



Keith Burkhardt



SHERRARD KUZZ^{LLP}
Employment & Labour Lawyers

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Rob Kennaley

**COVID-19 and CONSTRUCTION:
IDENTIFYING ISSUES and MANAGING RISK**

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Bidding and Tendering after COVID-19

- ❖ COVID-19 Risks will and should be addressed in the Contract Documents
 - ❖ is the virus, any virus or a pandemic specifically addressed as part of the *force majeure* clause?
 - ❖ how will orders impacting or stopping work be addressed? Will the contractor/subcontractors be entitled to additional compensation?

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Bidding and Tendering after COVID-19

- ❖ COVID-19 Risks will and should be addressed in the Contract Documents
 - ❖ who will pay for additional OHS/A requirements, including testing, PPE and social distancing requirements?
 - ❖ who bears the risk if subtrades or suppliers refuse to attend or perform as originally contemplated for OHS/A reasons?

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Bidding and Tendering after COVID-19

- ❖ COVID-19 Risks will and should be addressed in the Contract Documents
 - ❖ what insurance is available? All Risks? Builder's Risk? How will business interruption be dealt with, if at all?
 - ❖ what insurance *will be required*?
 - ❖ *Active Fire Protection 2000 Ltd. v. B.W.K. Construction Co.*, 2005 CanLII 24226 (ONCA)

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Bidding and Tendering after COVID-19

- ❖ A formal tender process is, of course, only one way buyers and sellers can come together in construction
- ❖ Other Ways May Include:
 - The Purchase Order
 - The Unsolicited Quote
 - The Request for a Quotation
 - The Request for Proposals

The Tender Process

- ❖ *R. v. Ron Engineering and Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111
 - The terms of Contract “A” included bid irrevocability and the obligation to enter Contract “B” upon award
- ❖ *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943
 - “the Contract A/Contract B approach rests on ordinary principles of contract formation, and there is no reason in principle why the same approach should not apply at this lower level”

The Tender Process

- ❖ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619

found an implied term that only compliant bids would be considered;

held that the privilege clause did not allow the Owner to award to a non-compliant bidder; and

held that if the owner is to award based on factors other than price, those criteria should be disclosed in the tender documents;

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The Tender Process

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

found an implied term requiring the Owner to be fair in the assessment of bids towards “protecting and promoting the integrity of the bidding process”;

held the duty requires tender authorities to treat all bids consistently, apply assumptions evenly and avoid “colourable” attempts to “achieve a desired result”.

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The Tender Process

- ❖ after *M.J.B. & Martel* (in a Contract A/Contract B tender scenario, and depending on the terms of the tender call):

only compliant bids should be considered;

only disclosed criteria should be considered;

factors other than price can be considered, if disclosed;

there is a duty to treat bidders fairly and equally, avoid bid-shopping and avoid “colourable” conduct towards desired outcomes.

The Tender Process

- ❖ However, the parties can potentially limit or waive damages for breaches of Contract “A”:

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), 2010 SCC 4 (CanLII), [2010] 1 SCR 69

Rankin Construction Inc. v. Ontario, 2014 ONCA 636 (CanLII)

The Tender Process

- ❖ Applying *MJB*, *Martel* and *Tercon* in the context of COVID-19:

owners / tender authorities need to carefully draft the tender documents and construction contract;

owners / tender authorities need to carefully administer a tender process; and

bidders need to carefully read the tender documents and requirements of the construction contract / subcontract;

The Tender Process

- ❖ Applying *MJB*, *Martel* and *Tercon* in the context of COVID-19:

beware the non-compliant bid and non-disclosed criteria;

consider fully and properly taking advantage of the “Q&A phase” during a tender process

The Tender Process

❖ Regardless:

contractors should incorporate the prime into their subcontracts;

subtrades need to read the prime contract if it is incorporated; and

contractor/subtrade disputes over which contract document governs need to be avoided.

The *Construction Act*

❖ The *Construction Act* changes must be considered:

when drafting any Contract or Subcontract!!!!

in any bidding and tendering circumstance!!!

The *Construction Act*

❖ Substantive changes already came into force* on July 1, 2018:

- | | |
|---|----------------------------------|
| ❖ longer lien timeframes; | ❖ bonding on “public contracts”; |
| ❖ new contract termination provisions | ❖ changes to what is lienable; |
| ❖ changes in holdback procedures; | ❖ enhanced trust obligations; |
| ❖ new publication requirements | ❖ re: the leasehold lien |
| ❖ an expanded scope of the s.39 request | |

* In relation to contracts procured or entered into after that date

The *Construction Act*

❖ Substantive changes already came into force* on July 1, 2018:

❖ **areas** can, will and should be addressed in contracts and subcontracts

- | | |
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The *Construction Act*

- ❖ Two ***extremely significant*** changes came into force* Oct 1, 2019:
 - ❖ **prompt payment**, which will make the payment of funds mandatory on strict timelines unless notices of non-payment provisions are given;
 - ❖ **adjudication** which will allow for the resolution of disputes in as quickly as 46 days

* In relation to contracts procured or entered into after that date

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The *Construction Act*

- ❖ Two ***extremely significant*** changes came into force* Oct 1, 2019:
 - ❖ **prompt payment** terms are mandatory, which means that every form of contract or subcontract which has not been amended to conform with the new requirements is void when it comes to payment provisions!;
 - ❖ we suggest that contracts and subcontracts be amended to comply with the new payment requirements;
 - ❖ also, there are many ways that parties can manage the practical difficulties and legal risks associated with prompt payment, through various contractual terms and conditions; and
 - ❖ the management of these difficulties and risks need to be considered in reviewing and drafting construction tenders, contracts and subcontract.

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The *Construction Act*

- ❖ Two ***extremely significant*** changes came into force* Oct 1, 2019:
 - ❖ **adjudication** imposes extremely strict timelines on the (at least interim) resolution of virtually any dispute that can be raised in construction.
 - ❖ it puts an incredible amount of discretion and decision making authority in the hands of an adjudicator, whose appointment might be imposed on the parties and who may or may not have either legal experience or experience with the subject matter of the dispute
 - ❖ again, the management of adjudicator's selection and discretion, and of what will be adjudicated when, and on what terms, needs to be considered in reviewing and drafting construction tenders, contracts and subcontracts

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The *Construction Act*

- ❖ **In the end, because of :**
 - COVID-19;
 - the **July 1, 2018** *Construction Act* changes;
 - the **prompt payment** *Construction Act* changes; and
 - the **adjudication** *Construction Act* changes ...

if there was ***ever*** a time to redo your form of tender package, contract, subcontract or purchase order, ***that time is now!!!***

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The Construction Act

See our Tool Kit available on our Website

Ontario's New Construction Act:
Preparing for a New World

Guides to the July 1, 2018 Changes
- and to -
Prompt Payment and Adjudication

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