SUPREME COURT OF CANADA

CITATION: Double N Earthmovers Ltd. *v.* Edmonton (City), 2007 SCC 3

DATE: 20070125
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BETWEEN:

Double N Earthmovers Ltd.
Appellant
and
City of Edmonton and Sureway Construction of Alberta Ltd.
Respondents

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 75)	Abella and Rothstein JJ. (LeBel, Deschamps and Fish JJ. concurring)
DISSENTING REASONS: (paras. 76 to 131)	Charron J. (McLachlin C.J. and Bastarache and Binnie JJ. concurring)

double n earthmovers *v.* edmonton

Double N Earthmovers Ltd. *Appellant*

v.

City of Edmonton and Sureway Construction of Alberta Ltd. *Respondents*

Indexed as: Double N Earthmovers Ltd. *v.* Edmonton (City)

Neutral citation: 2006 SCC 3.

File No.: 30915.

2006: June 16; 2007: January 25.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

Contracts — Tenders — City's tender specifying maximum age of equipment to be used on project — Contract awarded to lower bidder whose equipment was not all 1980 or newer — City informed by rival bidder prior to awarding of contract that lower bidder did not comply with 1980 equipment requirement — Information not investigated by City — Whether City accepted non-compliant bid — Whether City had duty to

investigate if equipment met tender specifications — Whether contract awarded on terms other than those set out in tender documents — Whether City violated its duty to rival bidder by permitting successful bidder to supply pre-1980 equipment — Whether City's pre-award negotiations with bidders amounted to "bid shopping".

Edmonton's call for tenders for the supply of equipment and operators stipulated that all equipment be 1980 or newer. The Conditions of Tender provided that the serial number and the City's licence registration number were to be provided for every piece of equipment, that "failure to comply either in whole or in part may invalidate the bid" and that the "City reserves the right to reject any and all Tenders, and to waive any informality". In its bid, Sureway Construction Ltd. listed a 1980 unit as Item 1 and a "1977 or 1980 Rental Unit" as Item 2. The City awarded the contract (Contract B) to Sureway and insisted on compliance with the 1980 requirement. When Sureway subsequently indicated that it would be supplying a 1979 unit, the City did not pursue the matter further. Although Sureway eventually replaced this unit, some of the work was performed by pre-1980 equipment through the duration of the 30-month contract. Double N Earthmovers Ltd., a rival bidder, claimed that the City breached the duties owed to it under the bidding contract (Contract A) and sued for the profits it would have realized had it been awarded Contract B. Double N had informed the City that Sureway did not own 1980 or newer equipment before Contract B was awarded but the City did not investigate. It was conceded that Contract A arose between the City and Double N. The trial judge dismissed the action and the Court of Appeal upheld that decision.

Held (McLachlin C.J. and Bastarache, Binnie and Charron JJ. dissenting): The appeal should be dismissed.

Per LeBel, Deschamps, Fish, **Abella** and **Rothstein JJ.:** The City did not accept a non-compliant bid. Although Unit 1 was manufactured in 1979, Sureway promised on the face of its bid to supply a 1980 unit as Item 1, and this is what the City accepted when it issued its Purchase Order. Sureway was obliged under the terms of its bid to supply a 1980 unit and that obligation was enforceable by the City. With respect to Item 2, the Conditions of Tender made bidders aware that not every failure to comply with the tender requirements would invalidate a bid. The absence of licence and serial numbers for the 1980 rental unit in Sureway's bid was precisely the sort of informality which would not materially affect the price or performance of Contract B. Since the provision of licence and serial numbers was not an essential term of the tender documents in this case, they were capable of being waived by the City. The bidding process represents a commitment to comply with what is bid. The tender documents did not prevent the City from accepting a promise to provide rental equipment or equipment not previously registered with the City. Where an owner accepts only a compliant option offered by a bidder, as the City did in its Purchase Order, there is no breach of any obligation of fairness owed to other bidders. [35] [39] [41-43]

The City did not breach any duties owed to Double N by failing to investigate Sureway's bid. Since each bidder is legally obliged to comply if its bid is accepted, there is no reason why bidders would expect an owner to investigate whether a bidder will comply. There was also neither an express nor an implied obligation in the tender documents to investigate the equipment bid prior to the acceptance. To imply such a duty would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. All bids must receive equal treatment to protect the bidding process and, to that end, an owner must weigh bids on the basis of what is actually in the bid and not

on the basis of subsequently discovered information. Allegations raised by rival bidders do not compel owners to investigate the bids made by others. [49-54]

The City's pre-award negotiations did not amount to "bid shopping". The City was specifically entitled by its conditions of tender to negotiate with the lowest compliant bidder after its initial evaluation and its exercising this right was no breach of its Contract A with Double N. The relevant time in the specific condition was any time after the tenders had been opened and the context was the tendering period, not the period after acceptance. [59-60]

The City did not enter into a contract on terms other than on terms as set out in the bidding documents and accordingly did not violate any duties owed to Double N. At the moment the City communicated its acceptance of Sureway's bid to Sureway, a 1980 unit was what Sureway promised and was obliged to supply. Although Sureway was subsequently found to be deceitful with respect to Item 1, it was its intentions at the time its bid was accepted that were relevant. Further, since the City did not know of the deceit until after it had accepted Sureway's tender, there was no collusion between the City and Sureway to disregard tender terms. [65-67]

The City did not violate its duties owed to Double N under Contract A by permitting Sureway to supply equipment manufactured prior to 1980. The owner's obligation to unsuccessful bidders, and its implied obligation to treat bidders fairly, does not survive the creation of Contract B with the successful bidder. The conduct Double N complained of — the waiver by the City of the 1980 requirement — occurred after the award of Contract B. Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed

and any obligations on the part of the owner to unsuccessful bidders have been fully discharged. Contract B is a distinct contract; the unsuccessful bidders are not privy to it. [69] [71]

Per McLachlin C.J. and Bastarache, Binnie and **Charron** JJ. (dissenting): The City breached its obligations to Double N to accept only a compliant bid and to treat all bidders fairly and equally. [126]

The requirement that all units bid be 1980 or newer was a material term of the tender. While there is much merit to the contention that an owner should be entitled to take a submitted bid at face value, the tender documents must be carefully reviewed and considered in their totality. Here, in addition to the year of the unit, the bidder had to provide the serial number and the City registration number for that unit. Given the circumstances of this case, it was not open to the City to ignore these specifications. The City's casual approach to Sureway's bid, particularly in light of the warning it received about the bid's likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant. Checking the equipment particulars — particulars which the City itself called for — against its own records was one such reasonable step the City was obliged to take in evaluating the bids for compliance. Had it done so, it would have readily uncovered Sureway's deceit in respect of Unit 1. [111] [114] [116]

With respect to Unit 2, Sureway's bid was, at best, ambiguous. On its face, it offered to supply a particular 1977 unit or an unidentified 1980 rental unit. The absence of any information about the proposed 1980 rental unit concerned a material condition of

the tender and was not a mere informality which the City had the right to waive. The City's right to insist on compliance could not turn what was on its face a non-compliant bid into a compliant one. The integrity of the bidding process is not protected by allowing a bidder to submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects to get rid of the competition unfairly, and then hash it out with the owner after it has been awarded the contract. By failing to insist on compliance with an essential term of the tender, the City breached its duty under Contract A to treat all bidders fairly and equally. The City cannot escape this fundamental obligation by postponing the fulfilment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier in the process. [120-125]

Cases Cited

By Abella and Rothstein JJ.

Applied: *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; **referred to:** *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, 2001 SCC 58; *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)* (2004), 242 D.L.R. (4th) 720, 2004 BCSC 1038, aff'd (2006), 266 D.L.R. (4th) 20, 2006 BCCA 246.

By Charron J. (dissenting)

The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *British Columbia v. SCI Engineers & Constructors Inc.* (1993), 22 B.C.A.C. 89; *Silex Restorations Ltd. v. Strata Plan VR 2096* (2004), 35 B.C.L.R. (4th) 387, 2004 BCCA 376; *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, 2004 BCCA 5.

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APPEAL from a judgment of Alberta Court of Appeal (McFadyen, Russell and Berger JJ.A.) (2005), 41 Alta. L.R. (4th) 205, 363 A.R. 201, 6 M.P.L.R. (4th) 25, [2005] 10 W.W.R. 1, [2005] A.J. No. 221 (QL), 2005 ABCA 104, affirming a decision of Marceau J. (1998), 57 Alta. L.R. (3d) 288, 213 A.R. 81, [1998] 6 W.W.R. 486, [1998] A.J. No. 51 (QL), 1998 ABQB 31. Appeal dismissed, McLachlin C.J. and Bastarache, Binnie and Charron JJ. dissenting.

Brian A. Crane, Q.C., and *I. Samuel Kravinchuk*, for the appellant.

Darrell Lopushinsky and *David Woo*, for the respondent the City of Edmonton.

Shauna Miller, Q.C., and *Peter D. Banks*, for the respondent Sureway Construction of Alberta Ltd.

The judgment of LeBel, Deschamps, Fish, Abella and Rothstein JJ. was delivered by

ABELLA AND ROTHSTEIN JJ. —

I. Overview

1 This appeal raises a number of issues relating to the "Contract A/Contract B" framework that has governed the tendering process in Canada since the decision of this Court in *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

2 A call for tenders involves a party's (often referred to as the "owner") requesting the submission of bids to complete a particular project. Where the parties intend to initiate contractual relations, a submission in response to a call for tenders can lead to the formation of Contract A. The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted. A bidder accepts that offer by submitting a bid that complies with the requirements set out in the tender documents. The contractual rights and obligations of

the parties to Contract A are governed by the express or implied terms of the tender documents.

3 A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought. Where a bid is accepted, the terms of the tender and bid documents become the terms and conditions of Contract B.

4 The dispute in this case arises out of circumstances that unfolded 20 years ago following a call for tenders issued by the City of Edmonton ("City"). The City sought bids on a 30-month contract to supply equipment and operators to move refuse at a waste disposal site. The tender documents issued by the City required that all equipment be 1980 or newer.

5 The City awarded the contract to Sureway Construction of Alberta Ltd., but permitted Sureway to supply equipment that was manufactured prior to 1980. As a result, Double N Earthmovers Ltd., a rival bidder, sued the City. It argued that the City breached the duties owed to Double N under Contract A in a number of ways and as a result, Double N is entitled to the profits it would have realized had it been awarded the contract.

6 Like the trial and appeal courts below, we find Double N's arguments unpersuasive.

II. Facts

7 In June 1986, the City issued a call for tenders on a 30-month contract to supply equipment and operators to move refuse at a landfill site. Four pieces of

equipment were initially sought; however, ultimately the City only made an award of the contract in respect of the first three pieces of equipment.

8 The tender documents included a four-page Tender Form, dated June 9, 1986, and three pages of equipment requirements, which were referred to in the Tender Form as the "attached specifications".

9 On the face of the Tender Form, a number of requirements were set out, which may be summarized as follows:

(1) All units had to be 1980 or newer.

(2) Items 1 and 2 had to be a "Caterpillar D8K/D8L and Dozer or equivalent".

(3) Item 3 had to be a "Caterpillar 627B Motor Scraper or equivalent".

(4) All equipment had to comply with attached specifications.

(5) Only local City of Edmonton contractors would be considered.

(6) A bid bond of $100,000 was required.

10 The back of the Tender Form set out certain "Conditions of Tender". The relevant conditions will be referred to later in the analysis.

11 In addition, the attached specifications set out various equipment requirements. The requirement that all equipment be 1980 or newer was repeated. The equipment requirements also required that bids include:

> ... all of the following for EACH and EVERY proposed unit:
> a. Make
> b. Model

c. Serial Number
d. Year of Manufacture
e. City of Edmonton Registration License Number
f. Cost Per Hour

12 Six bids were submitted. Bids were opened by the City on June 25, 1986. Each proposed an hourly rate for each piece of equipment described in the bid.

13 Sureway's bid for the first three items was as follows:

Item 1	a)	Caterpillar [a bulldozer]	$85.84/HR
	b)	D8K	
	c)	77V11997	
	d)	1980	
	e)	D0-0060	
Item 2	a)	Caterpillar [a bulldozer]	$85.84/HR
	b)	D8K	
	c)	77V7369	
	d)	1977 or 1980 Rental Unit	
	e)	D0-261	
Item 3	a)	Caterpillar [a motor scraper]	$124.12/HR
	b)	627B	
	c)	15S1373	
	d)	1980	
	e)	MS-030	

14 With respect to Item 1, although Sureway indicated its Caterpillar bulldozer had a manufacture year of 1980, the serial number and City of Edmonton licence registration number listed in fact corresponded with a Caterpillar bulldozer manufactured in 1979. With respect to Item 2, the serial number and City of Edmonton licence registration number listed in fact corresponded only to a Caterpillar bulldozer manufactured in 1977.

15 After bids were opened, the City assessed the total price of each bid by multiplying the estimated hours each piece of equipment would be used over the life of the contract by the rates set out in the bids. Using this methodology, the four lowest bids, from the lowest to the highest, were Kerna Construction Ltd., Twin City Equipment Ltd., Sureway, and Double N. Kerna was disqualified shortly after the bids were opened because it was not a City of Edmonton contractor.

16 On or about July 7, the City entered into separate negotiations with each of Double N, Sureway, and Twin City. As Twin City's bid was not accompanied by a bid bond, however, it too was disqualified shortly thereafter.

17 This left the bids of Sureway and Double N. Sureway's bid was lower.

18 Sureway was told by the City that it "would probably" get the contract if it could supply Item 3, the motor scraper, at the rate bid by Twin City. As a result, Sureway reduced its rate for Item 3.

19 In its meeting with the City, Double N also agreed to lower its bid; however, the evidence of a City official was that even with the revisions it had made, Double N's bid was higher than Sureway's.

20 Double N's principal believed that Sureway did not own any 1980 or newer equipment and told the City of his suspicions on July 7 and on several prior occasions. The response of City officials was that since Sureway had bid 1980 equipment, the City would be entitled to insist that Sureway supply 1980 equipment.

21 On August 18, 1986, the City Executive Committee approved awarding the contract to Sureway. A Purchase Order was issued to Sureway the same day. Work was to commence on September 1, 1986.

22 Sureway was required to register its equipment with the City prior to the September 1 start date so that the City could set up an account for Sureway. On August 28, Sureway's representatives attempted to register bulldozers manufactured in 1979 and 1977 as Items 1 and 2 of the contract.

23 As a result, City officials called a meeting with Sureway on August 29. The evidence showed that the City officials were angered that Sureway intended to register equipment manufactured prior to 1980. As the trial judge stated the "reaction of [the City officials] recorded at the August 29th meeting is ample evidence that in the mind of those from the City . . . a contract had been entered into for 1980 units or newer" ((1998), 57 Alta. L.R. (3d) 288, 1998 ABQB 31, at para. 53).

24 At the August 29th meeting, the City insisted on compliance with the 1980 requirement and Sureway agreed that its equipment would be upgraded to 1980 equipment within 30 days. This was documented in memoranda prepared by City officials.

25 In a subsequent letter dated September 5, however, Sureway said that it had "explored all avenues", and that it would be supplying the 1979 unit specified in its bid documents. The City did not pursue the matter further. As reflected in an internal

memorandum dated September 9, City officials decided that "this file to be allowed to lie peacefully".

26 A 1980 bulldozer was purchased by Sureway by October 1986. Nevertheless, some of the work was performed by pre-1980 equipment through the duration of the 30-month contract.

27 Double N sued the City for breach of contract. The City brought Sureway into the action by way of a third party notice.

28 At trial, Marceau J. dismissed Double N's claim. He found that Sureway's bid was compliant, and that Contract B came into being when the City accepted Sureway's tender on August 18, 1986. He found no duty on the part of the City to investigate Sureway's tender. Nor did he find that the City was in breach of Double N's Contract A by deciding, after accepting Sureway's bid, to let Sureway use equipment older than 1980. In the trial judge's view, all the Contract As came to an end upon the valid formation of Contract B with Sureway, and the City could not be liable to Double N for its post-Contract B dealings with Sureway.

29 Double N appealed to the Court of Appeal for Alberta. Its appeal was dismissed unanimously: (2005), 41 Alta. L.R. (4th) 205, 2005 ABCA 104. Russell J.A., on behalf of the court, agreed with the trial judge that Sureway's bid was compliant on its face, and that an owner is not subject to a duty to investigate suspicions of potential non-compliance. Russell J.A. also rejected Double N's argument that the City's Contract A obligations with an unsuccessful bidder could survive the formation of Contract B with a compliant bidder.

III. Analysis

30 As was reiterated by this Court in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, the express terms set out in the tender documents govern Contract A. However, Contract A may also contain certain implied terms if they meet the test for implied terms set out by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711: para. 27 of *M.J.B. Enterprises*. Implied terms can be based on the existence of any of: (1) custom; (2) the legal incidents of a particular class or kind of contract; or (3) the presumed intentions of the parties, where the term is necessary to give business efficacy to a contract.

31 In *M.J.B. Enterprises*, Iacobucci J. discussed the application of the third branch of that test to the tendering context:

> What is important . . . is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [Emphasis added; emphasis in original deleted; para. 29.]

Applying those principles, this Court in *M.J.B. Enterprises* recognized an implied term in Contract A that an owner will only accept a compliant bid.

32 In *Martel*, this Court recognized an additional implied obligation on the part of owners to treat all bids "fairly and equally". This had the necessary "obviousness" to meet the threshold in *Canadian Pacific Hotels*, since contractors would not likely spend the requisite time and money on a bid without expecting that each bid would be treated fairly: *Martel*, at para. 88.

33 Sureway and the City concede that Double N submitted a bid that complied with the tender requirements, and thus Contract A arose between the City and Double N.

34 Before this Court, Double N asserted that the City breached the duties it owed to Double N under Contract A by:

(1) accepting Sureway's non-compliant bid;
(2) failing to investigate Sureway's bid;
(3) engaging in impermissible "bid shopping";
(4) awarding the contract to Sureway on terms other than those set out in the tender documents; and
(5) permitting Sureway to supply equipment manufactured prior to 1980.

A. *Did the City Accept a Non-Compliant Bid?*

35 In the courts below, Double N's argument concerning the compliance of Sureway's bid appears to have related solely to the representation by Sureway that the unit it tendered for Item 1 was manufactured in 1980 when in fact it was manufactured in 1979. On the face of its bid, Sureway promised to supply a 1980 Caterpillar D8K as Item 1. That is what the City accepted when it issued its Purchase Order. Sureway was

obliged under the terms of its bid to supply a 1980 unit and that obligation was enforceable by the City. Double N cannot successfully argue that Item 1 of Sureway's bid was non-compliant.

36 In this Court, Double N's argument centred on Item 2 of Sureway's bid. With respect to Item 2, Sureway promised to provide a "1977 or 1980 Rental Unit". Double N interprets Sureway's bid as offering the City two alternatives, something which Double N appears to concede was not prohibited by the tender documents. Double N argues that the 1977 unit was not compliant on its face, but that the alternative 1980 unit was also not compliant because the bid did not contain the specifications for that machine that were required to be supplied for each proposed unit.

37 Sureway's offer of the "1980 Rental Unit" must be read in the full context of the particulars provided under Item 2. In doing so, it is apparent that the make, model and cost per hour listed by Sureway with respect to Item 2 applied to the 1980 rental unit. Thus, the 1980 rental unit was, on its face, promised to be a 1980 Caterpillar D8K, available at a cost of $85.84 per hour. However, as Sureway's bid indicated that it would rent the unit if its bid was accepted, the serial number and City of Edmonton licence registration number listed with respect to Item 2 could not apply.

38 The tender documents required that serial numbers and City of Edmonton licence registration numbers be provided for each and every piece of equipment bid. Condition 17 of the Conditions of Tender provided:

> Bidders are advised that all the instructions to Bidders and Conditions of Tender (as supplemented herein) must be strictly complied with and failure to

> do so either in whole or in part may invalidate the bid in question. [Emphasis added.]

39 Bidders accordingly were made aware that not every failure to comply with the tender requirements would invalidate a bid. Condition 17 must be read in harmony with Condition 7, which permitted the City to "waive any informality" in a tender:

> The City reserves the right to reject any and all Tenders, and to waive any informality therein, to award by item or class. The lowest or any Tender may not necessarily be accepted.

40 In our view, the absence of licence and serial numbers for the rental unit are precisely the sort of informality Condition 7 was designed to address.

41 Generally, an informality would be something that did not materially affect the price or performance of Contract B. The absence of serial numbers and the licence registration numbers cannot be said to affect materially the price or performance of Contract B. In this case, it would have been obvious to bidders that the provision of licence and registration numbers was not an essential term of the tender documents, and were therefore capable of being waived by the City. This is because it would have been impossible for any bidder to supply a City of Edmonton licence registration number for Item 4, as the City had never previously registered that type of equipment in the past. Indeed, the evidence shows that City officials did not view the provision of licence and serial numbers as a material condition of the tender. A City official testified that the request for equipment particulars was included solely to enable him more conveniently to

access information about the equipment and to proceed with registration, after a bid was accepted.

42 Double N's argument is that Sureway's bid in respect of the 1980 rental unit "amounts to nothing more than a representation that 'Sureway will comply'". But that is in the nature of the bidding process; it represents a commitment to comply with what is bid. We do not construe the tender documents as preventing the City from accepting a promise to provide rental equipment, or indeed, equipment that had not been previously registered with the City.

43 The City's Purchase Order constituted the City's acceptance. In the Purchase Order, the City specified the acceptance of three pieces of equipment and stated: "All above as per specifications previously submitted" and "All conditions of the tender specifications dated June 09, 1986 will apply". As one of the specifications of the Tender Form dated June 9, 1986 was that all equipment be 1980 or newer, in our view, the Purchase Order can be construed as the City's acceptance of the 1980 rental unit offered in Item 2 of Sureway's bid. Where an owner accepts only a compliant option offered by a bidder, there is no breach of any obligation of fairness owed to other bidders.

44 Further, according to the express terms of the tender documents, the City had the right to accept parts of a bid. Condition 7, set out above, permitted the City to award by item or class. The Tender Form also contained notations that indicated that the City would not necessarily accept all units bid by a bidder:

> Equipment items 1 and 2 and/or 4 must be provided by single contractor.

> Preference may be given to contractor able to supply total equipment requested.

The City exercised its power to award by item or class in declining to make an award of Item 4. In our view, choosing the compliant 1980 rental unit offered by Sureway was also within the City's right to award by item or class.

45 For these reasons, we conclude that the City did not breach any duties owed to Double N in accepting Sureway's bid for Items 1, 2 and 3.

B. *Did the City Have a Duty to Investigate Sureway's Bid?*

46 Double N submits that the City had a duty to investigate whether the equipment Sureway bid in fact met the City's specifications. Double N argues that a check of the serial number provided for Item 1 against the serial numbers of units registered in the City's database would have revealed that the unit bid in respect of Item 1 was in fact manufactured in 1979, not 1980. According to Double N, "[f]air and equal treatment requires that pertinent records on file with the City should be reviewed when evaluating the bids." In addition, Double N argues that through its complaints, it had made the City aware of the need to investigate the equipment Sureway bid.

47 In support of the existence of a duty to investigate, Double N pointed to the City's right to inspect equipment provided in the tender documents. Clause 11 of the Equipment Requirements provided:

> Equipment Inspection: Tendered equipment will be subject to inspection . . . for compliance [with] safety standards, landfill usage, and compliance with the Hired Equipment Rental Agreement.

This clause, however, provides a right to inspect, but does not impose a duty to do so. Moreover, the type of inspection contemplated in this clause would not necessarily reveal the date of manufacture of a unit. Thus, this clause is of no assistance to Double N.

48 Double N also made reference to Condition 9 of the Conditions of Tender which provided:

> The material delivered under this request for Tender shall remain the property of the successful Bidder until a physical inspection and actual usage of this material and/or service is made and thereafter accepted to the satisfaction of the City and must comply with the terms herein and be fully in accord with the specifications and of the highest quality. In the event the material and/or service supplied to The City is found to be defective or does not conform to specifications, The City reserves the right to cancel the order, or part thereof, upon written notice to the successful Bidder and return the product, or part thereof, to the successful Bidder at the successful Bidder's expense. [Emphasis added.]

Again, conferring a right to inspect is not equivalent to imposing a duty to investigate. Moreover, Condition 9 is couched in terms of *cancelling* a purchase order. Thus, it implies that equipment bid would only be checked for compliance with the specifications *after* the contract was awarded.

49 As there was no express obligation to investigate the equipment bid prior to acceptance, the question is whether there is an implied term to do so.

50 We do not think there is an implied duty requiring an owner to investigate to see if bidders will really do what they promised in their tender. We agree with Russell J.A.'s observation on behalf of the Court of Appeal, that:

> To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. [para. 36]

51 The notion that an owner is expected to investigate bids falls well short of the necessary "obviousness" to form part of the presumed intentions of the "actual parties": *M.J.B. Enterprises*, at para. 29. There is no reason why the parties would expect an owner to investigate whether a bidder will comply, when each bidder is legally obliged to comply in the event its bid is accepted. Whether or not the bidder is, at the time of tender, capable of performing as promised is irrelevant in light of the bidder's legal obligation to do so once its bid is accepted.

52 The duty of "fair[ness] and equality" was recognized in *Martel* in part because it was thought to be "consistent with the goal of protecting and promoting the integrity of the bidding process": para. 88 (emphasis added). Double N's focus instead is with the integrity of the *bidders*. The bidding *process*, by contrast, is fully protected by an obligation that all bids receive equal treatment. The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information.

53 Finally, contrary to Double N's suggestions, allegations raised by rival bidders do not compel owners to investigate the bids made by others. This would encourage

unwarranted and unfair attacks by rival bidders and invite unequal treatment of bidders by owners. This would frustrate, rather than enhance, the integrity of the bidding process.

54 For these reasons, we conclude that the City did not breach any duties owed to Double N by failing to investigate Sureway's bid.

C. *Did the City Engage in Impermissible "Bid Shopping"?*

55 Double N says that the City's pre-award negotiations with Double N and with Sureway amounted to "bid shopping". In Double N's submission, these negotiations sufficiently flawed the tender process that it must be set aside. It makes the argument for the first time in this Court, leaving us without the assistance of prior judicial findings.

56 In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, 2001 SCC 58, at para. 9, the Court quoted a definition of bid shopping that described the practice as follows:

> . . . "the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal". . . .

Other courts have described bid shopping somewhat more broadly, as "conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded": see *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*

(2004), 242 D.L.R. (4th) 720, 2004 BCSC 1038, at para. 100, aff'd (2006), 266 D.L.R. (4th) 20, 2006 BCCA 246.

57 In support of its argument that the tender documents prohibited what occurred, Double N referred to these words of Iacobucci J. in *M.J.B. Enterprises*: "The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition" (para. 41). But *M.J.B. Enterprises* makes clear that the tender documents control the contractual obligations of the parties to a tender, and Iacobucci J.'s observations were based on the particular documents in that case.

58 In this case, by contrast, the documents clearly indicated that some measure of negotiation was anticipated. Condition 25 provided:

> Changes in Tenders will not be permitted after the Tenders have been opened, unless negotiated with the lowest evaluated Tenderer.

59 "[L]owest evaluated tender" was not defined in the tender documents. However, it cannot, as Double N submitted orally, refer only to a tender that has been accepted. Had that been the intention, it would have been a simple matter for the condition to expressly say so. On the contrary, the relevant time in Condition 25 is anytime "after the Tenders have been opened" and the context is the tendering period, not the period after acceptance. While negotiated changes may occur after acceptance, the condition certainly does not preclude negotiated changes before when obligations have not yet become binding, which is the more likely time when such negotiations would take place. In the absence of a definition, the meaning of the words "lowest evaluated tender", read in conjunction with the implied requirement that the City only accept a

compliant tender, refers to the tender's offering compliant units at the lowest evaluated total price anytime after the evaluation.

60 Accordingly, pursuant to Condition 25, the City was specifically entitled to negotiate with Sureway, which was the lowest bidder offering compliant units after the City's initial evaluation. It was no breach of the City's Contract A with Double N for it to have exercised a right specifically conferred by Condition 25.

61 If the City can be criticized at all, it was not in its negotiations with Sureway, but rather with Double N. Since Double N was not the lowest evaluated tender, an argument can be made that the City ought not to have negotiated with Double N. However, since Double N has no basis for complaining about a breach that was to its benefit, this breach is of no assistance to Double N.

D. *Did the City Award the Contract to Sureway on Terms Other than Those Set out in the Tender Documents?*

62 Double N argued that Sureway's deceit in respect of Item 1 prevented Sureway and the City from forming Contract B on the day the City accepted Sureway's bid. It was not until the City decided to later permit Sureway to supply the 1979 unit that the parties came to a *consensus ad idem*. Thus, the contract the City awarded to Sureway was different from that tendered, constituting a breach of the City's Contract A obligations to Double N.

63 While Sureway's bid stated that the unit it offered in respect of Item 1 was a 1980 Caterpillar D8K, it was in fact a 1979 unit. The trial judge found that Sureway had

intended to deceive the City into thinking it had a compliant bid and then attempt to get the City to permit Sureway, after its bid was accepted, to supply equipment manufactured prior to 1980.

64 As explained by Estey J. in *Ron Engineering*, the primary obligation of a bidder is to enter into Contract B on the terms tendered if the owner accepts the tender. The essence of this obligation is that the owner will be able to hold the contractor to the terms of the tender and its bid because those terms automatically form the terms of Contract B.

65 At the moment the City communicated its acceptance of Sureway's bid to Sureway, a 1980 Caterpillar D8K was what Sureway promised and was obliged to supply. Although the trial judge found that Sureway had been deceitful, it is Sureway's intentions at the time its bid was accepted that are relevant. As stated by I. Goldsmith and T.G. Heintzman in *Goldsmith on Canadian Building Contracts* (4th ed. loose-leaf), at p. 1-15: "Although it is the intention to be contractually bound that is the determining factor, the intention must not be a unilateral one, concealed from the other party. The relevant intention is that which the party in question by his actions or words displays to the other, not some hidden intention which he may have concealed in the inner reaches of his mind."

66 Importantly, the trial judge made a finding that the City was unaware of Sureway's deceit until *after* it had accepted Sureway's tender. In his words, "no one in the City knew as a matter of fact that [Sureway] had bid the 1979 unit until August 28 or 29, 1986 and that is after the contract had already been let to [Sureway]" (para. 27). There was, as a result, no collusion between the City and Sureway to disregard the tender terms.

67 For these reasons, we conclude that the City did not enter into a contract on terms other than as set out in its bidding documents and thus did not violate any duties owed to Double N.

E. *Did the City Violate its Duties to Double N by Permitting Sureway to Supply Equipment Manufactured Prior to 1980?*

68 Double N argued in the alternative that if the City entered Contract B with Sureway on August 18, 1986, the City breached its duties owed to Double N under Contract A by permitting Sureway to supply equipment manufactured prior to 1980, thereby waiving a fundamental term of Contract B. What the City was obliged to do in the circumstances, Double N argued, was to require Sureway to perform as promised, and, failing that, to exercise its right under Condition 9 to cancel the contract with Sureway and either re-tender, abandon the contract or award the contract to Double N as the next lowest bidder.

69 This argument depends on whether the owner's obligations under Contract A to unsuccessful bidders, and in particular its implied obligation to treat bidders fairly, survives the creation of Contract B with the successful bidder. In our view, it does not.

70 In *Ron Engineering*, Contract A gave effect to an express term of the tender documents, which stipulated that revocation of a bid would be subject to forfeiture of a bid deposit. That stipulation emerged from the need for the expectation of certainty among both owners and bidders – owners needed and expected the certainty created by irrevocable bids, backed by deposits. The reciprocal obligations of owners implied in *M.J.B. Enterprises* and *Martel* arose out the expectation of bidders that if they undertook

the significant time and expense involved in preparing a bid, their bids would each receive fair and equal consideration by owners during the evaluation of bids and the award of Contract B.

71 The conduct Double N complains of (i.e. the waiver by the City of the 1980 requirement) is conduct which occurred *after* the award of Contract B. Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed. Thus, any obligations on the part of the owner to unsuccessful bidders have been fully discharged. Contract B is a distinct contract to which the unsuccessful bidders are not privy. In *Ron Engineering*, Estey J. held that the "integrity of the bidding system must be protected where under the law of contracts it is possible to do so" (p. 121 (emphasis added)). The law of contract does not permit Double N to require the cancellation of a contract to which it is not privy in the name of preserving the integrity of a bidding process, which is by definition completed by the time an award of Contract B is made.

72 In the face of a failure to perform Contract B on the part of one of the parties, the other party has the contractual rights and remedies set out in the contract and at common law. Bidders may be held to perform as promised, or the owner may have the right to cancel the contract. It is this range of remedies that acts as a disincentive to submit deceitful bids as, absent collusion, bidders cannot predict how the owner will respond. Where an owner determines that it is in its best interests to waive a term of the contract, that is within its contractual rights unless the contract stipulates otherwise. In this case, Condition 9 conferred a *right* of cancellation upon the City where the successful bidder did not comply with the specifications. It did not *oblige* the City to cancel the contract.

73 Finally, we note that there are good policy reasons for rejecting Double N's position. The observation of Russell J.A., at para. 56, is particularly apt:

> [P]arties to contract B might be subject to constant surveillance and scrutiny of other bidders, challenging any deviation from the original terms of contract A, thereby ultimately frustrating the tendering industry generally, and introducing an element of uncertainty to contract B.

IV. Conclusion

74 We conclude that Double N's bid received fair treatment throughout the bidding process. Sureway's bid offered units that were compliant on their face and open to acceptance by the City. The City was not aware of Sureway's deceit until after it had accepted Sureway's bid, nor did it collude with Sureway during the bidding process to perpetrate an unfairness against other bidders. Once the City accepted the offer of compliant units, Sureway's failure to supply as promised became a matter between the City and Sureway alone. The City was entitled to deal with Sureway's obligations as it saw fit.

75 The appeal is dismissed with costs to the City only.

The reasons of McLachlin C.J. and Bastarache, Binnie and Charron JJ. were delivered by

CHARRON J. —

1. Overview

76 The City of Edmonton concedes that it was contractually bound to accept only a compliant bid and to treat all bidders equally and fairly. These implied terms are intended to ensure the integrity of the tendering process. On the facts of this case, however, the dismissal of the action and third party claim by the courts below not only results in Sureway Construction of Alberta Ltd.'s reaping the profits of its deceit, but also enables the City to escape entirely from its implied obligations. Far from preserving the integrity of the tendering process, this result seriously undermines it. I therefore respectfully disagree with the conclusion reached by my colleagues and the courts below and would allow the appeal.

77 I will state, in a nutshell, why I come to this conclusion. I will then review the pertinent facts and findings below in more detail.

78 It is undisputed that a material requirement of the City's tender call was that all equipment bid be 1980 or newer. Double N Earthmovers Ltd.'s bid was compliant on that and all other requirements. Sureway, the successful bidder, was found to have deliberately pretended to submit a compliant bid while all along planning to use 1977 and 1979 equipment. Sureway's deceit matters not, it is argued: the City's right to "insist on compliance" with the express terms of the bid following its acceptance coupled with the accompanying contractual risk to the bidder ensures the integrity of the process.

79 The City does not dispute that it has a duty to accept only a compliant bid. However, even when repeatedly warned by Double N, before acceptance, about

Sureway's likely non-compliance with the age requirement — a matter that the trial judge found could have been easily verified by checking the specifications contained on the face of the bid against existing records — the City chose to do nothing, relying instead on its right to "insist on compliance" with this essential term following acceptance. Were it not for the City's "right" to take that attitude, which the trial judge accepted as determinative on this question, he would have found the City negligent in failing to check the accuracy of the specifications and, as such, in breach of its duty to take reasonable care to accept only a compliant bid.

80 Confining the evaluation of the tender to its *face*, it is argued, is necessary to give certainty to the process and promote the consistent and fair treatment of bidders. But this contention is undermined by the fact that the City took no steps to resolve an ambiguity which *was* apparent on the face of Sureway's tender documents. This ambiguity arose where Sureway offered a "1977 or 1980 Rental Unit" for Unit #2. Again, relying on the centrality of the requirement that all equipment be 1980 or newer, the City takes the position that its unqualified acceptance of Sureway's Unit #2 bid can only be construed as an acceptance of the promise to supply a 1980 Rental Unit. Nor is there any unfairness, it is argued, when an owner accepts only a compliant option offered by a bidder where that option amounts to no more than a promise to comply given, again, the owner's "right to insist on compliance" with the terms of the tender.

81 The City further concedes that it had an obligation to treat all bidders equally and fairly. However, during the course of negotiations with the City following the close of tenders, when Double N sought permission to bid older equipment in order to lower the price of its bid, as it believed Sureway had done, the City refused, insisting on the 1980 age requirement as an *essential* term of the contract.

82 Following acceptance of Sureway's bid, when came the time for the City to exercise this "right to insist on compliance" upon which it had relied in fulfilment of its obligations under Contract A, it chose instead to waive the essential age requirement, claiming that all its obligations under Contract A were now at an end. Because Contract B now governed, it is argued, the parties have the right to amend its terms to suit their need after it is entered into. The City therefore permitted Sureway to perform the contract using its 1977 and 1979 equipment. It is submitted that Double N, not being a party to Contract B, has no right to complain.

83 In these circumstances, it is perhaps not surprising that the trial judge, in refusing to award the City its full costs at the end of the proceedings, reasoned as follows:

> I am not granting costs beyond Column 6 because I have concluded that when the City of Edmonton allowed Sureway to bring the 1977 and 1979 machine to work on the landfill site, they convinced Double N they had breached their obligation to treat all bidders fairly.
>
> ((1998), 220 A.R. 73, 1998 ABQB 30, at para. 5)

Indeed, Double N had ample grounds on which to base this conviction. In failing to give effect to these grounds for complaint, the trial judge and the Court of Appeal engaged in circular reasoning. On the one hand, the courts below held that a bid can be regarded as compliant at the Contract A stage because the owner can always insist on compliance with the terms of the tender. On the other hand, they held that the owner does not need to insist on compliance with the terms of the tender at the Contract B stage of the process precisely because it accepted a compliant bid at the Contract A stage. With respect, this reasoning completely nullifies the protection afforded by the implied obligation to accept only a compliant bid.

84 I conclude that the City breached its obligation to accept only a compliant bid. Furthermore, I conclude that in the circumstances of this case, when it failed to insist on compliance with the age requirement in awarding Contract B to Sureway, the City breached its duty to treat all bidders equally and fairly. I also conclude that the City's breach of its obligations was effectively caused by Sureway's deceit and its deliberate attempt to induce the City to accept a tender for pre-1980 machinery. I would therefore allow the appeal and grant judgment in the action against the City and in the third party claim against Sureway in the amounts assessed by the trial judge with costs throughout.

85 I will now review the record in more detail to explain on what basis I have reached my conclusions.

2. The Evidence and Findings Below

86 In the summer of 1986, the City of Edmonton called for tenders for equipment and operators to move refuse in its Clover Bar landfill site. The City's tender was composed of a standard Tender Form, an Equipment Requirements form, and a Solid Wastes Branch Tender Specifications form. The closing date for the submission of bids was June 25, 1986.

87 The tender eventually called for two bulldozers, one of which was to be a back-up unit, and a scraper. Six bids were submitted, including bids from the appellant Double N and the respondent Sureway, plus bids by Kerna Construction Ltd. and Twin City Equipment Ltd.

88 The City made it clear from the outset that the equipment bid needed to meet certain requirements. In particular, the City's tender repeatedly indicated that all machines bid needed to be 1980 or newer. This requirement was included in capital letters on the first page of the Tender Form and was repeated again on the first page of the Equipment Requirements form. In addition, clause 12(a) of the Solid Wastes Branch Tender Specifications form informed bidders that preference would be given to "late model equipment in top mechanical condition. (1980 or newer)." In addition to the year of manufacture, the Equipment Requirements form called for a specification of the make, model, serial number, City of Edmonton registration licence number and the cost per hour. It also reserved to the City the right to inspect the equipment.

89 On June 25, 1986, Double N submitted a bid that was compliant in all relevant respects. The formation of Contract A between Double N and the City is not in dispute in this appeal.

90 On June 25, 1986, Sureway submitted its bid. It is this bid that is in issue in this appeal.

91 For Unit #1, Sureway bid a Caterpillar bulldozer, and listed it as having a year of manufacture of 1980, although it was in fact a 1979 machine. Sureway provided the other required specifications, including the serial number and City of Edmonton registration licence number. For Unit #2, Sureway bid a "1977 or 1980 Rental Unit" Caterpillar bulldozer or equivalent. While the cost listed by Sureway for Unit #2 was consistent with a 1980 Caterpillar bulldozer, the registration and serial numbers corresponded instead to the 1977 machine.

92 After the tender period ended, Ray Necula, President of Double N, contacted the City by phone. During the course of his conversation with Dan Danylak, the Supervisor of the City's Hired Equipment Section, Necula learned which machines Sureway had bid. Based on his knowledge of the equipment owned by Sureway, Necula promptly informed Danylak that Sureway had not bid 1980 or newer equipment. Danlyk accepted the information but did nothing about it. Necula concluded that Double N's bid would be successful, since to his knowledge Double N's bid was the lowest compliant bid.

93 Necula repeated this information about Sureway's likely non-compliance in further communications with the City. Among other contacts with City officials, he spoke to Jim Parlee, the City's Purchasing Officer, and informed him of the state of his knowledge. As the trial judge describes the contact: "Necula's strong suggestion to Parlee was that Parlee should have a look at the bid because Sureway was likely not bidding qualifying machines"((1998), 57 Alta. L.R. (3d) 288, 1998 ABQB 31, at para. 24). Parlee was not very disturbed by the fact that Unit #1, the 1980 Caterpillar tractor, might turn out to be a 1979 because the City would be insisting on compliance with the age requirement that all machines be 1980 or newer. Similarly, Parlee's response with respect to Unit # 2 was that the City could insist on the 1980 rental unit rather than the 1977 machine (A.R., at p. 23).

94 The trial judge accepted Necula's version of these contacts with City officials (para. 26). He also found that Necula's information about the age of the equipment was easily verifiable (para. 45) against records already in possession of the City and filed with Danylak's area of supervision (para. 11). However no verification was done, nor did the City exercise its right, contained in Clause 11 of the Equipment Requirements form, to inspect the equipment.

95 Parlee summarized and ranked the bids according to their cost to the City. Three bids were eventually considered: Kerna's bid; a combined Sureway/Twin City bid; and Double N's bid. On July 3, 1986, W. Worton, the Manager of Solid Wastes Branch, wrote a memo in which he recommended that the combined Twin City/Sureway bid be accepted. This bid was composed of Sureway's bids for the #1 and #2 Units, and Twin City's bid for the Unit #3 scraper. The price of Twin City's scraper was listed on this combined bid at $112.50/hr.

96 The trial judge found that between July 3 and July 7, 1986, there were conversations between Twin City, Sureway, and the City. He further found that on or about July 6, 1986, Bruce Hagstrom, the principal of Sureway, had a face to face meeting with Bernard Simpson, Operations Director of the City's Solid Wastes Branch. In this meeting it was made apparent to Sureway that if it could provide a scraper at the rate Twin City had originally bid, it would probably be awarded the contract.

97 Necula testified that on July 7, 1986 he met with representatives from the City and asked whether, if Sureway was going to be allowed to bid 1980 or older equipment, he could bid 1980 or older equipment as well. Necula was told that Double N would not be allowed to bid older machines, and that the City would accept only the equipment specified by Double N in its initial bid. It was made clear to Necula that the age of the machines was *not negotiable*.

98 On July 7, 1986, Sureway sent a letter to the City confirming "its original intentions to the submitted proposal". In this letter Sureway confirmed that its original Unit #1 would now be used as the #2 back-up unit, that a new Unit #1 would be obtained,

and that the Unit #3 scraper would be as previously quoted. The price of the scraper was listed in this letter at $124.12/hr, a rate in excess of the City's acceptable rate for such equipment.

99 On July 15, 1986, G.E. Weese, General Manager of the Real Estate & Supply Services Department, wrote a memorandum to C. Armstrong, the City Manager, recommending that Sureway's bid be accepted. Kerna's bid was rejected on the grounds that Kerna was not a City of Edmonton contractor, and Double N's bid was rejected because it was too high.

100 Weese's summary of Sureway's bid listed a rate of $112.50/hr for the Unit #3 scraper. This was a change from the revised bid submitted by Sureway in its letter of July 7, 1986. Harold Stoveld, who had oversight of the tender process at the time, became concerned that there was nothing in writing from Sureway confirming the $112.50/hr rate. He spoke with Hagstrom on August 8, 1986, and received a letter from Sureway dated August 11, 1986, confirming the lower price.

101 A purchase order awarding the contract to Sureway was issued by the City on August 18, 1986.

102 On August 28, 1986, Sureway attempted to register, as its #1 and #2 Units, a 1979 and 1977 machine, respectively. The City was not happy with this development and communicated its dissatisfaction to Sureway. In response Sureway undertook to supply only 1980 or newer units, but on September 5, 1986 wrote to inform the City that it was unable to do so, and would go forward with the 1979 machine.

103 On September 9, 1986, the City decided not to challenge Sureway on this point and let the matter "lie peacefully". The trial judge found that the City effectively waived the age requirement (para. 51). Although Sureway later provided a 1980 bulldozer as a back-up for the 1977 machine, the record shows that it used both the 1977 and 1979 machines during the course of the Clover Bar contract.

3. Analysis

104 This is the cautionary tale of a tendering process gone badly wrong. Although in some business contexts parties might decide to turn a blind eye to contractual inaccuracies and ambiguities, the tendering process is different. It is a process in which fairness and integrity are of paramount importance. Owners spend large amounts of money composing and issuing tenders, and bidders spend large amounts of money formulating and submitting bids.

105 As Estey J. said in *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, at p. 121, the "integrity of the bidding system must be protected where under the law of contracts it is possible to do so". In order to protect the integrity of the tendering process, this Court has adopted a particular analysis of that process: *Ron Engineering*; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60. This analysis is often referred to as the Contract A/Contract B analysis. According to this analysis, the tendering process is characterized by two contractual stages. At the first stage, the owner issues a tender, in response to which bidders submit bids. This creates a first contract — "Contract A" — between the owner and every compliant bidder. At the second stage, when the owner accepts a bid, a

second contract — "Contract B" — is formed. This is the actual contract to supply the equipment or to perform the work that was the subject-matter of the tender. A bidder's bid thus constitutes both an acceptance and an offer. It constitutes an acceptance of the owner's offer to receive and consider tenders, and it simultaneously constitutes an offer to perform the tendered contract.

106 It is settled law that the terms of Contract A are set out in the tender documents and that, in addition, there may also be implied terms based on custom or usage or on the presumed intentions of the parties. An implied duty to accept only a compliant bid was recognized by this Court in *M.J.B. Enterprises*. Speaking for the Court, Iacobucci J. found that this implied term was necessary to give "business efficacy" to the tendering process, explaining as follows:

> The rationale for the tendering process ... is to replace negotiation with competition. This competition entails certain risks for the appellant .... 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. Therefore I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted.

107 Likewise, in *Martel*, this Court held that an owner also had a duty to treat all bidders fairly and equally. As Iacobucci and Major JJ. said, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved" (para. 88). Such implication, they noted, "is necessary to give business efficacy to the tendering process" (para. 88).

108 The parties agree that these two implied terms formed part of Contract A: the City was obliged to accept only a compliant bid — in other words, it was implied that the City would not enter into a Contract B on terms other than those contemplated in the tender call — and the City was also obliged to treat all bidders fairly and equally. The thread running through *Ron Engineering*, *M.J.B. Enterprises* and *Martel* is the importance of business efficacy and the integrity of the tendering process. In my view, it is through the lens of these concepts that this case must be viewed.

109 The test for compliance in the tendering process is "substantial" rather than strict. Estey J.'s remark in *Ron Engineering* that it would be "anomalous indeed if the march forward to a construction contract could be halted by a simple omission" is often cited in support of the substantial compliance test: for example, see, *British Columbia v. SCI Engineers & Constructors Inc.* (1993), 22 B.C.A.C. 89. Although Estey J. made this remark in reference to the Contract B stage of the tendering process, there is no reason to doubt that these same considerations apply to the Contract A stage as well. It would make tendering unworkable if an owner and bidder were prevented from entering into Contract B based on an unchecked box.

110 Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with: *Silex Restorations Ltd. v. Strata Plan VR 2096* (2004), 35 B.C.L.R. (4th) 387, 2004 BCCA 376, at paras. 24 and 29; *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, 2004 BCCA 5, at para 15. A bid is substantially compliant if any departures from the tender call concern mere irregularities.

111 In the present case, it is not disputed that the requirement that all units bid be 1980 or newer was a material term of the tender. As noted earlier, this requirement was specified on the Tender Form, repeated again in the Equipment Requirements form, and referred to again in the Solid Wastes Branch Tender Specifications form. This was not an idle request. To the contrary, the City insisted on 1980 or newer equipment because in its experience older units tended to break down more frequently. The trial judge concluded that, in the view of the City, the age of the equipment was *essential* to the tender (para. 85). Consequently, a failure to bid 1980 or newer equipment would result in a bid that was not substantially compliant with the City's tender request.

112 Unit #1 and Unit #2 were to be 1980 or newer Caterpillar bulldozers (or equivalent). What is at issue in this appeal, then, is Sureway's bid in respect of those two pieces of equipment.

3.1 *Sureway's Deceitful Bid for Unit #1*

113 For Unit #1 Sureway bid a Caterpillar bulldozer, listing it as having a year of manufacture of 1980 when in fact it was a 1979 piece of equipment. In their reasons, Abella and Rothstein JJ. note that, on its face, Sureway promised to supply a 1980 Caterpillar D8K and that is what the City accepted. As a result, Sureway was obliged to comply with this term, and that obligation was enforceable by the City. They conclude on that basis that it cannot be successfully argued that Sureway's bid with respect to Unit #1 is non-compliant. With respect, I disagree.

114 There is much merit to the contention that an owner should be entitled to take a submitted bid at face value. However, the tender documents must be carefully reviewed

and considered in their totality. There was more than just the "1980 Caterpillar D8K" specification on the face of the tender. As it was required to do, Sureway provided the serial number and the City registration number for the bulldozer. The trial judge found that these specifications were readily verifiable — recall his finding that a check against records in the possession of the City and "filed with Danylak's area of supervision" (Danylak was the first City official to whom Necula spoke) "would have revealed that the year of manufacture of [Unit #1] was 1979" (para. 11). The City did not check its records.

115 The City argues, and my colleagues accept (in their reasons in respect of Unit #2), that these additional specifications were mere informalities that it was at liberty to waive. However, the City did not waive these requirements with respect to Unit #1 — to the contrary, they were provided by Sureway. Rather the City simply chose to ignore this part of the information on the face of the bid, even when urged by Necula "to have a look at the bid". Necula was not asking the City to rely on extrinsic information not available on the face of the tender documents. In effect, he was simply putting the City's nose to the face of the bid and asking that City officials read it attentively.

116 In my view, given the circumstances of this case, it was not open to the City to ignore these specifications. The City's casual approach to Sureway's bid, particularly in light of the warning it received about the bid's likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant. In my view, checking the equipment particulars — particulars which the City itself called for — against its own records was one such reasonable step the City was obliged to take in

evaluating the bids for compliance. I agree with the trial judge's conclusion that, if there was such a duty, the City was negligent in failing to check its own records. Had it done so, it would have readily uncovered Sureway's deceit in respect of Unit #1.

117 The City further takes the position, and my colleagues accept, that the requirement for equipment particulars was included solely to enable it to more conveniently access information about the equipment and proceed with registration *after* a bid was accepted. In my respectful view, the obligation to accept only a compliant bid requires that reasonable steps be taken to evaluate the bid for compliance *before* acceptance.

118 A similar position is taken with respect to the City's right to inspect the equipment under Condition 9 of the Conditions of Tender. As Abella and Rothstein JJ. correctly note, Condition 9 is couched in terms of *cancelling* a purchase order. From this they conclude "that equipment bid would only be checked for compliance with the specifications *after* the contract was awarded" (para. 48). However, while I agree that Condition 9 gave the City a right to cancel the contract after it was awarded if it was discovered that the equipment bid was non-compliant, in my respectful view, this does not mean that the City had no obligation to take reasonable steps to ensure it was accepting only a compliant bid *prior* to acceptance. Indeed, the right to inspect and cancel reserved under Condition 9 is complementary to this obligation. The obligation to accept only a compliant bid requires that the City enter into a Contract B on terms contemplated in the tender call. The right to inspect and cancel for non-compliance, reserved to the City under Condition 9, further enabled the City to fulfill this obligation. In this case, had the City inspected the equipment, Sureway's deceit would have been discovered and, in order

to fulfill its obligation to all Contract bidders, the City's only option would have been to cancel the purchase order. The City chose to do neither.

119 Russell J.A. on behalf of the Court of Appeal expressed concern about imposing any "duty . . . to investigate" on the owner, stating:

> To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties.
>
> ((2005), 41 Alta. L.R. (4^{th}) 205, 2005 ABCA104, at para. 36)

Abella and Rothstein JJ. agree with this observation, and I acknowledge that an owner does not have to launch an investigation to satisfy itself that a bidder *will in fact* do what it undertakes to do. Nor do I claim that an owner has a duty, in its evaluation of the bids, to search for additional information or to take action beyond that which it is empowered to take pursuant to the tender documents themselves. But this does not mean that the owner does not have an obligation to take reasonable steps to evaluate the terms of the bid to ensure that they conform with the tender call. Given the central importance of the nature of the equipment bid in this case, it is not surprising that the City specifically required that bidders provide details about the equipment bid that included not only the year of manufacture but also the serial number and city registration licence number. Since serial numbers and registration numbers can hardly be meaningful in and of themselves, an objective observer could only conclude that these specifications were intended to permit verification. It is also not surprising that the City reserved itself a right of inspection. These terms and conditions enabled the City to assure itself that the bid was compliant. By failing to take these reasonable steps to evaluate Sureway's bid for Unit #1, the City breached its obligation to Double N under Contract A.

3.2 *Sureway's Ambiguous Bid for Unit #2*

120 In its bid for Unit #2, Sureway specified a "1977 or 1980 Rental Unit". As stated earlier, the cost per hour accorded with a 1980 machine but the registration and serial numbers corresponded to the 1977 machine. Therefore, on its face, Sureway's bid offered to supply a particular 1977 Caterpillar D8K *or* an unidentified 1980 Caterpillar D8K rental unit. It can hardly be said that this bid was compliant with the City's request. The City asked only for apples, and Sureway responded by saying that it would provide the City with oranges, *or* with apples. At best, the bid was ambiguous. Since the ambiguity related to an essential term of the contract, this ambiguity cannot be said to be a mere irregularity.

121 Double N also argues that the addition of the words "or 1980 Rental Unit" amounted to a mere promise to comply and did not constitute a bid: see *Graham Industrial Services*, at para. 35. Abella and Rothstein JJ. reject this argument on the grounds that this is simply "in the nature of the bidding process; it represents a commitment to comply with what is bid" (para. 42). With respect, I disagree. Even if it were open to bidders to offer equipment not currently in their possession, there is a distinction between a bid that provides details of arrangements made to lease or acquire compliant equipment and a bid that provides nothing more than a bald assertion that it will comply. The absence of any information about the proposed 1980 rental unit concerned a material condition of the tender, and was not a mere informality which the City had the right to waive.

122 The City argues, and my colleagues agree, that the City's Purchase Order constituted "the City's acceptance of the 1980 rental unit offered in Item 2 of Sureway's bid" (para. 43). This is because the Purchase Order explicitly stipulated that "[a]ll conditions of the tender specifications dated June 09, 1986 will apply." The City relies on its right to insist on compliance in support of its contention that it fulfilled its duty to accept only a compliant bid in respect of the rental unit. It is argued that the integrity of the tendering process is protected by putting the risk of having to comply with any misrepresentation on the deceptive bidder. I am unable to accept this position.

123 The right to insist on compliance cannot turn what is on its face a non-compliant bid into a compliant one. Furthermore, I fail to see how the integrity of the bidding process is protected by allowing a bidder to get rid of the competition unfairly and then hash it out with the owner after it has been awarded the contract. Approaching the tendering process in this manner encourages precisely the sort of duplicity seen in the present appeal. A bidder can submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects, secure in the knowledge that if it is awarded Contract B it will be in a strong position to renegotiate essential terms of the contract. And an owner can reason that it may be best not to resolve any ambiguity before awarding Contract B, since at that time all Contract A obligations towards other bidders will terminate and it can then enter into renegotiations with the successful bidder without fear of liability. This approach is not consistent with a fair and open process.

124 Moreover, when push came to shove the City *did not* insist on compliance. Instead, the City acquiesced to Sureway's demands and decided to let the matter "lie peacefully". If what turned Sureway's *prima facie* non-compliant bid into a compliant one was the City's right to insist on compliance, then the City was duty-bound to do

precisely that. In my respectful view, when it failed to insist on compliance with this essential term of the tender, the City breached its duty under Contract A to treat all bidders fairly and equally. The City cannot escape this fundamental obligation by postponing the fulfilment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end.

125 To hold the owner to the material terms of its tender call in awarding Contract B is a corollary to the duty to accept only a compliant bid and is necessary to ensure fairness throughout the process. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier on in the process. This obligation does not mean that the parties have no freedom to negotiate on informal or non-material requirements at the time they enter into Contract B. Since variations of non-material terms could not have the effect of turning a non-compliant bid into a compliant one, other bidders would have no cause for complaint if such variations were made. Likewise, the parties are at liberty to amend the terms of Contract B after it has been entered into to address circumstances that may arise during the course of its performance. Since any of the bidders could be faced with changing circumstances that require an amendment to the contract, there could be no allegation of unfairness. However, where, as here, the City failed to take reasonable steps to evaluate the terms of the bid to ensure compliance, its waiver of the essential age requirement effectively turned a non-compliant bid into a compliant one and cannot be condoned.

126 For these reasons, I am of the view that the City breached its obligations to Double N to accept only a compliant bid and to treat all bidders fairly and equally. In

light of this conclusion, I do not find it necessary to deal with Double N's contention that the City improperly engaged in bid shopping.

4. Damages

127 I adopt the trial judge's reasons with respect to damages. I accept that had Sureway's bid been disqualified as being non-compliant, Double N, as the lowest evaluated bidder, would have been awarded Contract B. For the purposes of ascertaining damages, I accept the trial judge's finding that Double N should be entitled to damages for loss of the profits of the contract based on an initial rate of $88 an hour for Units #1 and #2 and $112.50 an hour for Unit #3. I see no reason to disagree with his evaluation of the contingency that the City would have rejected all tenders and gone to new tenders at 25 percent.

128 In accordance with the determination of the trial judge, I would therefore award Double N damages equal to 75 per cent of the lost profits of the contract, with costs throughout.

5. Third Party Liability

129 As the trial judge rightly concluded, the only way for the City to be liable to Double N "is if the year of manufacturing of the machine was so essential an element that to award the contract to Sureway for a 1979 [and/or 1977] machine would be a breach of a fundamental duty of fairness in the bidding process by the City" (para. 85). As he also remarked, if the City were found to have acted negligently in accepting Sureway's tender for a 1979 or 1977 machine, he would have concluded that "the cause of the breach of the

City's duty to act fairly vis-_-vis Double N was the result of the deliberate attempt by Sureway to induce the City to accept a tender which arguably was for a 1979 [and/or 1977] machine" (para. 85). He would then have found Sureway liable to reimburse the City for two-thirds of the damages together with costs.

130 On the question of third party liability, I agree with the framework proposed by the trial judge. Because I am of the view that the City did breach its obligations under its Contract A with Double N and that Sureway's actions were instrumental in bringing about this result, I would find Sureway liable to reimburse the City for two-thirds of the damages together with costs.

6. Conclusion

131 I would therefore allow the appeal, set aside the judgments below and give judgment in the main action and the third party claim in accordance with these reasons.

Appeal dismissed, McLachlin C.J. and Bastarache, Binnie and Charron JJ. dissenting.

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