

When the court implies terms into contracts



by Robert C. Taylor and Lisa M. Bolton

CONTRACTING PARTIES REASONABLY assume the terms set out in a written contract are the terms that govern the contractual relationship. However, in the procurement context, the assumption that a written contract is a definitive and exclusive source of the parties' understanding and their respective rights and obligations may not be correct. A court may find there are additional terms that can be implied to govern the contractual relationship even though they are not expressly contained in the written contract.

Accordingly, whether there are any implied terms and the nature of those terms are of considerable importance to each party to the contract and should be considered at the outset.

In *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, the Supreme Court of Canada (SCC) found that, in the bidding process, a contract (which it called "Contract A") can be created when a compliant bid has been submitted. The terms of Contract A are usually governed by its written provisions.

Why a court implies terms

In certain circumstances, the court will imply terms into Contract A (indeed, any contract). The Supreme Court of Canada held in *Canadian Pacific Hotels v. Bank of Montreal*, [1987] 1 S.C.R. 711, that the courts will imply such terms in three circumstances:

1. based on custom or usage;
2. as the legal incident of a particular class or kind of contract; or
3. to give business efficacy to a contract.

The underlying rationale for implying terms is that the court presumes it was the intention of the parties to include such terms.

Since *Ron Engineering*, the courts have proceeded to carefully scrutinize procurement documentation issued by purchasers to determine if additional contract terms should be implied. The SCC in *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, decided whether a purchaser could disregard the lowest compliant bid by relying on the words in a privilege clause, which stated: "The lowest or any tender shall not necessarily be accepted." The court reviewed the tender documentation and found there was "no explicit term in Contract A imposing an obligation to award Contract B [the contract to perform the work] to the lowest valid bidder."

Nonetheless, the court, in reviewing the other terms in the tender documents, held it was reasonable to infer that the purchaser could only consider "valid tenders." In coming to its conclusion, the court found that the tendering process involves risk and costs to bidders and no bidder would submit a bid if the purchaser could subvert the tendering process and accept a non-compliant bid.

The court then went on to consider the precise words of the privilege clause. The court agreed that the privilege clause was "compatible with the obligation to accept only a compliant bid" but was "incompatible with an obligation to accept only the lowest compliant bid." Thus, the court made it clear that the privilege clause would prevail.

Terms the court has implied

The courts have consistently held that it is essential to maintain the integrity of the procurement process and have been vigilant to ensure it is not subverted. The Supreme Court of Canada held in *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, there was an overarching duty on purchasers to treat bidders "fairly and equally" during the tendering process. The courts have sought to imply terms to meet that objective. In further articulating and refining that duty, the courts have implied the following obligations on purchasers:

1. to provide proper disclosure of material information to bidders, which means that information should be disclosed which is both correct and complete, and factual errors should be corrected;
2. to conduct a competition that is fair and transparent which includes the avoidance of favouring or discriminating against bidders and ensuring the valuation process is transparent and objectively fair;
3. to reject non-compliant bids;
4. likewise, to award a contract to the "successful" bidder, which means the bidder has met the mandatory criteria and satisfied the other criteria; and
5. to award the contract as tendered.

The imposition of terms is, by no means, a one-way street. The court has implied the obligations on purchasers such as, in *Ron Engineering*, above the obligation to perform Contract B if it has submitted a valid tender which is accepted by the purchaser.

Accordingly, unless the implied terms are expressly and specifically excluded by the written terms of the contractual documents, the courts will continue to imply obligations to ensure the procurement process is conducted in a fair manner. As such, purchasers, in drafting procurement documents, and suppliers in determining whether to submit bids, should consider the extent to which terms could be implied to govern the procurement, and the impact of such terms on any subsequent contractual relationship. *****

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