

**THE LAW OF TENDERING:
A HIDDEN TRAP FOR STRATA CORPORATIONS?**

by

John Mendes

**LESPERANCE MENDES
LAWYERS**

410 - 900 Howe Street
Vancouver, B.C. V6Z 2M4

(604) 685-3567 (tel)
(604) 685-7505 (fax)

The Law of Tendering: A Hidden Trap for Strata Corporations?

Consider the following scenario:

On being advised of building envelope defects, a strata corporation dutifully retains an engineer to prepare a building envelope assessment, an estimate of repair costs, and plans and specifications for the proposed remediation. The strata issues a call for tenders to ensure it obtains a competitive price.

After bids are received the Owners become concerned about the advice received from their engineer. As a result of these concerns, the strata corporation advises bidders that it will not be proceeding with the work in the call for tenders.

The low bidder sues the strata corporation, seeking damages for its loss of profits on the tendered project.

Does the contractor have a valid claim? A recent decision from our Court of Appeal reveals that the answer depends on the terms of the tender documents, the low bidder's compliance with these terms, and the strata's reasons for not proceeding with the tender: *Silex Restorations Ltd. v. The Owners, Strata Plan VR 2096*.¹

I. The Law of Tendering

A. The Traditional Approach

The *Silex* decision forms part of the modern law of tendering, which emerged in 1981. To understand this evolution, it is necessary to review some fundamentals of contract law. Three things are required in order for a contract to arise:

1. an *offer*,
2. an unconditional *acceptance* of that offer that is *communicated* to the other party while its offer is still valid, and
3. an exchange of something of value, known as *consideration*.

¹ (2002), 23 C.L.R. (3d) 36, affirmed (2004), 36 C.L.R. (3d) 73 (B.C.C.A.).

Traditionally, the law considered a call for tenders to be a request for bidders to make an offer in the form of a tender. A binding contract did not arise unless and until the owner accepted a bid. The consideration for this contract was the owner's promise to pay the contractor the amount of its bid in exchange for the contractor's promise to do the work described in the tender documents.

B. The Modern Approach

1. The Queen v. Ron Engineering

In 1981, the Supreme Court of Canada decided that the traditional approach to tendering was wrong. In *The Queen v. Ron Engineering & Construction (Eastern) Ltd.*² that Court considered a call for tenders for the construction of a water and sewage treatment plant. When tenders were opened Ron Engineering's bid of \$2,748,000 was \$632,000 lower than the second lowest bidder. Approximately one hour later Ron Engineering sent the Ministry a telex advising that its bid mistakenly omitted a cost of \$750,058, and requesting that it be allowed to withdraw its bid without forfeiting its deposit of \$150,000. The owner responded by asking Ron Engineering to sign the construction contract. Ron Engineering refused, and sued the Ministry for the return of its deposit.

Ron Engineering based its case on the traditional law of tendering. It argued that an owner could not lawfully accept an offer that it knew contained an error. Since a binding contract could not arise, the owner was required to return the bid deposit.

The Supreme Court of Canada rejected this argument. It held that tendering involves *two* separate agreements, "Contract A" and "Contract B". Contract B is straightforward - it is the construction contract entered into between the owner and the successful bidder.

The creation of Contract A was more controversial, and marked a radical departure from precedent. The Court concluded that an invitation to tender is properly understood as an offer, rather than an invitation to make an offer. Contract A arises when a contractor accepts this offer by submitting a valid bid. The terms of Contract A are set out in the tender documents.

In a later decision, our Court of Appeal summarized the reasoning in *Ron Engineering* as

² (1981), 119 D.L.R. (3d) 267.

follows:³

... an owner's invitation to tender constitutes an offer to all potential bidders. A contract ("Contract A") comes into existence when a contractor submits a tender in response to that offer. The terms and conditions of Contract A are governed by the terms and conditions in the call for tenders, which usually include that if the owner accepts the contractor's bid, the contractor will be obliged to enter the substantive construction contract ("Contract B"). Contract A will also usually include a term that bids are irrevocable once submitted and provide for forfeiture of the bid deposit in the event a contractor attempts to withdraw its tender.

The call for tenders specified that bids were irrevocable for 60 days. By withdrawing its tender Ron Engineering breached Contract A and forfeited its deposit.

2. The Duty of Fairness

The *Ron Engineering* decision set the stage for another case that has had a major impact on tendering in this Province. *Chinook Aggregates Ltd. v. Abbotsford*⁴ involved a call for tenders on a gravel crushing contract. The invitation to tender contained standard wording known in the industry as a "privilege clause", a term advising bidders that "the lowest or any tender will not necessarily be accepted" by the owner.

Chinook Aggregates submitted the lowest bid. Abbotsford nonetheless awarded the contract to a local contractor, in accordance with its policy of awarding contracts to local contractors whose tenders are within 10% of the lowest bid. This policy was not disclosed in the tender documents, for the obvious reason that Abbotsford did not want local contractors to relax their competitive pricing.

Chinook Aggregates sued. It argued that Contract A included not only the terms expressly set out in the invitation to tender, but also certain *implied terms*. These implied terms incorporated into Contract A practices so widely followed by the construction industry that they "go without saying".

Chinook Aggregates claimed that one well-recognised practice is that contracts are awarded to the lowest bidder qualified to do the work. An owner who follows an undisclosed policy of favouring local contractors disregards this practice and breaches an implied term of Contract A. Abbotsford replied that such a term could not be implied into its tender documents because of the privilege clause, which notified bidders that the lowest

³ *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, at para. 17.

⁴ (1987), 28 C.L.R. 290 (B.C.S.C.), appeal dismissed (1989), 35 C.L.R. 241 (C.A.).

bid would not necessarily be accepted.

Our Court of Appeal rejected Abbotsford's argument. It held:⁵

...it is inherent in the tendering process that the owner is inviting bidders to put in their lowest bid and that the bidders will respond accordingly. If the owner attaches an undisclosed term that is inconsistent with that tendering process, a term that the lowest qualified bid will be accepted will be implied in order to give effect to that process.

By awarding the contract to a local bidder, Abbotsford "was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others."⁶ Since *Chinook Aggregates*, our Courts have vigorously enforced this duty of fairness.

In *Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)* the British Columbia Supreme Court summarized an owner's duty of fairness as follows:⁷

In summary, there is an implied duty to treat all bidders fairly and equally. This includes treating all bids consistently and applying assumptions equally. Naturally, this requires disclosure of all the operative terms. If criteria other than the bid price are to play a part in the evaluation of tenders then notice of that must be given to all bidders. However, it is not necessary to disclose the exact weight allocated to each criterion. Nor is there an independent free standing duty of fairness independent of contract.

After *Chinook Aggregates* many owners grew reluctant to award the work to someone other than the low bidder. If the owner was not allowed to pass over the low bidder in *Chinook*, despite a clearly worded privilege clause and a good faith policy of favoring local bidders, some owners questioned whether they could ignore the lowest bidder under *any* circumstances. This sometimes presented a problem, particularly for public owners required to accept bids from all contractors to avoid any suggestion of favouritism. This system of "open tendering" was exploited by some contractors, who deliberately underbid work and made up lost revenue on the job by cutting corners and aggressively interpreting the contract in their favour.

Owners were therefore sometimes faced with a dilemma. They could accept a tender from a low bidder with a questionable reputation, and resign themselves to the likelihood that the project would be followed by costly litigation. Or they could accept a tender from a higher bidder with a reputation for delivering projects on time and on budget, and await the low bidder's lawsuit for breach of Contract A.

⁵ At page 249.

⁶ At page 248.

⁷ (2003), 29 C.L.R. (3d) 127 (S.C.), at para. 37; aff'd 2004 B.C.C.A. 485.

Fortunately for owners, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*⁸ the Supreme Court of Canada restored some balance to the law of tendering. The call for tenders in *M.J.B. Enterprises* also included a privilege clause advising that “the lowest or any tender shall not necessarily be accepted”. The Court held that a properly worded privilege clause means what it says, and allows the owner to award the work to someone other than the lowest bidder.⁹

... I find no support for the proposition that, in the face of a privilege clause such as the one at issue in this case, the lowest compliant bidder was to be accepted....

Therefore I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the lowest compliant bid. With respect to the latter proposition, the privilege clause must prevail.

3. Non-Compliant Bids

Ron Engineering held that Contract A comes into existence when a contractor submits a valid bid. What happens when a bid is invalid? Can the owner lawfully accept a bid that fails to comply with the terms of the call for tenders?

The Supreme Court of Canada answered this question nearly 20 years after *Ron Engineering*, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*¹⁰ *M.J.B. Enterprises* involved a call for tenders by the federal government for the construction of a pump house and water distribution system. The government awarded the work to Sorochan Enterprises Ltd., the low bidder. *M.J.B. Enterprises*, the second lowest bidder, sued on the basis that Sorochan’s bid failed to comply with the tender requirements and therefore could not be accepted by the owner.

The non-compliance related to the price of some of the work. The call for tenders stipulated that three types of fill could be used in certain trenches. Even though the cost of the fills varied considerably, bidders were required to provide one unit price per lineal metre of trench, regardless of the fill selected by the engineer.

M.J.B. provided one price for this work, as required by the tender documents. Sorochan attached a note to its bid advising that its unit price was based on the assumption that a certain type of fill would be used. If a more costly fill was required by the engineer, the

⁸ [1999] 1 S.C.R. 619

⁹ At paras. 30 and 48.

¹⁰ [1999] 1 S.C.R. 619

price would increase by \$60.00 per meter. The government relied on its privilege clause ("the lowest or any tender shall not necessarily be accepted") to accept the low bid from Sorochan.

The Supreme Court of Canada accepted M.J.B.'s argument that the privilege clause did not permit the federal government to accept a defective bid. Mr. Justice Iacobucci observed that approval of the government's conduct would undermine the competitive nature of the tendering process:¹¹

The rationale for the tendering process ... is to replace negotiation with competition. This competition entails certain risks for [bidders]. [A bidder] 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". It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid.

The Court accordingly held that the owner breached Contract A by accepting Sorochan's non-compliant bid.

M.J.B. Enterprises examined whether a standard privilege clause permits an owner to award a project to a non-compliant bidder. Such clauses are concerned with whether the work must be awarded to the low bidder or at all, and do not expressly address defective bids. Many calls for tenders contemplate this second scenario, and purport to allow the owner to disqualify or accept defective bids. Would such a "discretion clause" have saved the government in *M.J.B. Enterprises*?

Our Court of Appeal addressed the effect of discretion clauses in *Graham Industrial Services Ltd. v. Greater Vancouver Water District*.¹² The Water District sought tenders for the construction of a pumping station. Graham Industrial's bid of \$21,451,881 was about \$5,000,000 lower than the next lowest bidder. Immediately after the bids were opened, Graham advised that its bid contained a \$2,000,000 error and, like Ron Engineering, sought to withdraw it.

Graham Industrial later took the position that its bid did not conform to the tender requirements, and therefore could not be accepted by the owner. Graham cited a number of defects, including its failure to provide detailed summaries of its hauling operations and

¹¹ At paragraph 41.

¹² (2004), 25 B.C.L.R. (4th) 214.

plans for environmental mitigation, as required by the tender documents. Graham's bid included general statements that it would comply with these requirements but offered little in the way of detail.

The Water District replied that it had reviewed the bids and considered Graham Industrial's bid to be without significant defects. It relied on the following discretion clause to award the work to Graham:

10.1 If a Tender contains a defect or fails in some way to comply with the requirements of the Tender Documents, which in the sole discretion of the Corporation is not material, the Corporation may waive the defect and accept the Tender.

The Court of Appeal upheld Graham Industrial's right to walk away from the project. It held that a discretion clause is effective only once Contract A comes into existence. Contract A could not arise in this case because Graham Industrial delivered a bid that was "materially" non-compliant.

The Court defined material non-compliance as follows:¹³

... material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

The failure to give adequate details of its hauling operations and environmental mitigation was deemed to be material.

The Court held that discretion clauses confer a limited right to disregard defects. Such clauses do not entitle an owner to accept a bid that fails to "substantially" or "materially" comply with "important" or "essential" tender requirements. A properly worded discretion clause is effective only if there is a lack of "strict" compliance with "immaterial" requirements.

Which side of this distinction a defective bid falls under is not always clear. This was illustrated by our Court of Appeal's reasoning in *Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)*.¹⁴ The Regional District issued a request for proposals for the construction of a sewage treatment plant in Comox. The lowest tenders were submitted by Kinetic Construction (\$1,494,790) and D. Robinson Contracting (\$1,495,000).

¹³ At paragraph 34.

¹⁴ (2003), 29 C.L.R. (3d) 127 (S.C.), aff'd 2004 B.C.C.A. 485.

The Regional District awarded to work to Robinson Contracting even though its bid contained two irregularities. The first was a note added to Robinson's bid advising that if the contract required floors to be painted, the bid price would increase by \$5,230. The second defect was Robinson's inability to obtain insurance for the six year period required in the call for tenders. A note advised that the cost of this insurance was not included in Robinson's price.

The owner awarded the work to Robinson Contracting. It based its decision on its consultant's advice that Robinson was the superior contractor, and that the two qualifications in its bid would not result in a significant increase in price.

The Regional District's instructions to bidders included the following discretion clauses:

1. The Owner reserves the right in its absolute discretion to accept the Tender which it deems most advantageous to itself and the right to reject any or all Tenders, in each case without giving any notice. The lowest or any Tender will not necessarily be accepted. In no event will the Owner be responsible for the costs of preparation or submission of a Tender.
2. Tenders which contain qualifying conditions or otherwise fail to conform to the instructions to Tenderers may be disqualified or rejected. The Owner may, however, in its sole discretion, reject or retain for its consideration Tenderers, which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers.

The Trial Judge concluded that these clauses allowed the Regional District to accept Robinson's defective bid.¹⁵

In summary then, where there is no express clause allowing acceptance of non-compliant bids, it may be implied, as it was in *MJB, supra*, that only compliant bids will be accepted. If there is a clause allowing the acceptance of a non-compliant bid, then as in *Midwest, supra*, a non-compliant bid will not automatically give rise to a Contract A. However, there is no principle of law requiring the rejection of a non-compliant bid in favour of a compliant bid if the tender documents expressly reserve to the person requesting tenders the right to treat with non-compliant tenders. In situations where the tender documents expressly provide for the ability to accept non-compliant bids, the person calling for tenders has the discretion to accept a non-compliant bid and thereby create a Contract A with the non-compliant bidder. Once that occurs, a duty arises to treat the non-compliant bid and any compliant bids fairly.

This conclusion was affirmed on appeal. Mr. Justice Braidwood observed that the outcome of each case will depend on the specific wording of each call for tenders. Madam Justice Southin added:¹⁶

¹⁵ (2003), 29 C.L.R. (3d) 127 (S.C.), at paragraph 31.

¹⁶ 2004 B.C.C.A. 485, at paragraph 5.

Contract A is the contract which is made between a conforming bidder and the owner. There is no question that in this case Contract A arose. But if the owner does not go forward and give the construction contract to that conforming bidder but to someone else whose bid did not conform, the issue is whether, as Mr. Justice Braidwood has pointed out, the owner has in any way committed a breach of Contract A, the terms of which are found in the invitation to tender. There was no breach because Article 23 construed in light of the whole of the invitation permitted the owner to do what the owner did.

The law therefore appears to be in a state of flux. On the one hand, *M.J.B. Enterprises* and *Graham Industrial* indicate that an owner can never accept a materially non-compliant bid, regardless of the wording in its call for tenders. On the other hand, *Kinetic Construction* suggests that irregularities related to price and insurance (both of which would appear to be material) can be excused under an appropriately-worded discretion clause.

4. Damages

For a while, there was some debate in the case law about the damages payable to a bidder wrongfully deprived of a contract. Some cases held that the bidder was entitled to the profits that it would have earned on the project. A few decisions awarded the cost of preparing the unsuccessful bid only. The difference between the two approaches is significant as the profit on some large projects can be in the millions, while the cost of preparing most bids is under \$50,000.

The Supreme Court of Canada brought an end to this debate in *M.J.B. Enterprises*. It concluded that a bidder should be entitled to its loss of profits if it can prove that the owner would have awarded it the work. The Court found that the government would have awarded the work to M.J.B., the lowest *valid* bidder, if it had not awarded the work to Sorochan. M.J.B. was therefore given judgment for its loss of profits (approximately \$400,000).

Some owners can establish that they would have awarded the work to someone other than the plaintiff, perhaps because of the other bidder's superior reputation, or would not have awarded the work at all. These owners may avoid liability for loss of profits. Other owners will have a difficult time establishing that they would not have awarded the work to the plaintiff, and will be liable for that bidder's loss of profits.

II. **Silex Restorations Ltd. v. Strata Plan VR 2096**

Our client was a Vancouver strata corporation that issued a call for tenders for its building envelope repair work. The Owners planned to approve funding for these repairs after bids had been received and the actual cost of the work was known.

The instructions to bidders forming part of the tender documents required bids to be irrevocable for 90 days, and accompanied by bid security in the amount of 10% of the tender price.¹⁷ The instructions also gave the strata considerable discretion to reject and evaluate bids. The discretion clause provided:

- 5.1 At its sole discretion, the owner may reject as informal or irregular any tender which:
- .1 Is incomplete, conditional, obscure or contains qualifications.
 - .2 Fails to strictly conform with the substantive and procedural requirements of the Tender Documents, or
 - .3 Contains alterations, erasures, omissions per [sic] irregularities of any kind.

A privilege clause allowed the strata corporation to consider “any” criteria, including “criteria which the Owner, in its sole discretion, may consider appropriate to its evaluation”. Section 7.2.3 of the Instructions further provided:

- 7.2.3 Notwithstanding any custom in the trade or industry, or any previous policy or practice, the Owner may no [sic] necessarily accept the lowest or any tender. In its sole discretion, the Owner reserves the right to reject any or all tenders and to accept any tender which the Owner considers advantageous, whether or not it is the lowest tender.

After the close of tenders, the lowest bidder discovered a significant error in its bid price. Not wishing to take advantage of this mistake, the strata allowed the bidder to withdraw its tender. This left Silex as the lowest of the remaining bidders.

The bid delivered by Silex failed to comply with the Instructions to Bidders in a number of respects. Most importantly, it was accompanied by a bid bond that was valid for only 60 days, rather than the 90 days during which the bids were required to remain open.

Strata council satisfied itself that Silex’s references were in order. In August 2000, a Council member telephoned Silex to advise that it had been awarded the work, and request its performance bond.¹⁸ Believing the work had to be awarded prior to expiry of Silex’s 60-day bid bond, another Council member asked Silex to extend its bid bond by 30 days.

Throughout these discussions, neither the strata corporation nor Silex was aware that Silex’s bid failed to comply with the 90-day bid bond requirement in the instructions to bidders. Silex became aware of this problem shortly after Council asked for an extension

¹⁷ Such security, usually in the form of a bid bond or certified cheque, may be enforced by the owner if the selected bidder refuses to enter into a contract for the work.

¹⁸ A form of security that can be exercised if a contractor fails to complete the work under its contract.

of the bid bond, but failed to disclose its non-compliance to Council.

On September 12, 2000 our firm advised Silex that its tender would be accepted, subject to extension of its bid bond to 90 days and approval of funding for the repairs at a Special General Meeting to be held by October 18, 2000.

After this letter, strata council learned that an architectural firm retained to provide a second opinion on the plans and specifications issued with the call for tenders had concerns about the proposed work. The strata corporation advised its engineers on October 4, 2000 that their services were no longer required. The strata advised Silex that the Owners did not intend to proceed with the tendered repairs, and invited Silex to bid on a revised scope of work.

At their October 18, 2000 Special General Meeting the Owners voted to not proceed with the work proposed by their original engineers. Silex sued the strata corporation two months later.

Silex's arguments at trial were summarized as follows by our Court of Appeal:¹⁹

Silex presented the case at trial on the theory that Contract A had been created in one of two ways, either immediately upon Silex filing its bid, or if that bid was seen as non-compliant with the invitation to tender, through the subsequent waiver of the non-compliance by a member of the Strata Corporation in August 2002 or subsequently. Silex contended that the Strata Corporation had breached Contract A by refusing to sign Contract B, the contract for the remediation work, for reasons other than those contemplated by the terms of Contract A. One of those wrongful reasons, Silex said, was that the Strata Corporation made acceptance of the bid conditional on the Strata Corporation authorizing funds for the remediation work, a condition not disclosed in the invitation to tender.

The Trial Judge dismissed these arguments. The Court found that Silex's bid was non-compliant because it was not accompanied by a 90-day bid bond, and that this non-compliance was not waived²⁰ by the strata corporation.

Silex altered its theory on appeal. It submitted, as it had at trial, that Contract A was created by its submission of a bid sufficiently compliant with the invitation to tender. But Silex added that the strata corporation had actually accepted Silex's bid in August 2002, thereby requiring the strata to enter into Contract B.

The Court of Appeal, following its earlier reasoning in *Graham Industrial*, held that Contract

¹⁹ (2002), 23 C.L.R. (3d) 36, aff'd (2004), 36 C.L.R. (3d) 73 (B.C.C.A.).

²⁰ A legal principle acknowledging that a party may, by its words or conduct, renounce its legal rights.

A will come into existence between an owner and contractor only if the contractor's bid "substantially complies" with the call for tenders. Silex's failure to include a 90-day bid bond with its bid was a material defect precluding substantial compliance. Contract A therefore failed to come into existence.²¹

The Court of Appeal also rejected the argument that the August 2000 discussion in which a Council member advised Silex that its bid had been accepted constituted lawful acceptance of the bid, regardless of its defects. The Court dismissed this argument for two reasons. It held firstly that the August discussion, viewed in its proper context, could not be considered an unconditional acceptance of Silex's bid. The Court cited a number of reasons for this conclusion, including:

- a. the strata was not aware of the problems with Silex's bid bond at the time of its alleged acceptance of the bid, and always intended any acceptance to be subject to the approval of the Owners at a Special General Meeting;
- b. subsequent negotiations between Silex and the strata were inconsistent with an earlier unconditional acceptance;
- c. the strata never issued a formal notice of award to Silex, and there was no evidence that the performance bond requested by the Owners was ever delivered by Silex.

The Court also determined that Silex should not be allowed to claim that its bid had been accepted by the strata, because of the manner in which it presented its case at trial. Silex failed to plead²² in Supreme Court that its bid had been accepted. It declined an opportunity to apply to amend its pleadings before the Trial Judge. The Court of Appeal found that the strata would be prejudiced if Silex were allowed to raise this new argument on appeal, and dismissed it for procedural reasons.

III. Avoiding the Traps

Silex Restorations is the first decision in Canada applying the law of tendering to strata corporations. But it is unlikely to be the last.

²¹ At paragraphs 26 - 31.

²² A party's pleadings are documents filed with the Court that formally set out its claim or defence. A party cannot raise arguments not included in its pleadings, without leave of the Court.

The law of tendering is one of the most lucrative forms of litigation for contractors. The cost of taking a case to trial is reasonable, with most trials lasting no longer than a few days. The pay-off, on the other hand, can be huge. A contractor can earn its entire profit on a project without ever setting foot on site. It is little wonder that most construction cases decided in the Courts today involve tendering disputes.

Strata corporations involved in building envelope remediation projects are particularly vulnerable to these claims. It is common practice for strata corporations to tender the repair work, in order to obtain competitive prices. Many projects cost well over \$1 million, giving a disappointed bidder considerable incentive to speak to a lawyer.

To make matters worse, the limitation period²³ for commencing an action against an owner is six years. This means that a strata corporation can be sued well after its building envelope repairs have been completed.

How can a strata corporation reduce its exposure to these types of claims? The most effective way is by paying attention to the wording of its call for tenders. Measures that may be taken include:

- a. Properly drafted discretion and privilege clauses that give the owner latitude to reject defective bids, and to choose any bid that meets its needs. If money for the repairs has not been raised, the privilege clause should notify bidders that an award is subject to approving the required special levy at an SGM.
- b. A paragraph may be added limiting a bidder's damages in the event of a breach of Contract A to the cost of preparing its bid. A contractor may lose its motivation to sue if the prospect of receiving its profits on the job is removed.
- c. More radically, the strata may opt out of the tendering process altogether. Contractors may be advised that their submissions will not be considered a tender, and will not give rise to Contract A.

Strata corporations can also protect themselves during the tendering process. The strata should have its consultant carefully review its preferred bid prior to acceptance. This will disclose whether the bid is non-compliant, and presents the risk of a claim from a compliant bidder. Irregular bids are quite common. Tender requirements are often extensive and many bids are finalized on the eve of the close of tenders, increasing the risk of errors.

If the lowest bid is non-compliant, an owner may find itself in the unenviable position of

²³ A limitation period is a deadline for suing, set out in the *Limitation Act*, and sometimes in other legislation or the agreement between the parties.

deciding whom will it will be sued by. Will it accept the non-compliant bid and face a claim from the lowest compliant bidder? Or will it accept the lowest compliant bid and face a lawsuit from the non-compliant bidder, claiming its non-compliance was insignificant and should have been overlooked under the discretion clause?

Legal advice should be sought immediately if an owner is faced with such a dilemma. One possibility may be a Court application prior to the deadline for awarding the work, to determine who is legally entitled to the contract.²⁴

No amount of diligence can guarantee that an owner will avoid being sued. The foregoing precautions can, however, help strata corporations sidestep some of the traps posed by the modern law of tendering.

John G. Mendes
November 27, 2004

24

This was done by the owner (the Ministry of Transportation) in *British Columbia v. SCI Engineers & Constructors Inc.*, (1993), 22 B.C.A.C. 89.