

Managing Procurement Risk and Winning Strategies before the CITT

The Canadian Institute Public Procurement Seminar
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Presented by:
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Added experience. Added clarity. Added value.

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MANAGING RISK IN PROCUREMENT OR ... BIDDING & TENDERING: WILL THE FUN EVER STOP?

MANAGING LEGAL RISK

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Overview of Seminar (Agenda)

1. “Setting the Table”
 - Refresher on Contract “A” / Contract “B”
2. Understanding Procurement Documents
 - Do you really want Contract “A”?
 - Other essentials

Overview of Seminar (Agenda) Cont'd

3. Specialized Terms

- Limitation or exclusion of liability
- Negotiation

4. Introduction to the CITT

- CITT mandate and powers

5. CITT Complaint Process

- Short Timelines

Overview of Seminar (Agenda) Cont'd

6. Case Example

– *Canada v. Enterasys Networks of Canada*

7. Pros and Cons

– When to go and when not to go?

8. Q & A

Setting the Table

Overview

Old fashioned bidding;

THEN

Ron Engineering: the “Big Bang”

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

- W submitted irrevocable bid
- BUT escalator page missing
- McM notices error, accepts bid anyway
- W refuses to sign: “not their offer”
- Decision - W not bound
- Irrevocability defeated by obvious error

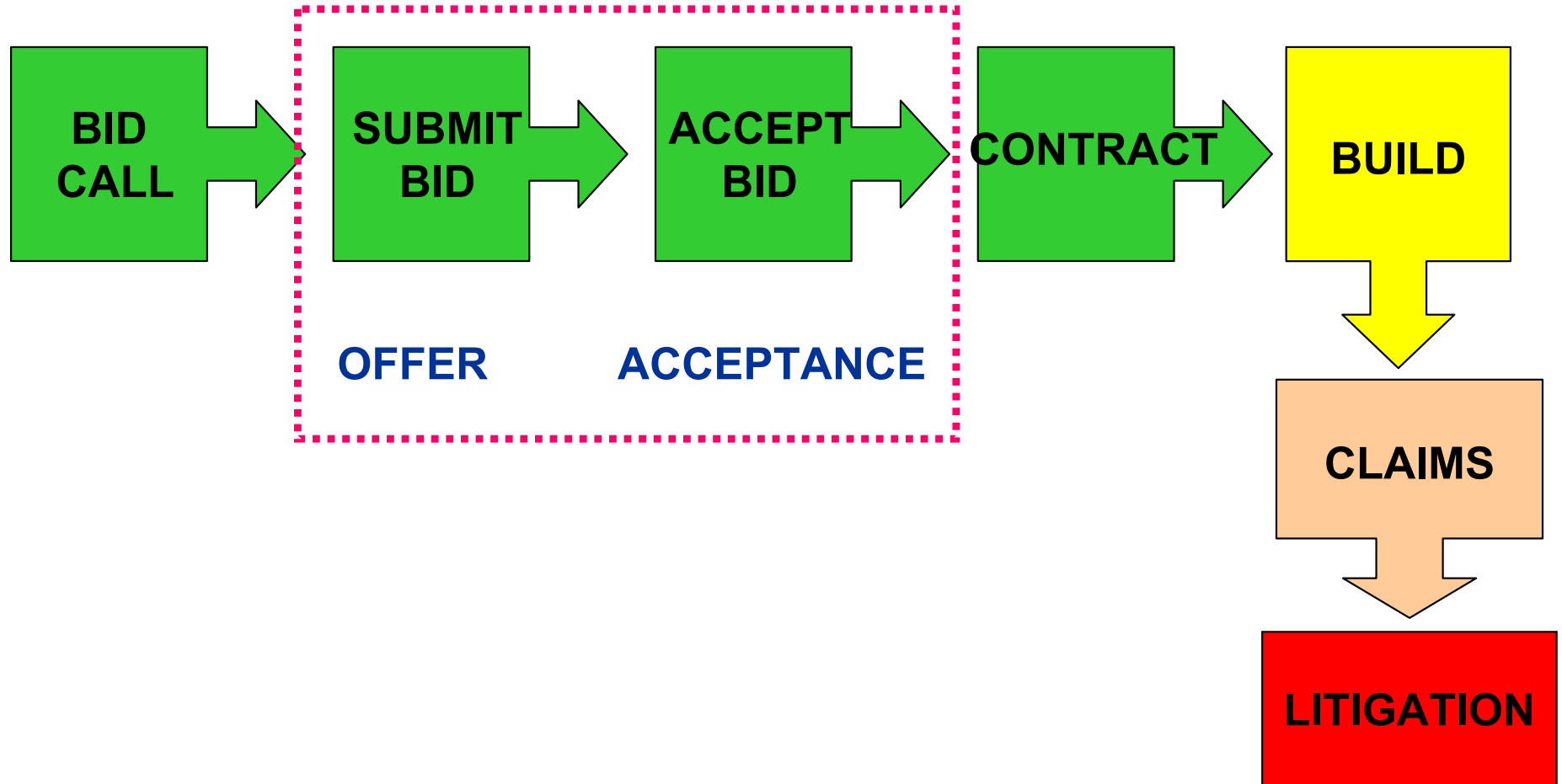
OLD LAW: GOOD LAW?

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

- K low by \$15,000: bid looks OK
- Irrevocable bid & bid bond
- Next day, K notices “hidden” error & withdraws bid
- Owner accepts bid anyway and K refuses to sign
- HELD: K not liable to owner
- Mistake after Closing BUT before acceptance
- Irrevocability defeated by “invisible” mistake

OLD LAW: A MAJOR BUSINESS PROBLEM

Old Fashion Bidding (Until 1981)

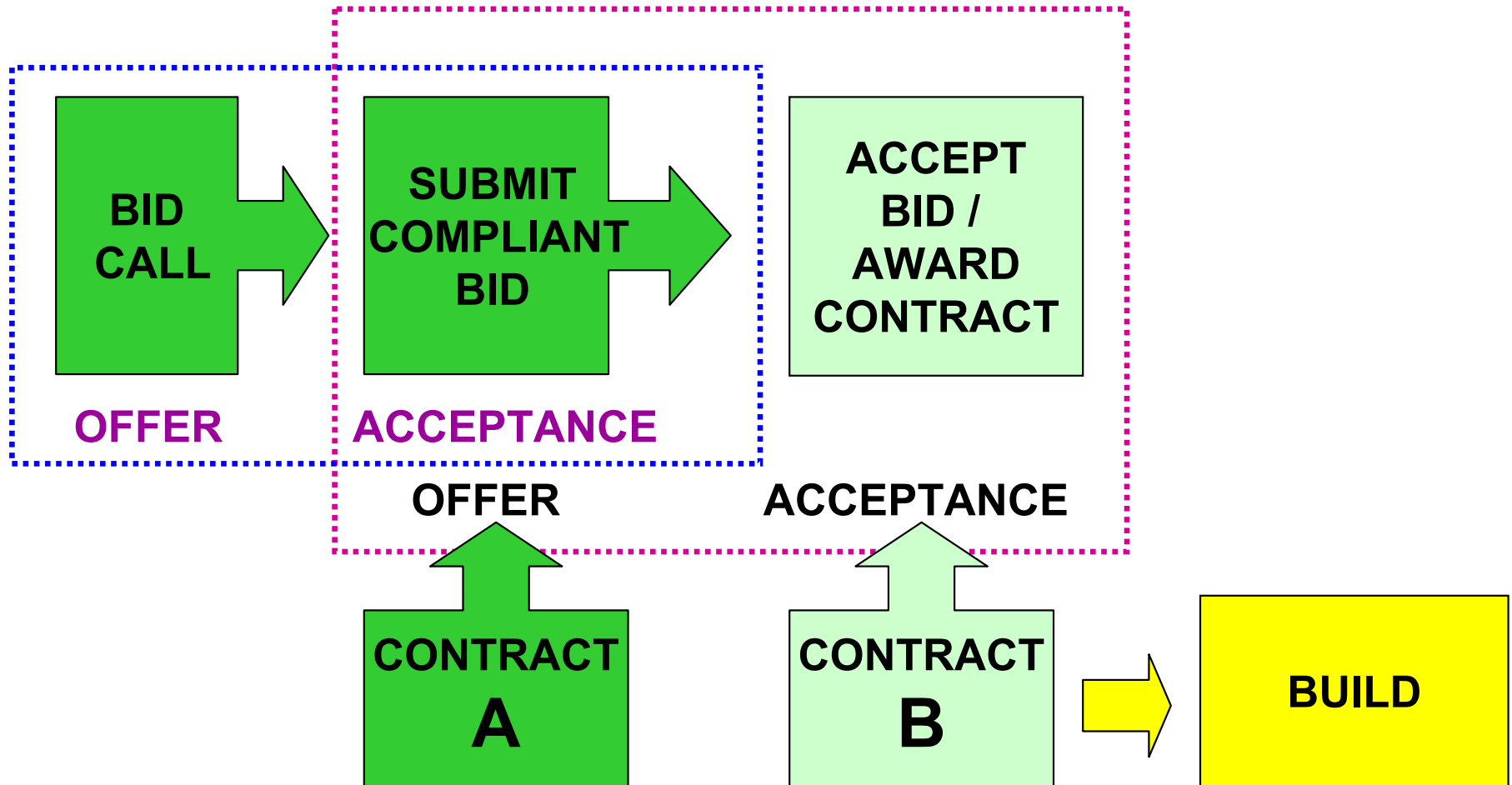


The Big Bang - Her Majesty v. Ron Engineering (SCC, 1981)

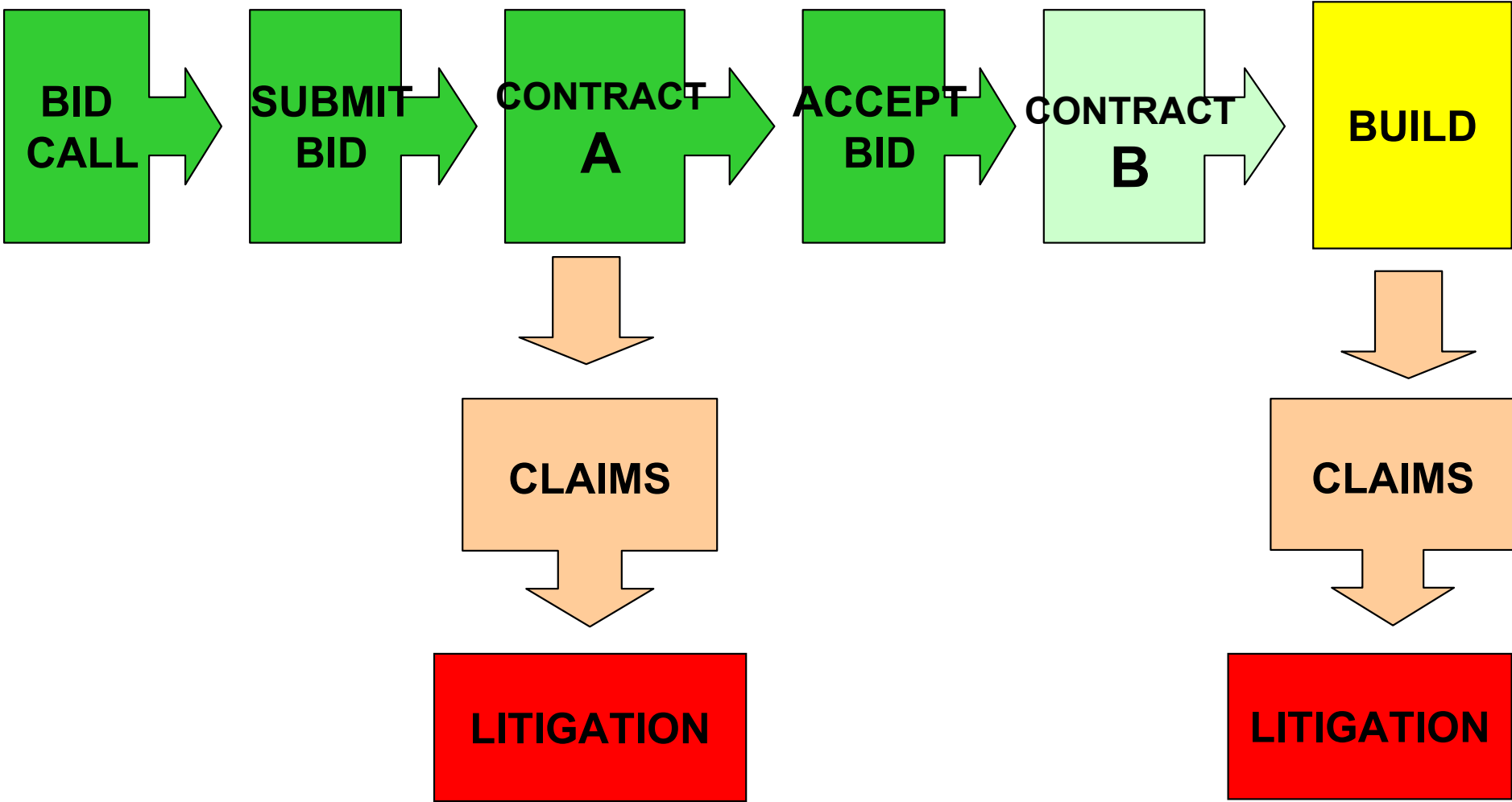
- Ron bids \$2.75 M (next low bid is \$3.3 M)
- Ron's bid close to HM's estimate
- BUT Post Closing - Ron discovers \$750,000 mistake
- Mistake is invisible (to HM)
- HM says Ron must sign anyway: Ron says no!
- HM grabs Ron's bid security (\$150,000)
- Ron sues - loses at SCC
- WHAT HAPPENED to Old Fashioned Bidding!

HOW CAN THIS BE? (Remember old Case Law!)

1981 – The Ron Engineering Revolution



THE BIG BANG



Big Bang Cases of Note

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

Big Bang Cases of Note (cont'd)

MJB v. Defence Construction (SCC, 1999)

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

NOTE – COMPLIANCE: WEAPON & SHIELD!

Big Bang Cases of Note (cont'd)

Martel Building v. Canada (SCC, 2000)

- M wants C to renegotiate lease
- Negotiations fail
- Bids called: M is low
- C gives itself wide leeway in bid evaluation
- “Fit Up” costs applied to all bids:
BUT card system costs, to M only
- M now second low

FAIRNESS IS IN FOCUS

Big Bang Cases of Note (cont'd)

Martel (cont'd) - Contract "A" Claim

- M claims breach of Contract "A" for:
 - Adding "Fit Up" (100K)
 - Adding card system (60K)
- "Fit Up" in bid documents
- So adding "Fit Up" on all bids: no foul
- BUT Card system NOT in bid docs
- So, adding card system on M only: unfair/uneven
- But, M still 2nd: even with foul - NO harm
- Fairness established
 - As Implied term of Contract "A"
 - Exists unless excluded

Big Bang Cases of Note (cont'd)

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

- E calls for equipment tenders in '86
 - Equipment must be 1980 or newer
 - Provide equipment reg. # to E
 - E retains right to negotiate
- S bids 2 machines as 1980 (not!!)
 - Double N complains
 - S promises to supply specified machines
 - E does not check registry to verify S promises
- E awards to S
- BUT - S uses older machines
- Double N sues

SCC on Double N.

<u>Issues</u>	<u>Majority (5)</u>	<u>Minority (4)</u>
Ron Eng (A & B)	Affirmed	Affirmed
MJB (compliant Bid)	Affirmed	Affirmed
Martel (fairness)	Affirmed	Affirmed
Compliance?	Yes	No
Duty to Investigate (new)	No	Yes
Negotiation (new)	No	N/A
Award Contract B	Yes	No

Big Bang Cases of Note (cont'd)

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

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

WHO COULD PREDICT THIS?

Big Bang Cases of Note (cont'd)

Elite Bailiff Services Ltd. v. BC (BCCA, 2003)

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

CONTRACT “A” IS A CONTRACT

Big Bang Cases of Note (cont'd)

Graham Industrial v. Vancouver (BCCA)

- Graham low bidder by \$5M
- Graham says
 - Own \$2M error
 - Therefore – its own Bid is non-compliant!!
- V. pleads discretion clause
 - V has “sole discretion”
 - Error is “not material”, so award!
- CA finds bid is non-compliant
 - “material” non-compliance
 - No Contract “A”!!

AN OBJECTIVE TEST: G WALKS

Big Bang Cases of Note (cont'd)

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

- Robinson low: Kinetic 2nd low
- Bid documents say
 - Owner has discretion to accept “non-conforming” bid
- BUT Robinson bid is non-compliant
 - Kinetic complains
 - Comox awards to Robinson anyway
- Discretion is a term of Contract “A”
 - Kinetic says only its bid is compliant
 - Court - BUT Kinetic agreed with discretion in Bid docs

THE BID DOCUMENTS CREATE THE RULES!

Exclusion of Liability Clause

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

- RFP for highway construction
- RFP says Bidders must be pre-qualified
- Successful bidder is joint venture
 - BUT ONLY one member was pre-qualified
 - Other member is new for RFP
- Tercon is 2nd low - claims breach of Contract “A”
- BUT RFP includes **exclusion** of liability clause
 - i.e., part of Contract “A”
 - Clause says NO compensation of any kind

Exclusion of Liability Clause (cont'd)

Tercon Contractors Ltd. v. B.C. (SCC) (cont'd)

- CA and SCC agree - Ministry was unfair
- ONLY Issue is applicability of exclusion clause
- SCC accepts that exclusion clause can be effective
 - Because both parties agreed!
 - BUT 5/4 Split (again!)
- Court: – THIS clause doesn't cover facts of unfairness
 - So, Tercon awarded damages
- SO – should Tercon clauses now be fashionable??
 - Public sector concerns
 - Private sector concerns

Privilege Clauses

- Lowest or any bid ... etc.
- Usual clause means:
 - Cannot accept non-compliant, BUT
 - Low bid not a lock
- Privilege clause will not:
 - Excuse unfairness OR
 - Permit breach of Contract “A”
- Privilege clause will permit
 - “nuanced view of cost”
 - Process cancellation

Post Bid Negotiations

- If bid docs say OK to negotiate with all Bidders
 - ONLY if compliant
- If bid docs silent on negotiations:
 - Case law says don't accept non-compliant bid
 - Breach of Contract "A"
- If bid docs allow negotiation with bidders
 - No breach of Contract "A"
 - Game theory takes over – BUT look out for fairness!

ALL NON-COMPLIANT? OK!

Drafting Procurement Documents

OVERVIEW

- To use Contract “A” or not?
- Prequalification of bidders
- Specialized Terms

Strategic Question / “A” or Not?

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

BUT - FLEXIBLE ≠ FREE LUNCH

Contract “A”: Why?

- Public owners:
 - Mandatory policy
 - Competition required
 - Accountability trumps strategy
- Project suitable for Contract A because
 - 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)
- 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

BUT CONSIDER HOW PROPONENTS WILL BEHAVE

Avoiding Accidents

- Know what you want
- If intent is non-binding, avoid Contract “A” indicia:
 - 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?

- To evaluate
 - Skill experience
 - Financials
 - Safety record
 - Claim history
- Fewer Contracts “A” during procurement
- Bid evaluation is 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”
(I can never get in)
- Optics: closed
- Blacklist

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

Consequences on Bids of Pre-Qualification

- 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**

Specialized Terms

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

REMEMBER:

CONTRACT “A” IS A CONTRACT



WINNING STRATEGIES BEFORE THE CANADIAN INTERNATIONAL TRADE TRIBUNAL: Procedure, Practice & Strategies

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I. Introduction to the CITT

- CITT Role
- Help to ensure that federal governments procurements are conducted in an open, fair and transparent manner.
- Whenever possible, maximizes competition

II. Procurements Covered by Trade Agreements

- Agreement on International Trade (AIT)
- WTO Agreement on Government Procurement
- North American Free Trade Agreement
- Canada-Chile Free Trade Agreement
- Canada-Peru Free Trade Agreement
- Canada-Columbia Free Trade Agreement

III. CITT Jurisdiction

- May commence an inquiry respecting complaints arising out of designated contracts made under the Agreement
- May make a determination as to whether or not the government procurement process has complied with regulations or the Agreements
- No tort/contract claims

IV. Short Time Limits Apply for Making a Complaint

- Complainant must file within 10 days after the day on which the basis of the complaint became known or reasonably should have been known
- May be extended to 30 days where the failure to file was due to circumstances beyond the complainant's control

V. The Complaint Must Be Complete

- The complaint must include all evidence
- Provides a basis for subsequent steps (e.g., the filing of a Government Institution Report (GIR))
- Include:
 - Complainants identity
 - The designated contract
 - The government institution
 - The file if requested

V. The Complaint Must Be Complete (cont'd)

- Address of the complainant for delivery of notices and communications
- All information and documents relevant to the complaint in the complainant's possession

VI. Timeframe for a Report and Reply

- Government institution has 25 days to respond by filing a GIR
- Complainant then has 7 days from date it receives the GIR to provide comments on the GIR or request that the case be decided on the basis of the existing record

VII. Protection of Confidential Information

- Information is only disclosed to the CITT, the government institution and legal counsel
- May use special processes to keep information in a confidential record

VIII. The Inquiry/Hearing

- CITT has powers of a superior court of record (e.g. respecting compelling attendance and inspection of documents)
- Decisions most often based entirely on written submissions
- A hearing is rare:
 - Parties can request it or CITT can hold a hearing on its own initiative
 - An oral hearing will be held where it is necessary to resolve an issue of credibility or to receive expert evidence

IX. The Decision

- Generally, within 90 days from date of complaint
- Parties can request “express option”
 - Decision then within 45 days
 - Parties must provide reasons for this option
- Decision will never be made more than 135 days from date of complaint

X. If Complaint Valid...

- Remedies? (not limited to)
 - the issuance of a new solicitation;
 - the re-evaluation of the bids;
 - the designated contract be terminated;
 - the designated contract be awarded to the complainant; or
 - the complainant be compensated by an amount specified by the CITT
- CITT must consider all the circumstances

X. If Complaint Valid (cont'd)

- Only a recommendation
- If government institution subject to the remedy recommendation declines to comply, it must provide reasons

XI. Complaint Dismissed

- CITT may dismiss a complaint where:
 - the complaint has no valid basis;
 - the complaint does not concern a procurement by a government institution;
 - the complaint breaches the applicable time limits; or
 - the complainant fails to file with the CITT the necessary information in support of its complaint

XII. Costs and Judicial Review

- Winner may get nominal costs
- The CITT decision is subject to Federal Court review
- May appeal the CITT's determination to the Federal Court of Appeal

XIII. Summary

- Advantages – short time frame
- Disadvantages – lack of discovery
- Strategies:
 - Ensure that the complaint falls within the CITT's jurisdiction
 - Act quickly
 - Include all relevant evidence in complaint

XIII. Summary (cont'd)

- Consider an interim order delaying the award of a contract
- File a reply where permitted
- Protect confidentiality
- Request an oral hearing where appropriate
- Avoid the express option

XIV. Conditions for Inquiry/Order

- CITT must decide whether it will conduct an inquiry into the complaint based upon the existence of the following jurisdictional facts:
 1. The complainant must be a potential supplier
 2. The complaint must concern a designated contract
 3. The complaint must disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable Agreement

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