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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 182 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:
M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25
Supreme Court of Canada

Building Contracts - Tenders - Bonds

The Court of Appeal of Ontario recently dealt with **Tenders** for construction contracts in *Bois A. Lachance Lumber Limited v. Conseil Scolaire Catholique de District des Grandes Rivières*. The tender documents required the bidders to obtain performance bonds "upon acceptance" of a bid. The Court of Appeal held that the successful bidder did not have to provide a performance bond with its bid, but only after acceptance of its bid.

The Court of Appeal went on to hold that, once the successful bid was accepted, then all the owner's tender duties owed to the other bidders were terminated, applying the rationale of the Supreme Court of Canada in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3. Accordingly, the owner could then wave or vary any term of the bid and enter into whatever

contract it liked with the successful bidder, and substitute a letter of credit for the performance bond.

This decision is a reminder of the difference between the contract formed by the tender process (Contract A) and the contract between the owner and a bidder arising from the tender process (Contract B). While Contract A contains a duty of fairness and a duty not to accept a non-compliant bid, once Contract A is completed and those duties are fulfilled, and the owner selected a bidder that meets the criteria of the tender documents, then the owner can enter into a Contract B which is different than the tender terms of Contract A.

The law entitles the owner to enter into a Contract B which is different from the terms set out in the tender documents because the law expects the owner to act in its own economic self-interest and not give up economic value to the contractor, and because the law wishes to leave the owner and contractor with the flexibility to enter into the best deal.

However, what has not been explored in this case is the degree to which the owner can influence the tender process. Can the owner put terms into the tender, and thus into Contract A, which it knows it will not insist upon, and which it knows that certain bidders cannot meet? Can the owner stipulate that the successful bidder must provide a performance bond, knowing from the beginning that certain bidders cannot provide such a bond and that it will waive that requirement or accept security of an entirely different nature? Can the owner stipulate a particular building material in the tender, intending from the outset to waive that requirement and accept another material? At what point does that sort of conduct amount to bad faith and a breach of Contract A? And at what point does Contract B become an entirely untendered contract? In the case of a public authority required to contract by tender, at some point does that conduct fall outside that requirement? These are unanswered questions which are raised by decisions such as that in *Bois*.

Building Contracts – Tender - Bonds: *Bois A. Lachance Lumber Limited v. Conseil Scolaire Catholique de District des Grandes Rivières*, 2010 ONCA 694 (CanLII)