an invitation to tender in this form was an invitation to treat, and no contract of any kind would come into existence unless or until, if ever, the council chose to accept any tender or other offer. For these propositions reliance was placed on *Spencer v. Harding*[680] and *Harris v. Nickerson.*[681] Secondly, it was submitted that on a reasonable reading of this invitation to tender the council could not be understood to be undertaking to consider all timely tenders submitted. The statement that late tenders would not be considered did not mean that timely tenders would. If the council had meant that it could have said it. Thirdly, the court should be no less rigorous when asked to imply a contract than when asked to imply a term in an existing contract or to find a collateral contract. A term should not be implied simply because it was reasonable to do so.[682] Fourthly, counsel submitted that the warranty contended for by the club was simply a

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676 *Derrick Concrete Cutting and Coring Ltd v. Central Oilfield Service Ltd* [1996] 3 WWR 765 (Alberta Court of Appeal).

677 (1987) 37 DLR (4th) 591; [1987] 3 FC 144; 77 NR 141 (FCAp, Can).

678 See for example, *Ben Bruinsma & Son Ltd v. Chatham City* (1984) 141 DLR (3d) 677; 11 CLR 37 (Ont SC); *Martselos Services Ltd v. Arctic College* (1994) 111 DLR (4th) 65, leave to appeal refused 115 DLR (4th) viii (Northwest Territories CA); *Pratt Contractors Ltd v. Palmerston North City Council* [1995] 1 NZLR 469 (HCNZ); *Maintec v. Porirua City Council*, unreported, CP 189/95, HCNZ, 1995; *McKinnon v. Dauphin (Rural Municipality of Manitoba)* [1996] 3 WWR 127 (Manitoba QB).

679 *Supra.*

680 (1870) LR 5 CP 561.

681 (1873) LR 8 QB 286.

682 *Liverpool City Council v. Irwin* [1976] 2 All ER 39 at 43, [1977] AC 239 at 253.

proposition 'tailor-made to produce the desired result'[683] on the facts of this particular case. There was a vital distinction between expectations, however reasonable, and contractual obligations.[684] The club here expected its tender to be considered. The council fully intended that it should be. It was in both parties' interests that the club's tender should be considered. There was thus no need for them to contract. The court should not subvert well-understood contractual principles by adopting a woolly pragmatic solution designed to remedy a perceived injustice on the unique facts of this particular case.

Issue:

Is the owner under any contractual obligation towards tenderers? If so, was that obligation breached, and is the plaintiff tenderer entitled to succeed in a claim for damages?

Yes. Provided a tender is submitted prior to the deadline, the tenderer is entitled as a matter of contractual right to have its tender opened and considered together with other conforming tenders, if other tenders are considered. In the circumstances of this case the tenderer is entitled to damages for the owner's breach of contract.

There was no discussion here of unilateral contracts or the two contract analysis. There seemed no doubt in Bingham LJ's mind where the merits of the case lay. But could the merits be matched with principle? He asked several hypothetical questions seeking to expose the intentions of the parties involved in the tender process.

> "... [What] if, in a situation such as the present, the Council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded? Or if the Council had considered and accepted a tender admittedly received well after the deadline? Counsel [for the Council] answered that although by so acting the Council might breach its own standing orders, and might fairly be accused of discreditable conduct, it would not be in breach of any legal obligation because at that stage there would be none to breach."[685]

This was a conclusion His Lordship could not accept. If it was accepted there would be an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties to the tender process. Bingham LJ observed that the tendering process was, in many respects, heavily weighted in favour of the owner as inviter. Tenders could be invited from as many or as few parties as it choose. There was no need to advise the identity or number of persons invited to tender. The invitee might (but not in this case) be put to considerable labour and expense in preparing a tender, ordinarily without recompense if it is unsuccessful. The invitation to tender might itself, in a complex case, (but not in this case) involve extensive time and resource to prepare, but the inviter does not commit itself to proceed with the project, whatever it is; the highest (or lowest) tender need not be accepted; no tender need be accepted; no reasons need be given to justify acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that its tender might not be the highest (or lowest). But some degree of protection is available. The court identified the following bases of intervention:

> "But where, as here, tenders are solicited from selected parties all of them known to the inviter, and where a local authority's invitation prescribes a clear, orderly and familiar procedure (draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question and an absolute deadline) the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that."[686]

Bingham LJ acknowledged that the Council's invitation to tender did not explicitly state that timely and conforming tenders would be considered. That was why the court was concerned with implication. But the Council did not say that it did not bind itself to do so, and in this context a reasonable invitee would understand the invitation to be saying, quite clearly, that if a timely and conforming tender was submitted it

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683 To quote Lord Templeman in *CBS Songs Ltd v. Amstrad Consumer Electronics plc* [1988] 2 All ER 484 at 497, [1988] AC 1013 at 1059.

684 See *Lavarack v. Woods of Colchester Ltd* [1966] 3 All ER 683 at 690, [1967] 1 QB 278 at 294 per Diplock LJ.

685 [1990] 1 WLR 1195, 1201G-H.

686 *Ibid.*, 1202B-E.

would be considered, at least if any other such tender was considered. It seemed plain that the Council's invitation to tender was, to this limited extent, an offer, and the Aero Club's submission of a timely and conforming tender amounted to an acceptance. His Lordship was pleased that what seemed to be the right legal answer also accorded with the merits as he saw them.[687]

The court stressed that an owner's invitation to tender is usually no more than an offer to receive tenders (an invitation to treat).[688] But here the tenderer was given some protection in law. On the facts and circumstances of this case, it seemed clear that the parties did intend to create contractual obligations. Of particular significance was the owner's stipulation that tenders be submitted in the official envelope provided and endorsed by the owner. This procedure was designed to maintain anonymity of the tenderer and prevent premature disclosure to other interested or potentially interested parties. Such a rigorous procedure must indicate an intention to consider *all* tenders submitted properly in time before any award is made.[689] It seems that the Court of Appeal here thought that it was dealing with exceptional circumstances. It is submitted however that the tendering arrangements of this case are not exceptional when the owner is a public body or a corporation. Although the Canadian decision in *Ron Engineering* [690]was not cited to the Court of Appeal in the *Blackpool* case, it is apparent that both courts held the view that the "integrity of the bidding system"[691] would be protected under the law of contracts. Bingham LJ would not accept that an owner could invite tenders in accordance with detailed stipulations, then simply ignore those stipulations with legal impunity. If the converse is true, and the owner is not legally accountable for compliance with tender conditions, there would be an unacceptable discrepancy between the law of contract and the confident assumptions of parties involved in the procurement process.

NEW ZEALAND

Pratt Contractors Ltd v. Palmerston North City Council (1995)[692]

The New Zealand High Court has also recently dealt with the tendering contract and its implied duty of fairness to tenderers. The City Council required tenders for the construction of a flyover interchange. Interested parties were required to submit a non-refundable deposit of $100 at pre-registration stage. The tender documentation was detailed and included provisions for the evaluation of tenders received. There were two tender evaluation methods open to the Council: in this case the process to be adopted was described as "lowest price conforming tender method". This process involved each tenderer submitting information against six non-price attributes. The Council was then required to assess each tenderer's responses against each of these attributes on a pass-fail basis. A fail on any of the attributes meant that the relevant tender was not a conforming tender and would not therefore be considered. Only a pass on each attribute permitted a tender to be considered on price alone: the lowest tender would then be the successful tender.

Four conforming tenders were received. Pratt Contractors submitted the lowest conforming tender and on that basis expected to be awarded the contract. But one tenderer submitted an alternative tender in addition to its conforming tender. Tendering procedures had contemplated alternative tenders, which might be permitted as a means of encouraging or permitting innovation. Proposals for alternative construction methods or choice of materials could be considered but such proposals must not alter the scope of the final product. The alternative tender here outlined a different design solution which would achieve the same product: "the saving in the construction costs would be in the order of $250,000." Certain other claims were made for the alternative scheme and the tender concluded: "We would be happy to meet and discuss this proposal or forward any further information you may require."[693]

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

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687 *Ibid.*, 1202-3.
688 The 'leading cases' are *Spencer v. Harding* (1870), *supra*, and *Harris v. Nickerson* (1873), *supra*: *per* Stocker LJ, *ibid.*, 1204.
689 *Ibid.*
690 *Supra.*
691 (1981) 119 DLR (3d) 267, *per* Estey J at 273.
692 *Supra.*
693 *Ibid.* at 473/37-38.

Pratt was aggrieved with the Council's contract award and commenced proceedings for damages. It argued, *inter alia*, that by submitting its tender a contract[694] was created between it and the Council, whereby the Council became obliged to consider only tenders which complied with the tender stipulations. Pratt further argued that this contract had an implied term obliging the Council to treat Pratt fairly and equally with other tenderers, and that should another design option be put forward by the Council, Pratt would be given the opportunity of pricing that option, and that there would be no negotiation with another tenderer. Pratt alleged that implied and express terms of the contract documents had not been complied with, and as a result it had lost

(i) the cost of preparing the tender;
(ii) the profit on the contract which should have been awarded to Pratt; and
(iii) the opportunity to gain qualification for other substantial construction projects, and consequently further lost profits.

In defence, the Council argued that its request for tenders was no more than an invitation to treat, and that therefore no contractual obligations arose. The Council denied the alleged failures catalogued by Pratt, and argued that, even if this was not correct, Pratt had no basis for recovery. The Council contended that the works contract had been properly awarded on the basis of the alternative tender, properly submitted in accordance with the tender documents, and that Pratt had no right to damages.

Issue 1:
Did the Council and Pratt have a contractual relationship arising out of the tendering process?

Yes. There were several authorities which made it clear that the starting point was that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although such a request might give rise to obligations to act fairly. On the other hand, it was obviously open to persons to enter into a preliminary contract with the expectation that it would lead in defined circumstances to a second or principal contract, along the lines of the analysis in the Canadian cases. Whether or not the particular case fell into one category or the other would depend upon a consideration of the circumstances and the obligations expressly or implicitly accepted.[695]

There were several factors pointing towards a contractual relationship. This was not a situation where there was a mere calling for tenders and nothing more. In order to tender at all, interested contractors had to register that interest and pay a $100 non-refundable deposit before they received tender documents for consideration. The actual submission of a tender was therefore contemplated as a second step and moreover, one which followed upon a declaration of interest backed by a non-refundable deposit. This was a significant point to the court. It seemed at least as strong, and maybe stronger point, than the suggestion in the *Blackpool* case[696] that the selection of tenderers was a significant factor. Secondly, the tender documents were extensive, detailed and substantial. They set out not only the nature of the project contemplated, supported by detailed specifications and drawings, but also set out the conditions of contract which would apply if a construction contract were entered into. Most significantly they included an addendum to the conditions of tendering which described in detail the tender evaluation process to be followed. The Council would only enter into a contract for the non-excluded tender with the lowest price.[697]

The court noted that the tender conditions indicated in detail the precise way in which the Council would evaluate tenders and indicated in mandatory terms, the basis on which a contract would be entered into. If the conditions were to impose obligations upon the Council so that it was required to act in accordance with its indicated intention, then the Council might become bound in a number of ways, as evidenced by the number of causes of action pleaded in this case. But in a commercial setting such as the tendering process, by far the most convenient framework within which obligations could be said to arise and within which they could be considered, was a contractual one. Should the Council attempt to deal with tenders on any basis other than that contained in the tender documents, there would be the basis for an estoppel argument but the court preferred to deal with the matter in terms of contract.[698]

Previous tender cases were based on different facts, but the one thing all the cases had in common was that in order to give effect to the various stipulations contained within the tender documents it was necessary to

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694 That is the 'tendering contract', not to be confused with the building contract.
695 [1995] 1 NZLR 469, *per* Gallen J at 478/51-479/5.
696 *Supra.*
697 [1995] 1 NZLR 469 at 479/48 - 480/15.
698 *Ibid.* at 480/16.

recognise a contractual relationship. The court was satisfied that here a contract was created by the act of submitting a tender in accordance with the Council's requirements.

Issue 2:

Was the Council in breach of contract in failing to award the contract to Pratt?

No. The terms of the tendering contract here provided that: "The principal shall only enter into contract for the non-excluded tender with the lowest price." The Council's general powers of rejection were not compromised by other provisions of the tendering contract, such as terms as to how competing tenders should be evaluated and a general duty of fairness and equity. The Council could not be permitted to use the general power to reject tenders so as to make an arbitrary choice of successful tenderer but it was not generally obliged to award the contract to Pratt, merely because it had submitted the lowest price conforming tender.

Issue 3:

Is the alternative tender a conforming tender capable of acceptance within the Council's tender conditions, or is the Council in breach for accepting same?

No. The alternative tender was not a tender at all because it lacked certainty of price, and it did not meet the specific requirements laid down in the tender conditions. The language used in the alternative tender was too vague on which to found a contract.[699] The alternative tender was therefore not a conforming tender. It was insufficiently precise to be capable of acceptance within the Council's tender conditions. In purporting to accept the alternative tender the Council was in breach of the tendering contract.

Issue 4:

Does the law impose a duty of fairness on the Council when dealing with tenders, and, if so, was that duty broken?

The Council conceded that it was obliged to proceed in a manner which met the general requirements of 'fairness'. It was unfair to accept as an alternative tender a document which was indefinite in terms of price and which required elucidation and confirmation. Such acceptance deprived the lowest conforming tenderer of such opportunity as it derived from that status. That came close, said the court, to negotiating with one of the tenderers within the tender process, but not on terms which applied to other tenderers.[700] It was also necessary to have within the tender conditions an adequate basis of assessment so as to avoid unfairness to tenderers. Here there was a breach of the Council's duty to treat all tenderers fairly.

There was potential danger as well as unfairness in accepting an alternative tender which offered cost savings not wholly due to more efficient design, but instead due to the omission of items which would be required in any event. The court observed that the tendering process could thus be manipulated if an unsuccessful tenderer could reduce its tender by a sum sufficient to secure the contract, by a means which was disguised by reference to some form of alternative construction. Such an unscrupulous tenderer could not only achieve success over other tenderers in this way, but if that tenderer was in fact the lowest tenderer, it could avoid being held to its alternative if the proposal was insufficiently precise to give rise to contractual obligations.[701]

The court had thus found for the plaintiff tenderer against the Council. It remained only to fix the quantum of damages. This aspect of the case is not discussed here (but see Part 3 below).

AUSTRALIA

Hughes Aircraft Systems International v. Air Services Australia (1997)[702]

The Federal Court of Australia recently followed Canada, England and New Zealand and accepted that in certain circumstances the procurement process is regulated by a process contract or tendering contract.

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699 A saving of $250,000 was mentioned, but not as a price, merely as a 'saving in construction cost'. The figure was not given definitively, but put 'in the order of'.

700 *Ibid.* at 483/34-41.

701 *Ibid.* at 483/47-53 and 484/10-13.

702 *Supra.*

The facts reveal a complicated and protracted procurement process over a period of four years. Some understanding of the factual background is necessary against which the court found the existence of a tendering contract and its terms. In 1989, following the Civil Aviation Authority's release of a request for tender (RFT), Hughes (a Californian company), Thomson-CSF (a subsidiary of a French company) and a third company were selected to participate in the project definition of the Radar Display Replacement Project (RADREP). In March 1991 the initial project was cancelled in favour of 'the Australian Advanced Air Traffic System' (TAAATS) concept. Whilst management had by then selected Hughes as the preferred RADREP contractor, that recommendation was never put to the Civil Aviation Authority (CAA) board. The CAA was succeeded by Air Services Australia, a Commonwealth statutory body.

The TAAATS I procurement process began with the issue of a request for Registration Of Interest (ROI) dated 30 May 1991 to six selected tenderers, two of whom were Hughes and Thomson. Over time the tenderers were reduced to Hughes and Thomson. The tender process itself underwent significant periodic modification. In December 1991 the CAA management recommended to the Board that Hughes be selected as the preferred tenderer, but no contract was awarded.

Four months later government initiated a review of the procurement process and concluded in December 1992 that the TAAATS I process was in significant respects unsound and unfair. Several recommendations were made which led to the TAAATS II procurement process proceeding on a revised basis. It was resolved that tendering be limited to Hughes and Thomson, each of which should be invited to participate in fine-tuning the detail of the process.

In January 1993 the CAA invited Thomson and Hughes to participate in a further competition for the TAAATS contract. A formal meeting was held and a transcript was kept. Its objectives were to provide reassurance to the two tenderers as to the processes to be followed and to secure their concurrence in those processes. CAA confirmed that Australian Industry Involvement (AII) was to be an element in the tender evaluation and that the evaluation of AII would be undertaken by a government department as consultant to the CAA's Tender Evaluation Committee (TEC); that the tenderers' Best and Final Offers (BAFO) would be evaluated in accordance with specified major and minor criteria (a priority order being given for the major criteria), and that the evaluation would be in accordance with a defined evaluation methodology; that an independent auditor, responsible to the Board, would be contracted to audit the conduct of the tender evaluation process; and that strict confidentiality would be maintained.

9 March letter

Negotiations between the tenderers and the CAA occasioned further revisions to the tender process expressed in correspondence, in particular the all-important letter of 9 March 1993. It was Hughes' case that the terms of this letter had contractual force, forming the basis of the first cumulative 'tendering contract' between the CAA and Hughes. Before referring to some of those terms it is necessary to backtrack slightly.

On 8 March 1993, the government department acting as consultant to the TEC wrote to Hughes and to Thomson confirming "the details of the evaluation criteria and approach that [it] will adopt in its evaluation of AII for TAAATS". In the interest of brevity, the detail of this correspondence is not provided here. The letter of 8 March emphasised that assessment of AII proposals would be regarded as a competitive process, and not be regarded as simply a hurdle to be cleared. The government was seeking to maximise the strategic opportunities for competitive Australian based firms, but did not expect AII proposals to have a negative impact on the installation timetable or the cost of TAAATS to the CAA. That letter was signed by both companies as a key stage in the evolution of the procurement process. That letter became an important element in Hughes' breach of contract claim.

The 9 March letter was said to have contractual effect and its content is therefore set out at some length. The letter reserved for the CAA the right to modify the strategy at any time after consultation with each tenderer. Both tenderers would be notified in writing of any such modifications. The tenderers were to develop AII proposals which would be considered in the evaluation of their offers. The government's letter of 8 March regarding AII was referred to. It was noted that that letter provided the same guidance to both tenderers on the matters to be addressed in the proposals, possible avenues for the tenderers to involve Australian industry, and the relative merits of involvement strategies. It was confirmed that the relevant government department would evaluate the offers and would provide copies of the proposals and evaluation report to the CAA. Tenderers were required to provide the evaluating department with such information as it might require and they were to agree that the CAA could provide such information held in the offers submitted to the CAA as would be required by the department in the evaluation of their proposals.

The 9 March letter also required tenderers to enter into a Deed of Agreement with the department covering the implementation of the proposed AII proposals. The 9 March letter also detailed arrangements for concluding the bidding phase of the procurement process. Tenderers would by letter be requested to submit their Best and Final Offers (BAFO) for the TAAATS Acquisition Contract at a future date. This would be the final opportunity for submission of material describing offers, price and other conditions applying. This information would be used in the evaluation of the offers for the selection of the TAAATS contractor. The price component of BAFO was to be delivered by hand in paper form and on magnetic media in a separate sealed envelope directly to the Project Manager, TAAATS Systems Acquisition Project.

The CAA then bound itself to evaluate BAFO for the TAAATS Acquisition with reference to the following Major Criteria, ranked as follows:

1. Operational and Technical Performance, logistics support and schedule
2. Price and other Financial Issues
3. Risk to Performance, Cost, and Schedule
4. Australian Industry Involvement.

Additional minor criteria were bullet-listed without weighting.

The 9 March letter further provided that the CAA would not be disclosing any further information regarding the level of importance or relative weightings of the criteria. In other words, criteria and criteria weightings for contract award were cast in stone from that point in time. The evaluation of proposals would be undertaken in accordance with a defined evaluation methodology. The methodology and CAA's conformance with that methodology would be independently audited.

Evaluation of tenders would use a qualitative assessment technique. The proposals would be first evaluated against all of the above criteria except for AII and price/financial considerations. If one proposal should not have substantial advantages over the other, both proposals would be considered equivalent and the recommendation for acceptance would be made on the basis of AII and price/financial considerations. If one proposal had substantial advantages over the other, the recommendation would be made on a value for money basis taking into account the identified advantages, the AII and the price/financial considerations. The CAA would establish the TEC, to comprise of senior CAA managers. A government representative would provide advice on AII matters directly to the TEC. An independent auditor would be contracted to verify that evaluation procedures were followed, that the evaluation was conducted fairly and that the offers received due consideration. The auditor would report to the TEC prior to the final recommendation to the CAA Board but would remain responsible to the Board. The CAA reserved the right to make available to a CAA-selected third party a copy of the tenderers' proposals for evaluation purposes only. Otherwise strict confidentiality of the information contained in the proposals would be maintained. The CAA undertook to ensure that any third party involved in the evaluation process would not have any affiliation with any of the tenderers for the TAAATS project.

Additionally, the 9 March letter indicated that the proposed acquisition "strategy" was outlined in detail in an *Attachment A*. In dealing with the post-BAFO period that *Attachment* stipulated that the CAA would evaluate the two offers strictly following the Evaluation plan referred to in the covering letter. The detailed evaluation would be completed in 4 weeks. The remaining 4 weeks would comprise high level consideration of the results of the various evaluations. Presentations to the TEC were to be made by project manager and evaluators. The results of the evaluation process would appear in a Report for TEC whereby a successful tender would be recommended to the Board. The Board would then consider the TEC recommendation and select the TAAATS contractor.

Consistent with its representations the CAA entered into an agreement with an individual who, as Independent Auditor, was required to monitor the TAAATS evaluation and selection process, for the purpose of ensuring that the process was appropriate and that it was conducted in as fair and unbiased a manner as was practicable. A schedule to the agreement specified in some detail the audit services to be provided.

The Request for Tenders (RFT)

On 19 July 1993 the CAA issued a RFT to both Hughes and Thomson. It was Hughes' case that the terms and conditions of the RFT had contractual force as and from the time Hughes submitted its BAFO on 5 October. Again it is necessary to set out some at least of the terms of the RFT. Note that, whilst the terms of the RFT are substantially similar to those of the 9 March letter to the extent they cover common territory, differences in expression exist between the two. This was a cause of some difficulty to the court.

The RFT provided that the CAA would make public the arrangement of any contract flowing from this RFT, including the contract price after contract signature. Neither the lowest tender, nor any tender, would necessarily be accepted by the CAA, who reserved the right to reject any offer which did not comply fully with the Clauses contained in the RFT and its Attachments. During the evaluation of the tenders pursuant to this tender process the CAA reserved the right to seek clarification in relation to any ambiguity or uncertainty from any or all of the Companies in relation to their offer to provide the Supplies. The CAA would not enter into any discussion or negotiation whatsoever concerning the price component of the Tenders during the evaluation of the offers and while the tender process was on foot. Alterations would not be allowed after a Tender had been submitted.

Under clause 16 of the RFT the Evaluation Criteria and the Methodology were set out essentially as the 9 March letter. But at clause 16.2.3 something different from the 9 March letter was provided:

> "The proposals will be first evaluated against all of the above criteria except for AII and price/financial considerations. If one proposal does not have substantial advantages over the other, they will be considered equivalent and *the recommendation will be made on the basis of price and financial considerations and then Australian Industry Involvement.*" (emphasis added by the court)

The court noted at this point that here there was a difference between the 9 March letter and the RFT. The sentence emphasised differed in that previously, where the proposals were considered equivalent, "the recommendation will be made on the basis of Australian industry participation and price/financial considerations." The reversal of the order of stating criteria was pointed out to the Project Manager by the Independent Auditor on 16 July while the RFT was in draft. The Independent Auditor described the change merely as one of "emphasis", but the relative weighting of these criteria had significance in Hughes' claim before the court. Returning to the RFT, it was further provided that if one proposal did have substantial advantages over the other, the recommendation would be made on the value for money basis taking into account the identified advantages, the price and financial considerations and then AII.

Hughes submitted its BAFO on 5 October 1993. It alleged that on and from this date it and the CAA were bound to a tender process contract on the terms of the RFT. This contract was said to be cumulative upon that created by acceptance of the letter of 9 March, so that any inconsistencies were resolved in favour of the RFT.

The TEC met on a number of occasions between 15 and 18 November 1993 to determine the preferred tenderer. In the event the TEC's recommendation for contract award was Hughes, which was lowest bidder by about $37m. This was formally reported to the Board by the TEC Report of 26 November. At the 18 November meeting the government's representative indicated that Thomson's AII proposals afforded wider community benefits than Hughes' proposals and that if Thomson was to be accepted because of this, there would need to be a subsidy of some form from the Federal government to the CAA. This view was put directly to the Board at its meeting on 6-7 December.

Between the 18 November TEC decision and the CAA board meeting of 6-7 December, the CAA Chief Executive briefed a member of the Federal parliament's upper house (the Senate) on the recommendation. A like briefing appears to have been given to a government minister by Department of Industry officers. Legal advice was sought severally by the TAAATS project manager and the Independent Auditor of the Attorney-General's Department concerning AII and the application of the evaluation criteria. By letters of 2 December to the Chairman of the CAA Board, and the Chief Executive, the minister raised directly the importance of AII in the award of the TAAATS contract and concluded:

> "One of the government's key objectives in encouraging the growth of our manufacturing and services sector, particularly in technology intensive activities, is to achieve our broader economic and social objectives. In this context, I would encourage the CAA to give every consideration to AII in reaching its final decision on the preferred tenderer."

The CAA Board was advised of the government's two major concerns regarding the TAAATS project. The first priority was that an air traffic control system was to be obtained which was technically advanced and would deliver safe and efficient radar services. The other priority was to maximise opportunities for Australian industry involvement. The decision was nonetheless a matter for the CAA Board using all the evaluation criteria established for the tender process.

At the 6-7 December CAA Board meeting the TEC recommendation in favour of Hughes was not accepted. A majority of the Board expressed a preference for Thomson based upon the risk associated with the purported lack of provenness of Hughes' Flight Data Processing solution. In the event, as recorded in the

Board minutes, the Board resolved to request the TEC to reconsider its advice to the Board in the light of the Board's belief that the TEC was interpreting the Authority's position on the AII issue too narrowly. On several grounds not detailed here the CAA thought that it was obliged to take a broader view which would be consistent with Board members' fiduciary duties under the Civil Aviation Act.

On 14 December Thomson submitted by letter a price reduction of $19.4 million to the TAAATS project manager and the TEC. It was considered that $16.7 million of this was an inadmissible price variation. The chairman of the CAA Board was informed (and probably the CEO) of the letter. At the Board meeting of 23 December the Board was informed that one tenderer (unnamed) had submitted an impermissible variation that could not be taken into account.

Again on 14 December Thomson sent to the Department of Industry's AII evaluation officer a letter in response to her letter of 10 December, which upgraded Thomson's export commitment by a sum in the order of $155 million. That upgrade was noted in Department's subsequent report to the CAA board.

On 15 December the TEC reconvened but did not change its recommendation. After taking independent legal advice from a QC, the Board on 23 December rejected the TEC's recommendation. The Board noted Government policy on AII and its considerable importance to Australian industry, and agreed that Thomson offered a significant advantage in this area. The Board further noted the net present values of total project cost for Hughes of $190.3M compared with $207.0M for Thomson. The Board decided that the substantial benefits offered by the Thomson AII proposal to the wider Australian community, and to the Authority itself, outweighed the price disadvantage of the company's tender. By letter of 24 December to Thomson, the TAAATS project manager indicated that the "clarifications" (ie the price reduction) contained in the letter of 14 December would be accepted in calculating the contract price and this in fact occurred.

On 12 January 1994 the CAA conducted a debriefing meeting for Hughes. At it Hughes' officers were told that the Board's decision was based on AII and that, while Thomson's contract price would not then be disclosed, when it was later published they would see that, as to the price difference between the two tenders, at net present value (NPV) levels, taking into account contract price, total project costs and life cycle costs, there really was not a great deal in it. The variance was only a few percentage points. Thomson's signing of the TAAATS contract with the CAA and the AII Deed of Agreement with the Commonwealth, occurred at a signing ceremony on 7 February 1994.

Hughes' claim

Hughes filed its application for preliminary discovery in the Federal Court on 22 December 1994. It argued that the 9 March letter (on its signing by Hughes) and the RFT (on Hughes' lodging of its BAFO) gave rise to sequential and cumulative tender process contracts with the CAA on at least the terms and conditions of those documents respectively, with the latter overriding the former to the extent of any inconsistency between them. For convenience Finn J referred to the alleged agreements as the "9 March contract" and the "RFT contract".

The essence of Hughes' submission was that the conclusion whether or not contractual obligations arose in consequence of arrangements made in connection with an intended procurement was simply a matter of construction. A party calling for tenders may do no more than issue an invitation to treat: eg *Spencer v. Harding*.[703] But equally the steps taken by it may result in the making of contractual commitments in relation to the whole or parts of the tendering process: eg *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council*;[704] *Queen in Right of Ontario v. Ron Engineering and Construction Eastern Ltd*;[705] *Fairclough Building Ltd v. Borough Council of Port Talbot*.[706] The growing body of case law in tendering contracts have been alleged merely demonstrated that each case turned on its own facts: see *Pratt Contractors Ltd v. Palmerston North City Council*.[707] It was Hughes' assertion that it was difficult to conceive of a factual matrix as strong as those here to support the existence of a contract.

CAA's denial of liability

The CAA denied that either the 9 March letter or the RFT acquired contractual effect. It was argued that, in the circumstances, no contractual intent was manifested by the parties; that the procedures laid down in the

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703 *Supra.*
704 *Supra.*
705 *Supra.*
706 (1992) 62 BLR 82 (CA).
707 *Supra.*

letter and the RFT to govern the tender process were in the nature of administrative arrangements and not contractual terms; and that there was no consideration in any event for the alleged 9 March contract. Emphasis was placed upon case law where courts have been unprepared to find any, or any relevant, pre-award contract: eg *Streamline Travel Service Pty Ltd v. Sydney City Council*;[708] *Gregory v. Rangitikei District Council*.[709]

The case dealt with several liability issues arising out of the procurement process. Only the contractual issues and the parallel Trade Practices Act claims are discussed here. The following questions have been framed to address the main points at issue.

First issue

Did either or both the 9 March letter and the Request For Tender (RFT) give rise to tendering contracts between Hughes and the CAA?

Yes. The 9 March letter constituted a binding statement of the procedures to be followed and the criteria to be applied in the award of the contract. This was no invitation to treat. The circumstances were redolent of contractual intent: the CAA intended to bind itself to comply with the procedures proposed. The parties had created a contract to protect the integrity of the bidding system. The mandatory language used was consistent with the imposition of binding obligations: that if a selection was made, it must follow the procedure and apply the criteria specified. The RFT also embodied contractual intent.

Second issue

When did the tendering contracts come into existence?

There were two cumulative contracts. The 9 March letter tendering contract was made when Hughes agreed to participate in the procurement process. This is somewhat earlier than in more general circumstances. The Request For Tender tendering contract was made on the lodging of Hughes' Best and Final Offer (BAFO), which is consistent with findings in other similar cases.

Third issue

Where was the consideration as a necessary element in an enforceable contract?

In the 9 March letter tendering contract, Hughes contended that it furnished consideration in agreeing to participate in the procurement process. This was recognised by the court as a clear benefit to the CAA. Hughes' participation constituted good consideration for the tendering contract, and would have done so even if Hughes had reserved the right to withdraw from the process. There was no discussion of the alternative position, that of the RFT tendering contract, but in that case, it is submitted that the tenderer provides consideration by submitting its tender for the owner's consideration and possible acceptance.

Fourth issue

What is the relationship of the two tendering contracts?

These contracts are cumulative, with the latter prevailing to the extent of any inconsistency. Apart from one point, the two contracts are markedly similar in their terms. By lodging their BAFO the parties were deemed to have agreed to dispense with the earlier 9th March contract, and that the RFT contract governed the post-Bafo procurement process. This finding was consistent with the evolving character of the parties' relationship.

Fifth issue

On what basis might the court imply a term to the tendering contract to the effect that the CAA would conduct its evaluation fairly and in a manner that would ensure equal opportunity to Hughes and Thomson?

There was no express term capable of this interpretation. But the case for an *ad hoc* implication of this term was overwhelming. Fairness in process and dealing was the *a priori* of this business relationship. Without such assurance of fairness, there would have been no contract. The term was definite and capable of precise expression, and was so obvious that the parties would have agreed to its inclusion if they had put their minds to it at the time. It seemed likely also that the same term could be implied by law as a legal incident of a particular class of contract, rather than on the basis of being necessary to give business efficacy to the

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708 (1981) 46 LGRA 168 (NSW).

709 [1995] 2 NZLR 208 (NZ)

contract: there may a good deal of overlap between the two categories of implication. In this case, Finn J was prepared to imply a duty to act fairly on both the *ad hoc* basis and as a matter of law.

Sixth issue

> *Did the CAA, having made representations as to the tender process and as to steps to be taken to ensure the integrity and fairness of that tender process, subsequently act in a manner inconsistent with those representations, and fail to disclose to Hughes that it proposed so to act, and/ or that it did so act? Was this "conduct" which was misleading or deceptive for the purposes s.52 of the Trade Practices Act (Cth) 1974 (Australia), and was Hughes therefore entitled on this basis to recover its loss and expense so caused?*

Yes. Some of the alleged representations were in fact made and falsified. The representations were several and continuing ones and constituted "conduct". They continued to induce reliance and functioned in an evolving commercial relationship. Disclosure was to be expected in these distinctive circumstances. It was no excuse for the CAA to say that they did not know of the need for disclosure; they remained liable for the consequences of their failure, because Hughes was reasonably entitled to expect such disclosure of facts known to the CAA. Fairness in process and dealing was the essence of this business relationship. The distinctive circumstances of this relationship were sufficient to found the expectation of disclosure. Hughes relied on the conduct of the CAA, but that conduct was in breach of s.52 of the Trade Practices Act 1974 (Commonwealth of Australia).

CONCLUSION

The tendering contract was originally conceived as a means of enforcing a tenderer's promise not to revoke its tender. As long ago as 1937 the Law Revision Committee suggested that English law should be changed. It was thought

> "undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period. ... It may be noted here that according to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard."[710]

More recently the Law Commission concluded that under English law in 1975,

> "a promise to keep an offer open for a specified time may be broken and the firm offer revoked without liability on the offeror, except where the offeree has accepted the offer before revocation or where the promise is made under seal or the offeree has given consideration for it."[711]

In countries which have legal systems developed from Roman law, rather than from common law, the firm offer is enforceable. Lord Dunedin explained the difference on this point between Scots law and English law:

> "If I offer my property to a certain person at a certain price and go on to say 'This offer is to be open up to a certain date' I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it. It would be different in England, for in the case supposed there would be no consideration for the promise to keep the offer open."[712]

It seems likely that many European Union countries follow generally the same pattern as Scots law, as does the law of South Africa. But common law jurisdictions such as Australia, Canada, New Zealand and the USA take the English position, but subject to statutory and court-made law revision. Quebec and Louisiana, with their French origins, are exceptions to the common law tradition in North America.

In the USA a claim by a main contractor against a subcontractor to enforce a firm offer was dismissed, since the offer relied on by the main contractor had been withdrawn before its acceptance.[713] But the development of the principle of "injurious reliance" has effectively made firm offers binding despite lack of consideration.

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710 Sixth Interim Report of the Law Revision Committee (1937) Cmd. 5449. The Committee proposed then a change to the law so that a firm offer "shall not be unenforceable by reason of the absence of consideration."

711 The Law Commission (1975) Working Paper No. 60: Law of Contract - Firm Offers: p.7.

712 *Paterson v. Highland Railway Co.* 1927 SC (HL) 32, *per* Lord Dunedin at 38.

713 *James Baird Co v. Gimbel Bros Inc,* 64 F (2d) 344 (1933) *per* Judge Learned Hand (2nd Circ).

Where an offeree has relied on a promise to hold an offer open, and acted on this promise to its detriment, a remedy is available to the offeree in damages against the offeror for breach of the promise. Cases are reported where a main contractor has obtained a remedy in damages against a subcontractor were that main contractor has relied on the subcontractor's firm offer in obtaining the main contract.[714] And the adoption of the Uniform Commercial Code by all States (except Louisiana, which follows French law[715] and would therefore find firm offers to be irrevocable) has consolidated the position with regard to offers made by merchants in the context of the sale of goods. Section 2-205 states:

> "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

Similarly, under article 1390 of the Civil Code of Quebec (1996-97) a term for acceptance may be attached to an offer, and if it is, "the offer may not be revoked before the term expires".

In English common law the tendering contract as originally conceived substituted for a law of firm offers. But the implications of the tendering contract go much deeper than enforcing the tenderers irrevocable promises. The decision in *Ron Engineering* that a contract was formed by the submission of a conforming tender creates obligations for the recipients of tenders, as shown in the subsequent cases. Years ago owners would rarely undertake obligations within tender documents, but now they do. They are, put simply, obliged to comply with the tender conditions stipulated, for example provisions as to selection of tenderers, evaluation of tenders and award of contracts. Owners must strictly comply with these conditions or breach of the tendering contract will result. And the ubiquitous privilege clause will not save an owner from the consequences of breach of obligation: *R v. Canamerican Auto Lease and Rental Ltd and Hertz Canada Ltd.*[716]

Just how far and wide can the decisions in the four cases discussed above be applied? The Supreme Court of Canada (Estey J) in *Ron Engineering* took the widest view: the "integrity of the bidding system must be protected where under the law of contracts it is possible so to do."[717] This was also the view of the Ontario Court of Appeal, although the Supreme Court set aside the order of the Court of Appeal, so restoring the first instance judgment in favour of the owner. Estey J's statement seems to suggest that whenever contract rules *can* be applied, they *will* be applied to uphold the integrity of the procurement process. Or it might be taken to suggest that contract rules, as opposed to promissory estoppel or negligence theories, are to be preferred as the basis for regulating parties obligations in this context. Gallen J in the New Zealand High Court characterised the tendering relationship as "contractual in nature"[718] and that despite the existence of "elements for an estoppel argument" he thought it "far preferable to deal with the matter in contract"[719] rather than in negligence or estoppel.[720] Bingham LJ's tentative view was that a claim in negligence, rather than in contract, would have failed,[721] but these words must be considered *obiter*. There is of course an obstacle to introducing a duty of care not to cause economic loss into the arena of pre-contractual negotiations.[722]

Bingham and Stocker LJJ limited their judgments to the circumstances of the *Blackpool* case. Bingham LJ referred to "the circumstances of this case" and not "any other".[723] Stocker LJ also referred to "the circumstances of this case" which to him indicated "that this [was] one of the fairly rare exceptions to the general rule expounded in the leading cases of *Spencer v. Harding*[724] and *Harris v. Nickerson.*"[725] It was the format of the invitation to tender which convinced Stocker LJ that the owner was under a contractual obligation to consider *all* timely and conforming offers if it considered any.

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714 *Northwestern Engineering Co v. Ellerman,* 10 NW 2d 879 (1943) (S. Dakota) and *Drennan v. Star Paving Co,* 333 P 2d 757 (1958) (Cal).

715 See Nicholas, B (1992) *The French Law of Contract* (2d ed) Clarendon Press, Oxford: pp.65-68.

716 *Supra.*

717 119 DLR (3d) 267, 273.

718 [1995] 1 NZLR 469, 479/26.

719 *Ibid.*, 480/35.

720 *Ibid.*, 486/45.

721 *Ibid.*, 1203F.

722 See *Dillingham Constructions Pty Ltd v. Downs (NSW Government)* [1972] 2 NSWLR 49 (NSW); *Morrison-Knudsen International Co Inc v. Commonwealth of Australia* (1972) 46 ALJR 265; *Howard Marine & Dredging Co Ltd v. A Ogden & Sons (Excavations) Ltd* [1978] QB 574; 2 WLR 515; 2 All ER 1134 (CA).

723 [1990] 1 WLR 1195, 1202G.

724 *Supra.*

725 *Supra.*

It was Hughes' case that each of these tendering contract cases turned on its own facts, and that in comparison with these other cases, its own case was so strong that it was difficult to conceive of a stronger factual matrix. The court described the circumstances of the CAA's procurement process as "redolent of contractual intent" because the CAA "was taking positive steps to procure the participation of the tenderers in a competitive TAAATS II. Integral to that was the prescription of a tender process acceptable to [the CAA]." These words reveal that in some circumstances the owner is not merely procuring a building or engineering project but the participation of the tenderers in a competitive process which is regulated by contract. It was not necessary for the Australian court to match the extravagant words of the Supreme Court of Canada which appear to suggest that a tendering contract is to be imposed wherever it is possible to do so. There was no need in Hughes' case for the court to impose a tendering contract when the parties had themselves elected to protect the integrity of their bidding system by making contractual provisions. The court again emphasised the "distinctive circumstances of this procurement" when reflecting on the counter-argument that there might be good public policy reasons as to why such procurements should not be regulated by contract.

The principle of the tendering contract seems well-established in Canada,[726] but the other jurisdictions referred to will require convincing argument to show the procurement parties' intention to establish a legal relationship during the procurement process. The final paragraph restates the general obligations of the tendering contract and sets out the factors which have pointed towards the existence of a such a contract.

The contract comes about by the timely submission of a conforming tender which is free from patent error. The owner's obligation seems to be to treat all tenderers equally and fairly and to *consider* all tenders if any tenders are considered. The owner might reject all tenders. The tenderer is obliged to keep its offer open for acceptance for the stipulated period, or if no period is stated, for a reasonable period. Other terms will be derived from statute and the tender invitation and conditions. The following specific aspects may be significant in finding the existence of a tendering contract:

(1) the format and terms of the invitation to tender;
(2) the fact that more than simple response is required to the invitation;
(3) the fact that submitting a tender is a second or third step in a process;
(4) a requirement to submit a tender deposit or bond;
(5) the format and terms of correspondence relating to the submission and evaluation of tenders;
(6) the facts and circumstances surrounding the invitation to tender and subsequent responses;
(7) the mandatory style of language used in an invitation, in conditions and subsequent letters;
(8) the fact that tender documents are extensive, detailed and substantial;
(9) the steps taken by the owner to maintain a competitive procurement process;
(10) the fact that the invitation to tender was limited to a select or very small class of tenderers;
(11) the presence of an irrevocability clause;
(12) the issue and form of the invitation;
(13) the formal requirements imposed by the tender invitation;
(14) the need for tenders to be returned in official endorsed envelope, which was designed to maintain the anonymity of the tenderer and preserve adherence to the owner's own standing orders.

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[726] There are many Canadian cases not listed here which have applied the decision in *Ron Engineering*. See Craig (1998) *Procurement Law for Construction and Engineering Works and Services*, Blackwell Science, Oxford: Chapter 6.

Part 3

The article in Part 2 above discussed the questions of liability in *Pratt Contractors v Palmerston North City Council*, but did not discuss the court's reasoning on the quantum of damages awarded to the injured bidder for the owner's breach. This further aspect of *Pratt Contractors* was reviewed in the author's conference paper (written jointly with Philip Davenport, solicitor and lecturer at the University of New South Wales, Sydney) presented to a CIB W65 (in conjunction with W92) International Symposium for The Organization and Management of Construction, Shaping Theory and Practice, held in Glasgow, September 1996.[727]

Pratt Contractors v Palmerston North City Council (1995)[728]
Quantum of damages

The court had thus found for the plaintiff tenderer against the Council. It remained only to fix the quantum of damages. The general principle should be consistent in all breach of contract cases. The successful plaintiff is to be put, "so far as money can do it ... in the same situation ... as if the contract had been performed."[729] In fact what Gallen J said is that "the plaintiff is entitled to be *restored* to the position it would have been in had the Council complied with the obligations imposed upon it."[730] The significance of this restatement is argued below.

Pratt sought damages under three heads: the wasted expenditure in preparation of their tender, the loss of profit which would have been earned had they been awarded this contract, and loss of future profits which they would have earned from future contracts, but for the loss off attributes caused by the failure to win this prestige contract.

1 Wasted expenditure

Pratt tendered on the basis that tender costs would not be directly recoverable. But since the Council was in breach of the tender conditions, Pratt was entitled to recover its wasted costs of tendering. Pratt recovered $17,822 under this head of claim.

2 Loss of profit due to the failure to secure this contract

Pratt argued that it would have been awarded the contract had the alternative tender not been accepted, and that it would have made a profit in the amount claimed, based on a percentage of their tender submitted. The Council argued that, had it not been for the alternative tender, no contract would have been awarded due to the excess of tendered price over budget. They also contended that had Pratt been awarded the contract they would have sustained *loss* rather than profit. The judge did not accept that the project would not have proceeded without the acceptance of the alternative tender. It represented a saving of only 6.7% on a budget of $3m. On the evidence, the judge concluded that had it not been for the alternative tender, Pratt would have been awarded the contract.

But what profit would have been earned by Pratt if it had been awarded this contract? The Council produced evidence to demonstrate the lack of profitability in the contract. The judge accepted that this had proved a more difficult contract to perform than had been anticipated, but he was not prepared to accept that Pratt would necessarily have earned no profit. Gallen J made his "overall assessment in the round", and awarded $200,000 to Pratt. This was the amount by which the successful tenderer had reduced the price to secure the contract. Gallen J said:

> The $200,000 is not disproportionate to the savings that the Council made by adopting a practice which I do not consider was open to it. It bears some relationship to the sums which the successful contractor effectively wrote off its non-conforming tender and it is comparable to the savings which were identified by the Council's advisers.[731]

3 Loss of future profits due to the loss of attributes caused by the failure to secure this contract

In Pratt's most speculative claim, they argued that the current system of tendering placed great emphasis on the pass/ fail test applied to the attributes of each tenderer. Winning this prestige project would have

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727 Volume 2, Managing the Construction Project and Managing Risk, p. 391 (only pp. 397-401 reproduced).
728 [1995] 1 NZLR 469.
729 *Robinson v. Harman* (1848) 1 Ex 850, 855.
730 [1995] 1 NZLR 469 at 487/12-13.
731 *Ibid.* at 489/22-26.

enhanced Pratt's attributes when under consideration on other projects. Evidence was adduced which demonstrated Pratt's lack of success in being considered for other work. This lack of success, it was argued, was due to the lack of attributes which would have been earned had they been awarded this contract. But the Council was able to demonstrate that even if Pratt had been awarded this project, and successfully completed it, there would have been little impact on its ability to secure these other projects. But the court held that this claim was too speculative and remote. Pratt therefore succeeded on the first two heads of claim, but not on the third. They recovered $217,822 against the Council and were entitled to costs.

Davenport's criticism of the decision by Gallen J[732]

Gallen J is criticised for awarding Pratt Contractors reliance loss and expectation loss at the same time. Gallen J awarded Pratt Contractors their wasted tendering costs when the Council, in breach of the 'tendering contract', awarded the contract to other than the lowest tenderer. Pratt incurred that tendering cost before the Council breached the contract. The cost was therefore not caused by the breach. Pratt would have incurred these costs even if they had been awarded the contract in question. The wasted tendering costs could only have been recovered as *reliance* loss, whereas Pratt's claim was, in truth, for *expectation* loss, that is the loss of profit which would have been earned but for the Council's breach.

The award of $200,000 to Pratt for loss of profit, was, with respect, not based on a logical method of assessing damages. An Australian court, faced with the same claim and without proof that Pratt would have made a profit if awarded the contract, would, it is submitted, follow *Amann Aviation*[733] and award only reliance loss, which here is the cost of tendering. On the other hand, given proof of loss of profit, the court would award that loss of profit, but not in addition to the cost of tendering. In no circumstances should Pratt be able to recover both cost of tendering and loss of profit.

Craig's defence and support of the decision by Gallen J

In cases of breach of contract the classical analysis[734] produces three situations in awarding contract damages: (1) where the injured party in reliance on the other, has conferred some benefit to the other who has failed to perform; the policy here is to prevent unjust enrichment and may be termed the *restitution* interest; and (2) where the injured party has relied on the other and changed his position to his detriment and may be termed the *reliance* interest; and (3) ignoring enrichment and reliance, a policy which seeks to give the value of the expectation created by the contract which may be termed the *loss of bargain* or *expectation* interest. Admittedly, the English court has only recently taken on board this sort of analysis, and maybe a less than wholesale adoption. The restitution measure is not normally used in England in breach of contract claims: an examination of what the injured party has lost is more likely than an assessment of what the other has gained, but frequently the expenditure will more or less be about equal to the gain.

1 The recovery of wasted costs as reliance loss

In the case of *Anglia Television v. Reed*[735]a leading actor repudiated his contract after the plaintiff TV company had committed expenditure on other actors etc. Note that not only was this wasted cost expended *before the breach* but some part was expended *before the contract* with Reed was made. Lord Denning MR said that in such a case a plaintiff was not limited to claiming expenditure *after* the contract was made: expenditure could be claimed which arose *before* the contract was made "provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."[736] Recovery of the pre-contract expense is justified because that loss cannot be avoided after the breach.[737] To paraphrase Lord Denning again: when Palmerston North City Council broke its 'tendering contract' it must have known perfectly well that much expenditure had already been incurred on the costs of preparing the tender. They must have contemplated, or at any rate it is reasonably to be imputed to them, that if the contract was broken, all that expenditure would be wasted, whether it was incurred *before* or *after* the contract (or its breach). They must pay damages for all the expenditure so wasted and thrown away.

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732 See Davenport's article in (1995) Australian Construction Law Newsletter (ACLN).

733 *C'wealth of Aust. v. Amann Aviation Pty* (1991) 104 ALR 1; (1992) 23 ACLN 35

734 Fuller and Perdue (1936) 46 Yale LJ 52, 52-56 *The reliance interest in contract damage*; see Beale, Bishop & Furmston (BBF)(1990) *Contract Cases and Materials* (2nd ed.) Butterworths, London, at pp. 466-467 and 562.

735 [1971] 3 All ER 690 (CA).

736 *Ibid.* at 692c.

737 *CCC (London) Films Ltd v. Imperial Quadrant Films* [1985] QB 16.

2 Recovery of lost profit as expectation loss

Davenport criticises the New Zealand court for awarding *both* the wasted cost of tendering and the loss of profit caused by the City Council's failure to award the contract to the plaintiff. At first glance this objection receives support from Lord Denning in the *Anglia Television* case: "... a plaintiff in such a case as this has an election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both." Lord Denning cited *Cullinane v. British 'Rema' Manufacturing Co Ltd*[738]as authority for this statement of law. But the question must be asked: what is meant by the term 'profit'? Is it *gross* profit or *net* profit? If the former, then clearly the statement is correct, otherwise double recovery of wasted expenditure would occur. That is *gross* profit would include the expenditure necessary to secure the contract, namely the costs of tendering. But if the term refers to *net* profit, then surely there is no objection in principle to recovery of *both* the wasted expenditure to secure the contract *and* the profit net of all costs necessary to perform the contract. In *Hydraulic Engineering Co Ltd v. McHaffie, Goslett & Co*[739]the plaintiffs recovered wasted expenditure *and* the net profit which would have been earned had the contract been performed without breach. In *Miller's* case[740] the plaintiff recovered the price paid for defective machinery (*restitution*), installation costs (*reliance loss*) and net loss of profits resulting from the breach (*loss of bargain/ expectation loss*). It seems clear from the judgment of Gallen J that *net* profit was awarded here, and awarded quite properly, to the plaintiff.

3 Recovery of both wasted costs and lost profit as restitutionary compensation?

To hark back to Fuller and Perdue's analysis: on what basis should the breach of contract damages in this case be classified? Is it *restitution* interest, *reliance* interest or *expectation* interest that is being protected and compensated? Davenport suggests the wasted tendering costs are a *reliance loss* and the loss of profits are an *expectation loss*, and that on well-founded principle both types of damages cannot be recovered. That is the conventional position. At first glance Gallen J does not appear to help us on this point. But the clue is in the statement: "The plaintiff is entitled to be *restored* to the position it would have been in had the Council complied with the obligations imposed on it."[741] Gallen J sees this award as *restitutionary* compensation. This type of damage is appropriate when there is a total failure of consideration, as there is in this case. Pratt relied on the Council under the terms of the 'tendering contract' and conferred a benefit on them. The Council failed to discharge their obligations and should be forced to disgorge the value received from Pratt, who therefore recovers his expenditure on tendering, plus the amount by which the Council has benefited. The policy is to prevent unjust enrichment. The restitution interest comprises the two elements of *reliance* and *resultant gain*.

4 Conclusion on quantum of damages

The traditional view held in England and Australia is not to use a restitution measure to assess damages for breach of contract. For example in *Tito v. Waddell (No2)* Megarry V-C said:

> "First, it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff."[742]

Clearly the New Zealand court takes a different approach. In England there are exceptions which do allow the recovery in restitution of the profit made by a contract breaker.[743] It has been argued that this remedy should be more widely available.[744] The English contributor submits that breach of the tendering contract is a worthy exception where recovery of the restitution interest should be available. The Australian contributor disagrees.

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738 [1954] 1 QB 292; [1953 2 All ER 1257 (CA).
739 (1878) 4 QBD 670.
740 *Miller's Machinery Co Ltd v. David Way & Son* (1935) 40 Com Cas 204. According to Treitel (1987) *The Law of Contract* (7th ed) at p.726, there is no logical objection to combining these types of claims, so long as the plaintiff does not recover the same loss twice.
741 [1995] 1 NZLR 469 at 487/12-13.
742 [1977] Ch 106, 332.
743 See (BBF) (1990) *Contract Cases and Materials* at p.553. The example is that of a party in breach who owes a fiduciary duty to the injured party.
744 Refer to Jones (1983) 99 LQR 443 and Birks [1987] LMCLQ 421, cited by BBF.

Conclusion (derived from study of the *Pratt Contractors* case)

1 Owners should be mindful of the 'tendering contract' which places obligations on the owner: mainly to treat all tenderers fairly and to consider all conforming tenders.

2 Owners could seek to avoid the obligations of the 'tendering contract' by reducing all tendering conditions to the very minimum (consistent with other obligations), on the basis that it is the requirement for compliance with demanding tender regulation which creates the 'tendering contract'. This advice is inconsistent with advice given below, particularly in the matter of alternative tenders.

3 Owners could place an exclusion clause in every tender notice and invitation to tender. An example would be:

> This invitation to tender is not an offer capable of acceptance. This invitation to tender is an invitation to treat. The submission of a tender does not create any contract between the tenderer and the owner. The owner does not warrant compliance with the conditions of tender or with any tender codes or regulations.

4 Owners should not ask for cash or deposits from tenderers. Such payments could be construed as an element in the formation of the 'tendering contract'.

5 If the tender conditions incorporate other documents (or parts of documents) by reference, this must be clearly drafted to avoid ambiguity. Any confusion in the drafting will be construed against the owner. If the owner is obtaining funds from a funder who requires compliance with specific provisions as to tendering, these provisions must be included within the owner's conditions of tendering. Failure to do so effectively could breach the funding agreement.

6 There are good public policy reasons for considering alternative tenders. Alternative tenders "are an important means of ensuring that innovative approaches as to contracts are available to tendering authorities ... the public may very well benefit to a considerable degree from the encouragement of such innovation and the availability of cheaper methods of construction than have been contemplated by the tendering authority or their advisers."[745]

7 The taking of and consideration of 'alternative tenders' presents pitfalls to the unwary. If alternative tenders will not be considered in any circumstances, this should be clearly stated in the invitation and the tender conditions. If alternative tenders will be considered, the invitation and conditions must make clear exactly what 'alternatives' will be considered and the means of their evaluation. Thought must be given as to whether an alternative tender merely adjusts a previous tender, or stands as an independent offer capable of acceptance without reference to the previous tender. Does the consideration of the alternative tender mean that reassessment of the tenderer's attributes must be made?

8 Provisions for the consideration of alternative tenders must be made with a clear policy on the degree of departure from the original scheme which is permitted. The New Zealand conditions stated that any proposal must be "within the *scope* of" the request for tenders. But what does "within the *scope* of" mean? Subsequently a definition of the word *scope* was provided: "*Scope* is the project's principal purpose(s) and service(s) to users as specified in ...". It was suggested in evidence that this a practical definition that would suit the contracting world.[746] Other evidence suggested that *scope* should "be considered in relation to the nature of the project, as distinct from its purposes and in that case, its conformity became a matter of degree." Other suggestions would limit the definition of *scope*, such as a provision proposing that "alternative methods or materials which may alter the quality or durability but not the *scope* of the end result".[747]

9 The concept of a conforming alternative tenders must not be defined to tightly so as to restrict innovation, but must be not so broad as to permit a different design proposal, which would be unfair to tenderers who submit conforming tenders.

10 Any departure from the conditions of tender risks unfairness to the tenderer(s). The owner's obligation to be fair to all tenderers should not be compromised by bad management.

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745 [1995] 1 NZLR 469 *per* Gallen J at 485/22-26.
746 *Ibid.* at 486/7.
747 *Ibid.* at 486/8-18, ref. TNZ *Manual of Competitive Pricing Procedures* (CPP)

Chapter 7

Part 4

PROCURING SUBCONTRACT WORKS: HEAD CONTRACTOR'S RIGHT TO RELY ON IRREVOCABLE SUBCONTRACT QUOTATION[748]

Introduction

Procurement is rarely discussed in the context of the head contractor subcontractor relationship. Yet for every head contract, there may be scores of subcontracts, and each subcontract must be procured with the same integrity as the head contract. The problem is commonplace. The head contractor submits its tender based on a subcontract quotation and secures the head contract. The subcontractor in the meantime secures other work, or discovers an error in its tender, and does not wish to stand by its offer to the head contractor. An alternative subcontractor must be appointed at greater cost which is irrecoverable under the head contract. Does the head contractor have a remedy against the defaulting subcontractor?

In English law promissory estoppel[749] does not by itself found a cause of action

Although English law generally requires consideration to bind a promisor to its promise, an English court might employ the doctrine of estoppel, in this case *promissory* estoppel, as an apparent substitute for consideration. The essential elements of an estoppel were given by Lord Birkenhead in 1921 in the following statement:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."[750]

Note that here the representation complained of had to be one of *fact*. The estoppel arises through B relying on and acting upon facts given by A and B now suffering loss or detriment caused by that reliance and action. Although it is frequently said that estoppel can be used as a shield but not as a sword, this is an over-simplification. Estoppel, whilst not actionable *per se*, might provide the essential ingredient without which a cause of action would fail.

In *Central London Property Trust v. High Trees House Ltd*[751] Denning J (as he then was) reassessed the modern view of estoppel. He noted that the historic position (as noted above) was that to qualify as an estoppel, the representation must be one of *fact*. Any representation as to the *future* had to be embodied in a contract or deed. But the law had not stood still. Denning J said:

> "As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; it was a representation in effect as to the future [...]. At common law, that would not give rise to an estoppel, because, [...] a representation as to the future must be embodied as a contract or be nothing.[752] So at common law it seems to me there would be no answer to the whole claim.
>
> What, then, is the position in view of developments in the law in recent years? The law has not been standing still [...] There has been a series of decisions over the last fifty years [...] In each case the court held the promise to be binding on the party making it, even though under the old common law it might be

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748 Davidson and Abdel Meguid (ed) Procurement – a key to innovation, pp. 101-110.

749 Estoppel is a rule of law whereby a person is prevented from denying the truth of a statement made or denying facts alleged to exist. Promissory estoppel is an equitable doctrine and its effect is explained in the text.

750 *Maclaine v. Gatty* [1921] 1 AC 376 *per* Lord Birkenhead at 386.

751 [1947] KB 130; [1956] 1 All ER 256.

752 As was said in *Jorden v Money* (1854) 5 HL Cas 185.

said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases [...],[753] show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognised."[754]

Denning J was satisfied that such a promise was binding in law. In *Combe v. Combe*[755] Denning LJ (as he then had become) set some limits to the principle of the *High Trees* case, "lest it should be endangered". It does not create a new cause of action where none previously existed. Its effect is to prevent a party from relying on its strict legal rights when it would be unjust to permit such reliance, when regard is had to the parties' previous mutual dealings. "It may be part of a cause of action, but not a cause of action in itself." He said:

"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, although not of its modification or discharge."[756]

In English law the *High Trees* doctrine, or the doctrine of *promissory estoppel*, has been applied in several cases where one party has agreed to forego a right under a contract, but not as a substitute for consideration in the formation of a contract. A subcontractor might revoke its promise to keep its bid open for acceptance providing the head contractor avoids liability to the owner, but not if the head contractor becomes bound to the owner.

But in Australia the High Court has gone further in holding that a representation, not of fact but of future intent, constituted a promissory estoppel giving rise to a cause of action.[757] And in several States within USA promissory estoppel has for many years been an alternative to consideration in creating a ground to enforce a promise.

The (US) *James Baird* case: head contractor is not entitled to rely on a supplier's tender, under the doctrine of promissory estoppel, when tendering to the owner.

Assume that a head contractor has successfully tendered for construction work. His tender price included a price quoted by a merchant for the supply of linoleum. The merchant under-estimated the total quantity of linoleum to be used and mistakenly submitted a lump sum quotation. The merchant subsequently discovered its mistake but before that mistake could be communicated to the contractor, the latter's tender had been

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753 *Hughes v Metropolitan Ry Co* (1877) 2 App Cas 439, *Birmingham & District Land Co v London & North Western Ry Co* (1888) 40 Ch D 268, and *Salisbury v Gilmore* [1942] 1 All ER 457.
754 [1956] 1 All ER 256, 258-259.
755 [1951] 2 KB 215; 1 All ER 767 (CA).
756 [1951] 1 All ER 767, 770.
757 *Walton Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387. High Court of Australia.

accepted by the owner. The merchant refused to supply at the quoted price and was sued by the head contractor.

Is the head contractor entitled to rely on the supplier's tender to contract with the owner? 'No' said the Court of Appeals in *James Baird Co v. Gimbel Bros Inc.*[758] It was held, firstly, that there was no bilateral contract by which the contractor accepted the offer of the merchant and promised to pay for the linoleum in the event of its tender being accepted. In this respect the Judge Learned Hand said:

> "The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not, in the end, promote justice to seek strained interpretations in aid of those who do not protect themselves"[759]

Then the judge went on to consider the alternative argument that the merchant should be held bound by the doctrine of promissory estoppel but declined to hold the defendant bound in the absence of a binding contract of supply between contractor and merchant. (But an example of conflicting authority is *Drennan v. Star Paving,*[760] discussed below.)

The New Zealand court follows *James Baird*: head contractor is not entitled to rely on a subcontractor's tender, under the doctrine of promissory estoppel, when tendering to the owner.

In the New Zealand case of *Cook Islands Shipping Co Ltd v. Colson Builders Ltd*[761] the court also considered the question whether a subcontractor could be bound by the doctrine of promissory estoppel: that as a matter of justice, the subcontractor, having submitted a quotation to provide services in a given amount, on which the contractor relied in submitting its tender to the principal, should be estopped from denying the existence of a contract. Mahon J referred to the position in the USA, using the *James Baird* case (above) as an authority to deny the contractor a remedy under the doctrine of promissory estoppel.

The New Zealand court observed the inconsistency of United States authority in such circumstances but adopted the view that by the contractor obtaining his own contract by tender, the subcontractor is not bound in the absence of a prior bilateral contract between them. For those reasons the New Zealand court rejected the contractor's claim against the subcontractor based upon promissory estoppel.[762]

The (US) *Star Paving* case: head contractor is entitled to rely on a supplier's tender, under the doctrine of promissory estoppel, when tendering to the owner.

Tenders are due to be submitted to the owner tonight. It is now morning, and the head contractor takes a telephoned quotation from a subcontractor for incorporation in its tender. This procedure is common local practice. Between fifty and seventy-five bids from subcontractors will be telephoned to the head contractor that day. An administrative system had been devised to record and classify these bids. The head contractor is required to submit the names of subcontractors used in its bid. A bid bond is also required to 10% of the tendered sum, as a guarantee to enter contract if awarded the work. The head contractor wins the contract. The next day the subcontractor informs the head contractor of a mistake in its price and withdraws. The head contractor expects the subcontractor to honour its bid, but subcontractor refuses to perform. Another subcontractor is then employed at greater cost. The head contractor sues the original subcontractor for his loss, on the grounds that it relied on the subcontractor's bid in submitting its own tender. The subcontractor defends on the ground that there was no enforceable contract between the parties: it has made a revocable offer and revoked it before the head contractor communicated its acceptance to the subcontractor.

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758 F 2d 344 (1933), Circuit Court of Appeals.
759 *Ibid, per* Judge Learned Hand at 346.
760 333 P (2d) 757 (1958) cited in *Hudson's Building and Engineering Contracts* (11th) para. 1.027.
761 *Cook Islands Shipping Co Ltd v. Colson Builders Ltd* [1975] 1 NZLR 422, at 438.
762 [1975] 1 NZLR 422, *per* Mahon J at 438/39.

Does the head contractor's reliance make the subcontractor's tender irrevocable? 'Yes' said the Supreme Court of California (Traynor J) in *Drennan v. Star Paving.*[763] The court held that although the subcontract tender had made no promise of irrevocability and no express or implied promise that the head contractor would employ the subcontractor should the head contract tender be successful, the subcontract tender did amount to an enforceable promise, if the head contractor relied on that tender to his disadvantage.

The *Restatement of Contracts*, applicable in California, provided at s.90 that a promise which can reasonably be expected by the promisor to be relied upon to induce action or forbearance of a definite and substantial character on the part of the promisee, and that action or forbearance is induced, is binding on the promisor if to hold otherwise would be unjust.[764] A list of authorities shows application of this rule in California.[765] The subcontractor promised to perform on terms expressed or implied and knew that the head contractor would rely thereon if the bid should prove to be the lowest. The subcontractor's offer induced "action of a definite and substantial character" on the head contractor's part.[766]

The subcontract offer was silent as to revocation. Had it made express provision for revocation, the court would have taken a different view. But here it must be decided whether terms as to revocability of the offer should be implied in law or in fact. Consider the analogous matter of a unilateral contract. An offer for a unilateral contract cannot now be withdrawn if part performance is given or tendered by an offeree.[767] The rationale is that a subsidiary promise is implied to the main offer, to the effect that if part performance or tender is given by the offeree, the offeror will not revoke its offer. Part performance or tender can thus be treated as consideration for the implied subsidiary promise. And, of course, under s.90 (above), one party's justified reliance and action upon an offer may be a sufficient basis to make the promise binding. Traynor J said:

> "Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract."[768]

Any lack of consideration here is not a problem, because reasonable reliance, exceptionally, acts as a substitute.[769] That is the effect of the estoppel doctrine, which is not to say that the need for consideration in a contract is abolished.[770] The subcontractor submitted its bid to obtain the subcontract. It intended, and wanted, the main contractor to rely on it, if it should be the lowest bid received, to formulate the main contract bid. It was in the interest of the subcontractor to make its bid as low as possible: the lower the subcontract bid, the lower the main contract bid, the greater the likelihood of being awarded the work.

The head contractor does not appear to have 'accepted' the subcontractor's bid in any way normally recognised in contract. The head contractor did promptly inform the subcontractor of its success, and it was at this time that the subcontractor purported to revoke its offer. But it was only fair, said the court, that a head contractor should have a "an opportunity to accept the [subcontractor's] bid after the general contract has been awarded to him."[771] The head contractor's obligation, on being awarded the main contract, is not to

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763 333 P (2d) 757 (1958) cited at *Hudson* (11) para. 1-027. Supreme Court of California.

764 According to *Hudson* (11) this is followed in the *Second Restatement of Contracts* (US, 1981) para. 89(2) and in subsequent cases. Reference is made to Sweet (1985) *Legal Aspects of Construction Contracts* (3d ed) West Publishing Co. USA: pp. 727-729.

765 333 P (2d) 757 (1958) *per* Traynor J at 759[2].

766 *Ibid.* at 759[3].

767 See s.45 of the *Restatement of Contracts*.

768 333 P (2d) 757 (1958) *per* Traynor J at 760[5].

769 See s.90 of the *Restatement.*

770 333 P (2d) 757 (1958) *per* Traynor J at 760[6], referring to *North Western Eng Co v. Ellerman* 69 SD 397, 408; 10 NW 2d 879, 884, Supreme Court of South Dakota

771 333 P (2d) 757 (1958) *per* Traynor J at 760[7].

delay acceptance of the subcontract bid whilst it shops for cheaper bids. "Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer."[772]

Does the presence of a mistake in the subcontract tender change the position? The subcontractor argued that it was entitled to revoke its offer on the ground of its mistake. Several cases were cited to the court in support. Traynor J said:

> "In those cases, however, the bidder's mistake was known or should have been known to the offeree, and the offeree could be placed in *status quo*. Of course, if [the head contractor] had reason to believe that [the subcontractor's] bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it.[773] [The contractor], however, had no reason to know that [the subcontractor] had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids for paving in [the area of the job.] He committed himself to performing the head contract in reliance on [the subcontractor's] figures. Under these circumstances [the subcontractor's] mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled [the contractor] as to the cost of doing the paving. Even had it been clearly understood that [the subcontractor's] offer was revocable until accepted, it would not necessarily follow that [the subcontractor] had no duty to exercise reasonable care in preparing its bid. It presented its bid with knowledge of the substantial possibility that it would be used by [the contractor]: it could foresee the harm that would ensue from an erroneous underestimate of the cost. Moreover, it was motivated by its own business interest. Whether or not these considerations alone would justify recovery for negligence had the case been tried on that theory,[774] they are persuasive that [the subcontractor's] mistake should not defeat recovery under the rule of s.90 of the *Restatement of Contracts*. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."[775]

The court affirmed the judgment given by the trail judge. The general contractor was entitled to rely on the subcontractor's bid, despite the alleged mistake therein.

In Canada the head contractor is entitled to rely on a subcontractor's tender when tendering to the owner under the principle of the two contract analysis.

The contractor submits a tender including a sum for mechanical work provided by a subcontractor. That tender is the lowest tender received by the owner, who, under the tender conditions, has thirty days available in which to give an acceptance or rejection. Four days after submission of tenders the subcontractor advises the head contractor of an error in its price, and purports to withdraw its tender. The head contractor argues that the subcontractor is unable to withdraw, since the subcontract tender is also bound into the thirty days acceptance period prescribed by the head contract.

Is the subcontract tender capable of being withdrawn or must the tender remain open for thirty days for the head contractor's acceptance? In *Northern Construction Co Ltd v. Gloge Heating and Plumbing Ltd*[776] the Canadian court held that the subcontractor could not withdraw its tender. There was a tacit or implied agreement between head contractor and subcontractors that the subcontract tender would remain open for acceptance for the same period as the head contract tender remained open. The subcontractor is liable for the damages suffered by the head contractor caused by its refusal to perform the subcontract.

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772 *Ibid.* at 760[8]: see *RJ Daum Const Co. v. Child*, Utah, 247 P.2d 817, 823.
773 *Robert Gordon, Inc., v. Ingersoll-Rand, Inc.* 117 F 2d 654, 660. 7th Circuit.
774 See *Biakanja v. Irving* 49 Cal 2d 647, 650; 320 P 2d 16.
775 333 P (2d) 757 (1958) *per* Traynor J at 761[9,10].
776 (1984) 6 DLR (4th) 450; 1 Const LJ 144. Alberta Court of QB, Canada, Miller J, 3.2.1984.

Miller J observed that many of the authorities cited by counsel in this case dealt with the owner-contractor relationship rather than contractor-subcontractor relationship. In the former circumstances (no doubt due to owner's tender checking and evaluation process) the mistake is discovered soon after opening of tenders and certainly before a tender is accepted. There is a difference between cases where the tenderer is author of the mistake and would itself suffer if held to contract, and here, where the head contractor has relied on the subcontractor's tender and would suffer if held to contract, but the subcontractor who is responsible for the error avoids liability.

There were two lines of authority available to the court. Following *Belle River Community Arena Inc v. WJC Kaufmann Co Ltd*[777] it would be inequitable if the owner, in the full knowledge that the tenderer has made a significant mistake, was allowed to extract performance from the tenderer. The rationale there was based on principles of equity rather than, as in *Ron Engineering*,[778] the contract fundamentals of offer, acceptance and revocation. In the latter case, the court held that a 'tendering contract' (a unilateral contract) was created by the submission of a timely and conforming tender, that this contract was collateral to any contract for construction work, and under its terms the tenderer was expressly bound not to revoke its offer, a promise secured by a tender deposit. As both owner and tenderer were not under any mistake when the 'tendering contract' came into existence (ie when the conforming tender was submitted) it was irrelevant to consider the law of mistake. Estey J in the Supreme Court of Canada disagreed with the approach and decision of the Ontario Court of Appeal in *Belle River*.

Piggott Structures Ltd v. Keillor Construction Co Ltd[779] was a case involving a claim by a head contractor against a subcontractor. The subcontractor had tendered for ground work, the tender had been accepted, then the subcontractor refused to perform alleging that the nature of the contract work had been misrepresented by an employee of the head contractor. The contractor sued for the subcontractor's specific performance. Evidence was apparently given at trial that it was custom and practice within the construction industry that a subcontractor's tender could be withdrawn at any time until the head contractor had submitted its tender, but not after that time. In the view of the court, this was reasonable, provided both parties were in agreement as to what the offer was.[780] As the majority of the Court of Appeal found no agreement between the parties as to the nature of the work, the head contractor's claim was dismissed. But this case is significant here because the court "seemed to affirm the general principle that a bid by a subcontractor, when used by the contractor, constitutes a binding contract by the custom and usage of the construction industry which can be enforced by the contractor."[781]

In *MJ Peddlesden Ltd v. Liddell Construction Ltd* [782]the court found for the subcontractor against the head contractor. The subcontractor's tender was used by the head contractor in its submission to the owner. The owner accepted the head contractor's tender within the period stipulated, but the head contractor did not communicate this fact to the subcontractor until after the period had lapsed. The head contractor then used another subcontractor for the work and the original subcontractor sued for damages. The head contractor defended on the grounds that there was no contract to breach but the court found that a unilateral contract between head contractor and subcontractor had been created by the tendering process which required only the owner's acceptance within the stipulated period to further bind all three parties. It was the owner's acceptance which finally bound the head contractor to use the original subcontractor, not the subsequent communication of acceptance. The head contractor was liable for its breach to the injured subcontractor.

Miller J returned to the *Ron Engineering* case. He referred to commentaries on the case,[783] then said:

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777 (1978) 87 DLR (3d) 761, Ontario Court of Appeal.

778 *The Queen in Right of Ontario et al v. Ron Engineering and Construction Eastern Ltd* (1981) 119 DLR (3d) 267, Supreme Court of Canada.

779 (1965) 50 DLR (2d) 97, Ontario Court of Appeal.

780 See McLennan JA in *Piggott* at 112, cited (1984) Const LJ 144, 149.

781 Miller J (1984) 1 Const LJ 144, at 149.

782 (1981) 128 DLR (3d) 360, British Columbia Supreme Court, Ruttan J.

783 *Commentaries*, (1982) 60 Can Bar Rev 345, at 353-354, Prof. Robert Nozick at 352.

"When contract A (the 'tendering contract'), as discussed in *Ron Engineering*, is analysed as an option contract, the following obtains. The invitation to tender by the owner, or by a general contractor to a subcontractor, is a request for an option that sets out the terms of the option except the price and includes the length of time it will remain open. That invitation to tender also states the consideration, namely, a promise to consider the submitted tender for the award of a contract. The submission of the bid by the subcontractor sets the price and binds the subcontractor to the terms proposed by the contractor. It should be noted, however, that while an optionee may propose terms, option contracts have been described as unilateral contracts because they impose obligations only on the optionor or grantor. ... The Optionee is not bound and never will be if he fails to exercise the option ... Exercise of the option must be communicated to the grantor in a manner consistent with the terms of the option ... The exercise of the option will require the optionee to award the contract to the grantor or, in default, to pay damages equivalent to the grantor's expectation loss.

In *Peddlesden* the court essentially found that the option had been exercised when the contractor 'adopted and made part of its tender' the subcontractor's bid. In *Piggott* the court essentially held that the earliest the option could have been exercised was at the deadline for the contractor's tender, since until that time, the subcontractor could withdraw his bid.

Indeed, *Piggott* suggests that, in accordance with the custom and usage of the construction industry, the option commences at the deadline for the contractor's bid. It must not be forgotten that all subcontractors who submit tenders are giving options to the contractor. Except where the invitation to tender specifies that the contract will be awarded to the lowest bidder, the contractor has promised only to consider the tenders. *Peddlesden* suggests that where a contractor uses a subcontractor in his successful bid, he has exercised his option subject only to the owner's acceptance of the construction tender. That exercise, however, unless the invitation to tender so specifies, does not end the options given by the other subcontractors. They remain open for the specified period so that the contractor may substitute a subcontractor if the designated subcontractor fails to honour his option.

While both *Peddlesden* and *Piggott* are unclear as to when the adoption of the subcontractor's bid was communicated to the subcontractor, it must be noted that option cases require such communication before the option may be said to be binding."[784]

If the option contract analogy is pursued, here, Northern Construction would be seen to exercise its option at the time when its tender was submitted to the owner incorporating Gloge's name and price. The subcontractor would be seen to have waived its right to receive communication that its bid had been adopted in accordance with construction industry practice, or, alternatively, the subcontractor did have notice of the option's exercise prior to its attempt to withdraw the option. But it is not the relationship between the date of *exercising* the option and the date of discovering the mistake that is relevant: it is the relationship between the date of *granting* the option and the date of discovering the mistake which is relevant. Miller J quoted from Professor Nozick:

"The principle of unilateral mistake has indeed been utilised to deprive parties of their expectation interest but only where (a) there is knowledge, whether actual or constructive of the mistake of the other party, and (b) where this knowledge was placed with the 'guilty' party *prior* to contract formation - this is the so-called 'snapping up' of a mistaken offer. It has never been applied where the mistake became known *after* contract formation."[785]

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784 Miller J (1984) 1 Const LJ 144, 150-151.
785 *Ibid.* at 151.

Following this proposition, even if Northern Construction exercised its option *after* learning of Gloge's error, Gloge is still bound by the contract and liable for breach.

Gloge's only way of avoiding liability then would be to establish that Northern Construction knew of the error prior to the *commencement* of the option. Gloge argued that Northern *did* know, simply because Gloge's price was 'significantly low', that is more than ten per cent below the next highest bid. Does this amount to constructive knowledge of the mistake? The expert evidence in this case suggested that questions would not be asked until the bid differential was more than ten per cent. As any bid could be 'low' for several different reasons, and only one being error, the court not find constructive knowledge of error simply because on bid was lower than another by 10% - 12%. Therefore Northern Construction had neither actual or constructive knowledge that Gloge's price contained a significant error when they used that bid in their tender to the owner, and thus created the 'tendering contract' which obliged Gloge to perform, or created the irrevocable option. If Gloge were allowed to withdraw with impunity, that would make Northern unpaid insurer of Gloge's mistakes: Miller J knew "of no principle of contract or equity which imposes that kind of duty unless it is expressly provided."[786] The subcontractor is liable for the damages suffered by the main contractor caused by its refusal to perform the subcontract.

Conclusion

Owners tend to distance themselves from subcontract procurement. But the common law appears to recognise that owners, interests are better served by a bidding system which extends its integrity to subcontract procurement. Distrust at this level will affect final outcomes.[787]

In English law it seems that it remains necessary for the head contractor to give consideration to the subcontractor in order to secure the irrevocability of the subcontract bid. The doctrine of promissory estoppel has been applied so as to bind a promisor to its promise but not, as in the Californian court, as a full substitute for consideration so as to create a cause of action if the subcontractor's offer is revoked before acceptance by the head contractor. But, it is submitted, following the Canadian authorities and by analogy with the position between owner and head contractor, the subcontractor's consideration for the irrevocability of its offer is the head contractor's obligation to consider the subcontractor's tender properly submitted. If the head contractor uses that subcontract bid in the formulation of the head contract bid, that amounts to 'acceptance' of the subcontractor's offer, subject only to acceptance of the head contract offer. Alternatively, the invitation to tender can be explained as a request for an option granted by the subcontractor on the terms stipulated by the tender invitation. On both bases, the successful head contractor must inform the subcontractor of the tender outcome in good time. The head contractor then becomes bound to award the contract to the subcontractor. By this scheme the integrity of the bidding process is upheld.

The Californian case of *Drennan v. Star Paving*[788] might also have been argued on the contractual basis of an irrevocable subcontract tender. The subcontractor could have been seen to offer irrevocability in exchange for the main contractor's consideration of the tender submitted and its eventual use and incorporation within the main contract bid. Or it could have been argued that by using the subcontract offer as the basis of the main contract bid, the main contractor had conditionally accepted that offer, conditioned only on being awarded the main contract. Any such arguments would have to be underpinned by evidence. According to the judgment of Traynor J, there was no such supporting evidence.

It is, of course, not surprising that the necessary evidence could not be found to support the contract arguments, if those arguments were not run before the court. And it mattered not that consideration for the promise was not found: the court applied the doctrine of promissory estoppel as set out in s. 90 of the *Restatement of Contracts*, which provided a circumvention of the consideration rule. According to *Hudson*

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786 *Ibid.* at 152.
787 Latham's *Interim Report* (Dec. 1993) commented on the lack of trust within the industry at p.9.
788 333 P(2d) 757 (1958).

this Californian decision has exercised great influence in the USA construction industry.[789] *Hudson* doubts whether an action based on promissory estoppel would succeed in England, but that an action in negligence based on *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*[790] might succeed. Perhaps the action could also be founded on the two contract analysis of *Ron Engineering*[791] along the lines developed above.

789 *Hudson* (11) at par.1-026.
790 [1964] AC 465 (HL).
791 (1981) 119 DLR (3d) 287; 4 Const LJ 241. Supreme Court of Canada, 27.1.81.

Chapter 8

Managing The Tendering Process - Lessons For Quantity Surveyors And Project Managers Emerging From The Common Law Courts

The aim of chapter 8 is to present the author's published paper *Managing The Tendering Process - Lessons For Quantity Surveyors And Project Managers Emerging From The Common Law Courts.* The objectives of that paper were to draw to the attention of clients' quantity surveyors and project managers some decisions of the common law courts in the context of construction procurement and to point out some consequences for the professional practice of the client's agents.

Chapter 8 is in two parts. Part 1 provides an introduction and summary of the paper reproduced in Part 2. Part 2 reproduces material from one published source, namely, the author's paper titled *Managing The Tendering Process - Lessons For Quantity Surveyors And Project Managers Emerging From The Common Law Courts*, published by the Australian Institute of Quantity Surveyors in the *Refereed Journal* (2000), volume 4, issue 1, pp.1-12. The article was written in July 1999.

Part 1

Material elsewhere in this dissertation shows that the tendering process has increasingly come under the scrutiny of the courts as the costs and detail required at this stage put a greater burden on tenderers. The present author once again found it necessary to review briefly cases which demonstrated the existence of the tendering contract, then proceeded to show that the terms of that contract are initially supplied by the owner who invites tenders. However, those contractual terms might also arise from a tenderer's promise to the owner and from the court through the process of implication.

The main body of the article dealt with several procedural points which commonly arise for the client and its quantity surveyor and/ or project manager during the tender evaluation and contract award process in order to show how the court's decisions shape procurement practice. The topics reviewed are as follows: making 'savings' on tenders submitted to meet the client's budget, the effect of hidden preferences in the client's award criteria, the effect of provisions enabling the client to award no contract (privilege clauses), and the expectations of lowest bidders. Each topic relates the story of at least one court judgment arising from a tender challenge and shows how practice should be shaped to meet legal requirements.

The author concludes with practical advice for clients, quantity surveyors and project managers, which if taken, will avoid creating the grounds to support claims from aggrieved tenderers. The

court condemned any unfair tendering practice which would amount to the owner 'cherry-picking' the most favourable rates and prices tendered whilst rejecting less favourable portions of a tender and calling for retender on those same portions. The owner is not permitted to treat bidders unfairly and unequally, say by giving a hidden preference to one tenderer, or to a class of tenderers, then defend itself under the privilege clause which provides that it is not obliged to award a contract to any person. If a contract is awarded, it must be as the result of the process set down in the tender conditions, but the owner is generally entitled to end the tender process without any contract award, and it may quite properly start a new process.

Part 2

Managing The Tendering Process - Lessons For Quantity Surveyors And Project Managers Emerging From The Common Law Courts

INTRODUCTION

Duties of quantity surveyor or project manager

Quantity surveyors representing client interests in construction and engineering processes have readily accepted obligations of care and skill in directing the procurement phase. The traditional services provided by quantity surveyors not only included preliminary cost advice and preparation of tender documents, but also advice on type of contract to be used and advice on obtaining tenders and negotiation with contractors. According to the Royal Institution of Chartered Surveyors (1966) quantity surveyors hold themselves out as expert in the matter of "obtaining tenders", in selecting suitable procedures to suit client's circumstances, in preparing short-lists of suitable tenderers, and in advising "on the most satisfactory tendering procedure".

Those consultants providing the professional service of project manager might adopt the *Standard Terms for the Appointment of a Project Manager,* 1998. Under clause 2.1 that project manager is expressly obliged to provide to the client the care, skill and diligence reasonably to be expected of a person holding itself out as capable of performing the management services necessary for the project in hand. The scope of the project manager's services to the client includes management of the procurement phase using project specific best practice procedures.

Both quantity surveyors and project managers must carefully reassess their advice to clients and their management techniques in the light of decisions of the courts so as to ensure that procurement practice adopted can indeed be described as "best practice". Practitioners will no doubt have relied upon traditional guidance as to the formation of contracts. Take for example the following few words from Turner (1977) in a well used and industry-trusted text:

> "An invitation to tender is not an offer. The tender itself is the offer ..."

Dorter and Sharkey (1981) stated that:

> "An invitation to tender is not a true offer except in the rare case where it contains an express statement that the lowest tender will he accepted."

Alternatively, take the advice on formation of a simple contract from Wallace (1979):

> "An invitation to tender given by a prospective employer to building contractors is a mere invitation to negotiate with the persons who reply, and not an offer to make a contract with the contractor whose tender is the lowest, or with any contractor at all. ... [Advertising] for or inviting tenders is a mere attempt to ascertain whether an offer can be obtained within such a margin as the employer is willing to accept."

Both practitioner texts were not closed to the possibility of a contract arising out of, and governing, the tender process. Wallace speculated, lacking at that time any clear authority from the courts, that there might be circumstances when a tendering contract could arise:

> "If, however, a request for tenders expressly states that the lowest tender will be accepted, it will, if sufficiently definite in other respects, constitute a true offer, so as to produce a concluded contract between the employer and the lowest tenderer. But more usually, it is the tender submitted in response to an invitation to submit tenders which is the offer and which, if accepted by the employer, will result in a binding contract. In every case the exact circumstances and language used must be carefully examined."

This article paints a different picture of the common law governing the tendering process as it has evolved in the last twenty years. There are now several cases where the tendering process has been held to be regulated by a contract, despite the absence of any statement whereby the owner promises to award a contract to the lowest bidder. This author highlights decisions of the Canadian courts which reveal development in the common law in the context of construction procurement, particularly the problems of making so-called savings on tenders received prior to acceptance, undisclosed preferences exercised by owners, low-bidders expectations of success and fairness generally in the process.

Procurement obligations

Contractual obligations can arise for both parties to the procurement process. There are several recent examples where parties have been held bound to express or implied promise(s) made to each other in a "tendering contract", "pre-award contract" or "process contract".[792] For example in the Canadian case of *Ontario v. Ron Engineering and Construction Eastern Ltd* (1981) the court held that a contract arose between the public owner and a tenderer, upon the submission of a compliant bid by that tenderer, whereby the lowest tenderer was bound by the bid conditions, in this case not to withdraw its bid within a period of sixty days after the date of bid opening. In the English case of *Blackpool & Fylde Aero Club v. Blackpool Borough Council* (1990) the public owner was held to be under an implied contractual obligation to each compliant tenderer to consider its bid, if it considered any bids. In the New Zealand case of *Pratt Contractors Ltd v. Palmerston North City Council* (1995) the public owner was held to be in breach of contract to the lowest compliant tenderer when it awarded the construction contract on the basis of a non-compliant bid to another tenderer. And in *Hughes Aircraft Systems International v. Air Services Australia* (1997) the Federal Court of Australia recently held that a procurement process was bound by a contract which arose out of correspondence between the relevant parties and out of the submission by the tenderer of a best and final offer in response to a request for tenders.

These cases and others are well documented elsewhere by Craig (1999). Suffice to say here that consultants must respond to the existence of these decisions of the courts in formulating advice to clients and in their procurement practices. Whilst it is true to say that a tendering contract is not yet found as "a matter of law and thus should not arise if a sufficient contrary intention is expressed and maintained", ([1999] ICLR 147) it seems likely that procurement of all but small-scale construction projects is governed by the law of contract unless the parties to the procurement process clearly agree otherwise. Such a revelation will come as a surprise to, and be resisted by, many industry practitioners, but the substantial opinions expressed in court and the commercial purpose of those funding the procurement process must, it is submitted, inevitably lead to some degree of regulated behaviour on the basis of contractual obligations.

Contractual terms supplied by owner

Having established that the tendering process is likely to be governed by a contract (unless the parties have agreed otherwise), it is relevant now to consider what the terms of that contract might be. As stated above, the tendering contract arose out of the submission of a compliant tender in response to the owner/ developer's invitation. That invitation made, *inter alia*, certain stipulations as to the manner and method of compiling and submitting tenders, and as to how tenders would be evaluated and results promulgated. The obligations of the parties are thus to be found in the tender stipulations together with those that a court might imply by operation of law or in fact. Many public bodies publish a Code of Tendering or similar (NSW, 1996) (Victoria, 1997). Private and public clients might adopt an industry standard tender code, such as AS 4120 (Standards Australia, 1994). All or some of the provisions of the code may become incorporated by reference as terms of the tendering contract.

Contractual terms supplied by the parties and the court

In the interests of clarity, the author's hypothesis is restated as follows: the submission of a tender in response to an invitation to tender *can* create contractual obligations for both parties. The obligations created will be found within the tender conditions, the applicable tender code, and other relevant material such as legislation and correspondence. All or some of the provisions of the tender code may be incorporated in the tendering contract by reference and/or by implication. Contractual terms might also be supplied by the court by the process of implication.

Some explanation seems necessary at this point. A court might fill a gap in the parties express contractual provisions by interpretation and/ or by implied terms. The latter process was conveniently summarised by Lord Denning MR in *Shell UK Ltd v. Lostock Garage Ltd* (1977). The first category of implied terms is that implied in law "as a legal incident of the [particular] relationship" in question. For example, a building contract would normally carry an implied term that work must be done with "all proper skill and care": *Young and Marten Ltd v. McManus Childs Ltd* (1969). This category of implied term is "not founded on the intention of the parties, actual or presumed, but on more general considerations": Lord Denning MR (above). The second category is "based on an intention imputed to the parties from their actual circumstances" (Lord Denning MR, above) and is referred to as a term implied in fact. Such a term will be implied only when necessary to make the contract work in its commercial setting. Reasonableness is an insufficient basis for

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792 Alternative labels used by the courts to describe a contract *arising out* of the procurement process, to be distinguished from the construction or engineering contract which might *result from* the procurement process. The Canadian court described respectively these contracts as 'contract A' and 'contract B'.

such implication. The term contended for must be capable of precise formulation and must not be inconsistent with an express term.

The Australian courts will follow the same principles laid down in the English courts. For example, in *Hughes Aircraft Systems International v. Airservices Australia* (1997) the Federal Court (Finn J) implied a term in the tendering contract that Airservices Australia would act fairly when making its contract award as a result of the tendering process. This implication was in both fact (ad hoc) and in law.

A term will usually be implied to the tendering contract to the effect that the owner *must* consider all conforming tenders if it considers any, see *Blackpool & Fylde Aero Club v. Blackpool Borough Council* (1990); the owner *must* treat all tenderers equally and fairly, see *Martselos Services Ltd v. Arctic College* (1994), *Pratt Contractors Ltd v. Palmerston North City Council* (1995); and the owner *must* award only a contract for the project tendered for and not for something different, see *Pratt Contractors* (above) and *Health Care Developers Inc and others v. The Queen in right of Newfoundland* (1996). This is not to say that the owner becomes obliged generally to award a contract, to the lowest bidder or any other bidder, because the owner will be protected by the ubiquitous 'privilege clause', see for example, *Martselos* (above), *Pratt Contractors* (above) and *McKinnon and another v. Dauphin (Rural Municipality of Manitoba)* (1996). The effect of a privilege clause is found in a tender stipulation that the owner is not obliged to accept the lowest, highest or any tender. In contrast to what might be expressed as the corollary of the views expressed by eminent textbook writers (above), the presence of such a clause does not prevent contractual obligations from arising, but it does shape the content of those obligations.

COURT DECISIONS SHAPE PROCUREMENT PRACTICE

1. Making 'savings' to meet the client's budget, or 'cherry-picking' the most favourable rates and prices tendered?

A City Council invited tenders for sodding or seeding work to certain soccer fields. By a privilege clause, the Council reserved the right to reject all or any tenders. The general conditions of contract provided for changes in the scope and quantity of work to be executed. Approximate quantities were given in the tender documents. If the quantity of work done and material furnished exceeded or was less than the estimated quantity, the Contractor would proceed with the work and payment would be made for the actual amount of work done and material furnished at the unit prices set forth in the contract, but in the case of a major item, where the quantity of work done or material furnished was less than the tender quantity by more than 20 per cent, an allowance to compensate for the Contractor's losses in fixed costs would be made at a rate equal to 10 per cent of the tender unit price on the amount of under-run in excess of 20 percent of the tender quantity.

Tenders were received as follows:

Ben Bruinsma & Sons Ltd	Alternative A	$92,812.50
	Alternative B	$65,972.50
FM Construction Ltd	Alternative A	$112,520.00
	Alternative B	$83,920.00

Tenderers had been invited to submit two tenders in order to obtain comparable prices for alternatives (A) sodding and (B) seeding. After opening of tenders the Council wished to proceed with alternative (A) but decided to look for savings in the project which appeared possible by deleting the item for cutting, rolling and placing of *existing* sod elsewhere on City projects. The tendering committee reported to the Council that this particular item was expensive: $35,200 in the low tender of Ben Bruinsma, and $55,220 in the second lowest tender of FM Construction. Considering the high cost of carrying out this operation, the tendering committee recommended to the Council that it delete this item and leave the existing sod in place, and cover it with the earth fill and topsoil, which was to be placed as part of the tender. If this recommendation were to be accepted, the total tender prices would, said the committee, be adjusted as follows:

Low tender -	F.M. Construction Limited,	
	Alternative A	$57,300.00
	Alternative B	$28,700.00
Second Low tender -	Ben Bruinsma & Sons Ltd.,	
	Alternative A	$57,612.50
	Alternative B	$30,772.50

When the item for cutting and relocating sod was deleted, the low tender of Ben Bruinsma became the *second lowest* tender, and the price of FM Construction now became *lowest* tender. FM Construction's tender, Alternative A, was duly accepted in the sum of $57,300, with the removal of the item of cutting and relocating of existing sod elsewhere. This enabled the City to make a saving of approximately $35,000.00.

On the following day Bruinsma complained to the City Council's engineer, writing two letters of objection about the contract award to FM Construction. Subsequently, Bruinsma's solicitor wrote to the City promising legal action, which followed a few days later. Bruinsma complained that it was improper for the Council to delete part of the work without first giving all tenderers an opportunity to retender against the revised specification, and therefore improper to award the contract to FM Construction.

(1.1) Is the City Council entitled to delete any item of work from the tender before that tender is accepted and the works contract formalised?

No. In *Ben Bruinsma & Son Ltd v. The Corporation of the City of Chatham et al* (1984) the tender and contract documents did not permit the City of Chatham to delete items from the tender before acceptance. Rather, Chatham had the obligation to accept or reject a tender as submitted and it was in breach of this obligation. Conflicting expert evidence had been presented to the court as to whether Chatham's method of making savings was common practice. The court said that having regard to the provisions of the contract, major items could not be deleted from the contract after it had been awarded without compensation to the contractor as stipulated. The cutting and rolling of sod etc. was a major item in this context, and if Bruinsma's tender had been accepted, it would have been entitled to substantial compensation for such deletion had the sodding item been deleted *after* the award of the contract.

It was the court's opinion that Chatham had erred in the interpretation of the contract documents. When Bruinsma submitted its tender, a tendering contract arose between Bruinsma and Chatham whereby the tender could not be withdrawn before the formal contract was executed by the successful tenderer, see *R v. Ron Engineering & Construction (Eastern) Ltd* (1981). The tender and contractual documents did not permit Chatham to delete items from the tender before acceptance. Rather, Chatham was obliged to accept or reject a tender as submitted. Its right to delete major items of the tender would arise only *after* the construction contract was made, and then only upon payment of compensation for deletion of any major items. Any other interpretation, said the court, would lead to unfairness in tendering.

A contractual relationship existed between Bruinsma and Chatham. Chatham was free to reject all of the tenders if (as was the case) it decided that the cost of the cutting and rolling, etc, of the sod was too expensive. It did not purport to do that, but rather deleted the one item from all the tenders and then purported to accept the FM tender. That in the court's opinion was a breach of contract or a breach of duty on the part of Chatham within the contractual relationship between Bruinsma and all the tenderers. It is a fair inference that Chatham would have accepted Bruinsma's tender as a low tender if it accepted any tender. Bruinsma was a competent contractor. It had done considerable work for Chatham on former occasions and there was no reason to reject its bid. It would be a considerable saving to Chatham if it had accepted Bruinsma's tender as submitted. If it then deleted the item of $35,200 for sod cutting after the execution of a construction contract it would have been subject to a payment of remuneration of 10 percent of 80 percent of $35,200, or $2816. In the alternative, had it accepted the FM tender as submitted and then deleted the same item at the figure of $55,220, it would have been subject to a payment to FM of $4,417.60. Bruinsma's claim against Chatham was upheld.

(1.2) What was Chatham's obligation to the tenderers, arising out of the 'tendering contract'?

Chatham was in breach of contract with Bruinsma and the other tenderers, and in breach of the duty arising out of that relationship. That included a duty to accept one of the tenders as submitted, or in the circumstances, to reject all of them if it was of the opinion that the sodding item was too costly. Instead of that it purported to accept the FM tender and then entered into a construction contract.

2. Undeclared award criteria leads to breach of fairness obligation and liability to pay compensation

The District of Abbotsford invited tenders for crushing stone. The tender instructions provided the usual privilege clause: that "the lowest or any tender will not necessarily be accepted". Chinook submitted the lowest bid, but the contract was awarded to a local company whose bid was within 10% of Chinook's bid. Chinook was not local. Abbotsford had adopted a preference policy whereby local contractors who bid within 10% of the lowest bid would be awarded the contract, despite not being lowest bid. The application of this

policy had not been advised to bidders. Chinook commenced an action for damages against Abbotsford to recover its wasted tendering costs.

(2.1) Is Abbotsford in breach of its obligation to treat all tenderers equally and fairly in giving preference to the local contractor, despite the presence of a 'privilege clause'?

Yes. In *Chinook Aggregates Ltd v. District of Abbotsford* (1990) it was held that Abbotsford was in breach of obligation arising out of an implied term in the 'tendering contract' which came into existence when Chinook submitted a bid to Abbotsford in response to its invitation to tender. That obligation was to treat all tenderers equally and fairly. From the evidence of usage and custom the court implied a term to the effect that the lowest qualified bidder was entitled to have its bid accepted, and that Abbotsford was in breach of that term. The privilege clause permitted Abbotsford to reject all tenders or to reject a nonconforming tender, but it did not permit Abbotsford to breach a term of the 'tendering contract' and give an undeclared preference to a local tenderer over the lowest bidder.

Abbotsford's appeal against the trial court's decision was dismissed. The appeal court said that Abbotsford had made a considered decision prior to inviting lenders, not to give notice of its local preference policy to bidders in its instructions to bidders. Abbotsford's officials had thought that if notice was given this might alert local contractors to the fact that they were afforded a preference. It could be presumed that Abbotsford had decided that the absence of notice would give it a price advantage. On the other hand, outside contractors such as Chinook believed that they were on an equal footing with all bidders.

Chinook had testified that if it had been aware that Abbotsford might apply a local preference in favour of local contractors up to 10 per cent over the lowest bid, it would not have bid on the job because it would have been virtually impossible, in view of the competitive market, to bid 10 per cent lower than the lowest bidder.

Expert evidence had been given to the court that if there were special qualifications which a bidder must meet, such as local content, use of local, native or union labour, or preference to a local contractor, it was standard practice in the construction industry that any such qualification be stated in the tender documents and instructions to bidders. In the absence of notice from the owner of preferential rules or criteria for the award of a contract, then all participants in the industry acted on the principle that the low qualified bidder got the job.

The purpose of the words "lowest or any tender will not necessarily be accepted" included in the tender documents was to allow the owner to award the contract to another bidder if the low bidder was not qualified, that is, did not satisfy the conditions of tender such as the posting of a bond, or bid only on part of the work, or made a mistake in his bid and requested to be let out of his tender. The phrase was also included in the tender documents to allow the owner to cancel the entire project if circumstances beyond his control prevented him from being able to award the contract.

This case was another example of the tendering contract formed between owner and tenderer. A contract was constituted when a bid was received by Abbotsford in response to tender documents, such as an advertisement to bidders or instructions to bidders. That conclusion was reached by applying the reasoning in *Best Cleaners & Contractors v. Canada* (1985) which applied the decision of the Supreme Court of Canada in *Ron Engineering* (1981). The appeal court here referred to the 'two contract analysis' of Estey J in *Ron Engineering* and noted that the trial judge had applied these principles to the instant case.

Abbotsford had argued that the effect of the privilege clause was to permit it to select *any* tender submitted by *any* qualified bidder, and that it was not restricted to accepting the lowest tender. A term could not be implied to the tendering contract that obliged Abbotsford to award a construction contract when such an implied term was contrary to the express term of the tendering contract. Custom and usage could not supply a contractual term which overrode an express term which was contrary to the custom and practice. But the appeal court was unable to accept Abbotsford's argument that the privilege clause gave it the right to exercise a local preference when that local preference was not revealed by, or stated in, the tender documents. The basis for that portion of the reasoning in *Ron Engineering* (1981) and for the reasoning in *MSK Financial Services Ltd v. Alberta* (1987) giving effect to a privilege clause and relied upon by Abbotsford, was the proposition that the tender documents had set out fully all the terms which would be incorporated into the tendering contract once a bidder submitted its bid in response to the tender documents. The concept was based upon offer and acceptance in the law of contract. But where, as here, the owner attached a condition to its offer, and that condition was unknown to the tenderers, the owner could not successfully contend that the privilege clause made clear to a tenderer that it had entered into a contract on the express terms of the wording of that clause.

There was, said the appeal court, no consensus between the parties that the wording of the privilege clause governed. It would be inequitable to allow Abbotsford to take the position that the privilege clause governed, when Abbotsford had reserved to itself the right to prefer a local contractor whose bid was within 10 per cent of the lowest bid. By adopting a policy of preferring local contractors whose bids were within 10 per cent of the lowest bid, Abbotsford in effect incorporated an implied term without notice of that implied term to all bidders, including Chinook. In so doing, it was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others. This duty had been recognised by the court in *Best Cleaners & Contractors v. Canada* (1985) but it had to be recognised that the circumstances here, and in *Best Cleaners*, were different to the circumstances in the *Ron Engineering* case, where the rights and obligations of the parties had been clearly set out in the tender documents. In *Best Cleaners*, and in the instant case, there was no express prohibition of negotiations between the owner and tenderers and the changing of terms in the proposed contract. If such terms existed, they must be implied in the 'tendering contract'. In *Best Cleaners* those terms were so implied. The effect of those implied terms, said the court, was quite limited, but important: they simply impose on the owner calling the tenders the obligation to treat all bidders fairly and not to give any of them an unfair advantage over the others. The appeal court agreed with Chinook that it is inherent in the tendering process that the owner is inviting bidders to put in their lowest bid and that the bidders will respond accordingly. If an owner was to attach an undisclosed term that was inconsistent with that tendering process, a term that the lowest qualified bid will be accepted should be implied in order to give effect to that process.

3. Preference to local firm amounts to breach of 'tendering contract'

The Saskatchewan Government invited tenders for the construction of a bridge. Tender documents provided that the government "may refuse to accept any tender, waive defects or technicalities, or ... accept any tender that [it] considers to be *in the best interests of the Province*" [emphasis added]. The Highways and Transportation Act provided that where a government minister "deems it *inexpedient* to let the work to the lowest bidder, he shall report the matter to and obtain the authority of the Lieutenant Governor in Council before awarding the contract to any other than the lowest bidder" [emphasis added].

Kencor, a firm from Calgary, Alberta, submitted the lowest tender. Graham, also from Calgary, but with a branch office in Saskatchewan, was about $100,000 higher. Both firms would meet the 'Saskatchewan content' provisions of the proposed contract. The Government's technical officers concluded that Kencor was more technically qualified for the proposed work, and recommended acceptance of its tender. All papers were passed to the Deputy Minister of Highways and Transportation, and one day later, the contract was awarded to Graham, against the officers' recommendation, by means of order in council.

The order in council stated that it was deemed to be expedient and in the public interest to award the contract to the firm submitting the second lowest tender, namely, Graham Construction and Engineering Ltd of Saskatoon, Saskatchewan, who was considered to be a local contractor to which preference should be given. There was no indication in the tender documents that preference might be extended to Saskatchewan bidders, and Kencor was unaware of this possibility. Kencor sued the Government for damages arising out of its failure to accept Kencor's low bid.

(3.1) Is the Government entitled to apply a preference policy when the tender documentation did not identify this as a factor which might be considered?

No. In *Kencor Holdings Ltd v. Government of Saskatchewan* (1991) the court held that the Government was in breach of contract and liable to Kencor in damages. The court recognised that a body of law had developed respecting tenders and consequent obligations. The starting point of course was *Ron Engineering*, and the judgment that a tendering contract resulted when a bid was submitted in response to an invitation to tender. An implied term of that contract imposed the qualified obligation of the owner to accept the lowest tender, and the degree of this obligation was controlled by the terms and conditions established in the call for tenders. There was nothing in the tender documentation in *Kencor's* case which would render these observations inapplicable. *Ron Engineering* was applied in the *Chinook Aggregates* case discussed above, where the owner was in breach of duty to treat all bidders fairly and not to give any an unfair advantage.

On the same basis, Kencor argued that the government could not invoke the privilege clause to excuse the utilisation of a local preference policy, not revealed in the tender documents, to justify awarding the contract to Graham Construction.

The Saskatchewan court found ample evidence of an industry custom dictating acceptance of the lowest, qualified bid in a tendered project, which would provide the basis for such an implied term of the tendering contract which resulted from the submission of Kencor's bid in response to the government's invitation to tender. The term was implied in recognition of industry custom and on the authority of *Ron Engineering*. To maintain the integrity of the tendering process it was imperative that the low, qualified bidder succeed. This was, said the court, especially true in the public sector. If governments were to meddle in the process and deviate from the industry custom of accepting the low bid, competition would wane. The inevitable consequence would be higher costs to the taxpayer. Moreover, the court went on, when governments, for reasons of patronage or otherwise, apply criteria unknown to bidders, great injustice would follow. Bidders, doomed in advance by secret standards, would waste large sums preparing futile bids. Kencor, in this case for example, spent $23,000 on its abortive tender.

The court here noted that the privilege clause, with its reference to "best interests of the Province" was wider in scope than its counterpart in *Chinook*. Still, concluded the court, the principles were the same. The government sought to trigger the clause to shield itself from the ramifications of having unilaterally superimposed on its contract with Kencor a new implied term of local preference. If the government was to be allowed to succeed in its argument that its privilege clause was paramount and its discretion virtually unlimited, then the court could see no circumstances when the government would ever be liable for damages. The government could always maintain that it was "inexpedient" to accept the low bid and "in the best interests of the Province" to accept the higher hid. With cabinet deliberations being secret, the public could never challenge an irrational or capricious exercise of this discretion. This, said the court, was a blatant case of unfair and unequal treatment of Kencor in order to benefit another contractor. Kencor's bid was more than $95,000 lower than that of Graham Construction; its commitment to Saskatchewan content, both labour and materials, was equal to or better than Graham Construction; and Kencor had more experience for the job. The only factor appearing to favour Graham Construction was the misleading description of it as a local contractor. Kencor was given judgment against the government which had breached its contract with Kencor and was responsible for the ensuing damages. Compensation had been agreed upon at $180,000 which represented, among other things, Kencor's loss of profit for not having been awarded the contract.

4. All tenderers to be treated equally and fairly, but privilege clause negatives any duty to accept any tender

Arctic College invited tenders for janitorial services. Tender documents contained a privilege clause, that the lowest or any tender would not necessarily be accepted. Government Contract Regulations provided that "a contract authority may refuse all tenders and award the contract to no one" and that "a contract authority shall only award a contract as a result of an invitation to tender to the tenderer who is responsive, responsible and has submitted a tender lower than that submitted by any other responsive and responsible tenderer."

Martselos and one other company submitted tenders. One of the directors of the other tendering company, who submitted the lowest tender, was also an employee of Arctic College. Martselos informed Arctic College of this fact and alleged that the other tenderer had breached the guidelines on conflicts of interest contained in collective bargaining agreements and in personnel policies. It was also alleged that this person could have exploited special 'inside' knowledge to assist in preparing the successful tender. The College investigated the allegation and sought internal legal advice, then decided that there was no conflict of interest, and awarded the janitorial contract to the lowest tenderer. Martselos commenced an action to recover loss of profits arising out of a breach of contract by Arctic College.

(4.1) Has there been a breach of the 'tendering contract such that the owner is liable to pay damages?

No. Arctic College could have quite properly decided not to award any contract at all. It is no different if the competing bidder is disqualified *after* the contract has been awarded. The privilege clause, in these circumstances, is a complete answer to the Martselos claim.

On appeal in *Martselos Services Ltd v. Arctic College* (1994) the court referred to the *Ron Engineering* case and the statement by Estey J that "the integrity of the bidding system must be protected where under the law of contracts it is possible so to do". This should be considered, said the appeals judge, as a duty to treat all bidders equally but still with due regard for the contractual terms incorporated into the tender call. If there had been any breach of the guidelines on conflict of interest, this would not amount to bad faith on the part of Arctic College towards Martselos. Any bad faith could only be on the part of the successful competitor, and the effect of such bad faith could only be to disqualify its bid. It could not create an obligation on the part of Arctic College towards Martselos. The conflict of interest issue was therefore irrelevant to a decision on the matter between Martselos and Arctic College.

The central question was whether Arctic College was under any obligation to award a contract to *any* bidder. It was not under any such obligation, as the tender regulations make clear, and as stated in the privilege clause. The decision in *Ron Engineering* was not to be interpreted as imposing a positive obligation on an owner to award a contract. If there was such an obligation in cases where there were several bidders, the tendering contract would oblige the owner to enter into contract with each of them. That was not the result of the decision in *Ron Engineering*. The owner's obligation to enter into a contract for works or services only arose upon acceptance of a tender. And the terms and conditions of the tender were quite clear in stating that the lowest or any tender would not necessarily be accepted.

It was argued that it was industry practice or custom to award contracts to the lowest bidder. But there was nothing in Canadian jurisprudence that "recognised any precedence of industry practice or custom over the privilege clause, where the privilege clause is an explicit term of a tender call, except in special circumstances."[793] Thus in the case of *Acme Building & Construction Ltd v. Newcastle (Town)* (1992) the Ontario Court of Appeal affirmed the first instance decision and expressed the opinion, that even if there was acceptable evidence of custom and usage known to all tendering parties, it would not prevail over the express language of the tender documents which constituted an irrevocable bid once submitted, and a contract, when and if accepted.

(4.2) What are the 'special circumstances' in which custom and practice might be held to override the privilege clause?

Those circumstances have been where an owner has relied on undisclosed criteria, or where the owner has taken into account irrelevant or extraneous considerations, or where there are specific provisions in the tender specifications that are inconsistent with the general privilege clause, or where the tendering process was found to be a sham.

5. Custom and usage does not prevail over express terms of 'tendering contract'

The Municipal Council advertised for tenders for crushing and hauling gravel. The usual privilege clause stated: "Lowest or any tender not necessarily accepted". McKinnon and Shingler (M&S) were experienced in construction but not in crushing gravel. They did not own a crusher, but thought that the necessary equipment was readily available. They submitted the lowest tender. The Council did not investigate M&S or their equipment, but in open meeting and against the recommendation of the 'gravel committee', rejected their bid, awarding the contract to the second lowest tenderer.

M&S sued for damages for breach of contract and breach of the duty of procedural fairness. At the trial, expert evidence was given that where a local authority did not have the protection of a bid bond (as here), it was entitled to look after its best interests and not necessarily accept the lowest tender, but evidence was also given that past gravel contracts had gone to the lowest bidder.

(5.1) Assuming that there is a contractual relationship between the Council and the tenderers, has there been a breach of that contract by the Council accepting the second lowest bid?

No. This claim fails. There was no discussion within the judgment in *McKinnon and another v. Dauphin (Rural Municipality of Manitoba)* (1996) of the basis of a 'tendering contract'. The *Ron Engineering* case was however listed as a 'case considered'. Damages were claimed for breach of that 'tendering contract'.

Unlike the position in *Chinook Aggregates* (1990), in *McKinnon's* case there was no 'local preference policy' whereby a bid from a local contractor which was within 10% of the lowest bid would be accepted. There was no evidence of actual local preference given to the second lowest bidder, although he was in fact a local contractor. There was not sufficient evidence of the existence of a local practice or custom whereby the lowest bidder must be awarded the contract where no bid bond is required. It was not sufficient, said the court, to show "that the lowest bidder often, or even always, got the award in the past".[794]

However, even if it had been concluded that local practice and custom was to award the contract to the lowest bidder, the Manitoba court preferred the approach of the Ontario court in *Acme Building* (1992) to that taken by the British Columbia court in *Chinook Aggregates*. The Ontario court was of the opinion that, even if there was acceptable evidence of custom and usage known to all the tendering parties, it could not prevail

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793 (1994) 111 DLR (4th) 65 at 73f.
794 [1996] 3 WWR 127 *per* Clearwater J at 142/33.

over the express language of the tender documents which constituted an irrevocable bid once submitted, and a contract, when and if accepted.

The Manitoba court noted that, with respect to accepting any given bid, the instructions to tenderers had stated that the Municipality would have the right not to accept the lowest or any other tender. This, said the court, gave the Municipality the right to reject the lowest bid and accept another qualifying bid without giving any reasons. In this case, the Municipality chose to give reasons, and there was nothing in those reasons which indicated that the Municipality had acted improperly in making the decision which was within its contractual right to make. There was no breach of contract by the Municipality: it was not obliged to accept the lowest tender. The tenderers' claim in damages for breach of contract failed.

(5.2) Has there been a breach of the duty of procedural fairness in the Council's handling of the tendering process?

No. There was no such breach of duty owed to the tenderers. Having referred to judicial authority[795] on the question of procedural fairness, the Manitoba court was satisfied that the Municipality did owe a duty of procedural fairness to M&S and to all bidders in considering the bids. This duty of procedural fairness included allowing or affording M&S a reasonable right to be heard if they desired to be heard. But the duty of procedural fairness must be considered in the context of the specific facts of any tendering situation. In this instance, it had been made clear to M&S and to all bidders that the lowest or any tender would not necessarily be accepted. M&S were specifically aware that the final decision, notwithstanding the recommendation of the gravel committee, was up to the Municipality as a whole.[796]

The Manitoba court was in no doubt that the gravel committee and the Municipality as a whole had been negligent in the manner in which it conducted (or in failing to conduct) its investigation . The so-called 'investigation' was not fair to M&S, but this, said the court, was not in itself a breach of the duty of procedural fairness. In the court's final analysis, having regard to the terms of the advertisement upon which the bid was submitted, it was within the sole discretion of the Municipality to accept whatever bid was submitted, and whatever bid it wished, provided it gave the same consideration to all bids. The fact that it accepted a higher bid may require the Municipality's councillors to answer to the voters in the future, but it did not, in this instance, constitute a breach of any duty owed to McKinnon and Shingler.

CONCLUSION

The main significance in the *Ben Bruinsma* case is the restricted power available to owners and their advisers to vary the scope and/or extent of tendered work prior to the award of a works contract unless express provision is made. The courts at both the interlocutory hearing and the full trial were critical of the owner's manipulation of tendered rates and prices for budgetary purposes. The court condemned any tendering practice which amounted to 'cherry-picking' the most favourable rates and prices tendered. If the recipient of tenders was permitted unilaterally to make a substantial deletion without notifying the tenderers and giving them an opportunity to revise their tenders to take the deletion into account, then here would not appear to be any reason why the recipient could not go further and delete other items. This practice, in the court's opinion, could easily make a mockery of customary tendering procedure. Furthermore, any other interpretation would lead to unfairness in tendering. The practice adopted by Chatham would permit public bodies to extract items from a tender that appeared to them to be favourable and reject the balance and then to call for new tenders on the items deleted — all without compensation for tenderers and without consent. Such action would amount to a serious interference with the tendering process and was not permitted by the tender and contract documents.

There is an important lesson here for all clients, architects, engineers and quantity surveyors. If budgetary savings are to be made after receipt of tenders, some system must be thought out and set down within the tender rules. If the proposed reductions are substantial, tenders must be reinvited for the reduced scope of work. If provided for within the tender rules, it may be possible to reinvite tenders only from a short list, say the three lowest tenderers. If reductions are not substantial, the reductions might be negotiated with the lowest tenderer, but this process must also be devised and set down in the tender rules so that all tenderers are aware and cannot bring claims for unfair and unequal treatment.

The privilege clause is a powerful tool at the disposal of the owner, but must be used carefully. *Chinook* and *Kencor* required the court to interpret the meaning to be given to the owner's privilege clause in the

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795 *Hughes Land Co. v. Manitoba* (1991) 76 Man R (2d) 64 (Man.CA) affirming Kennedy J (1991) 72 Man R (2d) 81.
796 [1996] 3 WWR 127 *per* Clearwater J at 143/36.

circumstances of each case. In both cases the owner was held to be in breach of its obligation to treat all tenderers equally and fairly when giving an undeclared preference to a local tenderer over the lowest bidder.

In both cases the court gave priority to expert evidence which showed custom and practice of contract award to low bidders. In both cases the court acknowledged the importance of the privilege clause permitting rejection of a non-compliant tender or all tenders, but this clause did not permit the application by the owner of an undeclared preference in favour of local traders.

The court in *Chinook* was prepared to imply a term to the tendering contract that lowest qualified bid will be accepted, despite inconsistency with the terms of the privilege clause. This is an example of the "special circumstances" referred to in *Martselos* when custom and practice might override the privilege clause. *Kencor* was decided by application of the same response to "special circumstances" despite the wider scope of the privilege clause in that case.

The issue in the *Martselos* case was again the nature of the owner's obligation in the light of the privilege clause. Even if the owner had been obliged to eliminate the competing bidder, it did not follow that there was any obligation, either in law or according to industry practice, to award the contract to Martselos. This position did not change simply because Martselos was the only eligible bidder. Arctic College could have decided not to award any contract. It was no different if the competing bidder was disqualified after the contract award. The privilege clause, in these circumstances, was a complete answer to the *Martselos* claim.

The *Martselos* case illustrates a good faith, or fair dealing, obligation on the party inviting tenders and confirms that the terms of the tendering contract cannot generally override or cancel the terms of a privilege clause which permits the inviter to make no contract award. Even evidence of industry practice that contracts are awarded to the lowest bidder could not override a clearly worded privilege clause, unless the tender process was a sham or was flawed by procedural irregularities, such as arose in *Chinook* and *Kencor*.

In *McKinnon* the court opted not to follow the reasoning of *Chinook* and *Kencor*, preferring the approach taken by the court in *Acme*. This contrasting position can be understood in view of the fact that the owner, whilst careless in its review of tenders received, operated no policy which would prejudice a low bidder's prospect of success. There was no solid ground in *McKinnon* on which to negate the obvious effect of the privilege clause in favour of custom and practice.

Common law courts have consistently required owners to treat all tenderers equally and fairly. Owners may not unilaterally 'cherry-pick' favourable rates and call for further tenders on the less favourable rates. Any undeclared preference in favour of one tenderer, or a class of tenderers , would be unfair treatment and therefore render the owner liable to compensate injured tenderers. A privilege clause gives the owner some degree of protection against any possible obligation to ward a contract, but it does not empower the owner to ignore the tender conditions. Those quantity surveyors and project managers who conduct procurement processes in ignorance of these developments in common law may well find themselves defending claims from aggrieved owners who have become obliged to compensate aggrieved tenderers.

References

Association for Project Management (APM) (1998) *Standard Terms for the Appointment of a Project Manager.*

Craig, R. (1999) *Procurement Law for Construction and Engineering Works and Services*, Blackwell Science, Oxford, England.

[1999] ICLR 147. Editor's "introduction" to Craig, Ron (1999) Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations. *International Construction Law Review* [1999] ICLR 261.

Dorter and Sharkey (1981) *Building and Construction Contracts in Australia*, The Law Book Company Ltd, Sydney: p.6.

New South Wales, Government of (1996) *Code of Tendering for the Construction Industry*, Construction Policy Steering Committee, Department of Public Works and Services, Sydney.

Royal Institution of Chartered Surveyors (RICS) (1966) *The Services of the Chartered Quantity Surveyor*, pp.1-4.

Standards Australia (1994) *Code of Tendering*, Australian Standard (AS) 4120.

Turner, D.F. (1977) *Building Contracts: A Practical Guide* (3d ed) George Godwin Ltd, London: p.11.

Victoria, Government of (1997) *Tendering for Public Construction and Related Consultancy Services*, Office of Building, Department of Infrastructure, Melbourne.

Wallace, I.N.D. (1979) *Hudson's Building and Engineering Contracts* (10th ed) Sweet & Maxwell, London: pp.6-7. See now the 11th edition (1995).

Cases cited

Acme Building & Construction Ltd v. Newcastle (Town) (1992) 2 CLR (2d) 308. Ontario Court of Appeal, Canada.

Ben Bruinsma & Son Ltd v. The Corporation of the City of Chatham et al (1984) 141 DLR (3d) 677; 11 CLR 37; 29 BLR 148. High Court, Ontario, Canada.

Best Cleaners & Contractors v. Canada [1985] 2 FC 293; 58 NR 295. Federal Court of Appeal, Canada.

Blackpool & Fylde Aero Club v. Blackpool Borough Council [1990] 1 WLR 1195; 3 All ER 25. Court of Appeal, England.

Chinook Aggregates Ltd v. District of Abbotsford [1990] 1 WWR 624. British Columbia Court of Appeal, Canada.

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

Hughes Aircraft Systems International v. Air Services Australia (1997) 146 ALR 1. Federal Court of Australia.

Kencor Holdings Ltd v. Government of Saskatchewan [1991] 6 WWR 717. Saskatchewan Queen's Bench, Canada.

Martselos Services Ltd v. Arctic College (1994) 111 DLR (4th) 65. Northwest Territories Court of Appeal 19.1.94. Leave to appeal to SCC refused 115 DLR (4th) viii. Canada.

McKinnon and another v. Dauphin (Rural Municipality of Manitoba) [1996] 3 WWR 127. Manitoba Queen's Bench, Canada.

MSK Financial Services Ltd v. Alberta (Ministry of Public Works) (1987) 23 CLR 172; 77 AR 362 (MC).

Ontario (the Crown) v. Ron Engineering and Construction Eastern Ltd [1981] 1 SCR 111; (1981) 119 DLR (3d) 287. Supreme Court of Canada.

Pratt Contractors Ltd v. Palmerston North City Council [1995] 1 NZLR 469. New Zealand High Court.

Shell UK Ltd v. Lostock Garage Ltd [1976] 1 WLR 1187; [1977] 1 All ER 481, 487-488. Court of Appeal, England.

Young and Marten Ltd v. McManus Childs Ltd [1969] 1 AC 454; [1968] 2 All ER 1169. House of Lords, England.

Chapter 9

Judicial Review of Public Tender Decisions

The aims of Chapter 9 are to present the author's published paper titled *The circumstances of competitive tendering demand a fair process: review of the Stannifer Developments case and other matters* and to provide supporting background material on the subject of judicial review of public tender decisions extracted from the author's published text, *Procurement Law for Construction and Engineering Works and Services.*

Chapter 9 is in two parts. The objectives in Parts 1 and 2 was to examine a substantial collection of public law cases that involved legal challenges to the public decision making processes in public procurement in order to establish the relative merits of this process compared to the private law challenges discussed in Chapters 3 to 8 inclusive; and to discover to what extent, if any, the court would find a public owner bound to an obligation of procedural fairness in its evaluation of tenders received and in its contract award process comparable to that found in private law and in the rules of the European Union public procurement rules. It is important to note that in judicial review it is not the merit of the decision which is under review but the process of arriving at that decision, and that in English law, does not provide a remedy in damages for the successful claimant, but rather the prospect of having the offending decision set aside. The author concludes in Part 2 below that there seems to be no general duty of fairness imposed on a public body conducting a public procurement process, but that such a duty might arise when the aggrieved bidder can show that it has an interest worthy of protection and that interest could be derived from statute, common law or from some practice adopted by the public body in question.

Part 1 of Chapter 9 contains materials from Chapter 11, Judicial Review of Public Tender Decisions, *Procurement Law for Construction and Engineering Works and Services*, published by Blackwell Science in 1999. This material sets judicial review in the context of procurement, mainly in the construction context, and commences with a summary of the cases which are subsequently examined in more detail. New material has been added to the 'comment' at section 9.7 and to several footnotes, particularly in respect of the Local Government Act 1999 and 'best value' policies.

Part 2 of Chapter 9 reproduces an article from *The International Construction Law Review*, volume 17, part 4, published October 2000.[797] This article was conceived in May 1999 and completed in April 2000 and reviews the case in public law of *Stannifer Developments Ltd v Glasgow Development Agency* (1998), a case that arose out of the sale by competitive tender of redevelopment land in the City of Glasgow. In this case the Scottish courts rejected the losing bidder's challenge by judicial review, denying the petitioner's claim that the award process was

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[797] [2000] ICLR 646.

unfair, unreasonable and in breach of natural justice. The article speculates as to how Stannifer might have argued its case in private law, as a breach of the tendering contract entitling the injured bidder to damages, and concludes with recommendations as to how the tender process might be better conducted. The Editors-in-Chief of *The International Construction Law Review* introduced the author's paper by describing it as "a helpful comparison with decisions in other jurisdictions." The author's conclusions and views, said the editors, "deserve careful study".

Part 1

Judicial review of public tender decisions

9.1 Summary of relevant cases

This chapter deals with judicial review of a public bodies' decisions when awarding a contract. This material would fall under the heading of 'public law' or 'administrative law' in England. The term 'judicial review' in England refers to the procedure prescribed by s.31 of the Supreme Court Act 1981 and Rules of the Supreme Court, Order 53 (see now Civil Procedure Rules). In other jurisdictions, such as Scotland, the term may have simply its ordinary meaning of review by a judge. A challenge of a public body's decision commences in England by an "application for judicial review" in the Queen's Bench Division of the High Court, where the remedy might be certiorari, mandamus, prohibition, an injunction, or a declaration. Private law claims against public bodies can be brought in the ordinary way. The distinction between private and public law is frequently hard to make, as the following cases will demonstrate. If the action or decision complained of lacks sufficient element of public law it is not, under English law, amenable to judicial review. There follows a summary of cases reviewed in more detail below.

Local authorities generally maintain lists of 'approved' contractors. In *R v Enfield London Borough Council, ex p Unwin (Roydon) Ltd* the contractor was struck from that list with no prior warning. The contractor challenged the Council's decision and won reinstatement to the approved list and was allowed to tender for further work.

Islington Council approved special clauses to be included in the Council's contracts which gave it the power to determine a contractor's employment, and take other contractual measures, if, for example, the contractor was in breach of statutory requirements as to sex or racial discrimination. In *R v Islington London Borough Council, ex p The Building Employers' Confederation* the court said that the Council was not entitled or permitted to incorporate into its contracts terms of a non-commercial nature. It seemed clear to the court that the purpose of the Local Government Act 1988 was to prevent local authorities from interfering with provisions between its contractors and their workforces. Certain provisions of the 1988 Act were amended by the Local Government Act 1999, as discussed further below.

A local authority is required to test the market so it invited its works department to tender for a contract on terms identical to those offered to outside contractors. The works department submitted the lowest tender and the council formally resolved to award the work to them, but no formal contract was executed. One year later the council resolved to retender the same work. Employees of the works department challenged, arguing that the Council had acted unfairly in abandoning the previous resolution in favour of the works department employees. In *R v Walsall Metropolitan Borough Council,* the court rejected the challenge, and refused to quash the council's fresh resolution. The Council's employees were in no worse position than independent contractors would have been under the terms of a contract.

In *General Building & Maintenance plc v Greenwich Borough Council* the Council had dropped the contractor from a tender shortlist because of its alleged shortcomings in health and safety matters. The contractor challenged, but was rejected by the court. The Council was entitled to treat health and safety matters as 'technical capacity' and to exclude a contractor on this ground. Similarly, in *Fairclough Building Ltd v Port Talbot BC* the court held that it was quite reasonable for a Council to remove a contractor from a tender list, even when tenders were in course of consideration, when there was a potential conflict of interest between the Council and one of its employees who had family connections with that contractor.

R v Lord Chancellor, ex p Hibbit and Sanders is important in demonstrating that judicial review might not be available in ordinary commercial matters involving the government. In this case it was held that despite the apparent unfairness in the public tendering process, there was an insufficient element of public law involved so as to permit judicial review. As the article in Part 2 demonstrates, this is a notable difference between the laws of England and Scotland. In Scots law there is no distinction between public bodies and private bodies when it comes to a question over the relevancy of judicial review.

9.2 Maladministration of the approved list of contractors.

R v Enfield London Borough Council, ex parte TF Unwin (Roydon) Ltd[798]

SCENARIO

The Enfield council maintained a list of approved contractors. Unwin derived a large proportion of its turnover from the council. Unwin did some work at the house of one of the council's employees. During the period of this work Unwin were summoned to a meeting with the council's chief executive. The council employee's building work was discussed. Three months later Unwin was informed of its suspension from the council's approved list of contractors. Unwin was given no explanation but was told of an inquiry into the conduct of the council's employees. Unwin sought judicial review of the council's decision to remove them from the approved list of contractors, seeking reasons for the action and an order to quash the decision. The contractor argued that the council was under a statutory duty to give reasons for this decision, by virtue of ss.17-23 of the

[798] (1989) 46 BLR 1.

Local Government Act 1988[799] and that the council's procedure in arriving at the decision was unfair and a denial of natural justice. The council accepted that it had failed to discharge its statutory duty under s.20 of the Local Government Act 1988. but that it could not provide more information when the relationship between the council and the contractor was under investigation (allegations of offences or irregularities) by the police.

QUESTION

Is the council obliged to give reasons for such a decision as to remove a contractor from the approved list?

RESPONSE

Yes. It was held in *R v Enfield London Borough Council, ex parte TF Unwin (Roydon) Ltd* that a contractor in this position is entitled to be informed of the accusations being made against it and to respond to the allegations before a decision is made.[800] The contractor is entitled to fair treatment from the council,[801] who was in breach of s.20 of the Local Government Act 1988. The contractor should be reinstated on the approved list and allowed to tender.

COMMENT

This case falls into the category usually labelled administrative law or judicial review. In this branch of the law the court reviews the exercise of power by a public body, which may have acted in excess of its decision-making powers, or may have exercised discretion to produce a quite unreasonable result. Or, as in this case, the court may have denied the individual its right to natural justice.

The court reviewed the operation of Part II (ss.17-23) of the Local Government Act 1988 which came into force on 7 April 1988. Contracts entered into by local authorities for the supply of goods, materials, services or building works are covered by this Act.[802] Section 17 deals with selection of firms for tender lists and contract awards. Unwin's case was affected by this section and also by section 20(1) which provides that

> "it shall be the duty of the authority forthwith to notify that person of the decision and, if that person so requests in writing within the period of 15 days beginning with the date of the notice, to furnish him with a written statement of the reasons for the decision."[803]

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799 The Local Government Act 1999 subjects most local government bodies in England and Wales to a new duty to make arrangements for the achievement of *best value* in the performance of their functions. The 1999 Act also abolishes statutory provisions which required certain public bodies to submit specified activities to Compulsory Competitive Tendering. Section 19 of the 1999 Act provides for the Secretary of State to specify by Order, in relation to best value authorities, matters which will cease to be "non-commercial matters" for the purposes of s.17 of the Local Government Act 1988. The 1988 Act always provided for *additional* non-commercial matters to be specified by the Secretary of State. The 1999 provision is intended to enable best value authorities to take into account certain workforce matters which could not previously have been taken into account when assessing tenders and awarding a contract. Section 19 came into force on 27 September 1999: see Local Government Act 1999 (Commencement No 1) Order 1999, SI 2169 of 1999.

800 See Part II, Public Supply or Works Contracts, Local Government Act 1988.

801 *Ibid.* A contractor is entitled to expect fair treatment as a consequence of the parties prior relationship, applying *O'Reilly v. Mackman* [1983] 2 AC 237 and *CCSU v. The Minister for the Civil Service* [1985] AC 374.

802 But see note above concerning changes introduced by Local Government Act 1999.

803 Part of s.20(1) Local Government Act 1988, at 46 BLR 11.

By section 20(2) it was clear that these provisions as to notice and reasons applied to both a decision to exclude a firm from an approved list, and a decision to decline to invite a firm to tender when that firm has requested to tender. Section 20(3) requires a statement of reasons to be furnished within 15 days of a request for same. Clearly Enfield had not complied with this duty in both failing to give reasons, and failing to give reasons timeously. This point was not disputed.

On the facts of this case the court held that Unwin had a legitimate expectation to be treated fairly which went beyond the scope of the 1988 Act. This was essentially because Unwin had a good trading record with Enfield over several years. "This expectation was not met and there was a clear breach of section 20 [of the 1988 Act]."[804]

9.3 Non-commercial matters to be avoided when awarding contracts.

R v Islington London Borough Council, ex parte The Building Employers' Confederation[805]

SCENARIO

Islington Council approved special clauses to be included in the Council's contracts. Amongst other matters, the special clauses required the contractor at all times to comply with the requirements of the Race Relations Act 1976 and of the Sex Discrimination Act 1975, plus any Act, rule, statement, code of practice, manual or other instrument or document amending or replacing either of the foregoing enactments. The contractor was to comply with all requirements for the safety, health and welfare of its employees and in case of any breach of these conditions it would be lawful for the Council (so far as permitted by the Local Government Act 1988) to determine the contract or the contractor's employment thereunder. Alternatively in such cases the Council might suspend the works or part thereof until such time as the contractor had complied with the clause or remedied the breach. The Council was empowered to execute such works and to do such other things as it considered necessary for the purpose of securing the contractor's compliance with these provisions.

QUESTION

Is the Council entitled or permitted to incorporate into its contracts terms such as the above, which are of a non-commercial nature?

RESPONSE

No. Under section 17(1) of the Local Government Act 1988 non-commercial matters must be disregarded by local authorities when awarding public supply or works contracts. In *R v Islington London Borough Council, ex parte The Building Employers' Confederation* the court said that:

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804 46 BLR 18 *per* Glidewell LJ.
805 (1989) 45 BLR 45. QBD, Parker LJ and Hutchison J, 15.3.1989.

> "The purpose of the [Local Government] Act [1988] is clearly in general to prevent local authorities from interfering with the provisions as between its contractors and their workforces ..."[806]

Since section 18(2) of the 1988 Act allows the inclusion of terms "relating to workforce matters"[807] providing they are "reasonably necessary to secure compliance with ... section 71" of the Race Relations Act 1976,[808] the special contract clause 3(1)(a) *does* comply with section 17 of the 1988 Act.[809] As there was no special exception made in the 1988 Act for sex discrimination matters, the Council conceded that special contract clause 3(1)(b) *does not* comply with section 17 and therefore should be dropped from the Council's contracts. The terms of a contractor's employment contract between contractor and employee is considered to be non-commercial in this context.[810]A wide interpretation is to be given to the words "terms and conditions of employment", in relation to workers, in section 17(5)(a) so that requirements for contracts of employment to include certain obligations as required by special clause 4 is in breach of the 1988 Act.

Thus local authorities must act commercially, not politically, when awarding public supply or works contracts, both from the point of view of potential tenderers excluded from the tender list, and from the point of view of tax payers who are presumed to wish their local authority to act with commercial discipline. Failure by a local authority to comply with section 17 is not a criminal offence but entitles a tenderer to seek judicial review of that authority's action Any losses may be recovered for breach of this statutory duty.[811]

COMMENT

At the time of drafting *Procurement Law* (January 1998) a private member's Bill (the Local Authorities Tenders Bill) had been given its second reading in the House of Commons, which, if brought into law, would have enabled the Secretary of State for the Environment to introduce regulations to change Part II of the Local Government Act 1988. The proposal, by Bethnal Green and Bow MP, Oona King, was to free local authorities from the need to operate commercially when awarding contracts and to be able to take into account such matters as equal opportunities policy and other social policy objectives in the context of pay and conditions. The Bill was introduced to remove the restrictions contained within the 1988 Act which prevented local government contracts from making stipulations on equality, pay and conditions, which Ms King argued, discriminated against women and ethnic minorities. This had been noticeable, she said, in the context of privatisation of local government activities. The content of any new regulations, said the MP, would only be known after consultation between government and industry, but the objective seemed to be to put local authorities under a twin duty to deliver best value, and protect employees. Lack of fair

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806 (1989) 45 BLR 45, *per* Parker LJ at 58.
807 S.18(2)(b) of the Local Government Act 1988.
808 S.18(2) *ibid.*
809 S.17 of the 1988 Act obliges local authorities and other public bodies to exclude non-commercial considerations from public supply or works contracts.
810 LGA 1988 s. 17(5).
811 See LGA 1988 s. 19(7).

competition and fair treatment it was suggested amount to a barrier to best value.[812] This Bill did not become law, but the Local Government Act 1999 has, with effect from 27 September 1999, introduced most of the changes in law sought by Ms King. It would be wrong to say that a local authority is not now required to act 'commercially' when awarding a contract, but the Secretary of State does now have the power to amend the list of factors which an authority can take into account when inviting tenders and awarding contracts. Those factors must of course be consistent with obligations of the Treaty on European Union, contractual obligations and the obligation to achieve 'best value' under the 1999 Act.

9.4 Contracting out the work: no unfair treatment of direct employees.

R v Walsall Metropolitan Borough Council, ex parte Yapp and Street[813]

SCENARIO

The Local Government Planning and Land Act 1980 as amended by the Local Government Act 1988 requires a local authority to test the market by obtaining tenders from independent contractors before deciding to employ its own direct works organisation. The Walsall Council invited its works department to tender for a measured term contract on terms identical to those offered to outside contractors. The works department submitted the lowest tender and the Council formally resolved to award the work to them, but, of course, no formal contract was executed. One year later the Council resolved to retender work previously tendered for successfully by the works department.[814] Employees of the works department sought judicial review of the Council's fresh resolution, arguing that the Council had acted unfairly in resolving to abandon the previous resolution, and that the legitimate expectations of the works department employees of secure employment had been unfairly jeopardised.

QUESTION

Is the Council entitled to seek new tenders for some of the work previously tendered and won by that Council's own works department?

RESPONSE

Yes. In *R v Walsall Metropolitan Borough Council, ex parte Yapp and Street* the issue before the court was narrowed in the judgment of Nolan LJ:

> "The only question is whether in resolving to carry out the policy the Council is in breach of its public law duty to act fairly towards its employees as well as towards others in the exercise of its powers and duties under the legislation, and in particular, whether it has failed to give effect to the legitimate as well as to the actual expectations of the appellants [Yapp and Street]."[815]

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[812] See *Local Government Chronicle* 16.1.1998 and *Municipal Journal* 16.1.98.

[813] (1993) 65 BLR 44: Court of Appeal 23/7/93; Nourse, Staughton and Nolan LJJ.

[814] According the editors of BLR (at 65 BLR 46) the council resolved to retender, not only to take advantage of lower prices caused by the recession, but also to change the terms on which the work was placed.

[815] 65 BLR 44 *per* Nolan LJ at 52.

It should be noted that the Council's works department did not have the benefit of a contract with the Council for the maintenance works. At first glance it seems that the Council's employees are in a worse position than that of an independent contractor who could pursue breach of its contractual rights against the Council. The employees relied on a judgment by Lord Templeman in a tax case who stated the principles applicable in such circumstances as follows:

> "In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the Commissioners if that decision is unfair to the appellant because the conduct of the Commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy."[816]

As to the scope of "legitimate expectations" the employees referred to a judgment of Bingham LJ who said:

> "If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness."[817]

But the Court of Appeal did not accept the argument of the works department employees. They refused to quash the Council's resolution. Appeals were dismissed on the grounds that, had private contractors been awarded the work, a formal contract would have been executed[818] which would have provided for either party determining the contractor's employment after 13 weeks' notice,[819] providing that at least six months had elapsed after the date of commencement. The Council's resolution had been in terms of the formal contract which would have been used with private contractors. The terms of this contract would not have legitimately created expectations that *all* repair and maintenance work for a four year period would be awarded to the successful tenderer. The Council had acted rationally and commercially in resolving to seek fresh tenders for the work. There had been due consultation with those affected whose expectations had been properly safeguarded.

It seems doubtful whether domestic public law in England provides a remedy in damages for a contractor against a local authority: any such remedy is likely to be in private law.[820] There is "in law

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816 65 BLR 52 *per* Nolan LJ referring to *R v. Inland Revenue Commissioners ex parte Preston* [1985] 1 AC 835 *per* Lord Templeman at 866.

817 *Ibid.* referring to *R v. Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 *per* Bingham LJ at 1569H.

818 JCT Measured Term Contract.

819 *Ibid.* clause 8.1.

820 See BLR editors' comments at 65 BLR 47. Of course on the facts of this case there was no contract at issue, but the local authority employees were to be treated *as if they had been* in contractual relationship with the council.

no general right to damages for maladministration".[821] It is therefore necessary for an injured bidder to exploit the important and significant remedies within the Local Government Act 1988[822] and the Public Works and Public Supplies Contracts Regulations 1991[823] to maintain an action for damages against the public contract awarding body. A remedy under the Public Works Contracts Regulations was obtained by the injured fenestration package bidder in *Harmon CFEM Facades (UK) Ltd v The Corporate officer of the House of Commons.*[824] A private law remedy was also obtained in this case for breach of the tendering contract. In Part 2 of this chapter it is argued that injured bidder Stannifer Developments might have succeeded in contract rather than rely, as it did unsuccessfully, on judicial review.

9.5 Health and safety policy is a matter of 'technical capacity'.

General Building & Maintenance plc v Greenwich Borough Council[825]

SCENARIO

Greenwich Council invited tenders for repair and maintenance of its housing stock. The proposed contract was within the scope of Regulation 5 of the Public Works Contracts Regulations 1991.[826] Greenwich opted for "restricted procedure" governed by Regulation 12. Regulation 16 allowed a council to exclude a contractor on limited grounds in relation to "technical capacity". General Building & Maintenance plc (GBM) applied to be included on the tender list but was rejected after criticism by the Council of its health and safety policy on an earlier contract. The Council treated this shortcoming as a lack of "technical capacity".[827] GBM commenced proceedings and argued that health and safety was not a matter of "technical capacity" and that therefore the Council was in breach of the Regulations in taking health and safety into account when deciding who to invite to tender.

QUESTION

Under the Regulations, is the Council entitled to take a contractor's record on health and safety into account as a matter of 'technical capacity' when drawing up a tender list?

RESPONSE

Yes. The Public Works Contracts Regulations 1991 and Council Directive 71/305/EEC were considered in *General Building & Maintenance plc v Greenwich Borough Council* when GBM were dropped from the council tender list for repair and maintenance work to dwellings. The court dismissed the action, refusing to order that GBM be allowed to tender, and refusing to enjoin the award of a contract by the Council until GBM had so tendered. It was quite competent to treat the

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821 *R v. Knowsley MBC ex p. Maguire and others* (1992) The Times 26/6/92 where the High court decided that in a dispute over the granting of Hackney carriage licences, the complainant had no right of damages against the local authority.

822 Sections 19(7) and (8).

823 Statutory Instruments, respectively numbered 91/2680 and 91/2679.

824 (1999) 67 Con LR 1, discussed in Part 2 of this chapter. See also chapter 5.

825 (1993) 65 BLR 57: QBD, Sir Godfrey le Quesne QC sitting as a deputy HC judge.

826 SI 1991/2680.

827 See Public Works Contracts Regulations 1991, s. 16(1).

technical aspects of health and safety as a matter of "technical capacity".[828] The local authority is therefore entitled to exclude a contractor from a tender list by considering its health and safety record as a matter of 'technical capacity'.

9.6 Council acted reasonably in removing contractor from tender list when conflict of interest became apparent.

Fairclough Building Ltd v Port Talbot BC[829]

QUESTION

In what circumstances might a Council remove a contractor's name from a tender list previously approved?

RESPONSE

In the circumstances where there is a potential conflict of interest between the Council and one of its senior employees. In *Fairclough Building Ltd v Port Talbot BC* the court had to consider such a delicate problem.[830] The Council was obliged to give fair consideration to the contractor's tender. But in the circumstances of this case the Council had limited room for manoeuvre: it could remove Fairclough from the list or sack their employee. It was reasonable, said the court, to remove Fairclough from the list. The Council was under no "absolute obligation to go through the appraisal process in respect of every single tender notwithstanding anything that might have emerged ...".[831]

The duty of the Council

> "was to act in good faith - not to issue a sham invitation to [the tenderers] ... Then it was [their] duty ... honestly to consider the tenders of those whom they had placed on the shortlist, unless there were reasonable grounds for not doing so."[832]

The *Fairclough* case can be distinguished from *Blackpool and Fylde Aero Club*[833]: the latter a case where the Council failed to consider the tender and thus breached the 'tendering contract'; the present case where consideration of the tender was in progress but it was terminated due to the special circumstances described.

> "A tender is always at risk of having his tender rejected, either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer. Provided that the ground of rejection does not conflict with some binding undertaking or representation previously given by the customer to the tenderer, the latter cannot complain... [The tenderer's] misfortune is due ... to an occupational hazard of their business and not to any unlawful act on the part of the Council."[834]

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828 65 BLR 57, 84.
829 (1992) 62 BLR 82, Court of Appeal, Parker, Nolan and Kennedy LJJ, 16.7.1992.
830 (1992) 62 BLR 82.
831 Fairclough, *ibid, per* Parker LJ at 93.
832 *Ibid, per* Parker LJ at 91 in quoting from an extract from the first instance decision.
833 [1990] 1 WLR 1195; 3 All ER 25 (CA).
834 *Ibid, per* Nolan LJ at 94.

COMMENT

The *Fairclough* case did not raise a public law issue nor was it a case of judicial review. It is included here to emphasise that the duty of fairness owed by owners to tenderers appears both in *public* law and in *private* law but that is where the similarity ends. In *GBM* (a public law case)[835] the contractor sought, not damages, but review of the council's decision and reinstatement to the tender list. In *Fairclough* (a private law case) the contractor sought, not reinstatement to the list, but damages for expectation loss in contract.

9.7 Public procurement of court services does not possess a sufficient public law element so as to expose that decision to challenge by way of judicial review

R v Lord Chancellor, ex parte Hibbit and Sanders.[836]

SCENARIO

The Lord Chancellor's Department sought tenders on a national basis for the supply of court reporting services from firms of shorthand writers. The tendering conditions reserved to the Department the right to enter into discussions with any tenderer to clarify its bid. The applicant firm, Hibbit and Sanders (H&S), who had supplied court services since 1907, submitted a tender to supply the services of shorthand writers to the Chelmsford group of courts for a period of three years from 1 April 1993. After bids were received, the Lord Chancellor's Department applied a procedure whereby it eliminated all bids which were £250,000 higher than the lowest offer submitted, then invited only the *selected* tenderers to reduce their tenders, rather than invite all tenderers who had satisfied all the non-financial criteria. Subsequently contracts were awarded on 15 January 1993 and H&S were informed that its bid had been unsuccessful, on price alone. H&S sough judicial review of the Lord Chancellor's decision.

QUESTION

Did the decision of the Lord Chancellor, when awarding contracts for court reporting services, possess a sufficient public law element so as to expose that decision to challenge by way of judicial review?

RESPONSE

No, said the Divisional Court in *R v Lord Chancellor, ex parte Hibbit and Sanders*. Whilst the Lord Chancellor's department acted unfairly when conducting the tender process, the decision awarding such a public contract lacked a sufficient element of public law so as to be amenable to judicial review. There was no power to grant the remedy claimed.

It seemed to Lord Justice Rose that the procedures adopted by the Lord Chancellor's Department when deciding which tender to adopt, where, in part at least, unfair. Surprisingly, Rose LJ seemed

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835 (1993) 65 BLR 57.

836 The Times 12.3.1993; The Independent 16.3.1993. QB Divisional Court, Rose LJ, Waller J, 11.3.1993. The case is discussed in more detail by Professor Sue Arrowsmith at [1994] CLJ 104, which has been relied upon to supplement the brief summaries given in the above reports.

prepared to accept some "secret monetary yardstick could be used for sifting tenders". But, reassuringly, the criteria for selecting firms for further discussion and negotiation "was in a different category".

The tender conditions issued by the Lord Chancellor's Department expressed a right of the Department to enter discussions with tenderers in order to clarify tenders. This provision, said Rose LJ, created a legitimate expectation on the part of tenderers, including the applicant, that tenderers would not be able at this stage to submit reduced bids. Although H&S had satisfied all relevant criteria, it was precluded from submitting a reduced bid. That action was unfair and prejudicial to H&S. But did the unfair treatment entitle the injured party to judicial review?

The Lord Chancellor was susceptible to judicial review, but only with respect to its decisions which were statutorily underpinned or involved some other public law element as to which there was no universal test. There was no statutory framework for the employment of court shorthand writers. The decision challenged here affected many other persons apart from the applicant, but that would be true of any tendering process. The fact that it was the performance of a commercial function which was challenged did not exclude the possibility of judicial review.[837] But, concluded his Lordship, it was not appropriate to equate tendering conditions attendant on a common law ability to contract, with a statement of policy or practice, or with policy decisions, in the spheres of inland revenue, immigration and the like, control of which were the special province of judicial review. Although the applicant had the sympathy of Rose LJ and was acknowledged to have been treated unfairly, the court could not give the relief claimed of judicial review because the decision challenged lacked a sufficient public law element.

COMMENT

What legal mechanisms might be invoked in aid of the aggrieved tenderer? The High Court in the *Hibbit & Sanders* case rejected the contention that judicial review provided a means for challenge of the public contract award process. Challenge is of course possible in the public sector, for breach of EU procurement directives or for breach of the corresponding UK Public Works Contracts Regulations. Effective remedies are provided, including the right to damages. Perhaps the means existed in *Hibbit & Sanders* to challenge for breach of the 'tendering contract' established in earlier cases discussed in this text, but it appears that that argument was not run before the court. The private law challenge presents a useful supplementary tool in the context of public procurement, but is probably the only ground for challenge in the private sector.

Returning to *Hibbit & Sanders*, there seems no doubt that the tendering process was conducted unfairly and that there had been a breach by the Lord Chancellor's Department of the equal treatment obligation.[838] It was claimed that the Department failed to process the evaluation of tenders and the contract award in the way which Hibbit & Sanders were led to believe would be applied. Rather than simply select the best offer, the Department negotiated with some, but not all,

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837 Rose LJ referred to *Secretary of State for Trade and Industry, ex p Vardy at al*, The Times 30.12.1992.

tenderers, giving the selected few the privilege of submitting amended lower bids. This appears to be a *prima facie* breach of the fairness and equal treatment obligations unless the tender conditions permitted such conduct. The conditions did provide that the Department had the right to enter into discussions with any tenderer if it was necessary to clarify a bid (the 'clarification clause'), but this provision, it is submitted, could not be used to justify wholesale renegotiation of prices with a selected few tenderers. Breach of the equal and fair treatment obligations would also provide a basis for Hibbit & Sanders' contention that tenderers could not be excluded from the tender process by a secret criterion which had not previously been revealed to tenderers.[839]

Hibbit & Sanders argued that the 'clarification clause' created the expectation that discussion (or negotiation) would focus on clarification only and not amount to a fresh tender round in search of lower bids. The Department's failure to satisfy this "legitimate expectation", which the Department had itself created, gave grounds, it was said, for judicial review under established principles of administrative law. It was clear to Rose LJ that Hibbit & Sanders' legitimate expectations had been denied, which was unfair and prejudicial to them. It seems then that if judicial review had been available in *Hibbit & Sanders,* the applicants could have successfully invoked the doctrine of legitimate expectations.

The explanation of why judicial review is not available in English law to remedy such situations was explained by Professor Arrowsmith. The court took the view that it was not sufficient to invoke judicial review on the ground that an action was undertaken in the exercise of a government function. There had to be some specific element of 'public law' in the decision complained of. There were many cases, both in the context of reviewing contractual powers, for example in the grant of licences, and in public services. These were presumed not to be 'public law' cases, and this case too was not one involving 'public law'. There was no "statutory underpinning" of the tender process here, neither was there a reviewable "policy decision" behind the decision to invite tenders. Despite the courts' sympathy for the merits of the applicant's complaint, it could provide no remedy in judicial review.[840]

Arrowsmith argues that the court was not compelled to reach this decision by established authority. Three cases are put forward which seem to show that a court need not embark on a search for a "public law element" in order to grant judicial review. In *R v Lewisham LBC, ex p Shell UK*[841] it was held that a decision not to deal with firms connected with South Africa (in the days of apartheid) was capable of review because the purpose of the decision was not one contemplated by the relevant procurement statute. In *R v Enfield LBC, ex parte Unwin,*[842] where a contractor was suspended from the approved list, the court held that such a decision was reviewable because it was in breach of natural justice. The two cases involved procurement issues. In *Jones v Swansea*

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838 An obligation found to exist in common law, for example see *Pratt Contractors* at 6.10, and also present in public procurement law governed by the EU directives, see *Commission v Denmark*, Case C-243/89, [1993] ECR I-3353.

839 See for example *Chinook Aggregates Ltd v District of Abbotsford.*

840 See Arrowsmith, *supra*, 109-110.

841 [1988] 1 All ER 938.

842 (1989) 46 BLR 1; [1989] COD 466; (1989) 1 Admin LR 51; 153 LG Rev 890.

City Council[843] it was the Council's contractual power as landlord of commercial property which was challenged. The court seemed doubtful that contractual powers were outside the scope of "public law". Arrowsmith reflects on the opportunity missed in *Hibbit & Sanders* for a re-appraisal of the English law on judicial review of public procurement cases, and, more widely, of the contractual powers of public bodies.

> "[Contractual] powers of public authorities should be reviewable on the same basis as other powers; the court should consider directly whether the relief sought is appropriate in the circumstances ... rather than insisting on a 'public law' element ..."[844]

Several cases are discussed in this chapter involving judicial review of the procurement process in other jurisdictions. Reflecting on these overseas cases in the face of Arrowsmith's argument, it will be observed that all cases here are set against a statutory procurement process which, apart from the EU public procurement regime referred to above, is not matched in England. The three Australian cases involve state or city regulations or statutes, as do the cases from Georgia, USA. Perhaps the most interesting case in the context of this discussion is that from New Zealand, where the Ministry of Commerce, against the background of the Radiocommunications Act 1989 (NZ), called for tenders for the 'purchase' of certain radio frequencies. The New Zealand High Court accepted that the court had a role to play in overseeing the proper disposal of government assets by use of the administrative review process. But that review did not amount to establishing which tender was best or to be preferred, and so the judicial review process did not equate to an appeal from the Council's or the Ministry's decision. The court was merely concerned with the fairness of the process and with statutory compliance. Even if unfairness or impropriety is found, the contract award is not necessarily set aside. The court exercises a discretion, and it may chose not to act, in the interest of the public, the taxpayers and other interested persons. On this last point, the courts in Georgia make it abundantly clear that the procurement code is drawn for the benefit of taxpayers, not for the benefit of tenderers, although wasted costs can generally be recovered by an injured low bidder when the code is breached. A review process is needed which embodies the principles set down in the New Zealand High Court, and which recognises the "public law" interest in non-discriminatory and equitable tendering processes.

It is submitted that the real problem in England is not to do with the process of judicial review, although no exception in principle is taken to Arrowsmith's argument for wider scope of judicial review of public procurement decisions. No, the problem in England is the lack of a solid and comprehensive procurement code which sets out the parties' obligations and provides effective remedies for breach. Such a code would provide the necessary statutory framework for judicial review of the public procurement process. There could be no argument that the "public law element" was missing. The private sector would be encouraged to contract into the provisions of the public procurement code, thus achieving some uniformity in the rules and practices across both public and private sectors. The code would be written to incorporate all the EU procurement

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843 [1990] 1 WLR 54, affirmed [1990] 1 WLR 1453.
844 [1994] CLJ 104, 111.

objectives, the principles of the United Nations model procurement law and the common law procurement principles as revealed in this text. The author's argument for a new construction procurement code is set out in Chapter 6, Re-engineering the Tender Code for Construction Works.

This procurement code, or tender code, would provide its own dispute resolution process by a Disputes Review Board, possibly with rules for fast-track arbitration under the Arbitration Act 1996. A model exists for a procurement tribunal which has the status of an inferior court. The Complaints Board for Public Procurement in Denmark is set up under the Danish Commerce and Companies Agency[845] to implement the EU Directive on Remedies,[846] but could have a wider remit. The Danish Complaints Board comprises three judges and sixteen lay persons, typically engineers, contractors, and academics with knowledge in this area. A tribunal comprises one judge and two lay persons, with the judge acting as chairperson for the hearing. The tribunal can suspend a prime facie illegal tendering procedure but is not empowered to award damages, which in this author's opinion is a serious and unnecessary limit on its jurisdiction. In Denmark, a claim for damages must be taken to the full court, where an appeal from the Board's decision would also be heard. The Board is thought by the Danes to have the standing of a court, and thus empowered to refer questions on the interpretation of the procurement directives directly to the European Court of Justice under EU Treaty Article 177, but this has not been tested in that no such reference has yet been made.[847] Verdicts of the Complaints Board have been published in Danish for the period 1 January 1992 to 1 September 1996,[848] and summaries of these decisions can be found in English at www.ks.dk/udbud/kdl/summary.

As an example of the Danish Complaints Board's work, consider the case *of Semco Energi A/S v Brønderslev Municipality*, [849] in which the Board held that the public body's negotiations with tenderers about both technical and price matters was a breach of the principle of equal treatment of all tenderers.

The municipality invited tenders using the restricted procedure permitted under the Utilities Directive for the erection of a combined heat and power station. Eight selected companies submitted tenders. The municipality's consulting engineers selected three of the eight as being of special interest and went into detailed negotiations with these three tenderers. All three tenders were considerably modified in the course of negotiations. Two of the tenders were changed in scope from the provision of six motor generators to the provision of seven, and the third tenderer reduced its price. It appears that the consulting engineers informed to a certain extent the three tenderers of the negotiations held with the other two. A contract was concluded with one of the tenderers who had changed the number of motor generators. The tenderer who reduced its price complained to the Board arguing that the municipality had violated the tender regulations. The

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845 Kampmannsgade 1, DK-1780 Copenhagen V, Denmark.

846 Directive 89/665 [1989] OJ L 395/33 provides remedies for breach of Directives 92/50, 93/36 and 93/37.

847 See article by Jordahn, Jens and Høegh, Katja, *The EU Directives on Public Procurement—Danish Experience*, [1998] ICLR 5, 6.

848 Kendelser fra Klagenævnet for Udbud (1997), KonkurrenceRådet, Nørregade 49, 1165 København K.

municipality argued that the Board should find in its favour and also claimed that the municipality was entitled to disregard the claimant's tender.

The Complaints Board was divided. A majority consisting of two members of the Board found that negotiations of the scope and nature as those carried out were in violation of the general European Community principle of equality. The majority found that it was not decisive whether the contracting entity's consulting engineers had informed each of the three tenderers during negotiations of the negotiations conducted with the other two tenderers and had thus informed the claimant that the two other tenderers had changed their tender so that requirements now comprised seven motors.

On the other hand, it was undeniable, said the majority, that cases might arise in which it would be in accordance with Community's principles of equality and transparency to give all tenderers the opportunity to subsequently change their tenders. However, it was the majority's opinion that an oral briefing as a part of negotiations of the nature involved in this case would not in any case constitute adequate compliance with these principles. The majority went on to say that it was in violation of the principle of equality for the contract with the successful tenderer to be for seven motors, when the tender documents would naturally be understood to mean that a maximum of six motors would be required.

A minority consisting of one member of the Complaints Board did not find that the municipality had violated the principle of equality. This member of the Board said that in his opinion the meetings which sought clarification with all three tenderers did not go beyond what is required in the case of a general contract and that there was no case of discrimination. The minority also found that the statement in the contract documents concerning the number of motor generators would have to be understood as an approximation and that the requirement to provide seven motor generators did not represent a deviation from the contract documents.

The Complaints Board agreed that the municipality would have violated the principle of equality if it had concluded a contract with the claimant. The majority of the Complaints Board said that the said negotiations had also included the claimant and that in this process the claimant's price had been negotiated, which is why the conclusion of a contract with the claimant would have constituted a clear violation of the principle of equality. The minority of the Board referred merely to the fact that the claimant had reduced its price during the negotiations. It was held that the negotiations with tenderers about significant technical issues, and to some extent about price, were in violation of the principle of equal treatment of all tenderers.

Compare this case with *Health Care Developers Inc and others v The Queen in Right of Newfoundland*[850] and *Best Cleaners and Contractors Ltd v The Queen in Right of Canada*,[851] discussed in Chapter above. In both these Canadian cases the courts held that public owner and injured low bidder were in a contractual relationship arising out of the tendering process, and that

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849 Case No 31, 31 October 1996. at www.ks.dk/udbud/kdl/summary/egneengelske-31.htm

850 (1996) 136 DLR (4th) 609, Newfoundland Court of Appeal, Canada.

the owner was in breach of its obligations arising out of that contract. There was an obligation placed on both public owners to act fairly towards all compliant bidders involved in the tendering process. The owners in each case were quite entitled to reserve for itself privileges that might not otherwise exist. For example, the right to reject all tenders. But the owner does not have the right to rely on undisclosed terms and conditions, nor to 'negotiate' with one tenderer or a number less than the whole group of tenders, and is therefore in breach of contract if it awards a construction contract applying award criteria which were not disclosed in the tender conditions or invitation, or as a result of 'secret' negotiation. Neither is the owner permitted to award a contract for something significantly different from the scheme for which tenders were invited. The principle of equal and fair treatment is also at the heart of the European Union public procurement regime as discussed in Chapter 10. However, it seems that a court has more difficulty in establishing and applying a principle of equal and fair treatment in the conduct of tendering when that court is conducting a process of judicial review, as the cases above, and the Stannifer Developments case below, demonstrate.

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851 [1985] 2 FC 293 (Federal Court of Appeal, Canada.

Part 2

The circumstances of competitive tendering demand a fair process: review of the *Stannifer Developments* case and other matters

"None but the brave deserves the fair."
John Dryden (1631-1700) Alexander's Feast, 1,15.

Introduction

This article reviews the unsuccessful challenge by a disappointed bidder at first instance, and on appeal, in the Scottish courts in the case of *Stannifer Developments Ltd v. Glasgow Development Agency*,[852] which arose out of the sale by competitive tender of publicly owned land in Glasgow. The scope of judicial review in Scotland is discussed and compared with judicial review in England, with emphasis on judicial review as an appropriate means of challenging the contractor selection and contract award processes. In the author's opinion, fairness is an essential element of this process but the Scottish court denied the existence of such a general rule. Some aspects of the decision in *Stannifer* are criticised. The author speculates as to how Stannifer might have sought a private law, as opposed to public law, remedy, and concludes with some recommendations made for the better conduct of the bidding process.

Invitation and submission of tenders

This case arose out of the sale by tender of a 1.9 hectares development site close to St Enoch's Square, Glasgow. On 6 December 1996 chartered surveyors, on instructions from Glasgow Development Agency (GDA),[853] issued an invitation to tender and set out information about the site and the terms on which it was offered for sale. Under the heading of 'Sale Terms' it was stated that, in addition to price, any offer must contain a number of elements, and that suspensive conditions in regard to certain matters including planning in principle would be acceptable. It was also stated that formal offers must be returned by 12 noon on 24 January 1997 and that GDA reserved the right not to accept the highest offer or any offer.

In response to that invitation offers were received from seven parties including Stannifer Developments[854] and Miller.[855] On 30 January 1997 GDA's chartered surveyors wrote to the bidders setting out "a proposed programme in respect of the decision-making process to select a preferred developer". The proposed programme included technical appraisal by a team of technical advisers, the selection by an independent review panel of a shortlist of three developers, presentations to the review team by those developers, submission to GDA's management executive, approval by the board of GDA, followed by a submission to Scottish Enterprise (SE)[856] for its approval.

Tender evaluation

By letter dated 10 February 1997 the chartered surveyors reported to GDA as to the outcome of the technical appraisal. At that stage the cash price offered by Stannifer amounted to £14,150,000 and by Miller £12,550,000, a difference of £1.6 million in favour of Stannifer's offer. The report included an analysis of the offers and a calculation of the net present value ("NPV") in respect of each of the offers. The NPV calculation was intended to show the likely profitability of the development by ascertaining the present value of the return and the costs and expenses likely to be incurred in achieving that return. If the same calculations are applied to the competing investment offers, the offer which shows the greatest excess of present value of receipts over expenditure (NPV) is the better investment. This is a discounted cash flow technique particularly suitable for making a decision on a range of options.

The review panel met on 13 February 1997. The briefing paper which was prepared for the meeting stated that the purpose of the review panel was to review the submissions received and to select a preferred developer for recommendation to GDA's board. It was proposed that the review process should have two

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852 1998 SC 156; 1999 SLT 459, Second Division of the Inner House of the Court of Session, the Lord Justice Clerk (Cullen), Lords Coulsfield and Eassie, 5 November 1998. Refer to www.scotcourts.gov.uk.

853 First respondents, who had delegated power from Scottish Enterprise for marketing the site.

854 Petitioners, Stannifer Developments Ltd and Land Securities.

855 Rival, and successful, bidders. A consortium of the Miller Group Ltd and MEPC UK Ltd.

856 Second respondents, a body established under the Enterprise and New Towns (Scotland) Act 1990 as successors to the Scottish Development Agency. Its function included "furthering the development of Scotland's economy and in that connection providing, maintaining and safeguarding employment" and other like activities.

stages. The first was to be on 13 February, which was to be "a review of the submissions resulting in a shortlist of 3/4 developers who will be invited to present to the panel". The second was to be on 25 February when there was to be "a presentation by the short-listed developers followed by the selection of a preferred developer for recommendation to the board". According to the minute of the meeting of the review panel on 13 February, a representative of SE pointed out that whilst the quality of the scheme was obviously important to GDA and to the panel, the Scottish Office guidelines state clearly that "the best possible price must be obtained on disposal of the SE assets". The review panel considered the seven offers and shortlisted three for further consideration, namely those of Stannifer, Miller and Gazeley Properties Ltd.

Thereafter on 19 February the chartered surveyors wrote to Stannifer and the other developers who had been shortlisted, informing them of the fact that they had been placed on a shortlist so that their proposals might be considered further. They were invited to make a formal presentation on the afternoon of 25 February. The letter also stated that GDA had asked that the shortlisted developers should be notified of a number of matters which were of concern and which would require to be discussed in more detail during the course of the presentation. These included the overage provisions.[857] GDA had also instructed that it proposed to impose a number of conditions including a non-returnable deposit of £500,000 payable on conclusion of the missives,[858] (which would bear interest at the rate of 7 per cent per annum compounded quarterly and would be treated as an allowable cost within the development agreement) as an advance payment of the site price. On 25 February both Stannifer and Miller wrote to the chartered surveyors submitting amended offers. Stannifer offered, in addition to an increased cash price of £15,575,000, an additional sum of £500,000 as deposit payable on conclusion of the missives and attracting interest at the rate of 7 per cent for the purposes of the financial appraisal. Stannifer also offered overage equal to 50 per cent of any profit in excess of 12.5 per cent return on the total development cost. For its part Miller offered a cash price of £15,035,000, together with overage amounting to 50 per cent of the profit in excess of 12.5 per cent of the total development cost. The NPV in respect of the two offers amounted to £15,603,568 and £20,463,542 respectively.[859] These offers were taken into consideration by the review panel at their meeting on the same date. The manuscript note of the meeting recorded a number of points which were made during and after the presentations. The note ended by recording the panel's conclusion as follows:

> "To recommend the Miller/MEPC scheme without qualification. However [a representative of GDA's chartered surveyors] to try to secure the £1 million lost to the Stannifer bid".[860]

By letters dated the following day Stannifer and the other shortlisted developers were informed of this recommendation. On 28 February GDA's chartered surveyors (member of the review panel) contacted Miller. The outcome of that contact was that Miller increased its overage to £1.5 million of profit in excess of 12.5 per cent of the development cost, together with 50 per cent of the remaining excess profit.[861]

Selecting the winning tender

GDA's board sat on 27 March 1997. According to a briefing paper prepared for that meeting it was stated, under the head of "Allocation of Risk and Return" that in principle the profit participation of Miller was most valuable to GDA. Under the heading of "Urban Design" it was stated that the review panel had concluded that Miller's proposals were more cohesive and showed greater awareness of the urban design dimensions, and that the city council's planning director (member of the review panel) had indicated that in his opinion Miller's proposal would be the easiest to convert to obtain approval by the planning authority. It was also reported that the panel had concluded that Miller should be selected as the preferred developer for six reasons as follows:

1. Miller's proposed design solution and development strategy offered the most convincing approach to delivering GDA's objectives for the site and its submission was the preferred design of the selection panel;

2. Miller had demonstrated an understanding of the leisure market and the conditions necessary to establish a leisure destination. This was shown in its building design, the scale and location of leisure content and the market and financial appraisals submitted;

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857 An element within the development agreement whereby any excess profit over and above a declared threshold is shared on an agreed basis between the parties to that agreement.

858 The probative letters written in Scotland in the context of sale of heritable property. The letters set out the terms of contract and become binding when exchanged between vendor and purchaser.

859 1999 SLT 459, 461K-L. There are no computations to explain the difference in NPV, other than that Miller's bid was deemed more viable.

860 *Ibid.*, 461L.

861 *Ibid.*, 462A.

3. Miller's scheme was commercially viable, its building cost allowances were considered appropriate, and its proposal provided a land price of £15,035,000 to GDA/SE as land owner;

4. The proposal was supported by Miller Group and MEPC who had significant capital resources and a proven track record in delivering projects of this scale and complexity throughout the UK;

5. Miller's proposal generated the highest NPV of all submissions at £20,463,554;

6. Miller's proposal complied with the section 50 condition and title restriction affecting the site.[862]

The briefing paper also stated:

> "It should be noted, however that the Stannifer proposal also satisfies conditions 2, 3, 4 and 6 and in addition provides a higher land value by £1 million. However, the review panel felt that Millers/ MEPC design solution was stronger and more appropriate for the location".[863]

Thereafter it was reported that the district valuer had expressed the view that the market had been adequately tested and that the best price was being obtained in the public interest. The recommendations in the briefing note were as follows:

> "The selection panel believes the most convincing and attractive proposal has been submitted by Miller/ MEPC. With some reservations, their proposal can be made to produce a scheme which would meet GDA's objective of establishing [Glasgow] St. Enoch's East as a quality city centre leisure destination, thereby enhancing the vitality and viability of the city centre Although the submission by Stannifer/ Lands Securities is considered to be less attractive by reference to design quality, they are nevertheless a substantial and experienced development company, who have offered the highest land value for the site. If it does not prove possible to secure an acceptable legal agreement with Miller/ MEPC as recommended herein, it is proposed that negotiations would be held with Stannifer/ Lands Securities".[864]

The recommendation made by GDA on 27 March 1997 went first to the projects advisory group, and then to the board of SE for consideration at its meeting on 5 June 1997. Prior to the latter meeting, solicitors acting for Stannifer had written to the members of the board complaining of a failure to follow the selection procedure as set out in the invitation to tender, in respect that certain parties were asked to reconsider their submissions after the original sealed bids had been delivered. Thereafter one party alone had been given the opportunity to make further revisions to both the form and financial nature of its bid. According to the briefing note for the board meeting it had been stated, *inter alia*:

> "The review panel considered all seven bids and short-listed three of these. The technical appraisal team considered none of these three were as financially attractive as the potential of the site merited. The three short-listed bidders were each advised of these concerns and given an equal opportunity to amend their bids to meet the concerns. Two, including Stannifer, did so. The review panel then asked that the three bidders indicate whether they would be prepared to make a £500,000 deposit if selected. All three did so. The review panel then selected the Miller/ MEPC scheme on the balance of price and economic advantage to recommend [to] GDA and SE. The bidders were told of that recommendation".[865]

Disappointed bidder seeks judicial review

Stannifer petitioned the court for judicial review seeking reduction[866] of GDA's decision of 27 March 1997 to recommend Miller's bid, and SE's decision of 5 June 1997 to proceed with sale of land to Miller. Stannifer challenged the public bodies' decisions as being decisions of discretion that were unfair, unreasonable and in breach of natural justice. The petition grounded the challenge on three parts:

> "(a) In failing to comply with the sealed bid procedure of tendering stipulated in the invitation to tender, the [public bodies] failed to meet the legitimate expectations of the petitioners.

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862 *Ibid.*, 462A-E.
863 *Ibid.*, 462F.
864 *Ibid.*, 462F-H.
865 *Ibid.*, 462J-K.
866 To quash, set-aside, annul.

(b) *Separatim*[867] in failing to comply with the procedures when deciding on tenders stipulated in the letter of 30 January 1997 from Messrs Montagu Evans the [public bodies] failed to meet the legitimate expectations of the petitioners.
(c) *Separatim* in permitting other tenderers to increase their offer after the submission of sealed bids or after the date of the presentations they did not give the tenderers equal treatment."[868]

The public bodies sought dismissal of the petition on the basis that it was incompetent,[869] and on the basis that the averments[870] in it were irrelevant[871] and lacking in specification.[872] On 4 December 1997 the Lord Ordinary Kingarth[873] repelled[874] the public bodies' plea that the petition was incompetent and reserved their plea as to its relevancy for another hearing. There had to be sufficiently relevant and specific pleas as to the alleged excess or abuse of power, and pleadings had to reveal what expectations Stannifer had and how these had not been achieved. The fact that pleadings had at first been insufficient led to the need for a continued first hearing. On 24 June 1998 Lord Ordinary Macfadyen dismissed the amended petition. Stannifer reclaimed.[875] Its motion was heard by the Second Division[876] and opinion given on 5 November 1998.[877] It is the opinion of the Second Division which is reviewed here, but in part also the opinion of Lord Kingarth. The paper concludes with speculation as to how the case might have been presented and resolved as a bid challenge mounted in private law.

Issue 1:
Were the decisions arrived at by the public bodies in breach of the terms of s.8(1)(g) of the Enterprise and New Towns (Scotland) Act 1990? Was the 'consideration' offered by Miller less than that offered by Stannifer, so that the public bodies had decided to sell the property for "a consideration less than the best that can reasonably be obtained"?

No case was made out in support of Stannifer's contention that the public bodies' decisions involved a breach of s.8(1)(g) of the 1990 Act.

The trial judge (the Lord Ordinary) had rejected Stannifer's argument that price was the sole criterion, and that to bring into account other matters such as design quality and deliverability amounted to a failure to apply the proper test. 'Consideration' could not be equated merely to cash terms, but included other financial returns, including the overage. Other considerations such as the acceptability of a proposal in planning terms had an important bearing on when the price offered was likely to be payable and inevitably influenced the judgment as to which offer afforded the best consideration. More generally a comparison of the offers inevitably involved a judgment on what the review panel referred to as 'deliverability', which depended upon the viability of the proposal as measured by the Net Present Value (NPV). The Lord Ordinary dismissed any suggestion that the highest bidder should win. He said:

"The disposal which may be concluded without the consent of the Secretary of State is not the one which offers the highest cash price, irrespective of how long may lapse before all the suspensive conditions are purified, and how uncertain it may be that the development will be brought to a satisfactory conclusion, but the one identified as yielding the best consideration that can reasonably be obtained. The best that can reasonably be obtained is, in my view, inevitably a matter of judgment."[878]

On appeal, Stannifer changed tack, and focused on what happened at the meeting of 25 February 1997, and particularly, having recommended acceptance of the Miller bid, the review panel's remark that a representative of the chartered surveyors and a member of the review panel was to try to secure "the £1 million lost to the Stannifer bid". There was no doubt that the panel had preferred Miller's architectural

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867 Alternatively.
868 *Stannifer Developments Ltd v. Glasgow Development Agency (No1)* 1999 SLT 430, 431H-I. Outer House of the Court of Session, Lord Kingarth, 4.12.1997.
869 Outside the jurisdiction of the court.
870 Facts pleaded.
871 Relevancy of the claim to the remedy sought, ie judicial review. The question of relevancy of the pleadings might be argued before evidence is heard. If the pleadings disclose no case, or lack specification, the case might be dismissed.
872 1999 SLT 430, 431L.
873 Trial judge, at first instance.
874 Dismissed.
875 Appealed.
876 Second Division of the Outer House of the Court of Session, an appellate jurisdiction presided over by the Lord-Justice Clerk.
877 Reported as "No2", 1999 SLT 459. www.scotcourts.gov.uk.
878 1999 SLT 459, 463C.

solution and it was closest to what Glasgow City Council wanted in planning terms. It seems that the review panel had major reservations about Stannifer's design and build scheme and was prejudiced against the design and build procurement process when it said that "the architect was not necessarily responsible for the end product." Miller's scheme was preferred because it looked "easier to sell" to Glasgow City Council than Stannifer's scheme.[879]

Stannifer questioned two aspects of the review panel's decision: (1) the recommendation of Miller's scheme; and (2) that the chartered surveyors should try to secure "the £1 million lost to the Stannifer bid". As to the first aspect, Stannifer accepted that it would have been difficult to challenge the panel's decision if it had recommended Miller's offer as best consideration (or best value) which was reasonably obtainable. But that could not have been the position when the panel asked the chartered surveyors to approach Miller to increase its cash offer. It should not have been assumed that Miller's offer was best consideration: rather, its initial rejection pointed to the opposite conclusion. It was not obvious that the panel had come to the view that greater deliverability in Miller's offer was superior to Stannifer's offer, which represented a higher cash price. It was that the panel came to the conclusion that Stannifer's proposals presented a perceived difficulty in obtaining planning permission, and they had calculated a lower NPV on that basis. There was no overwhelming reason to prefer Miller's offer and no reason to say that it represented best value reasonably obtainable. To recommend an offer which was not best consideration needed the Secretary of State's approval, which had not been sought.

The second aspect involved a procedural assessment of whether the proposed consideration was indeed the best that was reasonably obtainable. If the proposed consideration did not represent best value, the Secretary of State's consent was required for any disposal. Some procedure was needed to enable the disposing authority to decide what was best consideration. Statutory provision did not rule out any particular procedure, but, argued Stannifer, something was wrong with that procedure when it omitted something which might have yielded a better consideration. Stannifer might have increased its offer, but it could not be said what that offer might have been (because it had not been asked for). The review panel had shown a fundamental lack of understanding of how the market should be used in order to obtain best value. Competition, rather than the lack of competition, was required. The distortion of competition was evident from the panel's request that the chartered surveyors should approach Miller after Miller had been declared preferred bidder, but at a time, according to the Lord Ordinary, before the bidding process was complete. It followed, so Stannifer's argument ran, that Miller's bid could not be taken to represent best consideration reasonably obtainable,[880] and therefore needed the Secretary of State's consent prior to its acceptance. Stannifer sought to overturn the previous decision against its petition for reduction by showing that the review panel's recommendations (which GDA and SE accepted) should be set aside because the panel relied on matters which were not relevant to best consideration and they included the recommendation that one of the tenderers, but not the others, should be invited to increase its tender.[881]

Despite argument to the contrary, the court held that the review panel had discharged its function on 25 February 1997, and was not involved in any further recommendations after that date. The panel's recommendation in favour of Miller's bid was not based on factors irrelevant to the requirements of s.8(1)(g) of the Enterprise and New Towns (Scotland) Act 1990. Deliverability of proposals was an important evaluation criteria in establishing best value. Deliverability depended on factors such as resources and developer experience, commercial return as measured by NPV and the prospects of obtaining planning approval for each proposal. The briefing note prepared for GDA's meeting of 27 March 1997 indicated that Stannifer's offer was inferior to Miller's offer in two respects: (1) in the amount of NPV, and (2) in respect of design solution and development strategy. The amount of NPV was directly related to deliverability of each proposal. The design solution and development strategy had at least some connection with the obtaining of planning consent. All these matters had, said the court, a bearing on the value of consideration in Miller's bid. The court was not persuaded therefore that the panel's recommendation in favour of Miller was based on factors irrelevant to the value of consideration in its bid.

There was nothing in the fact that Miller had been approached with a view to increasing its bid to show that both GDA and SE were in favour of a bid whose value was less than the best value that was reasonably obtainable. The approach to Miller took place *after* the decision to recommend its offer. It did not follow from that that Miller did not offer the best consideration or that the review panel considered Miller's bid represented less than best consideration. It did not follow either, the court concluded, that better consideration would have resulted from an approach to the other bidders.[882] The panel's task was to make a decision as to

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879 *Ibid.*, 463D-F.
880 *Ibid.*, 463J-464A.
881 *Ibid.*, 464C.
882 *Ibid.*, 464I.

preferred bidder. They decided that Miller's bid was preferred and recommended accordingly. Any subsequent increase in Miller's bid would only increase the case for its recommendation, rather than show that reasonable steps were not taken to obtain the best value in the circumstances. Accordingly, said the court, no case was made out in support of Stannifer's contention that GDA's and SE's decisions involved a breach of s.8(1)(g) of the 1990 Act.

Issue 2:

Were the two public bodies involved under a duty of procedural fairness to Stannifer Developments, and if so, was that duty broken?

There is no general rule that a body seeking to exercise a statutory power is under a duty to act fairly, and that any unfairness would render such exercise of power as invalid. Under the terms of s.8(1)(g) of the 1990 Act, there was no legal restriction as to the manner in which a body could make a decision as to the exercise of that power. In the circumstances of this case the court could make no inference that the Act imposed a general duty to act fairly. Furthermore, even if the public bodies were bound by a duty of fairness whereby they were required to follow the previously announced review and selection procedure, there had been no breach since that procedure had been followed.

Stannifer had argued that both GDA and SE had failed to act fairly between Miller and the other bidders, particularly the short-listed bidders, Stannifer and Gazeley Properties Ltd. This contention had two grounds: that s.8(1)(g) of the 1990 Act implied a need for competitive bidding, and that there could be no competition without equality of treatment; and secondly, that Stannifer had a legitimate expectation that it should be able to participate equally in the decision making process until the decision had been taken that best consideration had been obtained.

Stannifer tried to strengthen its first contention by relying again on the concept of legitimate expectation. This was superfluous, said the court, referring to Simon Brown LJ's judgment in *R v. Devon County Council, ex parte Baker*[883] where His Lordship referred in turn to the judgment of Dawson J in the Australian case, *Attorney General for NSW v. Quin.*[884] A fair procedure was required in law because the circumstances demanded such a fair procedure, not because a fair procedure was expected legitimately by those whose interests were affected by that procedure.

The Lord Ordinary (the trial judge) had rejected Stannifer's proposition that GDA and SE were under a duty to act fairly when exercising a statutory power of sale. The present court (the Second Division) agreed with that judgment. Having observed circumstances where a body exercising statutory powers might be under a duty of procedural fairness,[885] the court said:

> "There is ... no general rule that a body seeking to exercise a statutory power is under a duty to act fairly, and accordingly that its exercise of that power is not valid unless it has done so. So far as concerns the power conferred by s 8(1)(g) of the 1990 Act, it was accepted that there was no legal restriction as to the manner in which a body could arrive at a decision as to the exercise of that power. In these circumstances we are unable to infer that it imposes a general duty to act fairly. As counsel for [GDA and SE] pointed out, [those public bodies] were concerned with a proposed transaction in essentially the same way as any commercial body, and hence were subject to the same contractual and delictual responsibilities that might affect such a body."[886]

Stannifer's second ground for a duty of procedural fairness lay in the proposition that they had a legitimate expectation of being able to participate equally in the decision making process until the decision had been taken that the best consideration had been obtained. In this context they maintained that the present case was an example of the type of case which would fall within the fourth and final category mentioned by Simon Brown LJ in *R v. Devon County Council*[887] where His Lordship had said:

> "The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The

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883 [1995] 1 All ER 73, 89 (CA).

884 (1990) 93 ALR 1, 39 (New South Wales, Australia).

885 For example, see *R v. Barnet London Borough Council, ex parte Pardes House School Ltd* [1989] COD 512; The Independent, 4 May 1989, concerned with consultation prior to disposal of land held for educational purposes, and the possible deprivation of an existing right or benefit.

886 1999 SLT 459, 465D-E.

887 *Supra.*

> authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice."[888]

Stannifer maintained that the intimated procedure gave rise to a reasonable expectation on their part that they would be given an equal opportunity with the other offerors. More specifically, Stannifer had argued that "in permitting other tenderers to increase their offers after the submission of sealed bids or after the date of the presentations", GDA and SE had failed to treat all tenderers equally and fairly. But it was a fact, concluded the court, that Stannifer had reconsidered its original offer and had made an increased offer on 25 February 1997. Stannifer had certainly not argued any loss of legitimate expectation arising out of this opportunity to increase its offer.

The review panel's task had always been to determine a short list of three bidders, receive presentations by them, and, as a result, recommend a preferred bidder to GDA. Stannifer's proposition that it had a legitimate expectation that it should participate in the decision making process until GDA and SE had decided which was the best offer, ignored, said the court, the true purpose of the panel. There had been no change of procedure by the panel.

> "Once the decision to recommend a particular developer had been made, the fact that a unilateral approach was made to that developer with a view to increasing the money which they offered does not run counter to the procedure which had been announced from the beginning. The critical point is that it *followed* rather than *preceded* a decision to recommend that particular developer. For these reasons we do not consider that [Stannifer's] arguments in this respect are well founded."[889]

In the language of the Scottish court, the reclaiming motion was refused, adhering to the interlocutor of the Lord Ordinary. Stannifer's appeal was dismissed.

Scope of judicial review in Scotland

The case was first heard in the Outer House by a single judge, Lord Kingarth, who repelled the public bodies' plea that judicial review of the bidding process was incompetent because it was merely conducting an executive process which was not amenable in Scots law to control by judicial review. In Scotland there is no distinction in grounds for judicial review between administrative and policy decisions on the one hand, and executive or operative decisions on the other. In England too, both decisions and acts can be invalid in public law, but there is a distinction between the remedies available. A decision might be set aside, but an act, once done, cannot so easily be undone.[890] In *Leech v. Deputy Governor of Parkhurst Prison*[891] the House of Lords made clear that the scope of judicial review in England did not depend on any distinction between judicial and administrative functions, but on whether the challenged decision affected the applicant's rights or legitimate expectations and on arguments as to the suitability and propriety of judicial review in the circumstances of the case in question.[892]

Judicial review in Scotland was governed by Rule 260B[893] which simply provided that such an application "shall be made ... in accordance with the provisions of this rule." More recent Rules of the Court of Session 1994 provide at rule 58.3(1) that "an application to the supervisory jurisdiction of the court ... shall be made by petition for judicial review." Guidance was given on the scope of this procedure in *West v. Secretary of State for Scotland.*[894] A convenient starting point was the abolition of the Scots Privy Council in 1708, just one year after the formation of Great Britain in 1707 as a result of the Union with Scotland Act 1706 and the Union with Scotland (Amendment) Act 1707. The result of the 1707 Act of Parliament at Westminster was to create a significant gap in the administration of justice in Scotland. Previously the Privy Council in Scotland had exercised a wide equitable jurisdiction which was not enjoyed by the Court of Session at that time. In the absence of any statute in 1708 to redistribute the jurisdiction formerly enjoyed by the Scots Privy Council, the Court of Session took it upon itself (some say reluctantly)[895] to develop within its own jurisdiction an extraordinary remedy where non existed in the law.

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888 [1995] 1 All ER 73, 89.

889 1999 SLT 459, 465J-K. Emphasis added.

890 In such circumstances it may be necessary to show breach of a private law obligation so as to entitle the injured party to damages. See Cane P (1996) *An Introduction to Administrative Law* (3d ed) Clarendon Press, Oxford: p.23.

891 [1988] AC 533 (HL).

892 See Cane, *supra*, p.28.

893 Rules of Court 1965.

894 1992 SC 385; 1992 SLT 636. First Division, Lord President (Hope), and Lords Cowie and Mayfield, 23.4.1992.

895 See Lord Kames (1778) *Historical Law Tracts* (4th ed) pp.228-229, referred to in *West* 1992 SLT 636, 639I.

The Court of Session succeeded to this extraordinary power as the supreme court in civil matters, and at the beginning of the 19th century began to create a consistent pattern for the next 200 years. Two significant points might be made here. Firstly, a clear distinction was made between *review on the merits* and *control of the process* of decision making by the body to whom the merits of the decision had been entrusted. Secondly, increasing use of the phrase 'excess of power' and the insistence of the court that justices or trustees would not be sole and exclusive judges of their own jurisdictions can be noted. As the Lord President (Hope) said:

> "even at the very earliest stage of its development, the emergence of a clearly defined principle that where an excess or abuse of the power or jurisdiction conferred on a decision maker is alleged, the Court of Session, in the exercise of its function as the supreme court, has the power to correct it."[896]

Cases in the early 1800s demonstrate the court's recognition of its supervisory-only duties and the distinction between the private jurisdiction entrusted to the decision maker on the merits, with which the court could not interfere, and control of the process where the decision maker refuses to act, or acts outside its powers.[897] *Forbes v. Underwood*[898] demonstrates another aspect of judicial review in Scotland. In this case it was held that the Court of Session alone had jurisdiction to compel an arbitrator (arbiter in Scotland) to proceed. The position of an arbitrator was analogous to that of a public body which refused to act. The court would interfere to compel action but it had no jurisdiction to tell the tribunal what to do. Any failure to comply with the court's order would be liable to punishment by imprisonment.

Lord Hope said that the importance of the *Forbes* case is that it shows that the principle upon which the supervisory jurisdiction is exercised by the Scottish court is not affected by distinctions which may exist for other purposes between public bodies and those who exercise a jurisdiction under a private contract. The public or private nature of the inferior body or tribunal is not decisive, nor is it necessary to inquire whether the decision of the inferior body or tribunal is administrative in character. The essential point is that a decision making function has been entrusted to that body or tribunal which it can be compelled by the court to perform. It is significant to note the tripartite nature of the relationship in discussion. Whether by statute or private contract, a decision making power or duty is conferred on a third party to whom the taking of the decision is entrusted but whose *manner* of decision making may be controlled by the court.[899]

The lack of any importance in a distinction between private and public law in Scotland can be seen in *St Johnstone Football Club v. Scottish Football Association* (SFA).[900] The council of the SFA had been entrusted by the articles of association of the SFA to fine or expel members of the SFA on grounds of which the council was to be sole judge. The Court of Session was quite able to entertain actions for judicial review which arose out of the decisions of the governing bodies of private associations, where a gross irregularity such as a departure from the rules of natural justice had been demonstrated.[901] The most striking feature of the Scottish cases was the consistency of approach over a period in excess of two centuries.[902] There had been no problems over the scope of remedies or distinctions between private and public law as have troubled England.[903] The development of the law in Scotland had been based firmly on principle, and had not developed on a case by case basis as had the law of England.[904] That Scottish principle may be simply stated:

> "The principle is that where a particular matter has been entrusted to an inferior body or tribunal the Court of Session cannot substitute its own view for what that body or tribunal may decide; but it can nevertheless interfere in order to control any excess or abuse of power or failure to act within the limits of the jurisdiction which has been conferred. That supervisory jurisdiction may be appealed to in order to insist upon standards of rationality and fairness of procedure in addition to what may have been expressly required by the statute or by the contract by which the limits of the inferior jurisdiction have been defined."[905]

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896 1992 SLT 636, 640E.

897 Lord Hope referred (at 640I) to several old cases, including *Countess of Loudon v. Trustees on the High Roads in Ayrshire* (1793) Mor 7398; *Heritors of Corstorphine v. Ramsay*, 10 March 1812, FC.

898 (1886) 13 R 465.

899 1992 SLT 636, 643A-B.

900 1965 SLT 171. Compare the English case of *R v. Football Association, ex parte Football League* [1993] 2 All ER 833 where the court held that a body which derived power from contract was not amenable to judicial review by a party to that contract. The effect of the contract was to make the conduct of the petitioning party merely a matter of private law: Cane, *supra*, p.21.

901 1992 SLT 636, 643I-J.

902 *Ibid.*, 644E.

903 In England, "the law of judicial review is more 'remedies-oriented' than private law": Cane, *supra*, p.10.

904 1992 SLT 636, 644E-F.

905 *Ibid.*, 644F.

In comparing judicial review in Scotland with that in England, it can be established at once that there is no difference in substance between the two systems of law with regard to the grounds on which judicial review may be available.[906] As Lord Fraser put it,[907] the decisions in several leading English cases, so far as they relate to matters of substance and not of procedure, are accepted as applicable in Scotland.[908] The problem which arises for Scotland is the influence there of English law on decisions as to the very competency of the judicial review process. For example, in *Connor v. Strathclyde Regional Council*,[909] the Lord Ordinary, influenced by English authorities, held that a petition for judicial review was incompetent because the activities of the Council's selection board did not indicate a sufficient element of public law for it to be subject to judicial review. This judgment was, of course, quite inconsistent with the supervisory jurisdiction of the Court of Session as established over the past 200 years and explained above. The English distinction between public law and private law in the context of judicial review does not apply in Scotland. English law is relevant as to the substantive grounds for review, but is irrelevant in Scotland to questions of competency.[910]

The *Forbes* case above shows that in cases involving quasi-judicial machinery in private law the Court of Session has a supervisory jurisdiction exercised through the process of judicial review. This case is illustrative of the tri-partite relationship between an inferior body, the appointing body and the petitioner. The same relationship was to be found where an employing Health Board had set up a committee of enquiry and committed to it a jurisdiction to investigate allegations against an employee, but not in the relationship between the board itself and the petitioner, its employee. The former, three-sided, relationship was amenable to judicial review, but not the latter two-sided relationship of employer and employee, in which the employer owed its employee a duty to act fairly, and which was regulated by the normal jurisdiction according to the relevant contract.[911] But that does not mean that judicial review in Scotland is limited to cases involving an element of public law, or to cases seeking a remedy in administrative law, as in England.

It has been established in this paper that in Scotland the court's supervisory jurisdiction gives it power to regulate the process by which decisions are made by any person or tribunal to whom jurisdiction, power or authority has been delegated or entrusted, whether by statute, or contract or any other instrument. The supervisory jurisdiction has only one purpose: to ensure that that jurisdiction, power or authority is not exceeded or abandoned. It is unnecessary to be concerned on any distinction between private and public law with respect to the competency of judicial review. Judicial review in Scotland is not confined to English cases held amenable to judicial review in that jurisdiction, and it is not correct to describe judicial review in Scotland as a public law remedy.

Judicial review is not available as an appeal from an unfavourable decision, but is the court's supervisory jurisdiction applied to the decision making process. It is not competent for the court to review the act or decision on its merits, nor may the court substitute its finding for that of the decision maker. The jurisdiction conferred on the decision maker is the power to decide, and can be applied to acts and decisions of administrative bodies and similar persons, and to inferior tribunals. An excess or abuse of jurisdiction may arise from stepping outside or failing to stay within that jurisdiction, departing from the rules of natural justice, failing to understand the law, or taking into account irrelevant matters. English and Scots law lack any substantial difference on the grounds upon which the decision making process may be open to review. The tri-partite relationship between an inferior body, the appointing body and the petitioner is the stuff of judicial review, but not the two-sided relationship governed by contract, even when one party to the contract is a public body.[912]

Stannifer's case for judicial review

Returning to *Stannifer's* case, it was accepted that the principles laid down in *West* had defined the principles by which the competency of an application for judicial review would be determined. The respondent public bodies tried to draw a distinction between policy decisions which would be subject to judicial review and purely operational decision which would not be subject to review, as decisions taken directly under contract

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906 See Lord Fraser's speech in *Brown v. Hamilton District Council* 1983 SC(HL) 1; SLT 397, 414, cited by Lord Hope, *ibid.*, at 644H and 646B.

907 In *Brown* at 414.

908 See *Watt v. Lord Advocate* 1979 SC 120; SLT 137, and refer to the English cases, *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680; *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147; 1 All ER 208. See also words to similar effect in *Wordie Property Co Ltd v. Secretary of State for Scotland* 1984 SLT 345, 347-348.

909 1986 SLT 530.

910 1992 SLT 636, 646G.

911 See *Tehrani v. Argyll and Clyde Health Board* (No2) 1990 SLT 118.

912 See *West, per* Lord Hope at 650I-651C.

with a third party would not be subject to judicial review. But the trial judge, in applying *West*, found no reason why the public bodies' actions in this case should not be subject to judicial review, provided there were sufficiently relevant and specific averments (allegations) as to their abuse or excess of power.[913]

But why seek judicial review when in the majority of cases it will be impossible to reverse the action taken in awarding the contract to the successful bidder and damages are not directly available as compensation? Judicial review might have been sought against a public body because it was perceived to be the only possible form of redress. It was not perceived that the public body had committed any private law wrong in making its decision, now challenged. However, this perception is fundamentally flawed if it can be shown that the public body was in breach of contract and that a private law remedy was available as of right. Not only would breach of contract found its own private law right to damages, but it would provide a substantive basis for the public bodies duty of fairness owed to each bidder in the tendering process.[914] An arguable case in contract is made out below.

Stannifer's case: no duty of procedural fairness in public law?

It seemed surprising that a Scottish court could hold that there was no general rule that a body seeking to exercise statutory power is under a duty to act fairly, and that any procedural unfairness on that body's part would render such exercise of power as invalid. The statute in question, concerning the disposal of public land, provided no restriction as to the manner in which the public body made its decision and no duty to act fairly would be imposed by the court. It would be even more surprising if public law imposed no duty of procedural fairness, whilst private law imposed that very duty. Would this not be the very opposite of what might have been presumed: that administrative or public law imposes higher standards on the parties than would private law? It has been argued that public law and private law are coming closer together in the context of making contracts, but the question remains open: does one or other system of law demand higher standards than the other?[915] Recent developments in private law are discussed below. This part further considers procedural fairness in public law.

Procedural fairness in public law arises out of the principle that natural justice shall be given in the administrative process. For example, in *Metropolitan Transport Authority (MTA) v. Waverley Transit Pty Ltd*[916] the Supreme Court of Victoria (Australia) dismissed an appeal against the trial judge's determination that MTA was bound to comply with the rules of natural justice when making its decision to award a contract to operate public service buses as a result of a public tendering process. The court there referred to several authorities with regard to the concept of 'natural justice' in the context of *Stannifer's* case, and held that the tendering process was bound by the rules of natural justice and fairness, in the absence of a clear exclusion within the relevant statute of any such duty, and that the public authority was in breach of this obligation when deciding who was the successful tenderer.[917]

In *Haoucher v. Minister of State for Immigration and Ethic Affairs*[918] Deane J was noted to have observed that

> "the law was moving towards what he described as being a conceptually more satisfying position where common law requirements of procedural fairness would be held to apply to any executive decisions unless Parliament clearly provided to the contrary."[919]

In *Annetts v. McCann*[920] the High Court of Australia (HCA) held that

> "the duty to apply procedural fairness arose where the exercise of a power was one which might 'destroy, defeat or prejudice a person's rights, interests or legitimate expectations' and in *Ainsworth* [921][the Court] regarded the passage last cited as defining the common law requirements for procedural fairness."[922]

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913 1999 SLT 430, 433I.

914 See *R v. Devon CC, supra*, at 88, and the first of Simon Brown LJ's "broad categories" under which a public body is "bound in fairness by representations made unless ... inconsistent with the statutory duties imposed upon it."

915 See for example, McLean, J (1996) *Contracting in the Corporatised and Privatised Environment*, 7 PLR 223.

916 [1991] 1 VR 181.

917 [1991] 1 VR 181, 204-205.

918 (1990) 169 CLR 648, 653.

919 *State of Victoria v. The Master Builders' Association (MBA) of Victoria* [1995] 2 VR 121, *per* Eames J at 159/50.

920 (1990) 170 CLR 596.

921 (1992) 175 CLR 564, *per* Mason CJ, Dawson, Toohey and Gaudron JJ at 576.

922 [1995] 2 VR 121, *per* Eames J at 158/50.

Dawson J, whose words were adopted by Simon Brown LJ in *R v. Devon County Council ex parte Baker*[923] and by the Lord Ordinary in *Stannifer's* case,[924] had expressly identified in *Attorney-General (NSW) v. Quinn*[925] that the common law was the foundation for the application of judicial review on the ground procedural unfairness.[926] Brennan J in the HCA had often made the same criticism as that made by Dawson J and which impressed the English and Scottish courts,[927] but the other members of the HCA have not

> "shared that concern, and the concept of legitimate expectation [of procedural fairness] is now a recognised part of the law relating to natural justice."[928]

In *KC Park Save (Brisbane) Pty Ltd v. Cairns City Council*[929] KC Park Save had sought to stay implementation of Cairns City Council's decision to end negotiations and call for fresh tenders in connection with the proposed design, construction and operation of a multi storey car park. The Supreme Court of Queensland held that under the Judicial Review Act 1991 (Queensland) there was no obligation upon a local government to give reasons for such a decision, and that the balance of convenience lay in favour of the Council and so KC's interlocutory application to stay further action by the Council was dismissed. Orders were made for the further conduct of KC's claim, now for damages, against the Council for possible breach of what the court described as "a right of small value".[930] The judgment is interesting for the court's observations on the reviewability of a council's decision not to accept a tender and a tenderer's right (or the lack of right) to procedural fairness during the tender process. The Court noted two decisions of justices sitting alone holding that, in the circumstances of those cases, a tenderer was *not* entitled to expect or require so-called procedural fairness in the making of the relevant decision by the governmental agency.

> "In *White Industries Ltd v. The Electricity Commission of New South Wales*[931] a tenderer for the supply of coal was placed on a short-list of four companies and talks ensued to clarify their offers and place them on a common basis for the purposes of comparison. The Electricity Commission accepted the recommendation of one of its officers to accept the offer of Costain, with whom the Commission had formerly had a contract. The plaintiff claimed that the commission had denied it natural justice in that it failed to afford it an opportunity to be heard 'in relation to its decision to abandon the basis of the invitation to tender and to increase the amount of coal to be supplied'. It was submitted that the plaintiff had a legitimate expectation that the commission would adhere to the conditions of tender or alternatively not depart from them without notice. Yeldham J. rejected the submission, observing:
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> > 'In my opinion the plaintiff, in the position of a tenderer, was not entitled to expect or require that the principles of natural justice ... should be observed in relation to it. I regard the nature of the power to contract by the acceptance of any one of a number of tenders to be inconsistent with an obligation to observe the principles of natural justice. A potential 'right' to gain a beneficial contract is not subject to the rules of natural justice.'
>
> A similar approach was made in *Cord Holdings Ltd v. Burke.*[932] In that case an attack was made upon the minister's decision to select a particular company as the one with which the minister should negotiate and contract in relation to a proposed casino. The plaintiff and other interested companies had been invited to submit proposals. The plaintiff had done so and had also attended a cabinet sub-committee on invitation to make oral submissions. It was submitted that in the circumstances the cabinet sub-committee and cabinet had a duty to act fairly and to give the plaintiff and other interested parties an adequate opportunity or being heard before making its decision. The point was raised on demurrer whether the circumstances pleaded in the statement of claim required the rules of natural justice to be observed in relation to such decisions. Smith J, appropriately in my respectful view, examined the subject matter of the power being exercised by the government, and also the nature of the interest of the plaintiff 'as the complainant of injustice in that subject matter'.
>
> The power in issue was the selection of the company which was to construct and establish the casino. The plaintiff had expended some money by being in the contest, but it had no special right to be selected as the developer. It was submitted that the legitimate commercial expectation of the plaintiff was derived

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923 [1995] 1 All ER 73, 89.
924 1999 SLT 459, 464L-465B.
925 (1990) 170 CLR 1, 57-8.
926 [1995] 2 VR 121, *per* Eames J at 160/25.
927 *A-G for NSW v. Quinn, supra*, at Issue 2.
928 [1995] 2 VR 121, *per* Eames J at 164/35.
929 [1997] 1 Qd R 497.
930 [1997] 1 QD R 497, 507/30.
931 No. 25212 of 1987; Yeldham J. 20 May 1987, unreported.
932 No. 2653 of 1984; Supreme Court of Western Australia, Smith J., 22 January 1985, unreported.

from its position as a member of the particular class of tenderers, and from its dealings with the cabinet sub-committee. Reference was made to *McInnes v. Onslow Fane*,[933] where Megarry VC spoke of the 'expectation cases':

> '... there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority.'

In *Cord's* case Smith J. considered that the decisions amounted merely to a refusal to grant to the plaintiff a privilege, and observed that nothing was taken from the plaintiff. The plaintiff could not legitimately expect that any proposal submitted in response to invitations extended to it would not be rejected out of hand. He accordingly concluded that this was not a situation in which the plaintiff could set aside the decisions on the ground that it had not been given a further hearing. "[934]

It seems fitting to review Australian authorities on public tendering following the example set by the Lord Ordinary in *Stannifer's* case.[935] The Australian courts take guidance from the English authorities, which would be relevant to Scotland on the grounds on which judicial review might take place. This brief review of the public law cases is inconclusive, but suggests that in certain circumstances a fair procedure is required in law in order to protect an interest where that interest is derived from statute or from some specific promise given, or practice adopted, by the relevant public body. The need for fairness might be stronger where the decision-making process under review removes, or refuses to renew, a right previously enjoyed, and less strong where that process merely grants a concession or privilege. Some courts impose a duty of fairness providing that the enabling statute does not provide otherwise: other courts look for some positive reason to impose such a duty. That reason may be found in the parallel developments in private law (contract), that the tendering process requires good faith or fair-dealing in order to fulfil its prime purpose. Tendering for construction work or a concession is an expensive process, for which the owner, public or private, does not expect to make direct payment. The general rule is that a successful tender pays the abortive costs of the unsuccessful tender, but investment on this basis depends on a fair process,[936] which has been "characterised as an implicit adoption of good faith values."[937]

Contract cases are inappropriate authority in an application for judicial review

Two English private law cases were referred to the court, but apparently without much vigour or enthusiasm. *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council*[938] and *Fairclough Building Ltd v. Port Talbot Borough Council*[939] did not, said the court, provide much assistance. As the court noted, neither of these cases involved an application for judicial review. The *Blackpool* case involved an invitation to the Aero Club from the Council to tender for an airport concession. The Club submitted its tender, which was not considered by the Council, and the concession was awarded to a third party. The Club successfully sued the Council for breach of contract. Bingham LJ said that the invitee was protected to some extent in common law. If an invitee submitted a conforming tender by the deadline, the invitee was entitled, not as a matter of mere expectation, but as a matter of contractual right, to have its tender opened by the inviter and considered for acceptance along with all other conforming tenders, if any tenders were considered. The Council's invitation was to be treated as an offer and the Club's timely and conforming tender was an acceptance, and a 'tendering contract' resulted. It was an implied term that all conforming tenders would be considered, if any where. In *Fairclough Building Ltd v. Port Talbot Borough Council* it was held that there was no breach of the tendering contract in removing the contractor's name from the short list when there was an apparent conflict of interest. The Council had acted reasonably in the circumstances. The *Fairclough* case will not be further considered here.

It can be easily seen why the court did not find a superficial review of the *Blackpool* case to be of much assistance. *Blackpool* involved a claim in contract, not an application for judicial review. It was not suggested, as it might have been in *Stannifer's* case, that Blackpool & Fylde Aero Club's contractual right to have its conforming tender considered, if other tenders were considered, should be likened to the requirement

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933 [1978] 1 WLR 1520; 3 All ER 211.
934 [1977] 1 Qd R 497, 503-504.
935 At 1999 SLT 459, 465A.
936 As recognised by many courts, for example, *Blackpool & Fylde Aero Club v. Blackpool BC* [1990] 1 WLR 1195; 3 All ER 25 (CA) discussed below.
937 See Furmston, Professor M, (1998) 114 LQR 362.
938 [1990] 1 WLR 1195; 3 All ER 25 (CA).
939 (1994) 62 BLR 82 (CA).

in public law of a 'right to be heard' as an element of natural justice. The claimant in *Blackpool* was successful in contract, but, as the Scottish court noted, on the evidence of *Blackpool* (and of *Fairclough*), "the contractual rights of disappointed tenderers ... are very limited."[940]

Stannifer's arguable case in contract and in Community law

However, *Blackpool* would have been an appropriate starting place if Stannifer had made a claim against the public bodies for breach of the tendering contract, arguing that it was an implied term of that contract that all conforming bidders should have been treated equally and fairly, using cases from Commonwealth jurisdictions analogous to Stannifer's position.[941] It is now well established in Canada, Australia and New Zealand that in circumstances similar to that of Stannifer's case, that a contract can arise out of the tendering process (providing there is no disclaimer of contractual status) whereby the owner is obliged to give all bidders equal and fair treatment, is obliged to consider all conforming bids if any are considered, is obliged to reject non-conforming or qualified bids, is obliged to award a contract only on the disclosed award criteria and to award only the contract for which bids were invited. Furthermore, the presence of a privilege clause[942] is not designed to negate the owner's duty of fairness and equality to all bidders: it merely negates any obligation for the owner to award a contract.[943]

It would have been interesting to learn of the Scottish court's response to a vigorously argued claim in contract; all the more interesting given His Honour Judge Humphrey Lloyd's judgment in *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons*[944] that a tendering contract had not arisen from the original request for tenders, but had arisen from repeated offers by the public owner that it would consider alternative tenders, and that such a contract was not precluded at common law because the tendering process had been regulated by statute.[945] In His Lordship's opinion "there must be something more than a request for a tender which is to be submitted competitively along with others" in order for a preliminary, or tendering, contract to arise.[946] That "something more", on the facts of *Harmon*, was the repeated offer by the public owner to consider alternative tenders that offered only cost-saving refinements in detail, but did not go so far as to amount to fresh design proposals of which other tenderers had not been informed.[947] In *Stannifer's* case, too, it was alleged that one tendering party, but not the others, had further revised its bid.

In *Stannifer's* case, there had to be competition in the disposal of the public bodies' assets. Competition, it is submitted, could not properly take place without equality and fair treatment of all bidders. But, in the opinion of this Scottish court, there was "no general rule that a body seeking to exercise a statutory power is under a duty to act fairly".[948] The court was not prepared to impose a duty on the public bodies to act fairly in conducting the tendering process.[949] The Scottish court referred to two English authorities. In *R v. Barnet LBC, ex parte Pardes House School*[950] it seemed to be implied that a public body was under a general duty not to act unfairly with respect to consultation when disposing of land held for educational purposes. The exercise of power in that case would have deprived persons of an existing right or benefit. But in *R v. Lord Chancellor, ex parte Hibbit & Sanders (a firm)*[951] it appeared that a court must consider in the circumstances of each case whether the exercise of statutory power was subject to an implied duty, derived from the relevant statute, to act fairly.[952] In *Hibbit & Sanders* there was no statutory framework underpinning the employment of shorthand writers in the court. Despite the apparent unfairness of the tendering process, the applicant was denied a remedy in judicial review because the Lord Chancellor's procurement of shorthand writing services lacked a sufficient element of public law, a ground for denial not relevant in Scotland, as explained above.[953] This author has previously set out Hibbit & Saunders' arguable case for a contractual

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940 1999 SLT 430, 434H.

941 In this context see Craig, *Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations* [1999] ICLR 261.

942 A clause which preserves the owner's right not to award any contract as a result of the tendering process.

943 The authorities for these propositions are conveniently assembled in Craig, R.W. (1999) *Procurement Law for Construction and Engineering Works and Services,* Blackwell Science Ltd, Oxford, England: Chapter 6.

944 (1999) 67 ConLR 1.

945 *Ibid.*, par.216.

946 *Ibid.*, par.214.

947 *Ibid.*, par.216.

948 1999 SLT 459, 465D.

949 *Ibid.*, 465E.

950 [1989] COD 512; The Independent, 4 May 1989.

951 [1993] COD 326; The Times, 12 March 1993; The Independent, 16 March 1993. See also article by Professor Sue Arrowsmith at [1994] CLJ 104. This case is noted and discussed in Craig, *Procurement Law, supra*: pp.598-602.

952 Lord Kingarth, 1999 SLT 430, 435F.

953 But nevertheless likely to be denied on the grounds that the relationship is two-sided and grounded in contract.

remedy against the Lord Chancellor.[954] The decision in that case, it is respectfully submitted, presents no obstacle to Stannifer's contention that a public body in Scotland is under a general duty of fairness when conducting a tendering process, whether that contention is grounded in public law or private law.

The proposed transaction in the instant case between the public bodies and the competing bidders was of a commercial nature. The public bodies had the same private law obligations as a private body would have had in the same circumstances.[955] Would the public bodies in these circumstances have contractual obligations to each of the bidders? The New Zealand High Court in *Gregory v. Rangitikei District Council*,[956] in a case on similar facts but with a more simple bidding procedure, held that a contract did not arise whereby the public owner was contractually bound to sell to the highest bidder, because the owner protected itself from such an obligation by providing qualifying words in the tender documents, "highest or any tender not necessarily accepted". Did the Council undertake to sell by tender? No, said the New Zealand court, as the tender invitation was conditioned by the words above. One possible outcome of the tender process was that no sale would result. Was the Council obliged to consider Gregory's tender? Was the Council in breach of contract in failing to consider Gregory's tender?[957] The New Zealand court found these arguments more compelling, but even supposing, without deciding, that such contractual obligations existed, the Council had in fact considered Gregory's tender, found it unacceptable, and moved on. Therefore if the obligations argued for existed, there had been no breach in *Gregory's* case. The New Zealand court seemed to think that in cases involving only a simple bidding process (such as *Gregory's* case) with no complex tender stipulations and minimum expenditure at tenderer's risk, no 'tendering contract' would arise, presumably on the basis that there was no need in such simple cases for contract law to impose control on the bidding process. But *Stannifer's* case involved a much more complex bidding process (detailed above) in which it seems much more likely that contract law would, and should, impose itself so as to maintain integrity in the bidding process.[958] *Stannifer's* case is, it is submitted, a strong case for the existence of a 'tendering contract' such as that found by the New Zealand High Court in *Pratt Contractors Ltd v. Palmerston North District Council,*[959] by the Federal Court of Australia in *Hughes Aircraft Systems Intentional v. Air Services Australia,*[960] and by the Technology and Construction Court in the *Harmon* case.[961] These cases are examples of a contractual obligation imposed on a public owner to treat all compliant bidders equally and fairly, and are also good examples of "interaction between private and public law" discussed above.[962]

There was no suggestion in *Stannifer's* case that the procurement process was governed by Community law. It is possible to argue that the public bodies were seeking tenders for public building works through the form of a lease disposal and eventual reversion. It could be argued that there was here a mixed contract for the performance of construction work and the assignment of property within the concept of 'public works contracts' or 'public works concession' set out in Articles 1(a) and (d) of Council Directive 93/37/EEC of 14 June 1993 replacing amended Council Directive 71/305/EEC of 26 July 1971. However, in *Gestión Hotelera Internacional SA v. Comunidad Autonóma de Canarias and others*[963] the European Court of Justice held that an agreement involving the carrying out of construction work by third parties as part of a wider agreement involving a concession and a lease of the necessary property did not constitute a 'public works contract' within the meaning of the Public Works Directive. There would therefore be no need to publish the invitation to tender in the *Official Journal*. Directive 71/305 provides little help on this point. On the other hand Directive 92/50, 16th recital, provides that where works are incidental to, and not the main object of, the contract, it is not a public works contract for the purposes of Directive 71/305.[964] Had *Stannifer's* case been regulated by Community law it could have argued that the public bodies here breached the principle of equal treatment of tenderers, which is at the heart of the Public Works Directive, when it accepted an increased offer from one bidder, without also seeking increased offers from the other bidders.[965] This immediately raises another anomaly: that where a bidding process is governed by domestic public law there is no general requirement for fair process, but when the process is governed by Community law, there is such a requirement.

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954 Craig, *Procurement Law*, *supra*, pp.599-600.

955 1999 SLT 459, 465E.

956 [1995] 2 NZLR 208, McGechan J, 2.12.1994.

957 The argument based on the English Court of Appeal's decision in *Blackpool*, supra.

958 Paraphrasing the words of Estey J in the Supreme Court of Canada, in *Ontario v. Ron Engineering and Construction Eastern Ltd* [1981] 1 SCR 111; (1981) 119 DLR (3d) 287, 273.

959 [1995] 1 NZLR 469, Gallen J, 13.12.1994.

960 146 ALR 1, Finn J, 30.6 1997.

961 *Supra.*

962 See Furmston, Professor M, (1998) 114 LQR 362, calling for 'exploration' of this interaction.

963 Case C-331/92 [1994] ECR I - 1329, ECJ, 19.4.1994.

964 See further discussion, Craig, *Procurement Law*, pp.728-734.

965 See *Commission of the European Communities v. Kingdom of Denmark*, Case C-243/89, [1993] ECR I - 3353, ECJ, 22.6.1993, discussed at Craig, *Procurement Law*, pp.707-724.

Of course, Stannifer's difficulty would not have ended by showing the existence of a contractual obligation (or statutory duty) placed on the public bodies which required fair dealing. It would have been necessary also to show breach and substantial loss as a result. Bids were to be tendered by 12 noon on Friday 24 January 1997, but apparently there was nothing in the invitation to tender to indicate what procedures would follow in the assessment and selection of bids. There was nothing in the tender document which would have prevented the public bodies from seeking revised offers or proposals prior to the presentations to be made by bidders, or would have prevented those bodies, after those presentations, from asking the preferred bidder to improve its terms and/ or proposals. In short, unless Stannifer could clearly show what obligation had been breached by the public bodies, a claim of unequal treatment amounted to nothing.[966]

From Stannifer's petition for judicial review, it seems that Stannifer would have been able to make a serious contractual challenge to the award process on the grounds, (1) derived from the invitation to tender, that the public bodies would not receive new or revised bids after 24 January 1997; and (2) derived from the letter of 30 January 1997, that no new or revised bids would be received thereafter, or, alternatively, not after the presentations on 25 February 1997.[967] On the other hand, the Lord Ordinary could not see in these two documents any foundation for Stannifer's expectation that the public bodies would not permit certain tenderers on the short list to revise their bids up to and prior to the presentations. Even if Stannifer's expectation had some foundation, Stannifer itself had benefited from the opportunity to revise its bid prior to its presentation.[968] Having itself modified its bid, Stannifer could hardly complain, it seems, of unfair and unequal treatment.

Stannifer's contract claim would have faltered again, since there was, it was said,[969] no breach in the tendering procedure when the owner made a unilateral approach to the already nominated preferred bidder, *after* the decision was made as to the identity of the preferred bidder, seeking an improvement in the price tendered. Any improvement in the price so obtained could not influence the decision already made as to successful bidder. But why would a successful bidder increase its price when it has already 'won' the competition?

Suppose the public owner sought to 'negotiate' a higher price with the preferred bidder prior to revealing the status of that bidder as 'preferred', would that render the bidding process 'open' rather than 'closed' and thus re-open the door for Stannifer's contention that it had been unfairly and unequally treated? The answer could have been 'yes' in *Stannifer's* case as the public bodies' statutory obligation was to obtain 'best consideration', and this could only have been achieved, it is submitted, when best and final offer was obtained, whatever previous decision had been made as to 'preferred bidder'. But this is speculation. The bidders were told by letter of the review panel's decision to recommend Miller's bid. Subsequently Miller improved the terms of its bid. The reports do not say why Miller increased its bid despite its status of 'preferred bidder'. One might speculate further that Miller was not confident of ultimate success despite its status as preferred bidder and increased its offer *after* the review panel's favourable recommendation to consolidate its position with GDA and SE. The fact that the public bodies were willing to consider further offers must show that the bidding process was not ended and it must therefore continue to be conducted in accordance with principles of fair dealing, a requirement imposed by the 'tendering contract'. The owners should have requested 'best and final offers', then closed the process to further bids. Stannifer would have had, it is submitted a good breach of contract claim against the public bodies for unfair and unequal treatment.

Review panel's lack of enthusiasm for Stannifer's design and build proposals

The architectural member of the review panel appears to have been prejudiced against the design and build procurement process. The BDP representative expressed major reservations about the design and build scheme proposed by Stannifer. It seems that those reservations were not with respect to the detail of Stannifer's proposals, but to the very principle of design and build procurement, "as the architect was not necessarily responsible for the end product." Whatever the perceived merits, or otherwise, of the design and build procurement process, if design and build proposals are not acceptable to the owner in principle, this should be clearly stated in the invitation to tender, as should the necessary design evaluation criteria when design and build proposals are requested.[970]

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966 Taken from the judgment of the Lord Ordinary, 1999 SLT 434H-L, in the context of Stannifer's application for judicial review on the ground that the public bodies had failed to meet its legitimate expectations.

967 1999 SLT 430, 435A-B, as a basis for founding Stannifer's petition for judicial review on legitimate expectations arising out of the bid process.

968 1999 SLT 430, 435C-D.

969 1999 SLT 459, 465J-K.

970 See *Health Care Developers Inc and others v. Newfoundland* (1996) 136 DLR (4th) 609, NCA, 4.6.1996.

Conclusions

From this review of *Stannifer's* case recommendations are made for the better conduct of the bidding process:

(1) It seems that there is no general rule in domestic public law which places a duty of procedural fairness on a public body in the conduct of a public tendering process. On the other hand a tendering process governed by Community law is bound by such a rule.

(2) A duty of procedural fairness may nonetheless arise in the circumstances of the case in question, for example, when a tenderer can show that it has an interest worthy of protection in public law and that interest is derived from statute, common law or from some practice adopted by the relevant public body.

(3) Injured bidders should seek redress in private law, not public law. It is possible that a complex bidding process, whether to sell or to buy, results in a contractual obligation for the owner. A simple bidding process may not lead to the creation of a contractual relationship. A contractual right might provide the interest protected in public law referred to in (2) above.

(4) A successful breach of contract claim is likely to result in compensation for unfair and unequal treatment by the owner, unless the owner has clearly excluded any contractual obligation of fair dealing. Additionally, breach of Community law should be pursued as a breach of statutory duty.

(5) Both public and private bodies initiating competitive bidding processes may be found to owe contractual obligations to compliant bidders.

(6) Fair dealing means treating all bidders equally and fairly from the start and through to the end of the process. Allowing one bidder to amend its bid after opening of sealed bids, or after presentations have been made by the bidders and before any bid has been accepted, is unfair and unequal treatment and likely to amount to a breach of contract.

(7) Tender documents should make clear provision for 'best and final offer' (BAFO) to be submitted by each bidder. No further offers should then be considered.

(8) Tender documents should make clear that the bidding process ends, (a) with acceptance by the owner of a BAFO submitted in accordance with tender stipulations, or (b) by rejection of all offers.

(9) The role of any review panel appointed by the owner to make recommendations on selection of 'preferred bidder' should be clearly set out in the tender documents so as to remove any doubt as to whether the publication of its recommendations as to 'preferred bidder' signifies the end of the bidding process and thus the end of the owner's obligations owed to all bidders.

(10) Evaluation criteria should be clearly set out in the tender documents, together with any weighting to be given. If price is not the sole criterion, the relevant criteria and priority must be given, including economic and design evaluation criteria.

(11) Any predisposition towards or against 'design and build' proposals should be disclosed in tender documents. It is unfair to downgrade proposals at evaluation stage on the basis of previously undisclosed criteria.

(12) If Net Present Value calculations are to be used to rank competing bids as to 'deliverability', the basis of calculation should be disclosed in tender documents. Terms such as 'deliverability' require definition.

(13) Matters of planning constraint should be disclosed in tender documents.

(14) Owners, public bodies, review panels and the like should accept that they owe a duty of procedural fairness to all competing and responsive bidders. Competing forces will recede without such fairness. The circumstances of competitive bidding demand a fair process unless documentation shows the opposite intention. "None but the brave deserves the fair". It is a brave bidder who risks all in certainty of fair process, but a foolhardy tenderfoot who cares not whether the process is fair or foul.

Chapter 10

Public Procurement In The European Union

The aims of Chapter 10 are to present the author's published paper titled *The Portsmouth Case* and to provide supporting background material on European Union (EU) public procurement law extracted from the author's published text, *Procurement Law for Construction and Engineering Works and Services.*

Chapter 10 is in two parts. The aim of Part 1 was to make an analysis of EU procurement law so as to provide background and supporting material for Part 2. Part 1 contains materials from Chapter 13, Public Procurement In The European Union, *Procurement Law for Construction and Engineering Works and Services*, published by Blackwell Science in 1999. This material sets the European public procurement regime in the construction context, and commences with a summary of the cases which are subsequently examined in more detail. New material has been added as a result of the decision in the Technology and Construction Court in the case of *Harmon CFEM Facades (UK) Ltd v The Corporate Officers of the House of Commons.*[971] The aim of Part 2 was to provide a detailed analysis of an unreported first instance judgment involving interpretation of the EU Public Works Directive and the UK Public Works Contracts Regulations 1991 so as to formulate advice to industry on how to cope with this recent legislation. Prior to publication the Court of Appeal handed down its decision which in part reversed and part affirmed the trial judgment. It was a complicated and time consuming process to present the two judgments as a single composite interpretation of laws from more then one source, but the result which emerged and is reproduced at Part 2 is the article from *The Construction Law Journal,* volume 15, part 2, published in the Spring of 1999.[972]

Part 1

Public procurement in the European Union: summary of relevant cases and introductory material

10.1 Case summaries

Chapter 10, Part 1 provides an introduction to the laws of the European Union with particular emphasis on procurement. It can be seen that certain Articles of the Treaty on European Union, together with the relevant Council Directives and decisions of the European Court of Justice form a formidable body of procurement law. Add to that 'body' the implementing Regulations enacted within the three jurisdictions of the United Kingdom, stir in some common law, judicial review and Local Government statutes, and turn out the increasingly complex English law of public procurement.

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971 (1999) 67 Con LR 1. His Honour Judge Humphrey Lloyd QC, 28.10.1999.
972 (1999) 15 Const LJ 88.

In *SA Transporoute et Travaux v Minister of Public Works* (Case 76/81) the European Court of Justice (ECJ) considered the application of the Public Works Directive 71/305. European procurement policies require open and transparent competitive tendering free from barriers to intra-Community trade. The Court held that Directive 71/305 is exhaustive of what a Member State might require of a tenderer from another Member State by way of pre-qualification. If the provision of services was conditioned on the satisfaction of additional requirements, the Treaty on European Union would lack effectiveness in abolishing such restrictions on the freedom to provide services by persons who are established in another Member State. This case also raises the issue of abnormally low tenders. The Court held that before deciding to reject an abnormally low tender, a contract awarding authority must seek from the tenderer which is too low or abnormal an explanation of abnormally low prices, so that that tenderer has a reasonable time within which to submit further details in support of its tender.

In *Re: an Italian incinerator contract, EC Commission v Italy* (Case 194/88R) the ECJ again considered Directive 71/305. The Court held that Directive 71/305 is to apply despite the need for urgency in commencing work. No contract can be awarded until the invitation to tender has been properly advertised in the *Official Journal*. In order to take advantage of the Article 9(d) 'extreme urgency' provision to short-circuit normal procedures, the urgency of the work must be brought about by events unforeseen by the contract-awarding body. In this case, the delay needed to advertise the contract was negligible in comparison to the six years delay in inviting tenders for the project.

In *Commission of the European Communities v Ireland* (Case 45/87) the Court held that work to provide a new water main was excluded from the scope of Directive 71/305, but it was within the scope of Article 30 of the EU Treaty. By including a specification clause to the effect that all pipes must be certified as complying with the Irish Standard Specification, and by subsequently failing to consider, or by rejecting without adequate reason, the tender based on the foreign materials, Ireland was held to be in breach of Article 30 of the Treaty. It was not necessary to prove that the specification impeded the import of pipes into a Member State. It was sufficient that such a provision *may* deter some firms from tendering. It also had the effect of restricting the available supply of pipes to those made within the Member State calling for tenders. The words "or equivalent" inserted after the reference to the national standard would have enabled the Member State to have ascertained compliance with technical requirements without completely ruling out foreign products. Such work is now within the scope of the Utilities Directive 93/38.

Fratelli disputed the procedure for the award of a contract for modernisation of a football stadium in preparation for the 1990 Word Cup. The firm's tender was rejected under local tender regulations which provided for the automatic exclusion of abnormally low tenders on a purely mathematical basis. The winning tender was 9.85% above that of Fratelli, who argued that the criteria applied to its excluded tender were incompatible with Directive 71/305. In *Fratelli Costanzo SpA v Comune di Milano and another* (Case 103/88) the Court considered the role of the ECJ in relation to domestic

law. The provisions of the Directive had direct effect within a member State and where national legislation was inconsistent with a Directive, the public body was bound by the Directive. In such circumstances an individual could rely on the provisions of a Directive before the Court, and the Directive 71/305 was quite specific about how the contracting authority should deal with abnormally low tenders.

Article 30 of the Treaty was considered by ECJ in *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No2 Di Carrara* (Case C-21/88). It was held that Article 30 precludes national rules which created preferences for certain suppliers in respect of public supply contracts. There was no derogation from Article 30 for local economic development programmes. The power was vested in a national court to ensure compliance with Article 30.

In *Commission of the European Communities v Kingdom of Denmark* (Case C-243/89) the ECJ held that the Danish Government was in breach of Treaty Articles 30, 48 and 59 and in breach of Directive 71/305 by inviting tenders on the basis of the 'Danish content' clause which obliged the contractor, to the greatest possible extent, to use Danish materials and consumer goods, Danish labour and equipment. The Government was also in breach of Directive 71/305 when Storebaelt negotiated with ESG on a non-compliant tender. That unfair practice was contrary to the principle of equal treatment of tenderers, which lies at the heart of the Public Works Directive. This case is analysed in detail below.

In *Ballast Nedam Groep NV v Belgian State* (Case C-389/92) the Court said that Directives 71/304 and 71/305 were designed to ensure freedom to provide services in the field of public works contracts. The first of those directives imposed a general duty on Member States to abolish restrictions on access to, participation in and the performance of public works contracts and the second directive provided for co-ordination of the procedures for the award of public works contracts. The two Directives, said the Court, must be interpreted to permit account to be taken of companies belonging to the larger group, when assessing the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined. It was for the legal person in question to establish that it actually had available the resources of those companies which were necessary for carrying out the works. It is for the national court to establish whether such resources were in fact available

The ECJ again gave judgment over with its relationship with national courts with respect to Directive 71/305 in *Gestión Hotelera Internacional SA v Comunidad Autónoma de Canarias and others* (Case C-331/92). The ECJ retains jurisdiction to give a preliminary ruling on the interpretation of a Directive after it has been transposed into national law. In this case the substantive issue was in relation to the status of a 'mixed contract'. It was held that an obligation to have building works carried out by third parties which was agreed within the framework of a public contract concerning the award of a concession for a casino and hotel business, together with the lease of the necessary property, did not constitute a public works contract within the meaning of

Directive 71/305. It followed that there was no need to comply with that Directive's publication obligations.

In *Commission v Netherlands* (Case C-359/93). The ECJ held a tender notice was unlawful, in that it failed to indicate the persons authorised to be present at the opening of tenders, and it failed to provide the date, time and place of opening of tenders, all contrary to the requirements of Supplies Directive 77/62. The Government was also in breach of Community obligations in failing to put the words "or equivalent" after the term UNIX as required by Article 7(6) of Directive 77/62. By defining its specification by reference to a product of specific make, the Netherlands had failed to fulfil its obligations under Directive 77/62 and under Article 30 of the Treaty. The phrase "or equivalent" is required to accompany any reference in tender documents to a trade name. It was sufficient here that the description complained of was capable of restraining trade.

The Italian provincial Government in Ascoli Piceno attempted to circumvent the rigours of Directive 71/305 by arguing that for "technical reasons" it was necessary to negotiate a 'follow-on' contract with an existing contractor. In *Commission of the European Communities v Italian Republic* (Case C-57/94), the Court held that the contracting authority was not entitled to the derogation of Article 9(b) on the grounds of "technical reasons" and was therefore in breach of its obligation under the Works Directive in failing to publish a tender notice.

R v Secretary of State for the Environment, ex p Harrow LBC is the first of three cases where the English High Court had to interpret Community law in the procurement context. Harrow LBC invited tenders for housing management services only from contractors capable of eventually taking over the ownership of the housing stock. That policy unnecessarily restricted the range of persons able to tender. The decision to restrict the list of tenderers by the application of irrelevant criteria was unlawful with respect to Directive 92/50 and Public Services Contracts Regulations 1993. This case is reviewed further below.

Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons (1999)[973] arose out of a bid challenge by an aggrieved subcontract bidder for the works or trade contract for the fenestration at the New Parliamentary Building (NPB) known as 'Portcullis House'.[974] The fenestration was not merely a cladding or curtain wall system but an integral component of the building's engineered protection against bomb blast and terrorist attack. Laing Management Ltd (LML) was Construction Manager appointed under the Construction Management Agreement (CMA). The Parliamentary Works Directorate (PWD) fulfilled the role of client and MHP was architect appointed by the client.[975] AFE was design engineer of the facade for the fenestration

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[973] Supra, chapter 5.

[974] New offices constructed for Members of Parliament, known as 'Portcullis House', situated over and adjacent to Westminster underground station in Bridge Street, Westminster, London SW1.

[975] The Corporate Officer of the House of Commons (defendant) is a corporation established by the Parliamentary Corporate Bodies Act 1992 with power to make contracts on behalf of the House of Commons. The post of Corporate Officer is held by the Clerk of the House of Commons who as head of his department is accountable to the House of Commons Commission by an Act of 1978. The two Houses of Parliament established the Parliamentary Works Directorate (PWD), successor to the Parliamentary Works Office (PWO), which had procured the construction of the NPB.

package. The plaintiff, Harmon, sought damages and made several claims against the public owner: that PWD had failed to observe the Public Works Contracts Regulations 1991 (PWR); was in breach of obligations under the Treaty on European Union (TEU);[976] was in breach of obligations arising from European Procurement Directives;[977] was in breach of obligations in private law arising from an implied tendering contract; and was liable for misfeasance in public office. The preliminary issues for decision by the court included questions as to whether Harmon had been treated equally, openly and fairly, whether there had been discrimination of a "Buy British" nature in favour of the successful contractor and as to the damages or compensation recoverable, such as exemplary or aggravated damages. The issues were mainly answered in favour of the contractor Harmon. This case was referred to in Craig's *Procurement Law* [978]as a case 'soon to be heard'. The judgment appeared about one year after the book went to press.

The final case, and the subject of detailed review in Part 2, is *R v Portsmouth City Council, ex parte Peter Coles, Colwick Builders Ltd and George Austin (Builders) Ltd.* This a lengthy and complicated case involving tenders taken by the City Council for maintenance, repairs and improvements to its council housing stock, further complicated by the contracting out of work to the Council's direct labour organisation. The first instance judgment and the decision of the Court of Appeal have been merged and seventeen questions posed covering almost the full scope of local authority tendering. Two points are highlighted here. Firstly, the court held that there was a period of time when the Works Directive 71/305 (as amended by 89/440) required Member States to bring the necessary measures into force to comply with it, but when the 1991 Regulations applicable to the United Kingdom had not been brought into force. That period ran from 20 July 1990 to 21 December 1991. Consequently, the doctrine of "*direct effect*" operated during that period. Secondly, it was held that the Works Directive did not regulate the award by the Council of the Maintenance Contract to its own workforce, because the Works Directive concerned the award of "public works contracts" which are defined as "contracts for pecuniary consideration concluded in writing between a contractor and an authority awarding contracts". Since the Council's own workforce was not a natural or legal person there was no contract so as to trigger the Directive's application.

10.2 Introduction to public sector procurement in the European Union.

It was always the intention of the original parties to the European Economic Community to create "an ever closer union among the peoples of Europe," and "to eliminate the barriers which divide Europe". More specifically in the commercial context, the originators desired to abolish "restrictions on international trade," "by means of a common commercial policy". These words, taken from the 1957 Treaty, remain the current policies as set out in the 'Common Provisions' of the EC Treaty as last amended by the Treaty on European Union.[979]

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976 Articles 6, 30, 59 and 65.
977 Eg, 71/305 and 89/665.
978 At pp.723-724.
979 Done at Maastricht: see [1993] OJ C 224/1.

Public procurement was always thought to be a substantial and important element of a single market, perhaps amounting to about ECU 720 billion or about 11% of Gross Domestic Product of the European Union. This would be equivalent to about half of the GDP of the Federal Republic of Germany.[980] Public procurement markets are now open to not only EU Member States but also to EEA/ EFTA countries and the USA, Canada and Japan.[981] Within the common market created by the Member States, discrimination on the grounds of nationality is prohibited when awarding contracts (Art. 6), as are quantitative restrictions on imports and exports (Art. 30-36), and restrictions on the right of establishment (Art. 52 et seq.), the right to provide services (Art 59 et seq.) and the right to make payments and move capital (Art. 73b et seq.) within any Member State. There are no application thresholds with respect to application of the Treaty: it applies to all public sector contracts.

The general and broad provisions of the Treaty have been augmented by Council Directives which establish a framework of objective and non-discriminatory criteria for the selection of contractors and the award of contracts within the *public* sector. At present there are six directives, covering public works, supplies and services contracts, utilities contracts and remedies for breach of these provisions. Their purpose is not total harmonisation but rather alignment of procurement rules and procedures within the Community.[982] The directives differ in some details but the common principles are of an anti-discriminatory nature involving transparency of the procurement process and the imposition of open technical standards. A substantial part of the directives' detail is the requirement for published notices, published procedures and published objective award criteria. For the purpose of this text only the Public Works Directive is discussed in detail, but this example will serve as an illustration of the provisions in the supplies and services directives. The utilities directive is different in character, setting down more flexible rules because it is recognised that such entities may be governed by private law rather then public law, or a blend of both laws of certain Member States.

The Directives are issued by "the European Parliament acting jointly with the Council, the Council and the Commission" under the authority of Article 189 of the Treaty on European Union (TEU). "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." In England, a directive is brought into domestic law by an Act of Parliament or by a Statutory Instrument or both. But the European Court of Justice has decided that in certain limited circumstances a directive can have 'direct effect' in a Member State,[983] and that a private person or body may recover damages from a Member State where there has been a failure to transpose the directive properly into domestic law.[984]

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980 See *Public Procurement in the EU*, a communication from the Commission at COM (1998) 143 final, p.1.

981 *Ibid.*

982 The terms European Union, European Community, European Communities or the Community are used interchangeably here. This is not historically accurate. There were three Communities, which became a Community and then a Union.

983 *Costanzo* (Case 103/88) [1989] ECR 1839, 1871 at para. 31.

984 *Francovich* and *Boniface* (Joined Cases C-6/90 and C-9/90) [1991] ECR I-5357 and Art. 177 of the EC Treaty.

An aggrieved tenderer might seek a remedy for a breach of the procurement obligations in a national court or tribunal, or by complaint to the Commission, or by taking concurrently both courses of action. Ideally any challenge should be made before a contract is made and not later than during the period of evaluation of tenders. Following a challenge, the Member State and the public authority will be informed. They must respond within 21 days by correcting the infringement, justifying their position or suspending the contract award pending further action. Under the utilities directive there is a provision for conciliation.

10.3 Common competitive procurement policies.

Each Member State has traditionally favoured and protected its own domestic market when procuring goods and services for the public sector. These policies created unfair competition, or at least did not create fair competition so as to enable a supplier or service provided to compete on equal terms with its competitor resident in another Member State. Not only does such preference protect a domestic supplier from the rigours of international competition, but the public purse suffers in that it pays out more than it might for its inputs. A study carried out for the European Commission in 1988 highlighted the fact that imports to the public sector were proportionately much lower that imports as a whole.[985]

As noted above, the Treaty prohibits anti-competitive activity in public procurement, and any consideration of procurement law must first start with a review of Treaty provisions. There are reported cases dealing with breach of Treaty obligations under Articles 30, 52 and 59. The abolition of restrictive measures by individual Member States was assisted by the introduction of procurement directives prohibiting, for example, public bodies placing provisions in their contracts which required preference to be given to local subcontractors.[986] But it was 1970-71 before Member States were themselves restricted in their preference of local contractors.[987] The European Court of Justice added to the momentum of change when it interpreted and enforced Articles 52 and 59 of the Treaty to the effect that access was opened to domestic public contracts for nationals from another Member State, without any specific enabling directive.[988]

Detailed procurement directives were introduced in order to prescribe more fully and co-ordinate the procedures to be adopted by public bodies in public procurement. Not only would the directives make it easier to establish the existence of discriminatory practices, but inefficient practices and procedures would be removed. Access to public contracts would be made more easy by demanding wide-spread public advertising of public contracts. The original procurement directives were issued as 71/305/EEC (Works)[989] and 77/62 (Supplies). These directives are the ones most considered by the courts, and although now obsolete, embody most of the principles to be found in

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985 See *The Cost of Non-Europe in Public Procurement* (1988), a report for the Commission by WS Atkins Management Consultants.

986 See Directive 64/429/EEC, [1964] OJ 1880/64; also Directive 62/427/EEC, [1962] OJ 1863/64.

987 See Supplies Directive 70/32/EEC, [1970] OJ L 13/1, and Works Directive 71/304/EEC, [1971] OJ L 185/1, wef 1.8.1972.

988 See Case 2/74 *Reyners v Belgium* [1974] ECR 631 and Case 33/74 *Van Binsbergen* [1974] ECR 1299.

989 Council Directives 71/305/EEC, [1971] OJ L 185/1 and 77/62/EEC, [1977] OJ L 13/1.

the current directives. Their application was limited to the traditional view of public bodies, such as central and local government. They did not regulate activities of nationalised industries, nor the sectors of water, energy, transport and telecommunications (the 'excluded sectors') because over the Community as a whole, these sectors involved both public and private providers. But these sectors (referred to as 'utilities') are now within the control of their own directives.[990] The impetus of the drive to complete the creation of a single market by the end of 1992 resulted in a reappraisal of the common market and public procurement in particular.[991]

10.4 The EU Procurement Directives.

The current procurement directives, in chronological order, are:

Directive 89/665[992] provides review procedures and remedies for breach of Directives 92/50, 93/36 and 93/37.
Directive 92/13[993] provides remedies for breach of Directive 93/38.
Directive 92/50[994] regulates services contracts in the public sector.
Directive 93/36[995] regulates supplies contracts in the public sector.
Directive 93/37 regulates works contracts in the public sector.
Directive 93/38[996] regulates contracts in the 'utilities' sectors.
Directive 97/52 (Public Procurement (Amendment) Directive) has now been adopted to amend Directives 92/50, 93/36 and 93/37.

The changes introduced by 97/52 are necessary following realisation by the EU of the GATT/ WTO Agreement on Government Procurement with other signatories.[997] The main amendments involve the adjustment of thresholds and the introduction of a new provision which forbids contracting authorities from seeking or accepting technical advice on the preparation of tender documents from persons having a commercial interest therein where such involvement would have the effect of precluding competition. Contracting authorities must now provide information on the advantages of the tender selected when asked to provide information by rejected bidders. Amendments are also made as to the provision of statistics to the Commission and equality of opportunity for access to public contracts.[998]

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990 Council Directives 93/38/EEC, [1993] OJ L 199/84 (replacing 90/531/EEC) and 92/13/EEC, [1992] OJ L 76/14.
991 See the *White Paper from the Commission to the Council on Completing the Internal Market*, COM (85) 310 Final.
992 [1989] OJ L 395/33. To be implemented in national law by 1.12.1991.
993 [1992] OJ L 76/14. To be implemented in national law by 1.1.1993.
994 [1992] OJ L 209/1 (amends 89/665, 77/62 and 71/305) to be implemented in national law by 1.7.1993.
995 [1993] OJ L 199/1 (consolidating 77/62 as amended by 80/767 and 88/295; amending to conform with 92/50 and 93/37) to be implemented in national law by 14.6.1994.
996 [1993] OJ L 199/84 (replacing 90/531/EEC and 92/12/EEC (amended)) to be implemented in national law by 1.7.1994. Also implements EU treaties with non-EU states.
997 See also discussion at 12.5.
998 See the proposals for the amendment at COM(95) 107 final, pp.4-5.

10.5 The UK Procurement Regulations.

These directives are enabled by s.2(2) of the European Communities Act 1972 and implemented within the United Kingdom as follows:

The Public Supply Contracts Regulations 1991 (replaced by 1995 Regulations)[999]
The Public Works Contracts Regulations 1991[1000]
The Utilities Supply and Works Contracts Regulations 1992 (replaced by 1996 Regulations)[1001]
The Public Services Contracts Regulations 1993[1002]
The Utilities Supply and Works Contracts (Amendment) Regulations 1993 (replaced by 1996 Regulations)[1003]
The Public Supply Contracts Regulations 1995[1004]
The Utilities Contracts Regulations 1996[1005]

10.6 The thresholds of application.

Public Sector Works. By Articles 6(1) and (2) of the Public Works Directive 93/37 the threshold of the Directive's application to public works is to those works whose estimated value net of VAT is not less than ECU 5m. Public Works Contracts Regulation 7(1) is to the same effect. The value threshold is expressed in national currencies fixed for a period of two years with effect from January 1992. The values are to be published in the Official Journal at the beginning of November preceding the operative period.

1 Jan 92-31 Dec 93	1 Jan 94-31 Dec 95	1 Jan 96-31 Dec 97	1 Jan 98-31 Dec 99
ECU 5m	ECU 5m	ECU 5m	ECU 5m
£3,535,775[1006]	£3,743,203[1007]	£3,950,456[1008]	£3,899,337[1009]

But the effect of Directive 97/52 is that for a public works contract in relation to which offers are sought by a GATT/WTO[1010] contracting authority, the threshold becomes SDR 5 m which is lower

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999 SI 1991/2679, in force 21.12.1991. Amended by SI 1993/3228. Revoked by SI 1995/201.
1000 SI 1991/2680, in force 21.12.1991. Amended by SI 1992/3279, SI 1995/201 and 1996/2911.
1001 SI 1992/3279, in force 13.1.1993. Amends SI 1991/2680. Directive 93/38 required amendment to these Regulations so as to bring service contracts within their scope by 1.7.1994. Consolidation implemented by SI 1996/2911 (12.12.1996). Amended by 1993/3227. Amended by SI 1995/201. Revoked by SI 1996/2911.
1002 SI 1993/3228, in force 13.1.1994. Amends SI 1991/2679. Amended by SI 1995/201.
1003 SI 1993/3227, in force 13.1.1994. Amends SI 1992/3279. Revoked by SI 1996/2911.
1004 SI 1995/201, in force 21.2.1995. Amends SI 1991/2680, 1992/3279 and 1993/3228, and revokes SI 1991/2679. Implements Directive 93/36. Amended by SI 1996/2911.
1005 SI 1996/2911, in force 12.12.1996. Amends SI 1991/2680, 1993/2680 and 1995/201, and revokes SI 1992/3279 and 1993/3227. Implements Directive 93/38.
1006 [1991] OJ C 321/7.
1007 [1993] OJ C 341/10.
1008 As advised by HM Treasury Procurement Policy Division.
1009 [1998] OJ C 22/2.
1010 See Council Decision 94/800/EC of 22.12.94, which concerned the conclusion on behalf of the EU Member States of the 'Uruguay Round' of multilateral trade negotiations (1986-94). The Agreement on Government Procurement is at Annex 4. It came into force on 1.1.96, and effectively introduced lower thresholds for the application of certain Directives. Schedule 1 of the Public Supply Contracts Regulations 1995 lists the central government bodies subject to the WTO Agreement on Government Procurement.

than ECU 5m. As of 1.1.1994, SDR 5m = ECU 4,952,730. The difference is of very little practical significance.

1 Jan 96-31 Dec 97	1 Jan 98-31 Dec 99
SDR 5m	SDR 5m
£3,913,108[1011]	£3,862,473[1012]

Public Sector Services. Similarly, by Articles 7(1) and (8) of the Public Services Directive 92/50, that Directive applies to public services whose estimated value net of VAT is not less than ECU 200,000 or SDR 130,000. The value threshold is expressed in national currencies fixed for a period of two years with effect from January 1994. The values are to be published in the Official Journal at the beginning of November preceding the operative period. The thresholds are as shown below for Supplies.

Public Sector Supplies. Similarly, by Articles 5(1) of the Public Supplies Directive 93/36, that Directive applies to public supplies whose estimated value net of VAT is not less than ECU 200,000. Public Supply Contracts Regulation 7(1) is to the same effect.

1 Jan 94-31 Dec 95	1 Jan 96-31 Dec 97	1 Jan 98-31 Dec 99
ECU 200,000	ECU 200,000	ECU 200,000
£149,728[1013]	£158,018[1014]	£155,973[1015]

But for a public supply contract in relation to which offers are sought by a GATT/WTO[1016] contracting authority, the threshold is lower than ECU 200,000

1 Jan 94-31 Dec 95	1 Jan 96-31 Dec 97	1 Jan 98-31 Dec 99
SDR 130,000	SDR 130,000	SDR 130,000
£96,403[1017]	£108,667[1018]	£104,435[1019]

The Public Works Directive (consolidated) 93/37/EEC.[1020]

Certain main terms are defined in Article 1. A "public works contract" involves the "either the execution, or both the execution and design of works"[1021] for a public body[1022] which wishes to

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1011 Estimated by the author.
1012 Estimated by the author.
1013 [1993] OJ C 341/10.
1014 As advised by HM Treasury Procurement Policy Division.
1015 [1998] OJ C 22/3.
1016 See Council Decision 94/800/EC of 22.12.94, noted *supra*.
1017 [1993] OJ C 341/11.
1018 As advised by HM Treasury Procurement Policy Division.
1019 [1998] OJ C 22/2.
1020 Council directive of 14/6/93 concerning the co-ordination of procedures for the award of public works contracts [1993] OJ L 199/54. This directive is enacted within England (and the UK) by the Public Works Contracts Regulations 1991/2680 (amended).
1021 93/37/EEC Article 1(a).
1022 See 93/37/EEC Article 1(b) which defines a "body governed by public law", as, inter alia, "financed for the most part by the State ... or other bodies governed by public law". See the list at Annex 1.

undertake building or civil engineering work.[1023] A "public works concession" on the other hand, involves building or civil engineering work, but rather than payment, the contractor receives "either solely ... the right to exploit the construction or ... this right together with payment".[1024] Concession contracts have become more prevalent throughout the Community and this latest Directive includes such contracts within the advertising rules. Where a public body subsidises another body to carry out works,[1025] then that other body must also comply with the Directive. The public body is seized of the responsibility for ensuring such compliance.[1026]

Smaller works contracts[1027] are exempt from the competition and procedural requirements of this Directive, as are works covered by article 4(a) and works involving national security.[1028] Also excluded are works "in pursuance of an international agreement ... between a Member State and one or more non-member countries" which are "governed by different procedural rules".[1029] The threshold cannot be circumvented by job-splitting. "No work or contract may be split up with the intention of avoiding the application of this Directive."[1030]

Public works contracts are to be awarded on the basis of "open procedures", "restricted procedures" or "negotiated procedures".[1031] Both 'open' and 'restricted' procedures involve submission of tenders: 'negotiated' simply means negotiation of contractual terms with one or more contractors. This latter arrangement is the exception to the general rule that there must be competition.[1032]

Negotiation, *after "publication of a contract notice* and after having selected the candidates according to publicly known qualitative criteria", is permitted only when the works are of a pure research nature and "not to establish commercial viability or to recover research and development costs";[1033] or "when the nature of the works or the risks attaching thereto do not permit prior overall pricing";[1034] or, where as a result of normal procurement procedure, "irregular tenders" have been received.[1035]

Negotiation *without prior contract notice* may be used when an open or restricted competitive tendering process has produced no tenders or no appropriate tenders, provided that in negotiation the contract terms are not "substantially altered";[1036] or "when, for technical or artistic reasons or for

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1023 See 93/37/EEC Article 1(c) for a definition of the relevant "work".
1024 93/37/EEC Article 1(d).
1025 Only contracts covered by Class 50, Group 502 of the general industrial classification of economic activities within the EU (NACE) nomenclature, and contracts for building work at hospitals, sports facilities, school and university buildings etc: see 93/37/EEC Article 2(2).
1026 93/37/EEC Article 2.
1027 Contracts whose value is below the threshold of ECU 5million. This represents in sterling £3,743,203 for the period 1/1/94 to 31/12/95: see Commission Notice at OJ C 341/10 (1993).
1028 93/37/EEC Article 4(b).
1029 93/37/EEC Article 5(a).
1030 93/37/EEC Article 6(4).
1031 93/37/EEC Article 7(1). The three procedures are defined at Article 1 (e), (f) and (g).
1032 93/37/EEC Article 7(4).
1033 93/37/EEC Article 7(2)(b).
1034 93/37/EEC Article 7(2)(c).
1035 93/37/EEC Article 7(2)(a).
1036 93/37/EEC Article 7(3)(a).

reasons connected with the protection of exclusive rights, the work may only be carried out by a particular contractor";[1037] or in cases of "extreme urgency brought about by events unforeseen by the contracting authorities ... (where) the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities";[1038] or "for additional works ... which have, through unforeseen circumstances, become necessary ... on condition that the award is made to the contractor carrying out such work", but subject to further conditions as to "great inconvenience" being suffered if the additional works should be awarded separately, or that the additional works must of necessity be executed with the final part of the original contract, and in any event, the additional works must not amount to more than 50% of the original contract;[1039] or, lastly, repetitive works, providing that the initial award was won by competitive tendering and that all the works are aggregated for the purposes of Article 6 with regard to the application threshold of the Directive, and subject to a maximum three years programme.[1040] The negotiation "exceptions" may be of major importance to a public body who is considering entering into a partnering or alliance arrangement.

The Directive prescribes procedure for giving notification to unsuccessful tenderers of a contract award,[1041] or of the decision to re-tender,[1042] and for making a report on the procurement exercise, if requested, to the Commission.[1043] Large-scale public housing schemes can be processed by "a special award procedure" where it is necessary to involve a contractor in the planning and design work at an early stage.[1044]

(i) Specification and other requirements of tender documents

Specifications are to be prepared "by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications."[1045] It should be noted that reference to national standards which do *not* implement European standards might, in certain circumstances, result in a breach of Article 30 (TEU).[1046] The exceptions permitted arise where there is "no provision for establishing conformity" within the standard, or if there is no "technical means" of so establishing conformity;[1047] or if application of European standards would result in goods incompatible with existing equipment;[1048]or if the project is so "innovative" as to be in advance of any such European standards.[1049] But any public body taking advantage of these carefully defined exceptions must "record, where possible, the reasons for doing so in the tender notice published in the *Official Journal* ... or in the contract documents

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1037 93/37/EEC Article 7(3)(b).
1038 93/37/EEC Article 7(3)(c).
1039 93/37/EEC Article 7(3)(d).
1040 93/37/EEC Article 7(3)(e).
1041 93/37/EEC Article 8(1).
1042 93/37/EEC Article 8(2).
1043 93/37/EEC Article 8(3).
1044 93/37/EEC Article 9. The awarding authority must give sufficient detail in the contract notice and apply the advertising rules relating to "restricted procedures".
1045 93/37/EEC Article 10(2).
1046 Ref to *Commission v Ireland* (Case 45/87) (Dundalk) [1988] ECR 4929; 44 BLR 1; [1989] 1 CMLR 225.
1047 93/37/EEC Article 10(3)(a).
1048 93/37/EEC Article 10(3)(b), but subject to the "contracting authority" having "a clearly defined and recorded strategy" of progression to compliance with European standards.
1049 93/37/EEC Article 10(3)(c).

and in all cases record these reasons in their internal documentation ...".[1050] Where Euro-standards do not exist, specifications should make reference to national specifications which are recognised as complying with Directives on approximation of laws etc relating to construction products.[1051] Specifications should not generally refer to "products of a specific make or source" which would "favour or eliminate certain undertakings." The exception is the case "where such specifications are justified by the subject of the contract".[1052] The words "or equivalent" tacked on to a reference to a specific product is expressly permitted where a contracting authority is otherwise unable to write a "precise and intelligible" specification.

It is submitted that tender documents *should* indicate "the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force" at the project location for the duration of the contract.[1053] When such indication is given, compliance with these obligations must be seen to have been taken into account.[1054]

(ii) Publicity for projects by publishing a notice

All projects caught by the threshold of Article 6 must be given publicity by means of a notice,[1055] as must the award of a contract, subject to exceptions.[1056] Notices must comply with the models given[1057] and are to be placed in the *Official Journal.*[1058] The cost of publication of notices is borne by the Community.[1059] Enquiries to would be tenderers are confined to prescribed matters relating to "economic and technical standards".[1060]

(iii) Tender programme periods

A period of not less than 52 days[1061] must be allowed between "dispatch of notice" and "receipt of tenders" in *open tender* procedures.[1062] Tender documents must be sent out to tenderers within six days of the contracting authority receiving an application to tender.[1063] Any additional tender information must be given at least six days prior to date for submission of tenders.[1064] Further time shall be given where tenderers are required to make site inspection or document inspection.[1065]

1050 93/37/EEC Article 10(4).
1051 93/37/EEC Article 10(5). Refer to Council Directive 89/106/EEC (21/12/1988): OJ L 40/12 (11.2.89).
1052 93/37/EEC Article 10(6).
1053 93/37/EEC Article 23(1). Strictly speaking, this is an option, unless mandatory within a Member State. Good practice suggests that this essential information should be given.
1054 93/37/EEC Article 23(2).
1055 93/37/EEC Articles 11(1)-(4). By Art. 17 a contracting authority may arrange to publish a notice notwithstanding a project cost under the threshold.
1056 93/37/EEC Article 11(5).
1057 93/37/EEC Article 11(6).
1058 93/37/EEC Articles 11(7)-(12).
1059 93/37/EEC Article 11(13).
1060 93/37/EEC Article 11(7). Refer to art. 26 on contractor's financial and economic standing, and to art. 27 on contractor's technical capacity.
1061 See 93/37/EEC Article 33 for method of calculation of time limits.
1062 93/37/EEC Article 12(1): 52 days, or exceptionally 36 days (art. 12(2)).
1063 93/37/EEC Article 12(3): provided tender documents have been "requested in good time".
1064 93/37/EEC Article 12(4): provided the request for information was made in "good time".
1065 93/37/EEC Article 12(5). the only reason why documents have not been forwarded to the tenderers is where they are "too bulky".

In *restricted* and *negotiated* tender procedures a period of not less than 37 days must be allowed between "dispatch of the notice" and "receipt of requests to participate".[1066] All tenderers must then be "simultaneously and in writing" invited to tender. The invitation letter must include detail on prescribed matters, including, inter alia, "the criteria for award of the contract if these are not given in the notice."[1067] When the tender is taken by *restricted* procedure a period not less than 40 days is allowed between "date of dispatch of the written invitation" and "receipt of tenders",[1068] except that a lesser period of 26 days is permitted where the public authority has published the preliminary "indicative notice" in the prescribed form.[1069]

"Requests to participate" from prospective tenderers can be made by letter, telegram, telex, fax or phone, but all electronic communications must be confirmed by traditional letter "dispatched before the end of the period" allowed for such requests.[1070] Periods may be shortened in cases of "urgency": a minimum of 15 days for "receipt of requests to participate ... from the date of dispatch of the notice"; and 10 days "from the date of the invitation to tender" to the date "for the receipt of tenders".[1071] Communications must be made by the swiftest means possible, but again confirmed by letter within the periods stipulated.[1072]

In the case of "concession contracts", not less than 52 days must be allowed between "date of dispatch of the notice" and "receipt of candidatures for the concession".[1073] Where "works contracts" are to be awarded by a "concessionaire other than a contracting authority" the time limits are the same as those prescribed[1074] for restricted and negotiated procedures: 37 days from dispatch of notice to request participation, and 40 days from invitation to tender for receipt of tenders.[1075]

(iv) Article 18

"Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Article 26 to 29."

(v) Selection of tenderers: articles 24-29

Contractors wishing to bid must pre-qualify for participation. Any contractor who is insolvent or is in the process of insolvency proceedings;[1076] or who "has been convicted of an offence concerning

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1066 93/37/EEC Article 13(1). The actual dates are to be fixed by the public body requesting tenders.
1067 93/37/EEC Article 13(2).
1068 93/37/EEC Article 13(3).
1069 93/37/EEC Article 13(4). The notice required here is the 'indicative notice' of Art. 11(1) drafted in accordance with the model in Annex IV A in the *Official Journal*.
1070 93/37/EEC Article 13(5).
1071 93/37/EEC Article 14(1).
1072 93/37/EEC Article 14(3).
1073 93/37/EEC Article 15.
1074 By 93/37/EEC Article 13.
1075 93/37/EEC Article 16.
1076 93/37/EEC Article 24(a) and (b).

his professional conduct";[1077] or who "has been guilty of grave professional misconduct";[1078] or who has not made the necessary social security or tax payments;[1079] or is "guilty of serious misrepresentation in supplying the information required" by this Directive[1080] "may be excluded from participation". Provisions are made with regard to acceptable proof of these matters. Contractors wishing to tender may have to show that they are licensed or registered as their local laws demand.[1081]

The next hurdle is that of "financial and economic standing", followed by "technical capability". Financial soundness can be demonstrated by production of "statements from bankers;[1082] or by the firm's accounts;[1083] or by an annual turnover statement;[1084] or by some other appropriate means.[1085] Technical competency may be demonstrated by formal qualifications;[1086] or a certified list of satisfactorily completed projects;[1087] or a list of tools and equipment;[1088] or details of the workforce and managerial staff,[1089] or of the "technicians or technical bodies which the contractor can call upon for carrying out the work".[1090] The contracting authority must state in the notice or in the invitation what references are to be given by tenderers.[1091]

Having weighed both the personal information and the economic and technical information the contracting authority must then draw up a short list from which tenders will be invited.[1092] Under restricted procedure at least 5, and up to 20, firms shall be invited to tender. This information must be given in the contract notice.[1093] UK observers would no doubt think that 20 tenderers is generally far too many for a *restricted* procedure! Under negotiated procedure tenders must be invited from at least three firms.[1094] There must be no discrimination on the grounds of nationality when drawing up tender lists.[1095]

[1077] 93/37/EEC Article 24 (c). The conviction must be "by a judgment which has the force of *res judicata*". Clearly a judgment of the High Court would be sufficient, as would a decision by any tribunal made within its competency.
[1078] 93/37/EEC Article 24(d). The misconduct must have been "proved by any means which the contracting authorities can justify".
[1079] 93/37/EEC Article 24(e) and (f). The payment liability could arise in the country of the contractor's domicile or in the country of the contracting authority.
[1080] 93/37/EEC Article 24(g).
[1081] 93/37/EEC Article 25. In the UK a company might have to prove registration with the Registrar of Companies. There is no register or licensing arrangement specifically for building and civil engineering contractors.
[1082] 93/37/EEC Article 26(1)(a). This should not be taken literally as a 'bank statement' but as a 'bank reference'.
[1083] 93/37/EEC Article 26(1)(b), but only where publication of the company's balance sheet is required by local law. Is there any country within the EU which does not require such publication?
[1084] 93/37/EEC Article 26(1)(c). Who scrutinises these statements? There is no provision made for verification here.
[1085] 93/37/EEC Article 26(3). The contracting authority may consider some other form of reference to be appropriate.
[1086] 93/37/EEC Article 27(1)(a).
[1087] 93/37/EEC Article 27(1)(b): works carried out over the past five years.
[1088] 93/37/EEC Article 27(1)(c): available for carrying out the work.
[1089] 93/37/EEC Article 27(1)(d): figures for the last three years.
[1090] 93/37/EEC Article 27(1)(e): "whether or not they belong to the firm".
[1091] 93/37/EEC Articles 26(2) and 27(2).
[1092] 93/37/EEC Article 22(1) but only when restricted or negotiated procedures apply.
[1093] 93/37/EEC Article 22(2). The range is to be determined by the "nature of the work to be carried out", but "in any event ... sufficient to ensure genuine competition."
[1094] 93/37/EEC Article 22(3), providing "there is a sufficient number of suitable candidates."
[1095] 93/37/EEC Article 22(4). Each Member State is charged with a positive duty to ensure that such discrimination does not take place.

(vi) Criteria for the award of contracts - "Chapter 3"

In principle there are two bases on which contracts can be awarded: "lowest price only"[1096] or "most economically advantageous tender".[1097] The exception is the case where a Member State had, at the time of adoption of the Directive, established rules for awarding contracts on "other criteria", "on condition that the rules invoked are compatible with the EEC Treaty."[1098] A contracting authority may decide to reject abnormally low tenders but it must first "request in writing details of the constituent elements" and attempt substantiation of the "explanations received".[1099] If the tender under consideration is to be considered on "lowest price only" the contracting authority must notify the Commission about any rejection of low tenders.

(vii) Taking into account Article(s) 19 (and 20-23)

When considering "lowest price only" tenders a "contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required ...".[1100] Any specific requirements for the presentation of variants, and any minimum specification content of variants must be stated in the contract documents. The tender notice should indicate if variants will not be considered at all. Rejection of a variant must not be made "on the sole grounds that it has been drawn up with technical specifications defined by reference to *national* standards ... or ... by reference to *national* technical specifications ..." (emphases added).

Contracting authorities may include an item in the contract documents seeking an indication of the extent of work to be sub-contracted by a successful tenderer.[1101]

Bids may be submitted by consortia without any obligation as to "specific legal form". However the successful consortium may be required to assume such specific form when "awarded the contract".[1102]

10.7 The equal treatment obligation.

In the *Commission v Denmark*[1103] the court said that although the directives did not refer specifically to an obligation imposed on contracting authorities which required equal treatment of all tenderers, it was nonetheless a duty which went to the very essence of the procurement directives. The equal treatment obligation has been found to exist in common law as an implied term of the

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1096 93/37/EEC Article 30(1)(a).

1097 93/37/EEC Article 30(1)(b). Examples of appropriate criteria are "price, period for completion, running costs, profitability, technical merit". Under Art. 30(2) the contract notice or the contract documents must state the relevant criteria to be applied "in descending order of importance".

1098 93/37/EEC Article 30(3). The special rules should have as their objective the giving of "preference to certain tenderers". Under Art. 32 the special rules and their application are to be reported to the Commission.

1099 93/37/EEC Article 30(4). The explanations are to be considered on "objective grounds". Suggested factors to consider are: (i) economy of construction method; (ii) chosen technical solution; (iii) exceptionally favourable conditions available to the tenderer; and (iv) originality of the tenderer's proposed work.

1100 93/37/EEC Article 19.

1101 93/37/EEC Article 20. There is an express provision that the giving of this information is "without prejudice to the ... principal contractor's liability."

1102 93/37/EEC Article 21. Presumably the new form must be adopted *prior* to the making of a binding contract.

1103 Case C-243/89 [1993] ECR I – 3353.

'tendering contract' or 'pre-award' contract: it also exists in EU procurement directives.[1104] In the *Denmark* case it was thought that a consequence of the equal treatment obligation was that all tenderers must submit conforming tenders in order to enable objective comparison.[1105] In the common law, it seems that the equal treatment obligation would only arise upon the submission of a tender that conforms to the tender conditions. Therefore, in the common law, a non-conforming tender would not benefit from the owner's or contracting authority's duty of equal treatment. It is hard to see how the procurement directive can impose an obligation on the tenderer. Both the Directive and the Regulations seem one sided, imposing obligations only on the public body concerned. What would be the contracting authority's remedy if the tenderer failed to honour its obligation to submit only a conforming tender? The better view, it is submitted, is that the equal treatment obligation only arises upon the submission of a conforming tender. Perhaps something was lost in the translation of the judgment from French to English!

10.8 Negotiations after opening of bids and prior to award of contract.

One consequence of an obligation of equal treatment is that the contracting authority will almost certainly be in breach of this obligation if it embarks on discussions or negotiations with one or a selected few of the tenderers. The safe solution, from a common law perspective, is to have no negotiations, or to have the same negotiations with all tenderers and to conclude with a fresh round of bids.[1106] The Commission has issued guidance to contracting authorities:

> "In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination."[1107]

It's hard to see how this can be good advice, since any change made to a tender after opening will tend to have a discriminatory effect. Perhaps the only amendment permissible would be correction of the sort of administrative error found in the New Zealand case of *Mirelle v The Attorney-General and the Ministry of Commerce.*[1108] A public transport authority in Belgium failed to heed the Commission's advice (above) when one tenderer was allowed to amend its tender after sending in 'supplementary' notes as to the technical aspect of its bid. The court found Belgium to be in breach of the equal treatment obligation.[1109]

1104 See the cases discussed in Chapter 6 with respect to the tendering contract and equal treatment obligation in common law.
1105 [1993] ECR I - 3353, 3394 par 37.
1106 From an analysis of the private law cases after Ontario v Ron Engineering (1981), discussed in chapters 2-8.
1107 See [1994] OJ L 111/114, with respect to Directives 93/37 and 93/38.
1108 Unreported. High Court of New Zealand, CP 969/91, Heron J, 27.11.1992.
1109 *Commission v Belgium* Case C-87/94 (the 'Walloon Buses' case) 25.4.96.

10.9 Remedies for breach of contracting authority's obligation under the Treaty, the Directives and the national Regulations.

Council Directive 89/665/EEC recognised the need for interim measures to be available within a Member State to suspend a public contract award, and that such actions must be dealt with as a matter of urgency. It also noted the need for a means of setting aside the effect of unlawful procedures and for providing compensation for harm suffered as a result of a breach of public procurement obligations.[1110]

Under Article 2 of 89/665, a Member State is required to ensure within its jurisdiction sufficient interlocutory measures to correct an alleged infringement, or to prevent further damage to interests protected under the Works Directive. There must be effective measures to suspend a contract award or the implementation of the decision of a contract awarding authority. The review procedures must be able to award damages by way of compensation to an injured bidder.

The provisions of this directive are enacted in the UK by Public Works Contracts Regulation 31, which creates a condition precedent to commencing proceedings: the aggrieved tenderer must have notified the contracting authority of its alleged breach and of its intention to bring proceedings, and must commence those proceedings within three months of the date when grounds to bring the proceedings first arose. The High Court has discretion to extend the period for commencing proceedings. In the *Portsmouth* case[1111] the trial judge found that the aggrieved tenderer had failed to particularise its claim to the contracting authority and was thus prevented from bringing it before the court. The claimant must be specific, said the judge, about the duty broken. It was apparently not sufficient to say merely that there had been a breach of the Regulations. A plaintiff must say, for example and as it was later established in *Portsmouth*, that the authority had failed to publish a notice in the Official Journal and had failed to state the criteria to be used in the evaluation of tenders as required by specific Regulations.[1112]

The alternative remedies regime are those provided by the Treaty itself, and are the remedies most evident in the reported cases. An aggrieved tenderer (or a Member State under Article 170 (TEU)) might complain directly to the Commission about the alleged breach of procurement obligations by a contracting authority. Neither the Directives or the Regulations can remove or restrict that right. Under Article 169 (TEU) the Commission may take action by first asking the relevant Member State to submit its observations on the matter, then serving its reasoned opinion to the State. If then the Commission is of the view that further action is required, it may commence proceedings in the Court of Justice. The Commission may seek an injunction or a declaration. The Court has set aside concluded contracts on at least two occasions.[1113]

1110 See preamble to Directive 89/665, [1989] OJ L 395/33.

1111 *R v Portsmouth City Council, ex p Peter Coles, Colwick Builders Ltd and George Austin (Builders) Ltd.* Unreported, Keene J, 6.6.1995. Part affirmed and part reversed, (1996) 81 BLR 1; The Times 13.11.1996 (CA).

1112 See also Regulation 26 of the Public Supply Contracts Regulations 1991 and Regulation 30 of the Utilities Supply and Works Contracts Regulations 1992 for similar effect

1113 Case 199/85 *Commission v Italy* [1987] ECR 1039, and Case C-272/91R (*Lottomatica) Commission v Italy* [1992] ECR I - 457.

It is uncertain as to what principles apply when awarding damages for breach of the procurement Directives and Regulations.[1114]

10.10 Framework Agreements and the scope for alliances.

The Utilities Directive 93/38 provides for the possibility of a 'framework agreement'. this is defined as follows:

> "Framework agreement shall mean an agreement between one of the contracting entities [ie public undertakings] defined in Article 2 and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period".

Under Article 5(1) a contracting entity "may regard a framework agreement as a contract within the meaning of Article 1(4) and award it in accordance with this Directive." This means that the framework agreement is treated as if it was a supply, works or services contract. Further, under Article 5(2) the contracting entity may then apply Article 20(2)(i) when awarding contracts based on the framework agreement. Framework agreements cannot be used to circumvent the ideals of the Treaty or the Directives. There must be no obstacle created to competition (Article 5(4). The derogation provided by Article 20(2) is that the contracting entity can adopt a procurement procedure "without prior call for competition". If the framework agreement is made otherwise than in accordance with the Directive, the derogation of Article 20(2)(i) is not available.

The framework agreement seems to offer the possibility of developing medium term alliance or partnering agreements with suppliers. This statement, of course, says nothing of the legal relationships which will arise during the procurement process. A framework agreement may be nothing more than a 'standing offer' whereby the contracting entity obtains, say, a price list of supplies or services, and calls off orders as and when needed. In reality there is no legal agreement until an order is placed. Generally, the supplier can withdraw its offer at anytime unless the contracting entity has purchased an option from the supplier, whereby the supplier is obliged to keep the offer open for the relevant period. Under this unilateral agreement, the contracting entity is not, however, bound to purchase. Alternatively, the framework may create reciprocal or bilateral contractual relations between the contracting entity and supplier, or group of suppliers, but the quantities of the various products or services to be supplied remain uncertain until an order is placed, but the entity is obliged to buy, and the supplier(s) are obliged to supply, all the contracting entity's requirements for the relevant period.[1115]

1114 See discussion at §13.8 and §14.18 of Craig's *Procurement Law*.
1115 See Chapter 2 of Craig's *Procurement Law*.

If, as the Commission suggests, a framework agreement under Article 5(1) is not actually a contract, then only the first two arrangements described above (standing offer, with or without option) qualify. The contracts resulting from the framework agreement are not by definition part of the framework, but these contracts may be awarded without a prior notice inviting competitive tenders. It remains necessary to communicate the contract award to the Commission under Article 24. Presumably if the contracting entity exercises its discretion not to treat its framework agreement as if it was a supply, works or services contract within the meaning of Article 1(4), any contracts placed out of the framework are bound by the full requirements of the Directive, including the prior call for competitive tenders.

Suppose the contracting entity opts to "regard [its] framework agreement as a contract" under Article 5(1). This gives scope to develop its alliance with suppliers in the spirit of trust and mutual co-operation associated with partnering, negotiating final quantities and prices within the derogation provided as to competitive tendering. This alliance arrangement could continue for the period of the framework, the contracting entity remaining mindful of the need to be able to demonstrate that it has not misused the framework agreement so as to hinder, limit or distort competition. The need to remain competitive imposes a time limit on the life of the framework. It seems likely that the market must be tested competitively at regular intervals.

There is no provision as to framework agreements in the Works Directives, the Supplies Directive or the Services Directive, yet it seems that local authorities, health trusts and the like have been adopting framework agreements in the context of the procurement of public services. The Times[1116] reported that the European Commission has threatened legal action in the European Court of Justice against the UK over its policies adopted for procurement of services in the public sector. The Commission had complained about the UK contracting out services in breach of Services Directive 92/50. This complaint covers contracts awarded by central government departments, local authorities, health services trusts etc. The complaint is with respect to framework agreements, where government bodies make deals for a period of three years with a panel of up to twenty contractors.

The Commission's complaint is that, despite advertisement in the *Official Journal* of the opportunities for making framework agreements, such agreements are anti-competitive. All contracts (over the threshold of £108,677) they say, should be put out to competitive tender.

There seems to be a difference in philosophy between the UK, which appears to want more flexibility, less competition, and less EU control over its procurement of public services, and the Commission, which wants more competitive tendering of individual procurements.

[1116] The Times 19 June 1997.

10.11 Public works contract. Breach of Articles 30, 48 and 59 (TEU) and breach of Council Directive 71/305 by inviting tenders on basis of 'Danish content' clause. Breach of the principle of equal treatment of tenderers, which lies at the heart of the public works directive, when Storebaelt negotiated with tenderer on a non-compliant tender.

Commission of the European Communities v Kingdom of Denmark (Case C-243/89). [1117]

SCENARIO

The Store Baelt, or 'Great Belt' is the stretch of water about 17km wide which separates the Danish islands of Funen (Odense) from Zealand (Kobenhavn). The Danish Government proposed construction of a road and rail link across the Great Belt. A company, controlled by the Danish State, was formed in the name of Aktieselskabet Storebaeltsforbindelsen (Storebaelt). On 9 October 1987, a notice was published in the *Official Journal* in the form of a restricted invitation to tender for the construction of a bridge across the Western Channel, estimated to cost DKR 3 billion (about 10% of the total project cost). At that time a tunnel in the Eastern Channel was in course of construction and tenders for the Eastern Bridge in course of preparation. On 28 April 1988 Storebaelt invited five contractor groups to submit tenders.

General Condition 6, clause 2, (the 'Danish content' clause) provided:

> "The contractor is obliged, to the greatest possible extent, to use Danish materials and consumer goods, Danish labour and equipment."[1118]

Storebaelt had produced three designs of bridge for tender purposes. General Condition 3, clause 3, permitted each tenderer to produce an alternative tender, on the basis that detailed design was performed by the tenderer to the satisfaction of the employer. A tenderer was also required to take full professional responsibility for the project and for its execution. The appointed contractor would also carry the risk for variations in quantities of work required as a consequence of the alternative design. The conditions for alternative tender also required that:

> "if the contractor submits a tender for an alternative project for which he assumes responsibility, he must state a price allowing for a reduction in the event that the contracting authority decides to take over the detailed planning [and design] of the project."[1119]

The European Storebaelt Group (ESG)[1120] was one of the five tendering groups. It submitted an alternative tender for a concrete bridge, for which ESG retained design risk. In order to be able to compare and assess the tenders, Storebaelt had to initiate discussions with the tenderers, and it was necessary to settle numerous tender reservations (tender tags). After a considerable fall-out in the number of tenders, Storebaelt continued negotiations with ESG on the alternative tender.

1117 Case C-243/89 [1993] ECR I - 3353. European Court of Justice, Full Court, 22.6.1993.
1118 [1993] ECR I - 3353, 3357/12.
1119 *Ibid.*, 3388.
1120 A consortium comprising Ballast Nedam from the Netherlands, Losinger Ltd from Switzerland, Taylor Woodrow Construction Ltd from UK, and three Danish contractors.

Those negotiations culminated in the signature on 26 June 1989 of a contract between ESG and Storebaelt.

The Commission, thinking that the above procedure was incompatible with European Union law, first wrote to the Danish authorities on 18 May 1989. The Commission was concerned that the clause requiring 'Danish content' was contrary to the principle of non-discrimination of Articles 30, 59 and 48 of the Treaty (TEU), and that tenders submitted had not been considered on an equal basis, as required by Directive 71/305. The unequal treatment allegation had arisen because the basis of negotiations was inconsistent with the General Conditions. Correspondence passed between the Commission and the Danish Government. The Commission asked that the signing of the contract be delayed: the Danes agreed to delay the signing for some time. The Danish government instructed Storebaelt to drop the offending 'Danish content' clause from the contract. As the tender expired on 30 June 1989, further delay was not acceptable to the Danish government and the contract was signed. The Commission then delivered a reasoned opinion on 14 July concluding that the Danish government had failed to fulfil its obligations under EU law, and that the proper course of action would be to rescind the contract and recommence the tendering process.

The Danish government responded by telex on 21 July 1989. It was acknowledged that the tender conditions were incompatible with EU law, but the problem was solved, it said, by removing the 'Danish content' clause before it had had any adverse affect on the other tenderers. On the second complaint, the Danes argued that the General Conditions permitted the employer itself to substitute an alternative design and take the design risk. The Commission therefore misunderstood the effect of the General Conditions. The negotiations with ESG had taken place after the submission of tenders, was no more than normal practice and was within the scope of every employer's fundamental power to start discussions with tenderers in order to agree matters arising out of a tenderer's reservations. The government further argued that the Commissions request to rescind the contract and recommence the tendering procedure was excessive from the point of view of Articles 169 and 171 of the Treaty, and from the point of view of Article 186. It would be wholly disproportionate to suspend the work, it argued, in view of the interests of third parties. There would be serious delay and costs for the Danish government. Excluded tenderers could get sufficient redress in the Danish courts.

The Commission persisted in the view that Denmark had failed to comply with its reasoned opinion and commenced an action for a declaration on 2 August 1989 before the Court of Justice under Article 169, EU Treaty. The Commission maintained its argument that Storebaelt was in breach of its obligation in Community law in view of its 'Danish content' clause and having conducted negotiations with the selected tenderer on the basis of an invalid tender.

The Commission also sought "interim measures" (an injunction) under Article 186. This was heard on 22 September 1989, when the Danish government issued the following statement:

"1. The Danish Government recognises that the General Conditions for tendering concerning the Western Bridge of the Great Belt contained a clause which was phrased so that it contravened the basic principle of non-discrimination enshrined in the EEC Treaty.

2. The Government has endeavoured to remedy this infringement of the Treaty by ordering the clause to be removed from all contract materials before the signing by 'Storebaelt A/S' of a contract for the construction of the Western Bridge. The Government solemnly undertakes vigorously to prevent discriminatory clauses or practices in future contracts for public works or purchase of goods.

3. The Government declares that the clause will entitle the tenderers on the Western Bridge to damages from 'Storebaelt A/S' provided that the said tenderers demonstrate a justified claim according to the normal conditions of Danish law (that economic loss has been suffered, that said loss was caused by the clause, etc).

4. However, as to the bidding costs the tenderers will have access to arbitration proceedings for the recovery of those costs. In those proceedings they will not have to establish that they would have won the contract in the absence of the clause.

5. This declaration is legally bonding on 'Storebaelt A/S'."[1121]

The Commission withdrew its application for interim measures in consequence of this statement.

(1) The argument as to 'Danish content'.

The Commission's argument was as follows. General Condition 6, clause 2, (the 'Danish content' clause) amounted to a barrier to the free movement of goods, services and workers. The requirements of this clause are based on nationality. Such manifestly discriminatory provisions are contrary to the fundamental principle of Article 7 (EEC Treaty), which provides

> "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."[1122]

The obligations which flow from the 'Danish content' clause hinder the import of materials from other countries and affect undertakings established in other Member States and non-Danish workers.[1123]

Although the offending contract clause was belatedly removed by the Danish Government, this rectification was insufficient to remedy such a serious and fundamental procedural defect within the invitation to tender. The offending clause affected the composition of the various tendering consortia and the contract documents sent out to the five prequalified consortia. Those documents

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1121 [1993] ECR I - 3353, 3360.
1122 Now Article 6 (TEU).

required tenderers to specify the percentage of Danish participation in the labour element of the contract. Detailed requirements were set out that certain materials must be supplied by Danish producers and that certain categories of products must be of a Danish origin. The existence of those detailed requirements rendered entirely irrelevant the argument that Condition 6, Clause 4 of the General Conditions enabled a tenderer to choose its suppliers and materials freely. The removal of the offending clause after submission of tenders had no real effect. It did not reverse losses suffered by unsuccessful tendering consortia. The Danish Government must require 'Storebaelt' to rescind the contract and invite resubmission of tenders on a basis consistent with Community law. Whether the contract awarded to ESG was valid in Danish law was not the issue here: it should be cancelled because it is inconsistent with Community law which has primacy over domestic law.

The Danish Government defended. It had recognised the infringement complained of and corrected the contract conditions before it was signed and admitted its liability towards tenderers. It had thus complied with the Commission's reasoned opinion given under Article 169 (TEU). Following the decision of the ECJ in *Commission v Italy*,[1124] the Commission's application must be dismissed. Its declaration of 22 September 1989 had recorded its failure as conclusively as any judgment could.

The Commission replied. The Danish Government had not complied with its reasoned opinion, which required a tendering process in accordance with Community law. This could only be realised by retendering the project on documents purged of obligations as to 'Danish content'. And, contrary to its statement of 22 September 1989, the Danish Government had not fully removed 'Danish content' from the contract conditions. 'Danish content' still appeared in the contract in the form, in particular, of specifications concerning materials. Three of those specifications were mentioned in the application, namely structural steel from Det Danske Stalvalsvaerk A/S, the components of the cement-based injection materials which must be manufactured in Denmark and the granite which must be Vang granite. After a more detailed examination, the Commission added three further specifications which required 'Danish content': only *imported* embankment materials had to be approved by a representative of the employer, the ballast for the railway had to be of a mineralogical composition which was normal for embankment sand *only* of Danish origin, and the guarantee to be provided by the contractor must be issued by a Danish bank or insurance company approved by the employer. Furthermore, the Commission had discovered in the final contract fresh conditions as to 'Danish content': dredging of embankment sand by *foreign* vessels was permitted *only* in the 'Romso SE' deposit, ESG reserved the right to require the use of *Danish* vessels notwithstanding the additional cost which might be involved and the loose cinders to be used could be of foreign origin *only* if the contractor proved that Danish loose cinders were not available on the market.

In addition, the Commission observed that unsuccessful tenderers' claims had not been settled because ESG had advocated an over-restrictive interpretation of the Danish Government's

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[1123] See Case 31/87 *Beentjes* [1988] ECR 4635.
[1124] Case 121/84 [1984] ECR 107.

statement. It was essential, said the Commission, both for future tenderers and for any actions seeking to establish liability in the present case, that the extent of the Danish Government's liability be established, even when, as here, it was no longer possible to secure full compliance with Community law through the annulment of the contract.

The Danish Government rejoined. The commission had not indicated in its application, or in its reply, upon what basis in Community law it relied, when it claimed that tendering should be recommenced. The Commission's position was "incomprehensible", in that it called for a new tender round, whilst at the same time it recognised that it was no longer possible to secure full compliance with Community law through annulment of ESG's contract. If the Commission was of the opinion that failing to undertake a fresh tender round was itself an infringement of Community law, it should bring a separate action under Article 169 (TEU). As the contract with ESG was not the subject of the Commission's claims there was no ground for any finding against the Government on that point.

With respect to the points raised by the Commission on the content of the contract specification, certain corrections were necessary, said the Danish Government. The references to qualities of Danish materials had been removed for all main supplies. The Danish Government conceded that certain provisions of the contract, of secondary importance, still contained specifications concerning Danish content. The provisions concerning structural steel, cement and Vang granite were in fact retained. The specifications concerning imported embankment materials was based on an incorrect translation of the term 'tilfore'. The specifications for railway ballast related to a layer of gravel beneath the ballast and constituted a quality requirement. The requirement of a guarantee to be provided by a Danish bank or insurance company was intended to ensure the most rapid enforcement possible of the guarantee. The provisions concerning dredgers were attributable to environmental protection objectives. As regards the use of loose cinders, the Danish Government denied that the specifications required them to be Danish.[1125]

QUESTION

(1) Is the Danish Government in breach Articles 30, 48 and 59 (TEU) and in breach of Council Directive 71/305 concerning the co-ordination of procedures for the award of public works contracts, in particular Title IV thereof by inviting tenders on the basis of the 'Danish content' clause?

Yes, said the Court in *Commission of the European Communities v Kingdom of Denmark* (Case C-243/89). The Commission's contention was well-founded on the first question.

The Court held that the action was admissible only in so far as the two grounds of the Commission's application related to the two provisions quoted from the General Conditions of

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[1125] This restatement of the arguments is derived from the *Report before Hearing*, prepared by the Judge-Rapporteur, PJG Kapteyn [1993] ECR I - 3353, 3364-3366.

tender,[1126] that is the 'Danish content' clause and the 'alternative tender' clause which led to the negotiation complained of.

(1) The argument relating to the 'Danish Content' clause

The Commission was not prevented from referring to other provisions of the contract in support of its argument. It was undisputed by the parties that the Danish content clause, as set out in Condition 6, Clause 2, of the general conditions, was incompatible with Articles 30, 48 and 59 of the Treaty (TEU). The court did not accept the Danish Government's argument that having deleted the clause from the contract, it had complied with the Commission's reasoned opinion. The fact remained that the tendering procedure was conducted on the basis of a clause which did not conform with Community law and which, by its nature, was likely to have affected both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia. It followed that the mere deletion of that clause at the final stage of the procedure could not be regarded as sufficient to have made good the breach of obligations alleged by the Commission. If the Danish Government had postponed the execution of the contract, as it had been asked to do, the breach of obligations complained of would not have produced any legal effects.

The Danish Government's contention that, because it had accepted liability, the action was, on this point, devoid of purpose, was rejected by the court, who said:

> "In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists even if the State concerned no longer denies the breach and recognises that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability."[1127]

(2) The argument as to negotiations undertaken on the basis of an invalid offer.

The Commission claimed that under ESG's alternative tender for a concrete bridge, the employer carried the design risk, whereas General Condition 3, clause 3, provided that an alternative tender was to based on the assumption that the tenderer provided the detail design and took full liability for design risk. Storebaelt considered ESG's noncompliant alternative tender as a basis for negotiations. In doing so, Storebaelt ignored the conditions provided within the contract documents and infringed the principle of equal treatment of all tenderers, laid down, inter alia, in Title IV of the Works Directive.

[1126] This was a procedural point. The case law of the ECJ has established that in actions brought under Article 169 (TEU) the scope of the action is defined by the matters of fact and law raised in the Commission's letter of formal notice and its reasoned opinion.

[1127] [1993] ECR I - 3353, 3393

Storebaelt did not itself adopt ESG's design as envisaged in General Condition 3, clause 3, which provided that in such circumstances the tenderer was to quote a reduced price. The Commission recognised the possibility that a tenderer might reserve or qualify some aspect of its tender but that possibility was limited by the terms of the tender documents which must be identical for all tenderers. That position was confirmed by Article 11 of the Works Directive, which provided that a tenderer must comply with the contract documents.[1128] It followed that the fundamental tender conditions could not be altered to suit one tenderer alone. Under the applicable tender conditions, an alternative tender must consist of a firm offer inclusive of all design risk for the tenderer's proposed structure, whereas, ESG's price was not firm but required further and extensive negotiation, and it was capable of modification when ESG was in possession of the prices submitted by competitors. The issue here was not as to the observation of certain formalities, but whether the procedure was regular so as to permit a fair evaluation of all tenders at initial opening and in subsequent stages. The Commission argued that Storebaelt was not able to make objective comparison of tenders, because it changed the conditions for ESG then negotiated on many aspects of its tender. The last phase of tender evaluation was therefore unfair to the other participants and the best offer did not necessarily win.

The Danish Government countered that the Commission had not in its application clearly identified which Community rules had been infringed or the factual circumstances. There was no rule of Community law, they argued, as to the extent to which a qualified tender may be considered, or as to the limits imposed on negotiations between employer and tenderers. ESG's offer, they observed, was chosen on the basis of criteria defined within the tender documents consistent with Article 29 of the Works Directive. ESG was given no preferential status and equality of treatment was observed for all tenderers. The matters criticised are outside of Community law.

As to the contract documents, the Danish Government observed that General Condition 3, clause 1, permitted tenderers to submit tenders both for the tendered design with or without variations, and for alternative designs. ESG's tender was without doubt an alternative design. Condition 3, clause 3, required the employer to bear the design risk exactly on the same basis as if it was its own design, in the event of the employer's choosing to undertake the detailed design of an alternative project drawn up by a tenderer. The Danish Government emphasised that in ESG's tender based on an alternative design, the amount of the contract had been fixed on the assumption that the employer would himself undertake the detailed design, this being a procedure not covered by Condition 3, clause 3. Moreover, ESG's offer merely supported a proposal which the employer did not ultimately take up.

Tenders were invited on 28 April 1988 and the contract had been signed on 26 June 1989. According to the Danish Government negotiations started with ESG after the middle of March 1989. The first meeting was held on 29 march 1989. Storebaelt's contacts with ESG before that date involved only requests for technical clarifications and did not raise questions of price. The negotiations with ESG led to agreement as to the responsibility for detailed designs and the

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[1128] See now Article 19 of Works Directive 93/37/EEC.

quantities set out in the contract. As compared with ESG's tender, which assumed that the detailed designs would be executed by the employer, the contract price was increased by DKR 50 million for the detailed designs to be prepared by ESG itself and for assumption of the associated design risk. The design contracted for did not differ substantially from the alternative tendered design. The changes to the ESG design were of a purely technical nature and were entirely normal in circumstances where an offer is based on a design prepared by the successful tenderer. The Danish Government rejected the view that any real negotiations took place over price with respect to responsibility for detailed design and design risk.

The Commission rejoined. It was clear from the text of the Works Directive that Member States were obliged to incorporate its requirements into their national law, and above all that they must make certain that the general principle of equal treatment for all economic agents, which is at the root of that Directive's provisions, is observed by the authorities awarding contracts. The invitation to tender must be based on objective, predetermined conditions which are known to the tenderers and which provide a fair basis of comparison. Those principles are derived in particular from the last two recitals in the preamble to the Directive. Observance of the Directive means that no change can be made to the contract documents and conditions of tender by the contracting authority for the benefit of one or more tenderers in the course of the tender process. That requirement applies also to tender variations or alternative designs. The provisions of Works Directive, Article 9, which authorise derogations from the rules intended to ensure the effectiveness of rights conferred by the Treaty with respect to public works contracts, must be interpreted strictly.[1129]

With respect to the principle of equal treatment, the Commission states that Article 20 of the Directive does not allow any possibility of negotiating the conditions of the invitation to tender. Those conditions must be observed in the final contract and there must be objective reasons for any changes to them. That position is confirmed by the statement of the Council and the Commission concerning Council Directive 89/440 of 18 July 1989 amending Directive 71/305.[1130] That statement constitutes an authentic interpretation of Community law and states as follows:

> "Statement concerning Article 5(4) of Directive 71/305/EEC. The Council and the Commission state that in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination."

The issue then for the court, argued the Commission, was whether Storebaelt complied with the fundamental principle of equal treatment, not whether it complied with Danish law. Compliance with local law did not necessarily mean compliance with Community law. Storebaelt acted in breach of

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1129 Case 199/85, *Commission v Italy* [1987] ECR 1039.
1130 [1989] OJ L 210/1.

its equal treatment obligation when it agreed to the various qualifications put forward by ESG in the course of negotiations. It was contrary to Community law to conclude a contract which limited liability to a ceiling of DKR 300 million and set a time limit for liability of six years, when tender conditions did not permit any limitation of liability in terms of value or duration. A contractual provision which limited ESG's risk as to under-quantification of work required to a fixed sum of DKR 5 million appeared to the Commission to be the result of negotiation, as was a 'special' stipulation that ESG would be paid separately for additional work in respect of which it assumed design risk.

There were several other contractual provisions incompatible with the tender documents and which therefore appeared to the Commission to be the result of negotiations, which was inconsistent with the principle of equal treatment.

The Danish Government rejoined. Community law made no provision for dealing with tender qualifications, but this was to be dealt with under national law. The requirement for equal treatment was satisfied because all tenderers were subject to a uniform application of Danish tender rules. The Commission should not be allowed at this late stage to introduce fresh argument and a 'new' principle of equal treatment. The Works Directive presupposed that tenders containing a reservation or qualification may be considered when, as here, tender conditions expressly permitted. Storebaelt was not obliged to determine a price in respect of the reservation included within ESG's design which was adopted, because it was a substitute for the employer's own design. There was nothing in Community law which prevented tender reservations or qualifications from being taken into account. All that was required was that tenderers knew of that possibility, and that no reservations or qualifications could be made on matters stated to be subject to strict interpretation.

The Danes observed that the Works Directive was silent on the extent to which negotiations are permissible, and that in such circumstances, national law applied. Danish law prohibited an employer from conducting negotiations with a view to lowering the price but it was permissible to negotiate with the tenderer who, before the commencement of negotiations, was already the lowest bidder for the project in question. As to the matter of risk linked to preparation of design and the questions over quantification of work to be done, the Danish Government contended that the Commission's arguments were based on confusion between the concepts of additional work and quantity variations. The contract concluded with ESG resulted in ESG bearing those risks, in accordance with the contract documents. It also states that the negotiations that were carried out concerning the risks associated with detailed design and quantities are not reflected in any change in the prices given in ESG's tender. The slight price increase was entirely in proportion. The Commission's claim should be dismissed.[1131]

1131 *Report before Hearing*, prepared by the Judge-Rapporteur, [1993] ECR I - 3353, 3366-3372.

QUESTION

(2) Is the Danish Government in breach of Council Directive 71/305 concerning the co-ordination of procedures for the award of public works contracts, in particular Title IV thereof by conducting negotiations with a selected tenderer on the basis of its invalid tender?

RESPONSE

Yes. The principle of equal treatment of tenderers, which lies at the heart of the Public Works Directive, was breached when Storebaelt negotiated with ESG on a non-compliant tender.

The Danish Government had argued that the Commission's claim based on its alleged breach of the 'principle of equal treatment' was constructed on a new legal basis, that 'principle' not being mentioned in the Works Directive. As the principle behind this claim had not been mentioned in the Commission's letter before action or its reasoned opinion, it was therefore inadmissible. This argument was rejected by the court which said that:

> "... although the [Works] Directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which in Title IV, lays down criteria for the selection and for award of the contracts, by means of which such competition is to be ensured."[1132]

As to the Commission's complaint with respect to the negotiations undertaken to produce ESG's successful tender, the court said that in order to assess the compatibility of the negotiations conducted by Storebaelt with the principle of equal treatment of tenderers, it must first be considered whether that principle precluded Storebaelt from taking ESG's tender into consideration. Observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.[1133]

Whilst, as the Danish Government argued, Danish law may permit tenders with reservations to be accepted, when that legislation is applied, the principle of equal treatment of tenderers must be fully respected. It would, for example be a breach of the equal treatment principle, if tenderers were allowed to depart from the basic terms of a tender by means of reservations, unless the tender conditions expressly permitted such departure. ESG's tender was not compliant, in so far as it failed to comply with Condition 3, clause 3. Its proposed price was not based (as it should have been) on the fact that it was required to undertake detailed design of its alternative structure and be fully at risk as to design and any variation in construction quantities.

[1132] [1993] ECR I - 3353, 3393-94.

[1133] Reference was made here to Council Directive 71/305/EEC, Article 11, which was deleted in amending directive 89/440/EEC: see Council Directive 93/37/EEC, [1993] OJ L 199/82.

The court was in no doubt that Condition 3, clause 3 was a fundamental requirement of the tender conditions. That clause specified the conditions governing the calculation of prices, taking into account the tenderer's responsibility for the detailed design and execution and for all project risk. The condition in question permitted no reservation. Therefore the principle of equal treatment prevented Storebaelt from considering ESG's tender. The Commission's second complaint was well-founded.

The court concluded that Denmark was in breach of its obligations in Community law, particularly having infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC. Denmark must pay the costs of the action.

COMMENT

Unfortunately the translation of this judgment from both French and Italian is not the usual standard of the European Commission. There are some odd turns of phrase used in this case.

There are several cases which deal with breach of Article 30 (TEU) but this case is important in its judgment on "the principle of equal treatment of tenderers, which lies at the heart of the [Public Works] Directive and which requires that tenders accord with the tender conditions, [which] must be fully respected."[1134] Although the Directive makes no mention of a principle of equal treatment of tenderers, it was said by the ECJ that this principle was at the very heart of that Directive in developing effective competition in public sector procurement. Application of the equal treatment principle means, said the court, that all tenders must be conforming (or compliant, or responsive) tenders in order to ensure that an objective evaluation is made of competing offers. Put another way, the contract awarding authority will be in breach of the equal treatment obligation if it considers, negotiates with, or accepts a tender which is non-conforming. The equal treatment obligation will not be fulfilled, said the court, if tenderers are allowed to depart from the fundamental tender conditions.[1135]

Not only is this advice invaluable to procurement officers and contractors engaged in public sector procurement of construction, engineering and related services, but it reveals the full extent and application of the 'fair and equal treatment obligation'. This obligation was found to exist in the common law cases discussed above: it exists in the cases analysed from England Canada, Australia and New Zealand.[1136] It exists in the USA cases considered from Georgia and the federal jurisdiction.[1137] And it exists as a fundamental principle underlying the European procurement regime. Equal treatment is thus a unifying theme found in all procurement systems so far analysed by this author. Such wide-spread good sense is rarely found!

The effects of this discovery could be very significant. So far, there seems to have been little litigation in England over the tendering process, whether public or private sector. But this seems

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1134 [1993] ECR I - 3353, 3395.
1135 Paraphrased from [1993] ECR I - 3353, 3393/33-3395/40.
1136 See Chapter 6 of Craig's *Procurement Law*.
1137 See Chapters 11 and 12 of Craig's *Procurement Law*.

likely to change as tendering costs increase with the complexity of projects and the growing demands of owners and public bodies. Another factor likely to swell the amount of procurement litigation is the presence now of formal rules and remedies for breach in the public sector. Private sector tenderers also have a raft of opportunities to attack unfair and inequitable practices, as revealed in this text. It seems likely that both private and public tender challenges will be made on common ground: the equal and fair treatment obligation is that common ground.

An aggrieved tenderer in a qualifying public procurement may pursue the remedy of damages under the Remedies Directives 89/665 and 92/13. In England these remedies are enacted in the Public Works Contracts Regulations 1991, reg 31, and the Utilities Supply and Works Contract Regulations 1991, reg 30. Damages is the *only* remedy under the regulations if the contract in question has been entered into.[1138] But there seems doubt as to what basis applies in establishing the quantum of such damages.[1139] Claims under the Utilities Regulations may well fare better than under the Works Regulations, because it is provided in the former legislation that the 'lost chance'[1140] of being awarded a contract can be compensated by the award of wasted bid preparation costs,[1141] without prejudice to any other claim for compensation an aggrieved bidder might have.[1142] Why, in principle, should a claim under Public Works Regulations be treated any differently? Does lack of express provision rule out this particular head of compensation in the Public Works context? Surely this is the minimum compensation payable under all the procurement regulations? A claim may of course be made for breach of a Treaty obligation in addition to claim under the national regulations.

The House of Lords recognised the scope for damages arising out of a breach of European Treaty obligations in *Garden Cottage Foods Ltd v Milk Marketing Board.*[1143] This case concerned a breach of Article 86 (TEU) which prohibits "any abuse ... of a dominant position within the common market". That article conferred rights on citizens of the UK under s.2(1) of the *European Communities Act 1972.* Those rights are given legal effect and enforced in the UK. A breach of Community law should

> "be categorised in English law as a breach of statutory duty, that is, imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty."[1144]

The *Garden Cottage Foods* case was applied in another case involving breach of Article 86: *An Bord Bainne Co-operative Ltd (The Irish Dairy Board) v Milk Marketing Board.*[1145] Here the Milk Marketing Board (MMB) argued that the Irish Dairy Board was limited to the remedy of judicial

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1138 See for example, Public Works Contracts Regulations 1991, reg 31(7).
1139 See Keating (6) p.382.
1140 See *Chaplin v Hicks* [1911] 2 KB 786 for development of the 'lost chance' rule in common law..
1141 Utilities Supply and Works Contract Regulations 1991, reg 30(7).
1142 *Ibid.*, reg 30(8).
1143 [1984] AC 130; [1983] 2 All ER 770; 3 CMLR 43 (HL).
1144 [1984] AC 130, 141; [1983] 2 All ER 770 at 775–776, *per* Lord Diplock with which Lord Keith, Lord Bridge and Lord Brandon concurred.
1145 [1984] 2 CMLR 584; (1984) 1-CLD-02-19. Neill J, Queen's Bench, 15.2.1984.

review and sought to have struck out part of the Irish Board's claims issued under writ for damages. The court rejected MMB's summons. Where damages were sought for alleged infringement of private rights under the Treaty, such claims could be made by an action suing for breach of statutory duty. However, the Court of Appeal dismissed an action in damages for breach of Article 30 (TEU) in *Bourgoin SA v Ministry of Agriculture.*[1146] The private law right conferred by Art 30 was, said the court, akin to the right in English law not to be subjected to an *ultra vires* measure even though made in good faith, for which the appropriate remedy was judicial review and not damages. But that Court of Appeal decision must now seem of doubtful authority. In *Kirklees MBC v Wickes Building Supplies*, Lord Goff said:[1147]

> "In *Bourgoin SA v Ministry of Agriculture Fisheries and Food*[1148] it was held by the Court of Appeal (Parker and Nourse LJJ (Oliver LJ dissenting)) that a breach of art 30 would not of itself give rise to a claim in damages by the injured party. However, since the decision of the European Court in *Francovich v Italian Republic*, *Bonifaci v Italian Republic* Joined Cases C-6/90 and C-9/90,[1149] there must now be doubt whether the *Bourgoin* case was correctly decided. It is true that *Francovich's* case was concerned with the situation where a member state fails to implement an EEC directive, the court holding that in such a case the member state is obliged to make good damage suffered by individuals as a result of its failure so to do. But the court in its judgment, spoke in more general terms, as follows:[1150]
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> '33. It should be stated that the full effectiveness of Community provisions would be affected and the protection of rights they recognise undermined if individuals were not able to recover damages when their rights were infringed by a breach of Community law attributable to a member state.
> 34. The possibility of obtaining damages from the state is particularly essential where, as in the present case, the full effect of Community provisions is conditional on the state taking certain action, and, in consequence, in the absence of such action being taken, individuals cannot rely on the rights accorded to them by Community law before national courts.
> 35. It follows that the principle of the liability of the state for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty.
> 36. The obligation on member states to make good the damage is also based on art 5 of the Treaty, under which the member states are bound to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under Community law ...
> 37. It follows from the foregoing that Community law lays down a principle according to which a member state is obliged to make good the damage to individuals caused by a breach of Community law for which it is responsible.'

1146 [1986] QB 716; [1985] 3 All ER 585.
1147 [1992] 3 All ER 717, 734 (HL).
1148 *Supra.*
1149 [1991] ECR I - 5357; [1992] IRLR 84, 1.11.1991.
1150 [1992] IRLR 84, 88 par 33–37.

It is not necessary for the purposes of the present case for your Lordships' House to decide whether the *Bourgoin* case was correctly decided, and indeed no argument was addressed to your Lordships on that question. But, having regard to the passage from the judgment of the European Court in *Francovich's* case which I have just quoted, it is in my opinion right that in the present case your Lordships should proceed on the basis that if, on the reference to it in the *Stoke-on-Trent* case,[1151] the court should hold that s 47 of the Shops Act 1950 is invalid as being in conflict with art 30 of the EEC Treaty, the United Kingdom may be obliged to make good damage caused to individuals by the breach of art 30 for which it is responsible."

The result of the decision in *Francovich* is that in order for the government of a Member State to be liable to one of its citizens for its breach of Community law causing loss by its failure to properly implement a Council Directive, three conditions must be met. It must first be established that the provision in question was intended to create individual rights; secondly, those rights must be capable of being determined from scrutiny of the Directive and its aims; and lastly, the breach of Community law must have caused the damage complained of. These principles are often referred to as 'the *Francovich* principle' or the 'principle of direct effect'.

If the measure of damages is to be on a tort basis, then the aggrieved tenderer can expect to recover its 'out of pocket' expenses, or *status quo* losses. It would recover, say, its wasted bid costs but not loss of profit. Having stated the basic rule, loss of expectation can be recovered in tort to a limited extent, but here it seems unlikely that it can be successfully argued that the expectation of a profitable contract award existed *before* the contracting authority's breach of statutory duty and was destroyed by that breach. If the aggrieved tender is to recover any more than wasted costs, perhaps its best avenue is to pursue the 'lost chance' or 'lost opportunity' approach.

Recovery of damages in tort has taken this direction in cases of damages for personal injury claims or for fraud. *East v Maurer*[1152] was an example of liability for fraudulent misrepresentation, an action in the tort of deceit. The plaintiff had bought a business from the defendant, relying on fraudulent statements made by the defendant. There was no appeal over the finding of liability but over the recovery by the plaintiff of loss of profits. This loss accumulated over the period of about three years when the business was operated by the plaintiff whilst trying to dispose of it. Beldam LJ observed that it was well established that the measure of damages for the tort of deceit and for breach of contract are different. In the tort of deceit it was not a case of putting the plaintiff in the position that it would have been in if the statement relied on was true. Rather, in such cases the plaintiff was entitled to recover for all losses suffered, as best money can do this. Whilst many past cases had not dealt with loss of profit specifically, it seemed clear to his Lordship that there was no basis on which it could be said that loss of profits incurred whilst waiting for an opportunity to realise the sale of a business to its best advantage were irrecoverable. So the defendant's contention that loss of profit was not a recoverable head of claim was rejected. But Beldam LJ

1151 [1991] Ch 48; [1991] 4 All ER 221.
1152 [1991] 2 All ER 733 (CA).

considered further the quantification of this claim. It seemed that the trial judge had based the award on an assessment of lost profits on what the business bought might have earned had the defendant's misrepresentation been a warranty that a certain volume of basis would have transpired. But this approach left out several significant factors. What should have been considered in his Lordship's view was the loss of profit which the plaintiff might have earned had not the fraudulent statement been made, and the money had then been invested in another similar business. This, it seems, is the chance to make a profit that was lost by investing money in reliance on the fraudulent misrepresentation. Evaluation of that chance had to take account of what might be called the business risk that no profit, or a less than desired amount of profit might result. The factors behind such an outcome would be the relative inexperience of the plaintiff, the unknown customer base and the degree of competition that existed for the service or product in question. Any notional profit sum must be discounted to allow for the chance that is might have resulted.

In *East v Maurer*, Beldam LJ established two clear starting points. First, that anyone investing in business would expect a higher return than putting the same money on deposit at the bank. Secondly, a working proprietor would expect to earn at least as much as a salaried assistant plus something more on account of the personal investment. From these points it would, it seems, be possible to establish what a reasonable sum would be to compensate for loss of profit. The assessment had to be 'in the round', as a jury would have done.[1153] Perhaps in the context of an aggrieved low bidder's claim for loss of profits, a slightly different but equally low level approach should be taken, but it is noted that the claim or lost profits need not be rejected in principle even when a tort measure of recovery is appropriate.

The Court of Appeal recently applied the 'loss of chance' principle in a case involving the sale of a house.[1154] The plaintiff's house sale went off because negligent solicitors failed to forward documents to the purchaser in time. The Court took the view that the proper approach to the award of damages was to evaluate the plaintiff's loss of chance that a sale would have materialised had the documents been sent so as to arrive with the purchaser in good time. It must be shown that there was a substantial chance, rather than merely speculative chance, that the sale would have been concluded. Then the evaluation of that chance was part of the assessment process as to the quantum of damage. The 'chance' element would lie on the rang 'just, but only just, substantial' at the minimum end, to near certainty at the other.[1155] There were a number of possible events which might have frustrated the sale, for example, loss of documents in post, or that despite its possession of the documents the purchaser might have withdrawn. In this case the Court of Appeal evaluated the risk of both events collectively at 50% and reduced the level of damages set at first instance by this amount.

Assume that the unsuccessful tenderer shows that it was truly the preferred bidder under a lawful application of the procurement rules. It recovers wasted costs and pursues loss of net profit. Having convinced the court that 'lost chance' of a profit is the correct approach to take, the claimant

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1153 Beldam LJ referred to *Doyle v Olby* [1969] 2 All ER 119, per Winn LJ at 124.

1154 *Stovold v Barlows*, The Times 30.10.1995, Court of Appeal, Stuart-Smith, Otton and Pill LJJ, 13.10.1995.

must show that if the procurement rules had been lawfully applied it had a chance of being awarded the contract somewhere in the range 'just substantial' to 'near certainty'. As it is the preferred bidder's claim now in question, it would be inappropriate to take into account the chance of being preferred bidder, one in five, say, if five bids were submitted. No; here it is necessary to evaluate the chance that despite the status of preferred bidder, the contract might not have been awarded. If the unfairly rejected tender was within, or near, the contracting authority's budget, it seems very likely that a contract would have resulted. This might be a 90% lost chance. The claimant must then show, on the balance of probabilities the profit that would have been earned, and could expect to recover 90% of that sum. On the other hand, if the unfairly rejected tender was 15% over budget, perhaps the corresponding discount is 50%, and possibly 75% or 100% when the rejected tender was greatly in excess of the budget. It could of course be necessary to establish that the authority's budget was sufficiently practical to enable this sort of assessment 'in the round'. And there may other factors to take into account in deciding how likely it was that a contract would have been awarded to the claimant.

Perhaps an aggrieved tenderer will pursue its claim in contract, as well as in breach of statutory duty so that ordinary common law principles will apply to the award of damages and permit recovery of lost profit. Contract cases are reported in this text where the damages awarded extends to not only wasted bid costs, but to loss of profit on the contract which would have been awarded but for the breach of duty by the contract awarding party.[1156]

Alternatively the aggrieved tenderer may argue that it is entitled to damages as a result of its reliance on a non-bargain promise. It could be argued that despite the lack of consideration between the contracting authority and tenderer, the tenderer has changed its position to its detriment in reliance on the contracting authority's gratuitous promise that it would abide by the relevant regulations and that it is now estopped from denying the existence of that promise. The principle of promissory estoppel is discussed above,[1157] as the provision in this respect to be found in the Restatement of Contracts (USA).[1158] The measure of damages applying the promissory estoppel theory would be the reliance loss following the USA model, and not permitting recovery of lost profit..

Another legal theory which may compensate the aggrieved bidder for its reliance loss is the principle of restitution of an unjust enrichment gained at the expense of another. In this theory, entitlement to compensation is not based on the existence of a contract, but on the "existence of a qualifying or vitiating factor such as mistake, duress or illegality."[1159] Applying this theory it would be argued by the aggrieved tenderer that the contracting authority has received a benefit at the tenderer's expense. This argument would be an alternative to the 'implied contract', or quasi-contract, approach of past years. This theory might be applied as follows: the construction contract

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1155 See *Allied Maples Group Ltd v Simmons & Simmons*, unreported, CA Transcript No 554 of 1995.
1156 See for example *Pratt Contractors v Palmerston North City Council* [1995] 1 NZLR 469.
1157 See discussion on *High Trees* case in Craig's *Procurement Law* at 2.12.
1158 See discussion of s.90 *Restatement of Contracts*, USA in Craig's *Procurement Law* at 2.13 and 2.14.

has been awarded in breach of the procurement rules, and in breach of the equal treatment principle, to tenderer A who submitted an alternative tenderer which was outside the cope of the project for which tenders were invited. Or the rules as to disclosure of award criteria or post tender evaluation were breached. The result is that the contracting authority has secured a 'windfall' of, say, £250,000 as the result of illegally awarding the contract to contractor A, when, if the rules had been properly applied, the contract would have gone to Contractor B. Contractor B can show its wasted tender costs but cannot show what profit was lost, so elects instead to recover the 'wind fall' from the contracting authority, and is compensated by damages of £250,000.

If there should be any need to support the view expressed here that tender challenges by disappointed bidders will become more frequent in England, it seems that such a challenge is soon to be heard arising out the construction of the new offices for Members of Parliament at Westminster. It seems that the USA based cladding contractor Harmon is mounting a challenge against the UK Government over the allegedly wrongful award of the high-profile multi-million pound cladding contract awarded to joint-venturer Alvis Steele.[1160] It is being suggested that the contract was awarded for "political not tender reasons." It is said that Harmon's bid was lowest, that it met all the relevant award criteria and that it should have been awarded the contract. The court will be asked to decide whether there was a breach of procurement regulations, then, assuming the answer is 'yes', whether liability to Harmon is limited to wasted bid preparation costs, or whether the firm is also entitled to loss of profit. No doubt much of the material reviewed here will be relevant to the points at issue in this case.

10.12 Public services procurement. Judicial Review. Breach of Directive 92/50/EEC and the Public Services Contracts Regulations 1993. Disqualification of tenderers by applying irrelevant criteria is unlawful. Examination of suitability and the awarding of contracts are two separate operations.

R v Secretary of State for the Environment, ex p Harrow LBC[1161]

SCENARIO

A local authority sought tenders for the management of its housing stock. But its long term plan was to transfer ownership of its entire housing stock. As a first step on this road it invited tenders only from persons who would in the long run be capable of acquiring ownership of the housing stock. But in so doing it restricted the range of tenderers and excluded tenderers who could provide the required housing management services but would not be eligible to acquire the housing stock.

QUESTION

Is a local authority entitled to restrict the list of tenderers in such a way under Council Directive 92/50/EEC[1162] *and Public Service Contract Regulations 1993*[1163]*?*

1159 See Davenport, P and Harris, C (1997) *Unjust Enrichment* Federation Press, Sydney: p.10, citing the decision of the High Court of Australia in *David Securities v Commonwealth Bank* (1992) 66 ALJR 768.

1160 See Contract Journal 28.1.1998: *Westminster row twist*, exclusive by Graham Ridout.

1161 [1996] 2 CMLR 524; The Times 16 January 1996. English High Court, Judge J, 12.1.1996.

1162 [1992] OJ L 209/1.

RESPONSE

No. The decision to restrict the list of tenderers by the application of irrelevant criteria was unlawful. In carrying out a judicial review of the Secretary of State's decision that the Council's tendering procedure did not comply with Public Services Directive 92/50, the English High Court in *R v Secretary of State for the Environment, ex p Harrow LBC,*[1164] reviewed the purpose of articles 30 and 32.

Article 30 of Directive 92/50 deals with the possible need for tenderers to belong to a particular organisation or possess a particular authorisation in order to be able to perform the tendered service. The article prescribes a means of showing compliance with a demand to show necessary status in each of the Member States. Article 32 sets criteria for evaluating a tenderer's ability to provide the tendered service and the evidence necessary to demonstrate "technical capacity". The notice or invitation to tender must specify which references are required as evidence to be submitted by tenderers. This article expressly confines information requirements to the "subject of the contract". Due regard must be paid to a tenderer's wish to protect technical or trade secrets.

The court held that Articles 30 and 32 of Directive 92/50 are concerned with performance of the proposed contract itself and the qualifications and skills needed to provide that performance. Ability to perform some other type of service outside the scope of the Directive is not a proper criterion for selection within the terms of the directive.

Article 36 of the Directive was also considered by the court.

> "1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:
>
> (a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date,
> delivery period or period of completion, price; or
>
> (b) the lowest price only.
>
> 2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance."

1163 SI 1993/3228.

1164 [1996] 2 CMLR 524; The Times 16 January 1996. English High Court, Judge J, 12.1.1996.

Article 36 of Directive 92/50 deals with the criteria for award of public service contracts. Articles 36(1) and (2) permit the award to be made on the basis of the "economically most advantageous tender" rather than "lowest price". The local authority had argued that a tenderer's inability to fulfil their long term intentions could not satisfy the criteria of Article 36. But the court did not agree. Judge J said that the long term capacity to accept transfer of ownership of the Council's properties was not relevant to the tenderer's skills as providers of housing management services. He continued:

"Carried to its logical conclusion the result of the Council's argument would be to vitiate much of the Directive. In effect the Council, for reasons appearing desirable, indeed necessary to it, could artificially limit those who might tender or be selected for one contract within the scope of the Directive to those who could also perform another contract outside its scope. This would introduce a criteria for selection which is not included in the qualifications referred to in Chapter 2 [Criteria for qualitative selection] of the Directive as applied by Article 27 [Chapter 1, Common rules on participation]. Article 36 [Criteria for the award of contracts] requires that the award shall be made either on the basis of the lowest price or the most economically advantageous tender, but does not permit the introduction of a fresh criterion for selection not already included and taken into account in Chapter 2 of the Directive. In accordance with the Directive the award of these contracts had to be based either on the lowest price or the most economically advantageous tender after all eight tenderers for the contract had been considered. That is consistent with the two stage process suggested by the European Court of Justice in the context of Directive 71/305[1165] in *Gebroeders Beentjes BV v Netherlands*,[1166] where it was stated:

> 'The examination of the suitability of contractors to carry out the contracts ... and the awarding of the contracts are two different operations in the procedure for the award of a public service contract.'"[1167]

The effect of the Council's decision to limit the list of tenderers to UK housing associations capable later of accepting the transfer of properties was to introduce a restriction on eligibility to tender which was contrary to the provisions of the Directive.

COMMENT

Council Directive 92/50 was issued on 18.6.92 and its implementation date was 1.7.93. It had direct effect until implementation by the Public Service Contract Regulations 1993[1168] which came into effect on 13 January 1994. As the Council's tender notice was published in the *Official Journal* on 4.11.93 it seems that the Directive, but not the Regulations, applied to this transaction. But there is no significant difference between the provisions of the Directive and the Regulations for the issues

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1165 OJ Special English Edition 1971 No L 185/5 p. 682.
1166 Case 31/87 [1989] ECR 4635; [1990] 1 CMLR 287.
1167 [1996] 2 CMLR 524, 537-8.
1168 SI 1993/3228.

raised here between the parties. Any breach of the Directive in 1993 would not be saved by the Regulations in force when contracts were signed in May 1994.

This case represents an recent entry by the judiciary of England and Wales into the interpretation of the Public Services Directive 92/50. It is unsurprising that the court should hold that the application of irrelevant criteria to the question of a candidate's suitability to tender was unlawful. What seems surprising is that any local authority should take a contrary view.

Part 2

Public Works Procurement: the *Portsmouth* case

Introduction

This article discusses the case of *R v. Portsmouth City Council, ex parte Peter Coles, Colwick Builders Ltd and George Austin (Builders) Ltd.*[1169] The Court of Appeal considered only part of the first instance judgment. Their Lordships part reversed and part affirmed the decision of Mr Justice Keene,[1170] who on 6 June 1995 had, *inter alia*, dismissed applications for judicial review of a decision by Portsmouth City Council on 23.9.92 to award building contracts to its own direct labour organisation. The facts are largely taken from the judgment of Keene J at first instance. The effects of the two judgments have here been merged for greater continuity and clarity. It is submitted that an examination of the decisions in both courts reveals matters of importance for those involved in public procurement of construction and engineering work and those who attempt to secure such public contracts.

Background

Portsmouth City Council wished to re-organise its housing repair and maintenance work in three contracts or groups of contracts, respectively Maintenance, Improvement and BISF. Article 11 of Directive 93/37/EEC[1171] requires that the first step should be to place a Notice in the *Official Journal* of the European Communities. This the Council did on 12 March 1991, with respect only to the proposed Maintenance contract. The Notice also advised prospective tenderers that criteria are "to be stated in the invitation to tender. Tenders will be accepted on the basis of best value for money. The Council do not bind themselves to accept the lowest or any tender." Advertisements were also published in the local press for all three contracts, but there was no Notice to the *Official Journal* given in respect of either the Improvement Contract or the BISF Contract.

For several reasons the tendering process was delayed. Significantly, on 2 April 1992 the Council made certain resolutions as to a revised programme for the Improvement Contract which would include not only part of the 92/93 year's work, but also the year 93/94, making an eighteen months contract period. The significance of this change becomes apparent in question 7.

Whilst the Council awaited submission of tenders, it considered the wider economic consequences of putting this work into the private sector. It noted that the Council's own employees, operating as Portsmouth Contract Services (PCS), had previously undertaken the repair and maintenance work, but that it might become necessary to reduce the volume of work awarded to PCS with the result that the City Council would incur redundancy and other costs. Tenders were eventually received by the Council for the BISF and Maintenance contracts in July 1992, and for the Improvement contract in August 1992. There was a powerful argument presented to the Council in favour of deferring its decision on its response on tenders for the Maintenance contract until it knew whether PCS was a strong contender for the award of a substantial proportion of the Improvement and BISF work The Council resolved that the tenders for all three contracts be evaluated at the same time, in September 1992.

The consequences for the Council of transferring the work to the private sector

The Council's building work with respect to its housing stock had traditionally been undertaken through a combination of the Council's own work force (PCS) and external contractors, with PCS taking almost 50% in value of such work and the private sector getting the remainder.

If private contractors could undercut PCS in their tenders, such an award of the contracts would have a beneficial effect on the Housing Revenue Account but would also involve substantial costs which would bear on the Council's General Fund. The Council then considered three options to illustrate the impact of particular contract awards, not only on the Housing Revenue account but also on the Council's General Fund.

Option one assumed that no work was awarded to PCS and that in consequence 152 employees were made redundant at a cost of £450,000. After allowing for certain other costs, such as pensions and loss on the forced sale of stock, as well as giving credit for interest on the investment of a capital sum received from the sale of a redundant works depot, option one would have resulted in the General Fund financing additional

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1169 81 BLR 1; The Times 13.11.1996. Court of Appeal. Leggatt, Hobhouse and Thorpe LJJ, 8.11.1996.

1170 Unreported. Queen's Bench Division (Crown Office List) CO/3062/92.

1171 Directive 93/37 consolidated Directive 71/305 (as amended by Directive 89/440) and the necessary measures should have been implemented within UK by 19.7.1990 (see Annex VII of 93/37).

expenditure of £581,600 over the succeeding three years. It was also noted that there would have been additional costs to be borne by other parts of PCS in respect of fixed overheads.

Option two showed the results of awarding PCS a total over the three years of £4.8 million out of the £11.75 million under the Maintenance Contract, together with £2.32 million under the Improvement Contract, and the whole of the BISF Contract, amounting to £493,000. Such an award would result in higher costs to the Housing Revenue Account as compared to the results of accepting the lowest tenders, the extra being some £499,000. That figure was then adjusted downwards to allow for a reduction in the contribution from that account to capital outlay, because of the receipt of money from the sale of the redundant depot. In the end, the extra cost to the Housing Revenue Account was put at just over £394,000. On the other hand, the redundancy costs of this option were said to be only £21,000, and the total cost of this option to the City Council in respect both of its Housing Revenue Account and its General Fund was estimated at £347,500. Option two appeared to be 'economically most advantageous'.

Finally, there was a third option in the report illustrating the cost of maintaining PCS activity at its current level. This in effect assumed that PCS would get an even greater share of work than had been assumed under option two. Although it saved the General Fund more than was achieved under option two, that was outweighed by the additional costs to the Housing Revenue Account. The end result of that option would be a net cost to the City Council of just over £374,000.

The Council's legal obligations in 'contracting out'

The Council in reaching a decision was under a duty not to act anti-competitively, that is not to act "in a manner having the effect of restricting, distorting, or preventing competition", a reference (though incomplete) to section 9(4)(aaaa) of the Local Government, Planning and Land Act 1980. The Council were also under a fiduciary duty to consider the financial implications of its proposals upon the residents of the City. The Council also accepted that it had a duty to act fairly and to take into consideration the impact of any decision on both the Community Charge payers and the tenants.

The Council's decision on contract awards

PCS did not submit the lowest tenders for the proposed contracts. If contracts had been awarded merely on the basis of 'best value for money' and the relative capacities of the tenderers concerned, PCS would have been awarded only a small portion of the Maintenance Contract work (about £135,000 per annum) and nothing under the other two contracts. But the Council took into account the wider economic aspects considered above. It resolved that work should be awarded to PCS in accordance with option two, with the private sector contractors being allocated the remainder of the work on a company by company basis. Thus, in broad terms the Council awarded 40% of the work under the Maintenance Contract, nearly 60% of the work under the Improvement Contract, and all of the work under the BISF Contract to PCS, despite the fact that PCS had not submitted the lowest bids. In essence, the basis for the Council's decision was that the costs to the Council generally from redundancy payments and other matters made option two the optimum economic choice.

Tenderers' reaction to the Council's decision

The Council wrote to the private contractors who had submitted the lowest tenders. Some of them, made vigorous representations with criticism being made in particular of the way in which the Council had calculated the redundancy costs. The Council responded to such criticisms with detailed calculations. Solicitors for the unsuccessful lowest tenderers sent a form of letter before action to the Council expressly pursuant to Regulation 31(5)(a) of the Public Works Contracts Regulations 1991.[1172] The Council responded by saying that the 1991 Regulations did not apply. Subsequently applications were lodged for leave to apply for judicial review of the Council's decisions. Leave was in due course granted after oral hearings.

The issues before the court: Public Works Contracts Regulations 1991

(1) What is a "public works contract" under the Public Works Contracts Regulations 1991?

Mr Justice Keene noted that the 1991 Regulations prescribe certain procedures to be followed when a 'public works contract' is to be awarded. Such a contract is defined by Regulation 2(1) as:

> "A contract in writing for consideration (whatever the nature of the consideration)

[1172] SI 1991/2680.

(a) for the carrying out of a work or works for a contracting authority, or
(b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements."

(2) Where the 1991 Regulations apply, what is the first step required prior to the award of a public works contract?

By regulation 9, prior information notices must be given. When a contracting authority intends to seek tenders in relation to a public works contract, it "shall, as soon as possible after the decision approving the planning of the work or works, send to the *Official Journal* a notice, in a form substantially corresponding to that set out in Part A of Schedule 2, and containing the information therein specified in relation to the contract."

(3) Where the 1991 Regulations apply, what contract award basis might apply?

There are two possible situations: that the award basis is simply "lowest price"; or that it is "most economically advantageous" price. The latter can only apply where criteria are stated in the prior information notice or in the tender documents. If no criteria are given in either place, only the "lowest price" basis applies.

Regulation 20(1) provides that "a contracting authority shall award a public works contract on the basis of the offer which (a) offers the lowest price, or (b) is the most economically advantageous to the contracting authority." Regulation 20(2) lists "criteria which a contracting authority may use to determine that an offer is the most economically advantageous". Those criteria "include [but, it is submitted, are not restricted to] price, period for completion, running costs, profitability and technical merit." Importantly, and no doubt due to the discretion given to a contracting authority to make its own selection of economic criteria, regulation 20(3) requires that a contracting authority must state its selected criteria on which it intends to base its decision, ranked in descending order, within the contract notice or contract documents.

Keene J said that the term 'contract notice' meant a notice sent to the *Official Journal* in accordance with a regulation, such as regulation 12(2). The term 'contract documents' is defined at regulation 2(1) and means "the invitation to tender for or negotiate the contract, the proposed conditions of the contract, the specifications or description of the work or works required by the contracting authority and of the materials or goods to be used in or for it or them, and all documents supplementary thereto".

(4) On what basis is it to be determined whether the 1991 Regulations apply?

Application is determined by comparing the date when the Regulations came into effect, with the date when the Council published a notice seeking offers for the work in question, subject to the financial thresholds, and the aggregating rules. Under regulation 1 the Regulations came into force on 21 December 1991. Regulation 5 provides that the "Regulations apply whenever a contracting authority seeks offers in relation to a proposed public works contract ...". The financial thresholds for the application of the Regulations are set out in Regulation 7. The Regulations are not applicable when the proposed public works contract is estimated to cost less than 5,000,000 ECU.[1173] The aggregating rules are contained in regulations 7(3) to 7(6). The relevant time under regulation 7(7) for the purposes of application of the Regulations is "the date on which a contract notice would be sent to the *Official Journal* if the requirement to send such a notice applied to that contract in accordance with [these] Regulations." Regulation 7(8) prohibits a contracting authority from entering "into separate public works contracts with the intention of avoiding the application of these Regulations to those contracts."

(5) Do the 1991 Regulations apply to a public works contract where the procedures required by those Regulations would have had to begin before 21 December 1991 when the Regulations came into force. ?

No. The 1991 Regulations apply only to procedures leading to an award, the selection of contractors, and the award itself, where the whole of that process commences after the date when the Regulations came into force, namely 21 December 1991. The answer to the question is contained in regulation 5 which limits the application of the Regulations to "whenever a contracting authority seeks offers ....." In Keene J's judgment, the use of the present tense indicated that the Regulations applied only to the seeking of offers in relation to such a contract *after* the Regulations came into force. That was borne out, he said, by the fact that the Regulations imposed obligations on an authority from the very start of the tendering process. On the face of the documentation considered by the court, none of the three contracts awarded by Portsmouth City Council,

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[1173] At the time of the *Portsmouth* case, equivalent to £3,535,775, and at the time of writing, equivalent to £3,899,337.

and the processes leading up to the award of those contracts, fell within the scope of the Regulations. But this was not the court's final position on the Improvement contract: see question 7.

(6) The Council split the housing work into three contracts. The effect was that only one contract appeared to be over the threshold set for the application of the 1991 Regulations. Should the three contracts be aggregated so that all the work is within the scope of the Regulations?

No. They are not to be aggregated merely because they all relate to the Council's housing stock and to the Council's housing function. A contracting authority is entitled to rely on regulation 7(4) subsequently if its action or inaction is called into question.

In considering the monetary threshold aspect of the Regulations, Keene J concluded that, on the face of the documents, only the Maintenance Contract had an estimated value over £3.3m (5,000,000 ECU), the threshold applicable by virtue of regulation 7(1). The Improvement Contract, when advertised, had an estimated value of just over £1.8 million, while the BISF Contract was worth under half a million pounds. But note that regulation 7(3) requires the values of contracts which are to be entered into for the carrying out of 'a work' to be aggregated. The aggrieved tenderers contended that all three of these contracts were for the carrying out of 'a work' or, alternatively, the Improvement and BISF contracts were and therefore should have their values aggregated.

The definition of 'work' by regulation 2(1) means "the outcome of any works which is sufficient of itself to fulfil an economic and technical function". Are all three contracts related to a 'work'? The tenderers argued that maintaining and improving a local authority's housing stock clearly go together and enable the authority to perform its functions as a housing authority. The function referred to in the phrase 'economic and technical function', they argued, must mean the function of the client, which here was the Housing Department with its function of keeping its housing stock in proper condition. Thus, maintenance and improvement was to be seen as fulfilling a single function.

But Keene J disagreed. The tenderers' submission amounted to a misconstruction of the definition of a 'work' in regulation 2(1). The reference within that definition to a 'function' being fulfilled made more sense to his Lordship if it dealt with the project itself , and whether the end product of the activities had a function, rather than looking at the function of the client. The legislation was intended to ensure that the end product, the 'outcome of ... works', had a function and was not merely a part of an incomplete whole, a part which could not operate by itself. Half a bridge would be an obvious example of such a part. This provision appeared to pursue the same objective as regulation 7(8), but due to its wider scope, would catch separate contracts in appropriate cases even though there was no intention on the part of the contracting authority to avoid the Regulations.

(7) When the Council decided in April 1992 to seek tenders for an 18 month contract running from October 1992 for the improvement of its housing stock, was it deciding to seek "offers in relation to a proposed public works contract"[1174] for which it had not previously decided to seek offers, and which would then invoke the 1991 Regulations?

Yes. The date of that decision fell after the 1991 Regulations came into force. The estimated value of the contract at that time would, it was conceded, have been in excess of the regulation 7 threshold. It followed therefore that the 1991 Regulations did apply to what was referred to as the Improvement Contract, in the form which subsequently became the subject matter of the September 1992 award of contracts. The 1991 Regulations did not apply to the Maintenance Contract nor to the BISF Contract, but they did apply to the Improvement Contract.

(8) With respect to the Improvement Contract, was the Council in breach of the Public Works Contracts Regulations 1991, regulations 9 and 12(2), in failing to issue a prior information notice to the Official Journal?

Yes. There was a breach by the Council of the duty owed under the 1991 Regulations to Colwick Builders Limited in connection with the Improvement Contract. It was clearly in breach of regulations 9 and 12(2) by failing to send the requisite notice to the *Official Journal*. And as a consequence of failing to issue a prior information notice, or to provide the necessary detail in the tender documents, the Council had not satisfied regulation 20(3). Under this regulation the Council was required to publish its contract award criteria. The absence of a statement on economic criteria to be applied, either in the notice or in the contract documents, limited the Council to awarding the Improvement Contract only to the lowest tenderer. The effect of

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[1174] See Regulation 5.

regulation 20(3), when no adequate provision is made within the tender documents, is to make the issue of a contract notice a condition precedent to a contracting authority's right to award a contract on the basis of the tender which is "the most economically advantageous to the contracting authority."

The aggrieved tenderers argued that the breach was not the failure to give notice in appropriate terms but the failure of the Council to award the contract on the basis of lowest price. That, said Keene J, could be of significance in relation to any assessment of damages, because the tenderers asserted that their loss flowed from the fact that this contract was not awarded to them or, more precisely, to the company amongst the tenderers which had submitted the lowest tender for the Improvement Contract, namely, Colwick Builders. If the Council's breach consisted merely of the failure to give advance notice of the criteria to be used, then the loss might merely be that which flowed from Colwick Builders putting in a tender when it would not have done had it known of the criteria to be used. In other words, its loss may be no more than the cost of preparing and submitting a tender.

It was important, said Keene J, that Contractors knew that when awarding this contract the Council would be concerned about the consequences that a contract award would have on its liability to make redundancy payments. Potential tenderers needed this information. It might have affected their willingness to bid at all, or if they did bid, it might have induced them to take certain steps which would have reduced the Council's liability. In his Lordship's view, if the Council proposed to adopt the approach which it did, it should have stated in a contract notice or in the contract documents that it intended to take account of the effects of any award on its overall financial position, including the financial consequences for itself as the employer of a direct labour force.

Keene J concluded that there was no doubt that the Council did not award the Improvement Contract on the basis of lowest price. It did, as a matter of fact, arrive at its decision on the basis of what award or combination of awards would be the most economically advantageous to it. Yet it did not specify the criteria in advance as required by the Regulations. The Regulations were therefore broken, by the failure to send to *the Official Journal* the notices required by Regulations 9 and 12(2).

(9) Was the Council, by its failure under Regulations 9 and 12(2), then obliged to award the contract on the basis of the lowest price offered?

No, said the trial judge, but the Court of Appeal disagreed. This was the aggrieved tenderers main ground of appeal. The judge was wrong, the tenderers argued, to hold that the Council could award the contracts on 23 September 1992 on any basis other than that of lowest price. Agreeing, Leggatt LJ said that as the Council had not stated in the contract documents which criteria applied, it was not entitled to take account of them as award criteria. It was therefore obliged to adopt the lowest price basis for contract award.

Keene J had been of the view that the Council's breach was not in awarding the contract in response to the most economically advantageous offer, but in failing to stipulate its award criteria in advance, amounting to a breach of regulation 20(3).

On appeal, Leggatt LJ observed that since the Council had been held to be in breach of the 1991 Regulations or of the Works Directive in failing to state the criteria which they applied in awarding the contracts, the question then became whether that precluded the Council from awarding the contracts on the basis of undisclosed criteria.[1175] The tenderers argued that a decision by the European Court of Justice (ECJ) was in their favour.[1176] That court was concerned with Article 27 of Directive 90/531,[1177] which was in the same terms as Article 29 of the Works Directive. The ECJ said:

> "The requirement under Article 27(2) of the Directive for the contracting entities to state 'in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance' is intended precisely to inform potential tenderers of the features to be taken into account in identifying the economically most advantageous offer. All the tenderers are thus aware of the award criteria to be satisfied by their tenders and the relative importance of those criteria. Moreover, that requirement ensures the observance of the principles of equal treatment of tenderers and of transparency."[1178]

1175 81 BLR 1, 10C.

1176 *Commission v. Kingdom of Belgium* (Case C-87/94) (*Walloon Buses*) [1996] ECR I – 2043.

1177 [1990] OJ L 297/1

1178 At paragraph 88 of the ECJ judgment, reproduced at 81 BLR 1, 10E-F.

Leggatt LJ reiterated the provisions of both the Works Directive and the 1991 Regulations to which similar considerations applied. There were two bases for awarding a contract: "lowest price" and "economically advantageous". For an award on the latter basis, the criteria must be stated. To Leggatt LJ, that looked like a condition precedent. He continued:

> "... [It] would be surprising if an authority could disobey the requirement and yet proceed to award the contract on the economically advantageous basis by reference to unstated criteria. As Advocate General Darmon said in Case C-31/87, *Gebroeders Beentjes v. Netherlands State*:[1179]
>
> > 'In such a situation, in which no criterion for awarding the contract has been validly specified in the contract notice or the contract documents, it appears that under the actual terms of Article 29 only the criterion of the lowest price may be applied.'

In the *Walloon Buses* case the European Court of Justice held:[1180]

> '... in order to ensure that a contract is awarded on the basis of criteria known to all the tenderers before the preparation of their tender, a contracting entity can take account of variants as award criteria only in so far as it expressly mentioned them as such in the contract documents or in the tender notice.'

I follows that since the Council had not mentioned in the contract documents the criteria which it applied, it was not entitled to take account of them as criteria. Since it was not entitled to take account of them, it was unable to award the contracts on the economically advantageous basis. It was therefore obliged to adopt the lowest price basis."[1181]

Leggatt LJ was not prepared to distinguish the facts of the *Walloon buses* case from the *Portsmouth* case. It was clear to his Lordship that to conceal the criteria to be applied before awarding the contract was "incontestably inconsistent with transparency and equal treatment."[1182]

Hobhouse LJ also considered that Article 29 of the Works Directive was of the same effect as regulations 29(1)-(4) of the 1991 Regulations. He said:

> "In my judgment they impose the obligation upon the awarding authority to award the contract only by reference to certain criteria. The authority is at liberty to award the contract on the basis of what is most economically advantageous only if the criteria it is going to use have been stated beforehand. It follows that, unless the authority has in advance stated other criteria, it can only use the criterion the lowest price and that if it should do anything else it will be in breach of the Directive and the regulations. This was the submission of [the tenderers] and it was in my judgment correct.
>
> The same conclusion follows from the judgment of the European Court of Justice in the *Walloon Buses* case (C-87/94). ...
>
> The same applies to the present case. By using, when deciding upon the award of contracts, criteria which had not been spelt out in the invitations to tender (nor at any other stage), the Council was in breach not only of its obligations in relation to inviting tenders but also in relation the award of contracts."[1183]

(10) Was the Council in breach of its obligations under the 1991 Regulations in failing to use objective criteria when making its contract award in response to the most economically advantageous offer?

No, concluded the trial judge, for reasons explained below. But the Court of Appeal, having held (above) that the Council was obliged to adopt the lowest price basis for contract award, said that there was no need to consider this alternative argument that the Council had adopted criteria which were not "objective".[1184] Although Keene J's analysis of the Council's rationale and use of objective criteria in awarding the contracts to its own staff was rendered redundant by the Court of Appeal's decision on this point, this part of the first instance judgment remains instructive nonetheless in situations where contracts are to be properly awarded on the basis of 'most economically advantageous' offer.

1179 Case 31/87 [1988] ECR 4635; [1990] CMLR 287, 20.9.1988, at paragraph 38 of his opinion of May 1985.
1180 Case C-87/94, *supra*, at paragraph 89.
1181 81 BLR 1,10I-11D.
1182 *Ibid.*, 11F.
1183 *Ibid.*, 16A-G.
1184 Leggatt LJ at 81 BLR 11I, Hobhouse LJ at 81 BLR 17B and Thorpe LJ at 18B.

Keene J's view that the contracting authority was entitled to treat its own contingent liability to meet redundancy costs as objective criteria for deciding on tenderers' participation in the housing works programme will cause concern to many parties in the private sector. His judgment was explained as follows. The preamble to Works Directive 71/305/EEC (now repealed and replaced by 93/37/EEC) referred to "the fixing of objective criteria for participation", and in *Gebroeders Beentjes v Netherlands*[1185] the court emphasised this aspect of a contracting authority's obligations. The Council's calculation of redundancy costs where quite capable of being checked by a third party and on that basis, said Keene J, the Council used objective criteria. There was no evidence that the Council applied its criteria in a way which discriminated in favour of its own workforce.

The injured low bidders had at first argued that such factors as redundancy costs and the effect of the closure of the unwanted depot could not be regarded as objective criteria because they could not be applied to all offerors. Keene J did not accept that these matters could not constitute objective criteria just because the wider financial effects would be different as between the external tenderers and PCS.

Keene J observed that the purpose of requiring objective criteria was to prevent arbitrary decision making by a contracting authority. If it were to use subjective criteria it would be impossible to tell whether it had applied the criteria. Directive 89/440/EEC (which amended 71/305 but which was repealed by 93/37) referred in its preamble to the need to be "able to monitor compliance with the prohibition of restrictions." In the *Gebroeders Beings* case, the court distinguished between objective criteria and those where the effect "was to confer on the authorities awarding contracts unrestricted freedom of choice as regards the awarding of the contract".[1186] But calculations of redundancy payments and similar financial effects were, in his Lordship's view, inherently capable of being checked and were objective in the sense intended. In making their replies, the tenderers eventually conceded this point.

It was further argued by the injured low bidders that the Council had misapplied these wider financial criteria to the three contracts in question. They drew attention to the fact that the calculations as to redundancy costs were related particularly to the Maintenance Contract. The Council assessed the effects of awarding all three contracts on the basis of best value for money and relative capacities of the contractors concerned. The redundancy consequences were estimated to be substantial. But no assessment was made of the redundancy costs of awarding, say, the Improvement Contract on such a basis but not the Maintenance Contract.

There was evidence that the Council considered the Maintenance Contract work as being 'core work' for PCS's continued existence. Therefore, the injured low bidders argued, the other two contracts were of lesser significance in terms of redundancy effects and other wider financial consequences, and it followed that the Council had failed to apply objective criteria independently to each offer. Had it done so, the Improvement Contract might well have been awarded largely to Colwick Builders. Thus the Council was said to have been in breach of regulation 20, although regulation makes no express reference to objectivity of criteria.

The Council defended by merely submitting that Option 2 represented the minimum amount of work needed to sustain PCS and so avoid the large costs of redundancies. Once it was accepted that the Council was entitled to consider the redundancy effects of making awards to private contractors, it followed that it had to consider the cumulative effect of awarding more than one contract in that way. It would, argued the Council, have been artificial and given a misleading result to have considered each contract in isolation. To take Option 2 was indeed a rational decision by the Council.

Keene J agreed with the Council. The tenderers' criticism of the Council's actions was unfounded. The factors considered by the Council were quite capable of being taken into account as objective criteria under the 1991 Regulations, and his Lordship was not satisfied that the Council applied them in a way which discriminated in favour of its own workforce. The position under the 1991 Regulations, therefore, was that there was a breach by the Council of the duty it owed to Colwick Builders Limited to comply with the provisions of regulation 20(3), in that it failed to state the criteria for its decision on the Improvement Contract in advance as required by that paragraph and failed to send the requisite notices to the *Official Journal* under Regulations 9 and 12(2). But, in Keene J's judgment, those were the only breaches of the 1991 Regulations by the Council in relation to these three contracts.

Regulation 31(3) makes a breach of duty under the 1991 Regulations actionable by a contractor who has suffered loss or damage as a consequence. It provides:

1185 *Supra.*
1186 [1990] CMLR 287, 304.

"A breach of duty owed pursuant to paragraph (1) above shall not be a criminal offence but any breach of the duty shall be actionable by any contractor who, in consequence, suffers, or risks suffering, loss or damage."

However, in this case Portsmouth Council relied on regulation 31(5)(a) which reads as follows, insofar as it was relied on:

"Proceedings under this regulation may not be brought *unless* -

(a) the contractor bringing the proceedings has informed the contracting authority ... of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) above by that contracting authority ... and of his intention to bring proceedings under this regulation in respect of it; ..."

(11) Is a tenderer's claim for loss or damage suffered as a result of breach of the 1991 Regulations defeated if the tenderer has failed to give notice to the Council of its intention to bring proceedings and of what breach of duty is to be relied upon in those proceedings as required by regulation 31(5)(a)?

Yes, said the trial judge, the tenderer's claim is defeated. But the Court of Appeal disagreed. Leggatt LJ noted some reluctance on the trial judge's part in holding that Colwick Builders Ltd had failed to comply with regulation 31(5). But, Legatt LJ said, it seemed that the trial judge accepted, and the Council apparently conceded in argument before him, that, if the breach had been in relation to the *substance* of the decision (rather than form) then the correspondence identified the breach sufficiently to satisfy regulation 31(5). Given that Colwick Builders had not complained of the Council's failure to state its award criteria, and the Court of Appeal's decision above that the Council was barred from awarding the contract to other than the low bidder, Leggatt LJ said that "Colwick Builders are not disabled by regulation 31(5) from bringing proceedings."[1187] Hobhouse LJ said that "the notice they served was sufficient. Their appeals succeeds."[1188]

The effect of the Court of Appeal's decision seems to be that because the Council's breach was one of substance, Colwick Builder's letter (through its solicitors) of 18 December 1992 satisfied the requirements of regulation 31(5). If on the other hand, the Council's breach was in form only, for example, a failure to state the contract award criteria in the tender notice or contract documents, Colwick's letter was insufficient because it failed to identify "the breach ... of the duty owed [by the Council] to him ... and of his intention to bring proceedings ... in respect of it".

The trial judgment remains instructive in the situation where the alleged breach by the contracting authority is in form rather than substance and/or the applicant's notice under regulation 31(5) lacks particularity. Keene J found that the requirement for the aggrieved tenderer to bring the alleged breach of duty to the notice of the Council and its intention to commence proceedings is a condition precedent to its right to recover such loss or damage. The tenderer must be specific about the duty broken. Here, the condition precedent was not met, and there was therefore no liability by the Council under the 1991 Regulations to any of the applicants.

The Council submitted that regulation 31(5) required the injured bidder not merely to inform the authority of its intention to bring proceedings but also of the breach of duty to be relied on in such proceedings. In this case, Colwick Builders did not inform the Council of any breach of duty consisting of a failure to send the requisite Notices to the *Official Journal* or of a failure to state the criteria for its decision in the contract notice or the contract documents. Solicitors wrote on behalf of all the aggrieved tenderers to the Council on 18 December 1992. The heading to the letter indicated that it referred to all three contracts. It read as follows:

"We have been instructed by the above who advise us that you have acted in breach of Public Works Regulations 1991.

Our clients intend to bring proceedings to remedy this breach pursuant to Regulation 20 of Public Works Contract Regulations 1991. We hereby give you notice of such action pursuant to Regulation 31(5)(a).

We shall be grateful if you will acknowledge receipt of this letter."

There is nothing, said Keene J, in regulation 31(5) which required all the information to have been provided in a single letter. But nothing in the correspondence originating from Colwick Builders took up a point relating to the Council's failure to send Notices to the *Official Journal* or its failure to state criteria for the

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[1187] 81 BLR 1, 12C.
[1188] *Ibid.*, 17C.

award decision in the contract notice or the contract documents. Colwick's attack was essentially on the decision itself and the reasoning behind it.

Is that apparent failure to satisfy regulation 31(5)(a) fatal to the claim by Colwick Builders? The Council, rightly in Keene J's judgment, pointed out that these are statutory regulations and that regulation 31(5) gives the court no discretion. However, it was less clear to his Lordship as to whether the injured bidder had to identify the breach of duty alleged, or merely was required to inform the contracting authority that there had been a breach of the duty owed under regulation 31(1), without being specific. The language of the paragraph, said Keene J, referring, as it did, to "the breach ... of the duty owed" rather than 'a breach ... of the duty' suggested to his Lordship that the breach must be identified, but that was not necessarily conclusive.

The purpose of regulation 31(5)(a) seemed to be to provide some possibility of the breach being remedied, in whole or in part, by the authority. That was borne out, said Keene J, by European Directive 89/665/EEC on review procedures when public works contracts are awarded. That Directive lay behind this Regulation. That Directive allowed Member States to require that the injured bidder "must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."[1189] The preamble placed particular emphasis on arrangements to ensure compliance "at a stage when infringements can be corrected". Indeed, Keene J found it difficult to see any purpose being served by such a requirement as that contained in regulation 31(5)(a) other than providing some possibility of the breach being remedied by the contracting authority.

That being so would reinforce the natural meaning which could be attached to the language of the paragraph, because a breach could only be remedied if it had first been identified with some specificity. The fact that in the present case no precise remedy of the breaches could have been achieved could not affect the interpretation of this provision. His Lordship concluded that it was a requirement of the 1991 Regulations that before proceedings could be brought under regulation 31, the tenderer must have informed the authority of *the* breach of duty which was alleged and not merely of *a* breach of duty. He reached that conclusion with some regret, because here the requirement for specificity seemed a somewhat technical objection. Nonetheless, it was a pre-condition imposed by a statutory regulation and it was one which was not met by Colwick Builders, or by any of the tenderers in relation to those breaches which his Lordship had found did occur. There was in Keene J's judgment no liability on the part of the Council to any of the aggrieved tenderers under the 1991 Regulations.

Issues before the court: the Public Works Directive

(12) Was there a period of time when the Works Directive (as amended) had direct effect within the UK, and would have had such direct effect on Portsmouth City Council in the award of these contracts?

Yes. There was a period of time when the Works Directive 71/305 (as amended by 89/440/EEC)[1190] required Member States to bring the necessary measures into force to comply with it, but when the 1991 Regulations applicable to the United Kingdom had not been brought into force. That period ran from 20 July 1990 to 21 December 1991. Consequently, the doctrine of "*direct effect*" operated during that period.[1191] The fact that the Works Directive had such direct effect on the Council is, it was said, borne out by the fact that a Notice was sent under the Directive to the *Official Journal* by the Council in relation to the Maintenance Contract on 12 March 1991, before the 1991 Regulations had come into force.

Keene J said that if the obligations under a Directive are clear and unequivocal, they may be relied upon in an English court in an action against the State or its organs or 'emanations', including local authorities, before the United Kingdom statutory instrument has come into force. The Council did not dispute that the Works Directive had such direct effect on it during the period referred to above. Moreover, added his Lordship, for the purposes of this case and subject to any reference being made to the European Court of Justice, the Council was prepared to concede that there is a right to damages for breach of the Directive.[1192]

Keene J found the Directive to be in generally similar terms to the 1991 Regulations. It too, as amended, only applies to contracts of an estimated value of 5 million ECU's.[1193] This meant that the only contract in respect

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1189 Art 1(3).

1190 And more recently consolidated in Directive 93/37/EEC.

1191 Hobhouse LJ agreed, 81 BLR 1, 14F.

1192 Hobhouse LJ agreed that there was a right to damages arising from such breach, 81 BLR 1, 14G. In *Gebroeders* case, *supra*, the ECJ held that Directive 71/305 is capable of direct effect when the implementation date has passed, but there has been no implementation.

1193 Article 4a(1).

of which a cause of action could lie under the Directive was the Maintenance Contract, since Keene J's earlier findings on the issues of aggregation applied to the Directive as they did to the 1991 Regulations. The other two contracts fell below the monetary threshold, that being true even of the Improvement Contract during the period before the 1991 Regulations came into effect.

(13) Was the Council, with respect to the Maintenance Contract, in breach of Directive 71/305 (as amended by 89/440), Article 29(2), which required the criteria intended to be applied when making the contract award to be stated in the contract notice or tender documents (as also provided in regulation 20(3) of the 1991 Regulations)?

Yes. Article 29(2) of the Directive was not complied with. The Council was in breach, with respect to the Maintenance Contract, because it did not state the criteria that were to be applied in the contract notice or in the tender documents. But for the reasons explained above in answer to Question 9, the Council was not obliged to award the contract to the lowest tenderer.[1194]

The relevant part of article 29 provides:

> "1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:
>
> - either the lowest price only;
>
> - or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.
>
> 2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance."

The Notice sent to the *Official Journal* by the Council about the Maintenance Contract stated, insofar as it indicated the basis on which an award would be made, that:

> "tenders accepted will be on the basis of the best value for money and the City Council do not bind themselves to accept the lowest or any tender."

Keene J accepted the Council's contention that that wording did not indicate that the award or awards would be made on the basis of the lowest price. 'Best value for money' was not the same thing. But that was not the point. It was the criteria which had to be stated if the basis of contract award was to be the most economically advantageous tender. What seemed to his Lordship to be indisputable was that the criteria which were applied in due course to the tenders for this contract were not stated in the contract notice or in the contract documents. For the reasons given earlier, he rejected the argument that the fact that the Council would consider the wider economic consequences for itself as an employer was so obvious that it did not need to be stated. Keene J found that article 29(2) of the Directive was breached by the Council in respect of the Maintenance Contract.

However, he did not accept that the Council was obliged to award the contracts to the lowest tenderers, nor did he accept that the award itself was in breach of the Directive either because of the failure to state the criteria in advance or because of the type of criteria applied. His reasoning was the same as that set out in relation to the 1991 Regulations.

Nonetheless, it followed in his Lordship's judgment that those amongst the tenderers who were interested in the Maintenance Contract and who could prove that they had suffered loss as a result of the breach of article 29(2) were entitled to damages. George Austin Limited and Mr PG Coles were known to be interested in this contract and might therefore have had a claim for damages. Keene J was not asked to deal with quantum in these proceedings, and he would return to that matter at the end of his judgment.

[1194] Hobhouse LJ said, of Keene J's judgment here, that "the City Council had been in breach of the tendering requirements of these Directives but not in relation to the award of contracts." The consequence of this distinction was, of course, that damages, if they existed, for such breach would be, it is submitted, relatively small, perhaps only wasted tendering costs. The real damages would lie in breach of an obligation to award the contract, where not only is it likely that wasted costs would be recovered, but also loss of profit from the non-existent contract. But the case here did not deal with quantum, only liability.

Issues before the court: the Local Government Acts

(14) Was the Council in breach of its obligations under the compulsory competitive tendering provisions of the Local Government Act 1980 as amended by the Local Government Act 1988?

There was no answer provided by the court to this question. As Keene J held that no private cause of action could lie for breach of s.9(4) of the 1980 Act, it was unnecessary to determine whether or not any breach of s.9(4)(aaaa) occurred in relation to these contracts. He would in any event, he said, have refused as a matter of discretion to grant a declaration. That was sufficient to dispose of the applications raised under the 1980 Act. There was no appeal from this part of Keene J's judgment.[1195]

Keene J observed that the Local Government, Planning and Land Act 1980 introduced a system of control over the power of a local authority to enter into agreements to carry out construction and maintenance work for other bodies, such agreements being known as 'works contracts', and over functional work undertaken by its own labour force in the performance of or in connection with its own functions as a local authority. Section 9 gave to the Secretary of State for the Environment a power to make regulations whereby he could, *inter alia*, specify descriptions of functional work which a local authority may not undertake without first complying with the conditions specified in s.9(4).

The 1980 Act was amended by the Local Government Act 1988 which, amongst other things, added to the conditions set out in s.9(4). Section 9(4)(aaaa) reads:

> "that in reaching the decision that they should undertake the work and in doing anything else in connection with the work before reaching the decision they have not acted in a manner having the effect or intended or likely to have the effect of restricting, distorting or preventing competition."

There is also provision in the 1980 Act, introduced by the 1988 Act, for the Secretary of State to serve a notice on a local authority under s.19A if it appears to him that the authority has not complied with various provisions of the Act, including s.9(4). Once he has served such a notice, then the local authority is required to submit to him a written response, and, under s.19B, the Secretary may then give a direction as to the cessation of the work or as to such conditions that must be attached to the carrying out of the work.

Keene J made the important distinction between the domestic rules for compulsory competitive tendering (CCT) by local authorities and the EU public procurement rules. It would be easy to assume that the CCT provisions and those in the European Works Directive 71/305 and its UK equivalent in the 1991 Regulations had the same purpose. That was patently not so. The 1980 Act, as amended by the 1988 Act, was clearly seeking to oblige public works and services to meet competition from the private sector. No such requirement was contained in the European legislation or subordinate UK legislation, which only operated if a public body chose to embark on a tendering process, but which then required the process to be one which was open to contractors across the Community on a comparable basis.

The aggrieved tenderers argued that the Council acted anti-competitively, largely on the basis of its assessment of the wider costs to the Council of awarding the contracts wholly or largely to the private sector contractors. But a question was also raised as to the legitimacy or otherwise of taking those wider costs into account at all. Would not a contracting authority be in breach of s.9(4)(aaaa) when it takes those wider costs to itself into account when deciding to whom a public works contract should be awarded? The argument was that to do so must inevitably distort competition, even if it did not restrict or prevent it. At the same time, it was recognised that a local authority had a fiduciary duty to its council taxpayers and must act prudently to safeguard their financial interests. It was not easy, said Keene J, to see how it could do that without taking account of the wider financial implications for itself as a local authority of a particular course of action. The injured low bidders fairly acknowledged that there might be problems in reconciling s.9(4)(aaaa) with the Council's fiduciary duty.

Those problems were insurmountable. It seemed unlikely that Parliament intended injured bidders to be entitled to a damages remedy given the sweeping powers of the Secretary of State to intervene.[1196] Even less likely would it be that Parliament intended a local authority to be liable in damages for performing its fiduciary duty to its council taxpayers and that such liability could only be avoided by breach of that fiduciary duty. His Lordship concluded that no private cause of action lay for breach of s.9(4) of the Act.

(15) Has the Council acted ultra vires in the making its decisions on the award of these three contracts?

[1195] Hobhouse J, 81 BLR 1, 14E.

[1196] See ss.19A and 19B.

This question should be tackled in two parts:

(a) in arriving at its decisions, has the Council failed to take into account a material consideration, namely, the Secretary of State's anticipated Direction under s.19B of the 1980 Act in respect of the already existing contracts; and

(b) that in respect of the Maintenance Contract, was there a legitimate expectation on the part of contractors that it would be awarded on the basis of the best value for money and that the decision would not take account of external costs such as redundancy liability?

On question (a) Keene J found that the Council did not fail to take account of a relevant consideration in this respect; and (b) the claim based upon legitimate expectation failed because there could not have been a legitimate expectation that this local authority would ignore its fiduciary duty to its Council taxpayers and tenants by taking no account of the effect of any course of action upon its financial position overall. Few people knowing anything about local government could have such an expectation, and even if the expectation existed, it would not have been a legitimate one.

The Council relied on the decision of the Divisional Court in *R v Lord Chancellor, ex parte Hibbit & Sanders*[1197] in support of its submission that the decision on such a contract did not give rise to any general duty to act fairly and was not subject to judicial review. Keene J shared some of the doubts expressed as to whether there was in the present decision a sufficient public law element as to make them susceptible to judicial review, although the process of awarding public works contracts is subject to considerable statutory underpinning. However, in the light of the conclusions which he had reached on the merits of the *ultra vires* grounds put forward, it was unnecessary to express any firm view on this further and far-reaching issue and his Lordship declined to do so.

Concluding his judgment on the *Portsmouth* case, Keene J said:

> "The end result of these proceedings in this court is that I find that the [Council] is liable to the [tenderers] George Austin Ltd and Mr PG Coles for its breach of article 29(2) of the European Works Directive, ie 71/305/EEC as amended, in respect of any loss or damage which those applicants may have suffered as a result. There has been no evidence put before me as to whether either of those two applicants has in fact suffered loss or damage or as to what their position would have been in the absence of that breach of article 29(2). ... All the other applications in these matters are dismissed."

Issue raised only on appeal

(16) As the Works Directive concerns the award of "public works contracts" which are defined as "contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts", is the Works Directive concerned with the award by the Council of the Maintenance Contract to its own workforce (PCS)?

No, said Leggatt LJ in the Court of Appeal. He noted that the Works Directive concerned the award of "public works contracts". That term was defined by Article 1 as meaning "contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts". Article 29(1) referred to "The criteria on which the authorities awarding contracts shall base the award of contracts." But when awarding work to PCS the Council was not, and could not have been, awarding contracts properly so-called, because even if (which seems unlikely) PCS could be regarded as "a natural or legal person", it was not possible for the Council to contract with its own department.[1198] Liberally though the European Court of Justice might he expected to construe the provision, Leggatt found it difficult to see how (unless by analogy) a Council could be regarded as having made with its department any "contracts for pecuniary consideration".

The reason, said his Lordship, why this belated and unmeritorious argument did not apply to the 1991 Regulations, and so to Colwick Builders Ltd, was that regulation 20(8) provides:

> "(8) For the purposes of this regulation an 'offer' includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons."

1197 *The Times* 12 March 1993; *The Independent* 16 March 1993. See also [1994] CLJ 104.

1198 As Hobhouse LJ put it, the Council was deciding *not* to award a contract.

There was no merit in the argument that because the 1991 Regulations were made to ensure national compliance with the Directive, regulation 20(8) did no more than reproduce the express or implied effect of the Works Directive. Regulation 20(8) had no equivalent in the Works Directive. It was inserted, said Leggatt LJ, by the draughtsman of the 1991 Regulations in order to make good an obvious *lacuna* in the Works Directive. A similar point had arisen in *Cumbria Professional Care Ltd v. Cumbria County Council.*[1199] In that case the court said:

> "Since, as a matter of law, the respondents cannot contract with themselves, the Directive cannot, in my judgment, be called into play ... A contract as recognised by domestic law, is not made when, as the result of an administrative decision a service provider, who happens to be in-house with the purchasing authority is selected to perform a function which the purchaser can lawfully award to itself."

It seemed inescapable to Leggatt LJ that the Council was not entering into a public works contract, within the meaning of the Works Directive, when it awarded the work to PCS. The Works Directive therefore had no application to this transaction. Therefore, decided the Court of Appeal, the appeal of Colwick Builders as to the Improvement Contract must be allowed but the appeal of Coles and George Austin {Builders) Ltd as to the Maintenance Contract should be dismissed.[1200]

Hobhouse LJ agreed with Leggatt LJ that, for reasons not those of Keene J, the appeals of Mr Coles and George Austin Builders must be dismissed with respect to the Maintenance Contract. He talked of the "fiction" under the 1991 Regulations whereby a Council might award itself a 'contract', but the Works Directive did not provide for a "fiction": it only applied to the award of an actual not a fictional contract.[1201] Thorpe LJ agreed.

Analysis and concluding comment

Not only is this case complex because three statutory frameworks are considered, but also because there are three contracts at issue and three parties seeking review of the several decisions made by the Council and the trial judge with regard to those contracts. The case commenced as motions for judicial review where the applicants (who are not clearly identified) initially sought declarations, an injunction to restrain the contract award process, an order setting aside the challenged decision, and damages. By the time the applications were heard the BISF and the improvement work had been completed, the maintenance work had been retendered on directions of the Secretary of State, and the PCS had been privatised. At the end of the trial the applications for review were dismissed, but the proceedings commenced by Cole and George Austin Ltd were to continue as if commenced by writ. On appeal Colwick Builders' established the merit of their case and the liability of the Council for breach of regulation 20 (of the 1991 Regulations) with respect to the Improvement Contract. On the other hand, on grounds not advanced at the trial, Coles and George Austin Ltd lost their appeal with respect to the Maintenance Contract. The commentators of *Building Law Reports* note that this case confirms a trend in public procurement challenges: that challenges now typically come from an aggrieved tenderer (or tenderers) seeking damages for breach from the public contract awarding body, rather than the Commission seeking declarations against the public body in breach.[1202]

The complexities of European and English public procurement law became entangled with English privatisation measures. Hobhouse LJ recognised the statutory arrangements for local government contracting as "regrettably complex". The Local Government Planning and Land Act 1980 required councils to treat their direct employees as independent contractors. Councils were expected to use contractors when they were shown to be more competitive. Amendments in 1988 and 1992 reinforced the competitive element between in-house providers and outside contractors. The Court of Appeal in the *Knowsley* case had explained the policy and effect of these statutory provisions.[1203]

The Council's 'killer' argument, in the *Portsmouth* case, raised only on appeal and accepted by the Court of Appeal, raises an important point. With respect to the contract to which the Works Directive applied (the Maintenance Contract), article 1 of that Directive defined "public works contracts" as "contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts ...". When awarding work to PCS the Council were not, and could not have been awarding contracts in the strict legal sense, because, even if, which seemed unlikely, PCS could be regarded as a natural or legal person, it was not possible for the Council to contract with its own department. Even if,

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1199 Unreported, Turner J, 30.9.1996.
1200 Leggatt LJ at 81 BLR 13F, Hobhouse LJ at 13G and Thorpe LJ at 18B.
1201 81 BLR 1, 18A-B.
1202 81 BLR, *Introduction*, page v.
1203 81 BLR 1, 14B.

as Leggatt LJ observed, the ECJ construed article 1 of the Works Directive liberally, it was difficult to see how, unless by analogy, a Council could be regarded as having made with its department "contracts for pecuniary consideration".

But this argument did not apply to the Improvement Contract, which was covered by the 1991 Regulations, due to the effect of regulation 20(8) which, unlike any provision in the Works Directive, anticipated that a bid might come from an operating arm of the local authority . Although it had been argued that regulation 20(8) did no more than reproduce the express or implied effect of the Works Directive, that was not a permissible approach to construction in the absence of a provision in the Directive which afforded a basis for the inclusion of regulation 20(8) in the 1991 Regulations. It must be taken that the draftsman of the 1991 Regulations included regulation 20(8) in order to make good an obvious *lacuna* in the Works Directive. It was inescapable that when awarding the contract to PCS the Council were *not* entering into a public works contract within the meaning of the Works Directive, which therefore had no application to this transaction. It is therefore clear that the Works Directive does not apply, but the 1991 Regulations do apply, to 'fictional' contracts, where parcels of work are awarded to in-house teams in competition with outside contractors.

It seems clear also that public bodies must state the criteria to be used when they wish to award works contracts on the basis of the "most economically advantageous" tender. If they fail to do this, the consequences are that (i) they must award the contract to the tenderer which offers the "lowest price"; or (ii) they will be in breach of the 1991 Regulations (regulation 20(3) and / or the Works Directive 93/37/EEC, art 30(2) and be liable in damages to any aggrieved tenderer.

The Court of Appeal applied here the decision of the European Court of Justice in the *Commission v Belgium.*[1204] In that case the Commission sought a declaration against the Société Régionale Wallonne du Transport (SRWT) in connection with a public contract to supply 307 standard vehicles. One tenderer was allowed to amend its tender after opening of tenders; one tenderer was admitted to the award procedure who failed the selection criteria laid down in the tender documents; and the contract award was made on criteria not specified within the tender documents. These actions, it was argued, amounted to a breach of obligations imposed by Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (the 'Utilities Directive', see now 93/38/EEC).[1205] Such actions, it was alleged, amounted to a failure to comply with the principle of equal treatment which underlies all the EU rules on procedures for the award of public contracts.[1206]

SRWT had published a notice in the *Official Journal* seeking tenders under the open procedure for the supply of buses. The contract conditions comprised 'general' conditions and 'special' conditions. Five tenders were received on 7 June 1993. A memorandum drawn up by officials prior to a council meeting on 2 September 1993, recommended Jonckheere for lot 1 and Van Hool for lots 2-6. But in August, EMI had submitted 'supplementary' notes as to technical quality aspects of its bid. Therefore at its meeting on 2 September the council deferred its decision, and SRWT undertook a fresh evaluation of tenders, taking into account the material submitted 'late' by EMI. As a result. A revised recommendation was prepared for the council meeting on 6 October 1993: lot 1 to Jonckheere and lots 2-6 to EMI. The council adopted this recommendation at its meeting. Van Hool complained to the Commission, which formally asked for Belgium's observations under article 169 of the EU Treaty,[1207] prior to bringing an action to court.

The ECJ held that

> (1) despite the fact that all tenderers came from one Member State, this was not a matter governed purely by domestic law. The obligations imposed on contracting parties by article 4 of Directive 90/531 is not subject to any condition as to nationality or seat of tenderers. It is possible that undertakings established in other Member States could be directly or indirectly affected by the award of a contract. The Directive's procedures must be observed regardless of the nationality or seat of tenderers.
> (2) by taking into account the supplementary information provided by EMI after the opening of tenders, the council was in breach of the principle of equal treatment of all tenderers.
> (3) by awarding the contract to EMI on a basis which did not accord with the prescriptive requirements of the 'special' tender conditions, by evaluating tenders using criteria not specified in the

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1204 Case C-87/94, (the 'Walloon Buses' case) 25.4.1996.
1205 [1993] OJ L 199/84.
1206 See ECJ circular 11/96, 22-26 April 1996, p.3.
1207 Art. 169 requires "a reasoned opinion on the matter" from the Commission after receipt of the Member State's observations. The Commission may then bring the matter before the ECJ if the Member State does not comply with the Commission's opinion.

tender documents or the tender notice, by taking into account cost-saving features proposed by EMI to offset financial differences between the low bid and the second low bid of EMI, and by accepting EMI's tender, having taken those cost-saving features into account, Belgium was in breach of its obligations under Council Directive 90/531/EEC of 17 September 1990.
(4) the Kingdom of Belgium must pay the costs of the action.

The obligation on contracting entities to publish an indicative notice, or tender notice, is clearly important in meeting the objective of effective competition in public procurement. There is a high degree of vigilance over the publication of notices in the *Official Journal*. In *Commission v Germany*[1208] the Commission sought a declaration that the Waterways and Navigation Office in Emden, Germany, had failed to honour its obligations under Directive 71/305/EEC (as amended by 89/440/EEC) when it awarded the public works contract, by negotiated procedure and without prior publication of a notice in the Journal, for the dredging of the lower Ems between Papenburg and Oldersum.

Under Article 5(3) a dispensation from the obligation to publish a prior notice is given in cases of "extreme urgency brought about by events unforeseen by the contracting authorities in question". Was the Federal Republic entitled to this dispensation? The ECJ has held in *Commission v Italy*[1209] that these provisions must be interpreted strictly and that the burden of establishing the existence of the exceptional circumstances rests on the party seeking to rely on the derogation. In order to take advantage of the derogation, three conditions must be satisfied concurrently: the existence of the unforeseeable event, extreme urgency rendering observance of the prescribed time limits impossible, and, a causal link between the unforeseeable event and the extreme urgency which results therefrom. Failure to satisfy any one condition means that use of the negotiated procedure (as opposed to the preferred competitive open and restricted procedures) is not justified.[1210]

The ECJ held that the delay caused by the refusal of the Weser-Ems Regional Authority to approve the project could not be regarded as an event which was not foreseeable by the contracting authorities, and therefore did not justify a derogation of the open procurement procedure in favour of negotiation, nor of the requirement to publish a prior notice. Accordingly, the Federal Republic of Germany, acting through the Waterways and Navigation Office, Emden, had failed in its obligations under Council Directive 71/305, as amended by 89/440 and was required to pay the costs of the action.

There seems no doubt from the facts of the *Portsmouth* case that not only did the tenderers remain ignorant of the Council's use of redundancy costs as an economic criterion in evaluating tenders, but that the Council itself had not resolved to use this criterion at the time tenders were invited. Perhaps the tenderers could have more successfully argued that the Council was in breach of a 'tendering contract' in using secret and undisclosed contract award criteria, adopting the authority of the numerous Canadian cases in this context.[1211]

1208 *Commission v Germany* (Case C-318/94) [1996] ECR I - 1949.
1209 *Commission v Italy* (Case C-57/94) (*Ascoli Piceno No2*) [1995] ECR I-1249, par 23; [1996] 2 CMLR 679; 77 BLR 1
1210 *Commission v. Italy* (Case C-107/92) (urgent avalanche barrier) [1993] ECR I-4655, par 12.
1211 See for example *Health Care Developers Inc v. The Queen in right of Newfoundland* (1996) 136 DLR (4th) 609, Newfoundland Court of Appeal, discussed by the author at (1997) 16 ACLR 33, and at Craig, R.W., *Procurement Law for Construction and Engineering Works and Services* (Blackwell Science, Oxford, 1999), p.279.

Chapter 11

Environmental risks and their impact on procurement of construction works

The aims of Chapter 11 are to present the author's published conference paper titled *Identification of environmental risks and their impact on procurement of construction works* and to provide supporting material in the form of an as yet unpublished paper under the same title. Chapter 11 is in three parts. The objective of Part 1 is to introduce Parts 2 and 3. The objective of Parts 2 and 3 are identical: to reveal to what extent the traditional 'environmental torts' place power in the hands of those affected by development and therefore represent a risk of legal challenge to the developer.

Part 1

Part 1 of Chapter 11 is an introduction to Parts 2 and 3. Part 2 was published in the proceedings of Symposium C of the CIB World Building Congress held in Gävle, Sweden, 7-12 June 1998. The theme of this Symposium was *Legal and Procurement Practices —Right for the Environment.*[1212] This paper considers the development risks by examining the 'controls' imposed by common law on the activities of developers and contractors in their relationship with environmental concerns. The risk is that a control is exercised so as to impose liability on the developer. The term 'developer' is used to describe both entities, which of course in reality may be the same or separate legal persons. The developer inevitably has the status of 'landowner' during the development phase, whereas the contractor probably does not, being merely a 'licensee' of the site.

Part 2 first examines two recent judgments in the House of Lords to show how the common law has not evolved to protect the interests of neighbours and local residents from the perils and hazards of property development which result in environmental deterioration. The conclusion is drawn that common law provides little control of development activity and inadequate remedy for those injured by environmental deterioration as a result of development. The common law protects only the enjoyment of the adjoining landowner or those injured by the developer's negligence. From the developer's perspective beyond the adjacent landowner, only the criminal law poses any real sanction for environmental deterioration. These substantial risks of criminal liability, which cannot be insured against, require identification and quantification at the procurement stage in the project cycle.

Part 3 was drafted as a second part to the Swedish paper but is so far not published. This paper notes that tort (civil wrong) is largely about compensating losses caused by wrongful harm inflicted by the conduct others. But compensation for injury is only part of the remedy: the tort of nuisance might also be used to *prevent* injury by restraining a wrongdoer by a formal process or simply by its deterrent effect. Consideration is given as to how the law of nuisance compensates an adjacent

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[1212] See pp.1627-1634.

occupier when unreasonable noise and dust causes injury, how nuisance law controls and regulates pollution, and how the common law overlaps statutory provisions as to noise abatement. Building works are usually of a temporary nature and any nuisance may be short-lived and trivial. Provided building work is done with reasonable care it is unlikely to amount to a nuisance. The exception arises where the temporary interference is nonetheless sufficiently substantial

In *Andreae v. Selfridge & Company Ltd* (1937) the Court of Appeal considered how far construction activity amounted to an actionable nuisance. The court held that Selfridge had conducted its operations in such a way as by noise and dust to interfere with the reasonable and comfortable occupation by Andreae of her premises and that as a result she suffered damage. The contractor must take proper precautions, and see that the nuisance is reduced to a minimum if it wishes successfully to avail itself of a 'reasonable user' defence. The court condemned the contractor for its noisy night operations. The complaints made were substantial. The court rejected any idea that, if persons, for their own profit and convenience, chose to destroy even one night's rest of their neighbours, they were doing something which was excusable. To say that the loss of one or two nights' rest was one of those trivial matters in respect of which the law would take no notice appeared to the court to be a misconception, and, if it was a misconception existing in the minds of those who conducted these operations (ie builders), the sooner it was removed the better. There was ample evidence that the dust produced by this operation was something which was not to be endured unless some proper explanation was given of why it came. The burden of establishing that was upon the contractor.

In *Lloyds Bank plc v. Guardian Assurance plc and Trollope & Colls Ltd* (1986) the Court of Appeal considered to what extent, if any, statutory provisions for abatement of noise supplanted a remedy in the tort of nuisance.

This part concludes with recommendations as to how construction noise risk should be managed by developers and constructors.

Part 2

Identification of environmental risks and their impact on procurement of construction works

1 Introduction

It seems that there is inevitably some conflict between the interests of developers and the population affected by development, who may be simply the neighbours, the local community or a much wider community. The common law has restricted the activities of developers where those activities impact on others beyond the site boundary and developed remedies where property, economic or personal rights are damaged. But does the common law generally provide sufficient protection and remedy from environmental deterioration caused by developers? What risks does the common law create that developers need consider during the procurement process?

2 The common law

The common law has created three control or regulatory processes that might provide a remedy for a plaintiff who alleges that the quality of its environment has deteriorated due to property development: negligence, nuisance and the rule of *Rylands v Fletcher.*[1213]

2.1 Negligence

The modern law of negligence is largely a creation of the common law courts during the last seventy years. The original policy of the law was simple, yet so much litigation on this theory has taken place. Each person was required to consider its own actions with respect to the impact that action might have on its neighbour, and to refrain from those actions which could reasonably be foreseen as likely to injure that neighbour. Inevitably the question arises: who is to be classed as a 'neighbour' in the circumstances in question? The answer originally provided was that a neighbour was any person who the law recognised as entitled to be considered as likely to be affected by the act, or acts, or omission, which are called in question.[1214]

Negligence is a tort (civil wrong) designed to provide, within limits, reparation for those injured by the carelessness of others. A negligence claim arises only on actionable damage. Much judicial time has been concerned with restricting the scope of duties owed, the extent of compensation allowed, the size and composition of the class of persons entitled to claim compensation, and the permitted time lapse between careless act and consequent damage. Recent policies of the English court have tended to restrict the scope of negligence claims, but this policy has not been adopted in other Commonwealth jurisdictions.

A plaintiff may have difficulty in establishing the degree of 'fault' necessary to secure compensation. Both private nuisance and *Rylands v Fletcher* avoid this problem by imposing the so-called 'strict' liability. Negligence is not further discussed in this paper.

2.2 Private nuisance

The law of private nuisance was reviewed by the House of Lords in *Hunter and others v Canary Wharf Ltd, Hunter and others v London Docklands Development Corporation.*[1215] It is necessary to state the factual background. That part of the River Thames between Limehouse Reach and Blackwall Reach and known to previous generations as the West India Docks used to be the thriving Port of London, but it fell into disuse with the growth in container traffic from the East coast ports. The riverside land became derelict and remained so until the Secretary of State approved[1216] a scheme which designated the Isle of Dogs, including Canary Wharf, as an 'enterprise' zone. Under this arrangement virtually any scheme could be constructed by-passing the normal process of development control. An agreement was concluded in July 1986 between LDDC[1217] and Canary Wharf Ltd which resulted in the construction of office buildings, including the César Pelli tower, 250 metres tall, on plan about 50 metres square, and clad in stainless steel, together with associated infrastructure works. A new road was constructed, the whole redevelopment process causing much excavation and movement of spoil over a construction period of four years.

1213 (1868) LR 3 HL 330; [1861-1873] All ER Rep 1. The case name became the principle's label.

1214 Paraphrased words of Lord Atkin in *Donoghue v Stevenson* [1932] All ER Rep 1, 11G-H.

1215 Two joined cases. [1997] 2 All ER 426 (HL).

1216 Using special powers under the Local Government, Planning and Land Act 1980, designed to encourage the regeneration of such rundown areas.

1217 The London Docklands Development Corporation, formed by an 1980 Order which designated London's docklands an urban development area.

The essence of the 'enterprise' zoning was that the normal statutory controls on development were eased or removed altogether thus attracting private property investment funds. Before 1980 and the introduction of enterprise zones, it seems unlikely that development on the scale of Canary Wharf would have taken place without a public enquiry[1218] and the opportunity created for local residents to voice their concerns. It may generally be said, that local concerns were overridden in this case pursuing instead the Government's view of the national interest.

The quality of the local environment must have been severely diminished for local people during the main construction phase. In Lord Hoffmann's words:

> "The local residents complain that the construction of the Canary Wharf Tower and the Limehouse Link Road caused them serious disturbance and inconvenience. Firstly, the construction of the road caused a great deal of dust in the air which settled upon their homes and gardens. If they opened their windows, everything in the room was soon covered in a layer of dust. If they hung out the washing in the garden it became dirty again. Secondly, the Canary Wharf Tower interfered with television reception. The great metal-clad tower stood between the BBC transmitter at Crystal Palace in south London and a swathe of houses, mainly in Poplar to the north of Canary Wharf, which lay in the building's electromagnetic shadow. The effect was that many houses could not receive television at all. In others, the quality of the signal was impaired. This state of affairs continued until April 1991, when the BBC brought a relay transmitter into service. Between July 1991 and August 1992 the residents had their aerials aligned to the new transmitter and the problem was thereby solved."[1219]

The local residents commenced two separate actions against the developers and LDDC. The first action (the 'television action') against the developers was founded on negligence and nuisance and sought compensation for the tall building's interference with television reception. This action failed and is not further discussed. The second action (the 'dust action') sought compensation from LDDC for damage and annoyance caused by dust from the construction operations and was founded on, inter alia, nuisance. There were 690 residents as plaintiffs in the 'television action', and 513 in the 'dust action'. The claims had been raised by a substantial group of local residents, including householders who had the exclusive right to possess the places where they lived, whether as freeholders or tenants, or even as licensees. The group included people with whom householders shared their homes, for example as wives or husbands or partners, or as children or other relatives. All of these people claimed damages in private nuisance, by reason of interference with their television viewing or by reason of excessive dust. The court addressed the following question as a preliminary issue of law. Does a plaintiff in an action for private nuisance need to have an interest in the property in question, and if so, what interest?

Lord Lloyd observed that private nuisances are of three kinds. They are nuisance by encroachment on a neighbour's land; nuisance by direct physical injury to a neighbour's land; and nuisance by interference with a neighbour's quiet enjoyment of his land. The basis of a cause of action in nuisance is damage to the land itself. The measure of damages is usually the diminution in the value of the land caused by the damage complained of. That loss is suffered by the owner or possessor of the land. The quantum of that loss was not affected by the number of people on the land. Each member of a family did not have a cause of action: there was only one potential cause of action per home.

It was not disputed that activities which cause dust on a person's property could amount to an actionable nuisance, but who can sue? The traditional answer, said Lord Hoffmann, is that as nuisance is a tort against land, including interests in land such as easements and profits, a plaintiff must have an interest in the land affected by the nuisance. That interest was characterised as 'possession or occupation'. A series of cases over the years have explored the quality of possession or occupation needed to found a claim in nuisance. Lack of title to the land was overcome by a lengthy period of occupation. Wrongful possession against the true owner's interest was sufficient to found an action in trespass or nuisance against a third party. Exclusive possession by the plaintiff was a feature of all the actions in nuisance.

Actions in nuisance should not be confused with actions in negligence. Lord Hoffmann said that negligence was based on *fault* but protected interests of many kinds, whereas liability in nuisance was *strict* but protected only interests in land. The effect of the liability in nuisance being strict, that is independent of any fault, is that it is no defence to a nuisance claim to say that all care was taken not to commit it. The liability arises out of the invasion of the proprietary or other interest in land.[1220] The exceptions to these well

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1218 Under the Town and Country Planning Act 1971.

1219 [1997] 2 All ER 426, 447d-e.

1220 See Lord Simonds in *Read v J Lyons & Co Ltd* [1946] 2 All ER 471, 482.

established principles lay in a Canadian case[1221] which had been followed by the Court of Appeal.[1222] But there was no good reason of policy why the old rules should be abandoned. Lord Hoffman did not agree with academic writings that had recently suggested that the law on this point should adapt to modern social conditions. On the contrary, any "development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap." Without an interest in the property affected by dust, said Lord Hoffmann, the plaintiff residents had no right to sue in nuisance.

The majority of the court were of the view that there was no good reason to depart from the law of nuisance as established in the authorities. A mere licensee had insufficient status to sue in private nuisance. An action in nuisance is only possible by a person who has the right to exclusive possession of the property affected. This means that co-habitees, partners, family members and lodgers without more than a license to occupy property are deprived of any right to sue a developer who harms the environment for such class of persons.

One voice of dissent was heard, that of Lord Cooke. In His Lordship's view the choice being made here was a policy choice, whether to restrict the law of nuisance to its historical position or let it expand at least with respect to who could sue. The law of nuisance had been established before the age of television and radio, motor transport and aviation, town and country planning, a 'crowded island', and a heightened public consciousness of the need to protect the environment. All these were among the factors now falling to be taken into account in evolving the law. It seemed absurd to Lord Cooke that whilst a husband as owner had standing to sue, his wife's occupancy of the matrimonial home was insufficient to found an action in nuisance. Children too should be entitled to relief from substantial and unlawful interference with amenities of their home. He noted developments on the law of nuisance within the USA. Here it was acknowledged that occupancy was a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land.

> "Thus members of the family of the possessor of a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors, as defined in § 328E. When there is interference with their use and enjoyment of the dwelling they can therefore maintain an action for private nuisance. Although there are decisions to the contrary, the considerable majority of the cases dealing with the question have so held."[1223]

More recently in *Bowers v Westvaco Corp*[1224] family members, including minors living at home, were awarded damages by the Supreme Court of Virginia for dust and vibration nuisance caused by truck-staging operations on adjacent property.

Lord Cooke attempted, in vain, to show that whilst it was accepted that in order to sue in the tort of nuisance it was necessary that the plaintiff have some link with the land. But the court was yet free to define the precise nature of that link. He could see that the adoption of his view might "add marginally to building or operating costs" but that was not an obstacle in adopting "reasonable safeguards in any other field of the law."

2.3 Rylands v Fletcher liability

The liability under the principle of *Rylands v Fletcher* was examined by the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc.*[1225] Eastern Counties Leather (ECL) was incorporated in 1879, and since that date has continued in uninterrupted business as a manufacturer of fine leather, employing about 100 people, all or whom live locally. It has used solvents in that process since the early 1950s, including PCE (perchloroethene) which has increasingly been in common, widespread and everyday use in dry-cleaning, in general industrial use (eg as a machine cleaner or paint-thinner), domestically (eg in 'Dab-it-off') and in tanneries. PCE is highly volatile, and so evaporates rapidly in air; but it is not readily soluble in water. ECL began using PCE sometime in the 1960s, and continued to use PCE until 1991. The amount so used varied between 50,000 and 100,000 litres per year. The solvent was introduced into what were (in effect) dry-cleaning machines and must have leaked into the ground.

Meanwhile, in the later 1970s concern began to be expressed in scientific circles about the presence of organic chemicals in drinking water, and their possible effects. The Directive (80/778/EEC) relating to the

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[1221] *Motherwell v Motherwell* (1976) 73 DLR (3d) 62. Now of doubtful authority.

[1222] *Khorasandjian v Bush* [1993] 3 All ER 669. Overruled insofar as it holds that a mere licensee can sue in private nuisance (Lord Goff at 441b).

[1223] The American Law Institute's *Restatement of the Law of Torts* (2 ed) 1977 which echoes *Prosser and Keeton on Torts* (5 ed) 1984: pp.621–622, cited at [1997] 2 All ER 426, 460.

[1224] 419 SE (2d) 661 (1992).

[1225] [1994] 1 All ER 53 (HL).

Quality of Water intended for Human Consumption was issued on 15 September 1980. UK regulations were made in 1989. The prescribed maximum concentration values for PCE has been 10μg/litre since 1 September 1989. The United Kingdom values have been brought back into harmony with the WHO Tentative Guideline Values of 1984. Before publication of these papers little was known about this subject.

Cambridge Water Company's (CWC) claim against Eastern Counties Leather (ECL) for contamination of percolating water caused by leaking solvent (PCE) was based on three alternative grounds: negligence, nuisance and the rule in *Rylands v Fletcher*. The trial judge dismissed CWC's claim on all three grounds—on the first two grounds, because ECL could not reasonably have foreseen that such damage would occur, and on the third ground because he held that the use of a solvent such as PCE in ECL's tanning business constituted, in the circumstances, a natural use of ECL's land. The Court of Appeal, however, allowed CWC's appeal from the decision of the judge, on the ground that ECL was strictly liable for the contamination of the water percolating under CWC's land, on the authority of *Ballard v Tomlinson*.[1226] It was against that decision that ECL appealed to the House of Lords. The question considered by the House of Lords was whether foreseeability was an essential element of liability under the principle of *Rylands v Fletcher*.

In order to consider the question in the present case in its proper legal context, it was desirable in Lord Goff's judgment to look at the nature of liability in relation both to the law of nuisance and the rule in *Rylands v Fletcher*, and for that purpose to consider the relationship between the two heads of liability. Since there is a close relationship between nuisance and the rule in *Rylands v Fletcher*, Lord Goff first considered whether foreseeability of damage is an essential element in the law of nuisance.

The principles of the law of nuisance have been discussed above. Lord Goff noted the original view of nuisance as a tort to land and that it had been distorted by cases involving claims for personal injuries which should have been brought in negligence. Historically nuisance was a tort of strict liability. When Blackburn J had given judgment in *Rylands v Fletcher* he had not regarded it as a revolutionary decision. He was not stating new but existing law, as is apparent from his judgment He was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape. It followed that the essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event.

The strictness of liability in nuisance had been reduced by the concept of 'reasonable user'—the principle of 'give and take' as between neighbouring occupiers of land. If the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. Strikingly, said Lord Goff, a comparable principle had developed which limited liability under the rule in *Rylands v Fletcher*. This was the principle of 'natural use' of the land. The unnatural use arose when that use involved increased danger to others. Then the defendant would be liable for the harm suffered by the plaintiff, notwithstanding that he has exercised all reasonable care and skill to prevent the escape from occurring.

The liability in nuisance is strict, but subject to the principle of 'reasonable user'. But it by no means followed, said Lord Goff, that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past sixty years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. Foreseeability was an essential element in determining liability in public nuisance for the spill of oil in Sydney Harbour.[1227] In Lord Goff's judgment, the law was settled to the effect that foreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance.

Lord Goff turned to consider the matter of foreseeability as an element in liability under *Rylands v Fletcher*. The general tenor of Blackburn J's statement of principle was that knowledge of the risk, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the *Rylands* principle. But the *Rylands* principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring. Lord Goff concluded that the historical connection of *Rylands* liability with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the *Rylands v*

[1226] (1885) 29 Ch D 115.

[1227] *The Wagon Mound (No 2), Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617; [1966] 2 All ER 709 (PC).

Fletcher rule. The recovery of damages in private nuisance depended on foreseeability by the defendant of the relevant type of damage. It was logical to extend the same requirement to liability under the rule in *Rylands v Fletcher*.

Should *Rylands* be developed by the courts as a principle of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations might properly be held strictly liable for the extraordinary risk to others involved? The cost of such damage would then be absorbed as an overhead of those engaged in the hazardous activity, rather than impose it on the injured person, its insurers or the wider community. This appeared to Lord Goff to be the trend in the USA.[1228] But as a general rule, it was more appropriate in His Lordship's view for strict liability in respect of operations of high risk to be imposed by Parliament, not by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, he added, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.

Returning to the instant case, all the ingredients were present to hold ECL liable in nuisance and under the principle of *Rylands*. But when ECL created the conditions which have ultimately led to the present state of affairs—whether by bringing the PCE in question on to its land, or by retaining it there, or by using it in its tanning process—it could not possibly have foreseen that damage of the type now complained of might be caused thereby. Indeed, long before the relevant legislation came into force, the PCE had become irretrievably lost in the ground below. In such circumstances, Lord Goff did not consider that ECL should be under any greater liability than that imposed for negligence.

His Lordship added that the present case might be regarded as one of historic pollution, in the sense that the relevant occurrence (the seepage of PCE through the floor of ECL's premises) took place before the relevant legislation came into force; and it appeared that, under the current philosophy, it was not envisaged that statutory liability should be imposed for historic pollution. If so, said Lord Goff, it would be strange if liability for such pollution should arise under a principle of common law. Since those responsible at ECL could not at the relevant time reasonably have foreseen that the damage in question might occur, the claim of CWC for damages under the rule in *Rylands v Fletcher* failed.

3 Conclusion

The common law controls on the developer who causes deterioration in the neighbourhood's environment are found to be less than adequate to afford the degree of protection generally required. Negligence requires proof of fault which is difficult to establish. Both nuisance and *Rylands* liability are said to be 'strict' and independent of fault, but require foreseeability of damage caused as a prerequisite to liability, and that so-called 'strict' liability is subject to relaxations—that of 'reasonable user' in nuisance cases, and that of 'natural use' of land in *Rylands v Fletcher* cases. Legal standing to sue in nuisance exists only for the person with exclusive right to possession of the affected property. A mere licensee has no such right. Society beyond the adjacent landowner had better look to statutory regulation for protection from, and sanctions against environmental deterioration. Developers need fear little in the common law beyond the immediate adjacent landowner. Only sanctions in criminal law pose any substantial risks.

[1228] See § 519 of the *Restatement of Torts* (2d) vol 3 (1977).

Part 3

Identification of environmental risks and their impact on procurement of construction works

1 Introduction

This paper continues the theme of the first part:[1229] that English common law has developed regulatory processes that might provide a remedy for a plaintiff who alleges that its environment has deteriorated due to property development. The law of nuisance provides some safeguards against noise and dust emanating from construction sites. A better understanding of how the law deals with such complaints will equip the developer to manage its risk in this respect.

2 Common law tort of nuisance

Tort is largely about compensating losses caused by wrongful harm inflicted by the conduct of others. But compensation for injury is only part of the remedy: the tort of nuisance might also be used to *prevent* injury by restraining a wrongdoer by a formal process or simply by its deterrent effect. Private nuisances[1230] are of three kinds: nuisance by encroachment on a neighbour's land; nuisance by direct physical injury to a neighbour's land; and nuisance by interference with a neighbour's quiet enjoyment of its land. The basis of a cause of action in nuisance is damage to the land itself. The measure of damages is usually the diminution in the value of the land caused by the damage complained of. The loss is suffered by the owner or legal possessor of the land.[1231]

It is useful to contrast the tort of nuisance with that of negligence, with which construction parties might be more familiar. In a case of nuisance the court enquires whether the defendant's interference with its neighbour's enjoyment of its land was reasonable in view of the defendant's activity. In negligence the court asks whether the defendant's conduct has fallen below the standard of the reasonable man. In nuisance the question is put: was the defendant's activity reasonable. In negligence the question involves a search for an element of carelessness in the defendant's conduct. Nuisance is fairness-based, whereas negligence is conduct-based. The action of private nuisance, like that of negligence, is founded on damage, which might be physical damage or personal discomfort (but compensation will extend to economic deprivation), although frequently in nuisance actions a plaintiff seeks an injunction.

Nuisance is usually associated with continuing events rather than a defendant's single act, but exceptionally an isolated event might itself amount to an actionable nuisance,[1232] because the nuisance arises from the continuing condition of, or activities on, the defendant's land. A single

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[1229] See p. 1627, *Legal and Procurement Practices - Right for the Environment*, Symposium C, CIB World Building Congress 1998, Sweden. ISBN: 91-630-6711-0.

[1230] To be distinguished from public nuisance which is not discussed here.

[1231] *Hunter and ors v. Canary Wharf Ltd, Hunter etc v. LDDC* [1997] 2 All ER 426 (HL).

[1232] *British Celanese Ltd v. AH Hunt (Capacitors) Ltd* [1969] 2 All ER 1252.

negligent act does not amount to a nuisance.[1233] Building works are usually of a temporary nature and any nuisance may be short-lived and trivial. Provided building work is done with reasonable care it is unlikely to amount to a nuisance.[1234] The exception arises where the temporary interference is nonetheless sufficiently substantial.[1235] The transient characteristic of an alleged nuisance is assessed against the extent of interference, so that a temporary nuisance like night-time pile driving will be considered unreasonable and will be restrained by a court.[1236]

3 Noise in the common law

Noise has been actionable in common law for some time. Hughes[1237] cites sixteen cases, many from the 19th cent which reveal actions in nuisance for excessive noise caused both by industrial process and by less obviously actionable noise producers. The cases include, for example, noise by machinery, operated during the night so as to disturb the plaintiff's sleep,[1238] use of a circular saw 12 hours per day,[1239] use of a steam hammer so as to disturb public worship,[1240] the loud broadcast of radio programmes in the defendant's factory,[1241] the keeping of particularly noisy animals,[1242] and the ringing of church bells.[1243] Perhaps surprisingly, less than 25% of the sixteen cases are directly attributable to construction operations unless loud music and loud pets have become common hazards on construction sites.

Actions in common law for nuisance caused by excessive noise will turn on their own facts, depending on the time of day, the duration, the nature and quality of the noise complained of. Night time noise is more likely to be actionable than day time noise. Outcomes are difficult to predict. Evidence of nuisance is difficult to establish, since nuisance requires a continuing process over a period of time, (and in private law, the action is against a single source). Therefore actions are expensive even in the County Court (the lowest level at which a civil action can be brought before the court, involving claims up to £50,000). A plaintiff would need to keep a diary recording the time noise started, when it stopped, its duration, the day (weekday or weekend), the quality (sound level, frequency). Such difficulties are said by Hughes to justify and explain the trend towards public law controls over noise. In addition noise by its very nature affects groups of people and it seems fitting that action should come on behalf of the group, or society, rather than remain the burden of the individual. However, the existence of public controls does not diminish the effect of the common law and its ability to grant a private remedy perhaps more onerous than under statute.[1244]

1233 *SCM (UK) Ltd v. WJ Whittall & Son Ltd* [1970] 1 WLR 1017.
1234 *Harrison v. Southwark & Vauxhall Water Co* [1891] 2 Ch 409, 413-4.
1235 *Matania v. National Provincial Bank Ltd* [1936] 2 All ER 633.
1236 *De Keyser's Royal Hotel Ltd v. Spicer Bros Ltd* (1914) 30 TLR 257.
1237 Hughes, D (1992) *Environmental Law* (2d ed) Butterworths, London: p.344.
1238 *Rushmer v. Polsue and Alfieri Ltd* [1906] 1 Ch 234; [1907] AC 121.
1239 *Husey v. Bailey* (1895) 11 TLR 221.
1240 *Roskell v. Whitworth* (1871) 19 WR 804.
1241 *Gilbert v. Marks & Co* (1949) 150 EG 81.
1242 *Leeman v. Montague* [1936] 2 All ER 1677.
1243 *Soltau v. De Held* (1851) 2 Sim NS 133.
1244 See *Lloyds Bank v. Guardian Assurance and ors* (1986) 35 BLR 34.

4 Construction activity as an actionable nuisance

In *Andreae v. Selfridge & Company Ltd*[1245] the Court of Appeal considered how far construction activity amounted to an actionable nuisance. Andreae occupied property in which she ran a hotel business. The business traded profitably in the years to May 1931, then made a loss in each of the years (bar one) from May 1932 to May 1935. Profitability declined allegedly due to Selfridge's adjacent construction activity, but there was also a period of economic recession in the years 1930 and 1931. It was argued by Andreae that in the course of developing a large island site, or portions of it, Selfridge had conducted its operations in such a way as by noise and dust to interfere with the reasonable and comfortable occupation by Andreae of her premises and that as a result she suffered damage.

It had been argued by the contractor that when one was dealing with temporary operations, such as demolition and building, everybody had to put up with a certain amount of discomfort, because operations of that kind could not be carried on at all without a certain amount of noise and dust. Therefore, the rule with regard to interference had to be read subject to this qualification, and there could, said the Court of Appeal, be no dispute about it, that, in respect of operations such as demolition and building, if they were reasonably carried on, and all proper and reasonable steps were taken to ensure that no undue inconvenience was caused to neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it.

The trial judge found in favour of Andreae, that there was such interference, and that there was damage.

4.1 Construction as a normal use of land

Does the entire operation of using pneumatic hammers for demolition purposes, excavating to a depth of 18m and constructing at this depth a steel framed structure held together with rivet fastenings, amount to activity commonly done in the ordinary use and occupation of land or houses, or is it unusual conduct of building operations within a city, and represent such unusual use of land so as to constitute a substantial interference with Andreae's occupation of her adjacent property?

No said the trial judge to the first question. All three activities amounted to unusual conduct and to substantial interference with Andreae's rights of enjoyment and, subject to proof of damage, would constitute actionable nuisance. But the Court of Appeal disagreed: it was not possible to say, nor was there any evidence in this case which would warrant its being said, that the type of demolition, excavation and construction work in which Selfridge was engaged was of such an abnormal and unusual nature as to prevent the qualification referred to above coming into operation. When the rule speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on, new inventions and

new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies. It was part of the normal use of land to make use in construction of certain types and depths of foundations and particular height of building as may be reasonable in the circumstances and in the light of contemporary technology. The court was unable to take the view that any of these operations was of such an abnormal character as to justify treating *whole of* the disturbance created by them as constituting an actionable nuisance.

The trial judge had in effect said that that reasonable care and skill qualification did not apply in the present case, because that qualification could apply only where the operations were such that could be described as the usual and normal use of land by people in this country. He had found that these operations were not usual operations, and, therefore, the whole of the operations in question, not merely matters in respect of which some precautions were carelessly or negligently omitted, but the entirety of the operations, were operations which, if they produced discomfort and interference, would be actionable, and the entirety of the damage suffered would be recoverable. With great respect to the trial judge, the Court of Appeal took the view that he had not approached this matter from the correct angle.[1246]

4.2 Night operations

Did the use of cranes in connection with demolition work carried on during the night amount to an actionable nuisance?

Yes, said the court, for the reasons explained below.

4.3 Operations carried out throughout a fifteen hours day

Did the use of cranes in this context during the hours 7 am to 10 pm amount to an actionable nuisance?

It might in some cases be regarded as a nuisance. In this case the plaintiff had reluctantly acquiesced in fifteen hours a day working after three or four weeks of around-the-clock working.

Selfridge's construction activity consisted of demolition of several buildings and construction of new buildings. The demolition began in December 1931. The work consisted of pulling down the existing houses, and excavating to a depth of some 18 metres, and erecting a steel-framed building, with three basements, a basement, a sub-basement and a sub-sub-basement, the framework of these subterranean parts of the building again consisting of a steel framework. Andreae first complained on 14 March 1932 of the night use of cranes by Selfridge. The evidence suggested that for several weeks prior to the complaint cranes had been used at night. The contractor agreed, in a letter dated 16 March, that the cranes should be stopped between the hours of 10 pm and 7 am. The court concluded that at the date of the letter Andreae had already been

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1245 [1938] Ch 1; [1937] 3 All ER 255 (CA), Sir Wilfrid Greene MR .
1246 [1937] 3 All ER 255, 264.

suffering something which constituted an unwarrantable interference with the comfortable occupation of her hotel, and the mere fact that she did not start to complain until 14 March did not mean that before that date there had been nothing about which to complain.

Andreae reluctantly acquiesced in Selfridge's undertaking to stop works at 10 pm, but thinking that this hour was too late. The court sympathised with the hotel owner and did not wish anything said in this context to be taken as being in any way an indication that the working of cranes of the relevant kind up to 10 pm was a thing which, in many circumstances, could not be an actionable nuisance. It seemed to the court that if persons, for their own convenience, chose to work machines of that kind overtime, and create a disturbance which was going on for 15 hours out of the 24, namely, from 7 am to 10 pm, that was a matter which might, in some cases, be very seriously regarded. But so far as the previous night-operations of the cranes were concerned, there was sufficient interference with the reasonable comfort of Andreae in carrying on her establishment to constitute an actionable nuisance.

Selfridge adhered to its undertaking with regard to the cranes, except on one occasion. But there were other occasions on which it conducted noisy operations at night. There had been several complaints made to the contractor, some of which had been remedied and some simply explained away. Those complaints were substantial complaints said the court and it protested against the idea that, if persons, for their own profit and convenience, chose to destroy even one night's rest of their neighbours, they were doing something which was excusable. To say that the loss of one or two nights' rest was one of those trivial matters in respect of which the law would take no notice appeared to the court to be a misconception, and, if it was a misconception existing in the minds of those who conducted these operations, the sooner it was removed the better.[1247]

4.4 Dust and dirt

Did the large quantity of dust and dirt discharged into the atmosphere by the demolition work and carried into Andreae's premises amount to an actionable nuisance?

There was ample evidence that the dust produced by this operation was something which was not to be endured unless some proper explanation was given of why it came. The burden of establishing that was upon the contractor. The quantity of dust and grit produced by this operation was something very serious indeed,[1248] and quite insufferable.[1249] But Andreae must put up with it, provided that all reasonable and proper precautions were taken to save annoyance to neighbours, which is a matter of evidence. The Court of Appeal was not satisfied that the contractor had discharged the burden of proof upon it. In the first place, it had pulled down at one and the same time eight houses, with what was admittedly a large number of men, and doing that quite obviously for reasons of its own, because it was in a hurry to get on with the work. Certainly water had been used. It was said that water should be used, and it was used, although it was not used, in the

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1247 *Ibid.*, 261.
1248 *Ibid.*, 262.

court's judgment to a proper extent, nor had any steps been taken to board up the windows of the houses. It had been said that, if they had been boarded up, having regard to the fact that the windows on the street had to be boarded up to safeguard passers-by, the only result of boarding them up on both sides would have been to let the dust go out at the top like smoke out of a chimney. But the court was not satisfied that a certain amount of boarding would not have been possible; and, indeed, the evidence of the witnesses was not considered at all satisfactory on that point. If the court accepted, as it did, Andreae's evidence with regard to the quantum of the nuisance, and the extent of it, it was impossible to believe that, if due care and attention had been given, and due regard had been had to the neighbours, that the demolition operation could not have been carried out in such a way so as not to cause the nuisance that it did. That might have involved slower work, it might have involved more careful work, but the court was in no doubt that it could have been done, albeit at some expense and delay to the contractor.

There seemed no doubt in this case that the contractor had not carried out the demolitions with sufficient care and skill, and that the adjacent owner was entitled to compensation.

4.5 Quantum of damage

To what extent had Andreae suffered damage as a result of nuisance caused by Selfridge's construction activities?

There was, said the Court of Appeal, unquestionably an interference with Andreae's rights by noise, noise which had taken place at unreasonable hours, noise which, according to the evidence, had affected the guests in Andreae's hotel, had caused them to complain, and had generally interfered with their comfort. That was the first matter. The second matter was that the profits of the hotel did not recover in the way in which, having regard to the history of the hotel, they might reasonably have been expected to recover. But the inference could not be drawn that the failure of the profits to recover had been due (to the extent to which the trial judge had thought that it was due) to Selfridge's construction operations, and it was still more illegitimate to say that it was due to that part of Selfridge's operations which constituted a nuisance. The court was therefore necessarily compelled to take some broad common sense view of the situation, having regard to the evidence.

Several things had to be kept in mind. It could easily be seen how hotel custom would suffer in the circumstances of this case. But earlier action could have been expected from Andreae. There was indeed injury caused to Andreae's business by Selfridge, but less than had been found by the trial judge.[1250] Selfridge could only be held liable for those activities on which it had crossed the permissible line.[1251]

[1249] *Ibid.*, 266.
[1250] *Ibid.*, 266.
[1251] *Ibid.*, 268.

4.6 Specific duty to carry out works with care and skill if 'reasonable user' defence to be available in actions for nuisance

What is the contractor's duty if it wishes successfully to avail itself of a 'reasonable user' defence?

Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. Important advice to builders was given by the court:

> "Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual, and conducted with proper and reasonable care and skill, are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say: 'We will go on and do what we like until somebody complains.' That is not their duty to their neighbours under the rule of law. Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: "But this would mean that we should have to do the work more slowly than we would like to do it, or it would involve putting us to some extra expense." All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that it would make it a prohibitive operation. It is all a question of fact and degree, and must necessarily be so."[1252]

What precautions should be taken to avoid building activity becoming an actionable nuisance?

The court advised:

> "The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which work is to be done; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights."[1253]

5 The common law of nuisance and statutory control of noise under the Control of Pollution Act 1974

In *Lloyd's Bank plc v. Guardian Assurance plc and Trollope & Colls Ltd*[1254] the Court of Appeal considered to what extent if any statutory provisions for abatement of noise supplanted a remedy in the tort of nuisance.

1252 *Ibid.*, 267.
1253 *Ibid.*, 268.
1254 (1986) 35 BLR 34 (CA).

Trollope & Colls carried out construction work for Guardian next to premises owned and operated by Lloyd's Bank causing substantial interference with the reasonable use of Lloyd's premises for which it obtained an interlocutory injunction restraining use of certain noisy tools between 0930 and 1300 hours and between 1400 and 1630 hours on any of the days Monday through Friday. A section 60 notice issued by the local authority under the Control of Pollution Act (CPA) 1974 similarly, but less restrictively, restrained Trollope & Colls between the hours of 1000 and 1200 and between 1400 and 1600.

Under the terms of the CPA a local authority is able to restrain and control nuisance caused by noise, which includes by definition vibration. Under s.60(2) "the local authority may serve a notice imposing requirements as to the way in which the works are to be carried out and may if it thinks fit publish notice of the requirements ...". Permitted hours of work and noise levels may be specified. In addition to the powers under s.60, a local authority has a more general power under s.58 to serve a notice requiring abatement of a noise nuisance or prohibiting or restricting its occurrence or recurrence. Under s.58(8) a local authority "may take proceedings in the High Court ... for the purpose of securing the abatement [etc] of the nuisance ... notwithstanding that the local authority has suffered no damage from the nuisance ...".

Trollope & Colls appealed, arguing that the evidence did not justify the finding of an actionable nuisance, and that the CPA 1974 had the effect of restricting the court's jurisdiction to grant an injunction in circumstances that gave rise to a notice under section 60.

The Court of Appeal was quite clear that nothing in the CPA restricted the powers of the High Court either to enforcing the section 60 notice or in prescribing an embargo not more extensive than that prescribed by the notice.[1255] The activities of the court in the law of nuisance were not restricted by the CPA. Nourse LJ said:

"... the views of the local authority are something which the judge ought usually to take into account. But that is exactly what [the trial judge] did in this case. He said that, because of the nature of the operations which [Lloyds] carry out on their premises, he was not satisfied that the section 60 notice would afford adequate protection. ... Having conducted a balancing exercise, [the trial judge] came to the conclusion that what [Lloyds] needed to provide them with adequate protection was six quiet hours during the course of the day... [That view] was plainly right. ... [Lloyds] are carrying on a responsible business, much of which requires close concentration and peace and quiet. There is ample evidence to show that the times when the drilling was at its height ... responsible members of their staff were quite unable to hear what people were saying on the telephone and were finding it very difficult to dictate to their secretaries... [Lloyds] could not carry on their business properly, and that to have a morning of two quiet hours and an afternoon of two quiet hours was quite inadequate. ... the learned judge was perfectly entitled to arrive at the conclusion at which he did."[1256]

1255 *Ibid.*, 40.
1256 *Ibid.*, 42-43.

This case is important in demonstrating that an occupier of property affected by noise of construction work can petition the High Court for an interlocutory injunction to restrain that nuisance, despite the fact that the local authority might have served a notice under s.60 of the CPA to enforce abatement of the noise, and that s.60 notice might be less restrictive than the High Court injunction.

6 Conclusion

The risk of construction activity stimulating claims in nuisance from adjoining land users can be minimised by exercising care and skill in taking proper precautions, and to see that the nuisance is reduced to a minimum. Constructors might restrict the hours during which work is to be done; they might limit the amount of a particular type of work which is done simultaneously within a particular area; and they might use relevant technology and appropriate methods so as to avoid inconvenience. An occupier affected by noise is not limited against the constructor in the tort of nuisance because a noise abatement notice has been served by the local authority under s.60 of the Control of Pollution Act 1974. A court's injunction might be more restrictive in common law than a comparable statutory notice.

Chapter 12

Conclusions and Recommendations

The aim of Chapter 12 is to provide a summary of the conclusions and recommendations derived from Chapters 2 through 11 and to present recommendations for further research. Readers should be aware that the following conclusions are drawn from judgments across several jurisdictions and that any one jurisdiction might take a different view of the common law. Readers knowledgeable of the common law will be aware that decisions of a foreign court are not binding within the jurisdiction under review. From an English perspective, decisions of Commonwealth courts are not binding on the English court but may be cited to the court and will generally be treated as persuasive of common law principles and application. This is most likely in circumstances where the English court has not yet faced the circumstances in question and has not therefore provided an answer to the issues raised. Perhaps more rarely a foreign case is cited to the English court in an attempt to persuade it that an earlier decision is wrong and should be reversed.[1257] The learned editor of *Hudson's Building and Engineering Contracts* points to another reason for research in Commonwealth jurisdictions: "the quite exceptional if not superior quality of Commonwealth and overseas judgments in the construction field, and the very great assistance which they have given [to the editor] in seeking to provide a coherent and constructive commentary on Construction Law ...".[1258]

The author readily acknowledges that in a sense no such thing exists that could be termed *Commonwealth Procurement Law*, in the same way that *British* or *American Procurement Law* does not exist. This is the inevitable conclusion of a study involving judgments from more than one jurisdiction, yet there are many eminent published works which attempt to state what the law is from more than a single jurisdiction. Examples would be *Hudson's Building and Engineering Contracts*, now in its eleventh edition,[1259] and *Legal Aspects of Architecture, Engineering and the Construction Process*, now in its sixth edition.[1260] This work therefore rests on well-established principles of comparative research leading to conclusions that reach over more than one jurisdiction.

It might be added that whilst the law researched and the conclusions stated emanate from several jurisdictions, the existence of comparable principles of law and industry-wide documentation plus the willingness of courts to review cases from another jurisdiction leads to harmonisation of common law decisions affecting the construction process. The significant exception is where legislation is introduced within a state governing procurement of public construction and services: then that state's judgments may not be relevant to another state which does not have comparable legislation. This research has been careful to separate decisions and conclusions on points of common law from those on points of European Union law, and decisions which affect only private law from those that affect only public law.

1257 Refer to Furmston, Prof M, *Some Thoughts on the Uses of Commonwealth and United States* Cases [1995] Con L Yb 13, referred to in Chapter 1.

1258 At page xxii of *General Introduction and Preface*, 11th edition.

1259 Wallace, Sweet and Maxwell, 1995.

It almost goes without saying that these conclusions are not intended to form the basis of legal advice on any specific problem. In such cases the advice of a lawyer expert in procurement law within the relevant jurisdiction should be sought.

Chapter 12 is in two parts. Part 1 is a summary of the conclusions and recommendations. Part 2 contains recommendations for further research.

The summary of conclusions and recommendations is grouped and presented under the following sub-headings: health and safety risks, private law, community law, public law and environmental law.

The main findings are that the common law has not developed sufficient and effective systems of controls in health and safety law and environmental law. Parliamentary intervention is needed and is awaited in the former area to make it more likely that companies and senior management are successfully prosecuted when management failure has resulted in a death on the construction site and the company and its management are judged to have fallen below the acceptable standard. The present government has published its proposals to create new offences of reckless killing, killing by gross carelessness and corporate killing. On the other hand, despite the inadequacies of the common law, environmental law has been developed by parliamentary process both domestically and internationally, and enjoys wide support through policies for sustainable development and environmental protection.

However, private law is being developed and moulded by the courts to create contractual obligations in construction procurement for both client and those submitting tenders at the client's request. The law of contract regulates the procurement process where it can be shown on an objective view that the parties so intended. Any breach of the tendering contract entitles the injured party to compensation for its damaged expectations. Perhaps the most important discovery revealed by the author's research is some of the practical effect of the imposition on the client of an obligation to treat equally and fairly all compliant tenderers. It seems that the full ramifications of the client's equal and fair treatment obligation are yet to be revealed but it is clear that certain activities within the construction procurement process need to be reshaped. For example, allowing one bidder to amend its bid after tender close would breach the client's equal and fair treatment obligation and entitle an injured bidder to compensation. Conversely, public law seems reluctant to recognise the need for procedural fairness in construction procurement, yet Community law, like private law, is bound by such a requirement. It seems anomalous that membership of the EU imposes procedural fairness on the procurement of public works above a certain threshold of price, but that domestic public law makes no such demands!

[1260] Sweet, West Publishing, 1999.

Part 1
Summary of conclusions and recommendations

Health and safety risks

12.1.1 At the procurement stage of a construction or engineering project both client and construction manager are required to identify risk of injury or death from construction process and provide sufficient resource and competence so as to minimise such risk. The common law response to a workplace fatality might have been prosecution for manslaughter but the law of corporate manslaughter is shown to be ineffective. However, government now proposes to introduce new laws that will make it much more likely that a construction company will be convicted of corporate killing where 'management failure' has resulted in death and the company's conduct is judged to have fallen below the required standard. Conviction will lead to substantial fines which must be met from shareholders' funds. It seems likely that invitations to tender will fail to materialise for the construction company that has been convicted of corporate killing.[1261]

Private law

12.1.2 Private law also regulates the procurement process for the reasons which follow. The rationale of the tendering process is to replace negotiation with competition. The competitive process is heavily weighted in favour of the owner and requires major investment by each tenderer. The rationale is destroyed if the owner is permitted to circumscribe the rules for the conduct of the tender process.[1262] Research of recent Commonwealth cases shows that a 'tendering contract' or 'process contract' may arise automatically from the timely submission of a tender that is free from patent error,[1263] and is compliant with the client's invitation. Alternatively, the contract might arise later when the client requests and the tenderer submits an alternative tender which proposes price reductions or changed design and method, or both.[1264] The invitation to tender may now seen as a qualified offer by the client to consider tenders for a construction contract.[1265] The client's 'standing offer' is accepted by any tenderer who submits a conforming bid.[1266] Consideration (as a necessary element of a contract) exists in that the client derives benefit from each tender and each tenderer suffers a detriment in submitting its tender.[1267] The contract so formed is referred to here as the 'tendering contract'[1268] that creates obligations for both client and tenderer with respect to the tender process. Generally the client becomes obliged to treat all tenderers equally and fairly and each tenderer is bound by the promise(s) given, for example not to withdraw its offer within given circumstances.[1269] The tendering contract was originally conceived as a means of enforcing a tenderer's promise not to revoke its tender.[1270] In English common law the tendering contract as originally conceived substituted for a law of firm offers. But the implications of the tendering contract go much deeper than enforcing the tenderers irrevocable

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1261 C2 (Chapter 2).
1262 C 5.
1263 C 7.
1264 C 3.
1265 C 5.
1266 C 5.
1267 C 5.
1268 C 4.
1269 C 4.
1270 C 7.

promises.[1271] A term is likely to be implied that only a compliant (conforming) tender will be considered and accepted by the client.[1272]

12.1.3 It is by no means certain that a tendering contract will inevitably arise from the invitation to tender and the reciprocal act of submitting a compliant bid. Whether a tendering contract arises depends on an objective view of the parties intentions, which might be determined from the tender invitation and tender documents (and presumably other circumstances surrounding the call for tenders).[1273]

12.1.4 There are several factors which have led the courts to the conclusion that a contract had arisen out of the tendering process:

(1) the format and terms of the invitation to tender;

(2) the fact that more than simple response is required to the invitation;

(3) the fact that submitting a tender (or revised tender) is a second or third step in a process;

(4) a requirement to submit a tender deposit or bond;

(5) the format and terms of correspondence relating to the submission and evaluation of tenders;

(6) the facts and circumstances surrounding the invitation to tender and subsequent responses;

(7) the mandatory style of language used in an invitation, in conditions and subsequent letters;

(8) the fact that tender documents are extensive, detailed and substantial;

(9) the steps taken by the owner to maintain a competitive procurement process;

(10) the fact that the invitation to tender was limited to a select or very small class of tenderers;

(11) the presence of an irrevocability clause;

(12) the issue and form of the invitation;

(13) the formal requirements imposed by the tender invitation;

(14) the need for tenders to be returned in official endorsed envelope, which was designed to maintain the anonymity of the tenderer and preserve adherence to the owner's own standing orders.[1274]

12.1.5 Clients could avoid a multitude of obligations arising from the tendering contract by reducing tender conditions to the very minimum, whilst consistent with other obligations. It is the requirement for compliance with demanding tender regulation which is instrumental to creation of the tendering contract. However, this advice is inconsistent with advice given below, particularly in the matter of alternative tenders.[1275]

12.1.6 Clients could place an exclusion clause in every tender notice and invitation. An example would be:

This invitation to tender is not a legal offer capable of acceptance. This invitation to tender is an invitation to treat. The submission of a tender does not create any contract between the tenderer

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1271 C 7.
1272 C 5 and 7.
1273 C 5 and 7.
1274 C 7.
1275 C 7.

and the owner. The owner does not warrant compliance with the conditions of tender or with any tender codes or regulations.

Clients should not ask for cash or deposits from tenderers. Such payments could be construed as an element in the formation of the 'tendering contract'.[1276]

12.1.7 If the tender conditions incorporate other documents (or parts of documents) by reference, this must be clearly drafted to avoid ambiguity. Any confusion in the drafting will be construed against the client. If the client is obtaining funds from a funder who requires compliance with specific provisions as to tendering, these provisions must be included within the client's conditions of tendering. Failure to do so effectively could breach the funding agreement.

12.1.8 A tenderer breaches the tendering contract when it fails to honour a promise thereby given to the client, for example an irrevocable tender is revoked. A client breaches the tendering contract when accepting a non-conforming tender and becomes liable in damages to the other injured tenderers, unless the terms of the tendering contract provide otherwise. Under the privilege clause the owner is usually empowered to reject all tenders and to start the procurement process again, but the privilege clause does not empower an owner to award a contract other than in accordance with the tender conditions.[1277] Awarding a contract on the basis of an undisclosed preference would be a breach of the client's equal and fair treatment obligation and result in an obligation to compensate a bidder deprived of proper consideration of its bid and the chance of a contract award.[1278]

12.1.9 The liability of the client to the injured compliant low-bidder, given the presence of a privilege clause, is not founded on breach of a duty to award the contract to the lowest compliant bidder, but founded on breach of obligation not to award the contract to a non-compliant bidder. Where, on the balance of probabilities, the injured compliant low bidder can show that the client would have awarded to it the contract that was in fact awarded illegally to the non-compliant bidder, the injured compliant low bidder is entitled to expectation damages for the owner's breach. The claimant is assisted in establishing the probability of its loss by the fact that the contract has been awarded, rather than cancelled. The loss of the construction contract was caused by the breach of the tendering contract and the loss was not too remote as to be unrecoverable. The client can be taken to know that if it awards the construction contract to a non-compliant bidder, one of the compliant bidders suffers the loss of that contract. It is sufficient that the client knows that the injured compliant bidder *could* be the claimant. Profit lost to a compliant bidder was reasonably foreseeable by the client as the probable result of the client's breach of tendering contract. The injured compliant low bidder is entitled recover the lost profit it would have realised had it been awarded the construction contract.[1279]

1276 C 7.
1277 C 4.
1278 C 3.
1279 C 5.

12.1.10 Legal theories other than contract might be thought apt to regulate the tendering process. Negligence and estoppel have been canvassed before the court as a basis for control, but courts have expressed a preference to deal with the matter in contract.[1280]

12.1.11 The traditional tendering process for building works was not intended to encourage design innovation by tenderers, but it has always been possible for tenderers to seek to pursue competitive advantage through novel construction methods, to the extent permitted by the tender conditions. A clause in the tender conditions which avoids any obligation falling on the client to award any contract as a result of the tendering process does not in law permit that owner to deviate from the contract evaluation and award criteria set down in those tender conditions. Without an express term of the tendering contract which permits the client to consider an 'alternative tender', such tenders cannot be considered. The client is in breach of the tendering contract when it negotiates with one tenderer, in response to its alternative tender, on terms which do not apply to the other tenderers. Without power to consider alternative offers, a client must reject *all* tenders, rather than attempt to negotiate with one tenderer within the tendering process and contrary to the tender conditions.[1281]

12.1.12 All tenderers are entitled to know the basis on which tenders will be evaluated and on which a contract award decision will be made; therefore tenderers must be informed of criteria, and any weighting of criteria, that will be used for evaluation of proposals.[1282] Where design is to be provided by tenderers the conditions must include criteria for evaluating quality of that design, as well as criteria for evaluating performance of design.

12.1.13 If innovation from tenderers is required, the client must expressly create the right for a tenderer to submit an 'alternative tender'.[1283] There are good public policy reasons for considering alternative tenders. Alternative tenders "are an important means of ensuring that innovative approaches as to contracts are available to tendering authorities ... the public may very well benefit to a considerable degree from the encouragement of such innovation and the availability of cheaper methods of construction than have been contemplated by the tendering authority or their advisers."[1284]

12.1.14 If a tenderer is entitled to submit an alternative tender, the client is obliged to consider such alternative proposals. Tender conditions must define the scope of 'alternative tender'. That scope must be not too tight so as to restrict innovation, but not too wide so as to result in a proposal for a scheme quite different to the one originally tendered for. There must be substantial compliance with the client's requirements before a bid can be considered as a conforming tender and be acceptable. However, errors in interpreting client's requirements and the consequent need for substantial redesign must result in rejection of that tender, but tenders should not be rejected because of some minor departure from client's requirements. Any departure by a client from the conditions of tender risks unfairness to

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1280 C 7.
1281 C 4.
1282 C 4.
1283 C 4.
1284 C 7. [1995] 1 NZLR 469 *per* Gallen J at 485/22-26.

the tenderer(s). The client's obligation to be fair to all tenderers should not be compromised by bad tender process.[1285]

12.1.15 An alternative tender must be put in terms which are sufficiently precise to enable acceptance by the owner without further negotiation of the terms of the offer, unless similar negotiations are undertaken with every compliant tenderer.[1286]

12.1.16 Tender conditions may provide for a tender deposit or bond which is to be forfeited to the client if the tenderer defaults on an obligation *under the tendering contract The amount of the deposit* or bond might be said by the client to represent liquidated damages for tenderer's breach but the client should provide an option to claim unliquidated damages under the general rules rather than retain only the tender deposit or bond.

12.1.17 Clients tend to distance themselves from subcontract procurement. But the common law appears to recognise that clients' interests are better served by a bidding system which extends its integrity to subcontract procurement. Distrust at this level will affect final outcomes. English law requires the head contractor to give consideration to the subcontractor in order to secure the irrevocability of the subcontract bid. Following the Canadian authorities and by analogy with the position between client and head contractor, the subcontractor's consideration for the irrevocability of its offer is the head contractor's obligation to consider the subcontractor's tender properly submitted. If the head contractor uses that subcontract bid in the formulation of the head contract bid, that amounts to 'acceptance' of the subcontractor's offer, subject only to acceptance of the head contract offer. On another view, the invitation to tender can be explained as a request for an option granted by the subcontractor on the terms stipulated by the tender invitation. On both bases, the successful head contractor must inform the subcontractor of the tender outcome in good time. The head contractor then becomes bound to award the contract to the subcontractor. By this scheme the integrity of the bidding process is upheld. The doctrine of promissory estoppel has been applied so as to bind a promisor to its promise but not in English law as a full substitute for consideration so as to create a cause of action if the subcontractor's offer is revoked before acceptance by the head contractor.[1287]

12.1.18 A new tender code is required for contractual regulation of the tendering process and should take the form, not of a 'good practice' statement but, of a standard set of contract conditions which apply or reflect decisions of the common law courts. It should be accepted by the construction and engineering industries and clients that the tender code becomes a contract document and that breach of the tender code entitles the injured party to damages (and possibly an injunction) under the normal rules of contract.[1288] The tender code must be more prescriptive and robust in providing mechanisms for regulating the parties' obligations, for example, dealing with errors and irregularities found in tenders; dealing with non-compliant tenders; dealing with tender withdrawal prior to its acceptance or rejection; making provisions as to time for submission of tenders and dealing with late tenders; making

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1285 C 4 and 7.
1286 C 4.
1287 C 7.
1288 C 4 and 6.

provision for submission of tender by fax or other electronic means; making provision for evaluation of tenders received; and imposing or negotiating price reductions with tenderers prior to acceptance of a tender. It is clear from this research that some dubious practices require to be changed.[1289]

12.1.19 Lessons for client's agents are as follows:

(1) Clients do not have unfettered power to vary the scope and/or extent of tendered work prior to the award of a works contract unless express provision is made within tender conditions. A client may not manipulate tendered rates and prices for budgetary purposes, and may not 'cherry-pick' the most favourable rates and prices tendered and discard the remainder on which to seek fresh tenders.

(2) If budgetary savings are to be made after receipt of tenders, some system must be thought out and set down within the tender rules. If the proposed reductions are substantial, tenders must be reinvited for the reduced scope of work. If provided for within the tender rules, it may be possible to reinvite tenders only from a short list, say the three lowest tenderers. If reductions are not substantial, the reductions might be negotiated with the lowest tenderer, but this process must also be devised and set down in the tender rules so that all tenderers are aware and cannot bring claims for unfair and unequal treatment.

(3) The privilege clause is a powerful tool at the disposal of the client, but must be used carefully. In interpreting the meaning to be given to a privilege clause the court gave priority to expert evidence which showed custom and practice of contract award to low bidders. The courts acknowledge the importance of the privilege clause permitting rejection by a client of a non-compliant tender or all tenders, but this clause does not permit the application by the client of an undeclared preference in favour of local traders. Clients have been held to be in breach of an obligation to treat all tenderers equally and fairly when giving an undeclared preference to a local tenderer over the lowest bidder.

(4) The general effect of a privilege clause ('client not obliged to award contract to highest/ lowest or any bidder') is for a client to avoid any obligation to a competing bidder, either in law or according to industry practice, to award the contract to the lowest qualified bidder. This position does not change simply because the lowest qualified bidder was the only eligible bidder. The client could quite properly have decided not to award any contract. It is no different if the competing bidder is disqualified *after* the contract award.

(5) A court may be prepared to imply a term to the tendering contract that lowest qualified bid will be accepted, despite inconsistency with the terms of the privilege clause and the apparent width of such a clause ('client may act in its own best interest'), on the basis that "special circumstances" might exists when custom and practice overrides the privilege clause. Those circumstances have been held to exist where a client has relied on undisclosed criteria, or where the client has taken into account irrelevant or extraneous considerations, or where there are specific provisions in the

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[1289] C 6.

tender specifications that are inconsistent with the general privilege clause, or where the tendering process was found to be a sham.[1290]

Community law

12.1.20 There is a link between furthering the objectives of the Public Works Contracts Regulations 1991 (PWR) and the usual clauses within construction contracts which prohibit one party from assigning the contract without the written consent of the other.[1291] It would undermine PWR if contracts awarded on the basis of a tenderer's particular and personal qualities could be properly assigned without such consent.[1292]

12.1.21 The strict time limit of three months for bringing an action under the Public Services Contracts Regulations 1993 (PSR) is exceptionally brief when compared with other limitation periods in English law but is not inconsistent with Community law and will therefore be enforced by the court unless some factor persuades the court to use its discretion to extend that period.[1293] Injured bidders seeking a remedy under PWR or PSR must give prior notice of intention to bring proceedings and set out the breach of duty which is thought to found its claim. In addition the proceedings must be commenced within three months from the date when grounds for the bringing of the proceedings first arose.[1294] Where the claim is for the loss of a chance to be awarded the contract, the three months limitation period starts to run when the contracting authority specifies a proprietary product which necessarily excludes an interested supplier from participation in the procurement process, and not from the later date when a contract is awarded to a rival supplier.[1295]

12.1.22 Where as a matter of law a contracting authority is obliged to award a works package to a claimant tenderer, breach by that authority of regulation 20 of PWR, of TEU Article 6, of the tendering contract, and its misfeasance in public office are all capable of causing to that claimant not only wasted bid costs, but also loss of gross margin or profit. Such a breach entitles the claimant to the margin that it would have earned on its tender which should have been accepted and/or its tender costs. It was sufficient for the claimant to show that it ought to have been awarded the contract in question in order to recover its wasted bid costs and its loss of margin or profit. Thus any recovery of damages for wasted bid costs or lost profit or margin may be recoverable by a claimant under one or several heads on the facts of a particular case, namely (1) as damages for breach of the Treaty of Rome (TEU); or (2) pursuant to regulation 31(3) of PWR and similar regulations under other public procurement regulations; or (3) as damages for breach of the tendering contract; or (4) as damages for misfeasance in public office.[1296]

12.1.23 A "public works contract" is defined by the Public Works Contracts Regulations 1991. Where the Regulations apply, the first step required prior to the award of a public works contract is for the

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1290 C 8.
1291 See for example JCT98 clause 19.1.
1292 C 5.
1293 C 5.
1294 Following the Court of Appeal's decisions in *Portsmouth* and *Matra*. See C5.
1295 See *Matra*, C 5
1296 See *Harmon v House of Commons* (1999), C5.

contracting authority to publish a prior information notice (in the *Official Journal* of the European Communities) under regulation 9. There are two possible bases for the award of a contract under the 1991 Regulations: simply the "lowest price"; or the "most economically advantageous" price. The latter can only apply where criteria are stated in the prior information notice or in the tender documents. If no criteria are given in either place, only the "lowest price" basis applies. Those criteria can include price, period for completion, running costs, profitability and technical merit. Importantly, regulation 20(3) requires that a contracting authority must state its selected criteria on which it intends to base its decision, ranked in descending order, within the contract notice sent to the *Official Journal* or contract documents. The Regulations are not applicable when the proposed public works contract is estimated to cost less than 5,000,000 ECU.[1297]

12.1.24 A contracting authority is entitled to split its housing maintenance work into three contracts, so that only one contract appeared to be over the threshold set for the application of the 1991 Regulations. The three contracts need not be aggregated so that all the work is within the scope of the Regulations, merely because the contracts relate to the public body's housing stock and to its housing function.[1298]

12.1.25 Where the 1991 Regulations apply, a contracting authority is in breach of regulations 9 and 12(2) when it fails to issue a prior information notice to the *Official Journal.* As a consequence of failing to issue a prior information notice, or to provide the necessary detail in the tender documents, a contracting authority has not satisfied regulation 20(3). Under this regulation a contracting authority is required to publish its contract award criteria. The absence of a statement on economic criteria to be applied, either in the notice or in the contract documents, limits the contracting authority to awarding a contract only to the lowest tenderer. The effect of regulation 20(3), when no adequate provision is made within the tender documents, is to make the issue of a contract notice a condition precedent to a contracting authority's right to award a contract on the basis of the tender which is "the most economically advantageous to the contracting authority." By its failure under Regulations 9 and 12(2) in not stating within the contract documents which criteria applied, a contracting authority is not entitled to take account of them as award criteria, and is therefore obliged to adopt the lowest price basis for contract award.[1299]

12.1.26 A contracting authority is obliged under the 1991 Regulations to use objective criteria when making its contract award in response to the most economically advantageous offer. The court's decision that a contracting authority is entitled to treat its own contingent liability to meet redundancy costs as objective criteria for deciding on tenderers' participation in the housing works programme is cause for concern to many parties in the private sector. A contracting authority is required to use only objective criteria for selecting parties to participate in public works. If a public body's calculation of redundancy costs is capable of being checked by a third party that means that objective criteria had been used. Even without evidence that a contracting authority applied its criteria in a way which discriminated in favour of its own workforce, tenderers for public works are disadvantaged when use of

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1297 C 10.
1298 C 10.

redundancy costs as an economic criterion in evaluating tenders is not revealed at the time of invitation to tender, because the public body had not resolved at that time to use this criterion.[1300]

12.1.27 When a public body's breach of the 1991 Regulations is one of *substance* rather than *form*, an injured bidder's letter through its solicitors (giving only notice of intended action and no detail on the basis of claim) satisfies the requirements of regulation 31(5)(a) for notice to be given to the contracting authority of the claimant's intention to bring proceedings and of what breach of duty was to be relied upon in those proceedings. If on the other hand, a contracting authority's breach is in *form* only (for example, a failure to state the contract award criteria in the tender notice or contract documents), an injured bidder's letter would be insufficient when it fails to identify "the breach ... of the duty owed [by the contracting authority] to him ... and of his intention to bring proceedings ... in respect of it". Any lack of particularity or failure by the aggrieved tenderer to bring the alleged breach of duty to the notice of the contracting authority and its intention to commence proceedings is a condition precedent to its right to recover such loss or damage. In order to succeed a claimant must therefore be specific about the duty broken.[1301]

12.1.28 As the Public Works Directive (now 93/37/EEC) concerns the award of "public works contracts" which are defined as "contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts", the Works Directive is not concerned with the award by a contracting authority of a 'works contract' to its own workforce. When awarding work to its own workforce a contracting authority is in effect deciding *not* to award a contract. It is not possible in law for a public body to contract with its own workforce. But this conclusion does not apply to the 1991 Regulations due to the effect of regulation 20(8) which, unlike any provision in the Works Directive, anticipates that a bid might come from an operating arm of the local authority. The draftsman of the 1991 Regulations included regulation 20(8) in order to make good an obvious *lacuna* in the Works Directive. When awarding a contract to its own workforce the Public Works Directive has no application, but the 1991 Regulations do apply, to 'fictional' contracts, where parcels of work are awarded to in-house teams in competition with outside contractors.[1302]

Public law

12.1.29 It seems that there is no general rule in domestic public law which places a duty of procedural fairness on a public body in the conduct of a public tendering process. On the other hand a tendering process governed by Community law is bound by such a rule. A duty of procedural fairness may nonetheless arise in particular circumstances, for example, when a tenderer can show that it has an interest worthy of protection in public law and that interest is derived from statute, common law or from some practice adopted by the relevant public body. Injured bidders seem to be more successful obtaining a remedy in private law for breach of contract rather than a review of the contract award

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1299 C 10.
1300 C 10.
1301 C 10.
1302 C 10.

process in public law. A contractual right in favour of an injured bidder might provide the interest protected in public law referred to above.[1303]

12.1.30 Both public and private bodies initiating competitive bidding processes may be found to owe contractual obligations to compliant bidders. A successful breach of contract claim is likely to result in compensation for unfair and unequal treatment by the owner, unless the owner has expressly excluded any contractual obligation of fair dealing. Fair dealing means treating all bidders equally and fairly from the start and through to the end of the process. Allowing one bidder to amend its bid after opening of sealed bids, or after presentations have been made by the bidders and before any bid has been accepted, is unfair and unequal treatment and likely to amount to a breach of contract.[1304]

12.1.31 Tender documents should make clear provision for 'best and final offer' (BAFO) to be submitted by each bidder. No further offers should then be considered. Tender documents should make clear that the bidding process ends, (a) with acceptance by the owner of a BAFO submitted in accordance with tender stipulations, or (b) by rejection of all offers.[1305]

12.1.32 The role of any review panel appointed by the owner to make recommendations on selection of 'preferred bidder' should be clearly set out in the tender documents so as to remove any doubt as to whether the publication of its recommendations as to 'preferred bidder' signifies the end of the bidding process and thus the end of the owner's obligations owed to all bidders.[1306]

12.1.33 Evaluation criteria should be clearly set out in the tender documents, together with any weighting to be given. If price is not the sole criterion, the relevant criteria and priority must be given, including economic and design evaluation criteria. Any predisposition towards or against 'design and build' proposals should be disclosed in tender documents. It is unfair to downgrade proposals at evaluation stage on the basis of previously undisclosed criteria. If Net Present Value calculations are to be used to rank competing bids as to 'deliverability', the basis of calculation should be disclosed in tender documents. Terms such as 'deliverability' require definition. Matters of planning constraint should be disclosed in tender documents. Owners, public bodies, review panels and the like should accept that they owe a duty of procedural fairness to all competing and responsive bidders. Competing forces will recede without such fairness. The circumstances of competitive bidding demand a fair process unless documentation shows the opposite intention.[1307]

Environmental law

12.1.34 The common law has created three control or regulatory processes that might provide a remedy for a plaintiff who alleges that the quality of its environment has deteriorated due to property development: negligence, nuisance and the rule of *Rylands v Fletcher.* However, these common law controls on the developer are found to be less than adequate to afford the degree of protection

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1303 C 9.
1304 C 9.
1305 C 9.
1306 C 9.
1307 C 9.

generally required. Negligence requires proof of fault which is difficult to establish. Both nuisance and *Rylands* liability are said to be 'strict' and independent of fault, but require foreseeability of damage caused as a prerequisite to liability, and that so-called 'strict' liability is subject to relaxations—that of 'reasonable user' in nuisance cases, and that of 'natural use' of land in *Rylands v Fletcher* cases.

12.1.35 Legal standing to sue in nuisance exists only for the person with exclusive right to possession of the affected property. A mere licensee has no such right. Society beyond the adjacent landowner had better look to statutory regulation for protection from, and sanctions against environmental deterioration. Developers need fear little in the common law beyond the immediate adjacent landowner. Only sanctions in criminal law pose any substantial risks.

12.1.36 The risk of construction activity stimulating claims in nuisance from adjoining land users can be minimised by exercising care and skill in taking proper precautions, and to see that the nuisance is reduced to a minimum. Constructors might restrict the hours during which work is to be done; they might limit the amount of a particular type of work which is done simultaneously within a particular area; and they might use relevant technology and appropriate methods so as to avoid inconvenience. An occupier affected by noise is not limited against the constructor in the tort of nuisance because a noise abatement notice has been served by the local authority under s.60 of the Control of Pollution Act 1974. A court's injunction might be more restrictive in common law than a comparable statutory notice.

Part 2
Recommendations for further research

12.2.1 The research should be widened to examine procurement cases arising in other member states of the European Union, particularly for projects that fall below the thresholds set for application of procurement Directives. The research should also look at how domestic courts implement EU procurement law within their own jurisdictions.

12.2 2 The research should examine how other member states deal with bid challenges. It is known that Denmark has a special tribunal to deal with same. Arbitration could be considered as an alternative to court proceedings as a means of resolving bid disputes. Alternatively, the tendering process could be defined as a 'construction contract' for the purposes of the Housing Grants Construction and Regeneration and Act 1996 so that a bid challenge could be referred to adjudication.

12.2.3 The research should embrace the jurisdictions within the USA. Although some cases are included within the author's *Procurement Law* a more systematic review might reveal more evidence of trends typical across all jurisdictions. The research would also continue in the search for a US case that endorses the existence of a tendering contract.

12.2.4 The research should establish the extent to which the UNCITRAL Model Procurement Law has been endorsed (or rejected) by countries around the world. If the Model Law has been rejected, the research should seek to ascertain why, and why the adoption of the Model Law seems less than might have been expected.

12.2.5 A body such as JCT or CIB should develop the suggestion that the Tender Code be drafted as a standard form of contract. This would immediately focus attention on the contractual framework of the tendering process, to the advantage of both parties and the wider community.

An Analysis of Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

APPENDIX - A
Bibliography of procurement law

Arrowsmith, S (1996) *The Law of Public and Utilities Procurement* Sweet & Maxwell, London.

Arrowsmith, S, *Protecting the Interests of Bidders for Public Contracts: The Role of the Common Law* (1994) 53 CLJ 104.

Arrowsmith, S, *An Overview of EC Policy on Public Procurement: Current Position and Future Prospects* (1992) 1 Public Procurement Law Review 28.

Bovis, C, *The Award of Public Contracts under the Framework of EC Public Procurement Directives* [1994] Journal of Business Law 615.

Brown, A, *The Extension of the Community Public Procurement Rules to Utilities* (1993) CML Rev 749.

Cremean DJ (1995) *Brooking on Building Contracts* (3d ed.) Butterworths, Australia.

Dalby, J (1998) *EU Law for the Construction Industry* Blackwell Science, Oxford, England.

Debattista, C *Performance Bonds and Letters of Credit: a Cracked Mirror Image* [1997] JBL 289.

Dorter, J and Sharkey, J (1981) *Building and Construction Contracts in Australia* The Law Book Co., Australia. Also (2nd ed) 1990 Looseleaf Service.

Frazier, KL, *Securing the Contractor's (and the Owner's) Performance on Public Construction Projects in the USA: Surety Bonds and Other Methods* [1997] ICLR 342.

Frilet, M and Baelen, A, *Public Works Procurement in Europe* [1995] ICLR 123.

Gaede, A.H. et al (1996) *Fifty State Public Construction Contracting* John Wiley & Sons, New York, USA.

Gedes, A (1993) *Public Procurement: A Practical Guide to the UK Regulations and Associated Community Rules* Sweet & Maxwell, London.

Jones, G, *The Recovery of Benefits Gained from a Breach of Contract* (1983) 99 LQR 443.

Jones, GW, *Performance Guarantees of Construction Contracts: Surety Bonds compared to Letters of Credit as Vehicles to Guarantee Performance* [1994] ICLR 3.

Leiby, LR (1988) *Florida Construction Law Manual* (2d ed) Shepard's/McGraw Hill, Inc, Colorado, USA.

Lewis, R (1982) *Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry* 9 Brit J Law and Society 153.

Loots, P C (1995) *Construction Law and Related Issues* Juta & Co., South Africa.

May, The Hon. Sir Anthony (1995) *Keating on Building Contracts* (6th ed.) Sweet & Maxwell, London.

McKenzie, H.S. (1994) *The Law of Building and Engineering Contracts and Arbitration* (5th ed.) Juta & Co., South Africa.

Millett, T, *The Role of the European Court of Justice in relation to Public Procurement* (1992) 1 Public Procurement Law Review 70.

Nozick, R.S. (1982) Contract Law--Formation--Unilateral Mistake--Supreme Court of Canada--*In the Province of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd* 60 Canadian Bar Review 345.

Percy, D.R. *Radical Developments in the Law of Tenders: a Canadian Reformulation of Common Law Principles* (1988) 4 Const LJ 171.

Robertson, A, *Effective Remedies in EEC Law Before the House of Lords* (1993) 109 LQR 27.

Rosenberg, G, *International Construction Procurement - The Developing Regulatory Framework* [1997] ICLR 168.

Smellie, R (1979) *Building Contracts and Practice in New Zealand* (2d ed.) Butterworths, NZ.

Stein, SGM (ed) (1996) *Construction Law* (Looseleaf Encyclopaedia) Mathew Bender & Co., New York, USA.

Steiner, J, *Coming to Terms with EEC Directives* (1990) 106 LQR 144.

Sweet, J (1994) *Legal Aspects of Architecture, Engineering and the Construction Process* (5th ed.) West Publishing Co., USA

Treitel, GH, *Mistake in Contract* (1988) 104 LQR 501.

Vranken, M, *The Relevance of European Community Law in Australian Courts* (1993) 19 Melbourne University Law Review 431.

Wallace, I.N.D (1995) *Hudson's Building and Engineering Contracts* (11th ed.) Sweet & Maxwell, London.

Winter, JA, *Public Procurement in the EEC* (1991) CML Rev 741.

APPENDIX – B
An Analysis of Commonwealth Construction and Engineering Procurement Law

Table of cases, statutes and other materials referred to within this dissertation

Table of Cases

Case/ Title	Thesis page number
Acme Building & Construction Ltd v. Newcastle (Town) (1992) 2 CLR (2d) 308. Ontario Court of Appeal, Canada.	55, 114, 244
Ainsworth (1992) 175 CLR 564	271
Allied Maples Group Ltd v Simmons & Simmons, unreported, CA Transcript No 554 of 1995	312
An Bord Bainne Co-operative Ltd (The Irish Dairy Board) v Milk Marketing Board [1984] 2 CMLR 584; (1984) 1-CLD-02-19	309
Andreae v. Selfridge & Company Ltd [1938] Ch 1; [1937] 3 All ER 255 (CA)	342-345
Andrews v. DPP [1937] AC 576	39, 40
Anglia Television v. Reed [1971] 3 All ER 690 (CA).	220
Anisminic v. Foreign Compensation Commission [1969] 2 AC 147; 1 All ER 208	270
Annetts v. McCann (1990) 170 CLR 596	271
Anon (1701) 12 Mod Rep 560	42
Anson v Trump (The Times 8 May 1998) (CA).	199
Asphaltic Limestone Concrete Co Ltd v Corporation of the City of Glasgow 1907 SC 463; (1907) 14 SLT 706	122
Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680	270
Attorney General for NSW v. Quin (1990) 93 ALR 1, 39 (New South Wales, Australia).	267, 272
Attorney General's Reference (No 2 of 1999) [2000] 3 All ER 182 (CA).	27, 28, 29
Ballard v Tomlinson (1885) 29 Ch D 115	337
Belle River Community Arena Inc v. WJC Kaufmann Co Ltd (1978) 87 DLR (3d) 761	228
Ben Bruinsma & Son Ltd v. The Corporation of the City of Chatham et al (1984) 141 DLR (3d) 677; 11 CLR 37; 29 BLR 148. High Court, Ontario, Canada.	5, 58, 199, 206, 244
Best Cleaners & Contractors Limited v. Canada [1985] 2 FC 293; 58 NR 295. Federal Court of Appeal, Canada.	5, 103, 162, 244, 260
Biakanja v. Irving 49 Cal 2d 647; 320 P 2d 16	227
Birmingham & District Land Co v London & North Western Ry Co (1888) 40 Ch D 268	224
Blackpool & Fylde Aero Club v Blackpool Borough Council [1990] 1 WLR 1195; 3 All ER 25 (CA).	3, 6, 7, 57, 61, 62, 65, 86, 103, 109, 113, 161, 162, 199, 244, 203-208, 214, 217, 254, 273, 275
Bourgoin SA v Ministry of Agriculture [1986] QB 716; [1985] 3 All ER 585	309
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Bozson v. Altrincham Urban Council (1903) 67 JP 397	52
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EC	*Public Procurement in the EU*, a communication from the Commission at COM (1998) 143 final	283
EC	*Semco Energi A/S v Brønderslev Municipality* (Complaints Board for	259

	Public Procurement, Denmark, Case No 31, 31 October 1996) at www.ks.dk/udbud/kdl/summary/egneengelske-31.htm	
EC	*The Cost of Non-Europe in Public Procurement* (1988), a report for the Commission by WS Atkins Management Consultants	284
EC	Treaty on European Union (TEU)	88, 92, 138, 282, 283, 300
EC	*White Paper from the Commission to the Council on Completing the Internal Market*, COM (85) 310 Final	285

Table of miscellaneous documents referred to

Case/ Title		Thesis page number
ABA	American Bar Association Model Procurement Code for State and Local Governments (1979)	91
ALI	*Restatement of the Law of Torts* (2 ed) 1977 (American Law Institute)	336
ALI	*Second Restatement of Contracts* (US, 1981)	226
All ER	All England Law Reports, Annual Review 1994	39, 40
Allen	*Textbook on Criminal Law* (1993) (2nd ed.) at p. 85	42
APM	*Standard Terms for the Appointment of a Project Manager.* Association for Project Management (APM) (1998)	243
Arrowsmith, Professor Sue	*R v Lord Chancellor, ex parte Hibbit and Sanders* [1994] CLJ 104	255, 258
Arrowsmith, Professor Sue	*The Law of Public and Utilities Procurement* (1996) Sweet & Maxwell, London	6, 7
Beale, Bishop & Furmston	*Contract Cases and Materials* (1990) (2 ed.) Butterworths, London	220, 221
Birks	LMCLQ 421[1987]	221
Blom, J	*Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd* (1981-82) 6 *Can Bus LJ* 80	109
Building	*Building* 30 June 2000, p.10	37
Building	*Building* 8 January 1993, p. 36	24
Building	*Building*, 2 June 2000, p.18	33
Building	*Building*, 2 June 2000, p.9	33
Building	*Building*, 21 February 1997, p.11	83
Building	*Building*, 9 June 2000, p.11	33
Cane P	*An Introduction to Administrative Law* (1996) (3d ed) Clarendon Press, Oxford	268, 269
CIB	*Code of Practice for the Selection of Main Contractors*, (1997) Construction Industry Board, Thomas Telford, London	198, 188
CIC	*Guidelines for the Application of Competitive Tendering.* Construction Industry Council (CIC), London	83
CIC	*The Procurement of Professional Services* Construction Industry Council (CIC), London, 1994. ISBN 1 898671 03 6	83
CIRIA	*A Guide to the Competitive Procurement of Consultancy Services for Construction* (1994) London (Connaughton, John)	83
CIRIA	CIRIA (1999) *'Safety in ports: ship-to-shore linkspans and walkways, a guide to procurement, operations and maintenance'*	32
Contract Journal	*Contract Journal,* 28 January 1998: *Westminster row twist*	314
Davenport, P	Australian Construction Law Newsletter (ACLN). (1995)	220
De Smith, Woolf and Jowell	*Judicial Review of Administrative Action* (5th ed) par. 19-010.	135
DETR	*Respect for People*	33
Digest	*Digest (The) Vol 7(2) Building Contracts*	12
Dorter and Sharkey	*Building and Construction Contracts in Australia*, (1981) The Law Book Company Ltd, Sydney	243
DT	*The Daily Telegraph* 3 October 1997	38
Farrow, JJ and Main, FR	*Use and Abuse of the Code of Procedure for Single Stage Selective Tendering*, (1996) Construction Papers No.70, Chartered Institute of Building (CIOB).	198
Fridman, G H L	*Tendering Problems* (1987) 66 *Can Bar Rev* 582	109
FT	*The Financial Times* 3 October 1997	38
Fuller and Perdue	*The reliance interest in contract damage* (1936) 46 Yale LJ 52	220
Furmston, Prof M	*Some Thoughts on the Uses of Commonwealth and United States Cases* [1995] Con L Yb 13 and 20	3
Furmston, Professor M	114 LQR 362 (1998)	273, 275
Gloag	Gloag on *Contract* (2d ed, p. 416)	126
Goldsmith	*Goldsmith on Canadian Building Contracts* 4th ed. (loose-leaf)	113
HC	*Legislating the Criminal Code: Involuntary Manslaughter.* Law Commission No 237, published as House of Commons paper HC 171, 4 March 1996	22,38

HLRA	*A Uniform System of Citation* (1991) (15th ed) The Harvard Law Review Association, USA	18, 19
HO	*Reforming the Law of Involuntary Manslaughter: the Government Proposals* (2000)	35
HO	www.homeoffice.gov.uk/consult/invmans.pdf	34
Holborn, Guy	*Butterworths Legal Research Guide,* (1993) Butterworths, England	11
HSC	HSC's press release C003 of 24 February 2000.	30
HSC	HSC's press release C014 of 6 April 2000	32
HSC	HSC's press release C022 of 22 May 2000	30
HSC	HSC's press release C022 of 22 May 2000	31
HSC	HSC's press release C048 of 29 October 1999	31
HSC	HSC's *Working Well Together* scheme (May 1999) (HSC's Construction Industry Advisory Committee (CONIAC) and the Construction Confederation).	33
HSC	Managing Construction for Health and Safety (CDM) Approved Code of Practice (ACOP) (1995) 20	24-25
HSE	HSE: *'Health and safety in excavations: be safe and shore'*	37
HSE	HSE's press release E013 of 28 January 2000	32
HSE	HSE's press release E044 of 8 March 1999.	37
HSE	HSE's press release E061 of 6 April 2000	36
HSE	HSE's press release E065 of 14 April 2000	30
HSE	HSE's press release E082 of 22 May 2000	33
HSE	HSE's press release E082 of 22 May 2000.	33
HSE	HSE's press release E100:2000 of 14 June	33
HSE	HSE's press release E112 of 4 July 2000	35
HSE	HSE's press release E144 of 27 July 1999	29
HSE	HSE's press release E151 of 30 July 1999	29
HSE	HSE's press release E164 of 26 August 1999	32
HSE	HSE's press release E175 of 10 September 1999	35
Hughes, D	*Environmental Law* (1992) (2d ed) Butterworths, London	340
ICE	*Guidance on the Preparation, Submission and Consideration of Tenders for Civil Engineering Contracts*, Institution of Civil Engineers, (1983) UK.	88, 198
IPD	IPM, EC Update, 11/92	27
JCT	JCT Measured Term Contract	252
JCT	JCT98, clause 19.1	125, 356
Jones	99 LQR 443 (1983)	221
Jordahn, Jens and Høegh, Katja	*The EU Directives on Public Procurement—Danish Experience*, [1998] ICLR 5	259
Kames, Lord	*Historical Law Tracts* (1778) (4th ed)	268
Keating	*Keating on Building Contracts,* 5th edition (1991), or 6th edition (1995)	6, 7, 309
Latham, Sir M	*Interim Report* (Dec. 1993)	230
Law Commission	Law Commission (1975) Working Paper No. 60: *Law of Contract - Firm Offers*	58, 216
Law Commission	Law Commission Report No. 237	44
Law Revision Committee	Law Revision Committee: Sixth Interim Report (1937) Cmd. 5449	58
Law Revision Committee	Sixth Interim Report of the Law Revision Committee (1937) Cmd. 5449	216
LC	RSC Order 53; see now Civil Procedure Rules (CPR) Schedule 2.	133
LGC	*Local Government Chronicle* 16.1.1998	250
McKnight, Jean Sinclair	*The Lexis Companion*, (1995) Addison Wesley, USA.	11
McLean, J	*Contracting in the Corporatised and Privatised Environment*, 7 PLR 223, (1996).	271
MJ	*Municipal Journal* 16.1.98	250
NB	New Builder 17/6/94 p. 3	24
New South Wales	*Code of Practice for the Construction Industry* (July 1996, ISBN 0 7310 6891 2) Department of Public Works and Services, New South Wales, Australia	89
New South Wales	*Code of Tendering for the Construction Industry*, (1996) Construction Policy Steering Committee, Department of Public Works and Services, Sydney.	243
New South Wales	*Code of Tendering for the Construction Industry*, July 1996, Department of Public Works and Services, New South Wales, Australia, (ISBN 0 7310 6897 1)	89, 90
New South Wales	*Implementation Guidelines* (July 1996, ISBN 0 7310 6802 5) Department of Public Works and Services, New South Wales, Australia	89
Nicholas, B	*The French Law of Contract* (1992) (2d ed) Clarendon Press, Oxford	217
NJCC	*Code of Procedure for Single Stage Selective Tendering,* National Joint	198

	Consultative Committee for Building (1959-1996)	
NJCC	NJCC *Code of Procedure for Single Stage Selective Tendering*	188
Nozick, Prof. R	Comment on *The Province of Ontario and the Water Resources Commission v Ron Engineering and Construction (Eastern) Ltd* (1982) 60 *Can Bar Rev* 345	109, 205, 228
Odams, A.M. (ed.)	*Comparative Studies in Construction Law: The Sweet Lectures*, (1995) Construction Law Press, King's College London	91
Percy, DR	*Radical Developments in the Law of Tenders: a Canadian Reformulation of Common Law Principles* (1988) 4 Const LJ 171	57, 205
Prosser	*Prosser and Keeton on Torts* (5 ed) 1984	336, 338
RICS	Royal Institution of Chartered Surveyors (1966) *The Services of the Chartered Quantity Surveyor*	243
Rogers	*The Law of Canadian Municipal Corporations* (2nd ed.)3	51
SAA	Australian Standard 4120 – Code of Tendering (31.12.1994)	90,91
SAA	*Code of Tendering*, AS 4120-1994, Standards Association of Australia.	198, 243
Shannon Kathleen O'Byrne	*Good Faith in Contractual Performance: Recent Developments* (1995) 74 Can Bar Rev 70 at 96, cited by Cameron JA at 136 DLR (4th) 628b	72
Smith & Hogan	*Criminal Law* (1978) (4th ed.) at p. 79.	42
Songer, Anthony D and Ibbs, C William	Managing Request for Proposal Development in Public Sector Design-Build (1995) *Journal of Construction Procurement* 1, 64-80.	103
Swan, J	Comment on *The Queen v. Ron Engineering & Construction (Eastern) Ltd* (1981) 15 *UBC L Rev* 447	109
Sweet	*Legal Aspects of Construction Contracts* (1985) (3d ed) West Publishing Co. USA	226
Times	The Times 19 June 1997	297
Times	The Times 20 September 1997	38
Times	The Times 5 March 1996	41
TNZ	Transit NZ: *Manual of Competitive Pricing Procedures* (CPP)	222
Treitel	*The Law of Contract* (1987) (7th ed)	221
Turabian, Kate L	*A Manual for Writers of Term papers, Theses and Dissertations* (1987) (5th edition, paperback) The University of Chicago Press, USA	18, 19
Turner, D.F.	*Building Contracts: A Practical Guide* (1977) (3d ed) George Godwin Ltd, London	243
Uff	*Construction Law*, (1999) Sweet & Maxwell, Preface	2
UNCITRAL	United Nations Model Law on Procurement of Goods and Construction	79, 80
Victoria	*Code of Practice for the Building and Construction Industry* (July 1994, ISBN 7306 0096 3) Office of Building and Development, Department of Infrastructure, Melbourne, Victoria, Australia	89
Victoria	*Making Choices: Qualification Criteria for Assessing Building and Construction Industry Suppliers* (1997, ISBN 0-7311-0855-8) Office of Building and Development, Department of Infrastructure, Melbourne, Victoria, Australia	89
Victoria	*Tendering for Public Construction and Related Consultancy Services. A Better Purchasing Guideline for the Victorian Public Sector*, January 1997, Office of Building and Development, Department of Infrastructure, Melbourne, Victoria, Australia (ISBN 0 7306 8691 4)	89
Victoria	*Tendering for Public Construction and Related Consultancy Services*, 1997, Office of Building, Department of Infrastructure, Melbourne 3000, Victoria, Australia	187
Victoria	*Tendering for Public Construction and Related Consultancy Services*, (1997) Office of Building, Department of Infrastructure, Melbourne.	243
Waddams, S M	*The Law of Contracts* (3rd ed 1993)	109
Wallace, I.N.D.	Hudson's *Building and Engineering Contracts* (10th ed) Sweet & Maxwell, London	51, 243
Wells, Prof Celia	*Corporations and Criminal Responsibility* (1993) Clarendon Press, Oxford, England: at p. 8.	42,44
Wells, Prof Celia	*Manslaughter and corporate crime* (1989) 139 New LJ 931	43
Wells, Prof Celia	*The decline and rise of the English murder: corporate crime and individual responsibility* [1988] Crim LR 788;	43
World Bank	*Guidelines for Procurement under IBRD Loans and Credits* published by IBRD/ World Bank in 1985, 1986, 1988 and (4th ed.) 1992 on which this text is based. It is understood that a (5th) revised edition was published in 1995	79

APPENDIX - C

Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

Directory of websites

ENGLISH COURTS
The High Court, latest judgments
http://www.courtservice.gov.uk/judgments/judg_home.htm

The House of Lords, judgments
http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm

Lord Chancellor's Department
http://www.open.gov.uk/lcd/

ENGLISH LAW
HMSO - legislation
http://www.legislation.hmso.gov.uk/

SCOTTISH COURTS
Scottish Courts Web Link/ Search
http://www.scotcourts.gov.uk/index1.htm

SCOTTISH EXECUTIVE
http://www.scotland.gov.uk/

PUBLIC PROCUREMENT
Danish Competition Authority
http://www.ks.dk/eng/index.html

World Trade Organisation
http://www.wto.org/wto/index.htm

WTO - Agreement on Government Procurement
http://www.wto.org/wto/govt/agrmnt.htm

Euopean Union - DG IV
http://europa.eu.int/comm/dg15/en/publproc/index.htm

UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994
http://ra.irv.uit.no/trade_law/documents/procurement/un_model_law/txt/procurement_model.complete.html

UNCITRAL Model Law on Procurement of Goods, Construction and Services
www.catco.se/docs/6/procurement_model_complete.html

UNCITRAL - Home Page
www.un.or.at/uncitral/

UK GOVERNMENT and PARLIAMENT
Department of the environment, transport and regions (DETR)
http://www.detr.gov.uk/

Government legislation
http://www.open.gov.uk/

Office of fair trading
http://www.oft.gov.uk/

House of Commons debates in Hansard
http://www.parliament.the-stationery-office.co.uk/pa/cm/cmhansrd.htm

HM Treasury - procurement
http://www.hm-treasury.gov.uk/pub/html/docs/cup/main.html

Government Procurement webcentre
http://www.ogc.gov.uk/

DETR - Best Value
http://www.local-regions.detr.gov.uk/bestvalue/bvindex.htm

EUROPE
ECJ - recent case law
http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en

ECJ - curia menu
http://europa.eu.int/cj/en/index.htm

EUROPA Home Page
http://europa.eu.int/index-en.htm

AUSTRALIA
OzEmail LawNet - latest cases
http://www.lawnet.com.au/

NSW Courts
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/

AustLII - search
http://www.austlii.edu.au/forms/search1.html?&mask=

Australian Parliament
www.aph.gov.au/

ACCC Home Page
www.accc.gov.au/

Federal Court of Australia
www.lawnet.com.au/courts/latest.html

LAW LIBRARIES
Bodleian Library
http://www.bodley.ox.ac.uk/guides/law/

Law Weblinks
http://www.bodley.ox.ac.uk/guides/law/weblinks.htm#Internet Resources for Law

Judith Bowers Law List
http://www.geocities.com/~jab/law/bowers.html

Hieros Gamos - Law and Government Database
http://www.hg.org/hg.html

Yahoo! Government Law
http://www.yahoo.co.uk/Government/Law/

Pace Law Library
www.law.pace.edu//lawlib/lawlib2.html

SEARCH
Alta Vista
http://www.altavista.com/

Info Seek
http://infoseek.go.com/?svx=search_header&lk=noframes&nh=10

LAW REPORTS
The Times
http://www.bodley.ox.ac.uk/

Weekly Law Reports
http://www.lawreports.co.uk/newwlr1.htm

Brewer Consulting
http://www.brewer-con.co.uk/index.htm

BLISS - Roger Knowles

http://www.blissuk.com/

USA LAW
FindLaw
http://www.findlaw.com/

My FindLaw
http://my.findlaw.com/

ABA - American Bar Association
http://www.martindale.com/profession/state_bars.html

Courts Net - search
http://www.courts.net/ny/index.html

US Department of Justice Antitrust Division
http://www.usdoj.gov/atr/

Federal Courts - Homepage
http://www.uscourts.gov/allinks.html

US Federal Circuit Court
http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=Fed

United States Court of Appeals for the Third Circuit
www.law.vill.edu/Fed-Ct/ca03.html

United States Court of Appeals, Fourth Circuit
www.law.emory.edu/4circuit/

U.S. Court of Appeals, 7th Circuit
www.kentlaw.edu/7circuit/

US Court of Appeals, Federal Jurisdiction - 8th Cicuit Opinions
www.wulaw.wustl.edu/8th.cir

United States Court of Appeals, Tenth Circuit
www.law.emory.edu/10circuit/

US Court of Appeals, 11th Circuit
http://www.law.emory.edu/11circuit/

USA - Idaho Law
http://www2.state.id.us/judicial/judicial.html

Emory University School of Law
http://www.law.emory.edu/

Public Contract Law Model Procurement Code
www.abanet.org/contract/model.html

U.S. House of Representatives - Internet Law Library - Code of Federal Regulations
http://law.house.gov/4.htm

APPENDIX - D

Controversial Aspects of Commonwealth Construction and Engineering Procurement Law

Author's published papers

Category 1: Books

Procurement Law for Construction and Engineering Works and Services
Blackwell Science Ltd, 924 pages, hardback, ISBN 0-632-04927-8
Published 1999.

Category 4: Conference Contributions - Refereed

4.1 CIB-W92 (Procurement Systems Symposium, Durban, January 1996) *North meets South: developing ideas.* Ed. by Professor Rob Taylor. ISBN-86840-178-2, pp.93-102.
Capital Works Procurement: A Comparative Analysis of Procurement in England and in New South Wales, Australia
(Joint paper with P. Davenport of University of NSW, Australia. R.W. Craig conceived the project, wrote the major part and edited the whole.)

4.2 CIB-W92 (Procurement Systems Symposium, Durban, January 1996) *North meets South: developing ideas.* Ed. by Professor Rob Taylor. ISBN-86840-178-2, pp.83-92.
International Public Procurement Systems

4.3 CIB-W65/W92 (Symposium, Glasgow, September 1996) The Organisation and Management of Construction: *Shaping theory and practice.* Volume 2, *Managing the Construction Project and Managing Risk,* ed. by Langford, DA and Retik, A. Published by Spon, London. ISBN 0 41921030 X, pp.391-402
Capital Works Procurement: Owner's Obligations under the 'Tendering Contract'.
(Joint paper with P. Davenport of University of NSW, Australia. R.W. Craig conceived the project, wrote the major part and edited the whole.)

4.4 COBRA 96 (RICS Construction and Building Research Conference, UWE, September 1996.
Works and Services Procurement: 'Tendering Contract' Obligations, Fairness and Revocation of Offers

4.5 Association of Researchers in Construction Management (ARCOM) 12th Annual Conference, Sheffield, September 1996. Proceedings ed. by Prof. Anthony Thorpe. ISBN: 0 86339 660 7. Vol. 1, p.1.
Manslaughter as a Result of Workplace Fatality

4.6 CIB-W92 1997 Procurement Systems: Symposium University of Montreal, Montreal, Canada, 19-23 May 1997. Edited by Colin Davidson and Tarek Meguid, CIB Publication 203, ISBN 0-9682215-0-5, p.91:
The Tendering Contract: Fairness, Equality and Innovation

4.7 CIB-W92 1997 Procurement Systems: Symposium University of Montreal, Montreal, Canada, 19-23 May 1997. Edited by Colin Davidson and Tarek Meguid, CIB Publication 203, ISBN 0-9682215-0-5, p.101:
Procuring Subcontract Works: Head Contractor's Right to Rely on Irrevocable Subcontract Quotation

4.8 CIB World Building Congress 1998 - Gavle, Sweden, June 7 - June 12
Construction and the Environment
Symposium C - Legal and Procurement Practices: Right for the Environment, pp.1627-1634
Identification of environmental risks and their impact on procurement of construction works

4.9 International Research Network on Organizing by Project (IRNOP) III
Calgary, Canada 5-8 July 1998
Contractual Solutions to Unfair Bidding Practices by Owners and Project Managers, Paper B13

4.10 CIB Joint Triennial Symposium (CIB W65, W55 and W92) 1999 - Cape Town, South Africa, Sept 5-10
Customer satisfaction: a focus for research and practice in construction, volume 1, Construction Process Innovation, pp.325-335
Good Faith or Fair Dealing in Construction Procurement

Category 5: Conference Contributions - Invited papers, but not refereed

5.1 Seminars by invitation, RICS Mid-Career Training Workshops, 1992.
(i) *Liquidated Damages and Extensions of Time.*
(ii) *Retentions and the Trust Fund.*
(iii) *Professional Negligence Update, 1992.*

5.2 Seminars by invitation, Birmingham Training & Enterprise Council, 1993.
(i) *Contractor's Liability on Site.*

(ii) *Introduction to Arbitration.*
(ii) *Forfeiture, Determination and Suspension of Construction Contracts.*

5.3 Seminar by invitation, Cheltenham Centre, Chartered Institute of Building, November 1994
The JCT Arbitration Rules.

5.4 Seminar by invitation, RICS West Midlands Branch CPD seminar, Birmingham, 1994.
Drafting Contracts and Constructing the Team.

5.5 Seminar by invitation, RICS West Midlands Branch CPD seminar, Birmingham, 1995.
Health & Safety Law for Construction Professionals.

5.6 International Seminar by invitation, New Zealand Institute of Quantity Surveyors/ Institute of Building (April 1995) UNITEC, Auckland, New Zealand. Also UTS, Sydney.
Dispute Resolution: a view from the UK.

5.7 Seminar by invitation, Centre of Construction Law & Management, Kings College London, June 1995
The Divergence of Opinion within Common Law Jurisdictions after the Decision in Murphy (1990).

5.8 Seminar by invitation, Cheltenham Centre, Chartered Institute of Building, November 1995
Design Liability Workshop.

5.9 International Conference by invitation, CII-Australia (Annual Conference, Sydney, April 1996)
What can Australia Learn from the (New) Engineering and Construction Contract?

5.10 International Seminar by invitation, Master Builders Association of Australia, Newcastle, NSW. April 1996.
Construction Procurement and Contracts: Comparative view, Australia and UK.

5.11 International Seminar by invitation, New Zealand Institute of Quantity Surveyors/ Institute of Building. April 96.
The Divergence of Opinion within Common Law Jurisdictions after the Decision in Murphy (1990) (Updated paper)

5.12 Pacific Rim Real Estate Conference, Massey University, Palmerston North, New Zealand, 20 January 1997.
The 'tendering contract': Pre-contract Obligations for Owners and Bidders.

5.13 International Seminar by invitation, hosted by the Architect's Business Unit and the Department of Civil and Resource Engineering, The University of Auckland, New Zealand:
What can the New Engineering Contract do for New Zealand?

5.14 International Seminar by invitation, hosted by NZIQS and NZIOB at UNITEC on 26 March 1997, Auckland, New Zealand:
Competitive advantage through tendering innovation

5.15 International Seminar by invitation, hosted by Department of Civil & Environmental Engineering, University of Melbourne, Victoria, Australia, on 7th April 1997:
The Victorian tender code and the common law

5.16 International Seminar by invitation, hosted by The Department of Infrastructure, Victoria State Government, Melbourne, Australia, on 8th April 1997:
What's happening in the UK - the 'Construction Act' 1996, the Arbitration Act 1996 and resolving disputes

5.17 International Conference paper by invitation, Fourth Annual Conference, Construction Industry Institute, Australia, on 10-11 April 1997, Melbourne, Australia:
Competitive advantage through tendering innovation

5.18 International seminar by invitation, hosted by the Director of Community Services and the School of Construction Management & Property, Queensland University of Technology, Gardens Point Campus, Brisbane, Queensland, Australia, on 21 April 1997:
Tendering: contemporary issues

5.19 International Seminar by invitation, hosted by NZIQS and NZIOB at UNITEC on 16 March 1997, Auckland, New Zealand:
Cases on Procurement Law

5.20 International Seminar by invitation, hosted by Beca Carter Hollings & Ferner, Consulting Engineers, 132 Vincent Street, Auckland, New Zealand on 17 March 1998:
Cases on Procurement Law

5.21 International seminar by invitation, hosted by the School of Construction Management & Property, Queensland University of Technology, Gardens Point Campus, Brisbane, Queensland, Australia, on 19 March 1998:
Cases on Procurement Law

5.22 International Seminar by invitation, hosted by The Department of Infrastructure, Victoria State Government, Melbourne, Australia, on 1st April 1998:
Cases on Procurement Law

Edited Works - Contributions: Category 7
Managing Educational Property: A handbook for schools, colleges and universities, edited by Warner, D and Kelly, G. Published (1994) by The Society for Research into Higher Education & Open University Press, England. ISBN 0 335 19129 0. Chapter 11 *Property and Related Law* written by Peter Barrett and Ron Craig, pp.158-179. (Pp.169-179 by R.W. Craig)

Case Studies in Post Construction Liability and Insurance. Edited by Prof Anthony Lavers, co-ordinator of CIB-W87. This book provides an international review of case studies. Published by E & FN Spon, London and New York. ISBN 0-419-24570-7. Contribution for 'Florida, USA' produced and edited by Prof Bill Barnes, SPSU, Marietta, Georgia, USA and R.W. Craig, Loughborough University, UK: pp.251-272.

Refereed Journal: Category 11
Australian Construction Law Reporter Volume 16, No2, 1997, pp.33-41
ISSN 0726-1551 Article: *Competitive Advantage through Tendering Innovation*
Editor, John Twyford, University of Technology Sydney
ACLR, Construction House, 3rd Floor, 217 Northbourne Avenue, Turner, ACT 2612, Australia

Construction Law Journal Volume 14, No 3, 1998, pp.169-179
ISSN 0267-2359 Article: *Manslaughter as a Result of Construction Site Fatality*
General and Articles Editor: Andrew Burr, Barrister, Atkin Building, Gray's Inn, London
Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF

Journal of Construction Procurement Volume 5, No 1, May 1999, pp.15-26
ISSN 1358-9180 Article: *How Innovative is the Common Law of Tendering?*
Editors: Peter Hibberd, David Jaggar and Roy Morledge, IPRG Ltd, PO Box 5601, Nottingham, NG1 4BU, UK

Construction Management and Economics (2000) Volume 18, pp. 91-100.
ISSN 0144-6193 Article: *Re-engineering the Tendering Code for Construction Works*
Editors: Ranko Bon and Will Hughes, E & FN Spon, 2-6 Boundary Row, London, SE1 8HN, UK

Construction Law Journal Volume 15, No 2, 1999, pp.88-110
ISSN 0267-2359 Article: *Public Works Procurement: the Portsmouth case*
General and Articles Editor: Andrew Burr, Barrister, Atkin Building, Gray's Inn, London
Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF

International Construction Law Review Volume 16, Part 2, April 1999, pp.261-286
ISSN 0265 1416 Article: *Protecting the Integrity of Construction Procurement by Imposed or Assumed Contractual Obligations*
Editors-in-chief: His Honour Judge Humphrey Lloyd QC and David Wightman, Solicitor
Lloyds of London Press Ltd, 27 Swinton Street, London WC1X 9NW

Australian Institute of Quantity Surveyors' Refereed Journal, (2000) volume 4, issue 1, p.1
Managing the tendering process - lessons emerging from the common law courts for quantity surveyors and project managers
Editor-in-Chief: Dr Martin Loosemore, UNSW, Sydney, Australia

Australian Construction Law Newsletter, (2000) Issue #70, p.32
Competitive Advantage Through Tendering Innovation (updated paper)
Editor: John Twyford, UTS, Sydney, Australia

International Construction Law Review Volume 17, Part 4, October 2000, pp.646-672
ISSN 0265 1416 Article: *The Circumstances of Competitive Tendering Demand a Fair Process: Review of the Stannifer Developments Case and Other Matters*
Editors-in-chief: His Honour Judge Humphrey Lloyd QC and David Wightman, Solicitor
Lloyds of London Press Ltd, 27 Swinton Street, London WC1X 9NW