

Maintaining the Integrity of Electronic Tendering by Government– Reflections on the Capacity of the Australian Legal Framework to Meet this Challenge

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Numerous governments are establishing electronic tendering systems for procuring in particular building services and goods. By comparison with other jurisdictions such as the United States and the European Union, the legal framework for government tendering in Australia is underdeveloped. No specific regulatory framework exists for ensuring the accountability, transparency or integrity of the government tendering process. The purpose of this article is to assess the ability of the current legal framework in Australia to effectively deal with a number of the new and novel legal challenges created by electronic dealings. This will be considered against the background of accepted practices and law related to the tendering process and relevant electronic transactions legislation, with a view to examining how the law might address the different, and sometimes heightened, risks involved in undertaking the process wholly in an electronic medium, rather than through the traditional paper document method.

1. Introduction

Growing confidence and efficiencies in the use of the internet for commercial transactions has prompted government entities to establish electronic tendering systems for procuring numerous building, services and sale of goods contracts¹. Whilst, the technology to establish electronic tendering systems is readily available, and largely uncontroversial, significant legal uncertainties concerning contracts formed electronically remain and until settled, act as a barrier to the widespread adoption of electronic tendering.

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¹ See for example the Australian Government Tender system, Austender, available at <https://www.tenders.gov.au/federal/index.shtml> [accessed 21 November 2005]; Brisbane City Council E-tender system available at http://www.brisbane.qld.gov.au/BCC:STANDARD:1584197162:pc=PC_327 [accessed 21 November 2005]; the Malaysian government e-construct system available at http://www.econstruction.com.my/Online2/index_en.php [accessed 21 November 2005]; and the Hong Kong government Electronic Tendering system available at <https://www.ets.com.hk/English/GeneralInfo/info.asp> [accessed 21 November 2005].

By comparison with other jurisdictions such as the United States and the European Union, the legal framework for government tendering in Australia is underdeveloped. Unlike these other jurisdictions, no specific regulatory framework exists in Australia for ensuring the accountability, transparency or integrity of the government tendering process. Although most Australian jurisdictions have government policies or codes regulating government spending and procurement², the integrity of the government tendering process is primarily governed from a legal perspective by the common law³. It is evident from the case law in Australia that most legal challenges to the government tendering process are grounded in the common law of contract. Therefore, if, as is suggested by Seddon⁴, the maintenance of integrity and transparency in government tendering is of significant public interest, the next fundamental question is whether the common law, in the absence of legislative regulation, is equipped to maintain this integrity in an electronic environment?

The respective State and Commonwealth iterations of the electronic transactions legislation aim to facilitate and preserve the validity of transactions undertaken wholly or partly through electronic communications⁵. No reported case law exists to enlighten parties as to the effectiveness of this legislation or to assist in its interpretation. Whilst it is true that electronic tendering mirrors to an extent the paper process and, therefore, certain disputes can be resolved through the adaptation of the existing common law related to tendering, new legal risks have arisen from the use of an electronic medium. Moving a previously paper based process to a wholly electronic environment raises new challenges for the legal integrity of the government tendering process. These challenges include:

- (i) how the integrity and confidentiality of documents created and transmitted electronically can be preserved?
- (ii) how the security of the system through which the parties are communicating can be ensured?
- (iii) how information within the documents such as identity of the parties and contents can be authenticated? and

² See for example Australian Government procurement policies at <http://www.finance.gov.au/ctc/index.html> [accessed 21 November 2005].

³ Government policies related to procurement and tendering are internal documentation only and have no legal effect unless incorporated into the tender conditions.

⁴ Seddon N, *Government Contracts*, 2nd ed, Federation Press, 1999, p 219.

⁵ *Electronic Transactions Act 1999 (Cth)*, s 3; *Electronic Transactions (Queensland) Act 2001 (Qld)*, s 3; *Electronic Transactions Act 2000 (NSW)*, s 3; *Electronic Transactions (Victoria) Act 2000 (Vic)*, s 4; *Electronic Transactions Act 2000 (SA)*, s 3; *Electronic Transactions Act 2000 (Tas)*, s 3; *Electronic Transactions Act 2003 (WA)*, s 3; *Electronic Transactions (Northern Territory) Act 2000*, s 3; *Electronic Transactions (Australian Capital Territory) Act 2000*, s 3.

- (iv) what is the best method of archiving and storing legal documents to ensure their evidentiary effectiveness and integrity for later legal proceedings⁶.

The purpose of this article is to assess the ability of the current legal framework in Australia to effectively deal with a number of the new and novel legal challenges created by electronic dealings. This will be considered against the background of accepted practices and law related to the tendering process and relevant electronic transactions legislation. This will include an examination as to how the law might address the different, and sometimes heightened, risks involved in undertaking the process wholly in an electronic medium, rather than through the traditional paper document method. Due to the underdeveloped state of the law in Australia in relation to tendering generally we will, where necessary, refer to decisions in other similar common law jurisdictions such as Canada and New Zealand for assistance.

Rather than resurveying the case law relating to government tendering, which is adequately dealt with elsewhere⁷, it is proposed to provide a critique of the likely legal response and some reflections on where deficiencies in this response may impact on the integrity of the government tendering process. Before considering the challenges it is important to have an understanding of the types of government electronic tendering processes in use.

2. The Anatomy of a Government Electronic Tender

The process followed in most electronic tendering systems mirrors, as far as possible, a paper tendering process. The purpose of this part is to provide an understanding of the common e-tendering systems in use in Australia and to highlight the differences arising from the use of an electronic medium for tendering.

2.1 Common E-Tendering Systems

Electronic tendering systems are being used globally in various ways. E-tendering, in its simplest form, is described as the electronic publishing, communicating, accessing, receiving and submitting of all tender related information and documentation via the internet, replacing the traditional paper-based tender processes, and achieving a more efficient and effective business process for all parties involved⁸. The types of systems being used can be placed into several categories:

⁶ See generally, Rong Du, Ernest Foo, Colin Boyd, and Brian Fitzgerald, "Defining Security Services for Electronic Tendering", Information and Security Research Centre (ISRC), Faculty of Information Technology, Faculty of Law, Queensland University of Technology, Brisbane, (Australian Computer Society Incorporated, 2004, paper delivered at the Australasian Information Security Workshop, 2004, Dunedin, New Zealand.

⁷ Seddon N, *Government Contracts*, 2nd ed, Federation Press, 1999, chapter 7.

⁸ NSW Department of Commerce (2003). *Welcome to the eTendering System Help Page*, New South Wales Department of Commerce.
<https://tenders.nsw.gov.au/commerce/shared/help.cfm?p_page=termsofuse&p_pagetitle=Terms%20of%20Use [accessed 21 November 2005]; NT Government. (2000), *An Introduction to 'Tenders Online'*, Northern Territory Government,

- **Principal to tenderer communication:** This type of system allows the principal to post the tender advertisement and documents on a website and the tenderers download the tender documents. The tender is still submitted in paper. There is no two-way communication occurring in an electronic environment.
- **Tender submission and two way communication:** This type of system builds on the first type and allows the tenderer to download tender documents from a website and also to submit their tender electronically. The system allows for and facilitates communication between the principal and tenderer, which may include the distribution of addendums to the tender documentation, negotiation of further terms and final submission of tender. This type of system is not usually used to electronically award the tender.
- **Electronic tendering contract formation:** A fully electronic system will provide all of the facilities and operation of the second type of system as well as allowing for the award of a tender and formation of the contract to occur electronically.

The majority of established government e-tendering systems in Australia and overseas fall within the second category and allow tender submission and two way communication. In Hong Kong, the government e-tendering system displays tender notices, contract award notices and General Terms and Conditions for Government Logistics Department tenders⁹. In addition, businesses can subscribe to access additional functions, such as updating company information, downloading tender documents and clarifications, submitting queries on tenders and submitting tender offers. The Standard Terms and Conditions for the tender comprehensively outline the procedure for both paper-based tendering and e-tendering. Similarly, in Australia, the Commonwealth Government Electronic Tendering system, *AusTender*¹⁰ also contains basic tendering functions such as, advertising tender project, downloading tender documents online and a facility for submitting tenders online and displaying awarded tenders online. Other State government entities in Australia such as the Queensland Public Works Department and the Brisbane City Council also utilise electronic tendering systems which allow for tender documents to be displayed electronically, tender submissions to an electronic tender box and communications between tenderers and the principal.

The majority of entities using e-tendering systems have not progressed to the next step of awarding a contract electronically, preferring to keep the contract in a paper form. Given the amount of documentation (design details, plans, and other specifications) usually included within a construction contract, the complexity of the contractual arrangements and the possible need for further negotiations at the time of awarding a tender, it is perhaps not surprising that the parties to a construction contract are generally more comfortable with the

Department of Corporate and Information Services, Contract and Procurement Services.

⁹ <https://www.ets.com.hk/English/GeneralInfo/info.asp> [accessed 21 November 2005]

¹⁰ The system is available online at: <https://www.tenders.gov.au/federal/index.shtml>.

execution of a paper contract. A number of studies confirm that the construction industry in Australia has, to date, not embraced the use of technology for e-business to the same extent as other industries. The reluctance to do so, particularly on the part of small to medium enterprises, appears to arise from the perceived cost and complexity of implementing an e-business system, perceived financial and legal risk and the perceived difficulty in learning new processes¹¹.

2.2 Comparison of E-Tendering and the Paper System

The majority of government e-tendering systems use a principal based architecture as opposed to tendering through the medium of a trusted third party. This only requires two types of entities for the system to work: the principal and the tenderer¹².

The principal is the main administrator of the tendering process and communicates directly with the tenderers. Within this type of system the principal maintains the electronic tender box. The principal will therefore have a responsibility to ensure the secure storage of all submitted tender documents until the close of tenders and to, ensure that submission times of tenders are accurately recorded. The principal is also responsible for the secure storage and archiving of documents after the tender has been awarded. This architecture places a great deal of trust in the principal. Tenderers place their trust in the access control system employed by the principal to ensure that collusion or internal malfeasance by the principal's users is difficult. The principal will usually have a scheme for verifying the identity and authenticating documents from the tenderers.

Within a principal based tendering system, common features and processes can be identified and mapped against the paper process.

Preparation and Pre-qualification

The majority of government e-tendering systems will involve a type of pre-qualification or registration process. In tenders for large construction contracts, such as roads or bridges, as opposed to contracts for the routine supply of goods or services, it is likely that the potential tenderers will be pre-qualified. Their general expertise, reputation, financial standing, capability and

¹¹ The existence of these perceptions was raised and discussed in the E-Business Adoption Study conducted through the Collaborative Research Centre for Construction Innovation by University of Newcastle. The report is available on the CRC for Construction Innovation website at www.construction-innovation.info.

¹² The examination of tendering in this article is restricted to the use of a principal based architecture. Other possible architectures include

- Trusted Third party architecture: The trusted third party based architecture is commonly used by private industry using systems such as *ACONEX* and *OPTUSINCITE*. The Commonwealth Government *AusTender* system is also based on this architecture.
- Distributed Third Party Architecture: The distributed trusted third party architecture uses multiple trusted third parties to provide security. There are separate trusted third parties for the time server and the certificate authority although both these services may be provided by the same entity. The authors are not aware of this system being implemented in any jurisdiction.

integrity will be already known and accepted by the principal prior to the invitation to tender being advertised. The level of pre-qualification may indicate their entitlement to tender for particular types of contracts¹³. As part of this process, each pre-qualified tenderer will usually be granted a user name and password to enable them to access the e-tendering system. The obvious importance of a prequalification process in an electronic environment cannot be understated as a method of assisting with the authentication of identity, thereby minimising the opportunity for fraud and or submission without authority. The legal response to a tender submitted fraudulently or without authority will be the first issue considered.

Call for Tenders

An electronic call for tenders or posting of the call to a website is not significantly different to the paper environment. The legal effect of the call for tenders arises from the content of the tender conditions and not the medium in which the call is advertised. While the call for tenders may take a variety of legal forms¹⁴, by far, the most common form of invitation to submit a tender will provide for the creation of a contract upon notification of the acceptance of a tender. The terms and conditions of the contract will be those embodied in the conditions of tender made explicit at the time of the invitation to tender. The legal effect of the call for tenders will usually be merely an invitation to submit a tender for consideration. This does not in any way bind the principal to accept the tender¹⁵.

In an electronic tender, the principal may also at this stage ascertain whether or not the respective tenderers registering an interest have the requisite technology to respond to the more formal tender invitation in an appropriate way. This could be achieved either through a pre-qualification process or a request to register an expression of interest.

Submission of Tenders

The tender conditions will usually regulate the form of the tender, the time for submission and the method of submission. The submission process within an electronic environment will usually involve the following steps:

- registration by the potential tenderer on the tendering website of the principal;
- downloading of tender documents from the site;

¹³ For example the Queensland Main Roads Departments gives each of its pre-qualified tenders a rating which indicates their expertise and the types of tenders for which they are approved. It also takes into account financial standing and previous record with the Department.

¹⁴ Examples include: (i) The conditions of tender may provide for the execution of formal documentation prior to the acceptance having legal effect: *Masters v Cameron* (1954) 91 CLR 353 at 360; *City of Box Hill v E W Tauschke Pty Ltd* [1974] VR 39; (ii) A standing offer may be created by the tender: *Colonial Ammunition Co v Reid* (1900) 21 LR (NSW) 338; *Munday and Shreeve v Western Australia* [1962] WAR 65; (iii) Negotiated tenders where the government enters into negotiations with a shortlisted group of tenderers usually after a registration process. Refer generally to Seddon N, *Government Contracts*, 2nd ed, Federation Press, 1999, chapter 7.

¹⁵ *Harvela Investments Ltd v Royal Trust Co of Canada (CI)* [1986] AC 207.

- receipt of addenda (if necessary); and
- electronic submission of the tender to the electronic tender box of the principal.

In both a paper and electronic environment, a failure to comply with the terms of the tender may result in a non-conforming tender. Unless the terms of a tender provide discretion to the principal to accept non-conforming tenders, they must be rejected by the principal. The failure of many a principal to comply with the terms of the call for tenders has been fertile ground for legal challenge where unsuccessful tenderers become aware of the principal accepting non-conforming tenders¹⁶. Additional examples where a tender submitted electronically may be non-conforming include, where the tender documents are corrupted, certain information is not included within the tender template, or where the tender documents contain a virus or macro which interferes with the system.

Late submission of a tender will continue to be an issue and may be complicated by an electronic environment. New factors which may impact on receipt of a tender submission include where the principal's server is unreachable before or at the closing time or where the system rejects a tender due to incompatibility between the tenderer's system and that of the principal. Is the tender late in these situations? If the tender is submitted late due to the conduct of the principal or their agents, what is the position of the tenderer? The added opportunities for non-conforming tenders to arise in an electronic environment raises the importance of ensuring, in the absence of regulation, that the tender conditions adequately deal with the decisions a principal will have to make about possible non-conforming tenders.

Evaluation Period and Acceptance of Tender

The tender terms and conditions will usually provide that no contract exists between the parties merely by the submission of the tender. A contract will arise only upon acceptance of the winning tender. Despite a clear stipulation to this effect, a significant proportion of the litigation in relation to tenders arises from the conduct of the principal during the period between submission and acceptance of a tender. There is now widespread judicial support in England, Canada, New Zealand and Australia for the view that a secondary or process contract is formed between the principal and a tenderer who submits a conforming tender. The main terms of the secondary or process contract are that the principal will comply with the conditions of tender and an implied term that the tenderers will be treated fairly by the principal throughout that process¹⁷. This term may be breached if the principal fails to evaluate the

¹⁶ *Smith Bros & Wislon (BC) Ltd v British Columbia Hydro & Power Authority* (1997) 30 BCLR (3d) 334; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195.

¹⁷ *Hughes Aircraft System International v Air Services Australia* (1997) 146 ALR 1 at 42 per Finn J. For a perceptive analysis of *Hughes Aircraft System International v Air Services Australia* (1997) 146 ALR 1 which compares the approach of Finn J in that case to the English Court of Appeal in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 ALL ER 25 see Andrew Phang, "Tenders, Implied Terms

tenders in accordance with the priorities and methodology described in the request for tender invitation¹⁸.

Where the request for tenders clearly sets out the criteria upon which those tenders will be evaluated, one of the implied terms would be that the principal undertakes to treat the tenderers equally and scrupulously apply those provisions for the evaluation of tenders¹⁹. In *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*²⁰, the Court indicated that if a tenderer submitted a conforming tender before the deadline, the tenderer was entitled not as a matter of mere expectation but as a contractual right, to be sure that the tender would be opened and considered in conjunction with other conforming tenders at the very least²¹.

The case for the existence of a process contract is strengthened where a deposit is lodged as security for the consideration of the tender by the principal and entry by the tenderer into the main contract (if that is required)²². However, there would be sufficient consideration, in any case, without tendering a security deposit. A potential tenderer, in response to an invitation to treat, furnishes consideration by expending time and money in preparing a complex tender response and submitting it in exchange for the implied promise to evaluate that documentation in an appropriate way²³.

If the invitation for tenders is explicit about what will be accepted, there is an implied expectation that only conforming tenders will be considered and that a tenderer is not entitled to negotiate the terms of the tender documents²⁴. In the same way, it would be unusual, except where invitations to tender expressly stated so, to permit a tenderer to withdraw its tender before the closing time. To permit this in the absence of a right to do so, would tend to suggest that an invitation to tender might not give rise to contractual obligations²⁵. Acceptance of the existence of a process contract has elevated what in the past may have been a matter of expectation by a tenderer, to a contractual right enforceable in a court. The existence of a process contract

and Fairness in the Law of Contract", (1998) 13 *Journal of Contract Law* 126 where the author (at 140-141) clearly prefers Finn J's endorsement of an implied duty of good faith and fair dealing on the part of the principal in the consideration of responses to tender invitations.

Hughes Aircraft System International v Air Services Australia (1997) 146 ALR 1 at 118.

¹⁹ *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 at 335.

²⁰ [1990] 3 ALL ER 25 (CA).

²¹ *Ibid* at 30 per Stocker LJ (with whom Bingham and Farquharson LJJ agreed).

²² See for example *Ron Engineering & Construction Eastern Ltd v Ontario* (1981) 119 DLR (3d) 267.

²³ *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999) 170 DLR (4th) 577 at 586 (SCC).

²⁴ *Ibid* at 592. For a recent example see *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

²⁵ *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999) 170 DLR (4th) 577 at 585, Iacobucci J delivering a judgment of the Court left open the issue of whether revocability of a tender might be implied (if it were not expressed) as it was in *Ron Engineering & Construction Eastern Ltd v Ontario* [1981] 1 SCR 111 at 122-123 per Estey J.

heightens the need for the tender conditions to clearly and explicitly state the process to be followed and how non-conforming tenders will be treated.

Although the process followed by the principal in the period after submission and related to the evaluation of the tenders is unlikely to change in an electronic environment, the methods employed to achieve this process will alter. Two important differences exist.

First, the tender box is electronic. Therefore, the method of opening the tender box so as to maintain integrity in the process and confidentiality of tenders will be important. The common law does not prescribe a method for the opening of tenders. This is usually governed by the terms of the tender or by internal policy. In the traditional paper based tender system, the integrity of a government tender is maintained by placing the tender in a tender box which can only be opened by two people with two different keys. If a similar policy is to be maintained in an electronic environment, similar security would need to be provided.

Secondly, electronic tender systems will generally provide the ability for a principal to distribute the tenders electronically to relevant assessors for evaluation. This raises the issue of confidentiality of tender terms and the ability for collusion and other practices to develop through the electronic exchange of sensitive information.

Award of Tender

At law, a contract is formed when the principal communicates their acceptance of the tender to the tenderer²⁶. However, it is usually the practice particularly in the case of large construction contracts for a formal agreement to be signed between the two parties once the tender has been awarded. Unless the tender conditions stipulate that formation of the contract is subject to the execution of a formal contract²⁷, this further act does not change the time of formation at law.

The award of a tender through an electronic medium raises for consideration the question of 'When is a contract formed if the parties use electronic means?' Judicial consideration has been given to the effect of acceptance using the post²⁸, facsimile²⁹ and telex³⁰. However, the contractual effect of using email or some other electronic means to communicate the acceptance of an offer has not been authoritatively considered. Although several decisions seem to accept that email is effective in a contractual context³¹, an

²⁶ *Powell v Lee* (1908) 99 LT 284; *Soares v Simpson* [1931] NZLR 1079.

²⁷ *Masters v Cameron* (1954) 91 CLR 353 at 360; *City of Box Hill v E W Tauschke Pty Ltd* [1974] VR 39

²⁸ *Henthorn v Fraser* [1892] 2 Ch 27 at 33; *Adams v Lindsell* (1818) 106 ER 250

²⁹ *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Reese Bros Plastics Ltd v Hammon-Sobelco Australia Pty Ltd* (1988) 5 BPR [97325].

³⁰ *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC

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³¹ *Ford v La Forrest* [2002] 2 Qd R 44; *IVI Pty Ltd v Baycrown Pty Ltd* (2005) Q Conv R 54-612 (affirmed on appeal [2005] QCA 205).

Australian court is yet to consider the time of formation of a contract formed through email communication.

3. Potential Challenges for the Legal Integrity of Government E-Tendering

The use of an electronic medium for tendering or any other type of contracting raises new areas of potential conflict particularly in relation to the security and integrity of information passing between the parties and retained within the system. The comparison of the paper and electronic system above, raised several issues which to date have not been considered by a court and are not dealt with sufficiently through legislative regulation. In this part, we propose to outline the legal issues raised in the different stages of the e-tendering process. In the following part, the adequacy of the legal responses to the challenges posed will be critiqued and deficiencies identified.

(i) Preparation and Prequalification

The use of an electronic medium heightens the possibility of a tender being submitted with mistakes, without authority or fraudulently. A significant factor in maintaining the integrity of an electronic tendering system will be how well the system minimises the opportunity for mistake, fraud and unauthorised tenders. If the technological security fails, will the law respond to protect the integrity of the process?

Legal Challenge: If the tender is lodged by a party without authority, fraudulently or negligently, what legal effect will this have on the ultimate contract and the obligations of the principal in the evaluation and award period?

(ii) Submission of Tenders and Closing Time

The receipt of tenders into an electronic tender box can, if the technology fails, raise issues relevant to the transparency and integrity of the process. The advantage of being able to determine with some precision the exact time a tender is lodged may be lost if the technology fails to accurately record the time or the technology fails and a tenderer, for no fault of their own, is unable to submit. A further challenge for an electronic system is maintaining the confidentiality of tenders prior to the closing date and preventing access to the tender box by any persons prior to this time.

Legal Challenges:

- (i) Is it possible to determine legally when a tender is 'received' by the tender box in the absence of an express clause in the tender conditions?
- (ii) What is the legal response to a situation where a tender is received late or never received due to failures within the principal's system?
- (iii) What is the legal response to a situation where the tender box is opened by the principal or an employee prior to the final submission time? Does the law differentiate between inadvertent and deliberate dissemination of sensitive information to other parties?

(iii) Award of Tender

The award of a tender using an electronic medium raises for consideration the important question of 'When is a contract formed if the parties use electronic means?' As previously discussed, the time of contract formation when an electronic medium is used has not been authoritatively examined by an Australian court.

Legal Challenge – When is a contract formed through electronic communication?

4. Legal Response to the Challenges – Possibilities and Deficiencies

4.1 Tenders lodged without authority, fraudulently or negligently

In a fully electronic environment, a tender will most likely be sent by a person or a corporation through an authorised officer. This authorised officer will usually hold or control the means of validating a tender submitted by a corporation. A pre-qualification process or registration process will usually provide the tenderer with a user name and password or in a more sophisticated system a digital signature key³². In both cases, the intended purpose of this type of security is to enable identification of the person submitting the tender and to limit their ability to renege or repudiate the submission. Where a tender is submitted without authority or fraudulently using these means of access what is the position of the tenderer and principal?

Legal Response – Position of the Tenderer

Individuals – Without authority or fraudulently

First, the *Electronic Transaction Act 1999* (Cth) (ETA), s15 (and State equivalents)³³ attempts to respond generally to the issue of unauthorised electronic communication by providing that the “purported originator” of an electronic communication is bound by that communication only if it is sent by

³² A digital signature using public key or dual key cryptography is produced by a computer performing a mathematical function on the document. The digital signature can be used to authenticate the contents of the document. This form of digital signature is operated by two keys, a private key and a public key. Each key will decrypt messages encrypted by the other key. This allows one key (private key) to be kept secret while the other is available publicly (public key). For an explanation of the digital signature infrastructure operating in Australia refer to Christensen, Duncan and Low, 'The Statute of Frauds in the Digital Age - Maintaining the Integrity of Signatures' – (2003) *E-law Journal*, Murdoch University (December 2003)

³³ *Electronic Transactions (Queensland) Act 2001* (Qld), s 26; *Electronic Transactions Act 2000* (NSW), s 14; *Electronic Transactions (Victoria) Act 2000* (Vic), s 14; *Electronic Transactions Act 2000* (SA), s 14; *Electronic Transactions Act 2000* (Tas), s 12; *Electronic Transactions Act 2003* (WA), s 14; *Electronic Transactions (Northern Territory) Act 2000*, s 14 ; *Electronic Transactions (Australian Capital Territory) Act 2000*, s 14 .

that person or with the purported originator's authority. The risk of an unauthorised communication is, therefore, placed on the recipient as the purported sender is able to deny the authenticity of an electronic communication sent without their authority. The expression "purported originator's authority" in the ETA, s15 (and its State equivalents) includes not only actual but apparent authority. Therefore, a tender submitted without an individual's authority or fraudulently by another party is unlikely to be binding on the individual.

Negligent use of the digital key could also lead to the submission of an electronic tender and the formation of a contract through the acceptance of the tender. However, this would only be a problem for the tenderer who would be bound by the acceptance of the tender by the principal. It is not in the same category as a contract formed through the perpetration of a fraud.

Corporations – unauthorised use of digital signature

In the case of an electronic submission by a corporation, the concept of 'apparent authority' makes it more difficult for the corporation to deny the tender was submitted with authority. The apparent authority of an officer or agent of a corporation is provided for in the *Corporations Act 2001* (Cth), s129 (3). In paraphrase that section provides that a person may assume that anyone who is held out by the corporation to be an officer or agent of the corporation has authority to exercise the powers and perform the duties customarily exercised or performed by that officer or agent of a similar corporation. For this to apply, the principal must show that there was an express or implied holding out by the corporation in which case the person would have actual authority on the part of the corporation³⁴.

In large commercial organisations, notably corporations, where tenders are submitted on a regular basis, a corporation appoints a designated officer (sometimes called a contract officer) as the only person with actual authority to submit the approved tender. A principal receiving a tender signed by the designated contract officer could assume that such officer has the requisite authority and has personally used his or her digital signature key to sign the tender on behalf of the corporation. The acceptance and subsequent awarding of the tender in that case will bind the corporation to the terms of the tender submitted. The same presumption might be made, depending upon the size of the corporation, in relation to a managing director³⁵.

Therefore, where an electronic communication has been signed under the digital signature key of a person who would normally sign such documents, but who in this instance does not have authority to do so, either at all, or upon

³⁴ *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 361.

³⁵ *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 6 WAR 68; if a Managing Director did not have actual authority, a corporation may still have been liable because of his or her apparent authority; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72.

different terms, an application of s 129 of the *Corporations Act 2001* will most likely result in the corporation being bound to the communication.

Corporations – fraudulent use of digital signature

Difficult questions arise where the digital signature key is misused by a person who is not the holder of the private key on the part of the corporation and who effectively appropriates, in the electronic sense, the electronic signature of that party on a tender document. This might occur when there has been unauthorised access to the private key through the digital signature key holder not properly protecting their key through password processes. It may also occur where that person has negligently given others free access to the private key and the person accessing it has misused it purporting to bind the corporation. In such a case, where the misuse of the private key is to achieve a fraudulent purpose, it could be equated to forgery in the traditional sense of that word.

It has been said that the indoor management rule, exemplified in the case of *Royal British Bank v Turquand*³⁶ does not apply to cases of forgery. This seems to be a rule of long-standing. For example, in *Ruben v Great Fingall Consolidated*³⁷, the secretary of a corporation fraudulently issued to the plaintiffs a certificate for shares in the corporation as security for a loan to him. The secretary affixed the seal of the corporation to the share certificate and forged the signatures of two directors. He then counter-signed the document with his own signature. The court did not hold the corporation to the certificate which Lord Loreburn LC said was a nullity³⁸. His Lordship said that the doctrine applied only to irregularities that might otherwise affect a genuine transaction and not to a forgery.

Dawson J in *Northside Developments Pty Ltd v Registrar General*³⁹, in agreeing that the indoor management rule applied only to irregularities that might otherwise affect a genuine transaction, intimated that Lord Loreburn LC must have been referring to transactions carried out with the authority of the corporation, either actual or ostensible, apart from any irregularity under the articles⁴⁰. The transaction in *Ruben v Great Fingall Consolidated*⁴¹, was not carried out with the authority of the corporation but undertaken solely for the private purposes of the fraudulent secretary.

It has been held that forgery is not confined to a seal or signature which is false. For example, in *Creditbank Cassel GmbH v Schenkers*⁴², a branch manager of a corporation fraudulently, and as it was found, without any actual or apparent authority, drew bills of exchange to the order of the corporation, signing them on behalf of the corporation, with his own signature and subsequently endorsing them on behalf of the corporation. The plaintiffs were

³⁶ (1856) 6 El. & Bl. 327; 119 ER 886.

³⁷ [1906] AC 439.

³⁸ Ibid at 443.

³⁹ (1990) 170 CLR 124.

⁴⁰ Ibid at 193-194.

⁴¹ [1906] AC 439.

⁴² [1927] 1 KB 26.

unable to invoke the indoor management rule because the bills of exchange were forgeries. Both *Bankes LJ*⁴³ and *Scrutton LJ*⁴⁴ could not find evidence that the endorsement of bills of exchange to this amount was in the actual or apparent authority of the branch manager.

Effectively, the indoor management rule, at common law, might only be applicable where there is an actual transaction by the corporation to which the rule might be applied. Where the entire transaction is fraudulent, the rule does not appear to apply⁴⁵. However, despite these reasonably consistent views, the question has been raised as to whether forgery is an exception to the rule in *Royal British Bank v Turquand*⁴⁶. The cases are capable of explanation on the footing that either the forged document was not put forward as genuine by an officer acting within the scope of his or her actual or apparent authority or that the third party should have been put on enquiry. As this question was not necessary for the resolution of the issues in *Northside Developments Pty Ltd v Registrar General*⁴⁷, the court left the question open⁴⁸.

Thus, two different situations might occur. Firstly, there may be the situation where an officer of a corporation who, for example, only has authority to submit tenders on behalf of the corporation up to \$100,000 submits a tender on behalf of the corporation for \$200,000. In such a case, the corporation would be bound upon acceptance (in the event of acceptance of the tender) notwithstanding that irregularity as the principal could rely on the indoor management rule. In the second case, the official of the corporation has no authority to submit tenders for any amount on behalf of the corporation, nor does the corporation hold that person out as able to do so. In such a case, arguably whether the corporation is bound and whether the indoor management rule applies to the benefit of the principal might depend upon whether the action was undertaken in the perpetration of a fraud by the individual holding himself or herself out to be an officer of the company or whether or not it was what might be called a mere procedural irregularity in the operations of the corporation. In the former case, that of fraud, the corporation may not be bound but, in the latter case, the view is open on the cases that the corporation could be bound and that the actions of the unauthorised official were within the application of the indoor management rule.

Identity Fraud and Forgery

There is a further issue in this context and that is whether what is understood to be forgery at common law equates with what might be identity fraud in an

⁴³ Ibid at 835-836.

⁴⁴ Ibid at 840.

⁴⁵ *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 at 506 per Clauson J.

⁴⁶ (1856) 6 El. & Bl. 327; 119 ER 886.

⁴⁷ (1990) 170 CLR 146.

⁴⁸ Ibid at 157 per Mason CJ; Brennan J stated that the corporation would not be liable unless the corporation had held the agent out as having authority to represent his or her own authority and if not, the agent cannot bind the corporation by his or her statement of authority and any loss suffered by the party in reliance cannot be sheeted home to the corporation (at 187).

electronic environment. Identity fraud involves the fraudulent adoption of another person's identity. Whilst such an action is a principal element of forgery, the circumstances in which a private key of another was used would have to be examined before the principles arising from the cases on forgery could be directly equated. Forgery involves a deliberate and deceitful act with the intention of defrauding a third party. Identity fraud is effectively the impersonation of another party who exists. In the case of an electronic communication, any person using the private key of another person or corporation to submit a tender is in effect impersonating the identity of the person authorised to use it with intent to deceive⁴⁹.

Conversely, is the use of a private key for a non-existent person forgery? Although the person is not impersonating an actual person, the use of a private key to submit a tender on behalf of a non-existent person, would satisfy the elements of intent to defraud. This situation is likely to be rare in the case of invited tenders where the private key of the corporation would have to be used to carry out the plan as the tender is directed to, and could only be submitted by, the corporation to whom the invitation was extended, although in some instances the principal may waive the requirement and accept a tender from a party not on the list⁵⁰.

Legal Response – Position of the Principal

The two primary issues for a principal who receives a tender submitted through forgery or fraud will be first, whether it is a conforming tender and secondly, whether a contract formed in ignorance of the fraud is voidable.

The circumstances in which a tender has failed to comply with the conditions of tender and consequently is a non-conforming tender have been considered in a number of cases. Most relevantly, in *Dockpride Pty Ltd v Subiaco Redevelopment Authority*⁵¹ the Western Australian Supreme Court considered whether a tender submitted by a person not personally invited to tender was a conforming tender. In that case an invitation to tender was issued by the Subiaco Redevelopment Authority (the Authority) to a company called Westpoint. Westpoint did not submit a tender in its name. A tender was submitted under another entity, Dockpride Pty Ltd (Dockpride), which was created specifically for the purpose of carrying out the tender. After the tender was awarded to another party, Dockpride commenced a claim against the Authority for a breach of the process contract between the parties. The Authority argued that as the invitation was submitted to Westpoint, Dockpride could not accept the invitation and consequently the tender did not conform and no process contract existed between the parties. The court held that although the submission of a tender by Dockpride was not an offer in accordance with the tender, the Authority, by their conduct (acceptance of the tender deposit and subsequent meetings with Dockpride about the tender) accepted Dockpride's tender as a valid submission. From this decision, it is clear that although a tenderer may not be invited to tender, a principal may, in their discretion, accept the tender even though no invitation was issued to the

⁴⁹ *R v Brott* (1992) 173 CLR 426 at 430.

⁵⁰ *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

⁵¹ [2005] WASC 211.

person. This is consistent with the general principles of contract law where a person is entitled to waive compliance with their own strict terms and accept an offer on different terms.

The issue of a conforming or non-conforming tender would only arise if one of the conditions of the tender specified certain requirements related to the identity of the party. For example, in a tender for a major infrastructure project such as a motorway or bridge, the government entity may have strict requirements and conditions concerning the identity and standing of the tenders to undertake the work. In this case, the conditions of tender would reserve the right to tender to certain individuals. A tender submitted by an individual who did not conform to the qualifications would be a non-conforming tender and could be rejected⁵².

The second issue raised is whether once a tender is accepted the discovery of the true identity of the tenderer would give the principal a right to avoid the contract. Where a person or corporation has fraudulently represented they are another entity, the misled party would have a right to rescind the contract for fraudulent misrepresentation⁵³ or to allege the contract was void from the beginning due to mistake as to identity⁵⁴. The only time a principal may want to resort to mistaken identity is where the intervention of third party rights prevents the rescission of the contract for fraud⁵⁵. Where dealings between a tenderer and principal are undertaken over the internet, a principal is likely to succeed on the basis of fraud or fraudulent misrepresentation or for mistaken identity. This is because the preponderance of case law suggests that only in the case of a face to face dealing will a deceived party find it difficult to rebut the presumption that they intended to deal with the person standing in front of them⁵⁶. Although a remedy is likely to be available to a principal deceived by the tender in an electronic process, the right of a principal to extricate themselves from the contract depends upon a favourable decision by a court.

Remedying Legal Deficiencies

The legal position of the tenderer and principal in the event of authorised or fraudulent use of a private key is far from clear. There is no clear response to whether a tenderer is bound to their tender or whether a principal is entitled to reject an unauthorised or fraudulent tender as non-conforming. One solution to this uncertainty is for the terms of tender to make provision for such an event.

The terms of tender should make it clear that, in the case of a tender submitted by a corporation, the tender will be deemed to be non-conforming if it is later discovered that the person who sent the tender was not authorised

⁵² In the absence of a wide discretion to accept or reject non-conforming tender, the principal would have to reject the tender.

⁵³ *Lewis v Averay* [1972] 1 QB 198; *Alati v Kruger* (1955) 94 CLR 216.

⁵⁴ *Cundy v Lindsay* (1878) 3 App Cas 459; *Ingram v Little* [1961] 1 QB 31.

⁵⁵ This may occur where a financial institution has provided funding to the tenderer in reliance upon the acceptance of the tender and a mortgage taken.

⁵⁶ *Phillips v Brooks* [1919] 2 KB 243; *Lewis v Averay* [1972] 1 QB 198; *Shogun Finance Ltd v Hudson* [2003] UKHL 62 (19 November 2003); cf *Ingram v Little* [1961] 1 QB 31.

to do so or the tender was submitted through fraudulent misuse of the private key of the tenderer. A conforming tender could be defined as a tender that has been submitted with the full authority of the tenderer. As there would be no way of determining, for example, whether a digital key had been misused at the time of transmission of the tender, the only way in which this matter could be dealt with is by making it a condition of acceptance by the principal that the tender was submitted with the proper authority of the principal. In any event, a contract formed by acceptance of a fraudulent tender would be vitiated by the ultimate proof of fraud and would be voidable at the instance of the principal⁵⁷. Such a condition may also cover the situation where the tender was submitted by other inappropriate use of the digital key. It may not be possible, upon the face of the tender, to differentiate between a fraudulent or unauthorised submission. In either case, the principal should not be bound to accept such a submission after the irregularity is discovered or notified to the principal. This can only be achieved with certain through a contractual term to that effect.

There would be no necessity for the conditions of tender to cover negligent submission as this would be the responsibility of the tenderer who would be bound to perform any contract formed by the acceptance of the tender, notwithstanding the tenderer may have been prejudiced by the negligent use of a digital key.

4.2 When will an Electronic Tender be Late?

Usually the conditions of tender will specify that a tender must be submitted by a particular time and date to the principal. A tender received by the principal after this time will usually be rejected as a non-conforming tender. In a paper environment, the fact a tender was received prior to the closing time will be relatively clear. If the tender was physically placed into the tender box prior to the closing time and subsequent opening of the tender, it will be received on time. When a physical tender box is replaced with its virtual equivalent, is it sufficient to continue to provide for the tender to be received/submitted/placed into the e-tender box by a particular time? Does a simple provision to this effect allow a principal to determine from a legal perspective whether a tender is submitted on time and is, therefore, capable of consideration as a conforming tender?

Legal Response

At common law, the submission of a tender is generally considered to be an offer to contract on certain terms⁵⁸. An offer is generally considered to be effective once received by the offeree (although the terms of the tender may alter this). In a paper based tendering system, a tender conforms to a requirement to be “received in the tender box by a certain date and time” if it is physically in the tender box by the nominated time. Assuming that a similar phrase appears in the conditions for an electronic tender when is a tender in the form of an offer received?

⁵⁷ *Redgrave v Hurd* (1881) 20 Ch D 1 at 12; *Alati v Kruger* (1955) 94 CLR 216 at 223.

⁵⁸ *Crowshaw v Pritchard* (1899) 16 TLR 45; *Cana Construction Co Ltd v The Queen* (1973) 37 DLR (3rd) 418 (SC).

The ETA, s 14(4) (and its State equivalents)⁵⁹ provides that, unless otherwise agreed, an electronic communication is received when it comes to the 'attention' of the addressee. If however, the addressee has designated a particular information system the electronic communication will be received when it enters that system⁶⁰.

The application of s 14(4) (and the State equivalents) to an electronic tendering system requires the identification of an electronic 'electronic communication' and an 'information system.' Electronic communication is defined to mean:

- a communication of information in the form of data, text or images by guided or unguided electromagnetic energy; or
- a communication of information in the form of sound by guided or unguided electromagnetic energy, if the sound is processed at its destination by an automated voice recognition system⁶¹.

Quite clearly an electronic tender submitted via a web based browser or via email would be an electronic communication. Therefore, in accordance with s 24 it will be received either when it comes to the attention of the addressee or when it enters a designated information system. 'Information system' is defined as 'a system for generating, sending, receiving, storing or otherwise processing electronic communications.' An electronic tendering system would satisfy this definition.

Arguably, a principal who provides in their conditions of tender that tenders must be 'received into the tender box' by a certain date and time are 'designating an information system' in accordance with s14(3) (or its State equivalents). Therefore, the electronic communication is received at the time the communication 'enters the information system' (ie the e-tender box) rather than the time the tender comes to the attention of the addressee⁶². Are there

⁵⁹ *Electronic Transactions Act 1999 (Cth)*, s 14(4) ; *Electronic Transactions (Queensland) Act 2001 (Qld)*, s 24(2); *Electronic Transactions Act 2000 (NSW)*, s 13(4) ; *Electronic Transactions (Victoria) Act 2000 (Vic)*, s 13(4); *Electronic Transactions Act 2000 (SA)*, s 13(4); *Electronic Transactions Act 2000 (Tas)*, s 11(4); *Electronic Transactions Act 2003 (WA)*, s 13(4); *Electronic Transactions (Northern Territory) Act 2000*, s 13(4) ; *Electronic Transactions (Australian Capital Territory) Act 2000*, s 13(4).

⁶⁰ *Electronic Transactions Act 1999 (Cth)*, s 14(3) ; *Electronic Transactions (Queensland) Act 2001 (Qld)*, s 24(1); *Electronic Transactions Act 2000 (NSW)*, s 13(3) ; *Electronic Transactions (Victoria) Act 2000 (Vic)*, s 13(3); *Electronic Transactions Act 2000 (SA)*, s 13(3); *Electronic Transactions Act 2000 (Tas)*, s 11(3); *Electronic Transactions Act 2003 (WA)*, s 13(3); *Electronic Transactions (Northern Territory) Act 2000*, s 13(3) ; *Electronic Transactions (Australian Capital Territory) Act 2000*, s 13(3).

⁶¹ *Electronic Transactions Act 1999 (Cth)*, s 5 ; *Electronic Transactions (Queensland) Act 2001 (Qld)*, Schedule 2; *Electronic Transactions Act 2000 (NSW)*, s 5 ; *Electronic Transactions (Victoria) Act 2000 (Vic)*, s 3; *Electronic Transactions Act 2000 (SA)*, s 5; *Electronic Transactions Act 2000 (Tas)*, s 3; *Electronic Transactions Act 2003 (WA)*, s 5; *Electronic Transactions (Northern Territory) Act 2000*, s 5 ; *Electronic Transactions (Australian Capital Territory) Act 2000*, s 5.

⁶² In the context of tenders, the second option of not designating an information system is impractical and would rarely occur in practice.

any legal risks in failing to elaborate on the meaning of 'enters an information system'?

One significant issue in the context of tenders for construction contracts is the volume and size of the documents which may be submitted. The size of the electronic documents that form a tender submission are usually large and numerous, the transmission of which could not reasonably be considered instantaneous, especially when employing open networks such as the Internet. Transmitting a document of 1 MB size using a typical dial-up Internet connection of 56 Kbps (kilobits per second) will not take less than 2.5 minutes. It is possible that a tenderer may be in the process of transmission at exactly the closing time. Assuming the system does not automatically reject the tender will this be a tender 'received' prior to the closing time? Should a principal deal with this tender as a non-conforming tender?

An application of the ETA, s 14(3) (or its State equivalents) results in the conclusion that the tender is received when the tender 'enters the information system'. No judicial determination of the exact scope of this phrase exists. It may be important that the ETA, s14(3) does not say receipt occurs when the electronic communication 'first' enters the information system. The absence of this descriptor may indicate that the entirety of the communication needs to be received by the information system. The lack of judicial consideration of this provision means that a principal could not with certainty either accept a tender submitted in the period overlapping the closing time as a conforming tender or reject the tender as non-conforming.

Remedying Legal Deficiencies

An examination of the common law and ETA provisions reveals that the exact time at which an electronic tender is received into an electronic tender box is unclear. While the ETA (and State equivalents) attempts to provide for the receipt of an electronic communication by an information system, the ETA does not provide sufficient clarity in relation to the exact time a tender is uploaded to the tender box. This will be of crucial importance where a tenderer commences to upload prior to the closing time but does not complete the process until after the time.

Generally, in a paper environment any tender received by the principal after the closing time will be non-compliant (unless the terms provide otherwise) and, subject to the conditions of tender, could be rejected by the principal. Previous authorities demonstrate the need for a principal faced with a challenge by an aggrieved tenderer to be able to prove either the tender was late or that the Conditions of Tender allowed the principal to include the tender despite its late submission⁶³.

⁶³ *Smith Bros & Wilson (BC) v British Columbia Hydro & Power Authority* (1997) 30 BCLR (3d) 334 where the British Columbia Hydro and Power Authority considered a tender that was submitted only one minute late and awarded the contract to that tenderer. However, as the terms of the tender did not give the Authority any discretion to consider a late tender, it was held that that tender should not have been considered and the plaintiff was awarded damages.

Therefore, in an electronic environment whether a principal should deal with a late tender as non-conforming will depend on:

1. The ability of the e-tendering system to accurately record the time information, including when a tender submission, is uploaded to the tender box; and
2. The drafting of the tender conditions related to the receipt of submissions.

The terms of tender should consider three issues. First the conditions should require submission of the tenders to the specific e-tender box. This will act as a designation of an information system for the purpose of ETA, s14(3) (or its State equivalents). Secondly, the condition should specifically provide for the time at which a tender will be deemed to enter the e-tender box. The possibilities a principal may consider include upon receipt of an email confirming the tender had been uploaded to the e-tender box or at the time noted on the e-tender website. Thirdly, the tender conditions should continue to include a wide discretion for the principal to accept or reject non-conforming tenders. Without such discretion a tender received even one minute late cannot be accepted by the principal without breaching the process contract between the principal and all other tenderers⁶⁴.

4.3 Technical Deficiencies or Difficulties and Non-conforming Tenders

The use of an electronic medium creates new opportunities for a tender to be treated as non-conforming by a principal. Legal recognition of a process contract between a principal and all tenderers who submit a conforming tender⁶⁵ increases the importance of continuing to include in tender conditions a specific discretion allowing a principal to accept or reject a non-conforming tender. Without an appropriately worded discretion, a principal who accepts a non-conforming tender is open to claims from unsuccessful tenders. For example in *MJB Enterprises Ltd v Defence Construction (1951) Lt*,⁶⁶ an invitation to tender included a clause to the effect that the lowest or any tender shall not necessarily be accepted. No other discretion was included in the terms of tender. Notwithstanding the lowest tender included a condition not contemplated by the invitation, the principal accepted that tender. The second lowest tenderer was successful in an action for damages as the court found that the reservation clause, as it stood, did not permit acceptance of a non-conforming tender and the acceptance of that tender was a breach of contract between the principal and the second lowest tenderer⁶⁷.

⁶⁴ Refer to the discussion above in relation to the process contract formed between a tenderer and the principal.

⁶⁵ *Smith Bros & Wislon (BC) Ltd v British Columbia Hydro & Power Authority* (1997) 30 BCLR (3d) 334; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195.

⁶⁶ (1999) 170 DLR (4th) 577.

⁶⁷ *Ibid* at 593-594.

The breadth of a discretion bestowed on the principal will depend upon the drafting of the condition. Will a simple discretion to accept or reject 'non-conforming tenders' be effective or should the clause go further? Ultimately, the breadth of a principal's discretion will depend upon the meaning given to the phrase 'non-conforming' in the tender conditions.

The circumstances giving rise to a non-conforming tender in a paper environment have been considered in a number of cases. Put simply, a non-conforming tender is a tender that does not comply with the requirements and terms of the tender. Whether compliance with the terms of tender must be strict or substantial has been debated in the Canadian courts with the majority of judges applying a substantial performance test to determine whether a tender is non-conforming. In *British Columbia v SCI Engineers & Constructors Inc*⁶⁸ McEachern CJ commented that:

...we think there are no circumstances in this case which requires the Crown to apply a strict rather than a substantial compliance test, particularly when the Crown was satisfied that no confusion was caused by the last revision.

One of the modern source authorities supporting a substantial compliance test as the appropriate judicial response to this kind of a problem is the *Ron Engineering* case⁶⁹ mentioned above where Estey, J., writing for the court, said at⁷⁰:

It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the numbers of weeks already specified by the contractor in its tender."

It would be otherwise, of course, if a material fact were omitted from the tender, or if the meaning of the tender was unclear, but that is not the case. It could also be otherwise if there were non-compliance that intruded substantially upon the secrecy of the tenderer process. It is almost unnecessary to add that the Crown could impose a requirement for strict compliance by rewording its Conditions of Tender appropriately...."⁷¹

There are judicial indications that a similar test would be followed in Australia⁷². The application of a substantial compliance test means that insignificant errors or non-compliance within the content of the tender will not render a tender non-conforming. Obviously, tenders which are submitted after the closing time⁷³ or contain terms not required by the tender⁷⁴ or fail to use

⁶⁸ [1993] 22 BCAC 89.

⁶⁹ *Ron Engineering & Construction Eastern Ltd v Ontario* (1981) 119 DLR (3d) 267.

⁷⁰ *Ibid* at 278

⁷¹ [1993] 22 BCAC 89 at [17] – [20].

⁷² *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [147].

⁷³ *Smith Bros & Wilson (BC) v British Hydro & Power Authority* (1997) 30 BCLR (3d) 334.

updated information contained in addendum⁷⁵ will be non-conforming and are examples of substantial non-compliance. Examples of substantial compliance in a paper environment have included where minor information is omitted⁷⁶, where a process for revisions of bids was not followed to correct an addition error in the original tender⁷⁷ or where insignificant irregularities or mistakes appeared in the tender documentation⁷⁸.

Equivalent situations to those described may occur in an electronic environment where a tenderer inserts an incorrect amount, submits additional information using a method not allowed in the tender conditions, omits pages or terms because of a problem with software, submits a tender late or includes additional terms not contemplated by the tender conditions. While a resolution of whether a tender submitted in the above situations is non-conforming can be obtained through analogy with paper based tendering, a new category of non-compliance, with no paper analogy, may arise due to technical deficiencies or difficulties. This would include situations where:

- (i) a virus or macro is attached to a tender document (maybe without knowledge or fault of the tenderer),
- (ii) a method of encryption is used that prevents the principal from easily opening the tender,
- (iii) the principal's system is malfunctioning and fails to accept a tender or wrongly rejects a tender; or
- (iv) the tenderer is unable to access the system.

Would these tenders be non-conforming?

Legal Response

The question of compliance with contractual requirements is not covered by the electronic transaction legislation at either State or Commonwealth level. Likewise, the jurisprudence on non-conforming tenders developed through case law is, in the writers' view deficient in its ability to resolve a dispute of this nature. While a court would be able to address the general question of whether the tender complied with the terms of the tender in relation to content or form of submission, no assistance is readily available to resolve a dispute arising from the negligence or inadvertence of the principal.

Although it maybe arguable that the examples given above arise from a failure of the technology to operate properly, allegations of negligence on the part of the principal will do little for a tenderer unless there is an obligation in the terms of tender for the principal to keep the tender box open, available and

⁷⁴ *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999) 170 DLR (4th) 577; *Canadian Logistics Systems Ltd v Canadian National Transportation Ltd* [2000] BCD Civ J 3253

⁷⁵ *Kelowna (City) v Maple Reindeers Inc* [2004] ACWSJ Lexis 9695.

⁷⁶ *J Oviatt Contracting Ltd v Kitimat General Hospital Society* [2000] ACWSJ Lexis 50616.

⁷⁷ *Foundation Building West Inc v Vancouver (City)* (1995) 22 DLR (2d) 94; *British Columbia v SCI Engineers & Constructors Inc* (1993) 22 BCAC 89

⁷⁸ *Chandos Construction Ltd v Alberta (Alberta Infrastructure)* [2004] AJ No 1438; *AON Reed Stenhouse Inc v Newfoundland* [2004] ACWSJ Lexis 5427.

functioning properly until the tender closing time. In the absence of such an express obligation, the question is whether a court may imply an obligation on the principal to take all reasonable steps to keep the tender box operational.

A court is unlikely to imply a strict obligation on the principal and is likely to prefer, if a term were implied, to limit it to reasonable steps on the part of the principal. This would mean a tenderer would need to prove negligence on the part of the principal in addition to loss and damage from the failure to submit before a remedy is available. The winding path that a court may take to possibly reach this point can in the writers' view be averted by including appropriate clauses within the tender conditions.

Remedying Legal Deficiencies

The examination above reveals that the meaning of 'non-conforming tender' in an electronic environment where the non-compliance arises from technical difficulties is uncertain. It is important that the situations in which a tender is non-conforming are clear and understood by both parties. To overcome any shortcomings in the law, a principal should consider inserting a clear indication of whether a tender is non-conforming for the following reasons and who bears the risk of that event:

- Where tender documents are submitted and a virus is introduced to the system by the tenderer;
- Where the tender documents include a macro within the document that prevents the document from being opened by the principal;
- Where a method of encryption is used that prevents the principal from easily opening the tender,
- Where the principal's system is malfunctioning and fails to accept a tender, wrongly rejects a tender or the tenderer is unable to access the system.

A principal may choose to respond to the first three issues by providing that a conforming tender should not only comply with all the specifications of tender, but should also be submitted virus free, in the manner prescribed in the conditions and in a state that allows the principal to immediately access and read the document once the e-tender box is opened. It should be made clear that a tender which required reformatting or decryption beyond that necessary through the use of the tenderer's public key would not conform and, subject to the tender conditions would be deemed non-conforming.

In the case of the last situation, the terms of tender should clarify whether the principal has an obligation to keep the e-tender box open and accessible until the closing time and the nature of that obligation. In fairness to tenderers, a principal would in most cases agree to take all reasonable steps within their control to keep the e-tender box accessible up to the closing time. As a practical step to facilitate the submission of tenders, a principal may decide to keep the tender box open past the closing time so that tenders received after the closing date may still be accepted rather than automatically rejected. While the tender may be stamped to indicate it was submitted late, the principal is then given an opportunity to investigate the reasons for the

lateness and exercise a discretion (which should be express in the tender) to accept or reject.

Where the failure to submit on time is due to a failure within the principal's system a cautious principal wishing to avoid litigation may accept a late tender and submit it to the evaluation process. This approach can only be used where the tender conditions include an appropriately worded discretion to accept or reject non-conforming tenders.

4.4 Opening the E-Tender Box and Distribution of Tenders for Evaluation

The common law does not prescribe a method for the opening of tenders or the distribution of tenders for evaluation. This is usually governed by the terms of the tender or in the case of government tenders, by internal government policy. In the traditional paper based tender system, most polices attempt to maintain the integrity of a government tender by requiring the tender to be placed in a tender box that can only be opened by two people with two different keys. The integrity of the evaluation process can also be maintained by only allowing one person to access the information and by sending copies only to the evaluation panel. The purpose of these safeguards is to minimise as far as possible allegations of collusion or bias in the process.

The importance of following a tender process exactly and adhering to evaluation guidelines is highlighted in the decision of Finn J in *Hughes Aircraft Systems International v Airservices Australia*⁷⁹. Finn J concluded first that there was a process contract between the tenderers and the principal and, secondly, the contract included not only the express terms but also an implied term that the government authority would conduct its tender evaluation fairly. The scope of this requirement was limited by Finn J to an obligation to avoid unfair dealing and distinguished from a situation of apprehended bias. Therefore, although one member of the Board evaluating the tenders was associated with the corporation which was actually awarded the contract and failed to disclose their interest until late in the deliberation process, Finn J found that this affiliation had not influenced the awarding of the contract to that corporation. Whilst there may have been the apprehension of bias, there was no measurable consequence which amounted to an unfair dealing.

The decision in *Hughes Aircraft* provides a clear indication that principals, including governments, need to act fairly in the way they deal with and award tenders. To that extent an allegation of unfair dealing may have merit if the tender box were opened prior to the closing date, certain tenders were distributed to others prior to the closing time or parts of a tender were omitted when sent for evaluation. A principal who allowed such situations to occur either with or without their knowledge is likely to breach their obligation to act fairly toward all tenderers. Although little discussion of the extent of this obligation appears in the cases, whether the conduct was engaged in

⁷⁹ (1997) 146 ALR 1.

deliberately or inadvertently is unlikely to make a difference to the principal's liability for unfair dealing, unless a specific exclusion of liability is included in the terms of tender for inadvertent technical errors. However, the extent of the obligation of a principal who permits interference with the tender box or does not properly supervise the process of awarding the tender seems to be a breach of an implied term in the contract rather than negligence.

Remedying Legal Deficiencies

Although a clear obligation to act fairly toward all tenders will be implied as a term in a tender process contract, the application of this obligation to inadvertent or accidental opening of the tender box or mistaken or accidental distribution of confidential or sensitive information to other tenders, through, for example, technical malfunction, is unclear. A principal seeking to protect themselves for liability should adopt a combination of IT related and legal strategies.

First, the principal should ensure that the access control systems used for the opening of the tender box and the distribution of tender documents for evaluation are robust and meet relevant standards. The access control system on a server can be used to implement a secure tender box by restricting access to submitted tender documents until the close of tender. The access control system is also responsible for maintaining the privacy of submitted documents, ensuring that the identities of the tenderers who have submitted documents are kept confidential. The e-tendering system should carefully specify access control rules that determine which users can access which resources⁸⁰. It is generally recommended to limit user access on a need-to-know basis, assigning the least amount of privileges required.

Effective access control requires:

- § a means of verifying the identities of users requesting access to system resources (user authentication),
- § a comprehensive authorisation policy, and
- § robust software implementation of the access control software so that controls cannot be bypassed. Since inside attackers pose the main threat to the security of the e-tender box, the use of encryption is an appropriate mechanism. As tenders are received, the e-tendering application encrypts them. Even if an insider manages to get access to the submitted tender files, no information will be revealed, except possibly the number of submitted tenders and any other metadata that might have been stored in clear-text form.

Secondly, the conditions of tender should be reviewed to ensure appropriate exclusions of liability are included to protect against accidental or inadvertent mistakes by the system or through human intervention. The exclusion should

⁸⁰ In Queensland Information Standard IS18 (QG 2002) (available at http://www.governmentict.qld.gov.au/02_infostand/standards.htm [accessed 29 November 2005]) enunciates general principles regarding access control rules; more concrete advice is given in ACSI 33 (DSD 2004) (available at <http://www.dsd.gov.au/library/infosec/acsi33.html> [accessed 29 November 2005]).

extend to malfunctions in the e-tender system, negligence or fraud of employees, breach of the implied term of fair dealing, accidental distribution of confidential or sensitive information.

4.5 When is an Electronic Contract Formed?

A principal who uses an e-tendering system that allows for the awarding of a contract through electronic notification will need to give serious consideration to when a contract comes into existence. The time of formation of a contract is significant to the parties as once a contract is formed the tenderer is unable to revoke their offer and the terms of the tender cannot be changed except through mutual agreement between the parties. Surprisingly, the question of when is a contract formed through the use of electronic communication has not been considered by an Australian court. The question therefore arises as to when a contract is formed following the submission of a tender if the principal notifies the tenderer electronically of a successful tender.

Legal Response

Generally, in the absence of an express term, a contract is formed following the submission of a tender at the time acceptance of the tender is communicated by the principal to the tenderer⁸¹. One of the key issues in an electronic environment is whether a contract is formed at the time the principal sends their acceptance or at the time the tenderer receives or reads the acceptance.

Judicial consideration of the effect of acceptance using the post⁸², facsimile⁸³ and telex⁸⁴ may be relevant to a determination of this question. It is generally accepted that communication of an acceptance by facsimile or telex results in the formation of a contract at the time the fax or telex it is received by the offeror⁸⁵. In contrast an acceptance sent by post, to which the postal acceptance rule applies, is effective at the time it is posted⁸⁶. Commentators have debated the wisdom of applying the postal acceptance rule to an acceptance sent by email with most commentators advocating the abandonment of the postal acceptance rule for email⁸⁷. To date the

⁸¹ *Powell v Lee* (1908) 99 LT 284; *Soares v Simpson* [1931] NZLR 1079.

⁸² *Henthorn v Fraser* [1892] 2 Ch 27 at 33; *Adams v Lindsell* (1818) 106 ER 250.

⁸³ *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Reese Bros Plastics Ltd v Hammon-Sobelco Australia Pty Ltd* (1988) 5 BPR [97325].

⁸⁴ *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34

⁸⁵ *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR [97325]; *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Egis Consulting Australia Pty Ltd v First Dynasty Mines Ltd* [2001] WASC 22 cf. *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1968] WAR 244 where a public telex was used.

⁸⁶ *Henthorn v Fraser* [1892] 2 Ch 27 at 33; *Adams v Lindsell* (1818) 106 ER 250.

⁸⁷ ES Perdue 'Creating Contracts Online' in TJ Smedinghoff (ed), *Online Law*, the SPA's *Legal guide to Doing Business on the Internet*, Addison Wesley Redding Mass 1996 at 8; O'Shea & Skeahan "Acceptance of Offers by Email – How Far Should the Postal Acceptance Rule Extend?" (1997) 13 QUTLJ 247; Christensen "Formation of Contracts by Email – Is it Just the Same as the Post?" (2001) 1 QUTLLJ 22.

application or not of the postal acceptance rule to email has not been considered by a court⁸⁸.

The ETA in each State does not directly address the time of formation of a contract using an electronic communication. As previously considered, the ETA (Cth), s14 (and its State equivalents) provides two rules for when an electronic communication is received by an information system. The first rule is that if the addressee has designated an information system, the time of receipt of an electronic communication is the time it enters that information system. The second rule is that if no information system is designated, the time of receipt of an electronic communication is the time it comes to the attention of the addressee. The first rule is most likely applicable to a tender situation.

Generally, a tenderer will when submitting the tender electronically provide an address for delivery of notices, including notice of acceptance of the tender. The provision of an email address for service of notices and other correspondence would qualify as a designation of an information system. Therefore, the time of receipt of the acceptance will be the time it enters the information system of the tenderer. In most cases, this will be the time the email is delivered to the tenderer's computer⁸⁹.

The clear intention of this particular section, present in both State and Commonwealth legislation, is to provide for the time an email or other type of electronic communication is received. This may be interpreted by a court as a clear indication that the general common law rule, that acceptance is effective upon communication, should be retained. Alternatively, a court may view the legislation as providing a time of receipt for an email, but the question of when an acceptance is effective should still be decided using common law principles. While various academic views have been proffered in relation to this issue⁹⁰, the situation is less than clear and presents a significant issue for commercial dealings via the internet until a judicial determination is made.

Remedying Legal Deficiencies

As neither cases nor legislation assist with a determination of the time and place of formation of a contract formed through electronic communication, for the sake of certainty, this matter should be dealt with as far as possible in the conditions of offer, or in the case of tendering, the conditions of tender.

The conditions of tender may be utilised to describe the process by which the tenders submitted are respectively acknowledged and opened for consideration. The date of the contract can be a time which is deemed for the

⁸⁸ Although several decisions seem to have accepted that email is effective in a contractual context (*Ford v La Forrest* [2002] 2 Qd R 44; *IVI Pty Ltd v Baycrown Pty Ltd* [2004] QSC 430 (affirmed on appeal [2005] QCA 205)) an Australian court is yet to consider the time of formation of a contract formed through email communication.

⁸⁹ Where the tenderer is a large corporation with a networked system the information system may be the network or the individual computer on each person's desk.

⁹⁰ Hogan-Doran J, 'Jurisdiction in cyberspace: The when and where of on-line contracts' (2003) *Australian Law Journal* 377, 390; Willmott L, Christensen S, Butler D, *Contract Law*, 2nd ed, Oxford University Press 2005, [3.595].

purposes of the contract by agreement between the parties. The conditions of tender should, as best they can, follow the ordinary legal rules about acceptance of offers. Generally, as stated above, an offer cannot be accepted, subject to the postal rule exception, until the acceptance is communicated to the party making the offer. The conditions of tender should aim to ensure certainty between the parties about the time, date and place of contract in clear and simple terms.

First, the terms of tender should provide that the acceptance of the tender will be notified to the tenderer at the email address specified in the tender. This will act as both a consent to communication and a designation of an information system for the purposes of the ETA. Secondly, the conditions of tender should state that the date of contract will be determined by the time and date the mail is received by the tenderer's information system. An email is usually stamped with the time and date that the email enters the information system of the tenderer as recipient. Obviously, this type of deemed date and time of contract formation is particularly important when the contract is made electronically across different time zones.

Further, the place of receipt of the email acceptance is also generally accepted as the place of contract, in the absence of a contrary provision. Therefore, where tenders are submitted nationally and internationally, a principal would be prudent to include a provision designating the law applicable in the event of disputes⁹¹.

Conclusions

Uncertainties in the application of the law and interpretation of legislation concerning the electronic contracting process has meant, as far as construction contracts are concerned, there has been a slow take up in this form of contracting. Whilst larger corporations and the government have the technology to engage this process electronically, and some have done so in a limited form, the advent of fully electronic contracting for government will not become a reality until some of the issues raised in this paper have been authoritatively settled by the higher courts.

The resolution of some of these issues is vital to the integrity of the process out of which should emerge a fully enforceable contract. Issues such as the failure of systems at a critical time, the potential for fraudulent use of a digital key and the consequences for a tenderer of a lack of interface between two computing systems are features of an electronic environment that are of little relevance in the paper contracting process. Different rules and statutes apply to electronic communications and the time of receipt and opening of an email has different legal connotations from the receipt and opening of a letter. These are only a few of the matters which throw up novel legal questions not yet addressed in the literature. Whilst to some extent, some of these issues

⁹¹ For example, a principal in New South Wales who accepts tenders from other States or New Zealand should stipulate in the tender conditions that the law of New South Wales applies to the resulting contract.

can be addressed in the conditions of tender; many others remain to be considered judicially.

Secondly, it is likely that some of the recommendations here may form the basis of standard clauses utilised when contracting in the fully electronic environment. It takes time for such clauses to materialise. Statute law is never likely to deal with every contingency, especially a generic statute such as the ETA and its various iterations. It is not until some basic rules are settled that there will be sufficient confidence in electronic systems for their use to become the orthodox method of contracting. That time has not yet arrived. At present, it seems that those government departments and agencies who have been early adopters of the electronic tendering systems still download the contract at some stage and have paper copies signed. This defeats the purpose of the exercise and, to a large extent, reduces the efficiencies offered by fully electronic contracting.

This paper analyses electronic tendering against the background of the existing paper based process. It considers primarily the front end of the contracting process. There are further challenges in maintaining the relationship between the government and private contractors over a lengthy period in the electronic medium, where that is necessary, for example in long term construction contracts, where variations must be properly documented and where all relevant contractual material must be properly stored in case it is required for litigation at a later date. As this paper demonstrates, not all important questions can be satisfactorily answered at this stage and until there is more judicial guidance as to the efficacy of electronic contracts, these questions are likely to remain unanswered.