Fairness and Transparency in Large Project Public Procurement

John Haythorne[1] and Mollie Deyong[2]

EDITOR'S NOTE

The basic ground rules for the traditional bidding process, as set out in the seminal Supreme Court of Canada decision in *Ron Engineering*, as later modified in the *MJB* decision, are now well understood, not only by construction lawyers, but by participants in the construction industry. However, those ground rules were created in the context of a traditional design-bid-build procurement process. On large publicly funded construction projects, other procurement methods, such as design-build and public-private partnerships ("P3") have become more prevalent. As a result, the Contract A/Contract B analysis that flows from the *Ron Engineering* case may not provide the optimal basis for procurement of large public projects.

The authors of this paper have carefully analyzed the issues relating to public sector procurement by focusing on two overriding questions, being (1) whether an owner must define in the tender documents what a bidder must do to win the bid, and (2) whether the owner can retain discretion in evaluation of the bids. As stated by the authors, these two questions arise in all construction procurement.

This paper contains comprehensive analysis of the requirement for fairness in the bidding process. It explains why fairness applies to process rather than result. The applicable case law is examined and clearly explained.

There is also excellent discussion of the issue of transparency. The authors explain why transparency is not a requirement at common law, although it may in some cases be incorporated into the procurement process by reference.

The distinction between the RFQ (request for qualifications) and RFP (request for proposals) processes is clearly and thoughtfully explained, including the underlying reasons why an RFQ process provides value to both the owner and to proponents.

In discussing large public sector projects, the authors focus on three specific issues that are important to optimizing project delivery. These are efficient allocation of risk, the difference in technical knowledge between the owner and the proponents (leading to unequal bargaining positions), and how the procurement process can assist the owner in achieving optimum design.

1 Partner, Dentons Canada LLP.
2 Articled Student, Dentons Canada LLP.

Finally, the authors suggest ways in which Contract A can be created through negotiation between the owner and the proponents, rather than having Contract A simply arise automatically upon the submission of a tender.

We highly recommend this paper to all construction lawyers and industry participants involved in designing procurement processes for public sector projects.

1. INTRODUCTION

At the core of any procurement are two fundamental elements: the description of what bidders are required to submit as a bid, and the description of how the owner will judge the bids to select the winner. Intuitively, all bidders should be invited to submit the same information, and the owner should use the same criteria in judging the bids. Procurements for complex projects challenge these intuitions.

The purpose of this paper is to examine the fairness and transparency requirements of the common law of tendering in Canada with reference to public sector procurement of large construction projects. In conducting this examination we will focus particularly on two questions:

1. Must an owner define in tender documents "what a bidder must do to win"?

2. May the owner retain discretion in the evaluation of bids?

We focus on large public sector construction projects because they represent a significant portion of the construction economy, but also because they can raise challenging procurement questions that are not often encountered in smaller or private sector procurements. Large public sector construction projects are invariably complex, making it difficult for the owner to identify in advance all the factors that may become important (or even critical) under a construction or project agreement and during the life of the project. Competitive procurements of these projects must wrestle with these uncertainties.

We focus on the two questions set out above because they arise in virtually every procurement; either expressly or by inference, for the owner and for bidders. The questions are important because, as we discuss more fully below, the answer to them can have a profound effect on the procurement method, including, for example, the scope of invited or permitted innovation.

In this paper we review the common law. Any governmental procurement may also be subject to other legal constraints. For example:

(a) Statutory Requirements. Restrictions or conditions may be imposed on the government owner's authority to contract, or the manner of procurement. For example, pursuant to the *Canadian International Trade Tribunal Act* "designated contracts", which means "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or a class of contract designated by the *Canadian International Trade Tribunal Procurement Regulations*" are subject to the jurisdiction of the Canadian International Trade Tribunal.[3]

(b) Trade Agreements. Trade agreements have recently come to the forefront as sources of procurement restrictions for public bodies. Both internal agreements (such as the Canadian Free Trade Agreement) and external agreements (such as the Comprehensive Economic and Trade Agreement) impose procurement rules on all levels of government entities with the intent of creating open and non-discriminatory access to Canadian procurements for all potential proponents. Trade agreement rules apply to procurements above certain value thresholds, and include requirements relating to, for example, procurement documentation (i.e. Contract A terms), evaluation processes and publishing and access to opportunities. The ability of a public owner to sole source a contract is particularly restricted under the trade agreements, with sole sourcing being permitted only if a specified exception applies. A violation of applicable trade agreement procurement rules may result in a bid complaint from an aggrieved bidder, the result of which can be a monetary award or potential delay of a contract award.

3 R.S.C. 1985, c. 47, ss. 30.11(1) and 30.1.

(c) Government Procurement Policies. Many governments at all levels — federal, provincial and municipal — have adopted procurement policies and procedures.[4] Some of these policies or procedures are binding, but many are just policy, intended only to give general guidance to the government's representatives. We note that in some instances policies that were not intended to be binding have been made binding in a procurement by including the policy by reference in the procurement documents.

Full consideration of the laws that apply to procurement should consider these other sources of possible legal restrictions, as well the requirements of common law.

2. COMMON LAW FRAMEWORK — FAIRNESS AND TRANSPARENCY

An analysis of the law of tender in Canada frequently begins with the oft-quoted statement of Estey J. speaking for the Supreme Court of Canada in *R. v. Ron Engineering & Construction (Eastern) Ltd. ("Ron Engineering")*:

> I share the view expressed by the Court of Appeal that the integrity of the bidding system must be protected where under the law of contracts it is possible to do so.[5]

Since the *Ron Engineering* decision Canada has seen the development of a comprehensive common law framework for tendering processes. As stated by the Court of Queen's Bench for Saskatchewan in *Surespan Construction Ltd. v. Saskatchewan:*

> A summary of [the legal principles related to competitive bidding] must start with the Supreme Court of Canada's decision in *The Queen (Ont.) v Ron Engineering*, 1981 CanLII 17 (SCC), [1981] 1 SCR 111 [*Ron Engineering*] which introduced the Contract A/Contract B concepts that now govern the interpretation of rights and obligations in the tendering process. The principles were further developed by the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 SCR 619 *[M.J.B. Enterprises]; Martel Building Ltd. v Canada*, 2000 SCC 60 (CanLII), [2000] 2 SCR 860 *[Martel]*; and *Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3 (CanLII), [2007] 1 SCR 116 [*Double N*]. They are designed to protect the integrity of the bidding system.[6]

We note that in each of the cases cited by the court as authority for the applicable principles the owner was a public sector owner.

2.1 Flexible Contractual Basis for Tendering System

The common law of contracts in Canada gives contracting parties infinite freedom to decide for themselves the terms and conditions of their bargain,[7] subject only to tests of validity (e.g. offer, acceptance, consideration) and various overriding doctrines such as uncertainty, illegality and mistake. Given that the common law of tendering is rooted in contract, it follows that an owner has similar freedom and flexibility in designing a tendering system and drafting procurement documents.

The courts have accepted this flexible paradigm for tendering, going so far as to hold that the procurement documents define whether, in fact, a Contract A will be formed at all, and if it is, the terms of the related tendering system. As the Supreme Court of Canada stated in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd. ("M.J.B."):*

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4 For example, the BC Government's Core Policies & Procedures Manual includes a chapter setting out policies applicable to all procurement at the ministry level (See: Government of British Columbia, "CCPM Policy Chapter 6: Procurement" Core Policy & Procedures Manual, online: <https://www2.gov.bc.ca/gov/content/governments/policies-for-government/core-policy/poli-cies/procurement>), and the majority of local government bodies in BC have procurement policies or guidelines covering similar topics.

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6 Surespan Construction Ltd. v. Saskatchewan, 2017 SKQB 55, 2017 CarswellSask 104 at para. 54 ("Surespan").

7 The words of Sir George Jessel M.R. in Printing Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462 (Eng. Rolls Ct.) at 465 are frequently cited for the classic rule of freedom of contract: "[I]fthere is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred. .."

> Therefore it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that Ron Engineering suggests otherwise, I decline to follow it.[8] [Emphasis added.]

The *M.J.B.* decision itself demonstrated this flexibility by addressing the question of whether "low price wins" is a rule in the common law of tendering. This is one example of the flexibility that an owner can reserve in tender documents. In *M.J.B.* the court established that, absent prohibitions contained in the tender documents, a privilege clause can allow an owner to retain the discretion to not select the bidder with the lowest priced proposal. In recognition of the fact that "low price" does not always mean "low cost", *M.J.B.* explained that tender documents can grant an owner the flexibility to take a "nuanced view of price." The court stated:

> Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of 'cost' than the prices quoted in the tenders. In this respect, I agree with the result in *Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308 (Ont. C.A.). In that case, Contract B was awarded to the second lowest bidder because it would complete the project in a shorter period than the lowest bid, resulting in a large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost. However, needing to consider 'cost' in this manner does not require or indicate that there needs to be discretion to accept a non-compliant bid.[9] [Emphasis added.]

Following *M.J.B.*, the British Columbia Court of Appeal has confirmed an owner's right to award Contract B to the bid that, from the owner's perspective, provides the best value, tender documents permitting. In *Sound Contracting Ltd. v. Nanaimo (City)*[10] *("Sound Contracting")*, the City of Nanaimo ("Nanaimo") appealed a judgment for damages for failure to award a construction contract to the lowest bidder. Privilege clauses in the tender documents reserved the owner's right to reject any or all tenders, indicated that the lowest bid would not necessarily be accepted, and provided that Nanaimo would accept the tender deemed to be most favourable to the interests of the city. On the basis of *M.J.B.,* the Court of Appeal in *Sound Contracting* held that the terms of the tender documents released Nanaimo from the obligation to award the work to the lowest bidder where there were valid, objective reasons for concluding that better value may not be obtained by accepting a higher bid.[11] The bid evaluators felt that the lowest bidder would not result in the best value for Nanaimo due to concerns relating to the need for an on-site supervisor, the risk of under-running another contract because of anticipated work deletions due to budget restraints, and the likely costs of legal, staff and arbitration expenses.[12] These concerns arose from Nanaimo's prior dealings with the lowest bidder. The second lowest bidder had never claimed for contract under-run or made previous claims resulting in extra arbitration costs. The Court of Appeal, in overturning the decision of the trial judge, found that it was not its place "to substitute [its] own analysis for that of the owner in whom the discretion to award the contract ultimately resides and whose staff [had] 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."[13]

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8 M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., 1999 CarswellAlta 301, [1999] 1 S.C.R. 619 at para. 17 ("M.J.B.").
9 Ibid., at para. 46.
10 2000 BCCA 312, 2000 CarswellBC 1036, leave to appeal refused 2001 CarswellBC 125 (S.C.C.).
11 Ibid., at para. 17.
12 Ibid., at para. 7.
13 Ibid., at para. 19.

The court reached a similar conclusion in the analogous case *Continental Steel Ltd. v. Mierau Contractors Ltd.*[14] The appellant contractor challenged a damage award that had been granted against it on the grounds that the appellant had acted unfairly in not awarding a steel-erection subcontract to the lowest bidding subcontractor. Following the authority in *M.J.B.* and *Sound Contracting*, the court held that the appellant's privilege clauses established that it was not obligated to accept the lowest price bid and was entitled to act in its own best financial interests so long as its decision was not unfair to any bidder.[15] The appellant preferred the second lowest bidder because it seemed to provide the best value. Construction had to proceed on a tight schedule, and because of experience dealing with the respondent, the appellant thought that a contractual relationship could become disputatious and cause delay in completion of the project. The appellant felt that the small price differential between the two bids would likely be exceeded by additional cost and perhaps construction delay, and the court determined that the appellant had fairly and objectively exercised its discretion to make that decision.[16]

The same principle was adopted by the Ontario Superior Court of Justice in *Transit Glass & Aluminum Ltd. v. Sakto Corp.*[17] *("Sakto")* and *James A. Brown Ltd. v. Caisse Populaire Welland Ltée*[18] *("Welland")*. In *Sakto*, the defendant owner (Sakto) awarded a tender contract to the third lowest bidder. In the circumstances of the case, the bidders were aware that "schedule was king": Sakto had to pay a $500,000 penalty to its major tenant for each month of delay.[19] The owner awarded the contract to the bidder that it considered most likely to meet the construction schedule, which the court considered a reasonable and appropriate nuanced approach to cost.[20] The third lowest bidder was also the winning participant in *Welland*. The owner preferred the selected bidder because it had a more impressive corporate profile, was a larger company with more resources, and had extensive experience in the relevant field.[21] Moreover, the owner had several pieces of negative information that suggested that the plaintiff, the lowest bidder, was unreliable. There was sufficient evidence to support a reasonable belief that the selected proponent would provide better value to the owner, and the court determined that in the circumstances it was bound to respect the owner's reasonable exercise of business judgement.[22]

The above decisions imply that an owner can retain the right to award Contract B based on its subjective (but necessarily fair and reasonable) judgment of best value. On this authority, an owner is not obligated to set out precisely what a bidder must do to win. Although, as explained below, an owner may not evaluate a bid based on undisclosed criteria, the above decisions demonstrate that the owner can retain discretion to holistically consider and compare bids. Determining best value inherently depends in part on a comparison of proposals. An owner may not be able to accurately predict in advance the comparative factors that determine best value.

2.2 Duty of Fairness

While the common law contractual basis for tendering provides flexibility, one general constraint is the duty of fairness owed to all compliant bidders under Contract A. Though it is the vernacular, the term "duty" may be somewhat misleading here as the duty of fairness is an implied contractual term rather than a free-standing duty like that of good faith or a duty in tort.[23] As such, the content and scope of the duty of fairness depends on the contractual context and therefore the particular tendering system. The Ontario Superior Court of Justice described the duty of fairness as follows:

> ... the duty must be defined with due consideration to the express terms of the tender documents, and a tenderer has the

14 2007 BCCA 292, 2007 CarswellBC 1114, leave to appeal refused 2007 CarswellBC 2947 (S.C.C.).
15 Ibid., at para. 26.
16 Ibid., at paras. 27-28.
17 2008 CarswellOnt 1380, [2008] O.J. No. 980 (S.C.J.) ("Sakto").
18 2009 CarswellOnt 1375, [2009] O.J. No. 1089 (S.C.J.) ("Welland").
19 Sakto, supra, note 17 at para. 165.
20 Ibid., at para. 179.
21 Welland, supra, note 18 at para. 21.
22 Ibid., at para. 33.
23 Hub Excavating Ltd. v. Orca Estates Ltd., 2009 BCCA 167, 2009 CarswellBC 957 at para. 39 ("Hub Excavating").

> right to reserve privileges to itself in the tender documents: see *Martel*, at para 89. The duty of fairness requires tenderers to ensure all the bidders are given equal footing in a tender and no bidder receives an unfair advantage over any other. Therefore, the key question is whether the plaintiff was treated unfairly relative to other bidders: see *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works),* 2011 FC 70, 328 D.L.R. (4th) 665, at para 46, aff'd 2012 FCA 110, 349 D.L.R. (4th) 193. A tenderer will be in breach of its duty if it creates a sham of a bidding process.[24]

At minimum, the duty of fairness is an obligation to treat all bidders equally and to refrain from making decisions in an arbitrary or capricious manner. It is a duty to treat bidders fairly, rather than a promise to reach a "fair" outcome. In the words of one author:

> While a full definition [of "fairness"] remains murky, we do know what fairness is not. The promise of fairness is not substantive; it is procedural or related to process. To promise fairness is to promise not that the meritorious bidder will win, only that the criteria for victory said to be employed will be the one used. When a bid selection process is examined for its fairness, it is probed not for being correct, only for proof that whatever decision was made was fairly arrived at.[25]

While many cases discussed an owner's duty to treat bidders fairly and equally,[26] the contractual duty of fairness in tendering was definitively established by the Supreme Court of Canada in *Martel Building Ltd. v. R. ("Martel").*[27] In *Martel,* like in *M.J.B.*, the court found that a privilege clause did not contain sufficiently express language to vitiate an implied term, which in *Martel* was the implied term of Contract A to treat bidders fairly and equally. The court determined that business efficacy and the integrity of the bidding process requires an implied term that all bidders are treated fairly and equally, although the extent of this obligation is a matter of fact in each case.[28] The court reasoned that without this implied term, a bidder's fate could be predetermined by undisclosed standards and bidders would either incur significant expenses in preparing futile bids or decline to participate at all.[29]

Hub Excavating Ltd. v. Orca Estates Ltd. ("Hub Excavating"),[30] a decision of the British Columbia Court of Appeal, illustrates the procedural rather than substantive nature of the duty of fairness. In Hub Excavating, the trial judge found that the appellant owners breached their duty of fairness in three ways: (1) they proceeded with a futile bidding process when they knew or ought to have known from the outset that the project was not economically feasible; (2) through their agent they made inaccurate statements to the respondent that led it to believe it would be awarded the job; and (3) having decided that the project would not proceed they failed to advise the respondent promptly of that decision.[31] The appellate court determined that these findings were premised on a misapprehension of the nature and scope of the implied duty of fairness established in *Martel.*[32] With regard to the first two points, the court concluded that while the respondent's arguments and the trial judge's findings may support a claim of negligent misrepresentation, there was no inequality or inconsistent treatment in the bid process and therefore no breach of contract. The third finding ignored the express 30-day irrevocability period in the contract, and the court held that the implied duty of fairness cannot override an express contractual term.[33]

The respondent argued, *inter alia,* that since the objective of the duty of fairness is the protection and promotion of the bid process, to proceed with

24 2007 BCCA 292, 2007 CarswellBC 1114, leave to appeal refused 2007 CarswellBC 2947 (S.C.C.).
25 Anne McNeely, Canadian Law of Competitive Bidding and Procurement, (Aurora: Canada Law Book 2010) at 136
26 See, for example: Best Cleaners Contractors Ltd. v. Canada, [1985] 2 F.C. 293 (C.A.), Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1989), 35 C.L.R. 241 (B.C. C.A.); Northeast Marine Services Ltd. v. Atlantic Pilotage Authority, (sub nom. Northeast Marine Services Ltd. v. Administration de pilotage de l'Atlantique) [1995] 2 F.C. 132 (C.A.), leave to appeal allowed (November 6, 1995), Doc. 24629 (S.C.C.); George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality) (1999), (sub nom. Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)) 48 C.L.R. (2d) 236 (Ont. C.A.).
27 2000 SCC 60, 2000 CarswellNat 2678..
28 Ibid., at paras. 88-89.
29 Ibid.
30 Supra, note 23.
31 Ibid., at para. 35.
32 Ibid., at para. 36.

a futile tender call must be a breach of that duty.[34] It argued that treating all bidders equally but badly "impoverishes the entire process".[35] The court rejected the respondent's arguments, finding that they could not "overcome the clear legal principles that define and limit the duty of fairness."[36] First, the court reiterated that the duty of fairness only comes into existence with Contract A and only extends to the process of assessing the bids. Second, the court held that it was not appropriate for a court to substitute its view of what makes sense for that of the owner. The project may not have been economically feasible, but the owner decided to test the waters by going to tender and placing the burden of the uncertainty of certain costs on the contractors by stipulating a lump sum contract and reserving its right to reject all bids. The court held that legally and practically, it was not appropriate for this business decision to be a breach of the contractual duty of fairness. Legally, the duty does not extend that far, and practically, perceived unfairness or "callous indifference" on the part of the owner will be dealt with by repercussions to its professional reputation.[37]

Rankin Construction Inc. v. Ontario (2013) (*"Rankin"*)[38] illustrates the point that the duty of fairness does not extend beyond the terms of Contract A. In *Rankin,* the Ontario Superior Court of Justice held that even if the government owner conducted its procurement in violation of its own procurement policies, this was not in itself grounds for alleging a breach of the common law duty of fairness in tendering.[39] The internal policies of the government owner were not expressly incorporated by reference into the tender documents, and therefore did not form part of Contract A. The court found that a deviation from them did not give rise to a breach of a legal duty to a bidder.[40]

Although the procedural nature of the duty of fairness results in some uncertainty as to its scope and content, the duty does contain some commonly cited elements, such as the prohibition against selecting non-compliant bids or the use of undisclosed criteria. On this latter point, *Martel* echoed the decision of the British Columbia Court of Appeal in *Chinook Aggregates Ltd. v. Abbotsford (Municipal District) ("Chi-nook"),*[41] where it was held that a privilege clause did not give the owner the right to attach undisclosed criteria to its offer. The court in *Chinook* found that an owner had breached its duty of fairness by adopting a policy of preferring local contractors whose bids were within 10 percent of the lowest bid when that preference was not indicated in the tender documents. The respondent testified that had he known of the owner's hidden preference, he would not have bid on the job because it would have been virtually impossible for him to bid 10 percent lower than the lowest bidder. The court reasoned that a privilege clause could not operate to permit the award of a contract based on hidden preferences because undisclosed criteria go to the core of contract formation.[42] Where undisclosed criteria influence evaluation, the owner has effectively incorporated an implied contractual term without notice to the bidders and there is thus no consensus between the parties that the wording of the privilege clause governs.

2.3 "Duty of Transparency"

It is sometimes suggested, particularly with regard to public sector procurement, that an owner has a general duty of transparency. The prohibition against a hidden preference in evaluation may have the appearance of a transparency requirement, as might the duty of fairness which requires that no bidder be given an unfair advantage. However, the leading procurement cases do not suggest that there is an independent duty of transparency implied as a term of Contract A.

34 Ibid., at para. 41.
35 Ibid.
36 Ibid., at para. 42.
37 Ibid., at para. 45.
38 2013 ONSC 139, 2013 CarswellOnt 103 (S.C.J.), additional reasons 2013 CarswellOnt 3019 (S.C.J.), affirmed 2014 CarswellOnt 12595 (C.A.).
39 Ibid., at para. 46.
40 Ibid.
41 1989 CarswellBC 203, [1989] B.C.J. No. 2045 (C.A.) at para. 9.
42 Ibid.

This point can be confusing because there is no question that a duty of transparency can be imposed on an owner by statute or regulation and therefore included by reference into Contract A, or otherwise expressly included as a term of Contract A. However, absent a term in Contract A imposing transparency obligations on the owner, there is no duty of transparency at common law. Statements regarding the need to protect the public can be interpreted as meaning that there is a general duty of transparency. We respectfully suggest that the recent decision *Mega Reporting Inc. v. Yukon (Government of) ("Mega")*[43] is an example of a court becoming mired in this confusion.

In *Mega*, the plaintiff Mega claimed that the government of Yukon as owner had improperly evaluated its proposal when it decided that Mega had not established required minimum experience and performance criteria. The Yukon Territory Supreme Court found that the evaluation committee appointed by the owner to evaluate bids was not able to demonstrate that it carried out the evaluation properly. The court found that the owner's evaluation of Mega's bid:

> ... failed to meet its duties of fairness, accountability, and transparency. From the limited evidence that does exist, largely being Mr. Daniels' handwritten notes, we know that the evaluation committee acted unfairly in marking Mega down for failing to provide letters of reference. We also know that the process used by the evaluation committee to decide the value of points assigned for meeting the basic criteria was not described in the RFP. In the face of this, the evaluation committee's failure to keep a record of its full route to decision prevents Yukon from refuting the concerns raised about a lack of fairness, transparency, and accountability in the evaluation of Mega's bid.[44]

The court considered the opinion of a public procurement expert and described his conclusion as follows:

> He finally opined that the process that was followed was not fair and transparent because transparency requires that an entity to be able to show via documents generated contemporaneously that the process it used and the decisions it made were fair. Transparency provides the proof of fairness. He observed that a reconstruction of events several months after the conclusion of a bid process is not transparent. Transparency requires generation of minutes or reasonably thorough notes during the evaluation meeting.[45] [Emphasis added.]

Nonetheless, the court stated that it would have reached its conclusions without consideration of the expert opinion. It held:

> Government procurement involves the expenditure of large amounts of public funds. As observed in *Almon* at para 28, "[t]he credibility and integrity of the competitive procurement system rest, in large part, not only on bids being properly assessed against the prescribed evaluation criteria in actual fact but also on the supplier community's perception that bid evaluations have been conducted in a fair and transparent manner." The public, therefore, has an overriding interest in making sure that its funds are being expended in such a manner as to ensure the competent provision of adequate goods and services at a reasonable price. The legislation that directs this to occur in the Yukon, being the Regulation and the Directive, thus falls within the category of enactment which may not be waived by private contract.[46] [Emphasis added.]

Statutes or regulations may well impose transparency obligations. In fact, in *Mega* the RFP documents did incorporate by reference legislation and policy that indicated that Yukon, as owner, has a duty of transparency. However, the court did not appear to find a duty of transparency on the basis that it was incorporated by reference into Contract A. Instead, the court imported statutory duties within the common

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43 2017 YKSC 69, 2017 CarswellYukon 129 ("Mega"). It has been reported that this decision is being appealed: Emily Blake, "Yukon Government Seeks Dismissal of Company's Claim" (14 December 2017) The Whitehorse Daily Star, online: <http://www.whitehorsestar.com/News/ yukon-government-seeks-dismissal-of-company-s-claim>.

44 Mega, supra, note 43 at para. 31.

45 Ibid., at para. 24.

46 Ibid., at para. 36.

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law of tendering, finding that Yukon had a duty of transparency for the purpose of protecting the public, and the public purse, in public sector procurements.

Our conclusion that there is no duty of transparency in the common law of tendering is justified by the Contract A/Contract B paradigm. That paradigm is based on private law, and the only parties to a Contract A are the bidder and the owner. The public is not a party to Contract A and, while there may be a public interest in law that facilitates commerce and the award of contracts, it is arguably not correct to impose or find duties for the purpose of protecting the public per se. The implied duties that apply to tenders, such as the duty of fairness and the rule against hidden preferences, were established to protect the integrity of the tendering process and to protect the legitimate interests of the participants, the owner and the bidders. This protection is in itself in the public interest. There is no justification or need to extend the common law of tendering to impose a duty of transparency for the purpose of protecting the public at large.

3. CHALLENGES IN IMPLEMENTING LARGE CONSTRUCTION PROJECTS

3.1 Growth and Influence of Public Sector Project Procurements

Generally, the law of tender has developed without distinguishing between contracts offered by public owners as compared to private owners, but most of the leading cases that developed our common law of tendering involved public projects and public sector owners.[47]

This is not particularly surprising because governments are a major contributor to the construction industry and governments generally award construction contracts through public procurement. A review of the largest construction projects in Canada shows that a large portion of them are public sector projects.[48] These projects will, almost certainly, be undertaken by public procurement. For policy reasons, governments and governmental entities favour the use of the public procurement process to award contracts, especially construction contracts. Public procurement is seen as good public policy that stimulates growth, promotes innovation and sustainable economic development, and guards against corruption and local favouritism.[49] In addition, internal and international trade agreements now require open and competitive bidding for government contracts above certain value thresholds and severely restrict government's ability to sole source a contract.[50] In part as a result of these policy and regulatory requirements, virtually all public sector construction contracts at all levels of government are awarded through public procurement.

While the common law of tendering in Canada imposes certain duties on both public and private sector owners, there is no rule under Canadian common law that mandates when tendering must be used. This absence creates a significant difference between the public and private sectors: the freedom of the private sector to award a contract, or implement a project, by way of negotiation rather than by way of tender. The result is that while tendering is available to the private sector, it is the public sector, and contractors and consultants who focus on public sector projects and contracts, who are most involved with and interested in the law of tender.

3.2 New Project Structures for Public Infrastructure

Beginning at least in the early 2000s Canadian governments began to take an active interest in finding new efficiencies in the "project delivery" of public sector projects, particularly public infrastructure projects. We adopt Lynn Thompson's definition of "project delivery method":

> a system used by an agency or owner for organizing and financing the design and construction of a structure or facility. Delivery methods focus on the assignment of legal and financial responsibility for a project to an organization or an individual providing design and construction services.[51]

47 For example, in the summary of leading cases provided by the court in Surespan, supra, note 6 at para. 54, each case cited by the court involved a public sector owner.

48 Renew Canada, "Project List 2018", Top 100: Canada's Biggest Infrastructure Projects, online: https://top100projects.ca/2018filters/>.

49 See, for example: Simona Baldi et al., "To Bid or Not to Bid: That is the Question: Public Procurement, Project Complexity and Corruption" (2016) Eur J of Pol Econ 43 at 89 and 91.

50 Canada's federal government and virtually every province have issued policies that call for openness and transparency in the award of public contracts, with the stated objective of guarding against the risk of corruption and obtaining economic efficiencies through competition. See, for example: Government of Canada, "Reviewing Government Contracting Practices", (24 May 2016) Office of the Procurement Ombudsman, online: <http://opo-boa.gc.ca/examen-reviewing-eng.html>.

This interest in new forms of project delivery was a response to widespread dissatisfaction with public procurement of infrastructure, which was characterized by significant cost overruns and delays.[52] Design-Bid-Build is an example of a traditional method of project delivery that sparked critique and influenced the implementation of new forms of project delivery.

Design-Build contracts have been in use for many years. In a Design-Build contract the owner signs a single contract for both design and construction. The objective of Design-Build is to permit and encourage the designer and the constructor to collaborate so as to achieve a design that meets the owner's functional needs, but that also can be constructed efficiently. In contrast, when using the Design-Bid-Build project delivery method an owner typically contracts a consultant to design the project and puts that design to a RFP for the general contractor. The general contractor is then responsible for constructing the project in accordance with the design set out in the RFP. A criticism of traditional Design-Bid-Build project implementation is that under that method the design phase, the bid phase and then the build phase occur sequentially, in silos, with little or no opportunity for information sharing, or optimization, between the phases. In Design-Bid-Build the design is typically prepared separately and finalized without any input required from the constructor, and as a result the design carries the risk of including avoidable high constructability costs. These higher costs could be reduced or minimized with little prejudice to the design if the designer had access to the constructor's construction methods and expertise. Advocates of Design-Build argue that in Design-Bid-Build parties are not motivated to find such efficiencies. In Design-Bid-Build the designer focuses on doing a good design, and the constructor is retained to simply construct that design. In a traditional Design-Bid-Build procurement the sole focus of the competition is the price of the construction of the design as presented in the tender documents, with no focus on, or even opportunity to consider, whether construction costs might be reduced by making minor design adjustments. In fact, in Design-Bid-Build the procurement documents traditionally forbid an owner from accepting a bid that contains design improvements or efficiencies because to do so would be to accept a noncompliant bid.

One new structure of project delivery that has found favour in Canada is the Public-Private-Partnership ("P3") structure, versions of which are being developed and used with increasing frequency.[53] There are many definitions of a P3. One definition is that a P3 is:

> A partnership agreement in the form of a long-term performance-based contract between the public sector (any level of government) and the private sector (usually a team of private sector companies working together) to deliver public infrastructure for citizens.[54]

The Canadian P3 models were developed with input from, in particular, consultants and advisors from Australia, UK, France and Spain where some of the earliest P3 projects were undertaken. Canada has become a recognized leader in P3s, with particularly extensive experience in Ontario, British Columbia, Alberta and Quebec.[55]

A P3 is in some ways simply an extension of the Design-Build theory because in a P3 the owner enters into a single contract covering multiple aspects of the project. Under a P3 each of the designer, the constructor, the operator/maintainer and the lender has an interest in the successful performance of that single contract and will therefore collaborate to achieve the best overall project, balancing all of the design, construction, operation, maintenance and financing factors.

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51 Lynn Thompson, "Integrated Project Delivery — Will the Federal Government Join This Industry Trend?" (2017) The Construction Lawyer 37:3 at 14.

52 See, for example: Darin Grimsey and Mervyn K. Lewis, "The Governance of Contractual Relationships in Public-Private Partnerships" (2004) J of Corp Citizenship 15, which discusses the use of public private partnerships as a response to the cost overruns and delays in traditional methods of public procurement.

53 Between 1990 and 2015, over 220 projects have been delivered by way of P3s in Canada: Matti Siemiatycki, "Public Private Partnerships in Canada: Reflections on Twenty Years of Practice", (2015) Canadian Public Administration 58:3 at 343.

54 Association of Consulting Engineering Companies, "Understanding Public Private Partnerships in Canada", online: https://www.acec.ca/advocacy/public_private_partnerships/p3s_in_canada/ index.html>, at 6, citing Partnerships BC [ACEC Position Paper].

55 The federal government soon followed suit. See, for example: the Canada Line Transit Project; the Surrey BC RCMP Division E Relocation Project; the Champlain Bridge Replacement Project.

Because new project delivery structures such as P3s were being applied by government owners, for the policy and regulatory reasons listed above they were required to be implemented by public procurement. The project delivery structures had to be developed, or where imported from other jurisdictions, adjusted, in order to be compatible with Canadian construction practices and palatable to Canadian contractors and consultants. As public procurements, P3s also had to be compatible with the Canadian common law of tendering.

However, as we discuss below, the common law of tendering does not simply apply to public procurements that award contracts implementing these new project structures. The common law of tendering also animates the procurement process. As we discuss below, the very success of a P3 structure depends on the application of the common law of tendering because the common law ensures the competition that is essential to the success of the procurement of these project delivery structures.

To illustrate further the importance and role of competition in project delivery structures, and how the common law of tendering facilitates that competition, we examine three issues that the new project delivery structures must address or take into account: (1) the identification and allocation of project risk (the "**Risk Allocation Issue**"); (2) unequal knowledge and expertise relating to the project (the "**Knowledge Gap Issue**"); and (3) the owner's limited ability to predict the most effective design for the project (the "**Design Challenge**"). In addressing these issues we will return to the two questions posed at the beginning of this paper.

3.3 The Risk Allocation Issue

One issue that has been identified as a key to improving and optimizing project delivery is risk. By "risk" we mean any event or factor than may or may not occur, but if it does will have some impact (cost, schedule, damage, etc.) on the project. Every construction contract includes identification of certain risks, and expressly or by inference allocates those risks to one party or the other. The interest in exploring new approaches to project delivery, and examinations of the relative benefits of different project delivery contract forms, led to a greater awareness of the significance of risk and the impact risk transfer has on project price. Two general conclusions can be drawn from these examinations:

1. public sector owners (and the contracts that were in common use) historically did not generally identify all the risks to the owner that are inherent in a project; and

2. most risks cannot be eliminated (such as geotechnical uncertainty or schedule risk), but the costs of a risk are affected by the approach the parties take to the risk.

These risk transfer/price discussions also led to another conclusion recognized by experienced practitioners, which was that, as a general rule, the owner pays the price for all risks, regardless of whether the risk is transferred or not. If the owner retains a risk, then if the risk materializes the owner pays for it directly. Alternatively, if the owner transfers the risk to the contractor, the knowledgeable contractor will, as a condition of accepting the risk, add a risk premium to the contract price to cover the possibility that the risk will occur, with the result that upon transfer of the risk the owner pays.

From these conclusions came the realization that the best approach for the owner is to identify the party that is best able to manage a given risk, and transfer the responsibility for that risk to that party. By giving the risk to the party best able to manage a risk, then the cost of the risk is minimized. That way, the risk causes the lowest cost, and the owner, who will pay in any event, minimizes its cost. An underlying theory of P3s is to re-organize and re-structure the allocation of risks so as to "give the responsibility to the counter party who, as between the counterparties, is in the best position to manage (and therefore to minimize the cost of) that risk."[56] This has become a mantra for P3 projects.

While the theory of "give the risk to the party best able to manage the risk" might be an optimum solution, the

56 See, for example: ACEC Position Paper, supra, note 54 at 4: "In any form of project delivery, including P3s, the best results are achieved when there is a fair sharing of risk and reward among the parties, including the consulting engineer, and when risk is allocated to the party best able to manage that risk." [Emphasis added.]

party who is that best manager might not be willing to accept the risk, or perhaps as significantly, will only accept the risk under certain terms and conditions.[57] It is all very well to determine the optimum risk allocation, but that determination is of no value if there is no counterparty willing to take that risk. In addition, the allocation of risk is only one side of the equation. There is always a price that accompanies the transfer of risk, and so the question becomes a double one for the owner: who will accept a given risk and at what price?

The growing awareness of the significance of risks was reflected in P3 procurements which developed techniques to identify material project risks and determine the price for those risks. The basic strategy for identifying the "party best able to manage" an identified risk and determining a contractor's realistic price to carry that risk is to invite qualified proponents to indicate their willingness and price to accept responsibility for a given risk through a competitive process. The rules for that process are as set out in the procurement documents.

3.4 The Knowledge Gap Issue

Another significant issue in large public sector project delivery is that the owner and the proponent are often not on equal footing with respect to knowledge and expertise relating to the design and construction of the project. Usually, the proponent is the expert with respect to the subject matter of the tender, and the owner is hopeful that the contract terms of the ultimate Contract B will be sufficient to protect the owner so that the owner receives what it is seeking for the agreed price. This unequal bargaining position becomes more evident the more complex the subject of the procurement. The market is continuously offering new materials, building components, construction methods with new construction equipment, and new suppliers that are likely beyond the knowledge of the government owner.

A government owner can retain external consultants with current knowledge and expertise to assist in the development and implementa-tion of an optimum project. However when an owner retains its own project team to bridge the Knowledge Gap it becomes vulnerable to the shortcomings of the Design-Bid-Build model. It is subject to the risk that it will make decisions, or take advice on decisions, that do not reflect all the factors that may be considered by a competitive multi-disciplinary team.

New project delivery methods such as P3s seek to tap into the current and often deeper knowledge and expertise of the private sector by inviting the proponents to offer solutions that reflect market-level knowledge and expertise. These methods, however, require that the procurement documents permit a degree of flexibility so as to encourage solutions which were unanticipated by the owner when it wrote the procurement documents. If the requirements of fairness and transparency require the owner to specify what is required in order for a bidder to win Contract B, then the owner may be prevented from receiving the optimum design since even with expert advice the owner may not have the expertise and knowledge required to properly set out requirements in advance.

3.5 The Design Challenge

Design is unquestionably a key factor in the cost of infrastructure or any construction project. By "design" we mean design writ large, including functional choices (e.g. exact location and number of lanes for the new bridge), technical choices (e.g. wood or concrete) and even aesthetic choices. The owner always has choices as to design, and classically in Design-Bid-Build, has made those choices before proceeding to procurement.

Design has been identified as potentially the most important factor in the total cost of a project.[58] The design defines the size of the project and also the materials that make up the project. Design also largely determines the construction methods that will be required, as well as the nature and cost of required maintenance and long term operating and staffing costs. In considering all these issues an owner may have expertise and knowledge with respect to some of them, but often does not have expertise with respect to

57 For example a small geotechnical consulting firm might be the best party to minimize geotechnical risk on a project, but most geotechnical firms are simply unwilling to accept unlimited geotechnical risk.

58 See, for example: Robert Lopez and Peter E.D. Love, "Design Error Costs in Construction Projects" (2013) 138:5 J. Constr. Eng. Manage. at 585, where the authors note that "the prevalence of design errors and their resultant cumulative negative effect upon the financial performance of organizations and projects is a leitmotiv within the construction industry."

them all.

New project delivery structures have tried to address ways for the owner to achieve an optimum design. Design, or elements of the design, can be the very subject of competitive procurement. The strategy behind new project delivery structures is to give the design question to qualified experts to competitively offer the best design solution. This is, of course, the strategy behind Design-Build contracts and P3s where design responsibilities are placed alongside cost and other factors in an effort to obtain a project that is optimized not only for price but other factors including specified design.

Returning to our two questions, the challenge with design competitions is to define in the competition documents sufficient criteria to give proper guidance to the competitors without inadvertently constraining design flexibility. For example, inviting alternate designs but mandating that low construction price will win can mean that the winning design must be the most utilitarian solution. Critics of "low-price wins" say that utilitarian solutions often do not provide the best overall value.

3.6 Managing the Risk Allocation Issue, the Knowledge Gap Issue and the Design Challenge Through Competition

The goal of a complex procurement is to use competition to identify optimal solutions to the Risk Allocation Issue, the Knowledge Gap Issue and the Design Challenge. One aim of this paper, in the context of an owner's duties of fairness and transparency and the two questions we posed at the outset, is to examine how the tendering system is used for that purpose. In particular:

1. With respect to Question 1, (Must an owner define in tender documents "what a bidder must do to win"?) we point out that an owner may not be able to completely define the contents of the winning bid because it simply is not in a position to give that definition. The owner is unlikely to know in advance the optimum risk allocation, the best work approach or the optimum design. These are the very questions that the owner may be seeking answers to in the procurement.

2. With respect to Question 2 (May the owner retain discretion in the evaluation of bids?) the complete answer is provided by *M.J.B.* where the Supreme Court of Canada said, in reference to schedule advantages, "It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost".[59] By referring to "other criteria" without limiting the scope to criteria that can be measured arithmetically, the court authorized the use of criteria that require judgment to apply, that is, those that require the exercise of discretion.

As project delivery considerations moved away from a strict focus on proposal price, other issues such as risk allocation, depth of expertise and design optimization became of greater interest. Arguably it is appropriate for an owner to include consideration of these issues, in addition to price, in the evaluation of proposals. While an owner must always meet a procedural duty of fairness, the measure of the relative value of different responses to these issues will not always be amenable to purely costing or price analysis, and will of necessity require that the owner retain and exercise a degree of discretion.

The competition in a procurement process provides motivation for proponents to offer viable and innovative responses to these issues. Without competition, a proponent could, for example, unreasonably price certain project risks, or take advantage of the Knowledge Gap to the owner's detriment. Competition seeks to ensure that the proponent who offers the owner the best overall solution for the Risk Allocation Issue, the Knowledge Gap Issue, and the Design Challenge will be awarded the contract. In other words, competition prompts viable responses to the issues that the owner could not conceive on its own. The full benefit of competition may be diminished if an owner is required to define "what a bidder must do to win" or is not permitted to retain discretion in the evaluation of bids.

59 Supra, note 8 at para. 46.

In the face of these conclusions, and the need for certainty and fairness, procurement processes have developed through which parties are able to competitively engage on these alternative factors, provide the owner with practical solutions and be confident that the owner will fairly assess them.

4. TENDERING SYSTEM: P3S AND OTHER LARGE CONTRACT PROCUREMENTS

Since the advent of new project delivery methods, and P3s in particular, academics have undertaken studies to try to identify accurate ways to identify and measure project risks, to analyse other similar project issues, and to develop procedures and methods to best deal with them. Organizations like the Canadian Council of Public Private Partnerships retained consultants to report to their members on such matters, to assist interested owners in implementing P3 structures, and to give credibility to P3s in the face of public scepticism and opposition.

In practice, the allocations of risk and responsibilities in P3s and other new project delivery structures were reallocations from the traditional allocations under normal construction and related contracts. From a practical viewpoint, the reallocations had to be negotiated and agreed to by the market invited to bid on contracts containing the reallocation. In many instances this market consultation is achieved through the procurement processes described below.

4.1 The Anatomy of a P3 Procurement — Mutual Cost and Effort

Iacobucci J. stated in *M.J.B.:*

The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd., supra,* at p. 30, with respect to a similar tendering process, this procedure is "heavily weighted in favour of the invitor". [60] [Emphasis added.]

There is no question that in the procurement of a large public infrastructure project, proponents must invest heavily with no guarantee of success. However, it may not be the case that the procedure is "heavily weighted in favour of the invitor". The procurement of a large public infrastructure project is a risky process for all participants, including the owner, and a successful procurement requires deliberate co-dependence between the owner and proponents.

As compared to a public sector project, in a private sector project the owner can more easily move into project implementation in smaller steps, first doing design and studies on a small scale until sufficient detail has been proved to justify the owner's full commitment. The private sector owner is not required to proceed by way of tender for any part of the project. It can enter into negotiations directly with, for example, long-lead equipment suppliers to place conditional manufacture-supply-install orders, or retain directly design consultants as needed to complete a design incrementally. In contrast, the public sector owner is generally required to run all steps in the implementation of a project through public competitive procurement.

For the public sector owner, by the time a large public infrastructure project is ready to go to public procurement the government owner will already be heavily invested. The project will already likely be the subject of public debate, scrutiny and perhaps political opposition. Preliminary reports at various levels will have been written and filed, and on larger projects even the budget allocations will have been made public. Those reports will have required engineering and financial studies to justify the project vis-à-vis other worthy competing projects. Before obtaining the authority to move forward with the project the government owner is already heavily invested in the project, financially and probably politically.

Having made this investment, as the public owner moves into the procurement stage it has several vital interests:

60 Ibid., at para. 41.

- it needs a procurement process that will produce credible, competitive proposals which the government can con-fidently foresee leading to a successful award of the project agreement;
- if possible, it would like early assurance that the proposal prices will be within budget. A government owner cannot commit itself to enter into any agreement that exceeds budgetary authority; and
- for the above reasons, it wants proposals from all short-listed proponents so as to give better credibility to the final contract price, and to increase the certainty that it will be able to reach a final, acceptable contract with one of the short-listed proponents.

The proponents' investment of effort and costs starts slowly and ramps up as the procurement goes through the short-listing stage (see Section 4.2) and into the proposal-preparation stage (see Section 4.3).

4.2 Request for Qualifications ("RFQ")

In the tendering process for a P3 project the owner expends the initial effort and expense. An RFQ stage generally precedes the RFP stage. The owner structures the RFQ to permit interested parties to respond with minimum effort and expense. For example, no design solutions, cost-estimates, or prices are invited at this stage. The RFQ simply requests qualifications (expertise, experience, know-how) and outlines the evaluation process the owner will use to select a short list. When responses are received the owner then incurs the cost and effort to evaluate and identify the (usually three) short-listed proponents.

The owner will usually take care in selecting the proponent short list. As discussed, the owner wants to be confident that a selected proponent will in fact fully participate in order to create competitive pressure.

Qualified interested parties want to see that other competing parties are also qualified and knowledgeable. A qualified proponent does not want to lose to a competitor that, through ignorance, submits an unrealistically low price and therefore wins.

4.3 RFP – Collaborative Process

Following the RFQ, the owner prepares the RFP, which is designed to be distributed only to the short-listed proponents. The RFP not only describes the tendering system that will be followed in inviting and evaluating proposals, but also includes a draft Contract B, including specifications and design requirements.

In preparing the RFP the owner is vitally concerned that all of the short-listed proponents will submit a bona fide proposal and therefore does not wish to offer an RFP that is unacceptable to a proponent. The owner not only wants to identify a winner, but is mindful that it is the full participation by each proponent which provides the incentive and competitive pressure to achieve optimum results. There can only be one winner, but prior to award all proponents, including the unsuccessful proponents, play a vital role in contributing to the incentive of each proponent to prepare and submit an optimal proposal including best price. The owner has an interest in not producing a one-sided RFP that would discourage proponents from submitting a proposal.

The RFP stage of a large infrastructure project often invites proposals that include design solutions as well as design and construction procedures, all for a fixed and committed price. Preparation of a proposal in response to the RFP requires all members of a proponent team to invest considerable effort and cost, as the proposal must address the project requirements that each team member would be responsible for if the proponent is ultimately successful.

In such a complex process, where all parties — the owner and each member of a proponent team — are required to make significant investments, it is in everyone's interest to do what they can to be sure that there are no misunderstandings. A proponent wants assurance, to the extent possible, that its proposal will not in some unanticipated way be unacceptable to the owner so as to be either evaluated lower or in the worst case, be non-compliant. The owner wants assurance that the requirements outlined in the RFP are acceptable to proponents and a reasonable basis for competition under the RFP.

In order to reduce the procurement process risks for both owner and proponent, the owner establishes procedures within the tendering system as described in the RFP to invite and permit comments and suggestions from the proponents on the RFP itself and on the draft Contract B. The RFP also includes a procedure by which individual proponents can meet confidentially and directly with the owner in order to

obtain confirmation that its efforts are not misguided. These are frequently called "Collaborative Meetings". The procedures set out in the RFP pursuant to which proponents can comment on elements of the RFP and draft Contract B, together with the Collaborative Meetings, create a "Collaborative Process."

Collaborative Meetings are particularly important in light of the Risk Allocation Issue, the Knowledge Gap Issue and the Design Challenge. Both the owner and the proponents have information to contribute in response to these issues. The owner wants to know if there are any issues in the RFP that are show-stoppers for any proponent which, if not amended, would mean that the proponent will decline to prepare and submit a proposal. If the proponent discovers elements of the project which are incomplete or ambiguous, or which have proven to be problematic on other projects, then the proponent does not want to guess as to how to respond and risk having its proposal evaluated lower. A proponent wants the maximum degree of certainty so it can be confident that it is producing a competitive proposal.

The need and utility of private confidential discussions is greater for issues on which the owner has invited innovation or where the owner might be surprised by a proponent's response to the issue. As discussed above, on issues pertaining to risk allocation, the inclusion of new materials or techniques, and design solutions, a proponent does not want to inadvertently propose a solution that, for reasons unknown to the proponent, is completely unacceptable to the owner. At the same time, the owner does not want to receive a completely unacceptable proposal and lose the competitive benefit of one of the proponents. The owner, however, may be ignorant to the issue in advance of receiving information from a proponent, and so is challenged to prescribe in advance precisely what is or is not acceptable.

4.4 The New Age Contract A

A confidential discussion between the owner and one bidder in which information might be exchanged that was not fully disclosed to other bidders was at one time considered an anathema to fair tendering. It was axiomatic that protection of the integrity of the tendering system mandated that at all times there be a level playing field and it was viewed as strictly forbidden for an owner to speak privately with one bidder without taking care to ensure that any information given to one bidder was shared with all bidders.

However, as discussed above it has become apparent to parties participating in complex procurements that the simple "level playing field" restriction does not serve the parties. Government owners were seeking optimum solutions from the procurement, and proponents were eager to respond, but in many instances the best solutions were achieved by applying confidential commercial or technical solutions which a proponent did not wish to share with competitors. A proponent is willing to spend effort and incur costs to identify and develop an innovative, cost-effective solution, if by doing so it improves its chance of winning. The improved opportunity to win is the incentive for a proponent to apply its knowledge and know-how to the owner's project challenges. If that incentive is properly offered and the proponent is successful in uncovering innovations, then the owner is the ultimate beneficiary, receiving a superior project at a lower cost. A proponent will not be motivated to make such efforts at innovation if the procurement rules require that its efforts be shared with its competitors.

Standard P3 procurement documents, as well as procurement documents for other project delivery structures, have developed provisions setting out the procedural rules that govern these information exchanges. These rules control, for example, how a proponent can submit questions and comments, and how the owner can answer. The purpose is not to diminish competition, but to heighten it, while taking steps to focus competition on the intended issues. At the heart of these rules are:

1. A statement that, provided fairness does not require disclosure, all information exchanged will be treated as confidential and only disclosed to other proponents with the consent of the discloser. An owner may not disclose information received from one proponent to a competitor for the purpose of improving the proposal of the competitor.

2. An articulation of the owner's need for and duty of fairness such that if information is given that alters the competition itself then the owner retains the right to share the information with other proponents. (For example, a proponent cannot claim confidentiality regarding an error it discovers in the specifications.)

It is apparent that the Collaborative Process presents the opportunity for unfairness, even if inadvertent. Consequently, the Collaborative Process places a burden on the owner to vigilantly guard against unfairness. The Supreme Court of Canada stated in *Bhasin v. Hrynew:*

> Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see *Swan and Adamski,* at §1.24.[61] [Emphasis added.]

This statement came as no surprise to those who have participated in complex procurements or Collaborative Meetings. Recognizing that proponents rely on the proper behaviour of owners, most complex procurements include the employment of a "Fairness Monitor": a qualified, independent person whose role it is to monitor all critical steps of the tendering systems, including Collaborative Meetings, with the duty to report on any unfairness that he or she observes. This role serves to give the proponents comfort that the owner is meeting its duty of fairness in the administration of the tendering system.

The rules of fairness are set out in the RFP, which contains express provision that the proponents, by participating in the Collaborative Process and other processes described in the RFP, and by submitting a proposal, consent to the terms of the RFP. To the extent that the owner has adjusted the terms of the RFP throughout the RFP process (including the terms of the draft Project Agreement attached to the RFP), the terms of the RFP are the result of negotiation and discussion between the owner and proponents. The entire approach has been implemented as a deliberate application and extension of the Contract A paradigm as first presented by Estey J. in *Ron Engineering* which stated that a procurement could include a preliminary Contract A, the terms of which are as set out in the tender documents. The refinement is that, to some extent Contract A is not "unilateral" as first suggested in *Ron Engineering*, but is an agreed-to preliminary agreement achieved through negotiations, undertaken during the RFP process.

5. CONCLUSIONS

The common law of tendering provides that there is an implied duty of procedural fairness included in a Contract A, by which the owner is not permitted to give an unfair advantage to any bidder. However, a Contract A does not include a common law implied duty of transparency *per se.* Providing an owner does not breach its duty of fairness:

1. the owner has no common law obligation to define precisely in the procurement documents what a bidder must do to win; and

2. the owner has no common law obligation to define precisely how it will evaluate bids and may, by provisions included in the procurement documents, retain discretion in the evaluation of bids.

The contract framework of Contract A/Contract B permits an owner the freedom to design a tendering system that permits exploration of complex issues and the exercise of discretion to find best value. This is a positive outcome for all players in the procurement system. For the owner, this level of process flexibility affords more opportunity to achieve optimizations through competition that may not be available in a more traditional, "transparent" tender model. Provided the owner's chosen tendering system is clearly defined and fairly implemented, this framework also benefits proponents by allowing them to engage more directly with the owner and fully exercise their resources in preparing a proposal without fear that their innovative solutions will be shared with competitors across a strictly regulated "level playing field".

61 Bhasin v. Hrynew, 2014 SCC 71, 2014 CarswellAlta 2046 at para. 60.