



EXPECT THE BEST

Blaney
McMurtry
BARRISTERS & SOLICITORS LLP

**IS THERE ANY MEANING
LEFT TO THE PRIVILEGE
CLAUSE AFTER *M.J.B.
ENTERPRISES LTD. V.
DEFENCE CONSTRUCTION
(1951) LTD.?***

Michele A. Hecke

Blaney McMurry LLP

416.593.3935

mhecke@blaney.com

Is there any meaning left to the privilege clause after *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*?¹

Michele Hecke²

Owners should not underestimate the importance of the wording of the “privilege clause” in a tender. Properly drafted, a privilege clause can provide an owner with broad discretion to accept or reject tenders, a discretion that may be subject to an overriding duty of good faith and fairness. That qualification is one effect of the Supreme Court of Canada decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*³ and a number of cases decided in its wake.

Contract A versus Contract B

The modern law of construction tendering in Canada is rooted in the Supreme Court of Canada’s landmark decision in 1981 in *R. v. Ron Engineering & Construction (Eastern) Ltd.*⁴ The court developed a two-contract analysis of the tendering process: “Contract A,” which arises between a contractor and an owner upon the submission of a tender, and “Contract B,” the construction contract, which arises between the owner and the successful bidder once the tender is accepted by the owner.

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.

¹ This paper has been updated since initial publication as part of the LSUC seminar program “The Six-minute Construction Lawyer – December 1, 2000 to July 5, 2001.” I thank my colleague Tanya Litzenberger for her assistance in that regard.

² Michele Hecke, Architectural, Construction, Engineering Services (ACES) Group, Blaney, McMurtry LLP

³ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 170 D.L.R. (4th) 577, 237 N.R. 334, 44 C.L.R. (2d) 163, 232 A.R. 360, 195 W.A.C. 360, [1999] 1 S.C.R. 619, [1999] 7 W.W.R. 681, 69 Alta. L.R. (3d) 341, 3 M.P.L.R. (3d) 165, 49 B.L.R. (2d) 1

⁴ *R. v. Ron Engineering & Construction (Eastern) Ltd.*, 13 B.L.R. 72, (sub nom *Ron Engineering & Construction (Eastern) Ltd. v. Ontario*) 35 N.R. 40, 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111

Although *Ron Engineering* focused on the obligations of a contractor upon the submission of a tender, *M.J.B. Enterprises* examined the corresponding obligations of the owner upon a tender call. At issue in *M.J.B. Enterprises* was whether the inclusion of a privilege clause in the tender documentation allowed the owner to accept any tender submitted, including one that was not compliant with the tender documentation. Using the two-contract analysis developed in *Ron Engineering*, the court considered whether Contract A had been formed and, if so, whether any obligations were, as a consequence, imposed upon the owner.

The owner had invited tenders for the construction of its project. The tender material included a standard privilege clause: “The lowest or any tender shall not necessarily be accepted.” The owner awarded the contract to the lowest tenderer. *M.J.B. Enterprises* was the second lowest. The winning tender included a handwritten note outlining a schedule of final costs. This proviso was contrary to the tender documentation, which contemplated that tenders submit only one price. Although some tenderers complained that the note constituted a qualification that invalidated the tender, the owner decided that it was merely a clarification and accepted the tender. *M.J.B. Enterprises* brought an action for breach of Contract A, claiming that the winning tender should have been disqualified and that its own tender should have been accepted as the lowest valid bid.

The trial judge found that, although the note did indeed qualify the tender, the owner was at liberty to accept the tender in light of the privilege clause, and it was under no obligation to award the contract to *M.J.B. Enterprises*.⁵ The Alberta Court of Appeal affirmed the decision.⁶

⁵ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1994), 18 C.L.R. (2d) 120, 164 A.R. 399 (Q.B.)

The Supreme Court of Canada, however, reversed the decision, holding that M.J.B. Enterprises should succeed on its claim.

The Supreme Court of Canada found that Contract A was deemed to have been formed once M.J.B. Enterprises submitted its tender in response to the invitation to tender. The terms of Contract A were governed by the tender documentation. The court found that, although the tender documentation did not expressly provide that Contract A imposed an obligation on the owner to award Contract B to a “valid” tender, terms could be implied based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intention of the parties to give business efficacy to a contract.

In the circumstances of the case, an implied term to accept only a compliant tender was held to exist, based on the presumed intentions of the parties. The court reached this conclusion after referring to a number of terms in the tender documentation, including that tenders would be deemed to be invalid if they did not comply with the owner’s requirements, if they were received after closing, if they were not submitted on the proper form, or if they were altered or incomplete. Clearly, the owner intended to accept only compliant tenders. Otherwise, the repeated references to invalidity would be meaningless if the owner was free to select a non-compliant tender.

From a business perspective, the court noted that the tendering process replaces negotiation with competition, with certain risks being assumed by the tenderer for the effort it expends and the costs it incurs in preparing the tender and in providing a security deposit.

⁶ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1997), 33 C.L.R. (2d) 1, 196 A.R. 124, 141 W.A.C. 124 (C.A.)

Exposure to such risks would make little sense if the owner was allowed to circumscribe the tendering process and accept a non-compliant tender. Therefore, although the privilege clause effectively allowed the owner to accept a tender that was not necessarily the lowest compliant tender, the owner should not be at liberty to accept one that was non-compliant.⁷

The court held that the privilege clause did not override the implied term excluding non-compliant tenders. Instead, the express privilege clause and implied term were consistent in that they both operated to produce standardized tenders from which the owner could select the most advantageous and compliant one, taking into account factors other than price. The owner's discretion to accept a bid that was not the lowest was referred to as a "more nuanced view of 'cost' than the prices quoted in the tenders,"⁸ a notion that other courts have since seized in expanding the scope of owner discretion.

M.J.B. Enterprises was awarded damages in an amount equal to the profit that it would have made had it been awarded the contract.

M.J.B. Enterprises signals to owners that privilege clauses do not grant them the freedom to accept or reject tenders without having regard to the spirit and intent of the tender documentation. It also suggests to contractors that care must be taken to ensure that all tenders abide by the rules of the tender call to ensure compliance.

Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Facility Ltd.

⁷ *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)* (2000), 2 C.L.R. (3d) 176 (Fed. T.D.)

⁸ *M.J.B. Enterprises* (S.C.C.), at p. 179, para. 46, 44 C.L.R. (2d)

In *Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Facility Ltd.*⁹

the British Columbia Court of Appeal confirmed that a tender must be compliant for Contract A to arise, and that held that there could be no implied duty of fairness to the tenderers if Contract A was never formed.

BC Gas Utility Ltd.'s privilege clause was quite detailed:

OWNER reserves the right to reject any or all Tenders, including without limitation the lowest Tender, and to award the Contract to whomever OWNER in its sole and absolute discretion deems appropriate notwithstanding any custom of the trade to the contrary nor anything contained in the Contract Documents or herein. OWNER shall not, under any circumstances, be responsible for any costs incurred by the Tenderer in the preparing of its Tender.

Without limiting the generality of the foregoing, OWNER reserves the right, in its sole and absolute discretion, to accept or reject any Tender which in the view of the OWNER is incomplete, obscure, or irregular, which has erasures or corrections in the documents, which contains exceptions and variations, which omits one or more prices, which contains prices the OWNER considers unbalanced, or which is accompanied by a Bid Bond or Consent of Surety issued by a surety not acceptable to the OWNER.

Criteria which may be used by the OWNER in evaluating tenders and awarding the contract are in the OWNER's sole and absolute discretion and, without limiting the generality of the foregoing, may include one or more of: price; total cost to OWNER; the amount of B.C. content; the amount of Canadian content; reputation; claims history of Tenderer; qualifications and experience of the Tenderer and its personnel; quality of service and personnel proposed by the Tenderer; ability of the Tenderer to ensure continuous availability of qualified and experienced personnel; the Construction Schedule and Plan; the proposed Labour and Equipment; and the proposed Supervisory Staff.

Should the OWNER not receive any tender satisfactory to the OWNER in its sole and absolute discretion, the OWNER reserves the right to re-tender the Project, or negotiate a contract for the whole or any part of the Project with any one or more persons whatsoever, including one or more of the Tenderers.¹⁰

⁹ *Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Facility Ltd.* (1999), 47 C.L.R. (2d) 101 (B.C. S.C. [In Chambers]), **reversed in part (2000)**, (sub nom. *Midwest Management (1987) Ltd. v. B.C. Gas Utility Ltd.*), 5 C.L.R. (3d) 140 (C.A.)

¹⁰ Reproduced at pp. 106-107, para. 13, 47 C.L.R. (2d), and at p. 143, para. 5, 5 C.L.R. (3d).

The tender documentation required that tenders be completed exactly as requested to allow for comparison on a uniform basis. Midwest Management submitted the lowest tender but did not comply with the tender documents. Its tender was not accepted.

Midwest Management brought a claim against the owner for breach of Contract A and breach of duty of fairness.

Breach of Contract

The plaintiff alleged that its tender was rejected, even though its bid was the lowest, because it had labour agreements with non-affiliated unions, which had disqualified it. The plaintiff claimed that the call for tenders did not indicate that labour agreements were criteria for evaluation. The owner moved for summary judgment, seeking to dismiss the claim. It argued that the plaintiff's tender did not comply with the tender documentation, so Contract A did not come into existence; accordingly, the plaintiff's claim for breach of contract must fail.

The court rejected the plaintiff's argument that the broad wording of the privilege clause made its tender capable of being accepted, and that the tender did in fact meet the requirements of the tender documentation because of the privilege clause, which made any proposal capable of being accepted.

The plaintiff also asserted that a duty of fairness on the part of the owner in its dealings with a tendering contractor was an implied term of Contract A, and that such a duty was violated if there was a secret precondition that no company with labour agreements with non-affiliated unions could be awarded the contract.

The British Columbia Supreme Court dismissed the plaintiff's claim for breach of contract, finding:

However, as the *MJB* and *Toby* cases emphasize, for a tender to trigger a contract A it must be valid, i.e., comply with the requirements of the tender documents published by the owner. That did not happen here and the train stops there. There is no implied duty of fairness arising out of a contract A because no contract A arose.¹¹

The British Columbia Court of Appeal agreed with this finding.

Duty of Fairness

The plaintiff also argued that even if Contract A had not come into existence, the surrounding circumstances of the call for tenders, the submission of tenders, and the subsequent dealings between the parties gave rise to a duty of fairness, the breach of which could result in liability independent of the contract. The British Columbia Supreme Court held that:

Although if it knew of “no free-standing enforceable duty of ‘fairness’ *simpliciter*”, the law “might recognize a duty arising on the case”. It allowed the plaintiff's claim in this regard to continue.¹²

The British Columbia Court of Appeal, however, found that the trial judge erred in law in holding that the claim might succeed. The British Columbia Court of Appeal held “a duty [of fairness] is quite inconsistent with an adversarial, competitive tendering process. To find such a duty would cause great uncertainty in this area of the law”.¹³

¹¹ *Midwest Management* (B.C.S.C.), at p. 110, para. 23, 47 C.L.R. (2d)

¹² *Midwest Management* (B.C.S.C.), at p. 11, paras. 29, 31, 47 C.L.R. (2d)

¹³ *Midwest*, B.C.C.A., at 145.

The court reversed the British Columbia Supreme Court's decision and dismissed the plaintiff's claim for breach of duty of fairness.

What this decision makes clear is that a contractor must comply with the requirements of the tender documentation if it intends to rely on the benefit of Contract A in asserting a claim for breach of contract, and that no claim for breach of duty of fairness outside of Contract A will succeed.

George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)

The Ontario Court of Appeal considered *M.J.B. Enterprises* in *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)*.¹⁴ The tender documents in that case contained the following privilege clause:

The Region reserves the right to reject any or all bids submitted or any part and the lowest of any bid will not necessarily be accepted. [sic]¹⁵

The only variable allowed in the tenders was price. Tarmac Canada submitted the lowest price and the municipal official who analyzed the tenders recommended that Tarmac Canada's tender be accepted.

The second lowest tender was submitted by a local contractor. It considered its bid more worthy because it paid taxes in the region and employed local workers. Nothing in the tender documentation indicated that preference might be given to local contractors or workers. The

¹⁴ *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1999), (sub nom. *Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)*) 5 M.P.L.R. (3d) 1, 48 C.L.R. (2d) 236, 125 O.A.C. 72, 2 B.L.R. (3d) 80 (C.A.)

¹⁵ Reproduced at p. 237, para. 2, 48 C.L.R. (2d).

matter was referred to city council, which awarded the contract to the local contractor without giving reasons for its decision. Tarmac Canada brought an action against the owner, claiming that the award had been made based on undisclosed criteria.

At trial, the owner was held liable for failing to act fairly or in good faith in connection with Tarmac Canada's bid. In reaching that conclusion, the court took into account the failure of the regional municipality to explain its decision. Although the region was not obligated to give reasons, "in the absence of possible grounds in the tender documents or a published policy ... the defendant risks an adverse finding of fact by the court."¹⁶

The decision was affirmed on appeal.

George Wimpey is noteworthy, particularly in Ontario, for its recognition of an implied duty of fairness and good faith on the part of the owner that will override the effect of a privilege clause.

In *Martel Building Ltd. v. Canada*¹⁷, the Supreme Court of Canada again considered this implied duty of fairness. The Supreme Court of Canada held "[a] privilege clause reserving the right not

to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly"¹⁸

¹⁶ *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1997), 34 C.L.R. (2d) 123, 40 O.T.C. 68 (Gen. Div. [Commercial List]), at p. 129 C.L.R., para. 24

¹⁷ *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R., at 860

¹⁸ *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R., at 895

In that case, Martel claimed that the respondent breached a duty of care owed to Martel in its conduct of negotiations to renew a lease and during the tendering process. The Supreme Court of Canada reaffirmed its decision in *MJB* and went on to hold,

“While the Lease Tender Document affords [the respondent] wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify this duty. ...[S]uch an implied contractual duty is necessary to promote and protect the integrity of the tender system.”¹⁹

The Supreme Court of Canada recognized the serious consequences which would flow from a “duty of care” being imposed on the tendering process and instead maintained the “implied duty of fairness” as a term of Contract A.

Sound Contracting Ltd. v. Hood Point Improvement District and *Sound Contracting Ltd. v. Nanaimo (City)*

Two recent decisions from British Columbia, both involving Sound Contracting Ltd., add an interesting twist to the *M.J.B. Enterprises* analysis and swing the pendulum in favour of the owner.

In the first, *Sound Contracting Ltd. v. Hood Point Improvement District*,²⁰ Sound Contracting delivered the lowest compliant tender for a water system upgrade. The tender documentation contained a standard privilege clause: “The lowest, or any tender, will not necessarily be accepted.”²¹ The owner’s engineer recommended accepting either Sound

¹⁹ *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R., at 897 - 898

²⁰ *Sound Contracting Ltd. v. Hood Point Improvement District* (2000), 1 C.L.R. (3d) 76 (B.C. Master)

²¹ Reproduced at p. 78, para. 10, 1 C.L.R. (3d).

Contracting or the second lowest compliant bid, Capilano Highway Services. The engineer noted that other municipalities had found it difficult to work with Sound Contracting on other projects and that additional costs for extra work claims might have to be anticipated. The contract was subsequently awarded to Capilano based on “ ‘their accessibility and their bid.’ ”²²

Sound Contracting brought a claim against the owner for breach of Contract A. Master Horn dismissed the claim, finding that the privilege clause obliged the owner to award the contract only to a compliant bidder, not necessarily the lowest bidder, in accordance with *M.J.B. Enterprises*. The plaintiff’s claim that the Capilano bid was non-compliant was rejected.

Sound Contracting further alleged that the owner, in making its decision, used criteria not disclosed in the tender documents, namely, Sound Contracting’s claims history and the potential for future claims. The master recognized that an owner is obliged to treat all bidders fairly and in good faith, and that it will be in breach if it awards the contract based on considerations or criteria extraneous to those identified in the tender documents. Nevertheless, he purported to rely on *M.J.B. Enterprises* to dismiss that aspect of Sound Contracting’s claim.²³ Specifically, *M.J.B. Enterprises* recognizes that the privilege clause allows an owner to take “a more nuanced view of ‘cost’ than the prices quoted in the tenders,”²⁴ that it may well have reasons not to accept the lowest tender. Rogue bids and contractor experience were cited as possible reasons for deviating from the lowest tender. The master found that claims history and the potential for future claims could be considered in assessing the “cost” of Sound Contracting’s bid.

²² *Sound Contracting Ltd. v. Hood Point Improvement District* (2000), at p. 81, para. 23, 1 C.L.R. (3d)

²³ Please see p. 82, paras. 26-27, 1 C.L.R. (3d), where Master Horn discusses *M.J.B. Enterprises*.

²⁴ *M.J.B. Enterprises*, p. 179, para. 46, 44 C.L.R. (2d)

This decision is presently under appeal.

Two months later, the British Columbia Court of Appeal released its decision in *Sound Contracting Ltd. v. Nanaimo (City)*.²⁵ At issue was the City of Nanaimo's rejection of Sound Contracting's tender for the Hammond Bay project.

While the city was evaluating the tenders for the project, an arbitrator granted Sound Contracting's claim for overhead and profit for work that had been deleted from the scope of the contract on an earlier project for the City of Nanaimo. In evaluating the bid on the Hammond Bay project, the city calculated what it might have to pay Sound Contracting for similar claims on the project and added the cost of a reviewing engineer to Sound Contracting's tender price. After adding those costs, Sound Contracting was no longer the lowest tenderer.

The privilege clause in the tender documentation provided as follows:

Article 18. Tender Rejection

The Owner reserves the right to reject any or all tenders; the lowest will not necessarily be accepted.

The City of Nanaimo reserves the right to waive informalities in or reject any or all tenders or accept the Tender deemed most favourable in the interests of the City of Nanaimo.

Article 19. Award

Awards shall be made on tenders that will give the greatest value based on quality, service and price. Preference shall be given to local suppliers where quality, service and price are equivalent.²⁶

²⁵ *Sound Contracting Ltd. v. Nanaimo (City)*, 74 B.C.L.R. (3d) 239, [2000] 5 W.W.R. 545, 2 C.L.R. (3d) 1, 11 M.P.L.R. (3d) 49, 138 B.C.A.C. 116, 226 W.A.C. 116 (C.A.), leave to appeal refused (January 25, 2001), Doc. 28073, McLachlin C.J.C., Iacobucci and Major JJ. (S.C.C.)

The trial judge had held that the city had breached Contract A by using undisclosed criteria to evaluate the Sound Contracting tender differently from the others.²⁷ The court concluded that Sound Contracting's claim for costs on the prior project – and a potential claim on the project at issue – was a legal right flowing from the owner's standard form contract. It was therefore improper for the city to conclude that another contractor would forego its legal right. It was also improper to penalize Sound Contracting for exercising that right.

The city's appeal was successful and the action was dismissed. In allowing the appeal, the court focused on the “nuanced view of ‘cost’ ” approach articulated in *M.J.B. Enterprises* in finding that the owner was entitled to examine Sound Contracting's claims history and held that the owner did not breach Contract A. Chief Justice McEachern, writing for the court, evidently had some reservations about the decision:

I confess that I find this somewhat worrisome as it creates an opportunity for arbitrariness in the operation of the bidding system. It must be recognized that a compliant tender establishes a legal relationship between the parties conditioned only by the privilege clause. The privative clause gives the owner a discretion and that discretion must surely be exercised fairly and objectively. ...

In this case, the previous dealings between these parties provided the basis for the additional criteria addressed by Nanaimo. It is not for us to substitute our own analysis for that of the owner in whom the discretion to award the contract ultimately resides and whose staff, in my view, have not been shown to have acted unfairly or other than in good faith in determining which tender provided the “greatest value based on quality, service and price” to the City. Nor can it be said, in my view, that the consideration of past dealings between these parties constituted an undisclosed criterion. In fact, past dealings are probably the best indicator of how a proposed relationship will come to work

²⁶ Reproduced at p. 3, para. 4, 2 C.L.R. (3d).

²⁷ *Sound Contracting Ltd. v. Nanaimo (City)* (1997), 42 M.P.L.R. (2d) 202, 42 B.C.L.R. (3d) 324, 41 C.L.R. (2d) 69 (S.C.)

out in practice. I would caution, however, that this discretion must not be exercised in such a way as to punish or to get even for past differences.²⁸

The *Sound Contracting* cases are troubling and controversial. If followed, contractors seeking to exercise their legal rights against an owner may find additional costs being added to their tenders in the evaluation process without their knowledge. These decisions seem to allow an owner to take into account factors not explicitly set out in the tender documents and add hidden costs to a tender under the guise of the privilege clause, in spite of the admonition in *M.J.B. Enterprises* that evaluations be based solely on disclosed criteria.

Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)

*Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)*²⁹ outlines the method of calculating damages, including loss of profit, when a plaintiff proves that the owner has breached Contract A by accepting a non-compliant tender.

The tender documentation specified that the successful tenderer was to enter into a standard form agreement with the construction manager, which required the labour affiliations of the successful tender to be compatible with the construction manager's union obligations. The lowest tenderer, which was awarded the contract, based its price on the use of non-unionized labour. When the contractor could not execute the construction manager's agreement because of the labour issue, the owner elected to bypass the construction manager altogether and contract with the contractor directly.

²⁸ *Sound Contracting*, at pp. 5-6, paras. 18-19, 5 C.L.R. (3d)

²⁹ *Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)* (2000), 2 C.L.R. (3d) 84, 183 N.S.R. (2d) 236, 568 A.P.R. 236, 5 B.L.R. (3d) 214 (S.C.)

Maritime Excavators, the lowest compliant tenderer, sued. The court found that nothing in the tender documentation indicated that the construction manager's unionized labour requirements could be avoided or that the owner could contract separately with a tenderer. Accordingly, the owner was found to be in breach of Contract A.

In determining entitlement to damages, the plaintiff must demonstrate that it has lost an opportunity to obtain the contract and prove the extent of that loss in percentage terms. In other words, the court must speculate on the likelihood of the plaintiff obtaining the contract had it not been improperly awarded. This examination takes place in the context of the privilege clause. In *Maritime Excavators* the owner was technically at liberty to re-tender, or not accept the lowest compliant tender, but the court found that the owner had no reason to refuse the plaintiff's tender as the lowest compliant bid, and there was insufficient time for a re-tender. Therefore, the only reasonable option was to accept Maritime Excavators' tender. Maritime Excavators was awarded damages for loss of its profits on the project. Accordingly, owners can expect a privilege clause to be less effective if a re-tender is impractical in the circumstances or if the lowest tenderer would have been awarded the contract in any event.

Implications

Where do these cases leave parties to the tender process? Both owners and contractors must be vigilant in ensuring that tenders submitted and accepted comply with the criteria set out in the tender documentation. The accepted tender need not be the lowest price, as long as the tender documentation contains a privilege clause to that effect. Owners are obliged, however, to award the contract based on criteria disclosed to the tenderers and to treat all tenderers fairly. As such, an implied duty of fairness is owed only to tenderers who submit compliant tenders; a

contractor, therefore, must make sure that it remains compliant if it wishes to seek redress against an owner following an unsuccessful tender.