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## Two recent court cases could mean the end of established bid acceptance rules

Construction Corner  
Clive Thurston  
President, OGCA

Are there rules for bidding? That is a question that the OGCA hears too often and a number of significant court decisions have only succeeded in muddying the waters.

Recently two cases have resonated across Canada and the industry, *Tercon*, and *Double N*. I recently participated in a panel discussion on "What's New In the Law of Tendering," where we reviewed *Ron Engineering, Contract A and B*, but this time, the cases mentioned above and a number of others lent a more urgent air to the presentation.

We are all aware of the development of bidding law from *Ron Engineering, M.J.B., Martell* and many others which have resulted in a fairly accepted standard on the roles and responsibilities of the parties involved.

"Preserving the integrity of the bidding process" and "Duty of fairness" were the watchwords for all to live by.

There has been a continual stress on the system caused by a seemingly never-ending attempt to create the perfect Privilege Clause.

Now with the creation of the "exclusion of liability clause" in the *Tercon* case we may be headed back to the Wild West. With the case being appealed to the Supreme Court, should this language be upheld, I and many in the legal profession believe it will be the end of *Ron* and all the established rules for accepting a bid.

You may think we are being too dramatic, but if you have read the commentaries on this case and seen the wording of this "killer clause" you can not come to any other conclusion.

It will give owners a complete and unfettered right to award to anyone, ignore non-compliant or irregular bids and, in effect, bid shop.

While we await this decision, we have no shortage of other issues with which to concern ourselves.

*Double N* has unearthed a recognition that owners do not have to look beyond the bids that they receive and can rely on that information to make a decision. They owe no further duty to the other bidders once determining the low bidder.

If, before awarding, the owner discovers an irregularity, he can overlook that (provided the bid language provides for it). He can also negotiate changes to the cost and award and use information provided by the other bidders in that negotiation.

With the information we have willingly been providing to owners at the time of bid, owners have in effect gathered all the information they need to negotiate a new price with the low bidder.

That means that unit prices, labour rates, and alternate prices can all be used by an owner to negotiate with the low bidder before actually entering into contract B.



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Corner

The courts have established that owners can waive minor errors or irregularities in the bid. What they did not define is the word "minor." This is a two-edged sword for owners as they can overlook these "minor" infractions and award to the bidder, but cannot force that bidder to accept the contract as the bid was non-compliant and the law has clearly stated non-compliant bids must be rejected.

Contractors need to remember that an owner can set the rules of acceptance as long as they are clearly stated and apply equally to all bidders.

This includes the ability to accept late or irregular bids. If you agree to play by these rules, then you have no recourse if the owner decides to award to someone else.

We are facing some challenging times and the tightening of the economy will only see more onerous and restrictive clauses added to contracts. Our response to these challenges will set the stage for future bidding far into the future.

Clive Thurston is president of the Ontario General Contractors Association and a member of the DCN editorial advisory board.

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