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Contractual Obligations in the Pre-Award Phase of Public Tendering

Peter Devonshire

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Abstract

The law of public tendering has received vigorous scrutiny since the Supreme Court of Canada's landmark decision in *R. v. Ron Engineering*. The Supreme Court's two-contract model re-defined the juristic boundaries of the tendering process, imposing a scheme of obligations in what was formerly regarded as a pre-contractual phase of the transaction. This article considers the ramifications of this development, with particular reference to the relationship between discretionary functions and legal duty. It is argued that the dynamics of tendering do not conveniently mesh with formal contract analysis and that the vision of *Ron Engineering* has been sustained by recourse to broader doctrines of fairness and good faith.

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CONTRACTUAL OBLIGATIONS IN THE PRE-AWARD PHASE OF PUBLIC TENDERING[©]

BY PETER DEVONSHIRE*

The law of public tendering has received vigorous scrutiny since the Supreme Court of Canada's landmark decision in *R. v. Ron Engineering*. The Supreme Court's two-contract model re-defined the juristic boundaries of the tendering process, imposing a scheme of obligations in what was formerly regarded as a pre-contractual phase of the transaction. This article considers the ramifications of this development, with particular reference to the relationship between discretionary functions and legal duty. It is argued that the dynamics of tendering do not conveniently mesh with formal contract analysis and that the vision of *Ron Engineering* has been sustained by recourse to broader doctrines of fairness and good faith.

Le droit des soumissions publiques a été scruté vigoureusement depuis l'arrêt de principe de la Cour suprême dans *R. c. Ron Engineering*. Le modèle en deux contrats de la Cour suprême a redéfini les balises juridiques du processus de soumission, imposant un processus d'obligations qui était auparavant perçu comme une phase précontractuelle de la transaction. Cet article considère les ramifications de ce développement, en se référant particulièrement à la relation entre les fonctions discrétionnaires et le devoir légal. Il soutient que la dynamique de la soumission ne concorde pas avec l'analyse contractuelle formelle et que la vision de *Ron Engineering* fut maintenue par les recours aux doctrines plus larges de l'équité et de la bonne foi.

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I. INTRODUCTION

It is trite that the Supreme Court of Canada's judgment in *R. v. Ron Engineering & Construction (Eastern) Ltd.*¹ has had profound ramifications on the judicial view of public tendering. In rejecting traditional analysis,² *Ron Engineering* propounded a distinct contractual model based on the formation of preliminary and final contracts (termed contracts A and B respectively). On this scheme, a request for tenders constitutes an offer by the owner.³ The submission of a conforming bid becomes an acceptance on the terms specified in the tender call.⁴ The preliminary contract⁵ prescribes the manner in which the owner is to

¹ [1981] 1 S.C.R. 111 [hereinafter *Ron Engineering*].

² Formerly a request for tenders was regarded as an invitation to treat, creating no contractual obligations on the part of the owner. The submission of a bid constituted an offer which the owner was at liberty to accept or reject. If the owner elected to accept a particular tender, a binding contract was then concluded with the successful bidder. See A.G. Guest, ed., *Anson's Law of Contract*, 26th ed. (Oxford: Clarendon, 1984) at 26; I. Goldsmith, *Canadian Building Contracts*, 3d ed. (Toronto: Carswell, 1983) at 19-20; *Halsbury's Laws of England*, vol. 9, 4th ed. (London: Butterworths, 1980), para. 230; I.N.D. Wallace, ed., *Hudson's Building and Engineering Contracts*, 11th ed., vol. 1 (London: Sweet & Maxwell, 1995) at 1.019, 3.053; G.H. Treitel, *The Law of Contract*, 9th ed. (London: Sweet & Maxwell, 1995) at 14-15; and A.G. Guest, ed., *Chitty on Contracts*, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994), paras. 2-013, 2-022.

³ The term "owner" denotes the party inviting bids.

⁴ Contract A arises immediately on the submission of a bid. See *Ron Engineering*, *supra* note 1 at 121. The principal terms of the contract include: (i) the irrevocability of the bid for a specified period, (ii) the owner's obligation to consider all conforming bids in accordance with the conditions of tender, (iii) the owner's qualified obligation to accept the lowest tender, (iv) the mutual obligation of owner and successful bidder to enter into contract B, and (v) the bidder's right to recover any tender deposit if the bid is not accepted.

⁵ Contract A was characterized as a unilateral contract. This formulation has attracted vigorous academic criticism. See J. Blom, "Mistaken Bids: *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*" (1981-82) 6 Can. Bus. L.J. 80; G.H. Fridman, "Tendering Problems" (1987) 66 Can. Bar Rev. 582; R.S. Nozick, Case Comment (1982) 60 Can. Bar Rev. 345; N. Rafferty, "Mistaken Tenders: An Examination of the Recent Case Law" (1985) 23 Alta. L. Rev. 491; and J. Swan, Case Comment, (1981) 15 U.B.C.L. Rev. 447. See further S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book, 1993), para. 159, 160, 394 [hereinafter

consider the submissions and the substantive contract is awarded on that basis. At this point the owner and successful bidder are obliged to enter into contract B, the formal agreement.⁶ In contrast, the law before *Ron Engineering* regarded proceedings prior to the award of the contract as a pre-contractual⁷ phase of the tendering process.⁸

The Supreme Court's judgment is essentially schematic and makes little attempt to define the content of the transactional framework. Instead, the elements of a workable system have gradually taken form in a succession of lower court decisions. The exercise has exposed the limitations of formal reasoning and underscored the need for more potent doctrines. The intervening years have witnessed a move from traditional rule-based analysis to open recognition of a transcendent standard of fairness. Although *Ron Engineering* was an application of the former, the continued vitality of the two-contract model has largely been attributable to the reception of the latter as an overarching principle in the field of public tendering. This article will examine these developments, assessing the implications of orthodox contract reasoning and the impetus towards more expansive forms of analysis.

The following issues will be considered. First, the integrity of contract A hinges upon an enforceable duty to award the tender in accordance with conditions prescribed in the bid call. However, tender

Contracts].

⁶ This analysis has been extended to the relationship between contractor and sub-contractor: *Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), 32 B.C.L.R. 392 (S.C.); *Gloge Heating & Plumbing Ltd. v. Northern Construction Co. Ltd.* (1986), 67 A.R. 150 (C.A.) [hereinafter *Gloge*]; and *Fred Welsh Ltd. v. B.G.M. Construction Ltd.* (1996), 24 B.C.L.R. (3d) 52 (S.C.) [hereinafter *Fred Welsh*].

⁷ The presence or absence of contract does not relieve an owner from alternative forms of obligation, such as liability for negligent misstatement or misrepresentation. See, for example, *Cardinal Construction Ltd. v. Brockville (City)* (1984), 4 C.L.R. 149 (Ont. H.C.J.) (misdescription of utility installations in project drawings accompanying tender documents); *Defence Construction (1951) Ltd. v. Municipal Enterprises Ltd.* (1985), 71 N.S.R. (2d) 59 (C.A.) (failure to advise tenderers of increase in statutory wage schedules); *K.R.M. Construction Ltd. v. British Columbia Railway* (1982), 40 B.C.L.R. 1 (C.A.) (presenting a substantial underestimate of the quantity of material to be moved); and *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (non-disclosure of conditions of work site).

⁸ See, for example, *Calgary (City) v. Northern Construction Co.* (1986), 67 A.R. 95 at 101 (C.A.), McDermid J.A., aff'd [1988] 1 S.C.R. 757 [hereinafter *Northern Construction*]; *Fred Welsh*, supra note 6 at 61, Romilly J.; and *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1993] 1 F.C. 371 at 398 (T.D.) [hereinafter *Northeast Marine T.D.*], McNair J. The absence of accountability in the tendering process prior to *Ron Engineering* is clearly illustrated in *Sankey v. Minister of Transport*, [1979] 1 F.C. 134 (T.D.).

documents commonly contain a disclaimer⁹ reserving the right to accept or reject any bid. On a literal construction such provisions may effectively negate any obligation by the owner, thereby undermining the very basis of a binding agreement.¹⁰ The inevitable question is whether the two-contract model can be sustained in these circumstances.¹¹ Since 1981 courts have had to weigh the implications of this interpretation against the binding authority of *Ron Engineering*. Their attempts to reconcile principle and pragmatism will be assessed.

Secondly, if the disclaimer does not rob contract A of juristic effect, the problem persists that an owner's obligations must be understood in the context of an arrangement contemplating the exercise of discretion. The two must necessarily be reconciled because unchecked discretion is inconsistent with a binding legal process. In fact, freedom of choice is illusory if the transaction is constrained by defined expectations and standards of fairness. The resolution of these perspectives goes to the heart of contract A, determining its essential content as well as the form of liability engendered by its breach.

Thirdly, attention will be directed to the evolving role of fairness and its relationship to traditional contract analysis. This leads to the final consideration, namely, the influence of policy objectives in fashioning the modern scheme of public tendering.

II. THE DISCLAIMER

A. *The Problem in Context*

Ron Engineering concerned the effect of mistake in the submission of a tender and the status of the bid deposit. However the broader discussion has left an enduring imprint on the contractual basis of public tendering. Unfortunately the Supreme Court did not provide any guidance as to the effect of an owner's disclaimer on the formation

⁹ Also commonly referred to as a "privilege clause." In this article both terms will be used interchangeably.

¹⁰ This possibility remains after *Ron Engineering* because the Supreme Court conceded that the owner's obligation to accept the lowest tender was qualified by the terms of the bid call: *supra* note 1 at 122-23.

¹¹ As Romilly J. expressed the point in *Fred Welsh*, *supra* note 6 at 69: "This type of clause, not uncommon in call-for-tender documents, could be interpreted to be in obvious contradiction to the reasoning of *Ron Engineering*. ... If such a clause were to be given its full effect on face value, it could be capable of preventing the formation of the Contract A, as envisioned by the court in *Ron Engineering*."

of a preliminary contract. This was an opportunity foregone because the tender documents in *Ron Engineering* contained a disclaimer in common form stating: "The commission reserves the right to reject any or all tenders ... and the lowest or any tender will not necessarily be accepted."¹² Although the clause was mentioned in the appeal materials it was not addressed in the Supreme Court's judgment. Thus the decision is silent as to the degree to which an owner's obligations can be modified by appropriate contractual terms.

Judicial responses have been varied. At one extreme there has been a refusal to accept that the words mean what they say. In *R. v. Canamerican Auto Lease & Rental Ltd.*¹³ the tender specifications stated: "The Department will not necessarily accept the highest offer, nor will it be bound to accept any tender submitted."¹⁴ At first instance¹⁵ and on appeal¹⁶ this was dismissed as a "boilerplate" clause, which, taken literally, would allow the owner to choose between tenderers in a completely arbitrary fashion.¹⁷ However, the trial judge conceded that some effect should be given to the provision,¹⁸ essentially on the basis that the owner's discretion was circumscribed by reasonableness, not arbitrariness. This intermediate position is the most obvious option if efficacy is to be given to the two-contract model. A disclaimer conferring unlimited discretion is incompatible with the concept of a binding agreement. At the same time, it may be neither fair nor realistic to dismiss the provision out of hand, for there are circumstances where a disclaimer serves a legitimate function in the process of bid selection.

¹² See Swan, *supra* note 5 at 455.

¹³ [1987] 3 F.C. 144 (C.A.) [hereinafter *Canamerican*]. See also *Kencor Holdings Ltd. v. Saskatchewan* (1992), 96 Sask. R. 171 at 174 (Q.B.) [hereinafter *Kencor Holdings*], Halvorson J.; and *Fred Welsh*, *supra* note 6 at 69-70, Romilly J.

¹⁴ *Canamerican*, *supra* note 13 at 153.

¹⁵ (4 March 1985), Ottawa T-4780-76 (F.C.T.D.) at 21 [unreported] transcript.

¹⁶ *Supra* note 13 at 156-58, Heald J.A.

¹⁷ Although this may seem a restrictive approach, on the facts there was a valid interpretative basis for limiting the disclaimer. In construing the documents as a whole it was apparent that the owner had undertaken to be bound by a prescribed selection procedure. For example, the request for tenders stated that "tenders will be awarded to qualified tenderers on the basis of the highest offers to Transport Canada": *ibid.* at 151.

¹⁸ Reed J. commented that "the clause in question would enable the Department to choose as between airport bids and system bids ... or to reject a bid which did not meet the confidence factor (a bid which it was unreasonable to expect the tenderer to be able to pay), or indeed in some other circumstances which do not now come to mind ...": *supra* note 15 at 21 transcript. This qualification was not mentioned in the Court of Appeal's judgments although there was general agreement with Reed J.'s approach.

Contracts for major construction works are a case in point. Where the dollar value of competing bids is fairly close, factors such as the applicant's business record, financial stability, and capacity to perform, may outweigh the economic benefit of accepting the lowest tender. Accordingly a degree of flexibility in the decisionmaking process is warranted in relation to considerations that have a direct bearing on performance of the tendering contract.

Canamerican can be contrasted with decisions giving expression to the principle that parties are generally free to enter into agreements in their own terms. For example, in *M.S.K. Financial Services Ltd. v. Alberta*,¹⁹ it was claimed that the owner had rejected the lowest tender for a property management contract in favour of a higher bid submitted by a party that failed to meet the prescribed eligibility criteria. The Instructions to Bidders specified: "The lowest or any tender may not necessarily be accepted and the Minister reserves the right to reject any and all tenders."²⁰ The plaintiff, being the lowest bidder, argued that contract A required the owner to enter into contract B with the plaintiff. The court noted Estey J.'s remarks in *Ron Engineering* as to the qualified obligations of the owner and observed:

It is clear ... that if the owner accepts a bid both parties are obligated to enter into a contract B. However, it does not necessarily follow that the owner is obliged to accept any particular bid and enter into a contract B. Such an obligation on the part of an owner would exist only if the terms of contract A required the owner to accept a particular bid. ... In this case there was no obligation on the defendant to accept any bid. It had a right to accept any particular bid, if it wished. The failure by the defendant to exercise that right in regard to any particular bid does not give an unsuccessful bidder a cause of action.²¹

In some senses this draws *Ron Engineering* full circle. The degree to which the owner is obliged to accept the lowest tender is, in the words of Estey J., controlled by the terms and conditions established in the call for tenders. Such terms may negate any binding obligations and defeat the inference of a unilateral contract.²² Thus the model

¹⁹ (1987), 77 A.R. 362 (M.C.) [hereinafter *M.S.K.*].

²⁰ *Ibid.* at 365.

²¹ *Ibid.* at 366-67, Master Funduk [emphasis omitted]. See also *Elgin Construction Co. v. Russell (Township)* (1987), 24 C.L.R. 253 at 257 (Ont. H.C.J.) [hereinafter *Elgin Construction*], White J.; and *Martselos Services Ltd. v. Arctic College*, [1994] N.W.T.R. 36 at 42-46 (C.A.) [hereinafter *Martselos Services*], Vertes J.A., leave to appeal refused [1994] 3 S.C.R. viii.

²² The circuitry of this reasoning is captured in the following passage: "[w]hen the respondent [bidder] submitted its tender, that gave rise to Contract A. As noted in *Ron Engineering*, in addition to the obligation to enter into Contract B on acceptance, the appellant [owner] had the qualified obligation to accept the lowest tender but subject to the 'terms and conditions established in the call

which the Supreme Court posits is in danger of collapsing in upon itself. Or at least, so it would seem. However, the majority of post-*Ron Engineering* decisions have upheld a preliminary contract despite the inevitable presence of a disclaimer. The application of this clause has been assailed from two directions: first, and perhaps most predictably, by recourse to strict construction;²³ second, by prescribing a baseline of fairness for the efficacy of contractual terms. The latter has a more general application in regulating the tendering process and will be addressed separately.²⁴

B. Construction

A disclaimer serves to relieve the owner of binding obligations in awarding the tendering contract.²⁵ If the clause is sustained in this form, the bid call is effectively relegated to its former status as an invitation to treat, leaving participants without redress for any perceived improprieties. It is questionable whether this accords with the parties' expectations in the modern tendering context, particularly when bidders are required to prepare complex technical submissions and to lodge a deposit to establish *bona fides*.²⁶ In these circumstances, discretion without accountability would create "an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties."²⁷

for tenders.' One of the explicit terms of the tender call in this case was that the lowest or any tender would not necessarily be accepted": *Martelos Services*, *supra* note 21 at 43, Vertes J.A.

²³ A strict interpretation bordering on a *contra proferentem* construction is consistent with judicial treatment of limitation clauses generally.

²⁴ See Part IV, below.

²⁵ Recent cases illustrate that owners are increasingly attempting to achieve this end by couching the disclaimer in more expansive language. See, for example, *Kencor Holdings*, *supra* note 13 at 172; *Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 at 40 (Nfld. C.A.) [hereinafter *Health Care Developers*]; and *Fred Welsh*, *supra* note 6 at 71-72. There are also indications that limitation clauses are being imposed by owners as a condition of tendering. See, for example, *B.A. Blacktop Kamloops v. British Columbia (Ministry of Transportation and Highways)* (1996), 24 B.C.L.R. (3d) 149 at 151-52 (S.C.).

²⁶ See *Pratt Contractors Ltd. v. Palmerston North City Council*, [1995] 1 N.Z.L.R. 469 at 479-80 (H.C.) [hereinafter *Pratt Contractors*], Gallen J.

²⁷ *Blackpool & Fylde Aero Club Ltd. v. Blackpool Borough Council*, [1990] 3 All E.R. 25 at 30 (C.A.) [hereinafter *Blackpool*], Bingham L.J.

The matter can be addressed by ordinary rules of construction. In essence, a party occupying a superior bargaining position²⁸ is attempting to exclude or limit its legal obligations.²⁹ The assertion of such rights is treated with circumspection and the initial point of departure for this discussion is that privilege clauses will usually receive a narrow interpretation. The following implications will be considered: first, the award procedure specified in a request for tenders has been interpreted as an undertaking by the owner to comply with that process. The nature of the undertaking must be assessed in relation to a disclaimer purporting to negate this obligation. Secondly, the award process has been subject to challenge where the owner's decision was influenced by undisclosed considerations. Whether such practices are sanctioned by a privilege clause will be addressed from the perspective of traditional formation analysis. Thirdly, it is commonly assumed that privilege clauses must be interpreted restrictively in order to preserve the two-contract model. The necessity for this stance will be assessed against the neutral setting of New Zealand contract law, where the parties are free to contract in their own terms without specific allegiance to *Ron Engineering's* principles.

1. Implied promise

There are two components to the standard disclaimer: the negative right to reject bids and the positive right to award the contract arbitrarily and without accountability. The negative form of the disclaimer has proven effectual to the extent that courts have accepted that an owner may reject all bids³⁰ or alternatively, reject individual

²⁸ The owner, as author of the tendering documents which embody the express terms of contract A, is essentially placing potential bidders in a "take it or leave it" position. This is dictated as much by the tendering process as the personal inclinations of the owner. The two-contract model does not generally contemplate a bargaining exercise. Tenders for goods or services are invited on the basis that the same terms and conditions apply to all participants. Indeed, the process has been successfully challenged where the owner has departed from this principle.

²⁹ This could perhaps be more aptly expressed in terms of preventing such obligations from arising. In the context of contract A, a disclaimer does not exclude or limit an (existing) obligation because the parties' relationship is governed by the terms and conditions of the contract. If it is agreed that the owner will not assume certain obligations, the parties are merely precluding the formation of such terms.

³⁰ *Best Cleaners & Contractors Ltd. v. Canada*, [1985] 2 F.C. 293 at 306 (C.A.) [hereinafter *Best Cleaners*], Mahoney J.A.; *Martselos Services*, *supra* note 21 at 42-44, Vertes J.A.; *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), 40 B.C.L.R. (2d) 345 at 347 (C.A.), [hereinafter *Chinook Aggregates*], Legg J.A.; *Pratt Contractors*, *supra* note 26 at 487, Gallen J.; *Murphy v. Alberton*

tenders which are non-conforming.³¹ The former can be justified from a practical perspective in that the invitation may fail to elicit any satisfactory tenders and it would be unrealistic to compel an owner to proceed with the transaction. The latter is nothing more than proper administration of contract A: the requested act to form a contract, namely submission of a conforming bid, has not been performed. By definition it cannot be treated as an acceptance of the owner's offer.

Where, however, the owner elects to accept a particular bid, it has generally been held that the disclaimer cannot sanction a significant departure from the specified award procedure. Naturally, the greater the specificity the more readily it can be inferred that the owner has undertaken to evaluate bids on a particular basis.³² The primacy of this undertaking is reinforced by the fact that a disclaimer is usually a standard term of indeterminate application.³³ More particularly, the former is context-specific, the latter is not.

This approach has founded liability in a variety of situations. Most commonly the owner has been accountable for failing to award the tendering contract to the lowest eligible bidder³⁴ or for awarding a contract materially different from contract B.³⁵ Similarly, challenges have been mounted where the owner applied undisclosed assessment criteria³⁶ or accepted a non-conforming bid.³⁷ The principles are aptly illustrated by *Pratt Contractors*.³⁸ At issue was a contract awarded by the defendant council for the construction of road works. The bid call was

(Town) (1994), 114 Nfld. & P.E.I.R. 34 at 43 (P.E.I.S.C.T.D.) [hereinafter *Murphy*], Jenkins J.; and *Power Agencies Co. v. Newfoundland Hospital & Nursing Home Association* (1991), 90 Nfld. & P.E.I.R. 64 at 69 (Nfld. S.C.T.D.), Cameron J.

³¹ *Fred Welsh*, *supra* note 6 at 69-70, Romilly J.; *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 24 B.C.L.R. (3d) 379 at 389 (C.A.) [hereinafter *Vachon Construction*], Finch J.A.; and *Murphy*, *supra* note 30 at 43, Jenkins J.

³² *Canamerican*, *supra* note 13 at 157-58, Heald J.A.; *Vachon Construction*, *ibid.* at 389, Finch J.A.; *Pratt Contractors*, *supra* note 26 at 479-480, Gallen J.; and *Markholm Construction Co. Ltd. v. Wellington City Council*, [1985] 2 N.Z.L.R. 520 at 527 (H.C.) [hereinafter *Markholm Construction*], Jeffries J.

³³ The objection was voiced by Heald J.A. in *Canamerican*, *supra* note 13 at 158, that a specific award procedure should not be subservient to a conflicting general provision of "uncertain applicability."

³⁴ *Kencor Holdings*, *supra* note 13; *Chinook Aggregates*, *supra* note 30; and *Zutphen Bros. Construction Ltd. v. Nova Scotia (A. G.)* (1993), 125 N.S.R. (2d) 34 (S.C.).

³⁵ *Best Cleaners*, *supra* note 30.

³⁶ *Chinook Aggregates*, *supra* note 30; and *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197 (B.C.S.C.) [hereinafter *Tercon Contractors*].

³⁷ *Vachon Construction*, *supra* note 31.

³⁸ *Supra* note 26.

accompanied by detailed tendering guidelines and comprehensive technical information. These materials indicated that tenders would be assessed in two stages. Applicants were initially judged by certain criteria, such as experience, physical resources and technical skill. Those who met the required standard in each category would be considered in relation to price. Although the tendering form proclaimed that the owner was “not bound to accept the lowest or any tender he may receive”³⁹ the owner undertook to enter into a contract with the eligible tenderer offering the lowest price.

The plaintiff, a company that had offered the lowest price, challenged the council’s decision to award the contract to a competitor which had submitted a non-conforming bid. Reviewing the evidence, Gallen J. observed that the documents were extensive and detailed. They prescribed precise methods for evaluating tenders and amounted to a promise that the contract would be awarded to the lowest eligible tenderer. The degree of particularity provided a context in which the court could infer a binding commitment to act in a certain way. In turn, bidders accepted this undertaking as a basis for expending time and money in preparing submissions. The contractual nature of the arrangement was underscored by the stipulation that only parties who had registered their interest and paid a \$100 non-refundable deposit were eligible to bid. Cumulatively, the facts supported the two-contract model and it was concluded that the council was in breach of the terms it had itself imposed. As Gallen J. expressed the principle:

Once it [the Council] determined to accept a tender, then I think it was obliged to do so on the basis on which it sought tenders. The plaintiff has therefore been the victim of a breach of contract because once the Council purported to act within the tendering framework, it was obliged, if it awarded a contract at all, to award it to the tenderer submitting the lowest conforming tender.⁴⁰

Turning to the disclaimer, it was accepted that the owner was at liberty to reject all bids. This was not, however, the option it chose. Council instead elected to accept a particular bid. In the face of a specific award procedure the negative form of the disclaimer could be countenanced, the positive could not.

³⁹ *Ibid.* at 481.

⁴⁰ *Ibid.* at 487.

2. Undisclosed terms

Although the precise scope and function of a disclaimer is unsettled, there is consensus that such clauses cannot regularize or sanction procedural impropriety.⁴¹ A common objection by disappointed bidders is that the bid selection was governed by undisclosed considerations which operated to the advantage of some, but not others. Applying the principles established in *Ron Engineering* it has been recognised that the parties' rights crystallize on the formation of contract A. Undisclosed conditions cannot form part of that contract and therefore fall outside the contemplation of the disclaimer. This was most directly expressed in *Chinook Aggregates*,⁴² where the British Columbia Court of Appeal forcefully denounced the owner's attempts to apply an unstated policy of preferring local contractors whose tenders were within ten per cent of the lowest bid. Delivering the judgment of the court, Legg J.A. observed:

[W]here the appellant [owner] attaches a condition to its offer ... and that condition is unknown to the respondent [bidder], the appellant cannot successfully contend that the privilege clause made clear to the respondent bidder that it had entered into a contract on the express terms of the wording of that clause. There was no consensus between the parties that the wording of the privilege clause governed.⁴³

Chinook Aggregates was cited with approval in *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*,⁴⁴ a case which similarly turned on the application of a disclaimer to a decision based on undisclosed criteria. In *Northeast Marine* the Federal Court of Appeal questioned whether disclosure was necessary in every instance, and postulated two distinct bases for assessing bids.

The salient facts were that the defendant authority advertised for the provision of pilot boat services and the contract was ultimately awarded to a party submitting a higher bid than the plaintiff, the lowest qualified bidder. The defendant's decision was prompted by a concern that in view of the plaintiff's other operations in the region, it would

⁴¹ Such conduct is sometimes regarded as transgressing basic expectations of fairness and addressed on that footing. See discussion in Part IV, below.

⁴² *Supra* note 30.

⁴³ *Ibid.* at 349. See similarly *Fred Welsh*, *supra* note 6 at 69, where it was observed that arbitrary discretion under a privilege clause would negate consensus as to the terms of contract A.

⁴⁴ [1995] 2 F.C. 132 at 160 (C.A.) [hereinafter *Northeast Marine*], Stone J.A. (dissenting). The majority expressed general agreement with the reasons of Stone J.A. while differing as to his conclusions on the evidence.

effectively enjoy a monopoly if awarded the contract. This was not mentioned in the bid particulars as a possible consideration in assessing tenders. The defendant relied on a disclaimer reserving "the right to reject any or all tenders or to accept any tender considered in its best interest."⁴⁵ The Trial Division of the Federal Court⁴⁶ held that the clause had no application where the owner purported to impose pre-conditions that were not revealed to the participating bidders. This conduct breached an implied obligation under contract A to treat all bidders fairly and accordingly the defendant was liable in damages. By a majority the authority's appeal to the Federal Court of Appeal was allowed.

Delivering the majority judgment, Letourneau J.A. drew a distinction between a condition of the tendering process and a consideration in assessing bids. If the monopoly issue had fallen under the former category, the plaintiff's bid would have been rejected at the outset. Instead, the tender was accepted, assessed on its merits and identified as one of two final qualified bids. Factors such as the possibility of a monopoly entered the picture at that later stage when particular bids were evaluated. At this point the owner was exercising its powers under the privilege clause to accept or reject any bid. The issue of monopoly was a legitimate consideration, along with such matters as safety, financial stability and conflict of interest. In developing this argument it was necessary to address the established view that a disclaimer can only apply to the express terms of contract A.⁴⁷ The Court asserted that the right to inquire as to a possible monopoly was so fundamental that it could reasonably be implied. There was no need to specifically advise participants because the assumption could be drawn that a public body would take such matters into account in the proper discharge of its duties.

It is respectfully submitted that the rationalization of the condition-consideration distinction is unconvincing. The Federal Court of Appeal equated monopoly with other concerns fundamental to the interests of contracting parties. Few would dispute that public bodies should refrain from contracting with bidders whose practices are unsafe or whose status gives rise to a conflict of interest. The observance of

⁴⁵ *Ibid.* at 143.

⁴⁶ *Northeast Marine T.D.*, *supra* note 8.

⁴⁷ *Fred Welsh*, *supra* note 6 at 69, Romilly J.; and *Chinook Aggregates*, *supra* note 30 at 348-49, Legg J.A.

such standards is an obligation, not a mere discretion.⁴⁸ However, the possibility of a monopoly or conflict of interest is not so patent or immediately discoverable as to enable an owner to summarily reject submissions at the time of the bid opening. These objections would more likely be identified at the evaluation stage, whereupon the relevant tenders would be rejected. It is inappropriate to depict this as an exercise of discretion for there is no real latitude to award contract B to the bidders concerned. Therefore *Northeast Marine* confuses two distinct functions occurring during the same phase of the tendering process: the assessment of bids against discretionary criteria (considerations) and identification and automatic rejection of unacceptable bids, which contrary to the court's view, are conditions of tendering.

Moreover, *Northeast Marine* expresses the condition-consideration distinction in unduly constricted terms. The distinction was seemingly driven by the perception that a privilege clause applies to some criteria (considerations) and not others (conditions). It is unclear why this should be so, for if an owner may reject bids on purely discretionary grounds, then *a fortiori* a disclaimer can be invoked to counter an impropriety or overriding public policy concern. In fact it is questionable whether the disclaimer is strictly necessary because a defective submission extinguishes any obligation to enter into a contract with the affected bidder.

It has previously been noted that the majority judgment in *Northeast Marine* is inconsistent with the general view that a disclaimer can only govern the express terms of contract A.⁴⁹ To incorporate this judgment into mainstream thinking it must be accepted that the power to reject bids under the privilege clause is exercisable in respect of matters so notorious that they need not be expressly declared. This may be permissible in cases of obvious impropriety.⁵⁰ However any broader

⁴⁸ In the language of Letourneau J.A., this is a condition, not a consideration.

⁴⁹ Compare with *Chinook Aggregates*, *supra* note 30, where it was held that an undisclosed local bidder preference could not be sustained in the absence of prior disclosure. *Northeast Marine* and *Chinook Aggregates* cannot be distinguished on the ground that the criteria in each were materially different. If the avoidance of monopoly is a legitimate policy objective, then measures to stimulate or protect a provincial economy should be viewed in the same light. In fact the issue is beyond doubt in some jurisdictions which by statute have expressly declared that a local preference policy operates in public sector tendering. See, for example, *Provincial Preference Act*, R.S.N. 1990, c. P-33.

⁵⁰ For example, bribery or bid-rigging. Here the owner would not be strictly dependent on express terms, including the disclaimer, to reject the bid because any resulting contract may be invalid on public policy grounds. Proposals that fail to meet minimum safety requirements are in a

application of this principle would run counter to present emphasis on open competition, certainty of terms and accountability in the evaluation of tenders. It would also encourage a quest for grounds that could be proffered after the event as a legitimate basis for excluding certain bids—a prospect that is philosophically unattractive and out of step with current thinking.

3. A comparative perspective

In the post-*Ron Engineering* era Canadian courts have tended to de-emphasize the scope of a disclaimer as a perceived necessity in upholding the two-contract model. The thrust of this thinking has tended to divert inquiry as to whether a protective stance is strictly necessary. Assessing the matter anew, the following question is posed: what are the consequences of accepting that parties are free to contract in their own terms? Does it inevitably follow that a freedom of contract approach would place the two-contract model in jeopardy? The answer can most usefully be explored from the perspective of a jurisdiction that has applied the principles of *Ron Engineering* without commitment to its binding authority.

similar category although their rejection can be rationalised on ordinary principles of offer and acceptance: the owner is not bargaining for unsafe goods or services. Bids can also be validly rejected on grounds of monopoly, conflict of interest and financial soundness. The process must however be explained on a different basis again. What is or is not a monopoly, for example, is largely a question of degree, requiring careful and detailed assessment of not only the bid submission but also extraneous factors such as market conditions, status of competitors and so on. Usually this can only be undertaken at the evaluation stage of the tendering process. If such concerns are foreseeable, it should be incumbent on the owner to advise of its intention to scrutinise submissions on this basis. This would encourage participants to produce information to assist the owner in making an appropriate determination. The disclaimer could ultimately be invoked in rejecting a particular bid in the context of this open procedure.

New Zealand courts⁵¹ have been receptive to the contractual model espoused in *Ron Engineering*,⁵² while recognizing that parties are at liberty to enter into different forms of arrangement or to negate this scheme by appropriate language. Thus, on a freedom of contract approach, the implications of a disclaimer have been squarely confronted without any overriding allegiance to the two-contract model.

In *Pratt Contractors*⁵³ the initial point of departure was that a simple tender constitutes an invitation to treat and it was therefore necessary to establish the contractual nature of the arrangement.⁵⁴ Having found that the parties intended to create binding obligations on the submission of a tender, the disclaimer was effectively subordinated to the positive averment that the owner would enter into a contract with the lowest eligible bidder.

A similar interpretative approach was evident in *Gregory*.⁵⁵ Here, the bid particulars did not contain any undertaking by the owner to sell the subject property to the highest bidder. There was scant

⁵¹ *Ron Engineering* has not been readily adopted in other Commonwealth jurisdictions, which continue to adhere to the traditional contractual approach. For the Australian position see J.W. Carter & D.J. Harland, *Contract Law in Australia*, 3d ed. (Sydney: Butterworths, 1996), para. 212; and N. Seddon, *Government Contracts* (Leichhardt, N.S.W.: Federation, 1995), para. 6.5. Compare para. 6.9 *et seq.*, where the author postulates possible bases for imputing legal obligations in the pre-award phase of tendering. For the English position see references cited *supra* note 2. English law regards a request for tenders as an invitation to treat and not an offer. It has, however, been recognised that a contractual obligation may be imposed on the invitor in exceptional circumstances, as where there is an express undertaking to sell to the highest bidder. See *Harvela Investments Ltd. v. Royal Trust Company of Canada (C.I.) Ltd.*, [1986] 1 A.C. 207 (H.L.).

⁵² *Markholm Construction*, *supra* note 32 at 526; and *Pratt Contractors*, *supra* note 26 at 475 *et seq.* Compare *Gregory v. Rangitikei District Council*, [1995] 2 N.Z.L.R. 208 at 220-22 (H.C.) [hereinafter *Gregory*].

⁵³ *Supra* note 26. For facts see text accompanying notes 38-40.

⁵⁴ Gallen J. reiterated this view in the later decision of *Maintec Ltd. v. Porirua City Council* (19 October 1995), (N.Z.H.C.) [unreported] at 10 transcript:

The starting point I think is the general rule established in the nineteenth century that the action of calling for tenders amounts to an invitation to treat and does not generally give rise to any legal relationship between the parties. There is however, 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 *Markholm Construction Co.* ... and I accepted it in the *Pratt Contractors* case ... the question really is whether in the particular circumstances a Court is able to conclude with confidence that the parties intended to create contractual relations in respect of the tendering process, as distinct from the acceptance of the tender itself

See further *Shivas v. BTR Nylex Holdings Ltd.*, [1997] 1 N.Z.L.R. 318 (H.C.), where this *dictum* was cited and applied.

⁵⁵ *Supra* note 52.

information on the conditions of sale and a disclaimer was prominent on the front and only page. In these circumstances it was held that the disclaimer defeated the formation of a preliminary contract.⁵⁶ Recognition of the two-contract scheme was essentially a matter of construction: a preliminary contract would be countenanced insofar as it was consistent with any disclaimer.⁵⁷ *Gregory* departs markedly from *Canamerican*, where the Federal Court of Appeal refused to accept that an appropriately worded disclaimer could empower an owner to choose in a completely arbitrary way between tenderers.⁵⁸ In *Gregory*, McGechan J. forcefully affirmed the parties' freedom to contract in their own terms:

Parties at arm's length may contract in a way which allows the arbitrary, abnormal, or even downright stupid. The disdain for the "arbitrary" is a valid interpretative approach, in deriving intentions, but goes no further. If, to the contrary, the Canadian Court [in *Canamerican*] intended to lay down some wider rule, I respectfully decline to follow. There is no suggestion such is needed under commercial conditions prevailing in New Zealand, and freedom of contract should be allowed.⁵⁹

This suggests that the distinct focuses of Canadian and New Zealand jurisprudence may be ultimately leading in different directions. Canadian decisions have robustly resisted attempts to subvert contract A. To that end there has been a discernible shift from formal analysis to broader notions of fairness.⁶⁰ In contrast, New Zealand courts have tended to adhere more closely to the traditional contract paradigm. If each continues on a parallel path, different regimes will emerge.⁶¹ Classical contract theory nurtures rule-certainty and constrains the exchanges of contracting parties within a set-piece of offer and

⁵⁶ However the defendant council was found liable on the alternative grounds of negligence and breach of s. 9 of the *Fair Trading Act, 1986*, No. 121 (N.Z.).

⁵⁷ The principle could also be stated in reverse, namely that a disclaimer will be effective to the extent that it is consistent with the parties' general intention. For example, an express promise by the owner may prevail over a general disclaimer: see *Canamerican*, *supra* note 13 at 158.

⁵⁸ *Ibid.* at 156-58.

⁵⁹ *Supra* note 52 at 221. Nevertheless, McGechan J. accepted that the facts of *Canamerican* disclosed substantial grounds for imputing a promise to award a contract on a certain basis. To that end it was understandable that the Federal Court read down a general statement (the disclaimer) to the opposite effect.

⁶⁰ See discussion at Part IV, below.

⁶¹ On the assumption that parallels, by definition, never intersect. In fact the projection may be too extreme in that New Zealand decisions contain isolated references to fairness in the tendering context: *Pratt Contractors*, *supra* note 26 at 478, 481-83, Gallen J. What is however unclear is whether the principle will be applied with equal vigour and attain a similar paramourcy in this area of law.

acceptance. In the case of public tendering, terms are largely dictated by the owner, as author of the invitation to tender. If the parties are deemed responsible for the outcomes of their agreement, then the dice is loaded in favour of the owner.⁶²

The Canadian approach has moved more towards transactional certainty, directed to bolstering the tendering scheme as a model of mutually understood rights and obligations.⁶³ Indeed, at the urging of Estey J., the protection of the tendering system has become a proclaimed objective. Accordingly, conditions of the tendering contract are sanctioned insofar as they are instrumental and not destructive of that scheme. Where they tend to the latter, the balance is redressed by traditional techniques of construction or the *ad hoc* intervention of an overarching principle of fairness.

III. DISCRETION AND OBLIGATION

A. Overview

In the years since *Ron Engineering* the Supreme Court's model has been buttressed by a growing expectation of probity in the pre-award phase of the tendering process. The underlying principle has been variously expressed as a standard of good faith, or a duty of fairness or reasonableness.⁶⁴ For present purposes it will be assumed that in whatever form the obligation is cast, the owner is subject to some commonly acknowledged constraints. Two aspects will be considered.

First, the constraints arise in the exercise of what is ostensibly a discretionary function. However, any notion of autonomy is illusory

⁶² This was starkly acknowledged in *Blackpool*, *supra* note 27 at 30, Bingham L.J., where the Court of Appeal applied the traditional contract approach:

A tendering procedure ... is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often ... be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case ... involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need 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.

⁶³ See discussion of the court's role in balancing the respective interests of owner and bidder in Part IV, below.

⁶⁴ *Ibid.*

because contract A—largely unhindered by the disclaimer⁶⁵—has become a vehicle for enforceable expectations. One of those expectations is that the substantive contract will be awarded on a certain basis. Should this be understood as a mandate to accept the lowest bid? If so, the process is little more than a procedural formality. On the other hand, if the owner retains a vestige of active discretion, the scope of that discretion will determine the nature of the owner's obligations under contract A.

The second issue examines an implication of the first. Assuming in a given case that the substantive contract is awarded in a manner inconsistent with the owner's duties under contract A, does it necessarily follow that a cause of action is bestowed on the disappointed bidder offering the lowest eligible tender? If an impropriety in favouring bidder X engenders liability to bidder Y, then some fundamental assumptions are being drawn as to the owner's discretion and the enforceability of obligations under a preliminary contract. Attention will be directed to two recent decisions which have adopted conflicting positions.

The issues relevant to establishing liability have a corresponding impact on the assessment of damages and in the final section this will be explored in relation to remoteness and compensation for conjectural losses.

B. *Scope of Discretion*

The owner's obligations under contract A are usually adduced from the particulars of the bid call. Positive averments that the successful tender will be awarded on a certain basis—most typically that contract B will be offered to the lowest eligible bidder—are generally enforced irrespective of the presence of a general disclaimer.⁶⁶ Suppose the tender documents are silent on the point. If the transaction is a simple sale of land or inventory, it can be confidently anticipated that the highest bid will prevail. From the owner-vendor's perspective, monetary return will usually be the sole consideration. It would be perverse as well as improbable for an owner to frustrate its own interests by awarding the tender on a different basis. In these circumstances the

⁶⁵ Compare decisions such as *M.S.K.*, *supra* note 19, which upheld the full measure of a disclaimer in enforcing an owner's discretion.

⁶⁶ As Heald J.A. expressed the principle in *Canamerican*, *supra* note 13 at 158: "[A] specific award procedure rule should not be presumed to be subservient to a general rule of uncertain applicability which contradicts the specific rule."

absence of an explicit statement of the award procedure would be unlikely to negate the objective expectations of the parties.

This approach has been extended to tenders contemplating a continuing relationship between owner and successful bidder, such as capital works projects⁶⁷ or contracts for the provision of services.⁶⁸ Such cases have propounded an obligation to accept the lowest bid as an implied term of the preliminary contract. A similar outcome was achieved by different means in *Chinook Aggregates*.⁶⁹ The British Columbia Court of Appeal affirmed the trial judge's finding that an obligation to award contract B to the lowest qualified bidder was imported into the tendering process⁷⁰ as a result of custom or usage of the construction industry.⁷¹ This approach has since been largely discredited. Particularly where industry practice competes with a disclaimer, courts have upheld the latter as an express term of the contract. In *Martselos Services*⁷² Vertes J.A., writing the leading judgment of the Northwest Territories Court of Appeal, expressed the point in uncompromising terms:

The respondent argues, however, that it was the industry practice or custom to award these contracts in the past to the low bidder. ... Canadian jurisprudence, however, has not recognized 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.⁷³

In practice the distinction is more analytic than substantive. The disclaimer is an express contractual term. Industry custom, by definition, is not. Courts have rejected implied terms deriving from the latter.⁷⁴ Yet there have been no similar qualms at treating expectations as to the award procedure as an implied term simpliciter, enjoying paramountcy over the same express condition (the disclaimer). The reason, it is submitted, is that conventions of interpretation have been subordinated to policy considerations. The lowest eligible bid criterion is seen as a

⁶⁷ See *Vachon Construction*, *supra* note 31.

⁶⁸ See *Martselos Services*, *supra* note 21.

⁶⁹ *Supra* note 30.

⁷⁰ The obligation prevailed over the standard disclaimer "the lowest or any tender will not necessarily be accepted."

⁷¹ See similarly *Kencor Holdings*, *supra* note 13 at 173.

⁷² *Supra* note 21.

⁷³ *Ibid.* at 43.

⁷⁴ See *ibid.*; *Elgin Construction*, *supra* note 21 at 257, White J.; and *Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308 (Ont. C.A.) [hereinafter *Acme*], leave to appeal refused [1993] 2 S.C.R. v.

desirable facet of the tendering process. This is particularly so where the owner is the Crown or a public body, for there is an expectation that such parties will demonstrate fiscal responsibility in the conduct of public tendering. The theme was sounded in early decisions such as *Wilfrid Nadeau Inc. v. R.*,⁷⁵ where Walsh J. remarked:

There is no doubt that a contract should normally be awarded to the lowest tenderer unless there is reasonable justification for not doing so. This is a duty which is not owed to the lowest tenderer, however, but to the public treasury which should never be called upon to pay a higher price than is necessary without good reason.⁷⁶

The sentiment has been echoed in subsequent cases⁷⁷ and was recently emphasised in *Northeast Marine*, where the Federal Court held that a contract for pilot boat services was subject to an implied term to accept the lowest qualified bidder because the owner was a Crown Corporation with ultimate accountability to the Parliament of Canada.⁷⁸

A note of caution is appropriate. The lowest eligible bid criterion may be too simplistic for determining the award of complex contracts, such as major construction works.⁷⁹ Where bid prices are fairly close, factors such as financial and technical competence, business record and capacity to perform, may outweigh any benefit of accepting the lowest tender.⁸⁰ The point is well stated by Immanuel Goldsmith:

The purpose of the 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.⁸¹

⁷⁵ [1977] 1 F.C. 541 (T.D.) [hereinafter *Wilfrid Nadeau*].

⁷⁶ *Ibid.* at 558.

⁷⁷ *Kencor Holdings*, *supra* note 13 at 174, Halvorson J. (see passage reproduced in text accompanying note 145); *Tercon Contractors*, *supra* note 36 at 206-07, Brenner J.

⁷⁸ *Supra* note 8 at 413, McNair J. Reversed on other grounds: *supra* note 44; and *Ken Toby Ltd. v. British Columbia Buildings Corp.* (1997), 34 B.C.L.R. (3d) 263 at 288-90 (S.C.), Burnyeat J.

⁷⁹ For example in *Health Care Developers*, *supra* note 25, the decisionmaking process traversed a range of technical, financial and political considerations. In this case the Newfoundland Court of Appeal accepted that the owner had validly dismissed the lowest bid on the ground that its construction proposals were not "functionally acceptable."

⁸⁰ The list is not exhaustive. In *Acme*, *supra* note 74, the Ontario Court of Appeal upheld the owner's right to invoke a disclaimer and award a project to the second lowest bidder that was in a position to complete the work sooner and hire more local sub-contractors.

⁸¹ *Supra* note 2 at 19. See also *Pratt Contractors*, *supra* note 26, where intense competition between bidders for a prestigious contract drove bid prices to levels that were only marginally economic.

Such concerns underscore the fact that while the broad language of a privilege clause may potentially sanction irregular practices or arbitrariness, there are a range of legitimate interests which can only be safeguarded by an appropriate form of discretion.

C. Liability to Bidders

1. Remoteness

Although the submission of conforming bids will bring into existence a series of separate preliminary contracts,⁸² for practical purposes an owner's liability does not extend to each contracting party.⁸³ If breach of contract A gives rise to a cause of action it must therefore be asked: by whom and on what basis?

It is apparent from the preceding discussion that the discretionary element of bid selection has largely been superseded by an obligation to accept the lowest eligible tender. Failure to observe this requirement must necessarily be actionable, or else contract A is meaningless. This is essentially a "but for" argument. If the owner had observed its obligations under contract A, the plaintiff would have been awarded the tender. As a result damages are recoverable for losses attributable to the breach. Yet how secure is this assumption? Does it necessarily follow that in awarding the contract to a rival bidder the owner has diverted a benefit from the plaintiff?⁸⁴ This presupposes that the owner would have proceeded in any event to award contract B to one of the participating bidders and that on an objective view the

⁸² *Ron Engineering*, *supra* note 1 at 121-23; *Marselos Services*, *supra* note 21 at 43; and *Health Care Developers*, *supra* note 25 at 46.

⁸³ Breach of contract is actionable *per se*. However, the nature and probability of the loss is relevant in assessing remoteness, to determine whether there is a compensable loss or merely an entitlement to nominal damages. See generally *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 49 D.L.R. (4th) 205 at 210-11 (B.C.C.A.), McLachlin J.A.

⁸⁴ If the plaintiff is unable to establish the nature of the contractual benefit (its expectation interest), damages may instead be recovered for reliance losses. These are alternative and not cumulative heads of damages: *Anglia Television Ltd. v. Reed*, [1972] 1 Q.B. 60 at 63-64 [hereinafter *Anglia Television*], Lord Denning M.R.; *CCC Films (London) Ltd. v. Impact Quadrant Films Ltd.*, [1984] 3 All E.R. 298 at 305-06 (Q.B.D.), Hutchison J.; and *Sunshine Vacation Villas Ltd. v. Hudson's Bay Co.* (1984), 13 D.L.R. (4th) 93 at 99-100 (B.C.C.A.) *per curiam*. As to the limits of this election see *Bowlay Logging Ltd. v. Domtar Ltd.*, [1978] 4 W.W.R. 105 (B.C.S.C.), *aff'd* (1982), 135 D.L.R. (3d) 179 (B.C.C.A.).

plaintiff would have succeeded.⁸⁵ Whether it is realistic to impute this outcome will depend on the particular facts.

For example, suppose two bids are received for the provision of services to the owner. The first is very low, but invalid due to a defect in form. The second, a valid bid, is very high and exceeds what the owner is prepared to pay. If the owner wrongfully purports to accept the first bid, does this entitle the second bidder to claim that by default it should have been awarded the contract? In such circumstances there is a cogent argument for giving effect to the disclaimer and assuming that an owner, acting reasonably,⁸⁶ would have rejected the remaining tender.⁸⁷ What is being invoked here is the negative right to reject bids and it has been suggested earlier⁸⁸ that this aspect of the disclaimer has been more readily enforced than the positive right to engage in an arbitrary bid selection exercise. Two recent decisions have considered this negative right in relation to an owner's liability to the lowest eligible bidder.

In *Martselos Services*⁸⁹ the owner invited tenders for a janitorial contract. The bid call contained a standard disclaimer.⁹⁰ In addition, the owner, a college, was subject to government regulations and policies which authorized the owner to refuse all tenders⁹¹ and specified that contracts should only be awarded to "the tenderer who is responsive, responsible and has submitted a tender lower than that submitted by any other responsive and responsible tenderer."⁹² Two tenders were received. After the bids were opened but before the contract was awarded, the plaintiff alleged that its competitor's (lower) bid should be rejected. Essentially it was argued that a shareholder of the competing company, who was also an employee of the defendant, had breached

⁸⁵ In *Health Care Developers*, *supra* note 25, proceedings were brought by two disappointed bidders, H and D. It was found that even if the owner had properly performed its obligations under contract A, one of the bidders, D, would not have had a realistic prospect of being awarded contract B. Therefore D was only awarded nominal damages.

⁸⁶ However, there are limits to judicial indulgence to such arguments in favour of a party in breach.

⁸⁷ The counter argument is that there would be no remedy for the owner's breach. On balance this may be preferable to compensating a party that would not have received a contractual benefit if contract A had been properly performed.

⁸⁸ See *supra* note 30 and accompanying text.

⁸⁹ *Supra* note 21.

⁹⁰ The clause read "The lowest or any tender not necessarily accepted": *ibid.* at 39.

⁹¹ The *Government Contract Regulations*, N.W.T. Reg. 008-85, s. 14 (1) stated: "A contract authority may refuse all tenders and award the contract to no one."

⁹² *Ibid.* s. 14(2).

conflict of interest guidelines. After investigation, the college decided that no conflict had arisen and awarded the contract to that party. The plaintiff claimed damages for loss of profits resulting from breach of contract A. The plaintiff succeeded at first instance on the ground that the potential conflict of interest disqualified the competitor and the services contract should therefore have been awarded to the plaintiff, the only other eligible bidder.

A different stance was taken on appeal. Delivering the leading judgment of the Northwest Territories Court of Appeal, Vertes J.A. considered that the matter should be resolved by reference to the statutory and contractual privilege clauses. The owner's obligations under the tendering contract were governed by the terms of the bid call and accordingly the disclaimer operated to negate any duty to award the contract to the plaintiff. The submission that the court should impute an appropriate course of conduct, with the next eligible bidder succeeding by default, was therefore rejected. His Lordship concluded:

The issue here is what was the appellant obligated to do? Even if it had an obligation to eliminate the competing bidder, it does not follow that there was any obligation ... to award the contract to the respondent. This does not change simply because the respondent is the only eligible bidder. The appellant 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 the respondent's claim.⁹³

This may be contrasted with the later appellate decision of *Vachon Construction*.⁹⁴ In this case the owner permitted amendment of the bid price after a tender had been opened. After deliberation, the owner proceeded to award the tender to that bidder. The plaintiff, the next lowest bidder, contested the award claiming that the successful tender in its original form was invalid, and therefore the plaintiff should have been awarded the contract. The owner argued that a disclaimer⁹⁵ extinguished any obligation to award the contract to the plaintiff or any other party. On the *Martselos Services* approach the clause would be "a complete answer to the [plaintiff's] claim."⁹⁶ The British Columbia Court of Appeal took a different view. The owner was in breach of a

⁹³ *Supra* note 21 at 45-46 [emphasis omitted].

⁹⁴ *Supra* note 31.

⁹⁵ The provision read "The Owner reserves the right to accept or reject any or all offers": *ibid.* at 382.

⁹⁶ The full quotation is reproduced above at text accompanying note 93, *supra*.

duty of fairness to all tenderers,⁹⁷ including of course, the plaintiff. Such conduct could not be cured by a disclaimer. In this manner, Finch J.A.⁹⁸ endeavoured to reconcile *Vachon Construction* with the earlier appellate authority. His Lordship opined that if, as in *Martselos Services*, a bidder has acted improperly, then the owner is not required to award contract B to a rival bidder and accordingly effect can be given to a disclaimer.⁹⁹ However, if, as in *Vachon Construction*, the owner has acted unfairly, it would be inappropriate to allow that party to invoke a privilege clause to sanction its own impropriety.

To this Finch J.A. added that, unlike *Martselos Services*, the owner had given an advantage to the successful bidder.¹⁰⁰ The connection between the two points is not clear. In isolation this suggests that the status of a privilege clause may be determined by reference to the consequences of the owner's conduct—the conferring of a benefit. This is a different proposition, with a different emphasis, from merely holding that an owner's misconduct precludes it from invoking contractual defences under the privilege clause.

Martselos Services and *Vachon Construction* are difficult to reconcile unless it is recognized that each has a distinct focus. *Vachon Construction* was circumspect in balancing the interests of owner and bidders, with the acknowledged aim of maintaining the credibility of the tendering process. Fairness was a central theme. The impropriety of accepting an invalid bid precluded recourse to contractual defences and triggered a duty to award contract B to the next eligible bidder. In contrast, while *Martselos Services* does not treat contractual terms as sacrosanct, the view emerges that express provisions cannot be readily dislodged by an implied obligation of fairness. This orientation is essentially a case of swimming against the tide, and the British Columbia Court of Appeal's response in *Vachon Construction* suggests that

⁹⁷ Fairness was also countenanced in *Martselos Services* but the court accepted the primacy of contractual terms, including the disclaimer.

⁹⁸ Williams J.A., in separate reasons, expressed agreement with Finch J.A., who delivered the leading judgment.

⁹⁹ It is questionable whether *Martselos Services* can be rationalized as a case where misconduct was solely attributable to the successful bidder. In both *Martselos Services* and *Vachon Construction*, there was a period of deliberation and consultation by the owner after opening bids and before awarding the substantive contract. If the bidder's conduct in *Martselos Services* was improper, then the owner's informed decision to grant contract B to that party must be similarly tainted.

¹⁰⁰ The advantage in question being the opportunity to amend its bid in breach of the conditions of tendering. *Chinook Aggregates*, *supra* note 30, was also said to be susceptible to this analysis. In that case the advantage was an undisclosed preference for local bidders.

construction analysis is destined to be marginalized in favour of more purposive doctrines.

The decisions are instructive not only in illustrating the pivotal role of fairness in fashioning the content of the parties' obligations but also in demonstrating that the discretionary element of the tendering exercise continues to present difficulties in determining liability for breach of the preliminary contract and quantifying the resultant loss. The latter issue now falls to be considered.

2. Damages for conjectural losses

To this point it has been established that discretion has largely been subordinated to an obligation to award contract B to the lowest eligible bidder. While this can be sustained as a general principle, its application is often tempered by the practical uncertainties of the tendering exercise. This is particularly evident when the remedial implications are considered.

Where an owner is in breach of contract A, the court is frequently drawn into a complex speculative exercise in assessing the nature of the bidder's loss and the corresponding measure of damages.¹⁰¹ If there are several comparable bids, a party wrongfully excluded from consideration has at best lost the opportunity of a benefit and is essentially claiming damages for loss of a chance. The attendant uncertainty of the claim is particularly pronounced where tenders are evaluated against non-monetary considerations and their relative merits are largely a matter of subjective assessment. However, an obligation to award contract B to the plaintiff does not have to be established as a certainty,¹⁰² for it has long been recognized that compensation may be granted for a speculative loss.¹⁰³ In a tendering context the anticipated

¹⁰¹ The mere fact that a loss cannot be quantified with certainty does not preclude an award of damages: *McRae v. Commonwealth Disposals Commission* (1951), 84 C.L.R. 377 at 411-12 (Aust. H.C.), Dixon and Fullagar JJ.

¹⁰² See *Northeast Marine C.A.*, *supra* note 44 at 168-72, Stone J.A.; and *Health Care Developers* *supra* note 25 at 59-60, Cameron J.A.

¹⁰³ The classic authority for damages for loss of a chance, *Chaplin v. Hicks*, [1911] 2 K.B. 786, has been approved in Canada: *Wood v. Grand Valley Railway Co.* (1914), 30 O.L.R. 44 at 49-51 (S.C. (App. Div.)), Meredith C.J.O.; *Toronto Transit Commission v. Aqua Taxi Ltd.*, [1957] O.W.N. 65 at 66-67 (H.C.J.), Gale J.; *Webb & Knapp (Canada) Ltd. v. Edmonton (City)*, [1970] S.C.R. 588 at 600, Hall J.; *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* (1980), 28 O.R. (2d) 6 at 15 (H.C.J.), Craig J. [hereinafter *Multi-Malls*]; and *Northeast Marine C.A.*, *supra* note 44 at 170-72, Stone J.A. See also discussion in S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book, 1996), paras. 13.260-13.370 [hereinafter *Damages*]. A similar approach has been adopted in Australia: *Poseidon*

profit for the substantive contract may be readily ascertainable because calculations are usually made before bidding to determine the feasibility of the contract and the attainable profit margin.¹⁰⁴ The problem of uncertainty arises in respect of a different facet of the transaction, namely whether the plaintiff, as a disappointed bidder, would have been awarded the tendering contract if there had been compliance with contract A.¹⁰⁵

In this regard it may be questioned whether recovery for loss of a chance adequately reflects the fact that the contingencies on which the chance depends are within the control of the party in breach. The historical view is that damages should be assessed on the basis that contractual duties would have been discharged in a manner that is least burdensome to the defendant.¹⁰⁶ The vigour of this principle has however been diminished by modern expectations of reasonableness as a standard of contractual performance.¹⁰⁷ Tendering cases in particular have been receptive to this approach, emphasising the analogous concepts of fairness and good faith. Such thinking is incompatible with the traditional stricture that a party is not liable for failing to grant a benefit it has no obligation to confer. The modern retort is that obligations will be imputed to correspond with the parties' reasonable expectations.

Nevertheless, the link between the owner's breach and the bidder's loss is attenuated in a tendering context: the plaintiff is effectively arguing that if the owner had observed the terms of contract A, the plaintiff may have been awarded contract B, and as a result may have been in a position to realise certain gains. This is illustrated in *Health Care Developers*,¹⁰⁸ where the provincial government invited

Ltd. v. Adelaide Petroleum NL (1994), 68 A.L.J.R. 313 at 319-20 (Aust. H.C.), Mason C.J., Dawson, Toohey and Gaudron JJ. A comparable statement of the New Zealand position is found in *Schilling v. Kidd Garrett Ltd.*, [1977] 1 N.Z.L.R. 243 at 248-51 (C.A.), Richmond P., and 269, Cooke J.

¹⁰⁴ Moreover the owner will usually have accepted an alternative tender, which provides an obvious yardstick for quantifying the disappointed bidder's loss. The loss in this context denotes frustration of the plaintiff's ability to obtain the anticipated profit from the tendering contract.

¹⁰⁵ Quantum is only relevant if causation has first been proven. From an evidential perspective the two may overlap. In establishing that the plaintiff's loss is attributable to the defendant's breach, the degree of chance (or probability) may be similarly relevant to valuation of the contractual benefit.

¹⁰⁶ *Cockburn v. Alexander* (1848), L.J. 18 C.P. 74 at 83, Maule J.; and *Deverill v. Burnell* (1873), L.R. 8 C.P. 475 at 480-81, Bovill C.J.

¹⁰⁷ *Abrahams v. Herbert Reisch Ltd.*, [1922] 1 K.B. 477; *Bold v. Brough, Nicholson & Hall Ltd.*, [1963] 3 All E.R. 849 (Q.B.D.); and *Paula Lee Ltd. v. Robert Zehil & Co. Ltd.*, [1983] 2 All E.R. 390 (Q.B.D.).

¹⁰⁸ *Supra* note 25.

tenders for the construction of a hospital. The tender documents provided little guidance on a number of key matters such as design specifications, construction materials, and the general basis on which the contract would be awarded. The documents contained a disclaimer and the transaction was subject to the *Public Tender Act*,¹⁰⁹ which authorized the government to pass over the preferred bidder and award the contract to another party if such a course was deemed expedient.¹¹⁰ Thus, the criteria for selection and the subject matter of the contract were uncertain and the decision making body enjoyed broad discretionary powers.

The Newfoundland Court of Appeal found that the successful tender should have been rejected. Although the owner was in breach of contract A, there remained significant hurdles in establishing breach as a proximate cause of the plaintiff's loss. For example, did it necessarily follow that the owner would have proceeded in any event to award the contract to one of the qualified bidders? And if so, was there a real likelihood the plaintiff would have succeeded in these circumstances? With respect to the former it was inferred that contract B would have been awarded to one of the eligible bidders—a finding assisted in part by the government's stated objective of stimulating construction activity. In terms of the latter, it could not be determined conclusively that the plaintiff would have been awarded the tendering contract if the successful bidder had been excluded. The plaintiff had nevertheless sustained the loss of a chance and was entitled, at a minimum, to a portion of its lost profits divided by the number of qualified tenders. However, having regard to the fact that either the plaintiff or a specific rival bidder were the strongest contenders, damages were assessed on the basis of one-half of the plaintiff's expected profits.

Although the court in *Health Care Developers* awarded damages by reference to the disappointed bidder's anticipated profits,¹¹¹ in more extreme cases the contingent nature of the claim has resulted in relief

¹⁰⁹ R.S.N. 1990, c. P-45.

¹¹⁰ Section 8 reads:

(1) Where tenders are invited in accordance with this Act and it appears to the government funded body inviting the tender not to be expedient to award the contract to the preferred bidder, the head of the government funded body shall report to and obtain the authority of the Lieutenant-Governor in Council before rejecting the preferred bidder or awarding the contract to a person other than the preferred bidder.

¹¹¹ The principles for awarding damages in public tendering have attracted little discussion. In most cases quantum has either been deferred for a separate hearing, agreed between the parties, or determined at trial without further discussion on appeal.

being confined to reliance interests only.¹¹² *Canamerican* falls into this category. There the plaintiff was one of several successful bidders for car rental concessions at certain Canadian airports. The gist of the claim was not that the owner, Transport Canada, had failed to award contract B to the plaintiff, but that a concession had been granted to one of its competitors, in breach of the prescribed selection procedure. The plaintiff claimed for losses attributable to the increase in business it would have gained if its competitor had been eliminated. Alternatively, the plaintiff sought to recover the extra amount it had tendered for the purpose of outbidding its competitor. The Federal Court of Appeal affirmed the judgment below awarding damages for the latter, and holding that the claim for loss of profit was too remote.

Similarly, in *Pratt Contractors* the court resisted a claim for future losses where it was argued that the tendering contract was a high profile construction project that would have served as a stepping stone to similar work.¹¹³ Damages were however awarded for loss of profits in respect of the specific tendering project. The court's approach to the latter is a striking example of the difficulties that can arise in assessing the value of the contract to the plaintiff.

In its submissions the defendant council adduced seemingly cogent evidence that the plaintiff would have been unable to realise a profit and in fact would have sustained a significant loss on the project. There had been keen competition between bidders and profit margins were reduced to a minimum. During the construction period there was exceptionally wet weather. Flooding and associated problems made performance of the contract more difficult and in turn, more costly. In this regard the court had the benefit of evaluating the plaintiff's claim against the actual performance of the contract by the successful bidder. The latter had operated at a deficit. Nevertheless, Gallen J. declined to hold that the plaintiff would have similarly failed to make a profit and awarded \$200,000 damages. It can be said that in circumstances such as these, there is much to commend the more conservative option of limiting recovery to reliance interests.

Canamerican and *Pratt Contractors* demonstrate the difficulties of assessing the value of the substantive contract to a particular bidder. Various techniques have been adopted in translating these uncertainties

¹¹² In proceedings between general contractor and sub-contractor it has been suggested that damages should be limited to bid preparation expenses unless the invitor has accepted the bid and then refused to enter into contract B. See *Bate Equipment Ltd. v. Ellis-Don Ltd.* (1992), 132 A.R. 161 (Q.B.); and *Fred Welsh*, *supra* note 6.

¹¹³ *Supra* note 26 at 489.

into an award of damages. Where there is no obvious superiority between tenders, damages may be assessed on the basis that each had an equal statistical chance of success.¹¹⁴ If, however, it is possible to identify a sub-class of stronger bids, the award may be calculated by reference to the number of relevant submissions. In cases where precise quantification is inappropriate or impossible there remains the broad option of awarding a global sum without regard to statistical opportunity. Alternatively, attempts at quantifying expectation interests have sometimes been abandoned in favour of limiting compensation to thrown away costs.¹¹⁵ Superficially at least these diverse generalized approaches fall within the cynical principle that “[i]n some contract cases, damages for loss of a chance may represent a pragmatic response to the uneconomic pursuit of truth in the definition of the plaintiff’s true expectation loss.”¹¹⁶

However, this must be balanced against the fact that there is a point beyond which judicial investigation is fruitless. The search for a

¹¹⁴ Such awards seem more in the nature of compensation for the value of an opportunity than the worth of an unrealised contractual benefit.

¹¹⁵ Reliance claims by disappointed bidders fall into two categories: expenditures in preparing for a submission and costs arising after the lodging of a bid. Claims in the former category are pre-contractual, for contract A is only formed when a bid is submitted. Most tendering decisions have readily countenanced reliance damages as an alternative to recovery of expectation interests, although the pre-contractual aspect of the claim is seldom discussed. The status of pre-contractual losses is not free from controversy. There are relatively few cases on point. Perhaps the best known authority is *Anglia Television*, *supra* note 84, where the defendant, a leading actor, wrongfully repudiated a contract to perform in a television play and was held liable for the plaintiff’s wasted expenditures before entering into the contract. The Court of Appeal expressed the view that these costs were recoverable if they were reasonably in the parties’ contemplation as likely to be wasted if the contract was broken: *ibid.* at 64, Lord Denning M.R. This reasoning is open to the objection that no commitment had been secured from the defendant at the time the expenses were incurred and therefore the plaintiff had embarked on this course at its own risk. From this perspective it is arguable that there is no causal connection between the loss, the formation of the contract or its breach (see A.I. Ogus, “Damages for Pre-Contract Expenditure” (1972) 35 Mod. L. Rev. 423). Waddams is critical of *Anglia Television* but suggests that the result may be defensible on the basis that as against a party in breach, it should be (rebuttably) presumed that the plaintiff’s expenses would have been met by income and therefore the outlay would have been recovered if the contract had been performed: *Damages*, *supra* note 103, paras. 5.220, 5.230, cited with approval by the Newfoundland Court of Appeal in *Health Care Developers*, *supra* note 25 at 61 (See further *Contracts*, *supra* note 5, para. 707). In relation to public tendering it is submitted that a bidder who is awarded, or has acquired the right to be awarded the tender in accordance with contract A, is entitled to recover anticipatory expenses if the owner wrongfully fails to proceed. The bidder has been prejudiced by a form of detrimental reliance, having incurred expenses in anticipation of what has become an accrued right. This principle would necessarily exclude unsuccessful bidders who may have incurred similar expenses in reliance of the same inducement.

¹¹⁶ M.G. Bridge, “Expectation Damages and Uncertain Future Losses” in J. Beatson & D. Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995) 438.

precise measure of loss is often impossible in tendering cases and it is a toss of the coin whether expectation losses should be quantified impressionistically or whether the vista of compensation should be reduced to the disappointed bidder's reliance interests. In some cases it is possible to predict that on a balance of probabilities the plaintiff should have been awarded the tendering contract.¹¹⁷ This presupposes an affirmative response to the questions posed earlier, *viz.* that if the owner had observed the terms of contract A and reasonably exercised its discretion, the plaintiff bidder would likely have been awarded contract B and proceeded to realise its anticipated profit. Not uncommonly the contingent nature of the claim is such that it may be more accurate to class the expectancy as a chance of a benefit rather than the assurance of a gain. The conservative option of limiting recovery to reliance losses would often be to the owner's advantage. The economic reality of tendering is that a bidder's expenses will usually be less than the reward of the contract itself,¹¹⁸ and if the costs of tendering are minimal, the owner's breach would be effectively without a sanction. Therefore the inclination to award substantial as opposed to nominal damages for the disappointed bidder's expectation interest,¹¹⁹ hints at a policy initiative¹²⁰ of enforcing contractual compliance within the framework of the two-contract model.

¹¹⁷ Occasionally the outcome can be asserted as a certainty. See, for example, *Lanca Contracting Ltd. v. Brant (County) Board of Education* (1986), 54 O.R. (2d) 414 (C.A.). The plaintiff company submitted a tender for the construction of a school. Subsequently, at a meeting of the board of education, the president of the plaintiff company was led to believe that the bid had been accepted. The majority of the Ontario Court of Appeal held that a binding contract was formed and the defendant board was liable in damages.

¹¹⁸ *The Commonwealth v. Amann Aviation Pty. Ltd.* (1991), 66 A.L.J.R. 123 (Aust. H.C.) is a spectacular exception. The plaintiff successfully tendered for a contract to conduct aerial surveillance on behalf of the defendant government. Subsequently the defendant wrongfully terminated the contract, at which point the plaintiff had incurred significant expenditures in preparing for performance. There were uncertainties as to the profitability of the contract, but the plaintiff was able to recover approximately \$5.5 million reliance losses.

¹¹⁹ Even if this means discounting the value of the contractual benefit to reflect attendant uncertainties. At some point on this sliding scale a limit is reached below which only nominal damages will be granted. Although tendering awards tend to fall within a 50-100 per cent band, there is general authority for recovery based on lower probabilities. In *Multi-Malls*, *supra* note 103, the chance of rezoning land was assessed at 20 per cent and damages for breach of a contract of sale were discounted accordingly. See further D.H. Clark, "Loss of a Chance in (and by) the Supreme Court of Canada" (1996) 75 Can. Bar Rev. 564.

¹²⁰ See discussion in Part V, below.

IV. AN OVERRIDING PRINCIPLE OF FAIRNESS

It has been observed¹²¹ that in the years following *Ron Engineering* lower courts have strived to maintain the essential principles of the two-contract model against its perennial *bête noire*, the privilege clause. The task has required some inventiveness because the Supreme Court's contractual scheme was propounded in sparse terms. While Estey J. speaks of protecting the integrity of the bidding system there is little to suggest the form and scope of this protection. In fact the sentiment is expressed more as a laudable objective than a paramount doctrine.¹²² Even the key obligation to accept the lowest tender is controlled by the conditions of the bid call¹²³ and there is nothing to suggest that this and other essential terms could not be varied unilaterally in order to negate contractual obligations. Overall, the impression emerges that a determined drafting exercise could dislodge the model from its slender pedestal.

Judicial methodology in earlier decisions followed traditional lines, defining the relationship of bidder and owner on ordinary principles of construction. However, there is evidence of growing receptiveness to more expansive doctrines. Increasingly, contractual terms have been tested against a general principle of fairness. There are obvious attractions to a free ranging approach disengaged from the limitations of technical analysis,¹²⁴ and the standard has been readily adopted as an implied term of contract A, or more broadly, as a general duty under the tendering process.

The clarion was sounded in *Best Cleaners*,¹²⁵ where Pratte J. spoke of an implied term restraining the Crown from negotiating with a particular bidder and changing conditions of the proposed contract. Although such terms were not mentioned in the Supreme Court's judgment, they could nevertheless be implied: "they simply impose on

¹²¹ See Part II, above.

¹²² The latter is thwarted by conceding the primacy of the general law of contract, and with it, the parties' rights to bargain in their own terms.

¹²³ *Supra* note 1 at 122-23.

¹²⁴ Flexibility in determining the content of contractual obligations on a case by case basis is evident in *Fred Welsh*, *supra* note 6. Romilly J. found, at 70, that the defendant owner had breached its duty under contract A to treat all bidders fairly and the disclaimer was declared void in light of the owner's "deceit, secret intent and unfair practices."

¹²⁵ *Supra* note 30.

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.”¹²⁶

In the intervening years fairness has become a common theme in tendering cases¹²⁷ and its role is now uncontroversial. In its most vigorous form, fairness is seen as an overarching principle which transcends contractual terms.¹²⁸ Although this is sometimes expressed as a specific, such as equality of opportunity or a duty of disclosure,¹²⁹ such references are more illustrative than an intended limitation of the principle.

In the law of tendering, fairness is commonly linked with good faith¹³⁰ and although the two are often referred to interchangeably,¹³¹

¹²⁶ *Ibid.* at 300. Pratte J.A. dissented in his view of the evidence and the appropriateness of granting the Crown’s application for a non-suit. Both Pratte and Mahoney J.J.A., writing the majority judgment, followed *Ron Engineering’s* analysis of the contractual relationship between the parties. In the context of this relationship Mahoney J.A. briefly adverted to a requirement of good faith: *Best Cleaners*, *supra* note 30 at 307.

¹²⁷ See, for example, *Chinook Aggregates*, *supra* note 30 at 350, Legg J.A.; *G. Mallin Electric Ltd. v. Westland Construction Ltd.*, [1996] 112 Man. R. (2d) 131 at 133 (Q.B.), De Graves J.; *Kencor Holdings*, *supra* note 13 at 173-74, Halvorson J.; *Vachon Construction*, *supra* note 31 at 386-87, Finch J.A.; *Northeast Marine C.A.*, *supra* note 44 at 150-51, Stone J.A.; and *Health Care Developers*, *supra* note 25 at 46-47, Cameron J.A.

¹²⁸ See, for example, *Vachon Construction*, *supra* note 31 at 386-87; *Chinook Aggregates*, *supra* note 30 at 348-50; *Northeast Marine C.A.*, *supra* note 44 at 150-51; and *Fred Welsh*, *supra* note 6 at 70, 73, Romilly J.

¹²⁹ *Chinook Aggregates*, *supra* note 30 at 350; *Fred Welsh*, *supra* note 6 at 66; *Best Cleaners*, *supra* note 30 at 300, Pratte J.A.; and *Vachon Construction*, *supra* note 31 at 389, Finch J.A., 389-90, Williams J.A.

¹³⁰ See *Martselos Services*, *supra* note 21 at 41-42; *Health Care Developers*, *supra* note 25 at 46-47; *Northeast Marine C.A.*, *supra* note 44 at 150-51; and *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Q.B.) [hereinafter *Opron Construction*]. An examination of the good faith principle is beyond the scope of this article. Good faith has varied applications both within the panoply of contract law and beyond. It has been imposed in pre-contractual dealings (most typically as a duty to bargain in good faith) and subsequently as a standard of contractual performance. There are differing perceptions of the good faith principle within the Commonwealth. English decisions have been reticent in adopting this standard: *Walford v. Miles*, [1992] 1 All E.R. 453 (H.L.), a case concerning an agreement to negotiate (criticized in E. McKendrick, “The Regulation of Long-term Contracts in English Law” in Beatson & Friedman, eds., *supra* note 116 at 319-21). Compare with the more expansive observations of Bingham L.J. regarding the role of good faith and fairness in contract law in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433 at 439-45 (C.A.). The doctrine has yet to gain a secure footing in Australia: *Service Station Association Ltd. v. Berg Bennett & Associates Pty. Ltd.* (1993), 117 A.L.R. 393 (Aust. F.C. (Gen. Div.)) [hereinafter *Service Station Association*], although the judicial climate appears receptive to such developments: *Renard Constructions (ME) Pty. Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.) [hereinafter *Renard Constructions*]; and *Hughes Aircraft Systems International v. Aircservices Australia* (1997), 146 A.L.R. 1 (Aust. F.C. (Gen. Div.)). The latter view has been questioned by Sir Anthony Mason, “Good Faith and Fault in Contract Law” (1996) 11 J. Cont. L. 89 at 89-90. In New Zealand good faith has been described as a latent premise of the law relating to

the latter is generally regarded as more restrictive.¹³² Good faith is essentially proscriptive, taking form as a negative interdiction.¹³³ As Kelly J. expressed the point in *Gateway*: “The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract.”¹³⁴ Put concisely in the context of tendering, it has been said:

formation and performance of contract (*Livingstone v. Roskilly*, [1992] 3 N.Z.L.R. 230 at 237-38 (H.C.), Thomas J.), while obligations of reasonableness and mutual cooperation have been propounded as an implied term of certain agreements: *Devonport Borough Council v. Robbins*, [1979] 1 N.Z.L.R. 1 at 22-24 (C.A.), Cooke and Quilliam JJ., 28-30, Richardson J. Although the matter is not entirely free from controversy, Canadian case law has openly countenanced a standard of good faith in contractual performance: *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Health Care Developers*, *supra* note 25; *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C.T.D.) [hereinafter *Gateway*], *aff'd* (1992), 112 N.S.R. (2d) 180 (S.C.A.D.); and *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.* (1992), 129 A.R. 177 (Q.B.), *aff'd* (1994), 19 Alta. L.R. (3d) 38 (C.A.). The reservations expressed by Kerans J.A. on behalf of the Court of Appeal indicate the unsettled status of this principle: *Opron Construction*. Compare with the divergent opinions as to a duty to bargain in good faith in *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 50 B.C.L.R. (2d) 126 (C.A.), leave to appeal refused (1991), 79 D.L.R. (4th) vii (S.C.C.). See further J. Cassels, “Good Faith in Contract Bargaining: Principles and Recent Developments” (1993) 15 Adv. Q. 56. In the United States good faith is explicitly recognized as a general principle of contract law: *The Restatement of the Law, Second: Contracts 2d* (St. Paul, Minn.: American Law Institute, 1981), § 205; *Uniform Commercial Code* § 1-203 (St. Paul, Minn.: West, 1972). See S.J. Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith” (1980) 94 Harv. L. Rev. 369, which explores the good faith doctrine in relation to the abuse of discretion in contractual performance.

¹³¹ See M.G. Bridge, “Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?” (1984) 9 Can. Bus. L.J. 385 at 387.

¹³² This is of course an oversimplification in the context of the wider operation of the good faith doctrine. Adopting Professor Finn’s thesis, good faith lies between the primary duties associated with an unconscionability standard and the selfless obligations of a fiduciary to act for the benefit of another (see P.D. Finn, “The Fiduciary Principle” in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) c. 1). In a terrain without boundaries good faith imparts characteristics of each, with proscriptive standards dominating—without excluding—prescriptive duties.

¹³³ In some circumstances a positive duty may also arise under the good faith standard as an expression of the principle that good faith requires each party to have regard to the other’s interests and inhibits their respective rights to act self-interestedly. For a more detailed analysis, see Finn, *supra* note 132.

¹³⁴ *Supra* note 130 at 191-92. In *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)) at 276, Blair J. asserted that the good faith doctrine of contractual performance is part of the law of Ontario. See also Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: The Commission, 1987) at 175.

“As to the standard of conduct demanded by good faith, at a minimum, it would require that a party not act in bad faith.”¹³⁵

Good faith, or perhaps more accurately, the restraint of bad faith, is less exacting but more precisely understood than fairness. The latter, a broader and more amorphous concept, has the obvious allure of flexibility for achieving justice *inter partes*. Perhaps for this reason tendering cases have relied more heavily on fairness to define an appropriate measure of conduct. In its application there are indications that the content of fairness may be fashioned by the parties' reasonable expectations.¹³⁶ If fairness is gauged by this standard it is necessary to come to terms with a seemingly open-ended question. What, in a given situation, are their reasonable expectations?¹³⁷ In some senses this is a tautology because what the parties expect is to be treated fairly. However, the problem is narrower than first appears because fairness has been judicially circumscribed in the context of public tendering. Although the categories are not closed, most cases reflect defined expectations of the owner's conduct under contract A: to disclose any preference or criterion that may affect selection,¹³⁸ to accept only conforming bids,¹³⁹ and to refrain from awarding a form of contract that

¹³⁵ *Health Care Developers*, *supra* note 25 at 50, Cameron J.A. For a comparative discussion of good faith in contract law, see Priestley J.A. in *Renard Constructions*, *supra* note 130 at 263-68. Of particular relevance is his Honour's endorsement of the views of Professor Summers (R.S. Summers, "Good Faith' in General Contract Law and the Sales Provisions of the *Uniform Commercial Code*" (1968) 54 Va. L. Rev. 195):

In his view, the expression "good faith" as commonly (and sometimes vaguely) used by judges is best understood as an "excluder"; that is, it "has no general meaning or meanings of its own, but ... serves to exclude many heterogenous forms of bad faith". ... I think Summers was quite accurate when he said "... the typical judge who uses this phrase is primarily concerned with ruling out specific conduct, and only secondarily, or not at all, with formulating the positive content of a standard."

See *Renard Constructions*, *supra* note 130 at 266-67. See further Gummow J. in *Service Station Association*, *supra* note 130 at 401-07.

¹³⁶ *Fred Welsh*, *supra* note 6 at 66. It has been argued that reasonable expectations should properly be treated as an adjunct of good faith. See G. Henley, "Significant Developments in the Canadian Law of Tenders" (1991) 18 Can. Bus. L.J. 382; and S.K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995) 74 Can. Bar Rev. 70.

¹³⁷ Although the role of custom and usage has not been viewed consistently in a tendering context, the reasonableness of a given expectation is sometimes measured against long standing industry practice. See, for example, *Chinook Aggregates*, *supra* note 30 at 350-51. However the role of trade custom as an interpretative aid is necessarily limited. The beliefs of the contracting parties are usually more germane than generalized inferences from unrelated transactions.

¹³⁸ *Chinook Aggregates*, *supra* note 30.

¹³⁹ *Vachon Construction*, *supra* note 31.

is materially different from contract B.¹⁴⁰ In these situations any defence based on a privilege clause has been resisted and the dictates of fairness asserted as an overriding principle. Indeed, its primacy has been identified as an essential element in preserving the integrity of the tendering process.¹⁴¹

It is trite that the enforcement of fairness in its different manifestations is viable only so long as such rights cannot be bargained away. Perhaps surprisingly, freedom of contract retains a vestigial influence here, fostering isolated suggestions that parties can contract out of this obligation. Shannon O' Byrne¹⁴² argues that in limited circumstances an "unreasonableness" clause negating good faith may be enforceable providing it 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."¹⁴³ In a tendering context this revives the debate as to the paramountcy of the Supreme Court's contractual model. A number of decisions have defended its principles by subordinating the disclaimer to an objective expectation of fairness. In *Health Care Developers*, however, the Newfoundland Court of Appeal accepted that within the constraints of O' Byrne's proposition, the participants were at liberty to contract out of fairness or good faith.¹⁴⁴ While this view may be sustained in limited or perhaps extraordinary situations, it is submitted that public tendering will likely prove an inhospitable setting for its widespread application. The bidding exercise is often costly and time consuming. It is simply not feasible for the owner-bidder relationship to be governed by a form of contract that fails to vindicate expectations of fairness. The appropriation of arbitrary powers would profoundly undermine confidence in the system and ultimately prove self-defeating.¹⁴⁵ The concern was expressed graphically by Halvorson J. in *Kencor Holdings*:

¹⁴⁰ *Best Cleaners*, *supra* note 30.

¹⁴¹ *Northeast Marine C.A.*, *supra* note 44 at 151, Stone J.A.

¹⁴² *Supra* note 136.

¹⁴³ *Ibid.* at 96.

¹⁴⁴ *Supra* note 25 at 51. These comments were however *obiter*. On the facts the owner conceded that there was no clause specifically reserving the right to treat bidders unfairly.

¹⁴⁵ As Romilly J. noted in *Fred Welsh*, *supra* note 6 at 66:

General contractors, or sub-contractors ... are concerned that favouritism not be shown other tenderers and that arbitrary or capricious decisions not be made. Those submitting tenders are willing to accept some risk and bear the cost of preparing an unsuccessful bid, provided the "rules of the game" are clearly spelled out and define what actually happens.

To maintain the integrity of the tendering process it is 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.¹⁴⁶

Further, an “unreasonableness” clause is philosophically untenable in public sector tendering. Where the owner is the Crown or a public body, there is an expectation of what may broadly be termed “contractual probity.”¹⁴⁷ This is manifested as a private law duty¹⁴⁸ embracing expectations of procedural fairness as well as reasonableness in exercising discretionary functions. This is supplemented by a mandate to observe fiscal responsibility in safeguarding the public purse.¹⁴⁹ Notably in *Health Care Developers* the court specifically left open the question whether, “for reasons of policy the Crown should not be permitted to contract out of the good faith doctrine.”¹⁵⁰ The sentiment could, of course, equally apply to all forms of contract because the suppression of basic expectations of fairness is offensive both as a bargaining objective and a proposed mode of contractual performance.¹⁵¹

¹⁴⁶ *Supra* note 13 at 174.

¹⁴⁷ Notions of fairness and good faith are of course relevant to contracts generally. The point here is that the philosophical and moral imperatives are more obviously pronounced in relation to the Crown as a contracting party. For further discussion see S.K. O’Byrne, “Public Power and Private Obligation: An Analysis of the Government Contract” (1992) 14 *Dalhousie L.J.* 485. See also P. Finn & K.J. Smith, “The Citizen, the Government and ‘Reasonable Expectations’” (1992) 66 *Aus. L.J.* 139, which explores the proposition that the State should act as a moral exemplar in its dealings with the community.

¹⁴⁸ The private law duty is sometimes enforceable by a public law remedy such as certiorari. See *Thomas C. Assaly Corp. v. Canada* (1990), 34 *F.T.R.* 156 (F.C.T.D.).

¹⁴⁹ See comments of Walsh J. in *Wilfrid Nadeau*, *supra* note 75 at 558, reproduced in text at note 76.

¹⁵⁰ *Supra* note 25 at 51. See also the observations of Denault J. in *Glenview Corp. v. Canada (Minister of Public Works)* (1990), 34 *F.T.R.* 292 at 296 (F.C.T.D.).

¹⁵¹ Steven Burton and Eric Andersen question whether the resultant relationship can be characterised as contractual. The authors suggest that a disclaimer of good faith is tantamount to the denial of an obligation to keep one’s word. Logically, it is a contradiction to make a promise while denying any obligation to keep it. The enforcement of such provisions would effectively be licensing a form of promissory fraud: S.J. Burton & E.G. Andersen, *Contractual Good Faith* (Boston: Little, Brown & Co., 1995), para. 3.2.5.

V. DOCTRINE OR POLICY?

In *Ron Engineering* Estey J. spoke of preserving the integrity of the bidding system. The phrase has been reiterated in a host of decisions but there has been little discussion of its application or underlying intent in the continuum of public tendering. Has the phrase prompted a practical exercise of judicial stewardship or are the courts merely displaying deference to a formless theme, an ideal without content? The matter can be addressed by asking two basic questions: what do the words mean and what are the dynamics of their implementation? The latter prompts inquiry as to whether the integrity of the bidding system is synonymous with preservation of the Supreme Court's two-contract model. At first blush the answer—implicit in most decisions—is yes. It will be argued, however, that recent cases are explicable on a different basis, reflecting the dictates of a broader policy objective.

Addressing the first point, it may be suggested that the integrity of the tendering process is essentially directed to ensuring the continuity of an effective system: at bottom, a system that works. This can only be achieved if expectations¹⁵² of a predictable and orderly procedure are maintained.¹⁵³ This has found expression in different ways—for example, as an endorsement of industry practice that bids from sub-contractors remain irrevocable for the same period as the general contractor's tender to the owner.¹⁵⁴ Similarly, the general contractor is entitled to rely on telephone quotes from sub-contractors when it is understood that this information will be included in the general contractor's tender.¹⁵⁵ More generally, it has been held that confidence

¹⁵² This has been rationalized as “an attempt by the courts to reconcile the reasonable expectations of all parties within the context of acceptable commercial standards and practice”: *Fred Welsh*, *supra* note 6 at 66, Romilly J.

¹⁵³ A narrower aspect of this policy objective is demonstrated by the Supreme Court's pronouncement on the law of mistake. By imposing a contractual nexus between owner and bidder upon the submission of a conforming tender, the bidder is effectively prevented from withdrawing due to an error in the bid price (compare the law prior to *Ron Engineering: Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd.* (1978), 20 O.R. (2d) 447 (C.A.)). In balancing the parties' interests it may be conjectured that notwithstanding the apparent harshness of allowing one party to profit from an innocent error, the court was attempting to enforce an orderly process by preventing bidders from renegeing on their promises after tenders are lodged.

¹⁵⁴ *Gloge*, *supra* note 6. Irving J.A., speaking for the Alberta Court of Appeal, observed at 153: “This industry practice is eminent common sense. Without such accepted practice the tendering system would become unenforceable and meaningless.”

¹⁵⁵ *A.W. MacPhail Ltd. v. Kelson* (1989), 96 N.B.R. (2d) 330 (C.A.).

in the system requires that contract B should usually be awarded to the lowest qualified bidder.¹⁵⁶ Again, there is increasing recognition that dealings between owner and bidder are subject to an implied duty of fairness.¹⁵⁷ The obverse of this proposition is that courts lean against the assertion of arbitrary rights on the ground that absence of accountability would severely undermine an effective system of tendering.¹⁵⁸

Maintenance of a scheme that commands the confidence of all participants requires a deft balancing of interests. The dynamics were expressly acknowledged in *Fred Welsh*, a decision that affords an insight into judicial governance of the tendering system. Here, the integrity of the bidding process was characterized in terms of preserving an equilibrium between reasonable, but competing, expectations. Commenting on the function of a privilege clause, Romilly J. opined that if full effect was given to the provision, “the delicate balance of power in the bidding process would clearly tip in the invitor’s favour to the bidder’s detriment.”¹⁵⁹ In the same spirit, his Lordship acknowledged that there was a *quid pro quo* for forfeiting absolute discretion under the disclaimer, namely the ability to attract quality, competitive bids.¹⁶⁰

This leads to the second issue. If courts are concerned primarily with maintaining the viability of a system, it must be asked whether *Ron Engineering’s* model is the essential and only means of achieving that end. To put the decision in context, there is no doubt that the

¹⁵⁶ See Part III(B), above. This principle has been applied not only to penalise owners for awarding contract B to a higher bidder, but also to sanction the acceptance of the lowest eligible tender even where the bidder has made an error in calculating the bid price. For example, in *Northern Construction*, *supra* note 8, a clerical mistake by the defendant contractor resulted in a substantial underestimate in its tender. The owner refused to allow the bid to be corrected and awarded the contract to the defendant. The defendant refused to execute contract B and the owner proceeded to accept the next lowest tender. On facts similar to *Ron Engineering* the Alberta Court of Appeal upheld the owner’s right to sue for the difference between the two bids. On the question of damages, the defendant argued that the owner should have mitigated its loss by accepting the defendant’s amended offer—the amount of its original tender as submitted, plus the additional sum by which it had underestimated the bid. The court gave short shrift to this submission, expressing the concern that this would change the tendering system to an auction. Clearly the court was averse to compelling an owner to contract with a party in breach; moreover, the defendant’s proposal would have legitimated bid negotiation after the fact.

¹⁵⁷ See, for example, *Northeast Marine C.A.*, *supra* note 44 at 151, where Stone J.A. describes this as a “judicially imposed obligation whose purpose and object is to preserve the integrity of the tendering process.”

¹⁵⁸ *Kencor Holdings*, *supra* note 13 at 174, Halvorson J.

¹⁵⁹ *Fred Welsh*, *supra* note 6 at 69.

¹⁶⁰ *Ibid.* at 66.

contractual regime and the philosophy which informs it, has transformed the tendering process. The preliminary contract provides a framework of express obligations and the opportunity to import terms consistent with its effective administration. It is reinforced by some key concepts, but the principle of fairness—so recurrent in modern decisions—is not mentioned in the Supreme Court’s judgment. This is not altogether surprising because the case is an exposition of traditional contract analysis. Doctrinal adherence to *Ron Engineering* is synonymous with orthodox rule-based reasoning, which begs the question whether formal analysis is sufficiently pliant to fulfil the policy objectives of public tendering. The challenge should not be understated. The conditions of public tendering are essentially the product of a standard agreement. Of necessity, tendering contemplates that common terms will apply to all bidders and that there is little or no room for individual negotiation. The result is that the owner, as author of the bid particulars, dictates terms and does so in a manner favourable to itself. It has been observed that such agreements

undercut the jurisprudential basis for many rules of traditional contract law. Those rules presuppose a contracting environment characterized by negotiative interplay of conflicting interests. ... When, as in standardized contracting, unilateralness replaces negotiation and abstract generality precludes bilateral realization of interests, these traditional doctrines no longer serve that end.¹⁶¹

The armoury of traditional remedies is directed more to the non-fulfilment of contractual obligations, lack of consensus or capacity, than redressing an inherent imbalance between the contracting parties.¹⁶² Some early decisions in the post-*Ron Engineering* era adhered to contractual orthodoxy in general, and formation analysis in particular. Their interpretations were often strained as they combatted privilege clauses with little more than a narrow construction and an unspoken reluctance to sanction the conferring of self-imposed immunities.

It has been suggested¹⁶³ that modern authorities have gravitated towards extra-contractual rules of conduct¹⁶⁴ as a basis of enforceable expectations. Increasingly, the adjudicative process is a blend of formal

¹⁶¹ R. Dugan, “Good Faith and the Enforceability of Standardized Terms” (1980) 22 *Wm. & Mary L. Rev.* 1 at 5.

¹⁶² In extreme cases unconscionability may operate as a restraint on an inappropriate exercise of contractual power.

¹⁶³ See particularly Part IV, above.

¹⁶⁴ The term “extra-contractual” may be a misnomer insofar as the rules are defined as implied terms.

reasoning undergirded by fairness and good faith.¹⁶⁵ The latter affords open recognition of a higher ideal: that the system must function and that the law should harmonize the parties' rights based on their reasonable expectations.¹⁶⁶ Thus, it has been held that the purported acceptance of an invalid bid cannot give rise to a contractual relationship; by the same token this conduct could be impugned for breaching a duty of fairness to other bidders.¹⁶⁷ Similarly, contract B can only be awarded in accordance with the terms of contract A and it would be unfair to invoke a privilege clause to legitimize a departure from that principle.¹⁶⁸ Again, the adoption of undisclosed preference criteria defeated consensus as to the subject matter of the disclaimer and constituted a breach of fairness to competing bidders.¹⁶⁹ Finally, a general contractor's failure to enter into contract B with a sub-contractor upon acceptance of the head contract has been denounced both as a contravention of contract A and an unfair practice.¹⁷⁰

These dual rationalizations are a reflection of contemporary ideology in which the law of contract is moving from autonomy towards just solutions based on the parties' expectations of fair dealing.¹⁷¹ The recognition of an overarching principle of fairness has been a critical development in tendering cases, facilitating a more flexible remedial focus and the ability to impose a minimum content of contractual expectations. The philosophical shift is aptly depicted by Nicholas Seddon: "[t]he traditional contract approach to tendering was preoccupied with formation analysis (a normatively neutral stance)

¹⁶⁵ John Adams and Roger Brownsword discern a similar phenomenon at work more generally in the modern contracting environment:

Faced with modern demands for consumer protection, for some measure of protection for reasonable pre-contractual reliance, and for greater flexibility in relation to the ongoing adjustment of contracts, the courts have tended to maintain the rhetoric of the classical law of contract while discreetly qualifying its substance—this has been a noble lie but, in the long run, a practice that has impaired the rationality of the law:

J.N. Adams & R. Brownsword, *Key Issues in Contract* (London: Butterworths, 1995) at 205.

¹⁶⁶ This form of judicial activism directed to upholding common assumptions on which the parties have acted has been appropriately characterized as "bargain maintenance": P.D. Finn "Equity and Contract" in P.D. Finn, ed., *Essays on Contract* (North Ryde, Australia: Law Book, 1987) at 143.

¹⁶⁷ *Vachon Construction*, *supra* note 31.

¹⁶⁸ *Health Care Developers*, *supra* note 25.

¹⁶⁹ *Chinook Aggregates*, *supra* note 30.

¹⁷⁰ *Fred Welsh*, *supra* note 6.

¹⁷¹ See *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675 at 696 (H.L.), Lord Wilberforce.

whereas now the focus of attention has shifted to a fair competition analysis ... with a decidedly value-laden set of assumptions. ..."¹⁷²

As an instrument of judicial policy, fairness and good faith eclipse the narrower forms of analysis associated with the Supreme Court's contractual model. As owners seek to define their powers in more expansive or explicit language, it is apparent that courts are refusing on policy grounds to accord the words their plain meaning. Traditional contract reasoning recedes from the picture as the subtext is exposed. The viability of public tendering requires an orderly scheme of mutually understood rights and obligations. In their written expression, tendering documents seldom reflect the expectations of bidders, as non-drafting parties. The silencing of those expectations is effectively placed beyond the reach of contract. Thus, the parties' capacity to bargain in their own terms and, more specifically, the owner's ability to unilaterally define the content of the relationship, has been curtailed to the extent that it is inconsistent with the essential objectives of the tendering exercise. As the embers of freedom of contract are extinguished, a unitary duty of fairness is emerging from the ashes.

VI. CONCLUSION

Ron Engineering cast a formerly pre-contractual phase of the tendering process into the contractual arena. Its assimilation has been problematic because the mechanics of tendering do not conveniently mesh with the traditional contract paradigm.¹⁷³ Moreover the Supreme Court's model has been asserted in the face of an arrangement that is largely mute as to the bidder's expectations and contemplates the allocation of contractual benefits as the sole preserve of one party. The imbalance is at best only partially redressed by interpretation and implied terms. These traditional tools are deployed as a defensive response to a scheme decreed by the owner, and although the more obvious abuses are restrained, judicial intervention in this form is merely palliative.

¹⁷² Seddon, *supra* note 51 at 212. It may be questioned, however, whether traditional analysis is entirely bereft of normative content. See text below.

¹⁷³ For example, a bid constitutes acceptance for the purpose of establishing a contractual nexus, while at the same time retaining the form of an offer which the owner can accept or reject in awarding the substantive contract. Again, the ubiquitous privilege clause clouds a clear definition of the content of contract A.

It has been increasingly recognized that the language of contract A is an imperfect reflection of the parties' expectations. As the law of tendering has been exposed to more liberal influences, contractual behaviour has been assessed against general principles of fairness, good faith and reasonable expectation. The enforcement of these standards has marked a retreat from formalism and directed curial attention to the matrix of facts and assumptions that more fully define the tendering relationship.¹⁷⁴ It would, of course, be too sweeping to suggest that traditional contract analysis is normatively neutral. In a given case, the decision to apply a strict or liberal construction, to adopt a purposive interpretation, or to import implied terms, suggests the tacit promptings of certain value judgements.¹⁷⁵ The problem is one of degree. Orthodox contract theory cleaves to rule-certainty. As such it is a weak medium for change. If aspects of the tendering relationship are to be reconfigured, then its form must be shaped by doctrines that openly speak of an ethical standard. From this perspective it can be grasped that the tendering relationship transcends its written expression and that consensus is the function of a process rather than a defined event.

¹⁷⁴ As Lord Wilberforce remarked, the time has long passed when agreements are interpreted purely on internal linguistic considerations without reference to their essential supporting facts: *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 at 1383-84 (H.L.).

¹⁷⁵ See generally Bridge, *supra* note 131.