Current Challenges in Bidding and Tendering... and How to Overcome Them

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Overview

What we’ll cover ...

– Typical Tender Problems
– Legal Framework of Tendering
– Changing Face of Construction
– Broader Public Sector Directive
– Solutions
Typical Tender Problems
Contractors’ Problems

• Incomplete Bids
  – not all requested documents have been provided.
  – not all requested prices have been submitted, e.g. separate, itemized, unit or alternate prices missing or not properly filled out.
  – Subtrade list is missing or inadequate.
Contractors’ Problems

• Incomplete Bids (cont’d…)
  – Bid Bond missing from bid.
  – Surety’s Consent missing from bid.
  – Receipt of Addenda not acknowledged.

• Flawed Bids
  – Bid not signed or sealed properly.
  – Mathematical errors in bid.
Owners’ Problems

• Insufficient Number of Bids
  – only one bid received.
  – only two bids received.
Owners’ Problems

• Owner wants to manipulate bid result using Alternate or Separate Prices.

• Owner wants to award to low bid that is qualified or non-compliant.

• Two bids received that are identical, owner wants to use non disclosed criteria to determine award.
Owners’ Problems

- Owner wants to exercise privilege clause to award in accordance with non-disclosed criteria.
- Owner wants to add an uninvited bidder after a prequalification process.
- Owner wants to open a late bid either because too few bids received or owner knows/prefers bidder.
Owners’ Problems

• Owner wants to award contract for same scope to a bidder who submitted outside of the tender process.
Architects’ Problems

• Unit prices not properly specified or evaluated.

• Criteria for determining compliance are not specified or clear.

• Consequences of non-compliance are not clearly specified.
Architects’ Problems

• Methods of remedying informalities in the bid are not specified.

• An addenda is issued late, e.g. too close to submission deadline
Legal Framework of Tendering
Overview

What we’ll cover ...

• Principles of Tendering
• Contract “A”/Contract “B”
• Drafting considerations
• Contract wording
Overview

• “Privilege” Clause – price
• “Discretion” Clause – compliance
• “Limitation of Liability” Clauses
• “Exclusion of Liability” Clauses
• Specifications/Changes to scope of work
The Ground Rules

The “Watchwords”...

• “Good faith”

• “Preserving the integrity of the bidding system”

• “Openness”

• “Transparency”
The Ground Rules

• “Fairness”
  – Equal treatment of bidders
  – No “unfair” advantage given to one bidder over another
Background

• Understanding the context...

  – Contract A - “Bid Contract”
    • *Ron Engineering* (1981)
    • does not automatically arise in every case – *M.J.B. Enterprises* (1999)

  – Contract B – “Construction Contract”
Contract “A” and Contract “B”

**Contract “A”**

The “Bid Contract”

- Call for Tenders
- Offer

**Contract “B”**

The “Construction Contract”

- Offer
- Bid
- Acceptance
- Award to Bidder
The “Call”

• *Instructions to Bidders*
  – Time – specify cut-off time and clock
  – Place – submissions received at one location
  – Q & A process – all respondents must get same info
  – Site visit – mandatory or not?
  – Security – be clear what is acceptable
  – Forms to be submitted – keep it simple
“Traps”

• The “Submission Requirements” trap
  – Mandatory – “must”/“shall”
  – “Desired”, less significant – “may”
  – May determine disqualification!

Balanced
Approach

Rigid rules
Inflexible
Strict language

Loose rules
Flexible
Discretionary language
“Traps”

• The “Two-Part Closing” trap...
  – two-part submission done to make it easier on respondents
  – Naming of subcontractors, separate and alternate prices submitted after bid price

Q: Is the “bid” everything submitted, or is it only the initial submission?
Tender “Traps”

  - Bidder made a mistake and wanted out
  - Bidder’s bid form OK, but refused to submit supplementary information requested
  - Lower court said = “non-compliance”; Court of Appeal = “only breach of Contract A obligation”
  - TTC was still entitled to accept bid
Tender “Traps”

• The “Contract Form” ...
  – onerous “supplementary conditions” may change price competition into negotiation of contract terms and risk allocation
  – Bidders may qualify bids = counter-offer
    • Owner cannot “force” the contract on Bidder
    • BUT Owner may be freed of constraints of legal rules of tender/Contract A

...neither party “wins” the fight
Key Clauses

• Privilege Clause ...

  – “the lowest or any tender not necessarily accepted...”

  – allows consideration of “nuanced view of costs”

“Nuanced View of Costs”

  
  – Owner awarded to 2\textsuperscript{nd} low bidder due to prior bad experience with low bidder.
  
  – Court found that past experience went to “value” of bid, notwithstanding a bare bones privilege clause
  
  – Court warned: should not be used to punish or get even for past differences
Key Clauses

- Courts have continually upheld the privilege clause, i.e. you don’t *have to* choose the lowest bid
  - But what if the owner wants to choose a “problem” or non-compliant bid?
  - *MJB* says the “bare-bones” clause doesn’t help...
“Non-Compliance”

• What is “non-compliance”?

  – Problem with the bid submitted:
    
    • late
    • missing bond or other security
    • missing information about names of subcontractors
    • mathematical errors make bid price unclear
“Non-Compliance”

• What happens to a “non-compliant” bid?
  
  – General rule is that a “non-compliant” bid should be disqualified
  
  – Only compliant bids can be considered by the owner

  
  M.J.B. Enterprises
“Non-Compliance”

• What is test of “non-compliance”?  
  – used to be “Strict Compliance”  
  – now “Substantial Compliance”  
  • concern is “material non-compliance”  
  • i.e. does the “flaw” really matter?  
  • does it give a bidder an unfair advantage?
The “Discretion” Clause

• Owners try and address non-compliance with a “waiver” clause:

  “Owner has right to waive minor errors, omissions or irregularities in the bid…”

  = attempt to overlook defects

• still begs the question: what’s “minor”? 

  ...which leads to...
The “Discretion Clause”

...the “Ultimate Discretion Clause”:

“The Owner may, in its sole discretion, reject or retain for its consideration Tenders which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers”

Does this actually work?
“Non-Compliance” vs. “Mistake”

• Mistake
  – central issue in *Ron Engineering*
  – unless mistake is obvious, Owner can accept bid

• Non-Compliance
  – central issue in *M.J.B. Enterprises*
  – implied term of Contract A that non-compliant bids must be rejected

• What happens when the two meet?
Avoiding the Non-Compliant Bid

• *Graham Industrial Services Ltd. v. Greater Vancouver Regional District* (2004 B.C.C.A.)
  – bidder made a mistake in bid and wanted out
  – bid was non-compliant so no Contract A arose
  – Owner could not use discretion clause in Contract A to waive non-compliance and force contract
Accepting the Non-Compliant Bid

• *Kinetic Construction Ltd. V. Comox-Strathcona (Regional District)* (2004 B.C.C.A.)
  
  – Owner had wide discretion clause in tender documents (see “Ultimate Clause”)
  
  – Owner chose qualified (non-compliant) bid over compliant bid
“Catching” the Non-Compliant Bid

**Kinetic Construction...**

– Court considered non-compliant bid a “counter-offer” capable of acceptance by Owner, but didn’t give rise to Contract A

– Contract A containing discretion clause *did* arise with compliant bidders

– Discretion clause permitted consideration of non-compliant bid so no breach of Contract A by Owner by choosing non-compliant bid
Waiving “Non-Compliance”

The “Dilemma”:

• How do you reconcile these two cases?
• Can an owner waive non-compliance or not?
• Is acceptance ultimately up to the contractor?
Non-Compliance and Contract “A”

“Owner can accept non-compliant bids”
Other Cases on Non-compliance

_Coco Paving v. MTO_ (C of A - June 2009)

- MTO was prepared to accept a bid submitted electronically which was almost ½ hour late

- Bidder claimed to have sent it before 3 p.m. but instructions were clear “receipt” by MTO was key

- Ruled as being “non-compliant”
Other Cases on Non-compliance

*Maystar General Contractors Inc. v. Town of Newmarket* (September 2009)

- Town accepted bid with price that could be interpreted one of two ways
- Court said price was “uncertain” and therefore non-compliant
- “Waiver” language was not clear enough
Other Cases on Non-compliance


— Region had allowed one bidder to submit a tender package without all drawings called for

— Court held that “omission” did not matter to bid outcome, therefore bid was “substantially compliant”
The “Key” Clauses

• “Limitation of Liability” clause
  – For example, limit the Owner’s liability to cost of bid preparation if Owner commits a wrong
The “Limitation of Liability” Clause

Elite Bailiff Services Ltd. British Columbia (2003 B.C.C.A.)

– Owner didn’t have to disclose entire weighting scheme in advance; but weighting scheme led to arbitrary result = unfair

– Damages limited by clause in RFP:
  • no claim for damages in excess of preparation costs
  • waiver of claim for loss of profits

– Court said clause clear and enforceable, regardless of “wrong” owner may have committed
The “Limitation of Liability” Clause

*If* you use a “Limitation of Liability” clause consider:

- the Bidder’s liability to the Owner
- the Owner’s liability to the Bidder
The “Limitation of Liability” Clause

The Bidder’s liability to the Owner:

• The liability of the Bidder to the Owner for loss and damage arising out of the Bidder's breach of the “bid contract” shall be limited to the lesser of the actual loss suffered by the Owner and the sum of $● [amount of bid security]
The “Limitation of Liability” Clause

The Owner’s liability to the Bidder:

- The liability of the Owner to any bidder for loss and damage arising in tort or for the breach by the Owner of the “bid contract” shall be limited to the lesser of the sum of $\bullet$ [= amount of bid security or some other amount] and the reasonable cost to the bidder of preparing its bid.
Other “Key” Clauses

• “Exclusion of Liability” clause
  – “Owner is not liable to any bidder for damages arising out of the bid process”

• Does this work?
The “Exclusion of Liability” Clause


– involved request for proposal for construction of a highway in northern B.C.

– successful “bidder” had joined forces in joint venture with outside contractor after pre-qualification but before submission of proposal

– runner-up sued for breach of Contract A
The “Exclusion of Liability” Clause

Tercon Contractors Ltd. v. B.C. ...

– “no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP…”

– Owner committed a “fundamental breach” by accepting an ineligible proponent’s bid

– wording of exclusion clause not clear enough to cover circumstances

– trial judge held that Owner couldn’t rely on clause, awarded $3.3M in damages
The “Exclusion of Liability” Clause

*Tercon Contractors Ltd. v. B.C. (2007 BCCA)*

– On appeal, court held exclusion clause was clear and unambiguous

– Court considered parties to be on roughly equal footing

– It is up to the major contractors to act...if they don’t like the clause, they shouldn’t bid on such jobs
The “Exclusion of Liability” Clause

*Tercon Contractors Ltd. v. B.C., (2010 SCC)*

– On appeal, Supreme Court split 5-4

– Minority agreed exclusion clause was clear and unambiguous

– Majority held that wording didn’t cover the circumstances – needed better wording to work

– Whole court agreed that “fundamental breach” shouldn’t apply
The “Exclusion of Liability” Clause

Tercon Contractors Ltd. v. B.C. (2010 SCC)

– but court still has the ability not to enforce the clause if “unconscionable” or “against public policy”

– for majority, principles of fairness and the integrity of the process may still have overridden clause, no matter how clearly written
The “Exclusion of Liability” Clause

• What does this mean for the future of “Contract A”?  
  – If every Owner drafts crystal clear excluding language, will the courts uphold it?  
  – If so, is that the end of Contract “A”?  
  – What is the “consideration” for Contract “A”? 
The “Exclusion of Liability” Clause

*If* you were to use a clause, it must be clear!

– By submitting a Bid each Bidder acknowledges and agrees to waive any right to claim damages against Owner for any reason, cause, or thing whatsoever, arising out of or in relation to the bid process, including, without limitation...
The “Exclusion of Liability” Clause

...the manner in which the Owner conducted the process...

...the Owner’s application of evaluation criteria...

...whose Bids the Owner considered, and the eligibility of any Bidders to submit Bids ...

...who was awarded the contract...[ETC., ETC....]

Who would bid to that?!?
Changes / Bid Shopping

  - Owner reduced scope of project before award and sought credit from bidders
  - Award to other than lowest original bidder amounted to “bid shopping” and was breach of duty of fairness
  - Should have awarded and proceeded as change to construction contract
Changes / Bid Shopping

• *Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd.* (2008 NSCA)
  
  – Bidder submitted the only bid received
  
  – Bid price was 59% over budget
  
  – Before terminating bid process with Bidder, Town “shopped” supply-only price and acted as general contractor
Changes / Bid Shopping

Port Hawkesbury (Town) ...

– Bidder awarded damages for “lost” Contract B

– Appeal Court discounted damages by 35% to account for possibility of Contract B not being awarded

– Shows Owner must conclude dealing with bidders before moving to other options
Changes / Bid Shopping

• *Amber Contracting Ltd. v. Halifax (Regional Municipality)* (June 2008)
  – Owner re-tendered on same specs after first tender over budget
  – New bidder joined original three bidders in second round
  – “Winner” of first tender found to have been unfairly treated
Changes / Bid Shopping

- *Amber Contracting Ltd. v. Halifax (Regional Municipality)* (C of A - October 2009)
  - “Privilege clause” allowed owner to cancel, so owner wasn’t in breach of Contract A by cancelling an re-tendering later
  - Minority judge disagreed and thought conduct was unfair
The Tender Process

• The legal principles...

  – Contract A/Contract B process

  – Owner cannot choose based on undisclosed preferences or other hidden criteria

  – Subject to express terms to the contrary, implied contractual duty on Owner to reject non-compliant bids

  – Mistaken Bidders may get out of bid if bid is also non-compliant
The Tender Process

– Award will generally be based solely on price, especially with pre-qualification

– Owner should award contract as bid, without changes

– Little or no negotiation carried out

– Privilege Clause and Discretion Clause provides only limited flexibility in dealing with problem bids
The Tender Process

– Limitation and especially Exclusion Clauses don’t always work

– Duty on Owner to treat bidders *fairly*

  = implied contractual term of Contract A

– If no Contract A...no “free-standing duty of fairness”

*Coco Paving (1990) Inc.*
The Changing Face of Construction
The Changing Face of Construction

- New players
- New methods
- AFP / 3P
- Bundling
The Result

A new set of stresses and tensions entering our industry and challenging all of us.
The Issues

• Risk management
• Evaluation
• Procurement isolation and lack of knowledge
• Use of non-standard contracts and supplementary conditions
• Quality of tender documents
• The stressed process
• Communication
Risk Management

• Focus is to great on risk transfer.
• Some risks cannot be transferred.
• Bids evaluated on price on alone.
• Lack of recognition of the important role of pre-qualified submissions.
Evaluation

- The focus is more toward price instead of quality.
- The project budgets are many times unrealistic.
- Prequalification (for consultants and contractors) convoluted and not designed to ensure best value but rather to exclude bidders.
Procurement and Lack of Knowledge

• Lack of realistic timeframes for the tendering and procurement process.
• Inconsistency across different departments within the organization.
• Procurement process complicated
Non-Standard Contracts/Supplementary Conditions

• Creates confusion
• Not tested in law – poorly written, usually by a non-construction person
• Largest number of complaints to OGCA come from this area
Quality of Tendering Documents

- Inadequate time for proper design development.
- Ensure that the designer understands construction logistics.
- Lack of clear expectations of the work required (owner to consultant).
The Stressed Process

• Inefficiencies in the tendering and bidding process
• Lack of clarity creates adversarial situations
• Too many cooks in the kitchen
• Lack of prompt responses
• Unrealistic delivery times on price and project
Communication

“What we have here is a failure to communicate.”

from the 1967 film Cool Hand Luke
Broader Public Sector Directive
Overview

*Broader Public Sector Directive*

= 25 Mandatory Requirements

– Segregation of duties and approval authority schedules

– Competitive procurement

  • when do you have to run a competition?
  
  • what method should be used?
Overview

– Purchasing mechanics
  • where is it advertised?
  • how long should respondents be given?
  • where and when are submissions made?
  • how are submissions evaluated?

– Contract terms and contract management

– Record keeping

– Dispute resolution
Segregation of Duties and Approval Authority Levels

1. *Segregation of Duties* (7.2.1)

   - BPS organizations must segregate at least three of the five functional roles: Requisition, Budgeting, Commitment, Receipt, Payment

   - Responsibilities for these functions should lie with different departments or at a minimum with different individuals
Segregation of Duties and Approval Authority Levels

- Customer – client
- Departmental budget holder
- Purchasing Agent/Buyer
- Receiver
- Accounts Payer

- if can’t be done, adequate compensating controls approved by the external auditor must be in place
Segregation of Duties and Approval Authority Levels

2. Approval Authority (7.2.2)

– must have a documented Approval Authority Schedule (AAS) that outlines the organization’s authority levels for each of the five functional roles described in the segregation of duties (Section 7.2.1)

– consulting services thresholds treated separately
Segregation of Duties and Approval Authority Levels

Example:

- Manager (≤$10K)
- Director (≤ $50K)
- Vice-President (≤ $250K)
- President/CEO (≤ $1M)
- Board of Directors (>$1M)
Competitive Procurement

3. Competitive Procurement Thresholds (7.2.3)

– must conduct open competitive procurements where the estimated value of procurement of goods, non-consulting services or construction is $100K or more, unless exemption applies

– all non-exempt consulting services must be competitively procured
Competitive Procurement

4. Information Gathering (7.2.4)

– procurement planning is encouraged

– an Request for Information (RFI) or Request for Expressions of Interest (RFEI) may be used to gather information

– RFI – for technical product/supplier information

– RFEI – for interest and ability
Competitive Procurement

RFIs / RFEIs:

– not to be evaluated
– no contract award
– must not be used to pre-qualify
– no Contract A intended
– should be widely disseminated
Competitive Procurement

5. *Supplier Pre-Qualification (7.2.5)*

– pre-qualification for capabilities and qualifications of suppliers done by Request for Supplier Qualification (RFSQ)

– used for either single procurement or to establish Vendor of Record (VOR) arrangement

– must be clear that no obligation on the part of the Organization to actually call on any supplier as a result of RFSQ
Competitive Procurement

VOR process should:

– set value of future awards (ceiling price)
– length of time on list
– when will suppliers be added
– say: if not on list, may be excluded from opportunity to participate
– second-stage should follow set thresholds for competitive procurement and distribute work evenly if only one supplier required
Competitive Procurement

Competitive Processes:

- Request for Proposals (RFP)
  - complex delivery
  - multiple criteria

- Request for Tender (RFT)
  - price and delivery

- Request for Quotations (RFQ)
  - based solely on price
Purchasing

6. *Posting Competitive Documents (7.2.6)*

– calls for competitive procurements must made through an *electronic* tendering system that is equally accessible to all Canadian suppliers

  e.g. Merx, Biddingo

– complies with AIT

– encourages broad response
Purchasing

7. *Timelines for Posting Competitive Procurements (7.2.1)*

- must provide a minimum response time of 15 calendar days for procurements valued at $100,000 or more

- consider 30 days for complex procurements

- helps to improve quality of submissions
Purchasing

Communications with respondents:

– addenda
  • posted at least 7 days before closing date or extend time

– pre-submission Q&A process
  • must be asked least 7 days before closing date or extend time for answers
Purchasing

- limited communications during evaluation
  - clarifications

- communications after evaluation
  - notice of award
  - debriefing
Purchasing

8. *Bid Receipt (7.2.8)*

- closing date and time must be clearly stated

- closing date must be normal working day (Monday to Friday, excluding provincial and national holidays)

- late submissions that are delivered after the closing time must be returned unopened
Purchasing

– date and time stamp with contact info

– open after closing time with at least one witness
9. Evaluation Criteria (7.2.9)

– criteria should be developed, reviewed and approved before the competitive process begins

– criteria must be included in the competitive documents, including weight

– minimize number of mandatory criteria

– criteria can only be changed by addenda
Evaluation

- alternatives should be considered only if requested

- any relevant criteria possible (technical, financial, experience) if directly related to the procurement

- do not ask for info which will not be evaluated
Evaluation

10. Evaluation Process Disclosure (7.2.10)

– must fully disclose the evaluation methodology and process to be used in assessing a submissions

  • including weighting
  • role of reference checks, interviews

– must state process for resolving tie score

– must state that submission will be disqualified if mandatory criteria not met
Evaluation

– must only consider submissions which comply with mandatory requirements

– if mandatory criteria are met, then clarification questions may be permitted

• concern is “bid repair”
Evaluation

11. Evaluation Team (7.2.11)

– competitive process requires an evaluation team to rate and review compliant bids

– team must be aware of the restrictions involving confidential and commercially sensitive information

– must refrain from engaging in activities that may create or appear to create a conflict of interest
Evaluation

– a lead should be appointed

– ideally members are involved in developing evaluation criteria and weighting

– necessary expertise may involve both financial and technical – should reflect nature of goods and services being procured

– procurement division should participate
Evaluation

12. *Evaluation Matrix (7.2.12)*

- must ensure that each member of the evaluation team has completed an evaluation matrix, rating each of the submissions

- records of evaluation scores must be retained for audit purposes

- everything said must be fair, factual, fully defensible
Evaluation

13. Winning Bid (7.2.13)

- must select the highest evaluated submission that meets all mandatory requirements set out in the competitive procurement document as the winning bid

- may cancel if:
  - over-budget
  - non-responsive
  - not fair market value
Evaluation

– except pricing info publicly disclosed at opening, all submission evaluation details must be kept confidential

– bidders whose bids were rejected during process should be informed in writing within reasonable time
Evaluation

14. *Non-Discrimination* (7.2.14)

– must not discriminate or give preferential treatment in awarding a contract to a supplier:
  
  • e.g. geographic location within Canada
Evaluation

Examples:

– restrictions based on province of origin
– biased/slanted specifications
– favouring local content
– using hidden criteria
– unjustified exclusion of qualified bidder
Evaluation

– may be trying to achieve a “legitimate objective”

• safety and security
• consumer protection
• environmental protection

– only minimal impairment and restrictions permitted
Contract

15. Executing the Contract (7.2.15)

– agreement must be defined formally in a signed written contract before the provision of the goods or services commences

– if urgent need exists, can commence with an interim purchase order

– no requirements for order of signatures, or possibility of pre-contractual negotiations (as was the case with former “BPS Guideline”
16. Estabishing the Contract (7.2.16)

- the contract must be finalized using the form of agreement released with the procurement document

- if a procurement strategy was used without the contract released, the written agreement must be signed before supply commences

= only “indirect” reference to possibility of non-Contract A scenario in BPS Directive
17. Termination Clauses (7.2.17)

– all contracts must include *appropriate* cancellation or termination clauses

– should seek appropriate legal advice on the development of these clauses

– should consider life cycle stages for cancellation termination points

– more relevant for IT contracts
18. Term of Agreement Modifications (7.2.18)

- the term of the agreement and any options to extend the agreement must be set out in the competitive procurement document

- approval by the appropriate approval authority is necessary before changing term

- extension to the term of agreement beyond what is set out in the procurement document is non-competitive procurement if extension affects value or deliverables
Contract

19. Contract Award Notification (7.2.19)

– must post, in the same manner as the procurement documents were posted (e.g. Merx, etc.), notice of contract award

– notice posted only *after* the agreement between the successful supplier and the organization has been executed

– notice must include name, agreement start and end dates, including any extension options
Contract Award

20. Supplier Debriefing (7.1.20)

– for purchases valued at $100,000 or more, must inform all unsuccessful suppliers who participated in the procurement process of their entitlement to a debriefing

– suppliers have 60 days after award notice to request debriefing

– this may avoid future claims
Contract Award

Process:

– conduct separate debriefings with suppliers
– have a consistent process, including Fairness Commissioner if used
– focus on bid of bidder being debriefed without sharing information about other bids
– provide constructive suggestions
Non-Competitive Procurement

21. Non-Competitive Procurement (7.1.21)

– general rule is *competitive* procurement

– may use is non-competitive procurement in special situations:
  
  • non-application (AIT)

  • exemption

  • exception
Non-Competitive Procurement

- supporting documentation must be completed and approved prior to commencement

- Non-application by reason of AIT, for example:
  - artistic or cultural goods
  - services of regulated professions (architects, lawyers, etc.)
  - financial advisory services
Non-Competitive Procurement

Exceptions:

• single-sourcing:
  – situation of urgency
  – confidential nature of goods
  – security issues involved
  – local aggregate materials
  – lack of response to tender call
Non-Competitive Procurement

Exceptions:

• sole-sourcing:
  – technical compatibility with existing condition
  – no alternative exists
  – warranty work
  – design contest winner
  – prototypes
  – advantageous purchase (e.g. out of bankruptcy)
Procurement Documents and Records Retention

22. *Contract Management (7.2.22)*

– must be managed responsibly and effectively

– payments made in a timely manner, based on detailed invoices

– overpayments recovered in a timely manner

– scope is documented properly
Procurement Documents and Records Retention

– performance issues addressed on ongoing basis

– expense reimbursement must follow Expenses Directive
Procurement Documents and Records Retention

23. Procurement Records Retention (7.2.23)

– for reporting and auditing purposes, all procurement documents, as well as any other pertinent information, must be maintained in recoverable form for a period of seven years

– must have written policy for handling, storing and maintaining confidential and commercially sensitive information
Procurement Documents and Records Retention

Examples of records:

– evidence of approvals
– advertisements
– submissions
– evaluation documents
– award letters, notices
– agreements
Conflict of Interest

24. Conflict of Interest (7.1.24)

– must monitor any conflicts of interest during procurement activities applicable to all employees, advisors, external consultants or suppliers.

– must require any individual involved in supply chain-related activities to declare all actual or potential conflicts of interest

– if conflict exists, must be addressed
Disputes

25. Bid Dispute Resolution (7.1.25)

– must outline the bid dispute resolution procedures and ensure that any dispute is handled in an ethical, fair, reasonable and timely fashion

– process must be compliant with the bid protest or dispute resolution procedures set out trade agreements
Disputes

Methods:

– negotiation

– mediation

– arbitration
Fundamental Problem:

• How do we address the misconception of construction being a commodity instead of a service?
Solutions
Solutions

Risk Management

- Clearly identify the risks, roles and responsibilities. Educate to ensure understanding.
- Build strong teams. Focus more on collaboration and engagement, and less on avoiding litigation.
- Do proper planning, risk partnering and risk assignment.
- Set out rules of engagement so that everyone takes on appropriate risk.
- Allow adequate tendering time and design time.
Solutions

**Evaluation**

- Have a two-envelope selection process: a qualitative assessment; then a cost comparison.
- Use pre-qualification with CCDC 2. Factor in performance evaluation.
- Identify an industry-standard (or recommended) fee.
- Use QBS (quality-based selection). Find a forum to encourage the use of QBS.
- Consider the team composition and previous experience working together.
Solutions

Procurement

• Educate the procurement group on the client group’s needs and the contractor’s bidding process.

• Create industry working groups (bidding/closing, clauses, design).

• Implement weekly progress reports and involve designers at various stages of a project.
Solutions

**Non-standard documents / Supplementary conditions**

• Increase communication amongst all parties: build understanding and find consensus.
• Have larger governing body assess non-standard contracts.
• Ensure that risks are clearly defined and assigned.
• Use clear language in non-standard contracts and supplementary conditions.
• Have owners stipulate that general contractors use some standard contracts with all subcontractors and suppliers.
Solutions

Non-standard documents /
Supplementary conditions
• Work together as clients to develop common supplementary conditions for construction and design services.
• Review supplementary conditions with contractors.
• Recognize that some supplementary conditions and risk transfers are inevitable – ensure that they are sensible.
Solutions

Quality of tender documents

• Use QBS.
• Create a database of issues so that the industry can find solutions.
• Procurement Project
  www.procurementproject.ca
Solutions

The Stressed Process

• Create interactive teams, build understanding and raise the profile of procurement.

• Develop a long-term plan to improve communication and reduce silos.
Solutions

**Communication**

- Have a project leader to oversee an integrated design and construction process and communicate feedback throughout the project.
- Use communications tools (one-on-one, online Q&A’s, forms, clear response times).
- Start with a clear scope of work and clear documentation.
- Ensure an integrated design and construction process.
Applying Solutions
The Key Principles

1. Keep submission requirements simple and minimal.

2. Only ask for what you intend to evaluate and provide for later submission of all else.

3. Define the mandatory requirements for compliance narrowly and spell out the consequences of non-compliance clearly.
The Key Principles

4. Focus on those requirements required to establish an unequivocal Contact A.

5. Focus on those requirements that mitigate the potential for bid manipulation.

6. Focus on the broader notion of fairness, e.g. write fair rules and enforce them uniformly.
The Key Principles

7. Provide clear language addressing informalities and how they may be remedied.

8. Include well crafted and fair privilege, discretion, and limitation language. Be careful of exclusion clauses.

9. Reference CCDC 23 and rely on it as a baseline for common industry practices.
Thank You

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