

# **The Missing Link, Tendering and Administration of Remediation Contracts**

Nikki Abele, Barrister & Solicitor  
& Joe Petrie, P.Geol., R.E.T.

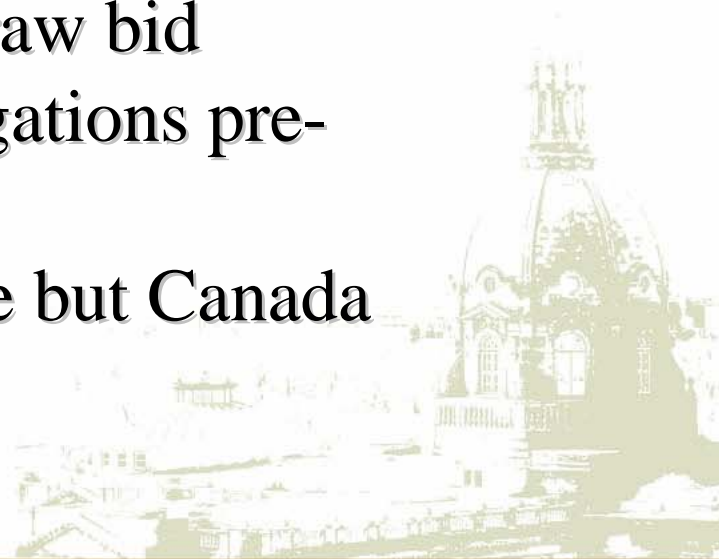
ESAA - Remediation Technologies  
Symposium  
Oct 24 to 26, 2007  
Banff, Alberta



## Introduction

### Pre: *Ron Engineering* (1981, SCC)

- Basic Contract Law applied
- Bidder could withdraw bid
- No contractual obligations pre-award
- Still law everywhere but Canada



*Ontario v.  
Ron Engineering  
and Construction*

**Contract A/**

**Contract B Analysis**



# The Creation of Contract A and Contract B



## **What are the Implications?**

Contractual relationship is created at submission of bid, even if no work contract awarded

**THIS IS CONTRACT A**



## **Duties and Obligations of Contract A**

- Terms are the terms of the tender documents
- Submission of bid is acceptance of those terms





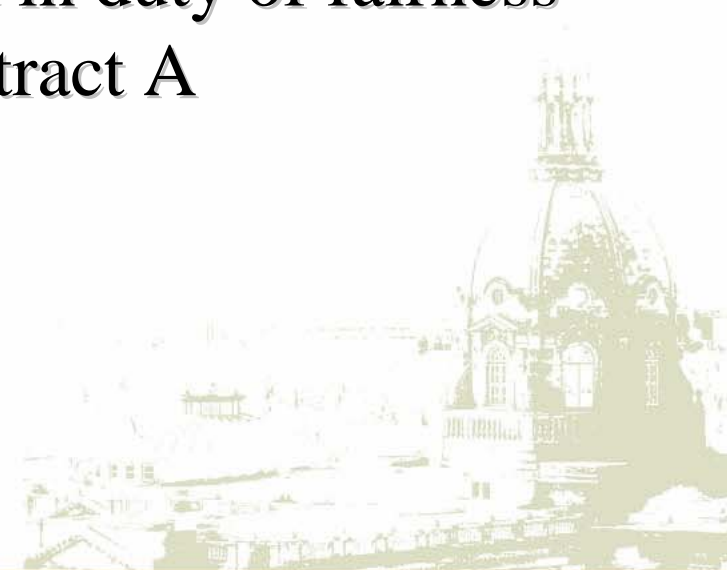
## **Implied Terms: *MJB v. Defence Construction***

### Terms read into relationship

- Can the term be complied based on custom or usage?
- Is the term a “legal incident” of a particular class of contract?
- Can the term be implied on the intentions of the parties?
  - \* e.g. acceptance of low bid often implied term unless expressly stated otherwise

## *Martel Building Ltd. v. Canada* (SCC, 2000)

- ✓ Supreme Court read in duty of fairness and good faith in Contract A





## **What Does Good Faith and Fairness Entail?**

Duty to –

1. provide proper disclosure
2. reject non-compliant tenders
3. Duty to conduct a fair  
Competition
4. To award to the winning bidder
5. To award the contract as tendered

**\* areas of dispute – what is compliant**

## Privilege Clauses

Principles applied to privilege clauses

**“lowest or any tender not necessarily accepted”**

- (1) bidding process creates a legal relationship between owner and compliant bidders that gives rise to legal duties
- (2) implied duties such as the “low bid rule” can be overridden by specific language that gives owners discretion
- (3) privilege clauses do not give owners unfettered discretion; must be exercised fairly and in good faith

## Obligations on Bidders

### Bidder

- must not revoke a bid
- must keep bid open for acceptance
- must enter into Contract B as awarded



## **Introduction to National Specifications**

- Format for the Specifications are be based on Construction Specifications Canada (CSC) Master Format.
- Master Format has 48 Divisions.
- Each Section of a Division is divided into three parts:
  - Part 1 - General
  - Part 2 - Materials
  - Part 3 - Execution



## **Master Tender Documents**

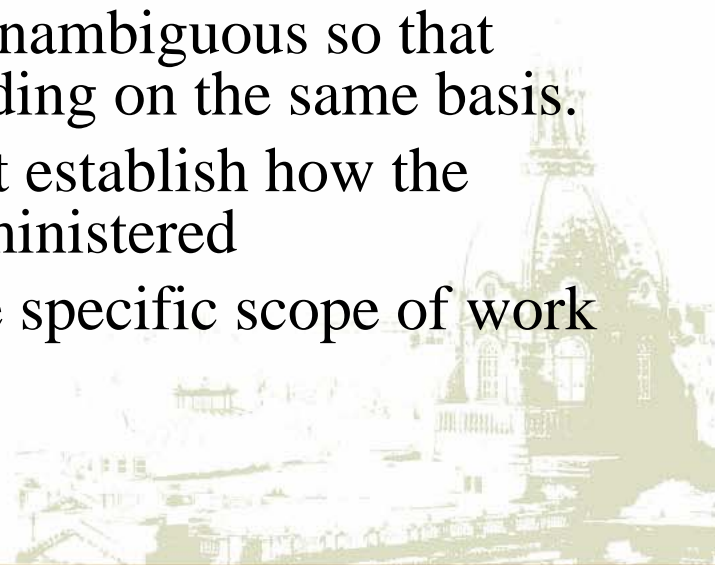
- Master Tender Documents have Divisions 00, 01 and 02
- Master Tender Documents were prepared for common remedial approaches of Excavation & Landfill Disposal, or Excavation & Landfarm or Excavation & Aeration using Allu Bucket



## **Master Tender Documents, cont'd**

The Master Tender Documents are structured such that:

- The bidding process is clearly defined, fair and transparent.
- Are complete and unambiguous so that Contractors are bidding on the same basis.
- Contain clauses that establish how the contract will be administered
- Edited to ensure the specific scope of work is clearly spelt out.



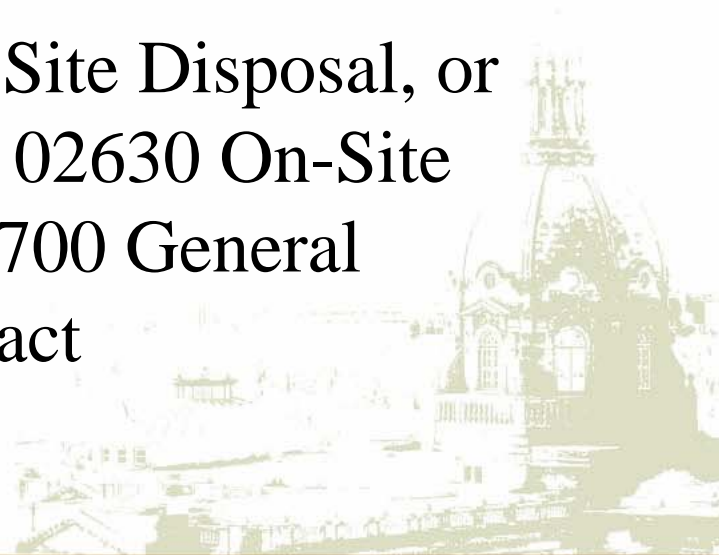


## **Master Tender Document Sections**

- Section 00100 Definitions
- Section 00200 Instructions to Bidder
- Section 00210 or 00220 Pre Bid Meeting or Mandatory Pre Bid Meeting
- Section 00400 Bid & Contract Form (Sections 00410 Off-Site Disposal, or 00420 LandFarm or 00430 On-Site Aeration by Allu Bucket)

## **Master Tender Document Sections cont'd**

- Section 01000 General Requirements
- Section 01210 Contingencies
- Section 02500 Removal & Disposal of Storage Tanks
- Sections 02610 Off-Site Disposal, or 02620 LandFarm or 02630 On-Site Aeration
- Section 00700 General Conditions of Contract



## **Section 00200 Instructions to Bidders**

- Bidder Qualifications
- Basis of Bid
- Sufficiency of Bid
- Bid Modification
- Bid Withdrawal or Acceptance
- Irregularities
- Examination of Bid Documents & Site
- Applicable Lien Legislation
- Contingencies
- Division of Work
- Interpretation & Modification of Bid Documents
- Addenda

## **Section 00700 General Conditions of Contract**

- Role of the Consultant
- Assignment
- Termination
- Subcontracts
- Contractor's Responsibility for Control of the work
- Protection of Property & Cleaning
- Hold Harmless Agreement
- Insurance
- Worker's Compensation Act & Occupation Health & Safety Act

## **Section 00700 General Conditions of Contract, cont'd**

- Regulatory Requirements
- Defective Work
- Contract Time
- Materials & Equipment
- Warranty Change in the work
- Valuation of Change in the Work
- Change in subsurface Conditions
- Payment
- Claims
- Disputes



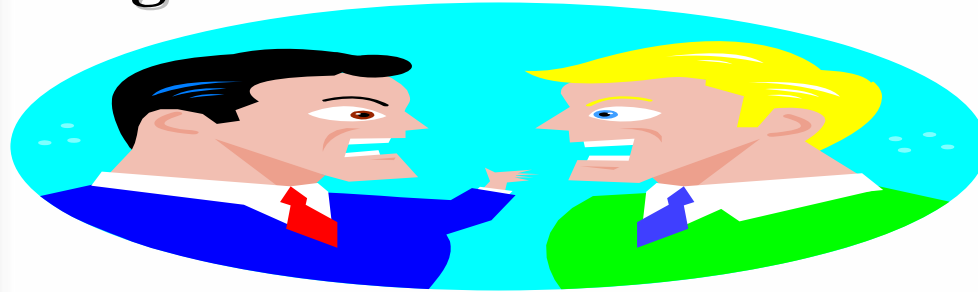
## **Section 01000 General Requirements**

- Contractor's Use of the Premises
- Unit Prices – Measurement for Payment
- Work Site Safety – This Contractor is “Prime Contractor”
- Certificate of Recognition (COR)
- Submittals
- Safety Requirements
- Quality Control
- Temporary Facilities & Controls
- Overloading & Cleaning of Streets





# Comprehensive Tender Documents Assist in the Prevention of Disputes & Litigation



# Questions

