

Construction Clients' Group Christchurch

Recent Tendering Cases
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What I am running through today

- Brief background to **tender law**
 - What is a tender contract?
 - What obligations arise under a tender contract?
 - What liability arises under a tender contract?
- What have the **Courts** held?
- Can you **contract out** of tender contracts?

What is a Tender Contract?

TRADITIONAL VIEW

- The ‘traditional’ view was that the tender process did NOT create a separate contract:
 - The Request for Tenders (or **RFT**) is considered an ‘**Invitation to Treat**’
 - Invitation to Treat = Invitation to Contractor (tenderers) to submit offer for primary contract
 - Tender = ‘offer’
 - No legal obligations arise between the parties until a tender is accepted and contract then formed

What is a Tender Contract?

MODERN VIEW

- More recently Courts have accepted a preliminary **tender process contract** can also be created:
 - The Principal's 'offer' in the RFT (ie offer to evaluate tender in accordance with tender conditions) is 'accepted' by any Tenderer by submitting a conforming tender
 - This acceptance gives rise to a preliminary **'Tender Contract'**
 - Failure to follow the tender contract may give rise to damages

What is a Tender Contract?

SUMMARY OF NZ APPROACH

- So modern tender law in New Zealand = **Two Contract Approach**:
 - **Tender Contract**: The submission of a tender constitutes a preliminary ‘tender contract’ between the Principal and Tenderer(s) in relation to the tender process, prior to the primary contract being awarded
 - **Primary Contract**: The acceptance of a tender concludes a binding contract between the Principal and the successful Tenderer

What obligations arise under a Tender Contract?

- A Principal under a tender contract must:
 - Follow express conditions: The Tender Conditions/RFT are the ‘conditions of contract’
 - Follow implied conditions:
 - act fairly and impartially
 - consider all tenders submitted properly & equally
 - (NB **express conditions can override implied conditions**)
- Failure to follow conditions = **breach of contract**

What liability arises under a Tender Contract?

- A failure to abide by these obligations can lead to your organisation being liable for the tenderer's:
 - Costs of Tendering
 - Loss of Profits
 - Loss of Opportunity
- Injunctions may also be taken out against your organisation impacting any progress on your project or deal

What have the Courts held?

Briefly discuss four cases

- Pratt v Palmerston North – Tender Contract breached
- Pratt v Transit
 - High Court = Tender Contract breached
 - Court of Appeal = Tender Contract but no breach
 - Privy Council = Upheld Court of Appeal

What have the Courts held? cont.

- Roading & Asphalt v South Waikato District Council
 - High Court = Tender Contract breached
 - Court of Appeal = Tender Contract no breach
- GHP Piling v Leighton Contractors
 - No Tender Contract

Pratt Contractors Ltd v Palmerston North City Council (1995)

- Tenderers required to register interest and pay non-refundable deposit
- Conditions of Tendering specified that the tender was to be awarded to the lowest tenderer, **no mention of ability to evaluate alternative tenders**
- Pratt was the lowest tender but Council awarded to another tenderer who submitted an alternative method

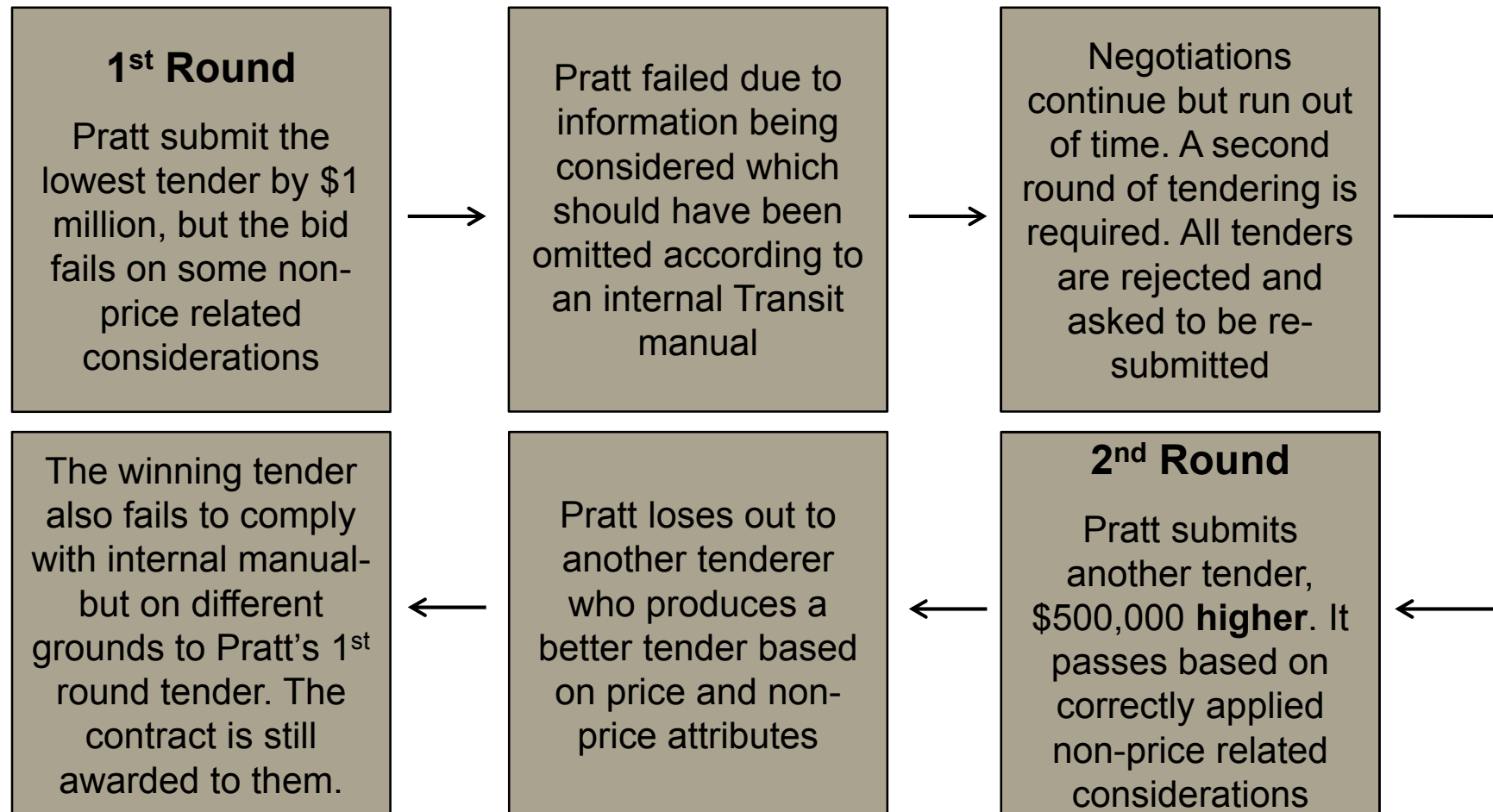
What was the result?

- The Court held that there was a **breach of the preliminary tender contract** with the lowest qualifying tenderer
- The Court awarded damages for the costs of the tender preparation (\$17,882) and loss of profits (\$200,000). There were no damages awarded for loss of opportunity

Pratt Contractors v Transit (2005) [High Court]

- Transit put out a tender for a highway realignment project, Pratt was one of eight to respond
- The RFT provided for a weighted attributes evaluation according to an internal transit manual
- The RFT required Transit to accept the tender with the highest score (made up of price and non-price attributes)
- The RFT specifically said the lowest or any tender would not necessarily be accepted

Pratt v Transit - Evaluation Process



Things are Looking Up for Pratt

Pratt was successful in the High Court!

- The High Court found the tender contract was in place for the 1st and 2nd round of evaluation
- This contract included the terms of the RFT and the internal Transit manual
- Transit then breached the tender contract and did not evaluate the tenders fairly and impartially:
 - 1st Round assessed the 'Resources' attribute incorrectly
 - 2nd Round considered Hayes' tender which was non-conforming and should have been rejected

Court of Appeal - Transit strikes back

But Unsuccessful In the Court of Appeal

- The **terms of the tender contract were only those in the RFT** and the documents it specifically refers to
- This meant internal **Transit manuals had no legal effect** and the CPP was only binding to the extent specific clauses were referred to
- The **Court was not going to step into position of the panel and re-evaluate the tenders**
- The High Court decision was overruled, but the Court of Appeal felt there was **still an obligation to deal fairly and even-handedly** with tenderers

Privy Council has final say!

- Pratt appealed to the Privy Council
- Upheld the Court of Appeal's decision
 - Preliminary Contract was the RFT and did not incorporate Transit Internal Manuals
 - Transit did not breach RFT by examining sub-attributes
 - **Implied duty of good faith and to treat all tenderers equally**

Roading & Asphalt Ltd - Background Facts

Roading & Asphalt Ltd v South Waikato District Council (2012)

- A local Council put out an RFT for waste disposal operations in the Waikato
- The tender was to be assessed on a 'Lowest Price Conforming Method', in two stages:
 - 1st Stage: Tenders assessed against 6 non-price attributes (e.g. relevant experience) on a pass/fail basis
 - 2nd Stage: Tenders who made it through the first stage would be ranked according to price

Roading & Asphalt Ltd cont.

- Council thought they were protected by saying, ‘the lowest tender price won’t necessarily be accepted’
- Roothing & Asphalt Ltd (RAL) made it through the first stage and were one of the last two tenderers left. When they submitted their price they were the lowest tenderer. But ultimately they were unsuccessful
- Council advised RAL that their tender had not been successful based on the ‘**Cost to Council**’. This criteria was not laid out anywhere in the Tender Requirements

Issues Considered

- The issues in this case were:
 - Was the Council entitled to consider ‘Cost to Council’ if it had already set out clear tender evaluation requirements?
 - Did the terms of tender give the Council the ability to accept any offer other than the lowest?

A Clear Win for the Tenderer

- Keane J found:
 - There was a **tender contract**
 - **Council had departed from its clear Conditions of Tendering** which RAL were allowed to rely on
 - Council were able to dismiss all tenders and start again, however if they did choose one tender, it had to be the one with the lowest price based on Council's own terms
 - Awarded RAL damages of \$330,634 plus GST for loss of profits for the two years of the contract. Nothing awarded in relation to the third discretionary year

The Appeal

- Council appealed - claimed the decision was not in breach of the terms of tender:
 - the invitation to tender specified that the lowest or any tender would not necessarily be accepted
 - the tender documents mentioned the Lowest Price Conforming method and set out six non-price attributes for stage one
 - Stage two consisted of *evaluating* which of the remaining tenders had the lowest price, but that the lowest or any tender would not necessarily be accepted

The Appeal cont.

- One reason for reserving the right not to choose the lowest tender was to address potential levy under Waste Minimisation Act 2008
- This was brought to the tenderers' attention as a 'bonus' in the Schedule of Quantities, Rates and Prices

Distinguishing Pratt

- Court **set aside High Court decision and awarded Council costs**
- The Court distinguished this case from *Pratt* on the basis of the following:
 - In *Pratt* the tender documents created a clear expectation that the contract would be let to the lowest bidder. In this case, there was no such provision

Distinguishing Pratt cont.

- The invitation to tender did not specifically refer to the Lowest Price Conforming method
- The tender documents stated that the Lowest Price Conforming method would be adhered to, but this was qualified by the requirement for the price attribute to be *evaluated* at stage two
- Council made it clear that the Schedule of Tenderer's Resources would be considered when evaluating the price attribute and that the lowest or any tender would not necessarily be accepted
- The form of tender contained an acknowledgement that Council was not bound to accept the lowest or any tender

Distinguishing Pratt cont.

- The nature and purpose of the ‘bonus’ was spelt out fully, and RAL addressed this in its response to the tender. Successful tenderer had a higher price but a better way of managing waste and therefore a better economic outcome for Council

GHP Piling Decision- A Principal's Success Story



GHP Piling v Leighton Contractors Pty Ltd (2012)

- Contract for significant piling works
- Tenders were received and reviewed but the Principal sent out another tender offer to one more party after this review (accusations of 'tender shopping')
- GHP was the leading tenderer for the job at the time this new request was sent out, but subsequently missed out on the job

GHP Piling Decision- The Claims

- **GHP argued that there was a tender contract** established and the Principal had breached by considering a non-conforming tender
- **The Principal argued** that GHP's response amounted to an '**invitation to treat**' (ie only an invitation to make an offer in respect of the primary piling contract, not an offer in itself to form a tender contract)
 - Alternatively the Principal argued that they had treated all parties in a fair and equal manner even if there was a tender contract

GHP Piling Decision- The Result

- The High Court stated the importance of **looking at the circumstances as a whole and viewing them objectively**
- The Judge helpfully set out a number of **features which may indicate a tender contract** including:
 - A requirement for registration and payment of a tenderer deposit;
 - A stated criteria for processing and evaluating tenders;
 - An express or implied commitment to accept the tender; and
 - The general formality of the tender.
- Rather than doing a box-ticking exercise, the absence of many of these factors as a whole, suggested to the Judge that the **parties didn't believe a tender contract had been formed**

What lessons can we take from these cases?

- ‘Two Contract’ approach accepted by Courts in NZ – where circumstances allow
- Tender contracts protect tenderers from unfair conduct by the Principal (NB unequal = unfair)
- ‘Tender Conditions’ are ‘Conditions of Contract’ and must be followed – you could be in breach if you do anything that is not envisaged or allowed by the Tender Conditions

Can you **contract out** of a Tender Contract?

- The *Onyx v Auckland City Council* case provides a good example of a Principal's ability to contract out. In this case the RFT contained this clause:

'No legal or other obligations shall arise between the Tenderer and the Principal in relation to the conduct or outcome of the tender process unless and until that Tenderer has received written notification of the acceptance of its Tender'

- This is a good example of how to contract out. Even if there were legal obligations, Council had reserved the right to consider non-conforming tenders
- Courts upheld the above clause and found any 'implied' duty to act fairly and even-handedly cannot override express terms in the RFT

Summary: What have we covered here today?

- Be aware of the **'Two Contract'** approach
- A **Court will look at the overall context** to determine whether the RFT has given rise to a **tender contract**
- Under a tender contract **you must comply with the Conditions of Tendering** (and be fair/impartial)
- **Clear tender conditions** giving you discretion are the key
- It is possible to **'contract out'** of tender contract – but best not to rely on this