Law of Tender Applied to Request for Proposal Process

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Abstract

The Canadian "Law of Tender" applies to all industries and all types of tendering processes, regardless of their name. The distinction between considering a process a "Request for Tender," with its associated legal obligations, or something else, with no legal obligations, depends on the content of the process documents. Project managers should consider any process that imposes at least one obligation on either participant a "Request for Tender." This approach will result in the project manager preparing for potential obligations rather than ignoring them.

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Projects consist of a number of phases, some or all of which may be managed by a project manager. While project managers are commonly associated with managing the project's execution phase, they could, and often do, manage the contracting phase of the project. This paper presents an investigation of issues project managers face during the contracting phase's "Request for Proposal" process.

Contracts are agreements between parties. In order to be considered valid, a contract must meet five criteria (Jack, 1996; Goodfellow, 1995–1; Jergeas, 1995):

1. It must consist of an offer and an acceptance of that offer.
2. Some consideration must flow between the contracting parties.
3. Both parties must intend to enter into the contract.
4. The parties must be able to carry out the terms of the contract.
5. The contract must be legal.

This paper analyzes how these criteria form mutual and unilateral contracts. It defines the tender process, focusing on how these two contract types are applied in that process, and explains the unique Canadian case-law precedent that sets tendering in Canada apart from tendering in the rest of the world. It also introduces the "Request for Proposal" process, along with the issue this paper examines: namely, how the Canadian "Law of Tender" applies to the "Request for Proposal" process.

Mutual Contracts. In its simplest form, a *contract* meeting the above criteria comes into existence when two parties perform certain actions. For example, the first party may offer to pay the second party an amount of money for performing some task. Once the second party accepts the offer, it becomes obligated to perform the task. The first party also becomes obligated to pay the agreed upon money to complete the contract (Goodfellow, 1995–2; Marston, 1985). To maintain clarity, this type of contract is referred to as a *mutual contract* since a subsequent section discusses a contractual variant called a *unilateral contract*. However, the law relating to both mutual and unilateral contracts is the same (Goodfellow, 1996).

The key actions in the mutual contracting process are offer, acceptance and consideration. The first party, the offeror, describes what it requires as part of its offer. The second party, the offeree, upon accepting the offer, causes a contract to be formed. At this point, both parties become obligated to satisfy the terms of the contract. (Goodfellow, 1995–2).

Not all offers result in acceptance. The offeror may withdraw its offer prior to it being accepted by the offeree. Once withdrawn, no offer exists for an offeree to accept, thus preventing a contract from being formed. On a similar note, the offer itself may contain conditions making it void after a certain period of time (Goodfellow, 1995–1; Jergeas, 1995). Once the defined period of time

has elapsed, the offeror would have to make another offer if it still wanted to form a contract (Marston, 1985).

Once an offer has been made and accepted, consideration (such as money) must flow between the parties. The amount of the consideration that flows between the parties is irrelevant to the perceived value of the performance. For example, a significant amount of property may be exchanged for $1 or a promise that some subsequent activity will take place. The contract parties themselves must fix the amount of consideration at the time their agreement is made. It may only be altered by mutual consent after a contract has been formed. Not even the courts will intervene to impose a "fair" amount of consideration (Goodfellow, 1995–2; Jack, 1996).

Unilateral Contracts. A variant to the mutual contract described above is the *unilateral contract*. This type of contract comes into being upon the offeree satisfying the terms of an offer. Returning to the previous example, the offeror may offer to pay the offeree an amount of money for performing some task. Once the offeree performs the task, the offeror becomes obligated to pay the amount of money (Goodfellow, 1995–2; Jack, 1996).

Like mutual contracts, unilateral contracts contain the elements of offer, acceptance and consideration. The offeror describes what is required as part of the offer. The offeree accepts the offer by its performance, which causes a contract to be formed. All that remains to complete the contract is for the offeror to provide consideration to the offeree (Goodfellow, 1995–2).

Tendering Process. The process of forming a contract may become quite complex, especially when offers involve multiple parties. As a result, a process has been developed to assemble and track offers. This is known as the *tendering process*. The offeror, usually referred to as the owner, creates and documents its offer which includes the performance it expects of the offeree, usually referred to as the contractor. The resulting set of documents is known as a *tender package*, and is intended to solicit *bids* from one or more contractors. The contractor's bid would specify the amount of consideration it requires in order to enter into and satisfy a contract through its performance (Marston, 1985).

In Canada, prior to the 1981 Supreme Court decision described below, the consensus around the tendering process was that the tender package assembled by the owner and placed out for bid was an invitation for offers, also known as an "Invitation to Treat." Contractors who took up the owner's invitation would offer their services to the owner as specified in the tender documents for an amount of consideration. Owners would then review the offers they received and accept the offer with the least amount of consideration required, thereby creating the mutual contract described earlier (Bristow, 1996–2; Goodfellow, 1995–1; Goodfellow, 1995–2; Jergeas, 1995).

Since the consensus held that it was the contractor making a contract offer to the owner, no contract could be formed until the offer was accepted by the owner. As such, the contractor could withdraw its offer at any time up to its acceptance by the owner or its expiration (Bristow, 1996–2; Goodfellow, 1995–2).

Ron Engineering. Such a withdrawal was attempted by a contractor firm, Ron Engineering, upon discovering a mistake in its bid. The sequence of events (Bristow, 1996–2; Goodfellow, 1995–2; Goodfellow, 1996) leading to this withdrawal were:

1. An owner placed a tender package out for bid.
2. The tender package required that the contractor submit a bid bond along with its response to the tender package.
3. Ron Engineering submitted its response, accompanied by a certified check bid bond.
4. The bids were opened by the owner, and Ron Engineering was found to have the lowest bid.
5. Ron Engineering reexamined its bid and discovered a genuine mistake.
6. Ron Engineering immediately contacted the owner and requested to withdraw its bid, and have its bid bond returned.
7. The owner rejected Ron Engineering's withdrawal and refused to return the certified check.

Under the formerly held view of the law, under a contract Ron Engineering would be entitled to withdraw its offer prior to acceptance by the owner, as was the case here (Goodfellow, 1996). This situation poses a problem for owners since contractors could withdraw offers at any time and for any reason. In Ron Engineering's case,

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it discovered a mistake. Other firms may find that they bid too low and attempt to amend their offers. Again, nothing would prevent them from taking these actions since no contract is formed until offer, acceptance and consideration occur (Goodfellow, 1995–2).

The Ron Engineering dispute was eventually settled by the Supreme Court of Canada (*Ron*, 1981). The Supreme Court ruled that the tender process consisted of two contracts, which it named "Contract A" and "Contract B." "Contract A" was a *unilateral* contract that came into being with a contractor responding to an owner's tender package. In "Contract A," an owner makes an offer which requests a contractor to perform an activity; namely, the submission of a response to an owner's tender package, for which the owner will provide consideration in the form of a promise to enter into a subsequent mutual contract if the contractor's response is successful. The key elements of offer (the owner's invitation to tender), acceptance (the contractor's submission of its response) and consideration (the owner's promise to enter into "Contract B") are all present to make "Contract A" a binding, unilateral contract. This contract is formed upon the contractor's response being submitted. According to the Supreme Court decision therefore, a distinct "Contract A" exists between the owner and every contractor who submits a response to the owner's offer (Bristow, 1996–2; Goodfellow, 1995–1; Goodfellow, 1995–2; Jergeas, 1995).

"Contract B" is a *mutual* contract that obligated the contractor to complete the work as specified in the tender package, and obligated the owner to provide the compensation requested by the contractor as part of its bid submission. This is the same type of contract that both parties would have entered into prior to the Supreme Court ruling (Bristow, 1996–2; Goodfellow, 1995–2).

Under this decision, the terms governing the tender process form a valid contract. In Ron Engineering's case, a term that rendered the tender irrevocable for a period of time was found to form part of a valid "Contract A." When Ron Engineering withdrew its bid, it breached "Contract A" and was not entitled to the return of its bid bond.

Obligations Arising From Ron Engineering. A number of obligations exist between owner, contractor and subcontractor as a result of the *Ron Engineering* decision. In the absence of a definitive Supreme Court ruling, provincial courts have generally concurred that owners are equally bound to the terms imposed by "Contract A." For example, owners are obligated to award the resulting "Contract B" to the contractor whose response is fully compliant with the tender and has the lowest price. Owners may not arbitrarily impose or hide evaluation criteria from contractors (Bristow, 1996–2; Goodfellow, 1995-2; Roth, 1992).

The contractor obligations were defined by the *Ron Engineering* ruling. "Contract A" forms when the contractor submits its bid, and that contract is governed by the terms of the tender documents. For example, the tender documents could specify that the submitted tender was to be irrevocable for a certain period of time (Bristow, 1996–2).

Implied obligations may also exist between the parties to "Contract A." For example, an Alberta court ruled (*Appleton*, 1987) that even if the tender package was silent on the subject of irrevocability, the contractor's response would still be considered irrevocable for a reasonable period of time in order for the owner to be able to assess the tender and make its decision (Goodfellow, 1996).

The same principle governing the formation of "Contract A" between the owner and the contractor also governs the relationship between the contractor and its subcontractors. In this case, the contractor makes an offer to one or more subcontractors for the work contained in the tender it received from the owner. When a subcontractor responds to the contractor's offer, "Contract A" is formed between the contractor and subcontractor with both being bound by the terms of the contractor's offer (Bristow, 1996–2; Goodfellow, 1995-2).

Mistakes. One issue not addressed in the *Ron Engineering* decision was the treatment of honest mistakes in a tender response. Typically, common law practice has been that contracts cannot be entered into when one or both parties recognize that a mistake has been made. Mistakes may be either apparent by being "obvious on the face of the record" or obscure by being "not obvious on the face of the record." A mistake is apparent if it is evident on simple inspection, otherwise it is obscure.

Such an event occurred in the *Ron Engineering* case when Ron Engineering discovered it had made an obscure mistake in its tender submission. A subsequent Supreme Court decision (*Northern*, 1984) further reinforced the *Ron Engineering* decision. Both these cases held that a party who responds to a tender, which is to be irrevocable for a period of time, cannot revoke its response during the period of irrevocability even if an obscure mistake was discovered (Bristow, 1996–2; Goodfellow, 1995–2; Marston, 1985; Roth, 1995; Goodfellow, 1996).

Request for Proposal. So far the courts have dealt with the tendering process as it applied to well-defined offers and acceptances. Another type of tendering process deals with work for which the owner does not have detailed specifications. This process is known as a "Request for Proposal" (RFP). It is meant to solicit creative, varied responses consisting of solutions to issues presented in the RFP documents.

In examining the differences between tenders and RFPs, it was found that tenders are used when owners

know what they want done along with the associated process, while RFPs are used when the end result is known but not how to accomplish it (Osborne & MacEachern, 1996; Selock, 1996). For example, an RFP may ask the contractor to provide a "multimedia computer" and leave it up to the contractor to determine the items that meet the owner's requirements. In a tender, the owner would have selected the items forming the "multimedia computer" in advance, and placed those items out to contractors for price quotes (Selock, 1996).

This paper investigates the positions of various owner, contractor and legal firms on the treatment of RFPs in the tender process. The intent of the research was to determine whether the RFP process is subject to the same tendering obligations arising from the *Ron Engineering* Supreme Court decision.

Methodology

The methodology used to prepare this paper began with a literature search for contract law-related topics in textbooks, articles, and on the World Wide Web. The information from this literature was used to establish the paper's framework and introductory material.

Following this literature search and discussion with industry practitioners, a survey was developed and tested. The survey was used to collect empirical data and practitioner responses to case situations. A total of 15 surveys were conducted with representatives from owner, contractor and legal organizations. An effort was made to balance the survey such that a representative sampling from the construction and information technology industries was obtained. These industries were chosen since the construction industry has considerable familiarity with the law of tender flowing from the *Ron Engineering* Supreme Court decision (Goodfellow, 1995–2). On the other hand, based on the experience of the authors, the information technology industry did not have the same degree of familiarity.

The survey consisted of nine questions (Table 1), designed to elicit discussion answers from participants rather than to gather statistical data. Interviews were held with each industry practitioner, where the questions were presented and answers recorded. At times, the answers triggered additional, clarifying discussions, the results of which were also recorded.

The industry practitioners surveyed were senior executives with their respective firms, typically at the director, vice president or president level. In the case of the law firms, the lawyers were at the partner or senior partner level. Participants with these backgrounds were chosen since they would have had both the real-life project experience and management expertise required to understand proposal-related decisions.

Once complete, the literature research and survey material was consolidated and supplemented by material used in delivering The University of Calgary project management lectures.

Investigation

The investigative portion of this research was based on interviews conducted with senior representatives of owner, contractor and legal organizations. The following sections cover the opinions expressed by each of these organizations. The sections are further divided into areas of interest. Those areas, and their purpose, are:

Definition. A consensus definition of the organizations' understanding of the RFP process is presented to set a context for the subsequent answers.

Observations. The organizations' consensus opinions on the process used to execute an RFP, along with background reasoning where applicable.

Obligations. A view on the obligations existing between the parties to the RFP process. The intent of this portion of the investigation was to determine the links that might have been believed to exist between the tender and RFP processes.

Compliance. Similar to the obligations area, the compliance area examines how the organizations view RFP response compliance with the terms set out in the RFP documents.

Mistakes. The intent of this area is to determine an RFP's treatment in the event it contains mistakes.

Implications. This area identifies relevant issues of which either owner or contractor project managers should be aware.

These areas of investigation are intended to provide an understanding of how each type of organization views the RFP process. Conclusions may then be drawn on the status of the RFP process in Canada.

Owner Organization Perceptions. An owner organization is considered to be the organization that requires the services of a contractor in order to satisfy the conditions that precipitated an RFP. A total of five owner organization views are presented, three of whom had experience in the information technology industry. The remaining two had experience in the construction industry.

RFP Definition. It was found that owners considered the RFP process to be two processes. The first was the "Request for Information" (RFI) process. The objective of the RFI was to explain, at a high level, the project's overall objectives and key result areas. The RFI process, and the RFP process in general, were typically used when the owner was unfamiliar with the potential supply base (Goodkey, 1996; Osborne & MacEachern, 1996). Potential contractors interested in the project then responded with descriptions of their capabilities. The list of contractors was evaluated and a short list of RFP participants prepared. In some cases, sufficient information may have been gathered by the RFI that, coupled with the

Interview Question	Purpose of Question
Please describe the type of business your firm is typically engaged in, including an explanation of the type of work it typically associates with RFPs.	To ensure a representative sampling of each type of firm was obtained, and that an understanding of the firms' business was recorded to set a context for subsequent answers.
Please explain what your firm hopes to achieve when it participates in the RFP tendering process.	To provide an understanding of the firms' expected outcomes.
Please explain (a) how the RFP tendering process differs from the tendering process used to obtain price quotes for prespecified materials and labor, and (b) how an RFP differs from a specification.	To gather information on the firms' interpretations of both the RFP process and tendering process.
Please explain the contracting sequence associated with an RFP being placed for tender, focusing on those events that cause obligations to exist between the parties.	*Ron Engineering* imposed obligations on parties to a tender based on their activities. This question examined whether similar obligations existed for the RFP process.
What obligations exist as a result of your firm submitting an RFP response? (Owner firms skip.)	A tender submission under *Ron Engineering* is an "acceptance." This question examined whether a similar view was shared by contractors submitting an RFP response.
What obligations exist as a result of your firm receiving an RFP response? (Contractor firms to describe responses to sections of the RFP sent to subcontractor firms.)	To examine the perceived obligations that might have existed when an RFP response was received, including those that existed from contractor to subcontractors.
What obligations, if any, exist as a result of an RFP response failing to meet some of the criteria set out in the RFP tender documents? Also, please explain how ambiguity in an RFP is handled.	To examine how tolerant the parties were to RFP responses, as creative and potentially ambiguous documents, not fully complying with the terms of the owners' RFP requests.
Please explain your firm's views when an *unobvious* error (one that the other party cannot detect through examination) is discovered in a submitted RFP response that has (a) not yet been accepted, and (b) has been accepted.	A *Ron Engineering* follow-on decision (*Northern*, 1984) specifically dealt with obscure mistakes in tenders. This question examined how tolerant the parties were to such errors in RFP responses. For clarity, the phrase "unobvious error" was used with interview subjects to refer to "errors not obvious on the face of the record."
Please explain your firm's views when an *obvious* error (one that is easily understood to be an error and everyone accepts is an error) is discovered in a submitted RFP response that has (a) not yet been accepted, and (b) has been accepted.	*Ron Engineering* did not deal with apparent errors in tenders, although some lower courts have in a roundabout manner (Roth, 1995, p. 3). This question examined how tolerant the parties were to apparent errors in RFP responses. For clarity, the phrase "obvious error" was used with interview subjects to refer to "errors obvious on the face of the record."

Table 1. Interview Questionnaire

owner's experience, may have caused a tender to be issued in place of an RFP (Braun & Read, 1996).

Next, the RFP itself was prepared. It was more detailed than the RFI, at times almost resembling a tender. In conjunction with the RFP's development, an evaluation matrix was prepared. The matrix was used to evaluate and weigh the various responses contained in the RFP. While the contents of the matrix were held private, since owners did not want contractors to respond to meet the terms of the matrix, the overall evaluation criteria were included in the RFP documents. This helped ensure that contractors would respond with a full description of their ideas and capabilities. Once the RFP process was complete, the successful contractor, or contractors, were chosen based on their ranking in the evaluation. The intention behind the RFP process was to

obtain the best value for the money, not necessarily the lowest cost solution (Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996).

Observations on the RFP Process. Typically, the RFP response evaluators identify three to six contractors who are capable of providing market-based, competitive pricing and specifications (Goodkey, 1996; Selock, 1996). A further evaluation process would then identify the single contractor with whom to work. Negotiations, if necessary, would occur in areas where there was uncertainty in either the RFP documents or its responses (Selock, 1996; St. John, 1996). In some cases, the RFP would be structured such that a contract could be arrived at shortly after the RFP evaluations were complete, with little or no extra negotiations (Osborne & MacEachern, 1996; St. John, 1996). This would depend on the terms the owner included in the RFP documents. These terms may have indicated that there were no obligations, that the end of the RFP process would result in negotiations or that a tender would be performed. Each case would be different (Braun & Read, 1996; Osborne & MacEachern, 1996).

The tender process obligates the owner to award the contract to the contractor whose response fully meets the tender's evaluation criteria and whose price is the lowest. An RFP differs from this since contracts are awarded based on best value to the owner, with price only forming one component of the evaluation criteria. A tender may be appropriate in cases where the owner is able to specify in great detail what it requires. In cases where the owner does not know these details an RFP may be appropriate (Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996). In either case, the underlying process driving the tender or the RFP is the same, with only the content of the process varying (Braun & Read, 1996; Goodkey, 1996; Osborne & MacEachern, 1996).

Obligations. Owners were found to believe that a number of obligations existed between themselves and contractors during the RFP process. These obligations primarily dealt with ensuring that contractors were treated equally and that the integrity of the process was maintained. The identified obligations were:

- Owners must inform all bidding contractors when there are changes in the RFP evaluation criteria (Osborne & MacEachern, 1996; Selock, 1996).
- Owners must inform contractors who have submitted their responses prior to the RFP submission deadline of changes that occur subsequent to the submission but prior to the deadline, such that they have the opportunity to adjust their response accordingly (Osborne & MacEachern, 1996; Selock, 1996).
- Owners must inform contractors why they have been eliminated (Braun & Read, 1996; Selock, 1996).
- Owners must disclose all relevant information the contractors may require to prepare their responses (Osborne & MacEachern, 1996).
- Owners expect contractors to hold their price firm for the number of days specified in the RFP, or meet any other commitments outlined in the RFP documents (Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996).
- Owners must keep the RFP responses sealed until after the submission deadline has passed (Selock, 1996; St. John, 1996).
- A moral obligation exists on owners to issue the RFP in good faith. For example, the owner should have a reasonable intention to proceed (Braun & Read, 1996; St. John, 1996).
- A moral obligation exists on owners to keep all the RFP responses confidential, even from the eventual successful contractor. Even the successful contractor should not be allowed to view confidential information from its competitors (Braun & Read, 1996; Selock, 1996; St. John, 1996).
- At times, there may be a moral obligation to compensate contractors when the RFP calls for a significant amount of design effort. The terms of such a compensation scheme would vary on a case-by-case and "common industry practice" basis (Braun & Read, 1996; Goodkey, 1996).
- Owners believe that contractors must inform the owner if conditions change in their responses. For example, in a RFP for consulting services, the contractor would have to inform the owner of the unavailability of people identified to perform a certain task. (Selock, 1996).

Three of the owners surveyed believed they were not under any obligation to proceed with the work if they so desired (Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996). Also, it was found that some private industry owners believed they had considerable flexibility in awarding the RFP to any contractor, not just the contractor that faired best in the RFP evaluation (Selock, 1996), a belief not shared by government owners (Osborne & MacEachern, 1996; St. John, 1996).

Some owners agreed that with a correctly worded document, the RFP process itself did not impose any legal obligations on any party. The only legal obligations that arose were those flowing from a signed contract, which would be obtained after the RFP process and after any required negotiations had concluded (Selock, 1996; St. John, 1996).

Conflicting beliefs were held by two owners who had some knowledge of the *Ron Engineering* case. One believed that no obligations existed during the RFP process since *Ron Engineering's* Contract A applied to tenders, not RFPs (St. John, 1996), while another believed that *Ron Engineering* obligations did exist since an RFP was simply a tender by another name (Osborne & MacEachern, 1996).

Compliance Issues. Owners believed the RFP process was not designed to award a contract solely based on price. They believed it was designed to be awarded based

on best value. In other words, contractors should not be disqualified for failing to meet all the items requested in an RFP, although they may be if they miss "mandatory" items. Missing items would be taken into account during the evaluation process, affecting the contractor's scoring according to the predefined matrix (Braun & Read, 1996; Goodkey, 1996; Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996).

In areas where the RFP was ambiguous, owners expected contractors to question the owners' meaning. The owner would attempt to answer the questions to the best of its ability, and then forward the questions and answers to all participating contractors to ensure a level playing field was maintained (Goodkey, 1996; Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996). If the owner was unable to answer the questions to the contractor's satisfaction, the contractor would be expected to document any assumptions it made in its response (Goodkey, 1996; Selock, 1996; St. John, 1996).

Mistakes. Some owners would allow contractors to withdraw from the RFP process in the event an apparent mistake was discovered prior to RFP acceptance. The owner's experience has shown that firms that were forced to enter into a contract they didn't want requested excessive change orders and were generally difficult to manage (Selock, 1996; St. John, 1996).

A key objective of owners is to achieve a good working relationship with contractors (Goodkey, 1996). In general, to be fair to all other contractors, a single contractor's request should not negatively affect the other contractors. For example, a contractor's request to lower its price upon discovering a mistake should be rejected. Alternatively, a contractor should be allowed to raise its price prior to acceptance since the competing contractors would stand an improved chance of winning (St. John, 1996).

In the event an obscure mistake was discovered after acceptance and conclusion of a contract, some owners expected the contractor to continue to honor its contract (St. John, 1996), while others expected to reach an arrangement through negotiation in order to maintain a good working relationship (Goodkey, 1996; Selock, 1996).

One owner, with some knowledge of the *Ron Engineering* case, would have awarded the contract to the contractor with the best value solution, regardless whether the mistake was discovered before or after acceptance. However, should the mistake affect the contractor's terms of compliance or a material item such as price, the contractor would be disqualified (Osborne & MacEachern, 1996).

In the event an apparent mistake was discovered by the owner prior to the proposal's acceptance, some owners would question the contractor to determine whether the contractor would still want its bid to be accepted as submitted. The expectation of some of these owners was that the contractor would then either withdraw or amend its bid (St. John, 1996), while other owners expected the contractor to simply amend it (Goodkey, 1996; Selock, 1996). One owner would even have taken the initiative to correct blatant mistakes. For example, in the case of a schedule showing item X at $50, item Y at $50 and the sum of these two at $75, the owner would advise the contractor that it would treat the bid as $100 unless the contractor wished to further update its response (Selock, 1996).

In the case where all contractors made apparent mistakes, some owners would ask all contractors to reevaluate their bids to ensure compliance with the tender. No specific instructions would be given as to where to look for mistakes. This would give all contractors an equal opportunity to make amendments (St. John, 1996).

In the event an apparent mistake was discovered after acceptance and creation of a contract, some owners expected the contractor to honor its commitments, some believed it was not possible to hold a contractor to its commitments, and others expected to reach an arrangement through negotiation (Goodkey, 1996; Osborne & MacEachern, 1996; Selock, 1996; St. John, 1996). The course of action chosen would have depended on the owner's perception as to whether or not the contractor purposely made the mistake (Goodkey, 1996; Selock, 1996; St. John, 1996).

Implications for the Owner's Project Managers. The research revealed that owner organizations do not believe that obligations exist during the RFP process. This means that the course of action chosen by an owner's project manager to address a mistake discovered during the RFP process may conflict with the beliefs of its employer. As such, the project manager may have to take on the added responsibility of reconciling various opinions on the most appropriate course of action.

An owner's project manager should address mistakes discovered during the RFP process with an understanding of the current progress of that process. As long as no contract is in place, the project manager should either hold the RFP's obligations firm or negotiate a resolution. The course of action depends on the RFP's contents, as described in the Conclusions and Recommendations section. A different set of rules apply after a contract is in place; these rules were not investigated as they occur subsequent to the RFP process and were outside the scope of this paper.

Contractor Firm Perceptions. A contractor organization is considered to be the organization that will provide its, or its subcontractor's, goods and services in order to meet the terms of the RFP. A views of four contractor organizations are presented. The organizations were split evenly between the information technology industry and the construction industry.

RFP Definition. There was general agreement among the contractors surveyed that RFPs are essentially tools used to get the contractor to the negotiating table. In general, the RFP process began with an owner attempting to define a problem, then determining which

contractor could best resolve that problem, and finally entering into contract negotiations with the most appropriate contractor (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996; Schmidt, 1996).

The process of defining the problem was viewed by some contractors as their best opportunity to win the owner's business. One approach contractors used was to develop a relationship with the owner well before the RFP process began, helping the owner determine its business problems. This allowed the contractor to influence the RFP's requirements. The purpose of the owner proceeding with the RFP exercise rather than directly awarding the contractor the business at this point was to give the owner's representatives the ability to show owner management or the public that they tested the market for suitable contractors (Akrouche, 1996; Schmidt, 1996).

The contractor's RFP responses would be evaluated by the owner using a scoring system with the high-scoring response winning. The scoring system was usually some combination of contractor-proposed solution and fee, such as 85% solution and 15% fee. This provided an opportunity for a high-fee contractor to win the business if it had a superb proposal (Goodwin, 1996), but complicated the evaluation process since each contractor's solution may have been different (Poulsen, 1996). It was believed likely that contractors who influenced the RFP's creation would win the evaluation process, because that contractor would have influenced the RFP in such a way as to play to its strengths while at the same time increasing the importance of areas where its competitors were weak (Akrouche, 1996; Schmidt, 1996).

Unless the RFP and its associated responses were well-defined and rigid, such as those commonly associated with the government (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996), the owner would enter into negotiations with the high-scoring contractor to resolve any outstanding RFP issues. It would be during this process that requirements and scope could be modified from the original RFP documents, altering the total price of the work (Akrouche, 1996; Goodwin, 1996; Schmidt, 1996). It appeared that this was the reason the price component of the RFP scoring system was given less weight than the solution component. If price was given more importance, contractors would view the RFP as requiring a "price to win," and aim to use price as the factor that would drive the subsequent negotiations. To quote one contractor: "Strategize to win, do not strategize to bid" (Schmidt, 1996).

Observations on the RFP Process. RFPs differ from tenders in that they afford contractors the opportunity to provide a creative solution along with their price. Contractors believe the creativity allowed for by RFPs provide them the opportunity to demonstrate to the owner the value they could deliver (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996; Schmidt, 1996).

Tenders, on the other hand, were viewed as processes that would obtain straight pricing for goods and services. In a tender process, the contractor would have no opportunity to show its creativity or value-added capabilities since acceptance is governed by low price (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996; Schmidt, 1996).

Contractors found the RFP process to be more complex than the tender process. RFPs allow contractors to tailor their response to resolve what they perceive to be the owner's true business problem. Conversely, no such creativity is required for tenders that were viewed as straightforward accounting exercises (Akrouche, 1996; Schmidt, 1996).

Obligations. All the contractors surveyed believed that no legal obligations existed during the RFP process. Nothing in the RFP process was binding until a contract was signed (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996; Schmidt, 1996), although some obligations may have been imposed by the owner on the contractor during the process in order for the owner to consider the contractor's response (Goodwin, 1996). For example, the owner may have stated that it would only evaluate responses from contractors who attended a bidder's conference. As such, the contractors may have to complete these undertakings as part of their RFP preparation process (Goodwin, 1996).

Contractors believed that the RFP process could be canceled at any time. For example, a contractor could withdraw and not owe the owner anything after the owner had selected it as the successful respondent. No surety bonds are used in the RFP process, nor does the owner pay the contractor for preparing its response (Goodwin, 1996).

Contractors believed that various clauses were inserted into the RFP documents and responses in an effort to protect either the owner or the contractor. For example, owners ensure they have the right to cancel the RFP process by including "no obligation to proceed to a contract" clauses in the RFP (Akrouche, 1996). Also, since the contractor was providing its creative work to the owner, it would include intellectual property clauses to prevent the owner from shopping one contractor's design to another, lower-priced, contractor (Poulsen, 1996).

Other than the lack of legal obligations, the contractors surveyed believed that certain ethical obligations existed. For example, contractors making the statement that their response would be irrevocable for a certain period were expected to honor that commitment (Akrouche, 1996; Poulsen, 1996; Schmidt, 1996).

Contractors believed they were obligated to deliver what they promised in their response if they won the RFP process. This was only a valid obligation if the owner accepted the entire response as-is, including any documented assumptions about the work included in the response (Akrouche, 1996; Schmidt, 1996). For example,

contractors proposing specific people in an RFP response would be obligated to use those people on the project, especially if the owner selected the contractor on that basis (Akrouche, 1996; Poulsen, 1996; Schmidt, 1996).

Two sets of perspectives were found when examining the obligations owed by subcontractors to contractors. In one set, the consensus among construction contractors was that the only obligation to subcontractors was an informal, unwritten obligation to not change their bid if the contractor's RFP response was successful (Goodwin, 1996; Poulsen, 1996). This was perceived as a moral obligation rather than a legally binding one (Poulsen, 1996).

The other set of views were held by contractors engaged in information technology projects. They refused to deal with subcontractors with whom they had not entered into "teaming" agreements. The subcontractors were obligated to honor their commitments in the event the RFP response was successful due to the terms of the teaming agreements (Akrouche, 1996; Schmidt, 1996). As an added measure of protection, the terms of the RFP to which the contractor was responding were included in the agreement made with the subcontractors. This helped to ensure that the subcontractors were bound by the same terms as the contractor (Schmidt, 1996).

Compliance Issues. The contractors surveyed had the goal of submitting a fully compliant RFP response. They believed that in the event they experienced problems responding to a section of the RFP, they should either find a subcontractor with whom to partner or not respond at all. The course of action would depend on the owner's rigidity in enforcing the RFP's terms and conditions. Some owners would disqualify a contractor for missing an item while others would attempt to arrive at an arrangement during negotiations (Akrouche, 1996; Poulsen, 1996; Schmidt, 1996).

In areas in which the RFP was ambiguous, such as the quantity of a required item, attempts were made to clarify the area first with the owner in a private manner. Privacy was desired so as to not alert the contractor's competitors that a particular area was being investigated (Poulsen, 1996). If those attempts failed to supply a satisfactory answer, the contractors then documented an assumption as to how they arrived at their response. This documentation would be included in the RFP along with disclaimer clauses stating that negotiations would be required to validate any subsequent due diligence findings. This process helped the contractor during the evaluation period since it demonstrated an understanding on the contractor's part of the work (Akrouche, 1996; Goodwin, 1996; Schmidt, 1996).

Mistakes. Various views existed in the case where obscure mistakes were discovered prior to the owner selecting a contractor. One set of views held that the contractor should remain silent and attempt to resolve any mistake situation during the subsequent negotiations, especially if the mistake was related to documented assumptions. The reason for this course of action was the belief that the purpose of the RFP process was to select a vendor, not to obtain a contract (Akrouche, 1996; Schmidt, 1996). Also, some RFP processes do not allow contractors to communicate with owners during the evaluation period. This meant that should the contractor attempt to inform the owner of the mistake, the contractor could be disqualified (Schmidt, 1996).

Another set of views held that contractors should let minor mistakes remain while major mistakes should be reported to the owner and the response withdrawn. Attempts would be made to be upfront and open, providing an explanation of the mistake. No attempt would be made to correct the mistake since this would appear to be taking advantage of a situation. The purpose of these actions is to exit the RFP process while retaining good relations with the owner (Goodwin, 1996; Poulsen, 1996).

Similarly, the contractors believed that they could negotiate an arrangement with the owner after their response had been accepted. This belief was based on the perception that no contract existed until one was signed. If the negotiations failed, the option to withdraw would still be available (Akrouche, 1996; Goodwin, 1996; Schmidt, 1996). However, one construction contractor did not agree and took the position that a contract had been made on owner acceptance, obliging the contractor to address the mistake (Poulsen, 1996).

In cases of apparent mistakes where the response had not yet been accepted, contractors believed the owner should afford them the opportunity to correct their mistakes (Akrouche, 1996; Goodwin, 1996; Poulsen, 1996). One contractor had experience with RFPs that contained clarification provisions. Such provisions allowed the owner to make specific requests to a specific contractor in order to understand the contractor's position. This communication was kept private from the other contractors who submitted responses, but the questions and resulting answers would form part of the contractor's response (Schmidt, 1996).

In cases in which the response had been accepted, a similar set of views existed. The contractors either believed they could arrive at a negotiated settlement or withdraw (Akrouche, 1996; Goodwin, 1996; Schmidt, 1996), with one contractor maintaining that a contract existed making it liable for the mistake (Poulsen, 1996).

Implications for the Contractor's Project Managers. The law of tender applies to all industries, not just the construction industry. Part of this research examined the practices of information technology industry contractors. These contractors were found to consider the RFP process a prelude to a future negotiation process. While this approach is not being criticized, the potential exists for a contractor's sales-based strategy to collide with an owner's contract-based strategy, resulting in unexpected

legal obligations for the contractor. To reduce the likelihood of such a scenario, the contractor's project manager should understand the obligations associated with both RFPs and tenders, as summarized in the Conclusions and Recommendations section.

Legal Firm Perceptions. The legal firms were asked to provide their opinions as to how owners and contractors interacted with one another during the RFP process. As such, the legal firms were treated as impartial, nonparticipant advisor-observers to the RFP process. Six law firm views are presented below; all of the lawyers were experienced in the field of contract law.

RFP Definition. Agreement was found among the lawyers that the names assigned to the tender documents, such as "Request for Tender" or "Request for Proposal," did not influence the document's classification. Instead, the content of the document determined its type. Tenders were considered to be documents that imposed obligations on both parties. Proposals impose no such obligations (Bristow, 1996–1; Barron, 1996; Eden, 1996; Westersund, 1996). To quote one of the lawyers surveyed: "It's not the form, but the substance that determines the character of the transaction" (Goodfellow, 1996).

To illustrate, one lawyer explained that an owner took a boilerplate tender document and replaced the word "tender" with "proposal." To this, the owner attached detailed drawings and specifications, and issued the document as a "Request for Proposal." The courts determined that the resultant document, although calling itself a RFP, was in fact a tender, since the level of detail and obligations it imposed were those of a tender (Eden, 1996).

The purpose of a "Request for Proposal" is to obtain a *proposal*. Proposals by themselves may not contain enough detail or certainty to be considered contracts. Typically, once a proposal has been made, further discussion is required to clarify its terms. The objective of clarifying the proposal's terms is to achieve a mutual contract, with the contractor making an offer and the owner accepting it (Barron, 1996; Eden, 1996; Westersund, 1996).

A tender, having a sufficient amount of detail from the outset, is itself considered an offer by the owner under *Ron Engineering*. Contractors accept the owner's offer by providing a compliant response, thereby forming a contract (Westersund, 1996). In general, a tender is a fixed process where the result is a quotation for specified goods and services, while the RFP process allows for varied responses, concluding with contract negotiations (Eden, 1996; Gregory, 1996).

Observations on the RFP Process. Lawyers believed that both owners and contractors appeared to benefit from the RFP process. Owners hoped to achieve a low-cost, creative design (Goodfellow, 1996). In issuing a RFP, owners had the opportunity to obtain a spectrum of designs and opinions at little upfront cost, although the design costs would typically be included as part of the winning proposal. This was contrasted with hiring a design firm, which limited the owner to the designs from that firm while paying for the firm's services. The cost deferral offered by the RFP process helped the owner improve the project's cash flow (Gregory, 1996). Also, owners who are pressed for time may opt for a RFP since the contractors would perform the design work. An owner only issues traditional tenders after the associated design has been completed (Eden, 1996).

Differing views were found to be held on the legal status of the RFP process. One set of views held that the RFP process appeared to be an "Invitation to Treat." This means that no obligations would exist on the contractor to respond to an RFP or for an owner to continue with the process once contractors had submitted their proposals, as long as the RFP did not impose obligations on the parties (Bristow, 1996–1; Barron, 1996; Gregory, 1996; Westersund, 1996). The following example, paraphrased from one interview, illustrates how an "Invitation to Treat" was handled by the courts:

> ***It is illegal to offer for sale automobiles with their odometers rolled back to show a lower mileage. One used car dealer rolled back the odometer of an automobile, and placed a large sign on it indicating its price. This dealer was charged and went to trial. The argument presented, which the courts accepted, was that the vehicle was not being offered for sale. Instead, the sign placed on the automobile was intended to invite potential buyers to make an offer to the dealer for the car, an "Invitation to Treat." Since the dealer was not offering the car with the rolled-back odometer for sale, it did not break any law*** **(Eden, 1996).**

This lawyer believed that *Ron Engineering's* "Contract A" provisions do not apply to "Invitations to Treat," although good faith must still exist between the parties (Westersund, 1996; Barron, 1996).

The other set of views held simply that the RFP process was the same as the tender process and the RFPs were fully subject to *Ron Engineering*. The owner's RFP is the offer, the contractor's response is its acceptance, and the subsequent promise to award the successful contractor the work, with or without additional negotiations, is the consideration (Goodfellow, 1996). This applied to all industries where tenders are used, not just the construction industry (Eden, 1996).

Obligations. Differing views were found on the obligations arising from the RFP process. One set of views held that, other than the obligation to act in good faith, no obligations existed as a result of the RFP process. However, the parties may still be bound by confidentiality, intellectual property or other tort-like

responsibilities. It was also believed to be prudent to include clauses in both the RFP and response to clarify commitments that may be taken out of context. For example, the contractor should include the disclaimer that the response is a proposal only, for which further negotiations would be required before a contract would be formed (Barron, 1996; Eden, 1996; Gregory, 1996; Westersund, 1996).

The other set believed that the RFP process incurred "Contract A" obligations at the time the first response is submitted. This opinion was tempered somewhat by provincial court discrepancies. All courts impose the obligation that a subcontractor honors the terms of its subcontract, while some are not imposing a similar obligation for the contractor to honor its commitments to its subcontractors (Goodfellow, 1996).

These views appeared to reconcile themselves when the RFP process was examined. The lawyers surveyed believed the RFP process and the tender process were the same. How to treat the process depended on the terms and content of the documents. If the terms of the RFP were clearly stated, including the obligations arising from the RFP, then those obligations became binding and the process would be considered a tender (Bristow, 1996–1; Barron, 1996). A lack of obligations meant the process would be considered an "Invitation to Treat." As described above, an owner may issue a document purporting to be an RFP, but with a sufficient amount of detail and obligations that will cause it to be considered a tender. The document's name is irrelevant, it is the content that matters (Bristow, 1996–1; Barron, 1996; Gregory, 1996).

Compliance Issues. Some lawyers believed that items missing from the RFP response should not disqualify a contractor since the owner is asking for flexible responses and missing a few items is part of that flexibility. Owners should document their RFP evaluation criteria, but be flexible in the evaluations to take into account the learning that occurs during the RFP process (Eden, 1996; Gregory, 1996). Others believed that, under *Ron Engineering*, RFPs not meeting all the requirements should be disqualified (Goodfellow, 1996). Again, it appears these views reconcile themselves when the process is identified as either an "Invitation to Treat" or a tender. In an "Invitation to Treat," any items missing from the response may be handled in a flexible manner. In a tender, the ground rules established in the documents will define the course of action to take (Bristow, 1996–1; Barron, 1996).

There appeared to be a consensus on how ambiguous areas of the RFP should be treated. Generally, ambiguity was believed to be good in the RFP process since the objective of the process is to obtain, within limits, many creative designs from various contractors. However, left unmanaged, ambiguity could cause too broad an interpretation of the RFP to be made, resulting in designs that cannot be effectively compared. For example, a contractor supplying a design for a roller/skating rink in response to a RFP calling for a roller rink might not be able to have its design effectively compared with the designs submitted by other contractors (Gregory, 1996). In order to resolve this, the owner would be obligated to show good faith during the RFP process by clearly defining the project's objectives. As issues are raised, questions are answered and addenda are usually issued to clarify points (Bristow, 1996–1; Goodfellow, 1996; Gregory, 1996).

Mistakes. The "Law of Mistake" was believed to govern apparent mistakes in documents. This principle would prevent contracts from forming when one or both parties discovered a mistake. However, as long as the owner was able to show that it did not know about a mistake during the contracting process, the results of that process would be valid. Hence, the onus would fall on the contractor to notify the owner when it discovered a mistake (Eden, 1996).

There were believed to be two issues to consider when dealing with obscure mistakes in an RFP process. First, the RFP must be determined to be either an "Invitation to Treat" or a tender. In the case of tender, the *Ron Engineering* decision would apply. This means that contractors and owners would be bound by the terms of the tender package and its response (Bristow, 1996–1; Goodfellow, 1996; Gregory, 1996).

In the case of an obscure mistake being found in an "Invitation to Treat," the contractor would be able to withdraw or amend its response prior to acceptance, which itself would be the outcome of a negotiating period (Barron, 1996; Goodfellow, 1996). After acceptance, which is a contract being signed, both owner and contractor would be bound by the contract's terms (Eden, 1996; Goodfellow, 1996; Gregory, 1996; Westersund, 1996).

Ideally, contractors who discover a mistake should immediately contact the owner. This turns an obscure mistake into an apparent mistake, which would then be handled as described below. Also, both parties should consider using clauses in both the RFP and response as a means of providing a form of blanket protection (Eden, 1996; Gregory, 1996; Westersund, 1996).

Divergent views were found on the treatment of apparent mistakes. One view held that apparent mistakes prevented a contract's formation, regardless of whether they were discovered in an RFP or tender (Barron, 1996; Bristow, 1996–1; Eden, 1996; Gregory, 1996). The other was that the parties were still bound by the rules of the tender process since Canadian Supreme Court cases (*Ron*, 1981; *Northern*, 1984) dealt with mistakes that were made apparent and still held the parties to the irrevocability clause included in "Contract A." The law prior to *Ron Engineering* was that owners could not snap-up tenders they knew contained mistakes. Now, the law is that a mistake in a tender is

not a reason to allow the contractor to withdraw the tender (Goodfellow, 1996).

Conclusions and Recommendations

Conclusions. A consensus was found among all parties on the definition of an RFP. Everyone concurred that an RFP was designed to elicit creative solutions to a problem. Those solutions may vary to some extent, with the owner having to determine which solution best meets its needs. The price associated with an RFP response was only one of a number of factors that had to be evaluated. It was entirely possible for a response to be chosen that was not necessarily the least expensive, but which provided the best overall value to the owner.

As part of the "best value" solution, owners sought RFP responses that would meet all the items being requested. Unlike tenders, owners were prepared to accept responses with missing, nonmaterial items since the results of an evaluation process, not full compliance, would determine the successful bidder. Contractors understood this requirement by attempting to submit fully compliant responses. Any ambiguity would be documented to aid the evaluation process.

Following RFP evaluations, owners and contractors would enter into negotiations to clarify outstanding items and arrive at a contract. This activity sets the RFP process apart from the tender process. The tender process concludes with the lowest compliant bidder being awarded a contract. The RFP process inserts the negotiation activity between the evaluation and contract award phases. This tends to imply that neither party is under any obligations during the RFP process.

Generally, owners and contractors did not believe that any contractual obligations existed in the RFP process until a final contract was signed, although moral obligations of fairness, equality and confidentiality were acknowledged. Also, to reinforce this belief, both owners and contractors were found to make use of certain clauses in an effort to remove implied obligations.

An exception to the above generalities was found with two owners who had some knowledge of *Ron Engineering*. One believed that no obligations existed since "Contract A" applied to tenders, not RFPs, while another believed that *Ron Engineering* obligations did exist since an RFP was simply a tender by another name. These beliefs contradicted one another due to their interpretations of Ron Engineering.

Knowledge of *Ron Engineering* was split almost evenly between the construction and information technology firms surveyed. Representatives of construction-associated firms, both owners and contractors, indicated an understanding of *Ron Engineering*, while information technology firms had no knowledge of it, with one exception being the information systems department of a large municipal organization whose purchasing department also engaged in construction tenders.

The awareness of *Ron Engineering* also influenced to some extent the perceptions of how mistakes discovered in RFP responses should be treated. Those who knew of *Ron Engineering* tended to believe that the "Contract A" provisions governed the parties' actions, while those who did not held varying positions.

Other than one owner who expressly stated that RFPs and tenders were identical except for the name, it appeared that owners and contractors treated the tendering process and the RFP process differently due to the names ascribed to them. This contrasted with the lawyers' consensus on the status of these processes, neatly summarized by the quote: "I'ts not the form, but the substance that determines the character of the transaction" (Goodfellow, 1996). The intention of this quote is to force a look past the names "Request for Proposal" and "Request for Tender" into the document's content. Documents having the characteristics of a tender should be treated as a "Request for Tender," otherwise they should be considered an "Invitation to Treat."

Recommendations. Three recommendations have been assembled to help contracting parties better understand their position when entering into the RFP process. However, the contracting parties are still advised to seek qualified, contract-law lawyers when drafting or responding to legal documents. Neither of the authors are lawyers, and the intention behind this paper was to present research, not to provide situation-specific legal advice.

This research examined how *Ron Engineering* and its principles are viewed by the construction and information technology industries. Since *Ron Engineering* originated from the construction industry, its principles are widely known in that industry. This research revealed that the information technology industry was not aware of *Ron Engineering* or its principles. This is unfortunate since the *Ron Engineering* decision is actually a law of tender case-law decision. Any industry using tendering processes in Canada is subject to the principles and processes flowing from this decision. Therefore, the first recommendation is more of a statement: *The "Law of Tender" applies to all industries*. Contracting parties should familiarize themselves with the introduction to this paper that presents an overview of tendering law in Canada to help understand how *Ron Engineering* may apply to other situations.

The research revealed that industry associated its obligations under a process based on the name of the process. If that process called itself a "Request for Tender," one set of obligations would apply; if it called itself a "Request for Proposal," another set would apply. According to the senior lawyers surveyed, this assumption is incorrect. In reality, the name of the process is irrelevant. What matters is the content of the process. As such, the second recommendation to contracting parties

is: *Determine whether the process is a "Request for Tender" or an "Invitation to Treat."*

The distinction between a "Request for Tender" and an "Invitation to Treat" is found in the content of the documents. The former occurs when the documents used in the process place obligations on the parties, while the latter occurs when no obligations occur. The research revealed a range of opinions as to the level of obligations that differentiate a tender from a RFP. One extreme held the position that all processes are tenders, while the other extreme held that only documents with a "sufficient" amount of detail may be considered tenders. Since "sufficient" is a nonquantifiable term, and since considering everything a tender is overly conservative: *Consider any process imposing one or more obligations on either party a tender.*

Although this third recommendation is still conservative it can be considered a prudent course of action. If this recommendation is followed, every process will be approached as a tender unless it explicitly disavows obligations, in which case it can be approached it as a RFP. As such, contracting parties will prepare for potential obligations rather than ignore them.

This paper and its recommendations may be common knowledge to those who understand and are aware of *Ron Engineering*, and a potential eye-opener to those who aren't. If this research base in the information technology industry is any guide, the information technology industry could be in for a fundamental adjustment to its approach to the "Request for Proposal" process.

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