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Bidding and Tendering: Will the Fun Ever Stop?

Construction and Infrastructure Law Group

Presented by:
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Bidding and Tendering: Will The Fun Ever Stop?

Overview of Seminar (Agenda)

1. “Setting the Table”
 - Refresher on Contract “A” / Contract “B”
2. Recent cases of note
3. Compliance/evaluation
4. Drafting/Understanding Procurement Documents
 - Do you want Contract “A”?
 - “May” v. “Shall”
 - Other essentials

Bidding and Tendering: Will The Fun Ever Stop?

Overview of Seminar (Agenda) Cont'd

5. Specialized Terms
 - Limit or exclusion of liability?
 - Negotiation?
 - ADR?
6. Over to You
 - Q & A



Setting the Table

Overview

- Old fashioned bidding
- Ron Engineering: the “Big Bang”



Bidding the Old Fashioned Way: McMaster v. Wilchar (CAO, 1973)

- Irrevocable bid for work at MAC
- Escalator page missing from W bid
- MAC notices error and accepts bid
- W refuses to sign: not their offer
- W not bound: MAC antisocial
- Irrevocability defeated by obvious error

OLD LAW: GOOD LAW

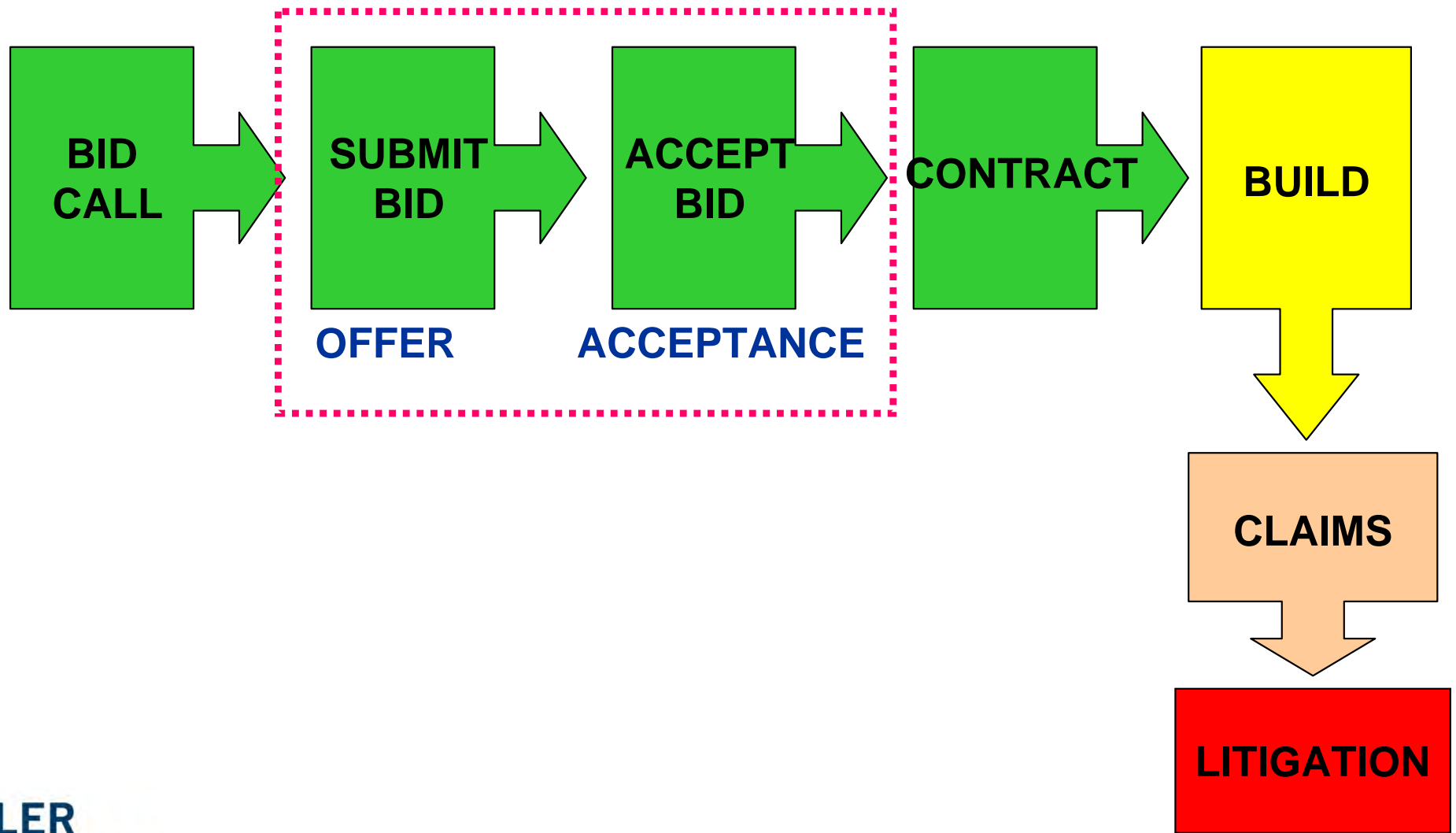


Bidding the Old Fashioned Way: Belle River v. Kaufman (CAO, 1978)

- K low by \$15,000: bid looks OK
- Irrevocable: bid bond
- Next day, K withdraws bid/error
- Owner later accepts bid
- K refuses: owner awards to another
- K not liable to owner
- Mistake disclosed before acceptance
- Irrevocability defeated by “invisible” mistake

OLD LAW: MAJOR BUSINESS PROBLEM

Bidding Until 1981



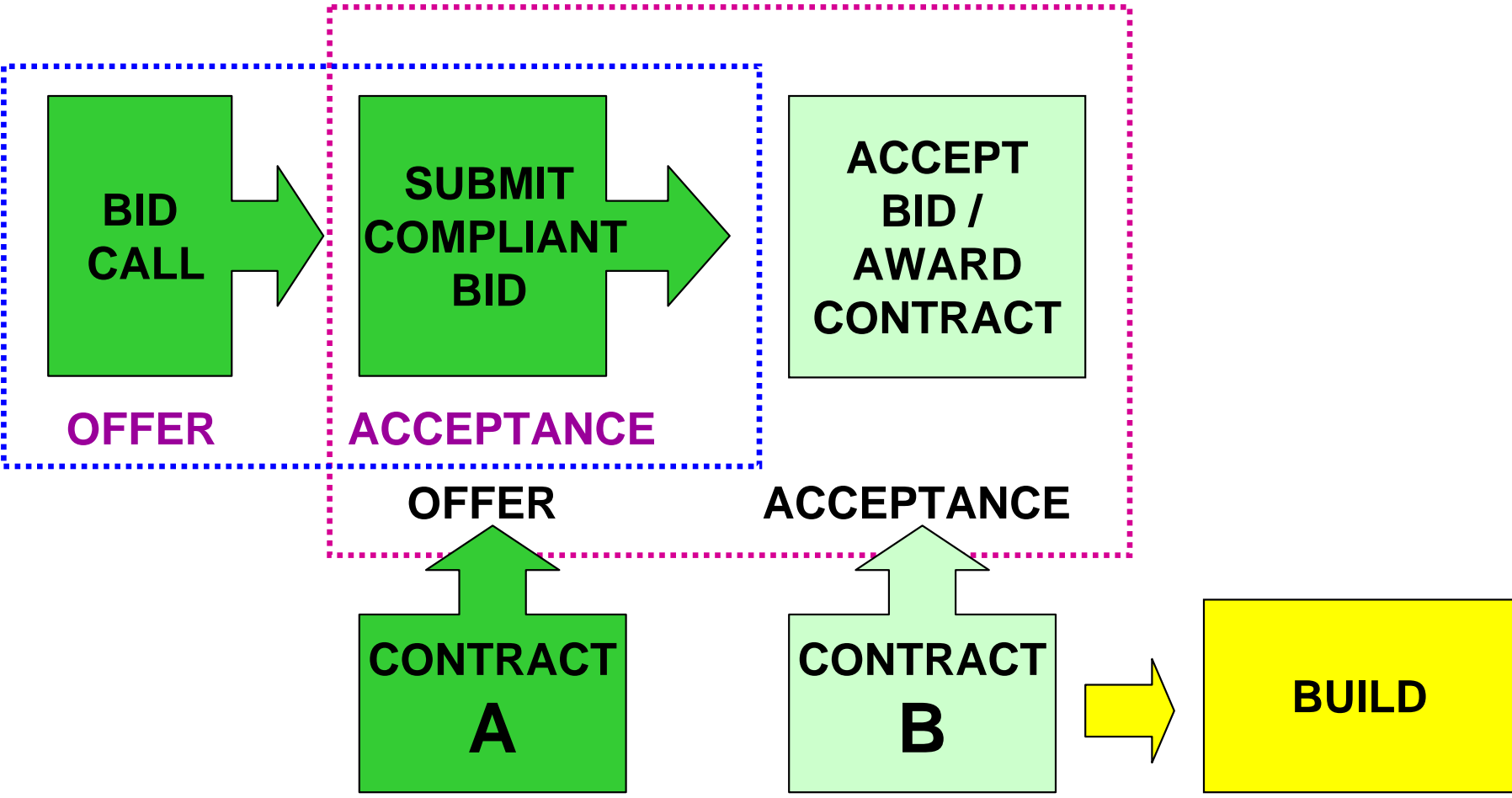


Her Majesty v. Ron Engineering (SCC, 1981)

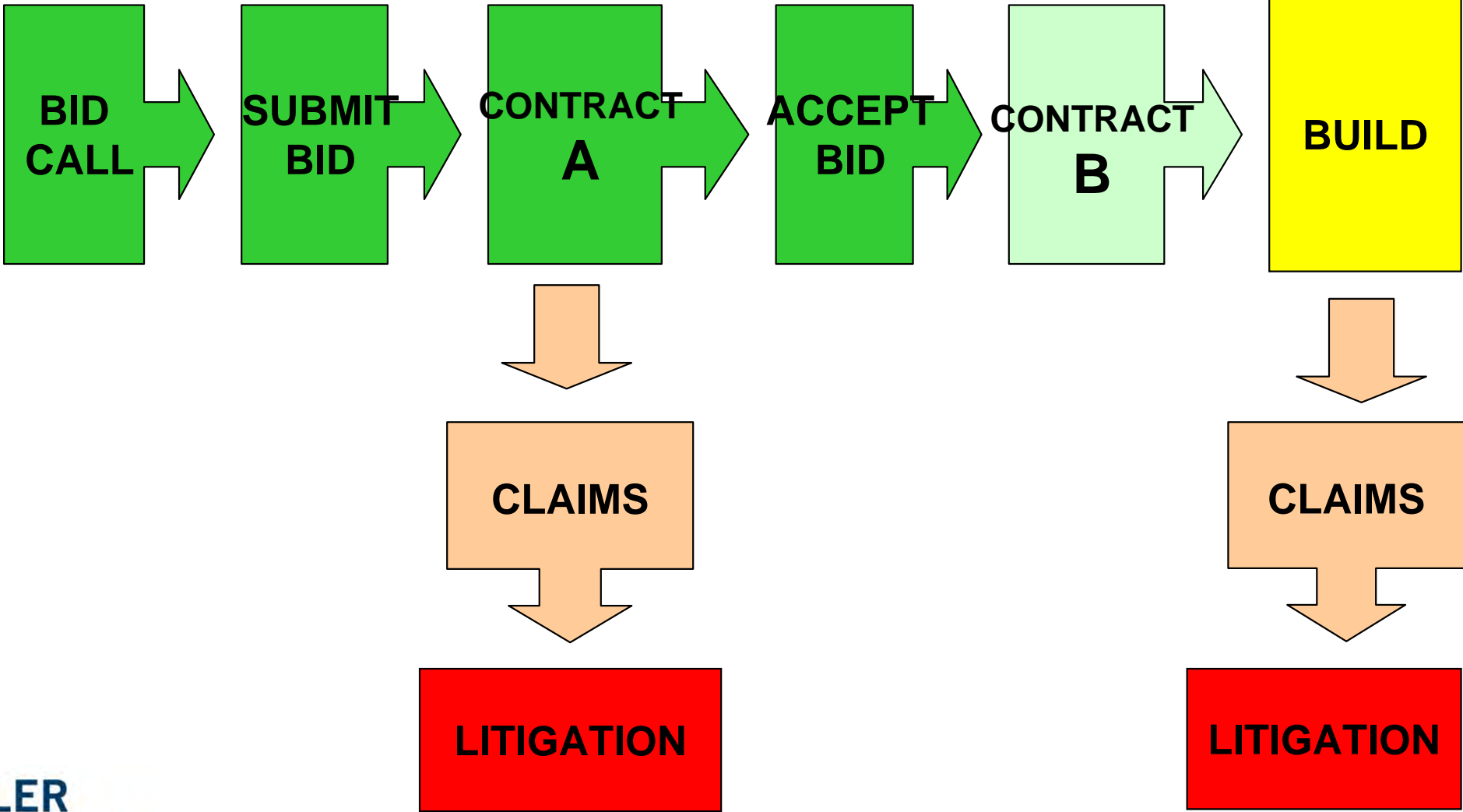
- R bids \$2.75 m: next bid \$3.3 m
- R price close to HM estimate
- R discovers \$750,000 mistake
- Mistake invisible in bid
- HM says sign: R says no
- HM grabs \$150,000 bid security
- R sues and loses at S.C.C.

HOW CAN THIS BE?

1981 – The *Ron Engineering* Revolution



THE BIG BANG





Recent Cases of Note

Recent Cases:

- MJB v. Defence Construction
- Martel v. Canada
- Double N v. Edmonton
- Elite Bailiff Services Ltd. v. British Columbia
- Tercon Contractors Ltd. v. BC
- Graham Industrial v. Vancouver
- Kinetic Construction v. Comox



Recent Cases of Note (con't)

MJB v. Defence Construction (SCC, 1999)

- DC calls bids for trenching
- Three different fills: one unit price
- MJB second: S low/two unit prices
- DC awards to S: thinks bid compliant
- MJB recovers damages in SCC
- SCC clarifies privilege clause:
 - Implied obligation to accept a compliant bid
 - No obligation to accept low compliant bid
- Belief in compliance no excuse

COMPLIANCE: WEAPON & SHIELD!



Recent Cases of Note (con't)

Martel Building v. Canada (SCC, 2000)

- M wants C to renegotiate lease
- Negotiations fail
- Bids called: M low
- Wide C leeway in bid evaluation
- “Fit Up” applied to all bids: card system, M only
- M now second: loses lease, sues

MARTEL: FAIRNESS IN FOCUS



Recent Cases of Note (con't)

Martel / Contract “A” Claim

- M claims breach of Contract “A” for:
 - Adding “Fit Up” (1000K)
 - Adding card system (60K)
- “Fit Up” in bid documents
- “Fit Up” on all bids: no foul
- Card system not in bid docs
- Card system on M only: unfair/uneven
- But, M second anyway: foul/no harm
- Fairness established
 - Implied term of Contract “A”
 - Exists unless excluded

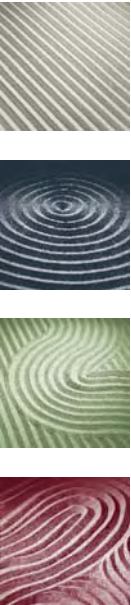


Recent Cases of Note (con't)

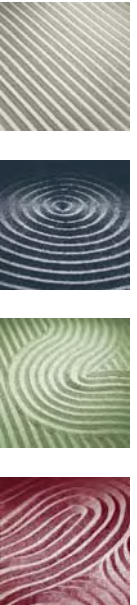
Double N v. Edmonton (City) (SCC, 2007)

- E calls equipment tenders in '86
 - Must be 1980 or newer
 - Provide equipment reg. # to E
 - Right to negotiate
- S bids
 - 2 machines as 1980 (not)
 - DN complains
 - S promises specified machines
 - E does not check registry
- E awards to S
- BUT - S uses older machines
- DN sues

SCC on Double N.



<u>Issues</u>	<u>Majority (5)</u>	<u>Minority (4)</u>
Ron	Affirm	Affirm
MJB	Affirm	Affirm
Martel	Affirm	Affirm
Compliant	Yes	No
Duty to Investigate (new)	No	Yes
Negotiation (new)	No	N/A
Award Contract B	Yes	No
Allow Use of Old Equipment (new)	Yes	Yes



Recent Cases of Note (con't)

Double N v. Edmonton (SCC 2007) (cont'd)

- Now What?
 - 21 years to 5/4 decision
 - Two solitudes
 - New features
 - Negotiation OK in Contract “A”
 - No duty to investigate
 - Contract “A” ends at award

WHO COULD PREDICT THIS?



Limitation of Liability Clause

Elite Bailiff Services Ltd. v. British Columbia (BCCA, 2003)

- RFP for bailiff services
- Owner evaluation system
 - Weighting scheme secret
 - Arbitrary result/unfair
- RFP includes limitation of liability clause
 - Recover preparation cost
 - No lost profit
- Elite wins but damages limited

CONTRACT “A” IS A CONTRACT



Exclusion of Liability Clause Tercon Contractors Ltd. v. B.C. (BCCA, 2007)

- RFP for highway construction
- Bidders must be pre-qualified
- Successful bidder joint venture
 - One member pre-qualified
 - Other member not pre-qualified
- Second bidder (T) claims breach of Contract “A”
- RFP includes exclusion of liability
 - Part of Contract “A”
 - No compensation of any kind



Exclusion of Liability Clause Tercon Contractors Ltd. v. B.C. (BCCA, 2007) Cont'd

- Tercon wins at trial
 - Exclusion too vague
 - Award is \$3.3 million
- Appeal court reverses trial
 - Parties on same footing
 - Clause “clear and unambiguous”
 - Don’t like? Don’t bid!

SCC WILL HEAR: MAJOR IMPLICATIONS

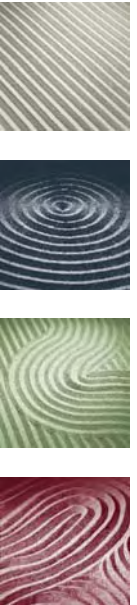


Recent Cases of Note (con't)

Graham Industrial v. Vancouver (BCCA, January 2004)

- Graham low bidder by \$5M
- Graham claims
 - Own \$2M error
 - Own Bid is non-compliant
- V. pleads discretion clause
 - “sole discretion”
 - “not material”
- CA finds non-compliant
 - “material” non-compliance
 - No Contract “A”

OBJECTIVE TEST: G WALKS



Recent Cases of Note (con't)

Kinetic Construction v. Comox (BCCA, Sept. 2004)

- Robinson low: Kinetic 2nd
- Bid documents say
 - Owner discretion
 - To retain “non-conforming” bid
- Robinson non-compliant
 - Kinetic complains
 - Comox awards anyway
- Discretion a term of Contract “A”
 - Kinetic compliant
 - So, Kinetic agreed with discretion in Bid docs

THE BID DOCS CREATE THE RULES!

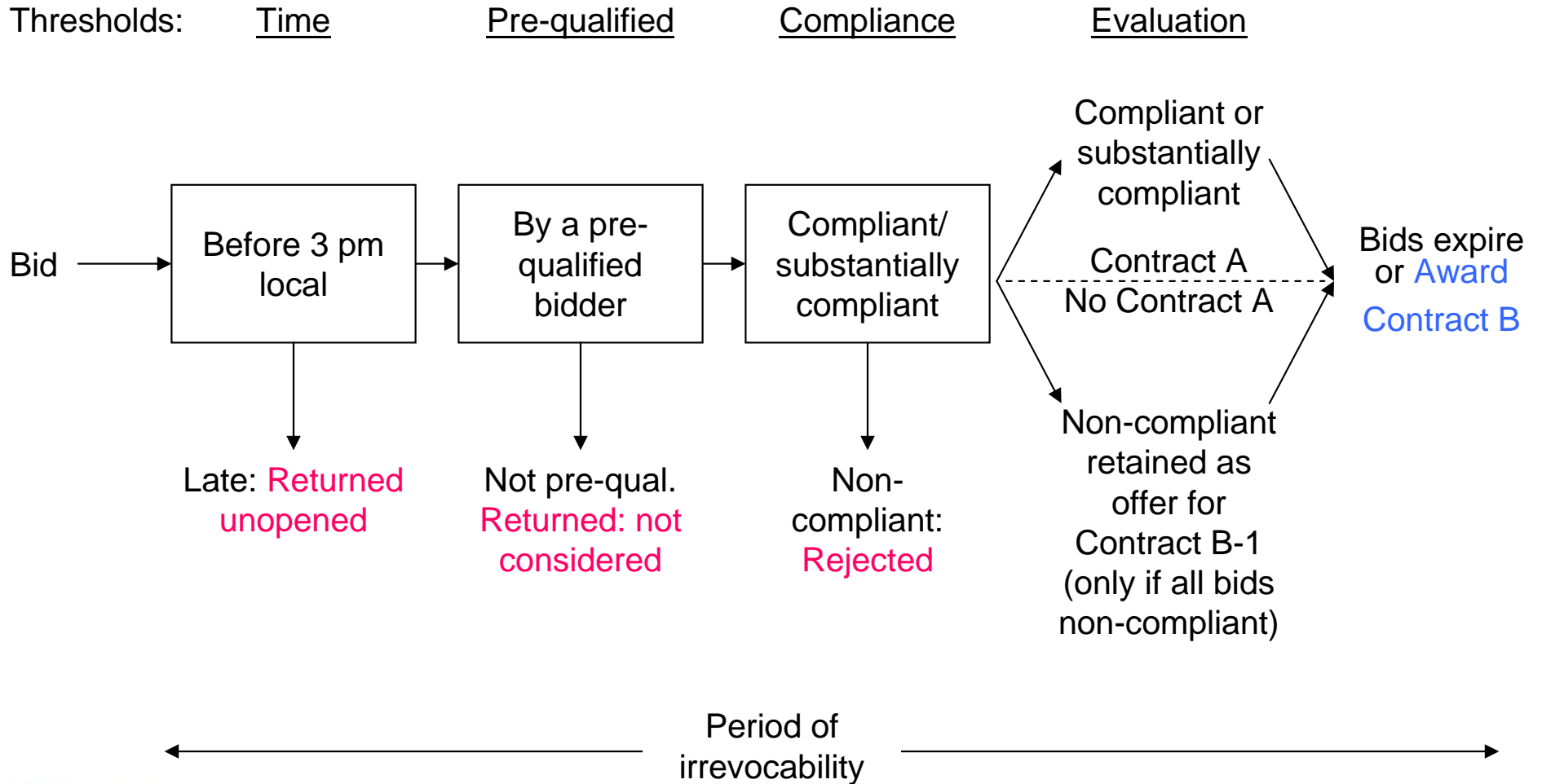


Compliance/Evaluation

OVERVIEW

- Bid process from stem to stern
- What is compliance?
- Evaluation/finer points

Bid Compliance and Evaluation Flowchart (The Road to Contract “B”)





Compliant/Non-Compliant

- Threshold issue
 - MJB rule
- Non-compliant examples (typically)
 - Late
 - Not pre-qualified
 - Unsigned (informal)
 - Mistakes/omissions (major)
 - Qualified (“yes, but”)
 - Not listing trades
- Substantial compliance (irregular)
 - Intention clear
 - No need to ask



Compliance

ON TIME

- What does “submit by” mean?
 - 3:00 (means up to 3:00:59)
 - 3:00:00 (means on the dot)
 - Say “before” (means up to 2:59:59)
- Whose clock?
 - Owner’s
 - Greenwich

Specify it!
- If late
 - Offer for Contract A expired
 - Return unopened: always



Not Pre-Qualified

- Assumes bidders pre-qualified by owner
- Term of Contract “A”
- Breach of Contract “A” if
 - Consider bid not pre-qualified
 - Unless change by addendum
- Watch out for:
 - Similar name: different corporation
 - Joint venture

RETURN UNOPENED (IF MARKED)!

DON'T EVALUATE IF OPENED!



Qualified

- Different than “pre-qualification”
- Not acceptance of Contract “A”
 - Counter offer rejects Contract “A”
 - Offer for different Contract “B”
- Tip off: bid says
 - “Yes” = compliant
 - “Yes but” = non-compliant

QUALIFICATION REJECTS CONTRACT “A”



Listing Trades

- Why mandatory?
 - Trades are 95% of job
 - Who does work matters
 - Stops bid shopping
- Watch out for
 - Own forces
 - Multiple trades
 - Blank
- Be sensible
 - Request only essential trades



Substantial Compliance

- Perfect bid is “rare”
- Old term: “irregular”
 - Minor error
 - Subtotal/total
 - Unnecessary information
- Judgment call (Double N)
 - Fix obvious
 - Fix irrelevant
 - Bid OK in spite

SUBSTANTIAL COMPLIANCE = COMPLIANCE



Evaluation: Finer Points Fairness

- Confirmed in Martel
 - Implied duty of fairness
- Fairness a term unless:
 - Disclaimed
 - No Contract “A”
- Outranks privilege clause
- Means (for example)
 - Award Contract “B” (not B-1)
 - Don’t change rules



Privilege Clause

- Lowest or any bid etc.
- Usual clause means:
 - Cannot accept non-compliant
 - Low bid no lock
- Privilege clause will not:
 - Excuse unfairness
 - Permit breach of Contract “A”
- Privilege clause will permit
 - “nuanced view of cost”
 - Process cancellation/expiry



Bids Over Budget / CCDC 23

- Most bid docs silent
- CCDC 23, 2005
 - Negotiate with low bidder and contract
 - Or, revise and bid to low 3
 - Or, re-bid

POST TENDER AUCTION: NOT!



Post Bid Negotiations

- Not over budget
- Compliant bids (Contract “A”)
- If bid docs silent:
 - Case law says no
 - Breach of Contract “A”
- If bid docs allow
 - No breach of Contract “A”
 - Game theory takes over

ALL NON-COMPLIANT? OK!



Drafting/Understanding Procurement Documents

OVERVIEW

- Contract “A” or not?
- Prequalification of bidders
- Creating bid documents

Strategic Question / “A” or Not?

- What suits your project?
 - creating pathway?
 - creating obligations?
- Flexible/not enforceable
 - RFEI
 - RFQ
 - RFP (true RFP)
 - Let’s talk/negotiate
- Structured/enforceable
 - Ordinary bid (Contract “A”)
 - RFP (like a bid)
 - Hybrid (RFP)

FLEXIBLE ≠ FREE LUNCH



Contract “A”: Why?

- Public owners
 - Mandatory policy
 - Competition required
 - Accountability trumps strategy
- Project suitable
 - Plans/specs available
 - Competition available
 - Comparison possible
 - Owner/team experience
 - No competing drivers

BIDS USUALLY RELIABLE



Contract “A”: BALANCE SHEET

Advantages

- Irrevocability
- Competition
- Apples to apples
- Bid security
- Commitment to Subs
- Nuance/privilege clause
- Substantial compliance
- Flexibility (some)
- Limit/exclude liability
- Dispute resolution

Disadvantages

- Obvious error
- Availability/market
- Qualifications (yes, but)
- Personal exposure
- Fairness/evenness
- Non-compliance
- Can be rigid
- Owner obligations
- Contract damages



No Contract “A”

Advantages

- Maximum flexibility
- Owner can walk
- Allows negotiation
- Explore solutions
- Test pricing
- Use creativity
- Low key

Disadvantages

- No commitments
- Bidder can walk
- Negotiation
- No time limit
- Very loose
- Tort damages
- No leverage

**CONSIDER HOW PROPONENTS
WILL BEHAVE**



Avoiding Accidents

- Know what you want
- If intent is non-binding, avoid:
 - Irrevocability
 - Bid security
 - Form of contract
 - Requesting an offer
 - Avoid “bid”, “tender”, “bidder”
- Either way
 - State intentions: be clear

CALL A ROSE A ROSE!



Pre-Qualification - Why Do It?

- Evaluate
 - Skill experience
 - Financials
 - Safety record
 - Claim history
- Fewer Contracts “A” on bid
- Bid evaluation simpler
 - Fewer bids/less work
 - Price: main focus
 - Lower risk of litigation
- Brisk competition (usually)

LOWER QUANTITY: HIGHER QUALITY



Pre-Qualification: Score Card

Advantages

- Simplifies bids
- OK by industry
- Focus on price
- Competitive
- Reduces bid disputes
- Better jobs
- No Contract “A”
- Follow Instinct

Disadvantages

- “Catch 22”
- Optics: closed
- Blacklist

**NO CONTRACT “A”:
MAXIMUM FLEXIBILITY!**



Consequences on Bids of Pre-Qual

- Low compliant bid wins subject to:
 - Bid is over budget
 - New bidder problem (not on list)
 - Nuanced view of cost
 - Privilege clause (MJB)

PRE-QUAL MAKES EVALUATION EASIER



Creating Instructions To Bidders

(Refer to Handout)

- Instructions to Bidders
 - Key to Contract “A”
 - Or, not
- Building Contract “A”
 - Refer to several clauses
 - All clauses important
 - Using “shall” and “may”
 - Just a flavour
 - What do you want?
 - Why?
 - Create a flow

Creating Instructions to Bidders

Compliance

- Intention to Create Contract “A” Section 1

- Intent to create Contract “A”
- Need for compliance
- $(O + A + C) - M = \text{Contract “A”}$



Creating Instructions to Bidders Bid Documents – Section 2

- Key to “bid contract”
- Key to Contract “B”
 - Scope of “Work”
 - Commercial terms (CCDC2)
 - Anticipate addenda
- Must be complete
- Creates defined terms



Creating Instructions to Bidders

Site Conditions – Section 3

- Location
- Available reports/studies
 - Limited reliance
- Duty to investigate
 - Not just geotech



Creating Instructions to Bidders

Bid and Performance Security - Section 6

- Bid security
 - Part of consideration
 - Expression of bona fides
 - Incentive/damage potential
- Agreement to Bond
 - Performance
 - L&M payment
- Both are key (“shall”)
 - Non-compliant if missing
 - Always reject

WATCH FOR BONDSMAN CONDITIONS



Creating Instructions to Bidders

Amendments to Bid Documents - Section 7

- Single point of contact
- No oral changes
- Report errors/discrepancies
- Addenda rule (RCM)
- Incorporate in Contract

IMPORTANT TO CONTROL INQUIRIES



Creating Instructions to Bidders

Bid Submission - Section 10

- Contents of sealed envelope
- “Before 2:30:00”: why?
- Local time
- No extra material
- Paper delivery only
- If late, offer has expired
 - Always return unopened

ELECTRONIC USED: STILL TRICKY!



Creating Instructions to Bidders

Bid Opening / Evaluation - Section 11

- Only pre-qualified
 - Return if not
- Single bid
 - Return
 - Agree to open: or not
- Privilege clause
- Irrevocable
- Base bid/adjusted
- Substantial compliance
- All non-compliant



Creating Instructions to Bidders

Contract Award - Section 13

- In writing
- 5 Working Days to:
 - Deliver bonds
 - Sign contract
 - Insurance
 - WCB
- Failure is breach of Contract “A”



Is That All There Is?

WE NEED TO CONSIDER SPECIALITY CLAUSES



Specialized Terms

- Limit or exclude liability? (Tercon)
- Alternative dispute resolution (ADR)
- Negotiation

**REMEMBER: CONTRACT “A”
IS A CONTRACT**



Creating Instructions to Bidders

Limiting Liability – Section 14

- Liability of bidder to Owner for loss and damage arising out of bidder's breach of "bid contract" shall be limited to lesser of actual loss suffered by Owner and the sum of \$ _____

LIMIT = BID SECURITY

- Liability of Owner to any bidder for loss and damage arising in tort or for breach by the Owner of the "bid contract" shall be limited to lesser of sum of \$ _____ and the reasonable cost to the bidder of preparing its bid

OR Tercon Clause (??!!)



Creating Instructions to Bidders

ADR Clause - Section 15

- What is ADR?
 - Negotiation
 - Mediation
 - Arbitration
- Contract “B” mandates ADR
- Contract “A” arbitration
 - Owner option
 - One arbitrator
 - No appeal
- Add other bidders



Creating Instructions to Bidders

ADR Clause – Section 16 cont'd

- Must be negotiation in IB to permit
- Consider subject matter
 - Unit prices
 - Scope of work
- Consider implications
 - How will bidders behave?
 - Do you really need it?

GAME THEORY KICKS IN



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