PUBLIC TENDERS

*Nicholas Seddon**

This paper examines various mechanisms for imposing legal liability on the tendering process. The traditional analysis in contract text books treats the tender as an offer so that no contractual relationship can arise until acceptance of a particular tender. Very little attention has been paid to the rules which govern the period prior to award of a contract. On the traditional analysis this period is free from legal obligation, absent fraud. In this paper it is argued that probity in the tendering process is enhanced by private and public law remedies available to the parties involved in the process.

Introduction

Governments use tenders as a method of procurement which is supposed to ensure that the taxpayer's dollar is spent in the most cost effective way. Across Australia, the requirement to seek tenders for procurement of government supplies is not necessarily mandated by law. For example, the Commonwealth Finance Regulations no longer require tenders to be used but, instead, a more flexible regime has been instituted,[1] whereas in Victoria, for example, tendering must generally be used for procurement worth above a certain amount unless specific exemption is sought.[2] Whatever the rules about seeking tenders, the preferred method for any major procurement is by tender. Tenders should ensure that procurement is by way of 'open and effective competition'.[3]

This method of acquisition has been the subject of a great deal of scrutiny in recent times with a plethora of inquiries, reports, recommendations, comment and analysis. Broadly, it is true to say that this seemingly unexceptionable method of acquisition has been found wanting in a number of respects. The defects which have been uncovered range from the most obvious corruption through to relatively minor things which go wrong and undermine the integrity of the process. In the middle, various levels of incompetence, ignorance of the law, unethical practices, unfair dealings and ordinary carelessness have marred the public procurement process.

To illustrate the very considerable attention which has been paid to the tendering process in recent times it is worth listing some of the inquiries and reports.

- Macphee, *Independent Review of the Civil Aviation Authority's Tender Evaluation Process for the Australian Advanced Air Traffic System* (1992).
- Royal Commission into *Productivity in the Building Industry in New South Wales* (1991) (Commissioner RV Gyles). A *Code of Practice for the Construction Industry* (1992) and a *Code of Tendering for the Construction Industry* (1992) followed this report.
- Standards Australia, *Interim Australian Standard Code of Tendering* 1993.

* *Nicholas Seddon, LLB, B Phil (Oxon), is Reader in Law, Law Faculty, The Australian National University.*

- Independent Commission Against Corruption, NSW (ICAC), *Pitfalls or Probity. Tendering & Purchasing Case Studies* (1993), plus various ICAC reports on specific contracts.

- Economic Development Committee (Victorian Parliament). *Inquiry into the Victorian Building and Construction Industry* (1993). Following this inquiry, a letter was sent to some 700 builders asking them to confess or lose the right to tender for government business in the future. This action was ruled illegal in *Master Builders Association of Victoria v The State of Victoria.*[4]

- Trade Practices Commission, Press Release of 29 March 1994 announcing a settlement between the Master Builders Association of New South Wales and the Commission, and the announcement by the Commission and Master Builders Australia Inc of a reform program for the Australian building industry.

- Pearce reports into the Commonwealth sale by tender of satellite pay-TV licences, *Inquiry into Certain Aspects of the MDS Tendering Process 1992-3,* and *Independent Inquiry into the Circumstances Surrounding the Non-requirement of a Deposit for Satellite Pay-TV Licences, and Related Matters.*

The focus of attention in this article is on the less obvious problems which may arise in the tendering process. In a sense, corruption, collusive tendering, cover pricing[5] and unsuccessful tenderers' fees[6] are not particularly interesting because the criminal or trade practices law can deal with these and there is no doubt that they are illegal.[7] The problem, of course, is to find methods of rooting out such practices. Asking each tenderer to sign a statutory declaration that it has not engaged in these practices in submitting its tender for a particular project is one strategy that has been adopted. Codes of practice[8] may have a beneficial effect so long as some real sanction can be applied to those who do not adhere to the codes. Such codes are not, however, legally enforceable.

Before going on to examine those practices or conduct which are the principal focus of this article it is worth noting that a particularly crude method of rooting out corruption adopted by the Victorian government[9] has been ruled illegal by Hampel J in *Master Builders Association of Victoria v The State of Victoria.*[10] The government sent out letters to some 700 builders who had in the past tendered for government work asking them in effect to confess to past collusive practices and asking them to repay to the government any money received which represented the fruits of collusive practices. Failure to respond meant that the builder was assumed to be guilty and would not be eligible to tender for future government work. The Master Builders Association of Victoria brought an action, seeking a declaration that this move by the government was illegal. The Association's standing to bring the action was not challenged and Hampel J said that it undoubtedly had standing. His Honour went on to hold that the action by the government was illegal because it was an abuse of power as it was infected by an improper motive, namely, it amounted

> to a coercive action by the use of economic power to recoup moneys without resorting to the courts for the determination both of the question of liability and quantum. I find the scheme was so unfair and unreasonable as to amount to an abuse of power.[11]

Further, the scheme was objectionable because it put economic

pressure on builders to incriminate themselves. The scheme by-passed the procedures sanctioned by the *Collusive Practices Act 1965* (Vic) which provides for the gathering of evidence which may lead to a criminal prosecution for collusive conduct. As noted in the editorial comment on this case[12] the Victorian government and its instrumentalities are not bound by the anti-competition provisions of the *Trade Practices Act 1974* (Cth) Part IV[13] yet Hampel J effectively held that the government was not permitted to abuse its position of market dominance.

2 Legal liability in the tendering process

This article explores the possible legal bases for challenging the award of a contract or seeking some form of redress when some defect, not amounting to corruption or similar wrongdoing, has occurred in the tendering process. There are a number of legal paths available to the disgruntled tenderer. The existence of these remedies has, it is submitted, a salutary effect on the tendering process. It is not enough to root out corruption and other obvious wrongdoing. It is also essential to impose an enforceable regime of legal sanctions, available for private enforcement, if the process of public procurement is to be truly governed by the principle of open and effective competition. In other words there should be fair dealing in the tendering process. Competition is not just undermined by collusive practices and the like. It is also jeopardised by lesser defects because the market will be cynical about a process which is not properly conducted. The consequence of such cynicism is that in any particular procurement there may be some players who decide not to enter the competition. This view is inspired by what occurs in the United States where the tendering process is constantly challenged by the participants themselves. The courts are very ready to uphold challenges in the name of maintaining the integrity of the procurement process. As a consequence the conduct of tenders in the United States is rigorously scrutinised and effective competition is maintained.

The argument for legal consequences arising out of the tendering process is part of a much wider debate which is attracting some attention. With the general move, characterised by the expression 'new managerialism', whereby the public sector in various ways either attempts to mimic the private sector or else simply hands over formerly public functions to the private sector, concern has been expressed about proper accountability, in the constitutional rather than the financial sense.[14] To what extent is the move to managerialism a development which effectively by-passes the accepted institutions of accountability? Contracting out formerly government functions may mean that important areas of public responsibility are no longer subject to parliamentary scrutiny and may place such activities beyond the reach of public law. This article does not attempt to answer these broader questions but suggests that at least in one area there are possibilities for accountability through various legal mechanisms.

What follows, then, is a discussion of the various ways in which the pre-award period in tenders may be the subject of legal liability.

A Contract

A tender is usually an offer made in response to an advertisement which is an invitation to treat. Acceptance of one of the tenderer's bids then brings into being a contract. Prior to this acceptance no contractual

relationship exists so that there is, on this traditional analysis of tenders, no legal obligation prior to award of the contract. This means that the body seeking tenders is free to accept a non-complying bid (for example, it may be late or it may not comply with the advertised specifications). Equally, if the advertisement provides that the contract will be awarded to the lowest bidder and the contract is then awarded to, say, the second lowest bidder, the advertised promise cannot be enforced. The body seeking tenders is free, on this analysis, to choose whichever bid it pleases, despite what is said in the advertisement. Another consequence of this analysis is that a tenderer may withdraw its tender at any time before acceptance, even after the tenders have been opened. There are variations on this theme as when, for example, the party seeking tenders asks for expressions of interest or enters into negotiations with selected contractors with a view to seeking best and final offers (BAFOs). In these variations on simple tenders there is, again, no legal regime to govern the *process* of tendering.

The possibility that the process of tendering, that is, the pre-award period, is governed by a contract has been recognised in the United Kingdom,[15] the United States[16] and in Canada.[17] The terms of this preliminary contract are determined by what is specified in the tender advertisement. The preliminary contract may be unilateral, imposing obligations only on the body seeking tenders, or bilateral, imposing obligations on both parties.

(1) Unilateral contract

The unilateral approach was adopted in *Blackpool and Fylde Aero Club v Blackpool Borough Council*[18] where it was held that the body seeking tenders was under an implied contractual obligation to give consideration to complying tenders. In that case the plaintiff submitted a tender which complied with the terms of the advertisement and was on time. It was mistakenly thought by the Council to have been late and so was not considered. The Court of Appeal believed that it was appropriate to imply a term because the process of seeking tenders was conducted according to a 'clear, orderly and familiar procedure'[19] which generated an expectation that it would be conducted properly. In other words, the notion of reasonable expectations in the contracting process provided the basis for imposing a legal obligation. It is probably accurate to say that non-lawyers would have such expectations in the tendering business.[20]

Before leaving England, it is also worth noting that in *Harvela Investments Ltd v Royal Trust Co of Canada Ltd*[21] the House of Lords held that there was a preliminary, unilateral contract which made enforceable a promise to award some shares to the highest bidder. The case had other complications relating to whether a referential bid was a valid bid[22] but for our present purposes it has implications both for auctions which are advertised to be without reserve and for the tendering process. If the body seeking tenders promises to award the contract to the lowest/highest bidder, then that promise is enforceable on the basis of a unilateral contract. Of course, in most tenders the body seeking tenders does not give such an undertaking.

In Australia there has been some acceptance of a preliminary contract governing the process of tendering[23] but, in more recent times, there have been two unsuccessful attempts to argue that the pre-award period is governed by a preliminary contract.[24]

The content of such a unilateral contract is limited. The contract is formed with each tenderer who puts in a complying tender and the contract is limited to any undertakings given in the advertisement by the body seeking tenders. The *Blackpool* case shows that a court may be prepared to find an implied term. All that the Court said was that there was a duty to consider a complying tender. It did not say that there was a duty to give proper consideration to a tender, that is, a more extended contractual duty which is akin to a public law duty to make a decision according to proper and rational principles.[25] If Australian courts are prepared to embrace the notion of a pre-award unilateral contract, its precise contents will have to be worked out. It is worth noting in connection with this question that Ian Macphee in his report on the air traffic control system tender[26] concluded that the contract was awarded on a wrong technical basis. In other words, though his analysis was not a legal one, he was prepared to say that the decision to award the contract should be made again because the award was not properly made on the merits.

If the unilateral contract is broken by the body seeking tenders, what remedy has the disgruntled tenderer? It is probably safe to say that he or she can at least recover the wasted costs of preparing the tender. The question of damages was not considered in the *Blackpool* case. Certainly in United States cases, damages have been awarded on this basis. It has been argued in the US that the tenderer should not be entitled to such damages unless he or she can show positively that he or she would have won the contract.[27] After all, in any other event, the tenderer should bear the cost of preparing the tender. This argument has not prevailed, however logical it may seem.

There are other possibilities for remedies. In a Canadian case[28] the court awarded damages on the basis that the tenderer bid a higher price than it otherwise would have if the tendering process had been properly conducted. Damages could in exceptional cases extend to expectation losses. For example, if the tender was one in which there was an undertaking to award to the highest/lowest tender and the disgruntled tenderer could show that he or she would have won, then there is no reason why the court should not award loss of profit damages. Alternatively, it may be sufficient if the tenderer can show that there was a probability of winning. The courts are prepared to award damages on the basis of probabilities.[29] It is conceivable that a disgruntled tenderer could obtain an injunction to stop the process if it is not being conducted according to the announced procedures.

(2) Bilateral contract

The bilateral approach is taken in Canada[30] and caters not only for obligations imposed on the party seeking tenders but also obligations commonly imposed on tenderers, such as not withdrawing the bid within 60 days of opening of tenders and the obligation to provide a deposit or bond.[31] The leading case of *Ron Engineering* has some curious features, not the least of which was that the judge (Estey J speaking for the Supreme Court of Canada) discussed the preliminary contract, which he called contract A, in terms of *unilateral* contract. He did this because of the features of this kind of contract that the tender advertisement constitutes an offer to the world and that acceptance is constituted by an act, namely, submitting a complying tender and so shares those characteristics of unilateral contract. But apart from these features, there is

simply no doubt that the contract is a bilateral one because it imposes obligations on both parties. Another odd aspect of the case was that it involved a bid in which there was a serious mistake. The bidder sought to withdraw the bid without penalty. It was held that it could not because of the binding nature of contract A under which the bidder undertook not to withdraw the bid for 60 days after the opening of tenders. But this meant that the bidder was effectively forced to enter into contract B in circumstances when the body seeking tenders knew that there was a mistake of which it took advantage. Despite these difficulties with the leading Canadian case, it has been followed in a number of cases which have applied the contract A and contract B analysis.

One of the curiosities of the bilateral contract analysis is that if a tenderer puts in a non-complying bid, this would constitute a counter-offer. (In the unilateral analysis it would constitute a non-fulfilment of the requested act and so there would be no contract with that bidder.) What if the body seeking tenders then accepts this counter-offer? The answer to this is that there is no contract A with the tenderer who put in a non-complying bid. But there are contract As with the *other* tenderers who have put in complying bids. It is they who are going to complain about the fact that a non-complying bid has been accepted and they have the contractual basis for such a complaint.

There is no reason why the bilateral contract analysis should not be used in the variety of tendering arrangements which commonly occur, such as seeking expressions of interest or the use of tenders to establish a list of suppliers. The common use 'contract' employed by the Commonwealth government for procurement is in fact a standing offer under which a particular supplier makes a continuing offer to the government which is accepted from time to time, resulting in a series of discrete contracts. Usually there is a panel of selected suppliers. Often the selection of the suppliers will have been brought about by a tender. How does this arrangement fit the two-contract analysis? The process of seeking suitable potential suppliers can be governed by a contract (contract A, as discussed above) with resultant remedies to companies or individuals who have been wrongfully excluded or who have suffered loss as a result of a failure by the government to adhere to the advertised tendering process. One of the terms of contract A in a standing offer arrangement is that there is no guarantee that any orders will be placed so as to form any contract Bs. So the selected suppliers cannot complain if no orders are forthcoming. A selected supplier may be able to complain if the government were to place an order with a supplier who had not been selected. But this would depend on the precise terms of contract A, namely, whether or not it was an exclusive dealing arrangement with the selected suppliers ('If we order, we will order from one of you...').

There is no doubt that the practical implications of the *Ron Engineering* and *Canamerican* decisions, if they were adopted in Australia, would be profound. The drafting of tender advertisements would have to be done very carefully. At present the preferred route for imposing some order on the tendering process is by way of codes. As noted earlier, codes are not legally enforceable. It would be possible to incorporate a code into a contract but this is not how the codes are used. The problem with this form of self-regulation is that the code can be ignored and there may be no sanction. Of course if a tenderer breaks a provision of a

tendering code, it may find that it is excluded from future tenders. But experience with codes shows that they are sometimes loosely applied and there can be 'drift' away from adherence to the code. Another problem is that if the government fails to adhere to a provision of a code then the government is in the position of both being prosecutor and judge of its own conduct. For example, the New South Wales *Code of Tendering for the Construction Industry* provides that the party seeking tenders (the government) should not engage in the practice of a 'Dutch auction', that is where the government talks to selected tenderers with a view to playing them off against each other to secure a lower price. If the government does this (and therefore breaks the code) the only sanction is a Departmental enquiry or, if that does not work, a complaint may be made to the Minister or, ultimately the Premier. This procedure is not very different from what is available if the Ombudsman undertakes an enquiry. At the end of the day what do the dissatisfied tenderers get? A contract remedy, involving the possibility of a damages payout, on the other hand, would be more likely to act as a deterrent to conduct of this kind.

It is my view that, apart from powerful authority from other jurisdictions, the climate of contract law in Australia is such that it would be quite consistent with the evident concern to fulfil the reasonable expectations of the parties for a court to find a pre-award contract.

B Trade Practices Act s52 and Fair Trading Act equivalents

Section 52 of the *Trade Practices Act 1974* (Cth), which prohibits engaging in misleading or deceptive conduct in trade or commerce, may apply to any commercial dealing, irrespective of contract. Misleading conduct prior to, or during the conduct of, a tender could therefore give rise to liability under the Act. The Act binds the Commonwealth and Commonwealth instrumentalities[32] so long as they are carrying on a 'business',[33] which includes a non-profit business. It is not clear what activities come within this definition but it would be unlikely for the Commonwealth to argue that it is not bound by the *Trade Practices Act* when it is engaged in commercial activity. Each State and Territory *Fair Trading Act* has an equivalent section to s52[34] and each Act binds the Crown in right of the relevant State or Territory.[35] Apart from damages under s82 of the Commonwealth Act[36] it may even be possible to use an injunction (s80)[37] to stop the process if there was misleading conduct. It would almost certainly be misleading conduct to announce the rules of a tender and then not adhere to them. There are potentially many other possibilities for the use of s52 in the tendering process.

C Negligence

In the light of the availability of s52 (and its *Fair Trading Act* counterparts) there would be little point in pursuing a negligence action in relation to statements made in the conduct of a tender (unless the government successfully argued that it was not bound by the section). However, such a possibility is still open where the conduct is not so much misleading as simply careless. For example if the body seeking tenders lost the tender or, as in the *Blackpool* case, it negligently thought that a tender was late, an action could be pursued. The English Court of Appeal was reluctant to find a duty of care in that case but it is submitted that there is no reason why a duty should not arise. In *Dillingham Constructions Pty Ltd v Downs*[38] it was held that the New South Wales government was not under a duty to provide Dillingham

with information about disused coal workings under the harbour which Dillingham was to deepen. This information was known to the government and was vitally important. Yet the terms of the contract, the exchanges between the parties about site conditions, including the notice inviting tenders, and the obligation imposed on Dillingham to investigate were such that Hardie J concluded that there was no assumption of responsibility by the government. It was conceded in *Dillingham* that a duty *could* arise in the pre-award period,[39] though not in this particular case. *Morrison-Knudsen International Co Inc v Commonwealth*[40] is to the same effect, that is, the High Court held that a duty of care might arise in the pre-award period but, because the Court was only asked to decide that question of law, the final outcome as to whether there was in fact a duty and whether it was breached was not considered.

The *Dillingham* case has to be viewed against the law as it was in 1972. At that time the law on negligent misrepresentation in Australia was governed by the Privy Council decision in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[41] which imposed a very restricted duty on people who provided information or advice. Since then the High Court has effectively not followed the strictures imposed in the *Evatt* case[42] and it is at least arguable that the *Dillingham* case would be decided differently to-day if the same facts were to arise. For example, in *Commonwealth v Citra Construction Ltd*[43] Citra was the successful tenderer for a project. The Commonwealth had provided a report to all tenderers, prepared by an independent contractor, which contained errors concerning the sub-surface condition of the site. Citra sued in negligence and was successful, despite attempted disclaimers by the Commonwealth. Campbell J held that the various standard disclaimer terms were not effective to exclude liability in negligence. He went on to hold that the Commonwealth was under a duty of care, relying on the *Morrison-Knudsen* case. The arbitrator had found that there was a clear breach of duty and this was not challenged in the court hearing. The Commonwealth attempted to argue that it was not responsible for the negligence of an independent contractor, relying on *Stoneman v Lyons*.[44] This argument was rejected by Campbell J who found that the Commonwealth had provided the report as its own.

D Estoppel

The pre-award period may generate liability on the basis of estoppel. It is quite easy to imagine an assurance being given or an assumption created by the body seeking tenders which is then not followed through with consequent loss being caused to tenderers. In *Metropolitan Transit Authority v Waverley Transit Pty Ltd*[45] the MTA gave an assurance to Waverley Transit that its contract for a particular bus run would be renewed and that the run would not be put out to tender at the expiry of the current contract. On the strength of this assurance, the bus company spent a considerable amount of money in re-equipping and upgrading its buses. When the contract expired, the MTA did seek tenders and awarded the bus run to another company. The Appeal Division of the Victorian Supreme Court held that the MTA was estopped from awarding the contract to the successful tenderer and that it should award the contract to Waverley Transit for another two years. The *Waverley Transit* case also dealt with administrative law issues.

E Administrative law

At Commonwealth level it is possible to challenge the tendering process under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[46] so long as the decision to award the contract can be said to have been made 'under an enactment'. This requirement operates somewhat arbitrarily in the contracting area. For the purpose of the 'under an enactment' requirement, neither the *Constitution* s61[47] nor the *Finance Regulations* made under the *Audit Act* 1901[48] are 'an enactment' with the result that a decision to award a contract made by the Commonwealth under its executive power cannot be reviewed under the *ADJR Act*. What if the contract decision were made under a statutory power to contract in the usual form for statutory authorities? Is this a sufficiently close connection to a statutory power to satisfy the 'under an enactment' requirement? The answer to this was Yes.[49] However, some doubt has been thrown on the possibility of using the *ADJR Act* to challenge the award of a contract under statutory power by the decision of the Full Federal Court in *General Newspapers Pty Ltd and Double Bay Newspapers Pty Ltd v Telstra Corp.*[50] The *Berkeley Cleaning Group* case was not followed and there is now some doubt about whether a decision to award a contract under the usual contract making power which is found in statutes which establish statutory corporations is a decision made 'under an enactment'. Davies and Einfeld JJ (Gummow J concurring) argued that the *ADJR Act* relates to decisions taken under a federal enactment which by virtue of the statute affect legal rights and/or obligations.

> A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract.[51]

The court relied on *Australian National University v Burns*[52] in which it was held that *terminating* a contract was not a decision under an enactment, even if the original contract was made by reference to the *Australian National University Act*. It is reasonably clear that terminating a contract is exercising a power under the contract. It is not so clear that making a contract is analogous. If one asks: where is the source of power to make the contract? the answer is 'In the statute'. As Davies J put it in *Post Office Agents Association Ltd v Australian Postal Commission*[53] when discussing the *Berkeley Cleaning Group* case

> The acceptance of the tender was an act done under that power [the general power to do all that was necessary for the performance of the statutory body's functions], not an act done under the contract resulting from the acceptance of the tender.

The court in *General Newspapers* attempted to save the *Berkeley Cleaning* case by saying that it involved a tender process which

> implied rights as between all the parties to the tender process that the tenders would be dealt with in accordance with the conditions of tender and fairly, at least in a procedural sense. Accordingly, the Court may well have had jurisdiction to deal with the dispute though, in our opinion, not under the ADJR Act.[54]

It is clear that a contract awarded *ultra vires* an enabling statute could be challenged under the *ADJR Act*. This much was acknowledged by the Court in *General Newspapers*. Also it is clear that where the tendering process is itself governed by a statutory procedure the process can be challenged under the *ADJR Act*. This is taken up below.

If the award of a contract can be challenged through administrative law,

what aspects of the award process are amenable to review and what criteria should be applied? These are unsettled questions and involve some fundamental issues about the extent to which it is appropriate to apply public law principles to government contracting. Should the government be entirely free to choose any contractor it wishes? Is there, at the minimum, a duty to act honestly when deciding who should be awarded the contract? Is there a more demanding duty to act both honestly and reasonably? Some of these issues were discussed in the *Waverley Transit* case. The reason why the MTA decided, contrary to its assurance, to put the contract out to tender was that it saw an opportunity to break what it perceived to be a monopoly. It was held that this decision was motivated by an improper purpose and could be set aside for want of procedural fairness. So, at the very least the award decision must be made honestly and for a proper purpose.[55] However, the ability to challenge a decision on other grounds may be more problematic.

Another possible ground of review is breach of natural justice or procedural fairness. Although a challenge on this basis has been rejected in some cases,[56] it has been accepted in at least one case. In *Century Metals and Mining NL v Yeomans*[57] the Full Federal Court concluded that procedural fairness had not been observed in circumstances where a number of companies were bidding to take over a mining operation on Christmas Island from the Commonwealth. The Court based its reasoning on the fact that the Commonwealth had created legitimate expectations relating to the process by which a company would be chosen and these expectations were not fulfilled. The implications of the *Century Metals* case for tendering are potentially significant. The notion of legitimate expectation was central to the decision and so it might be thought that the case is a special one of limited import because the legitimate expectation was generated by the Minister's specific announcement. Absent that announcement, the applicant would have had little basis for a challenge. But is there a need for a specific undertaking before a legitimate expectation can be generated? Would it not be sufficient that government bodies are expected, in any case, to conduct tenders with probity? This seems to be the assumption made by the Court in the *General Newspapers* case when it specifically mentioned the tendering process as one which required procedural probity. It is of the essence of a proper tendering procedure that the bids should be evaluated impartially and thoroughly. Further, at Commonwealth level, the *Finance Regulations* provide that purchasing must be effected through open and effective competition.[58] The various *Commonwealth Procurement Guidelines* provide further material which would lead a tenderer to expect that certain standards will be adhered to. For example, the Commonwealth is committed 'to maintaining high ethical standards in purchasing and to fair dealing with suppliers'.[59] Whilst the *Regulations* and *Guidelines* cannot form the basis of a direct challenge under the *ADJR Act* they may be sources of policy statements which generate tenderers' legitimate expectations as to the way in which tenders are to be conducted.

F Statutory illegality

If the tendering process is itself the subject of a legislative stipulation then it is possible to challenge the award of a contract where there has been a departure from the legislation. Thus, a tender decision was successfully challenged in *Hunter Brothers v*

Brisbane City Council[60] on the basis that the contract as awarded was void for illegality because the statutory procedure had not been followed. Lee J in *Australian Capital Equity Pty Ltd v Commonwealth*[61] held that stopping a tender process for the sale of television licences initiated under a statutory provision[62] was beyond power. However, it is by no means clear when a court will hold that a departure from the rules will provide the basis for a challenge. In the *Hunter Brothers* case it was argued that there must be some limit to the possibility of challenge when a very detailed procedure is laid down by statute.[63] If there is only one lock on the tender box instead of the prescribed two, is the whole process invalid? In *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* Davies J held that a tendering scheme promulgated by a written instrument under the *Customs Act 1901* (Cth) s266 did not constitute a set of binding rules but rather was an announcement of policy. The consequence was that a party who wished to challenge a departure from the announced rules was unsuccessful. The departure in this case allowed some tenderers, who had failed to comply with a deadline, a second chance to get it right whereas other tenderers had met the deadline. Davies J said in *Gerah*

> I accept that, in a Scheme such as this, which affects an industry, clear rules and fair dealing with all parties within those rules is important. Members of an industry will quickly lose confidence in a scheme if terms of the Scheme, clearly stated, are not complied with.[65]

Yet His Honour concluded that the non-compliance in the case before him did not affect the validity of the whole process. It is by no means easy to reconcile this case with the *Australian Capital Equity* case.

G Complaint to government and to the Ombudsman

It is, of course, always possible for a disgruntled tenderer to complain to the relevant government body or department if something has gone awry in the tendering process. At Commonwealth level, the Minister for Administrative Services formally recognised this process by appointing a Purchasing Complaints Commissioner. In addition it is possible to complain to the Commonwealth Ombudsman (who also acts as Ombudsman for the Australian Capital Territory) who has reported on a number of occasions about tendering.[66] The Commonwealth Ombudsman has investigated government contracting and has made recommendations for *ex gratia* payments. This form of review provides some incentive to conduct public tenders in a fair and proper way. In earlier investigations the Ombudsman's recommendation for an *ex gratia* payment was sometimes thwarted by the Department of Finance who said that no such payment should be made. Now, it is the particular Department's concern (and not the Department of Finance's concern) whether the Ombudsman's recommendation should be acted on. The practice now is to make such *ex gratia* payments.

At State and Territory level there is similarly the possibility of complaining to the Ombudsman and the various State and Territory Ombudsman's annual reports contain many stories about tenders which have gone wrong.

3 CONCLUSION

The integrity and probity of the tendering process is enhanced by the potential for private right of action brought by the very people who are interested in the process being

properly conducted. This is a form of self-regulation which does not require public resources for the policing of government commercial activity. It is relatively early days in Australia for this type of challenge and consequently it is not possible to predict how the courts will react to the range of legal possibilities which may operate in the pre-award period in a tender. Some are already being used. Others - contract in particular - remain to be tested.

Endnotes

1 In 1989 *Finance Regulation* 52, which made it mandatory to use tenders for procurement of suppliers worth more than $10,000, was repealed.

2 See *Treasury Regulations* supplemented by Department of Planning and Development directions. There are differing requirements depending on the type of procurement.

3 Commonwealth *Finance Regulation* 43(1) uses these words.

4 (1994) ATPR 41-297.

5 Cover pricing is where a company tenders for a job at a high price so that it will not be awarded the contract. This happens when the company has enough work yet does not want to be seen to be not interested in government work. It may also result from a collusive deal under which the job is 'awarded' ahead of time to one company by its so-called competitors.

6 This is an arrangement between tenderers under which the successful tenderer pays a fee to each unsuccessful tenderer.

7 It has been argued to the Victorian Parliament's Economic Development Committee that cover pricing is not necessarily in breach of the *Trade Practices Act* 1974 (Cth) - see *Inquiry into the Victorian Building and Construction Industry* (1993) 46. The Committee was unimpressed by this argument and pointed out that such a practice was in breach of the *Collusive Practices Act* 1965 (Vic), whether or not it was in breach of the *Trade Practices Act*.

8 Eg, *A Code of Practice for the Construction Industry* (1992), produced by the New South Wales government.

9 The idea was inspired by the Commonwealth government which has, so far, not been challenged in the courts.

10 (1994) ATPR 41-297. At the time of writing the decision is on appeal.

11 (1994) ATPR 41-297, at 41,969.

12 (1994) ATPR 41,964.

13 See *Bradken Consolidated Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107.

14 Eg, T Daintith, 'Regulation by Contract: the New Prerogative' (1979) 32 *Current Legal Problems* 41; M Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86.

15 *Blackpool and Fylde Aero Club v Blackpool Borough Council* (1990) 1 WLR 1195; *Harvela Investments Ltd v Royal Trust*

Co of Canada Ltd (1986) AC 207.

16 Of the numerous cases which have found that there is an implied contract prior to award, the leading case is *Heyer Products Co v United States* (1956) 140 F Supp 409.

17 *Ontario v Ron Engineering & constructions Eastern Ltd* (1981) 1 SCR 111; (1981) 119 DLR (3d) 267; *The Queen v Canamerican Auto Lase and Rental Ltd* (1987) 3 FC 144.

18 [1990] 1 WLR 1195.

19 [1990] 1 WLR 1195, 1202 (Bingham LJ). A similar argument was used by Stocker L J at 1203-4.

20 However, for criticism of the decision see Phang, 'Tenders and Uncertainty' (1991) 4 *JCL* 46.

21 [1986] AC 207.

22 It was held that a referential bid, that is, one which seeks to ensure that it will inevitably win by offering more/less by a specified amount than any rival bid, was an invalid bid.

23 *Dunton v The Warrnambool Waterworks Trust* (1893) 19 VLR 84; *Stafford v South Melbourne* [1908] VLR 584; *Brisbane Board of Waterworks v Hudd* (1910) QWN 11. The now defunct Australian Standard *General Conditions of Tendering* AS21240-1981 explicitly made a preliminary contract so that a tenderer who withdrew the tender in breach of condition 8 forfeited a deposit.

24 *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 LGRA 168, 176-177 (Kearney J). In *White Industries Ltd v Electricity Commission of New South Wales* (unreported May 20 1987 SC) Yeldham J expressly declined to decide on an argument put by the plaintiff that there was a contract governing the pre-award period.

25 In the United States the courts are prepared to formulate a contractual duty to give proper consideration to complying bids - see *Keco Industries, Inc v United States* (1974) 492 F 2d 1200, 1203-4.

26 Macphee, *Independent Review of the Civil Aviation Authority's Tender Evaluation Process for the Australian Advanced Air Traffic System* (1992).

27 In *Morgan Business Associates, Inc v United States* (1980) 619 F2d 892 it was held that an unsuccessful bidder whose bid was lost must show, in seeking to recover preparation costs, that it had a substantial chance of being awarded the contract.

28 *The Queen v Canamerican Auto Loas and Rental Ltd* [1987] 3 FC 144.

29 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 118 (Deane J).

30 *The Queen in right of Ontario v Ron Engineering & Construction Eastern Ltd* [1981] 1 SCR 111; (1981) 119 DLR (3d) 267.

31 In Australia these obligations can only be made enforceable through a deed under seal - a practice which has been adopted from time to time and

which reflects the evident commercial need for enforceable obligation in the pre-award period.

32 See *General Newspaper Pty Ltd and Double Bay Newspapers Pty Ltd v Telstra Corp* (1993) 117 ALR 629 in which there was an unsuccessful attempt to use s52 in connection with an assurance by Telecom that the applicant would be put on a tender list.

33 *Trade Practices Act* 1974 (Cth) s2A.

34 *Fair Trading Acts*- ACT (1992) s12; NSW (1987) s42; NT *Consumer Affairs and Fair Trading Act* 1990 s42; Qld (1989) s38; SA (1987) s56; Tas (1990) s14; Vic (1985) s11; WA (1987) s10.

35 The State and Territory Acts vary in the way they bind the Crown. For example, the *Fair Trading Act* 1987 (NSW) s3(1) mimics the Commonwealth provision in that it only binds the Crown in so far as it 'carries on a business', whereas the *Fair Trading Act* 1985 (Vic) s3(1) binds the Crown without qualification.

36 *Fair Trading Acts* - ACT s46; NSW s68; NT *Consumer Affairs and Fair Trading Act* 1990 s91; Qld s99; SA s84; Tas s37; Vic s37; WA s79.

37 *Fair Trading Acts* - ACT s44; NSW s65; NT *Consumer Affairs and Fair Trading Act* 1990 s89; Qld s98; SA s83; Tas s34; Vic s34; WA ss74, 76.

38 [1972] 2 NSWLR 49.

39 [1972] 2 NSWLR 49, 56.

40 (1972) 46 ALJR 265.

41 (1970) 122 CLR 628.

42 See *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 and *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.

43 (1986) 2 BCL 235.

44 (1975) 133 CLR 550.

45 [1991] 1 VR 181.

46 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284. See also *James Richardson Corp Pty Ltd v Federal Airports Corp* (unreported, Cooper J, 29 September 1992).

47 See *Dixon v Attorney-General* (1987) 75 ALR 300, 306 (Jenkinson J).

48 *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185. See also *ABE Copiers Pty Ltd v Secretary of the Department of Administrative Services* (1985) 8 ALN 141.

49 See cases cited in footnote 46.

50 (1993) 117 ALR 629.

51 (1993) 117 ALR 629, 636-7.

52 (1982) 43 ALR 25.

53 (1988) 84 ALR 563, 573.

54 (1993) 117 ALR 629, 637. An example of a successful challenge on the basis of administrative law remedies is

Streamline Travel Service Pty Ltd v Sydney City Council (1981) 46 LGRA 168.

55 Cf a recent Privy Council decision *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* (unreported PC 28 February 1994 noted in (1994) 5 *Public Law Review* 131). The Privy Council observed that 'it does not seem likely that a decision by a State-owned enterprise to enter into a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.'

56 *Cord Holdings Ltd v Burke* (1985) 7 ALN 72; *White Industries Ltd v Electricity Commission of New South Wales* (unreported May 20 1987 NSW SC, Yeldham J).

57 (1991) 100 ALR 383.

58 *Finance Regulation* 43(1).

59 *Commonwealth Procurement Policy Framework* (Oct 1989); and see *Commonwealth Procurement Guideline 3: Ethics and Fair Dealing* (Sept 1989).

60 (1983) 52 LGRA 430.

61 (1993) 114 ALR 50.

62 *Radiocommunications Act* 1983 (Cth) s92A.

63 The cases on the question whether a divergence from statutory tender procedures renders the whole process invalid have not been uniform by any means. Compare *Maxwell Contracting Pty Ltd v Gold Coast City Council* (1983) 50 LGRA 20 (relevant provision was directory not mandatory); *Wade v Gold Coast City Council* (1972) 26 LGRA 349 (provision specifying that tenders be called held to be mandatory not directory); *Attorney-General; ex re Scurr v Brisbane City Council* [1973] Qd R 53 (directory not mandatory); *Capricornia Electricity Board v John M Kelly (Builders) Pty Ltd* [1992] 2 Qd R 240 (directory not mandatory).

64 (1987) 14 ALD 351.

65 (1987) 14 ALD 351 at 365.

66 Almost every annual report has some reference to tendering. A discussion of the Ombudsman's role in such cases is made in Commonwealth Ombudsman, *1987-88 Annual Report* 21-23. See also the *Newsletter* of the Australian Institute of Administrative Law (No 8 of 1991) in which the Deputy Commonwealth Ombudsman describes ways in which the Ombudsman can be of assistance to tenderers.