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Tendering

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Basic Principles

- Tendering vs. negotiation – Is it a tender?
- Contract A/Contract B + implied duty of fairness to all bidders = Tendering contract rights and responsibilities
- i.e., Potential liability for damages for breach of Contract A
- Tendering authority (and tendering authority's consultant), for lost profit
- Tenderer, for difference from next highest bid

Is it tender?

- Tender vs. RFP
- Basic criteria:
 - Competitive procurement process
 - Period of irrevocability
 - Binding form of Contract B

Tercon Contractors v. B.C. (Min. of Transportation)

“Whether contract A is formed depends on the precise language and intention of the tender call. The court will look only to the substance of the transaction in the context of the procurement documents in order to determine whether the parties intended to enter into contractual relations....The courts have recognized several factors or terms indicative of an intent to form contract A. The irrevocability of the bid is one such factor....Other factors include the formality of the procurement process, whether tenders are solicited from selected parties, whether there was anonymity of tenders, whether there is a deadline for submissions and for performance of the work, whether there is a requirement for security deposit, whether evaluation criteria are specified, whether there was a right to reject proposals, whether there was a statement that this was not a tender call, whether there was a commitment to build, whether compliance with specifications was a condition of the tender bid, whether there is a duty to award contract B, and whether contract B had specific conditions not open to negotiation....

The label or name of the tender document is not a determinative factor....Neither is the requirement for a security deposit or the existence of established timelines....”

The tender documents

- Invitation to Bid
- Instructions to Bidders, referencing Contract B
- Tender Form



Privilege clauses

- The lowest or any tender will not necessarily be accepted.
- Tender irregularity may be a cause for rejection/can be waived.
- Price + other criteria + best interest can be taken into consideration.
- Limited or no liability for treatment of tender (**Tercon**).

Non-compliance

- Irregularity vs. non-compliance
- Waivable non-material non-conformance vs. non-waivable material non-conformance
- Material = affecting the price or performance of Contract B



Subcontract tenders

Contract A/Contract B can apply

General contractor must stick
with subcontract bid if it is
expressly picked up in GC's
tender

Bid shopping

“...where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others.”

Engineers and architects

- Preparation of tender documents and contract
- Receipt and evaluation of tenders
- Advice to client concerning tendering cans and cant's
- Tendering for consulting contracts



General contractors and construction managers



- General contractor as bidder
- Construction manager as administrator of trade contract tendering process/evaluator and advisor to owner/bidder

Procurement best practices

Understand
tendering law

Keep it simple

Quality control to
guard against
mistakes

Comply with
Contract A

Play fairly, to
maintain "the
integrity of the
bidding system"



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Thank you. Any questions?

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