

**MACQUARIE GENERATION V CNA RESOURCES [2001] NSWSC 1040**

Supreme Court of NSW – 15 November 2001

**FACTS**

In mid-2000, Macquarie invited tenders for the supply of crushed coal in accordance with the quality requirements defined in the specification. It was a term of the Invitation to Tender that all tenders submitted were to be irrevocable, open for 180 days after the close of the tender period and were capable of immediate acceptance by Macquarie.

CNA submitted a tender in which they proposed to supply coal from two areas which were the subject of a mining lease application by CNA which had not yet been converted into a mining lease. CNA's tender purported to be subject to a number of conditions including one requiring the approval of a related company's board.

On 15 March 2002, Macquarie wrote to CNA stating that it had accepted the offer in the tender. CNA did not reply to this letter as prior to 15 March 2002, they had made Macquarie aware that the board had not accepted the conditions of the tender.

Macquarie filed a summons seeking a declaration that CNA had wrongfully repudiated the agreement brought into existence upon submission by CNA of its tender.

**ISSUES**

Did a contract come into existence when CNA delivered the tender to Macquarie?

Did the tender comprise an unconditional offer by CNA capable of acceptance by Macquarie?

Was the offer still open to Macquarie on 15 March 2001?

Did Macquarie itself wrongfully repudiate the contract by insisting on a formal instrument being executed by CNA?

Did CNA wrongfully repudiate the contract?

**FINDING**

No tender agreement came into existence because the Tender submitted by CNA did not comply with the requirements of the Invitation to Tender.

The General Tender submitted by CNA was in fact a counter offer as it clearly stated that it was subject to the approval of a board of directors of a related company. At 15 March 2001 all offers contained in the General Tender remained conditional offers subject to fulfilment of that condition and the offers were therefore incapable of acceptance.

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Even if a contract had come into existence, the Plaintiff itself had wrongfully repudiated the contract by insisting that CNA execute formal Contracts which were not in conformity with the agreement made on 15 March 2001.

## **QUOTE**

*“The Plaintiff did not come to Court, as it might have done, seeking declarations as to the existence of a contract and as to its terms.*

*It acted peremptorily in commencing an action for damages, doubtless hoping thereby to force the Defendant to the negotiating table.”*

## **IMPACT**

Parties should be careful to ensure that tenders strictly comply with the requirements in the Invitation to Tender before purporting to accept that agreement.

Where a tenderer has set restrictions on the Tender Submission it should be noted that the Tender may constitute a counter offer rather than an offer capable of immediate acceptance.

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