



**Comox Valley Regional District – Legal Seminar**

**October 25, 2016**

**1:30 p.m. to 3:30 p.m.**

**Agenda**

**Overview of Procurement Law for Regional Districts**

1. Contract law basics
2. Regional District contract powers
3. Tenders, RFP's, and other forms of competitive procurement
4. Trade Agreements
5. Invitations to Tender
6. Contract A/Contract B
7. Implied Terms of Contract A
8. Invitation to Tender – Typical Term
9. The privilege clause – evaluating bids
10. Determining bid compliance
11. Negotiating with bidders
12. Cancelling the tender
13. Exclusion of liability clauses
14. Requests for Proposals
  - a. RFP's vs. Tenders – What's the Difference?
  - b. Can an RFP give rise to Contract A?
  - c. RFP's – Typical Terms
  - d. Evaluating proposals
15. Contract Award/Post Award
16. Case law update
17. Best Practices for Local Governments - RFP's/Tenders
  - a. Procurement do's and don'ts
  - b. Staff and Board roles
  - c. Ethical considerations

**CONTRACT LAW AND TENDERING FOR REGIONAL DISTRICTS**

Presented at:  
Comox Valley Regional District  
Courtenay, B.C.  
October 25, 2016

Presented by:  
Peter Johnson



STEWART McDANNOLD STUART  
Barristers & Solicitors

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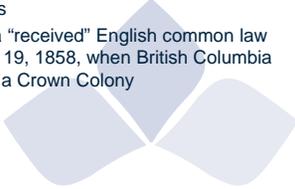
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**Contract Law 101**

- Contracts in British Columbia and most of Canada (Quebec is an exception) largely governed by common law
- Common law has evolved through centuries of judicial decisions
- British Columbia "received" English common law as of November 19, 1858, when British Columbia was proclaimed a Crown Colony



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**Contract Law 101**

- Constitutional authority for contract law – largely a matter of provincial power over property and civil rights
- British Columbia has enacted statutes that alter/supplement the common law of contract:
  - *Law and Equity Act*
  - *Sale of Goods Act*
  - *Business Practices and Consumer Protection Act*



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**Contract Law 101**

- A contract may be defined as:
  - A legally enforceable agreement
  - Between two or more parties who intend to enter into a contract
  - Formed by offer and acceptance
  - Supported by consideration



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**Contract Law 101**

- Key point:
  - Whether a contract is formed in any case is determined objectively, from the standpoint of the reasonable observer



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**Contract Law 101**

- “Legally enforceable”
  - Courts will provide a remedy for a breach
    - Damages
    - Specific performance
  - Bare Promises
  - Memorandum of Understanding
    - May be enforceable as a contract, if all elements of a contract are present!



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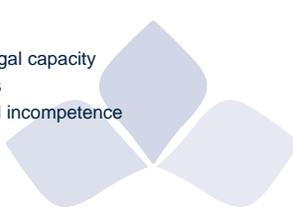
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**Contract Law 101**

- “Legally enforceable”
  - Courts will not enforce contracts where:
    - Duress
    - Fraud
    - Lack of legal capacity
      - Infants
      - Mental incompetence



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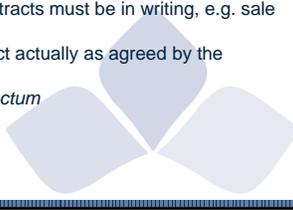
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**Contract Law 101**

- Other “legal enforceability” issues:
  - Criminal purpose/ counter to public policy
  - Oral vs. written
    - some contracts must be in writing, e.g. sale of land
  - Is the contract actually as agreed by the parties
    - *non est factum*
    - mistake



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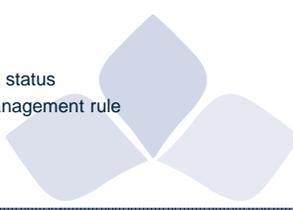
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**Contract Law 101**

- “Between two or more parties”
  - Privity of contract
  - Individuals
  - Partnerships
  - Corporations
    - Corporate status
    - Indoor management rule
  - Government



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**Contract Law 101**

- "Formed by offer and acceptance"
  - Offers
  - Invitations to treat
  - Unequivocal acceptance
  - Counter-offers
  - Communication of acceptance
  - Revocation of offers



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**Contract Law 101**

- "Formed by offer and acceptance"
  - Agreements to agree
  - Unilateral contracts



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**Contract Law 101**



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**Contract Law 101**

- “Supported by consideration”
  - Contract law requires there to be an exchange of value between the parties
    - Peppercorn (or “One Dollar”) consideration
    - Exchange of promises/performance
  - Exception – contracts under seal



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**Contract Law 101**

Regional Districts – Corporate Power to Contract

- *Local Government Act* section 263
- Regional District boards have the power to make agreements concerning:
  - Regional district services
  - Operation and enforcement in relation to the board's exercise of regulatory authority
  - Management of property



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**Contract Law 101**

Regional Districts – Corporate Power to Contract

- Regional District boards also have the power to make agreements with a public authority
  - Respecting activities, works, services within the powers of a party to the agreement
  - Operation and enforcement in relation to a party's exercise of regulatory authority
  - Management of property held by a party to the agreement



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**Contract Law 101**

Regional Districts – Corporate Power to Contract

- But – power to contract is subject to statutory limitations
  - Expenditures must be authorized under the financial plan
  - Is the expenditure in relation to an established service?
  - Contracts for more than five years (electoral approval required for capital liabilities)
  - Prohibitions on assistance to business
  - Limitations on delegation of authority

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**Contract Law 101**

Regional Districts – Corporate Power to Contract

- Delegation of Board authority (section 229, *Local Government Act*)
- Board may by bylaw delegate its powers, duties and functions, including those specifically established by an enactment to:
  - a board member or board committee
  - an officer or employee
  - another body established by the board
- Board can delegate power to contract

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**Contract Law 101**

Regional Districts – Corporate Power to Contract

- “Indoor management rule” – does not apply to regional districts
  - Contracts must be properly authorized in accordance with statutory requirements and internal procedures to be enforced against a regional district
- Regional Districts cannot be held to a contract that is *ultra vires* the regional district’s powers
- But, lack of validity of a contract may not shield a regional district from claims for compensation based on other legal principles – e.g. unjust enrichment

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**Competitive Procurement**

Competitive procurement, broadly speaking, could include any process by which:

- offers are solicited/obtained from multiple suppliers for the supply of goods, services, construction services, etc.
- owner selects the most favourable offer

In contrast to "sole source" procurement



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**Competitive Procurement**

Common Forms of Competitive Procurement

- Request for Quotations
  - Owner asks suppliers for their best price for a standard item or service
- Request for Expressions of Interest/Request for Qualifications
  - Owner intends to procure through RFP or Tender and wants a short list of pre-qualified participants



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**Competitive Procurement**

Common Forms of Competitive Procurement

- Request for Proposals
  - Owner requests proposals, with the intention of negotiating with the preferred proponent
- Invitation to Tender
  - Owner requests sealed bids for performance of a contract – price the most important consideration



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**Competitive Procurement**

Why Procure Through Competition?

- Better assurance of value for money
- May eliminate or reduce need for negotiation
- Openness/transparency
- Promotes public confidence
- Builds confidence among private sector participants
- May be a requirement under procurement policies/bylaws
- May be required under Trade Agreements:
  - Agreement on Internal Trade
  - New West Partnership Trade Agreement



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**Competitive Procurement**

Risks to the Owner

- Owners have been sued, successfully, for:
  - Awarding a contract to a non-compliant bidder
  - Awarding a contract based on undisclosed evaluation criteria such as a local preference policy
- Courts may award damages amounting to:
  - The plaintiff's costs in putting together its bid
  - If the court is satisfied that but for the breach the owner would have awarded the contract to the plaintiff, damages for loss of profit



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**Competitive Procurement**

Inter-Governmental Trade Agreements

- No statutory obligation for local governments to procure goods and services through a competitive process
- But, both AIT and NWPTA include requirements for open and competitive procurement practices on the part of local governments



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**Competitive Procurement**

Inter-Governmental Trade Agreements

- Under NWPTA the Province of B.C. has agreed that local governments must provide "open and non-discriminatory access to procurements" for:
  - goods or services of \$75,000 or more
  - construction of \$200,000 or more
- B.C. has also agreed to ensure that government entities post notices for all covered procurement on an electronic tendering system

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**Competitive Procurement**

Inter-Governmental Trade Agreements

NWPTA provides certain exemptions, including:

- Procurement from a public body
- From philanthropic organizations, prison labour, persons with disabilities
- Health and social services
- Sporting/convention facilities that are subject to commercial agreements inconsistent with NWPTA
- Where it can be demonstrated that only one supplier can meet requirements
- Unforeseeable situations of urgency
- Acquisitions of a confidential or privileged nature
- Legal or notary services

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**Competitive Procurement**

Inter-Governmental Trade Agreements

- NWPTA now includes a "bid protest mechanism"
- Suppliers may protest local government procurement decisions, if the supplier believes the decision was not in accordance with NWPTA
- May lead to arbitration
- Arbitrator has authority to award:
  - Up to \$50,000 in costs of the arbitration
  - Up to \$50,000 as a "recoupment award" for costs incurred in putting together the supplier's tender
- Compliance may be a condition of grant funding from senior levels of government

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**Competitive Procurement**

Social Procurement

- Definition - use of purchasing powers to leverage something of social value
- Adds "social value" to the mix of "cost", "environmental impact" and other criteria used in determining "best value"
- According to social procurement advocates, could include:
  - Procurement from "diverse suppliers" or "social enterprises"
  - Evaluation of proposals/bids includes assessment of "social impact" – employment opportunities/living wage requirements/sub-contracting to diverse suppliers

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**Competitive Procurement**

Social Procurement

- Definition - use of purchasing powers to leverage something of social value
- Adds "social value" to the mix of "quality", "price", "environmental impact" and other criteria used in determining "best value"
- According to social procurement advocates, could include:
  - Procurement from "diverse suppliers" or "social enterprises" – increased access to procurement opportunities
  - Evaluation of proposals/bids includes assessment of "social impact" – employment or training opportunities/living wage requirements/sub-contracting to diverse suppliers

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**Competitive Procurement**

Social Procurement

- Issues for local government:
  - Compliance with trade agreements (such as requirements for non-discriminatory procurement practices)
    - "local preference" policies are problematic for larger purchases
    - RFP's should be reviewed carefully to ensure compliance
  - Ensuring value for money for local taxpayers
  - Limits on local government powers
    - ensuring value to the local community vs. evaluating whether a supplier is socially responsible

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**Competitive Procurement**

Social Procurement

- Issues for local government:
  - "assistance" vs. "equal access"
  - In the context of an RFP or other competitive process - ensuring clarity/certainty in evaluation criteria
    - defining the social value you wish to achieve
    - do participants in the procurement process know and understand what the requirements are?



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**Competitive Procurement**

Invitations to Tender

- In most cases, owners use a tendering process where cost is the most significant factor:
  - owner has a predetermined set of requirements
  - is looking for the best price for delivery of those requirements
  - limited or no scope for negotiation



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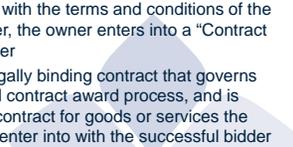
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**Competitive Procurement**

Invitations to Tender

Courts in Canada have articulated the following legal principles that govern contract tendering:

- By issuing an invitation to tender, and by accepting a bid that complies with the terms and conditions of the invitation to tender, the owner enters into a "Contract A" with each bidder
- Contract A is a legally binding contract that governs the tendering and contract award process, and is distinct from the contract for goods or services the owner intends to enter into with the successful bidder
  - that contract is "Contract B"



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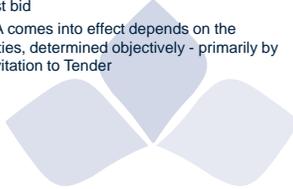
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**Competitive Procurement**

Invitations to Tender

- Contract A may provide that bids are irrevocable for a period of time, and may oblige the bidder whose bid is accepted to enter into Contract B with the owner
- Contract A may impose a qualified obligation on the owner to accept the lowest bid
- Whether Contract A comes into effect depends on the intention of the parties, determined objectively - primarily by the terms of the Invitation to Tender



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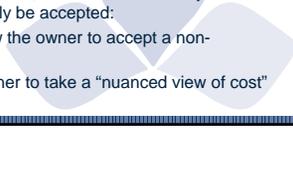
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**Competitive Procurement**

Invitations to Tender

- The terms and conditions of Contract A are for the most part as expressly set out in the Invitation to Tender
- But, Contract A may include certain implied terms:
  - that the owner will only accept a “compliant” bid;
  - that the owner will treat all bidders “fairly”
- The “privilege clause”, that the lowest or any tender will not necessarily be accepted:
  - does not allow the owner to accept a non-compliant bid
  - allows the owner to take a “nuanced view of cost”



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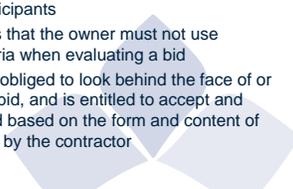
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**Competitive Procurement**

Invitations to Tender

- Scope of the duty of “fairness” – analyzed in light of express terms of Contract A
- “Fairness” means applying the rules of the tender equally to all participants
- “Fairness” means that the owner must not use undisclosed criteria when evaluating a bid
- The owner is not obliged to look behind the face of or investigate each bid, and is entitled to accept and evaluate each bid based on the form and content of the bid submitted by the contractor



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**Competitive Procurement**

Invitations to Tender – Typical Terms

A typical Invitation to Tender will include:

- A process for submission of bids
  - Deadline for submission
  - Indicates where bids are to be delivered
  - Will prescribe the form and content of the bid
  - That bids must be sealed
  - Procedures for amending a bid before the close of tenders
- Specifications/detailed description of the work the owner needs performed

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**Competitive Procurement**

Invitations to Tender – Typical Terms

- A statement that bids are irrevocable for a specified period of time
- A statement reserving the owner's right to waive "informalities" in a bid – the "discretion clause"
- A requirement for bid security
- Requirements for other information the owner thinks relevant – contractor's experience, references, list of sub-contractors, evidence that the contractor can provide a performance bond, lists of equipment and key personnel
- In some cases, the evaluation criteria the owner will use (if price is not the only consideration)

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**Competitive Procurement**

Invitations to Tender – Typical Terms

- A "privilege clause" – that the lowest or any bid will not necessarily be accepted, and that the owner reserves the right to reject any and all tenders
- A limitation of liability clause protecting the owner from claims for breach of Contract A
- The terms and conditions of Contract B
- For local governments, provisions re: confidentiality/*Freedom of Information and Protection of Privacy Act*

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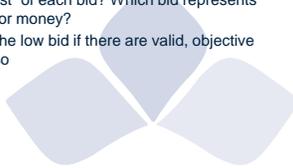
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**Competitive Procurement**

Invitations to Tender – The Privilege Clause and Bid Selection

- Owner can't rely on privilege clause to accept a non-compliant bid
- "Nuanced view of cost" – the privilege clause allows the owner to look behind the dollar value of the bid and to ask, what is the "true cost" of each bid? Which bid represents best overall value for money?
- Owner may reject the low bid if there are valid, objective reasons for doing so



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**Competitive Procurement**

Invitations to Tender – The Privilege Clause and Bid Selection

- Poor past performance by the contractor, whether based on the owner's experience or the experience of other owners
- Does the contractor have a history of making spurious claims for extras to try to make up for its low-ball bid?
- Does the contractor require a lot of extra supervision?
- Is the low bid too low or unbalanced? Is there a risk the contractor will not be able to complete the work at that price, or will cut corners?



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**Competitive Procurement**

Invitations to Tender – The Privilege Clause and Bid Selection

- Other similar factors that indicate that the "true" cost of the bid is higher than the price offered in the Form of Tender
- Owner is entitled to act in its own best financial interests so long as its decision is not "unfair"
- Courts have held the privilege clause supports a "reasonable exercise of business judgment" by the owner



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**Competitive Procurement**

Invitations to Tender – Bid Compliance

- Default test for bid compliance is "material" compliance
- Where the test is material compliance – discrepancies, errors or omissions that do not affect the integrity or fairness of the bidding process, or the price or performance of Contract B, may be waived by the owner
- Owners can "up the ante" by requiring "strict" compliance
- Where strict compliance is required - defects in the tender cannot be waived
- Strict compliance requirements should be avoided without good reason
- Watch for use of "shall" or "must" in the invitation to tender
- No "owner discretion" clause = strict compliance

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**Competitive Procurement**

Invitations to Tender – Bid Compliance

- Materiality is determined objectively – according to the courts, this is not a proper matter for the owner's discretion
- Must consider objectives underlying the tendering process, and the reasonable expectations of the parties, especially other bidders
- Test for materiality:
  - Does the defect in the tender undermine fairness of the competitive process, impact the cost of the bid or performance of Contract B, or create a risk of action against the owner by other bidders?

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**Competitive Procurement**

Material Compliance Scenarios

- o Bidder fails to fill in blanks in tender form but information required is found elsewhere in the bid
- o Bidder phones owner just before closing to advise of arithmetical error – owner makes correction – tender says changes to bids to be made in writing
- o Tender allows bidders to adjust tendered price up or down by fax, but instead faxes in new unit prices
- o Bidder provides a bid bond where tender requires a letter of credit
- o Bid states the price in numbers and in writing – there is a discrepancy – bidder advises owner at the tender opening that the lower price is the correct amount

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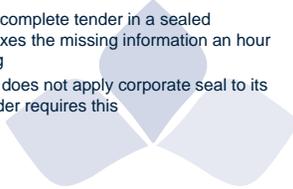
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**Competitive Procurement**

Material Compliance Scenarios

- o Bidder fails to include vehicle registration numbers in schedule of equipment
- o Bidder fails to complete list of subcontractors, or writes in "TBD"
- o Bidder submits incomplete tender in a sealed envelope, then faxes the missing information an hour before the closing
- o Corporate bidder does not apply corporate seal to its bid, although tender requires this



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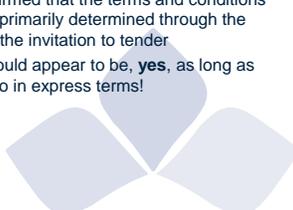
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**Competitive Procurement**

Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- Tendering law is founded in law of contract
- Courts have confirmed that the terms and conditions of the tender are primarily determined through the express terms of the invitation to tender
- So the answer would appear to be, **yes**, as long as the owner does so in express terms!



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**Competitive Procurement**

Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- *Kinetic Construction*
  - Owner expressly reserved right to retain and consider non-compliant bids. Court characterized the non-compliant bid as a counter-offer, found that given the clause, owner could consider the bid, but had to act "fairly" when comparing that counter-offer to the other compliant bids.
- *Graham Industrial Services, Ltd.*
  - Owner cannot reserve to itself the sole discretion to decide whether a defect is "material" or not



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**Competitive Procurement**

Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- But, **should** the owner reserve this discretion to itself?
- Potential bidders might perceive clauses that are too owner-friendly as creating an un-level playing field – might affect the price of bids, deter contractors from bidding
- Owner discretion clauses may protect the owner in “close to the line” cases where determining compliance is difficult
- Owners should avoid practices that undermine the confidence of suppliers and the public

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**Competitive Procurement**

Can the Owner Negotiate With the Low Bidder?

- Not unless the invitation to tender expressly allows for this, and then only as expressly permitted
- Remember that the tendering process is designed to replace negotiation with competition
- Re-negotiation of terms/conditions/changes with the contractor after Contract B is signed is another matter

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**Competitive Procurement**

Can the Owner Cancel the Tender?

- The “privilege clause” allows the owner to cancel the tender if the decision is made:
  - in good faith
  - for legitimate purposes
  - in a manner that ensures equal treatment to all bidders
- Examples:
  - All bids over budget
  - Errors have been made that have undermined the fairness of the tendering process

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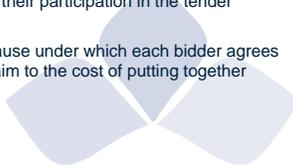
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**Competitive Procurement**

Exclusion/Limitation of Liability Clauses

- Owners sometimes try to limit their liability by:
  - Including in the invitation to tender a clause such as: “each bidder waives any claim for damages resulting from their participation in the tender”
  - Including a clause under which each bidder agrees to limit any claim to the cost of putting together their bid



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**Competitive Procurement**

Exclusion/Limitation of Liability Clauses

- Courts take a narrow approach to the interpretation of these clauses
- *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2010 SCC 4:
  - Clause limiting liability for anything arising from “participation in this tender” did not protect against claims for award to a non-compliant bidder



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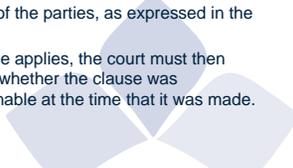
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**Competitive Procurement**

Exclusion/Limitation of Liability Clauses

- When determining if an exclusion clause applies:
  - Court interprets the clause to determine whether it applies to the specific circumstances.
  - Depends on the court’s assessment of the intentions of the parties, as expressed in the contract.
  - If the clause applies, the court must then determine whether the clause was unconscionable at the time that it was made.



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**Competitive Procurement**

Exclusion/Limitation of Liability Clauses

- If the clause is applicable and valid, the court must consider whether it should nonetheless refuse to enforce it because of an overriding public policy (to be proven by the party seeking to avoid enforcement of the clause) that outweighs the very strong public interest in the enforcement of contracts.



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**Competitive Procurement**

RFP's

- A Request for Proposals is usually structured to give the owner flexibility to negotiate with the proponent that puts forward the proposal the owner considers most desirable
- An RFP may also be appropriate where the owner has a general idea of its requirements, and wants to provide flexibility to the proponents to suggest solutions



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**Competitive Procurement**

RFP's

- Owners may expressly exclude the formation of Contract A – for example, by stating that the owner has no contractual obligation to any proponent unless and until a negotiated agreement is approved by the owner and is executed by the parties
- But, owners wishing to avoid Contract A can't "have it both ways" by saddling proponents with contractual obligations



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**Competitive Procurement**

RFP's – Does Contract A Arise?

Courts will look at:

- Are proposals irrevocable?
- Formality of the procurement process
- Formal deadlines for submission?
- Financial security requirements?
- Limited or no room for negotiation?
- Are terms of Contract B specified?
- Does the RFP expressly state that no Contract A is intended?



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**Competitive Procurement**

RFP's – Typical Terms

A typical RFP could include:

- A statement of the owner's requirements
  - usually written in broad terms – proponents may be invited to suggest a broad range of solutions
- A statement of required proponent qualifications
  - if a pre-qualification process has not preceded the RFP
- Required or desired proposal content
- Process for submission
- FOIPPA/confidentiality



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**Competitive Procurement**

RFP's – Typical Terms

- Process for evaluation
  - duty of fairness requires that evaluation criteria be disclosed
  - some RFP's set out a detailed evaluation matrix with points to be assigned in each category
  - some list evaluation criteria in more general terms



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**Competitive Procurement**

RFP's – Typical Terms

- Process for negotiation
  - Owner would typically express the intention to negotiate with the "preferred proponent"
  - May reserve the right to negotiate changes, terms or conditions without offering the same to other proponents
  - May reserve the right to negotiate with other proponents if negotiations with the preferred proponent fail



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**Competitive Procurement**

RFP's – Typical Terms

- Whether the owner intends to enter Contract A
- If no Contract A is intended, avoid:
  - stating that proposals are irrevocable
  - requiring security with the proposal
  - specifying required terms and conditions of Contract B



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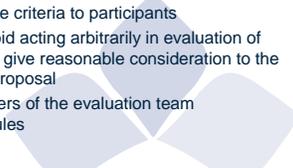
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**Competitive Procurement**

RFP's - Evaluating Proposals

- Evaluation process begins with the preparation of the RFP
  - carefully consider evaluation criteria/evaluation process
  - clearly disclose criteria to participants
- Owners must avoid acting arbitrarily in evaluation of proposals – must give reasonable consideration to the content of each proposal
- Ensure all members of the evaluation team understand the rules



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**Competitive Procurement**

Contract Award/Post Award Issues

- Board vs. staff roles – discussed below
- Limit communications/discussions with proponents before contract award
- Avoid public disclosure of information that may be subject to FOIPPA
  - Was any information submitted on a confidential basis (e.g. unit prices)? Consider whether FOIPPA section 21 may apply.
  - Do tenders/proposals contain personal information? Consider whether FOIPPA section 22 may apply.
- Once a contract is executed, all information set out in the agreement will generally be subject to public disclosure – FOIPPA section 21 does not apply to “negotiated” information

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**Competitive Procurement**

Tendering – Case Law Update

- *M.G. Logging and Sons v. British Columbia (2015)*
  - Appeal from dismissal of summary trial application
  - Case arose from competitive bid process for issuance of timber licences
  - Successful bidder used wrong company name on bid form, filled in a related company's (the intended bidder's) Timber Sales Enterprise number (a mandatory requirement for eligibility)
  - Tender documents contained no “discretion” clause –bid compliance to be determined strictly

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**Competitive Procurement**

Tendering – Case Law Update

- *M.G. Logging and Sons v. British Columbia (2015)*
  - Identity of the bidder an essential element of the contract – ambiguity as to who was bidding would render the bid invalid
  - Owner not required to look behind the face of the bid to determine who the “real bidder” is
  - Province's post-closing conduct (company searches, etc.) could not be taken into account when determining compliance – the fact that the Province might have been able to figure out who the “real bidder” was did not render this an irregularity that could be waived
  - Bid compliance to be determined objectively, as of the tender closing

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**Competitive Procurement**

Tendering – Case Law Update

- *True Construction Ltd. v. Kamloops (City)* 2016 BCCA 173
  - True Construction submitted a sealed bid without including a list of subcontractors, as required by the tender.
  - Faxed in the list of subcontractors 11 minutes before the close of bids.
  - Trial judge ruled that bid was non-compliant, upheld on appeal
  - "Allowing bidders to submit sealed bids that are incapable of acceptance and then complete them under a mechanism intended to permit revisions to a bid that can be accepted subverts the scheme".

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**Competitive Procurement**

Tendering – Case Law Update

- *Graillen Holdings Inc. v. Orangeville (Town)* 2016 ONSC 3687
  - Town put out tender for a biosolids project.
  - Of two responses, the Town selected Entec's as it set out a unique and cost saving process. The other tenderer, Graillen, sued for lost profits on the basis that Entec's bid was non-compliant.
  - The Court agreed that the Entec bid was non-compliant and found that by selecting it, the Town was in breach of contract A.
  - However, the Court did not make an award for lost profits because Graillen couldn't prove on the balance of probabilities that it would have been awarded Contract B
  - "I find it more likely that, had the Town adverted to the technical deficiencies in the Entec bid, it would have refrained from awarding the tender to either bidder and it would have issued a new tender."

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**Competitive Procurement**

Roles and Responsibilities

- Staff:
  - Implement Board policy/decisions
  - Board authorizes project/approves budget, staff then:
    - Work with consultants to produce front end documents - Board's procurement policies may govern whether a tender, RFP etc.
    - Administer the process by receiving and evaluating bids/proposals
    - Make a recommendation/present options to the Board

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**Competitive Procurement**

Roles and Responsibilities

- Board:
  - Board authorizes project/approves budget, directs staff to implement
  - Receives and considers recommendation for award of contract
  - Board's decision must be made within the terms of the tender/RFP



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**Competitive Procurement**

Ethical considerations

- Conflicts of interest
- Bid rigging
- Bid shopping



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**Competitive Procurement**

Do's and Don'ts

- When using standard form contracts – make sure you read and understand them
- Consider whether in the circumstances you want Contract A to arise, and make sure the wording of the document reflects your intention
  - If an RFP, avoid imposing legally binding requirements on the proponent (security, irrevocability of proposal, etc.) if you do not want Contract A to arise



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**Competitive Procurement**

Do's and Don'ts

- Avoid unnecessary use of terms such as "must" and "shall" to avoid the "strict compliance" test for tender compliance.
- Use "must" or "shall" for requirements that are essential to the fairness and integrity of the process.
- Avoid unnecessary, antiquated or impractical requirements for execution and submission of tenders.
- Try to achieve a reasonable balance between the interests of the owner and the bidders
- Consider whether the scope of the owner's discretion needs to be expanded. Does the owner want the discretion to accept a non-compliant bid? Keep in mind that the more "owner-friendly" the process is, the more reluctant suppliers may be to participate.

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**Competitive Procurement**

Do's and Don'ts

- If evaluation factors other than cost are to be considered, disclose them.
- All local government staff/elected officials involved in the process need to understand/follow the process as set out in the RFP/Tender.
- Follow the process you have set out in the invitation to tender or RFP – even if it means you have to reject a very competitive bid or proposal.
- Remember to look beyond the award of the contract - preserving your reputation and the integrity of your procurement process is extremely important.

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