Tenders and the Future of Tendering

Pamela Jack
Partner, Phillips Fox
Sydney

PREAMBLE

In proceeding with any construction project, some important decisions must be made at the outset. These include the choice of:

▶project delivery method — HOW;

▶the method for securing the services of those who will perform the contract — WHO; and

▶contract documentation — WHAT RULES.

Whilst these are only some of the many determinations that must be made by a principal in advance in any project, these strategic decisions will very often determine whether or not the project will enjoy a successful outcome.

Success, which generally means completion on time, on budget and without dispute, is more likely to be delivered if the strategic determination of how, by whom and in accordance with what guidelines is analysed and determined in a manner appropriate to the project to be undertaken.

HOW? – PROJECT DELIVERY METHOD

The choices available in the new millennium as to how a principal might achieve the ultimate goal of a successful project are extensive. Traditional project delivery methods include:

▶lump sum fixed-price contract for defined scope of work;

▶project management;

▶construction management;

▶costs plus contract with predetermined margins;

▶design and construct.

These methods are the subject of many standard form contracts and have historically been well accepted. These project delivery methods, however, have not been able to accommodate the need for financial involvement by contractors, sharing of development risk and particularly the changed requirements of the public sector. Other project delivery methods which have developed out of these different needs include:

▶Guaranteed Maximum Price;

▶Build Own Operate — BOO;

▶Build Own Operate Transfer — BOOT;

▶Design Construct and Maintain — DCM.

It is now common to see all sorts of combinations and permutations of these methods. Rather than adopt a consistent construction management model, a principal may require the construction manager to take full responsibility and contractual risk for subcontractors. He might also require the Contractor to undertake obligations to deliver the project within a particular time. These requirements then blur the distinction between traditional expectations of a construction manager and a head contractor.

The need for different methods for procuring construction projects has in part been driven by the public sector and the focus in that sector on privatisation and outsourcing. Driven by lack of available funds and the need to provide new or updated infrastructure, the public sector increasingly looks to the private sector to provide facilities and utilities formerly the strict domain of the public sector. These arrangements may require the acquisition of an interest in land, design, construction, financing, operation, maintenance and the ultimate return to the public sector of the facility.

The investment in construction and infrastructure projects by the 'contractor' is not limited to the provision of public infrastructure. Many projects would not be undertaken without the sharing of both the development and the construction risk between the parties.

The determination of the appropriate project delivery method will require review of the principal's requirements in regard to:

- the level of control it wishes to exercise over the project;
- the risk profile which it requires;
- its financing constraints;
- its internal organisational structure and its own ability to administer;
- external industry factors.

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WHO? – SELECTING A PROPONENT

The manner in which a principal may select an organisation to undertake the project can be as varied as the project delivery method. The available processes include:

- public competitive tender;
- limited tender to pre-qualified bidders;
- selection of competitive tenderers by Expression of Interest — EOI, or by Registration of Interest — ROI;
- negotiated arrangement;
- ongoing 'partnered' relationships.

The requirements in relation to the selection processes of the public and private sectors differ substantially, necessitating the selection process for each of those sectors to be dealt with separately.

PUBLIC SECTOR

In New South Wales the Government has adopted a Code of Tendering as well as a Code of Practice for the Construction Industry. The Code was recently revised and was published in issue #50 of *Australian Construction Law Newsletter* (1996): 9-16. The Code applies to all Government building construction, maintenance and materials supply contracts, consultant commissions, and government-funded sites and projects within the construction industry. The Code places obligations on parties both seeking tenders and tendering and is applicable equally to government-related projects with private-sector funding.

The Code is based on ethical principles of honesty and fairness, and recognises the essential nature of accountability and transparency in the selection of tenderers in the public sector.

In addition to compliance with the government code of tendering, most organisations within the public sector follow recognised and documented internal procedures for procurement. Those procedures usually establish specific processes for procurement, depending on the nature and size of the proposed project.

Legislation

In addition to the Codes and internal procurement guidelines, there are many other constraints on the public sector relating to procurement. The need to secure work and services by publicly-conducted tender processes is incorporated in many pieces of legislation. Some of these are noted below:

- *Public Finance and Audit Act 1983* — providing for administration by the Treasurer of the financial affairs of the State;
- *Public Sector Management Act 1988* — regulates the public service generally;
- *Public Sector Management (Goods and Services) Regulation 1995* — establishes the State Contracts Control Board, and makes tenders compulsory for all contracts above the prescribed amount (currently $100,000) as from March 1999 and for all 'period contracts', unless the Board gives a specific exemption. Three quotes are required for contracts under $50,000;

▶*Local Government Act 1993* — Section 55 makes public tendering mandatory for all contracts above $100,000, subject to limited exceptions;

▶*Local Government (Tendering) Regulation 1995* — sets out comprehensive procedures for open tendering and selective tendering.

Government Guidelines and Publications

The advent of the New South Wales Independent Commission Against Corruption, the Royal Commission into the building industry, the focus on local government officers as a result of ICAC investigations and the Police Royal Commission all serve to increase community concern about the accountability of those in public office. The opportunity, or perceived opportunity, for many in the public sector to influence decisions and outcomes which may create an unfair advantage has further fuelled levels of community expectation about the need for transparency and accountability.

This concern over accountability and conduct which meets community expectations has been addressed in many NSW Government and ICAC publications, some of which are set out below:

NSW Government Publications:

▶*Procurement and Disposal Guidelines — A Guide to Inviting, Assessing and Selecting Tenders and Other Offers* (published 1995);

▶*Guidelines and Principles for Private Sector Participation and the Provision of Public Infrastructure (Private Sector Guidelines)* — (published 1995);

▶*Code of Tendering for the Construction Industry* — July 1996 (Code of Practice);

▶*Code of Practice for the Construction Industry* — July 1996 (Code of Tendering);

▶*Implementation Guidelines for the Code of Practice and Code of Tendering.*

ICAC Publications:

▶*Pitfalls or Probity —Tendering and Purchasing Case Studies* (published 1993);

▶*Contracting for Services — The Probity Perspective* (published May 1995);

▶*ICAC Practical Guide to Corruption Prevention* (published February 1996);

▶*ICAC — Corruption Prevention Publications: Probity Auditing: 'When, Why and How'* (published December 1996);

▶*Direct Negotiations in Procurement and Disposals: Dealing Directly with Proponents* (published June 1997).

Accountability

Because of the responsibility of the public sector in terms of:

▶the social responsibility of government;

▶the expectation by the community of delivery of services and utilities by government;

▶the concentration of control over certain industries or aspects of industries;

▶the community-recognised potential for the development of unfair practices;

▶access to public money,

the community requires that the methods used in the public sector to choose service providers and contractors are transparent and that the entities, and often the individuals that control them, are accountable.

This degree of public accountability and transparency, as evidenced by the manner in which the public sector undertakes procurement, distinguishes the public sector from the private sector.

Whilst it may be said of the private sector that directors and managers are accountable to their shareholders and are required to meet similar objectives such as achieving 'value for money', the standards are in reality quite different. Because public or quasi public entities are perceived to be in a position to 'curry favour' or to develop favoured relationships, the policy of the public sector is to require compliance with codes of practice as referred to above and also to follow internal guidelines and procedures which are directed at minimising the development of such relationships.

Competitive Tendering

These issues of accountability and transparency are addressed by the extensive use in the public sector of competitive tendering. Competitive tendering is considered to be the fairest and most transparent way to provide:

- Open and fair competition;
- 'keenness' of pricing;
- opportunity for new players;
- disincentive for patronage.

Competitive tendering is required to be undertaken by local government bodies for any contract proposing expenditure of an amount greater than $100,000. The *Local Government Act 1993* requires councils to invite tenders for provision of all goods and services except where the proposed contract falls into a particular category which is set out in s.55(3) of the Act. The Regulations then provide details as to the manner in which a council is required to conduct the tender process. The tender procedures and requirements as set out in the *Local Government Act* and Regulations are mirrored in the procurement guidelines and other legislation applicable to government and semi-government bodies.

Generally, tenders must be called by open public tender. It is open to public sector organisations to limit the scope of the invitation to tender:

- by requiring pre-qualification of tenderers which requires tenderers to demonstrate an ability to perform particular types of projects by a separate tender process;
- by seeking expressions of interest by public invitation from which a tender panel may be drawn.

Whatever method is adopted for the invitation to prospective tenderers, great care must be taken as to the process and procedures utilised during the tender period. Direct negotiation is generally prohibited except in very limited circumstances. Usually this approach will only be acceptable where the proposed contract is for a small amount of money, where there is only one party who can satisfy the particular needs of the organisation, and where the circumstances do not warrant the time and cost of conducting a tender process.

Negotiation may also be an acceptable method of finalising a procurement strategy where a tender process has been conducted and has failed to provide an acceptable outcome. In that event, it may be appropriate to negotiate with the party who has made the best offer.

Dealing with proponents is the subject of the ICAC publication noted above, entitled *Direct Negotiations in Procurement and Disposals: Dealing Directly with Proponents*, in which it is stated:

As a general rule direct negotiations should be avoided. This is because there are very few situations in which it can be assured that they result in the best value being obtained for the public. The closed nature of the direct negotiations makes them the subject of accusations of improper behaviour, and can increase the opportunity for bribes to be offered and favours given.

Value for Money

For most organisations, particularly in the public sector, their espoused objectives generally include achieving 'value for money' and achieving the organisation's particular project objectives. 'Value for money' in this context does not, however, necessarily mean the cheapest price.

'Value for money' will require consideration of various attributes and skills of the proponents and their tenders including:

- technical merit;
- track record in similar projects;
- proven efficiencies;
- ability to perform within the timeframe;
- price.

THE TENDER PROCESS AND THE 'BID CONTRACT' – RECENT LEGAL DEVELOPMENTS

The Traditional View

At common law, the position has been that a call for tenders is no more than an invitation to treat. The tender is an offer in response to the invitation to treat. The principal is free to accept or reject the offer and

no legal relationship is entered until after acceptance of the offer.

It is true to say that if a tenderer submits a conforming tender strictly in accordance with the terms of the invitation to treat, then that tender is capable of being converted into a contract by acceptance. Until and unless that step takes place, the traditional view has been that there is no contract between the principal and the tenderer.

However, recent developments in the common law suggest that this view should not be held with complacency.

The Bid Contract

In 1981 the Canadian Supreme Court handed down its decision in the tender case of *Regina (Ontario) and the Water Resources Commission v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 RCS 111. In this case a tenderer paid a deposit and submitted a tender which contained a mistake. However, it did not act to inform the principal of the mistake until after its tender had been accepted. It then sought to revoke the tender and have the deposit refunded.

The court held that a unilateral 'bid' contract (contract A) had arisen between the contractor and the principal as soon as the contractor submitted its (complying) tender. This contract contained implied terms that the tender was irrevocable and that a contract would be entered into upon acceptance of the tender.

There was also a qualified obligation (controlled by the terms in the tender) on the principal to accept the lowest tender. The result was that the tenderer could not withdraw its tender once accepted and was not entitled to have its deposit refunded. The court stated that it wished to maintain the integrity of the tender process by ensuring that a contractor could not avoid acting on a conforming tender.

The *Ron Engineering* case has been followed by a string of Canadian cases in which the court has found the existence of a 'bid contract'. The extent of the terms that the court was prepared to imply into the 'bid contract' were extended in *Chinook Aggregates Ltd v Abbotsford [Municipal District]* [1990] 35 Const. Law Reports 241.

In *Chinook* the contractor submitted the lowest tender. The conditions of tendering included the usual clause that the principal was not bound to accept the lowest or any tender. Unbeknown to the tenderers, the principal had a policy whereby if any local tenderer was within 10% of the lowest bid by a non-local tenderer, the local tenderer would be preferred and awarded the contract. Following this policy, the contract was awarded to a local tenderer which was not the lowest bid. The unsuccessful lowest tenderer then sued the principal for breach of contract.

At first instance the court found that the principal was in breach of contract in that it had breached an implied term of fairness. On appeal, the court held that where a condition concerning a local preference is unknown to a contractor, the principal cannot rely on it because it would be inequitable to allow the principal to do so. The effect of this decision is that the principal could not use any acceptance criteria in the evaluation of tenders except those which had been disclosed in the tender as being applicable to its consideration.

'As a general rule, direct negotiations should be avoided.... The closed nature of the direct negotiations makes them the subject of accusations of improper behaviour, and can increase the opportunity for bribes to be offered and favours given'.

New Zealand

In *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469) tenders were invited for the construction of a traffic flyover. The tender documents stated that the assessment of tenders would be by the 'lowest price conforming tender' method. One of the tenderers submitted a non-conforming alternative tender identifying possible savings on the job. This alternative tender was accepted and a contract entered into.

Pratt sued, relying on *Ron Engineering*, and claimed that the submission of its lowest conforming tender gave rise to a contract between it and the Council. Gallen J, following an extensive review of Canadian, English and New Zealand authorities, agreed and found that a collateral contract

as to the terms of tendering arose between the parties when Pratt submitted its conforming tender. The terms included that the lowest conforming tender should be accepted. He concluded that to do otherwise than accept Pratt's tender would be unfair. Pratt was awarded the costs of its preparation of the tender and an amount for loss of profits.

The English Position

In a case which has received much wider coverage and comment than have its counterparts in other jurisdictions, the British Court of Appeal found that a limited form of contract came into existence when a conforming tender was submitted. In *Blackpool & Flyde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, the Club submitted a conforming tender to the Council by the required date. However, due to an administrative error, the tender box was not cleared until the following day and the tender was marked as late and not considered.

The Club sued the Council for breach of contract, alleging that a contract existed between it and the Council, a term of which was that if a tender was submitted by the deadline, the Council would consider it. The Court of Appeal agreed. However, the terms of the contract were only that the tender be considered; it did not extend to accepting the tender even if it conformed to the requirements.

This view was upheld in the later case of *Fairclough Building Limited v Borough Council of Port Talbot* (1992) 62 BLR 82. The Court of Appeal dismissed an application for damages brought by an unsuccessful tenderer because the Council had fulfilled its obligation to the tenderer by giving *some* consideration to the tender before dismissing it. The case was distinguished from *Blackpool Aero Club* because in that case *no* consideration was given to the tender.

Australia – The Traditional Position

There are two similar Australian cases, but both of them predate recent developments in overseas jurisdictions. *Streamline Travel Service P/L v Sydney City Council* (1981) 4 BCLRS 209 involved the sale by public tender of a site owned by the Council. Tenders were submitted and, following discussions between one of the tenderers and the Council, variations were made to its tender and it was accepted.

Streamline challenged this on the basis that the varied tender amounted to a new tender which the Council could not consider because it was submitted after the closing date. More importantly, they alleged that a binding contract was to be implied from the terms of the tender which bound the Council to consider each tender in accordance with the terms of the tender (which terms included relevant Council ordinances).

Kearney J (in the NSW Supreme Court) agreed with Streamline on the first point, namely that a new tender had been submitted and that the Council was precluded from considering it. However, he did not accept the second point. His Honour did not undertake any analysis of the law of offer and acceptance, assuming that a tender comprises an 'invitation to treat'. In his view:

there is no basis for the implication of such a contract or promise by the council. . . . The purpose of such a tender document is to test the market and to obtain offers. It is designed entirely for the benefit of the Council and is not intended to commit the Council to any obligation.

In the later case of *Maxwell Contracting Pty Ltd v Gold Coast City Council* (1983) 50 LGRA 29, Derrington J agreed with Kearney J's analysis.

'Bid Contract' – Acceptance in Australia

On 30 June 1997 the judgment of Mr Justice Finn in the Federal Court of Australia was delivered in the matter of *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1.

This case represents a significant development in the law relating to the tender process in Australia and brings Australian law into line with other common law countries including England, Canada and New Zealand. In a 340-page decision, which dealt with an enormous range of issues, the Federal Court (per Finn J) held, inter alia, that two 'pre-award' or process contracts came into existence between the parties. However, the decision itself makes no great contribution to the development of the law on 'pre-award', 'process' or 'bid' contracts.

It should also be noted that the question of damages was not addressed in the judgment. Consideration of the measure of dam-

ages is currently before the court.

The Facts in *Hughes*

The facts are long and detailed. Briefly, Hughes and Thomson both tendered for 'The Australian Advance Air Traffic Systems' contract ('the TAAATS contract'). Following the call for expressions of interest, the selection process was altered by the Civil Aviation Authority ('CAA'). After a government inquiry, a second tender was instituted and offers made to Hughes and Thomson only ('the TAAATS II contract'). Hughes was named by the initial evaluation team as the preferred contractor, but this was rejected by the CAA Board. Further information was gathered regarding both bids. Subsequently, the Board accepted a recommendation that Thomson be the preferred contractor. There was a further review and both were asked to participate in the process and entered into a specification development phase contract with the CAA. This included an agreement setting out the evaluation criteria to be applied in the final offer.

Thomson was eventually selected, according to the chairman of the CAA, principally on the basis of 'its significant commitments to work with Australian industry'. However, Hughes suspected that Thomson had been given the opportunity to reduce its price so as to be more competitive and that price was not given priority in the evaluation process (contrary to the letter in which the evaluation process was set out).

Hughes' Claims

Hughes instituted proceedings against the CAA (which had by this time become Air Services Australia) alleging:

- breach of contract;
- misleading and deceptive conduct;
- negligence in the administration of the tender process; and
- equitable estoppel.

In relation to breach of contract, Hughes submitted that whether or not contractual obligations arise in connection with intended procurement is simply a matter of construction. A party calling for tenders may do no more than issue an invitation to treat but, equally, the steps it takes may result in the making of contractual obligations. Hughes relied on *Blackpool & Flyde Aero Club, Ron Engineering, Fairclough Building* and also the New Zealand case of *Pratt Contractors.*

Hughes' Contentions

On 9 March 1993 the CAA forwarded to both Hughes and Thomson separate letters (which both later signed) which set out detailed procedures and criteria for the award of the TAAATS II contract. Hughes alleged that this gave rise to a 'tender process contract' in which Hughes agreed to participate in a new tender process on the terms of the letter.

On 19 July 1993 the CAA issued a request for tender (RFT) to both Hughes and Thomson. Hughes alleged that this letter had contractual force when Hughes submitted its best and final offer (BAFO) to the CAA on 5 October 1993. Hughes alleged that, from this date, it and the CAA were bound to a tender process which was in line with the terms of the RFT. This contract 'carried forward' the contract alleged to be recorded in the 9 March 1993 letter. Hughes claimed that these terms had been breached.

On the basis of this factual matrix, Hughes argued that the call for tenders was more than an invitation to treat and gave rise to a pre-award contract.

CAA's Contentions

CAA, for its part, argued that neither the 9 March letter nor the RFT had contractual effect because:

- there was no contractual intent manifested by the parties;
- the procedures in those documents were simply administrative arrangements and not contractual terms; and
- there was no consideration for the alleged 9 March contract.

The Decision

The court held that sequential process contracts or 'bid' contracts did exist.

His Honour found that the CAA clearly *did* intend in the 9 March letter to bind itself and Hughes to further participation in the tender process by setting out binding procedures. The necessity for this had arisen because of problems with the first TAAATS

tender, where serious questions were raised about the fairness and integrity of the process. In these circumstances, His Honour viewed the letter and the RFT as 'positive steps to procure the participation of the tenderers in a competitive TAAATS II'.

Quoting from the Canadian case of *Ron Engineering* (1981), His Honour stated that:

Integral to that was the prescription of a tender process acceptable to them. . . . The circumstances here were ones in which it properly can be said that the parties, by agreement, had used contract to protect 'the integrity of the bidding system'.

On the consideration point, His Honour held that Hughes' participation in the tender process constituted good consideration for the pre-award contract. He also found that the RFT had 'acquired contractual force' on the date of Hughes' lodgement of its BAFO. The court also held that the process contracts were breached.

His Honour went on to find that the CAA had breached this contract — in particular an implied term that the CAA would conduct its tender evaluation fairly. Further, he stated that 'a term should be implied as a matter of law into a tender process contract with a public body (such as this was) that that body will deal fairly with a tenderer in the performance of its contract'. He went on to imply such a term into the RFT.

His Honour considered that the CAA had breached the process contract because it did not evaluate the tenders in accordance with the procedures set out in the RFT, did not ensure that measures to ensure strict confidentiality of the process were maintained and it accepted an out-of-time change to Thomson's tender.

Conclusion

His Honour sounded a note of caution:

I should indicate, furthermore, that my findings of sequential pre-award contracts in this case have been ordained by the distinctive circumstances of this procurement and by the parties' responses to these. It has been suggested that there are sound reasons of public policy which should induct pause in the finding of such contracts in the tender/procurement contexts. I designedly do not enter on that. Here, it is plain that the parties have found it necessary to take explicit steps to protect 'the integrity of the bidding system'.

It is unfortunate that His Honour declined to consider the policy issue in more detail and did not undertake a more thorough analysis of the large body of case law which has developed on the issue. Instead, he confined his decision entirely to the factual matrix of the case and did not attempt to provide any rules or guidelines to determine when a process or bid contract will come into existence. Unfortunately, this means that the issue is likely to be the subject of further litigation in the future, as parties test the range of situations in which such a contract will arise.

Implied Term of Fair Dealing

In *Hughes*, Finn J was in no doubt as to the need to imply into the terms of the process contract a term of good faith and fair dealing. The relationship that the tenderers had embarked on in the facts of this case made it essential that there was a term of fairness of process and dealing. His Honour said: 'without the assurance of fairness, there would have been no contract'.

Finn J went on to analyse the law in Australia relating to the implication at law of an implied term of fair dealing. Having regard to the view expressed by Gummow J in *Service Station Association Ltd v Berg Bennett and Associates Pty Ltd* (1993) 45 FCR 84, in which Gummow did not take a 'leap of faith' and imply a term of fair dealing into contractual performance, Finn J went on to confirm his preference for the view of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 268. This view was that:

'It is plain that the parties have found it necessary to take explicit steps to protect "the integrity of the bidding system".'

People . . . have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its per-

formance. In my view this is in these days the expected standard and anything less is contrary to prevailing community expectations.

His Honour was prepared to find that a term of fair dealing should be implied into the particular class of contract under consideration, namely the process contract. Having considered the authorities on the 'bid' or process contracts, Finn J noted that if the purpose of the process contract is to be accomplished, namely to preserve to the parties the opportunity to participate in a tender process, then it is essential not to have that opportunity destroyed by the unfair dealing of one of the parties.

Finn J also explored the expectation of fair dealing of government bodies and went on to say:

. . . fair dealing is, in effect, a proper supposition of a competitive tender process contract (especially one involving the disposition of public funds) and given that a public body is the contracting party whose performance of the contract is being relied upon, a necessary incident of such a contract with a public body is, I am prepared to conclude, that it will deal fairly with the tenderers in the performance of its tender process contracts with them.

This point of view takes the Australian position much closer to the position in the United States where the term of fair dealing is implied in every contract (*refer* Restatement of Contracts, Second, Art 205).

Whether a term of fair dealing should be implied in particular contractual situations has been considered in a number of recent Australian cases.

In *Willow Grange Pty Limited v Yarra City Council* (unreported, Byrne J, Supreme Court of Victoria, 1 December 1997) the court considered the issue of fairness in relation to a lease of premises.

The Plaintiff had conducted a business of restaurant, kiosk and boat hire on Crown Land on the bank of the Yarra River. The lease contained a term requiring the Lessor to negotiate exclusively with the Lessees and, failing agreement the Lessor, allowing negotiation with any other party in relation to a new lease. At the end of the term there were some negotiations, but the Defendant – the City of Yarra – determined not to enter into a fresh lease and decided to put the lease to public tender.

The Tender process was complicated and confusing and occupied some 12 months. It commenced with the call for expressions of interest by the Department of Natural Resources and Environment, but was taken over by the Council of the City of Yarra. Four or perhaps five draft leases were made available to interested parties at different stages of the process. There also appeared to have been a number of different sets of selection criteria. When the City of Yarra took over, it issued a new comprehensive set of Tender documents, which it claimed were intended to replace all previous Tender documentation. The Plaintiff claimed that this was not clear.

The Plaintiff asserted that a term should be implied in the Contract that the City of Yarra would conduct the Tender process in a manner which was fair and equal to all tenderers and that information received by it would be confidential. Secondly, it relied upon a principal of administrative law that the City of Yarra would act fairly and apply the principles of natural justice in deciding whether to grant the lease to it.

The proceeding came before Byrne J in the Practice Court, on an application by the Plaintiffs for an interlocutory injunction. The injunction sought to restrain the Council from giving effect to its decision, which was founded upon the Tender process, and to prevent it recovering possession of the premises.

His Honour referred to *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 and held that, in the particular circumstances of this case, there was a triable issue as to whether the City of Yarra was contractually bound in its performance of the Tender process to act fairly to each of the tenderers. His Honour also referred to *Pratt Contractors Limited v Palmerston North City Council* (1995) 1 NZLR 469.

Byrne J emphasised the particular circumstances which included:

- the obligation in the lease to negotiate with the Plaintiff prior to the tender process;
- the terms of the Expression of Interest issued by the Department;
- the terms of the Victorian Local Government Code of Tendering;

▶ the City of Yarra's own code of practice for Expression of Interest; and

▶ the formality and documentation of the tender process itself.

His Honour referred to a number of cases which speak of a public law obligation to act fairly. The most recent being the decision of the Supreme Court of Queensland in *KC Park Safe (Brisbane) Pty Limited v Cairns City Council* (1997) 1 QdR 497.

The Court considered that there was a serious issue to be tried as to whether the Plaintiff's tender was assessed on the basis of criteria which were unknown to it and, more importantly, which were different from those which it was reasonably entitled to believe would in fact be applied. His Honour noted that, if at trial it was found that the selection was made on criteria which were not properly disclosed and fairness was denied, the decision of the Council might be quashed, as per the statements of the High Court in *Darling Casino Limited v NSW Casino Control Authority* (1997) 143 ALR 55.

The Court granted an interlocutory injunction restraining the City of Yarra from giving effect to its decision to award the lease to another tenderer, pending the determination at trial of the claim by the Plaintiff that it was entitled to fair consideration of its tender.

Recent Developments

The conduct of the tender process and whether there should be implied a term of fair dealing and good faith was considered in *Dalcon Constructions Pty Ltd v State Housing Commission* (unreported, Templeman J, Supreme Court of WA, 22 January 1998).

The Plaintiff sued the State Housing Commission for damages it claimed it had suffered as a result of the Commission declining to award it construction contracts. Dalcon contended that the Commission had acted improperly and for an ulterior purpose, in breach of its contractual duty to act honestly, impartially and in good faith in selecting the successful tenderer for each project.

Dalcon had tendered on a number of projects and had been rejected, despite being the lowest tenderer. The State Housing Commission had a standard form of Invitation to Tender which prescribed a clear, orderly and familiar procedure including Conditions of Tender that required the tender to remain binding on the tenderer for 21 days.

There was a deadline for submitting of tenders, and a public opening of tenders. All tenders were open to the public and the Conditions of Tender were stated to be non-negotiable. After the tenders were opened publicly, they were ranked in price order and the information posted on a public notice board. The executive officers would then prepare a standard form of Tender Recommendation for submission to the board meeting of the State Housing Commission. The decision would be made by the members of the Commission at that formal meeting and then communicated in writing to the successful tenderer.

His Honour stated that it was common ground, based on the *Hughes Aircraft* case, that whether the tender procedure gives rise to a contract or not depends on the circumstances of a particular case.

The Court held that in the circumstances, the parties did not intend that there should arise from the tendering process a contract including a term that the Commission would act honestly, impartially and in good faith in selecting the successful tenderer.

The Commission had a policy of partiality towards regional Contractors for projects outside the metropolitan area, and also a policy of partiality towards tendering organisations which had a particular Aboriginal involvement. Also, the Commission was not obliged to accept the lowest tender, and might decline to award Contracts to tenderers who they felt were overloaded with work, although they might otherwise have qualified. His Honour stressed that the term which allowed the Commission to accept a tenderer other than the lowest was an express term of the contract, noting *Codelfa Construction Pty Limited v State Rail Authority of NSW* (1981-82) 149 CLR 337, as authority that a term will only be implied where it is not contradictory to an express term of the Contract.

His Honour went on to consider the conduct of the State Housing Commission and held that, even if he were wrong and the term implying a duty of good faith and impartiality was implied, the conduct of the Commission was such that the term had not been breached as the Commission had not

acted dishonestly or in bad faith.

The NSW Court of Appeal recently implied a term of good faith and fair dealing into a lease of commercial premises. In *Alcatel Australia Limited v Scarcella* (unreported, NSW Court of Appeal, Sheller, Powell and Beazley JA, 16 July 1998) a Lessee brought proceedings against the Lessor seeking a declaration that it was not bound under its Lease to carry out certain work to the leased building to upgrade an internal stairway to comply with fire safety standards. Windeyer J at first instance had dismissed the Statement of Claim.

'It is common ground, based on the *Hughes Aircraft* case, that whether the tender procedure gives rise to a contract or not depends on the circumstances of a particular case'.

Under the lease, the tenant was required to ensure that the premises complied with any lawful requirements and, in particular, fire safety requirements. The Lessor had commissioned and obtained a report from a fire engineer who had found that the stairway had to be upgraded. The Lessor then requested the Local Council to issue a Fire Safety Order and requested that the fire engineer's report be incorporated into the Fire Order. It also requested the Lessee to carry out the necessary work.

On appeal from the decision of Windeyer J, the Lessee claimed that the Lessor had requested the Council to impose fire requirements which were stricter than those required by law and which were unreasonable.

The Lessee claimed that there was an implied term in the lease of good faith or reasonableness in the Lessor's performance of their lease obligations, and this bound the Lessor to co-operate in a reasonable way to ensure that the Lessee was not subject to the expense and impact of an unreasonable Fire Order.

The Court of Appeal considered the comments made by Priestley JA and Handley JA in *Renard's* case, and their acceptance in *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91 of the provisions of the United States Uniform Commercial Code and the Restatement of Contract. Their Honours also considered the comments made by Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84, the comments made by Finn J in the *Hughes Aircraft* case, and a large number of articles which were considered in that lengthy judgment.

Sheller JA (with whom Powell JA and Beazley JA agreed) held:

The decisions in Renard Constructions *and* Hughes Bros *mean that in NSW a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a Contract. There is no reason why such a duty should not be implied as part of this Lease.*

The Court of Appeal held that, on the facts, the Lessee had not demonstrated that the requirements of the Fire Order were unreasonable. Sheller JA continued:

in a commercial context it cannot be said, in my opinion, that a property owner acts unconscionably or in breach of an implied term of good faith in a Lease of the Property by taking steps to ensure that the requirements for fire safety advised by an expert fire engineer should be put in place.

Consequently the appeal failed, as there had been no breach of the implied term as to the duty of good faith.

The decision in *Alcatel* has recently been applied in *Garry Rogers Motors (Aust) Pty Ltd v Suburu (Australia) Pty Limited* BC 9903894, Federal Court, June/July 1999.

Finkelstein J, in relation to implied terms within commercial contracts to act in good faith, stated:

Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the presumption of both parties) but as a legal incident of the relationship . . . .

If such a term is implied it will require a contracting party to act in good faith and fairly, not only in relation to the performance of a contractual obligation, but also in the exercise of a power conferred by the

contract. There is no reason to think, prima facie at least, that the obligation of good faith and fair dealing would act as a restriction on a power to terminate a contract, especially if that power is in general terms.

The applicant had refused to adopt a business plan developed by the first respondent as part of its dealership agreement. The first respondent gave the applicant 13 months written notice terminating the agreement. The commercial relationship had been upheld between the two parties for seven years. While the business dealings between the two parties continued over the thirteen-month period, the court held that this could not be construed via promissory estoppel as the termination having been withdrawn.

'It is interesting to note that almost all the cases in which the existence of a "bid" or "process" contract has been found involve a public body'.

Finkelstein J recognised the legal contexts of implied terms of good faith and dealings, but did not hold that this could be implied to constrict the legitimate business dealings of parties to an agreement. He stated:

A term of a contract that requires a party to act in good faith and fairly imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interests of that party. That is to say, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.

The implication of a term of good faith was also considered in *Advance Fitness Corporation Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264.

Whilst the court accepted that the parties should act in good faith, Austin J, in concluding his judgement, held:

. . . fairness does not require in all circumstances of this case that such misconduct should compel the defendant to consent to substantial work which it does not wish to have done to the building which it owns — nor, in my opinion, does the law.

The Department of Administrative Services Case

The tender procedure has again come under the scrutiny of the courts in *JS McMillan Pty Ltd v Commonwealth of Australia* (1997) 147 ALR 419.

This case focused upon obligations under the *Trade Practices Act* and what might constitute misleading and deceptive conduct in the tender process.

In 1996 the Commonwealth Department of Administrative Services ('DAS') began to sell off the assets of the Australian Government Printing Service ('AGPS') and to put out for tender the services previously provided by the AGPS. In 1997 five 'packages' of work were put out to tender. McMillan expressed interest in several of these and, along with several other tenderers, was invited to tender for the work. However, McMillan was removed from the short-list because the tender evaluation committee determined that it had not complied with certain clauses in the tender documents.

McMillan alleged that the Commonwealth had been misleading and deceptive under s.52 of the *Trade Practices Act* in telling McMillan that it would be short-listed and in not informing McMillan that non-compliance with those particular clauses would result in their tender no longer being considered.

The Commonwealth denied that its actions had been misleading or deceptive, and argued that McMillan had suffered no loss. Further, it argued that the provisions of the *Trade Practices Act* did not apply to the Commonwealth because the tender process was not conduct in the carrying out of a business.

His Honour found as follows:

▶ The Commonwealth had been misleading in not telling McMillan that its failure to provide particular information in response to clauses in the tender package would result in its tender being dismissed as non-complying;

▶ McMillan had suffered loss because of this;

▶The Commonwealth would be covered by s.2A of the *Trade Practices Act* if the conduct was performed in the carrying on of a business;

▶The Commonwealth was not engaged in the business of selling off assets and the one-off decision to cease the activities of the AGPS, to sell its plant and equipment and to tender for the services previously provided by the AGPS was not conduct in the carrying on of a business.

As a result, His Honour concluded that the *Trade Practices Act* did not apply to this conduct and McMillan could not recover any damages. McMillan is presently appealing this decision.

The 'bid contract' and the concepts discussed in the *Hughes* case have very recently been considered in the Canadian case of *Midwest Management (1987) Ltd v B.C. Gas Facilities Ltd* (17 June 1999, British Columbia Supreme Court). The Court in this case took a somewhat cynical view of the 'bid contract'.

Midwest sought to apply the concepts developed in the *Ron Engineering* case to its situation and alleged that there was a breach of the bid contract. The owner (B.C. Gas) had in its tender reserved the right to reject any or all tenders, to accept or reject any tender which was irregular or incomplete and had further reserved the right to re-tender the project or negotiate a contract with any one or more of the tenderers or other persons.

Midwest submitted a tender which did not meet the conditions of the proposed contract. It was subsequently asked to clarify aspects of its tender but at a later time was informed by the owner that the tender was unsuccessful.

The Court held in this case that there was no bid contract if the tender did not strictly comply with the tender requirements. Midwest argued that, by issuing the Request for Clarification, the Owner had considered the tender valid and hence a bid contract came into existence at that time. Paris J did not agree, considering that this was merely an indication of a wish to negotiate further. His Honour Paris J held that Midwest had, at best, submitted a counter offer and accordingly, in the absence of a 'bid contract', there was no implied duty of fairness.

OVERVIEW

These cases highlight the need for fairness, transparency and consistency in the conduct of the tender process. This extends to:

▶clear statements to the tenderers of the proposed procedures to be adopted;

▶confirmation of the evaluation procedures;

▶a clear outline of the assessment criteria;

and above all a dedicated and unwavering application of all of the stated criteria and procedures.

Clearly, the failure to adhere to stated assessment criteria by the introduction of undisclosed policies (*refer Chinook*), the acceptance of a non-conforming tender where such possibility is not averted to in the published assessment criteria (*refer Pratt*), or a failure to adhere to stated procedures, assessment criteria and timeframes (*refer Hughes*) are all matters which now in Australia may give rise to legal liability .

It is interesting to note that almost all the cases referred to in which the existence of a 'bid' or 'process' contract has been found involve a public body. It is likely, however, that the same considerations will arise in relation to the conduct of a competitive tender process by an organisation in the private sector.

The negotiation of the 'bid' contract, together with the current willingness of the courts to imply a term of good faith and to act fairly, impose a further obligation on all parties involved in tending to observe strictly the advised procedures. ■

Pamela Jack's article is based upon a paper of the same title delivered in December 1999 to the Building Science Forum of Australia (New South Wales Division) seminar on tendering.