

The Dangers of Withdrawing a Tender

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It is common for contractors and consultants to submit tenders for executing work or providing services. Often a term of the conditions of tender is that the tender will remain valid for a certain period of time, usually 90 days.

Tenderers have seldom been unduly worried about such terms, believing that notwithstanding the term, a tenderer was free to withdraw its tender at any time before it is accepted.

Support for this belief comes from the leading textbooks on contract law, such as Chitty on Contracts. In the Twenty Seventh Edition of this famous work, published in 1994, it is stated:

"The general rule is that an offer may be revoked at any time before it is accepted. The rule applies even though the offeror has promised to keep the offer open for a specified time for such a promise is unsupported by consideration."

In support of this statement the case of *Routledge v. Grant* (1828) 4 Bing 653 is quoted where the defendant offered to buy a house giving the plaintiff six weeks to give a definite answer. It was held that the defendant was free to withdraw at any time before acceptance even though the six week period had not expired.

The result of this is that where a tendering period is very short, tenderers sometimes rush to submit a tender seemingly safe in the knowledge that they can check their figures once the tender is submitted, and if errors are found, withdraw their tender at any time prior to acceptance.

However, a recent Hong Kong case has changed the law in this respect, and contractors and consultants tendering can

now not rely on the position as set out in *Chitty*. The case is *City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance HCA No. A10750 of 1993*.

The plaintiff, City Polytechnic, invited tenders from several insurance companies, including the defendant, Blue Cross, to provide health insurance for its staff. The tender form included the following express term:-

We agree to abide by this tender for a period of three (3) months from the date fixed for receiving the same and it shall remain binding upon me/us and may be accepted at any time before the expiration of the period.

Blue Cross submitted its tender but wrote withdrawing it before the acceptance period of 3 months had lapsed.

City Polytechnic nevertheless wrote accepting Blue Cross's tender, but Blue Cross refused to issue any insurance policy. The Polytechnic then accepted another insurer at a higher premium, so as to mitigate its loss, but sued Blue Cross for damages for breach of contract.

At first instance, the claim was struck out on grounds that no reasonable cause of action had been disclosed.

However, the matter was appealed, and on appeal the court held that the modern law of contract did contemplate the possibility that, in tendering situations, an implied contract could come into existence binding the tenderer to keep his tender open for the specified period.

The consideration for such a contract was that there is either an express or implied agreement on the invitor of tenders part that he would consider all timely and

conforming tenders before awarding the contract. In this respect the court followed the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 where it was held that an invitor of tenders was bound to consider all tenders properly submitted.

In this case the court considered that the benefit moving from City Polytechnic to Blue Cross was City Polytechnic is undertaking to consider Blue Cross is tender along with all other conforming and timely tenders.

Accordingly an implied contract existed, whereby Blue Cross agreed to keep its tender open for three months, and by withdrawing their tender prior to the expiry of the three month validity period Blue Cross were in breach of the implied contract

and City Polytechnic were entitled to seek damages for that breach.

The measure of damage was the difference between the Blue Cross tender which was the lowest, and the next lowest tender which City Polytechnic were forced to accept.

Contractors and consultants tendering need to be aware of this decision and take great care when submitting tenders because should they discover errors in their tender prior to acceptance it may not be possible to withdraw the tender without being sued for damages for breach of the implied contract between them and the invitor, to keep their tender open for a specified period.

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