

**MILLER
THOMSON** LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

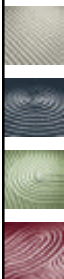


DON'T WASTE YOUR BID!

**Bill Pigott
Paul Sandori**

**OGCA 6th Annual
Symposium
April 24th, 2009**

1



Agenda

Part 1: Contract A – a Refresher

Part 2: Instructions to Bidders – brand new
Guidelines

Part 3: Subcontractor bids

Part 4: Questions & Answers

2



PART 1 Refresher

3

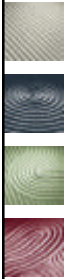


The Landscape

Glossary of Terms

- Bid/tender
- RFP
- “Bid Documents”
- Compliant/formal
- Non-compliant/informal
- Substantially compliant/irregular
- Pre-Qualified/GC or Trade
- Qualified Bid

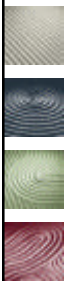
4



Contract Formation

- Intent to contract
- $(O+A+C) - M = \text{Contract}$
- Where:
 - O = Offer
 - A = Acceptance
 - C = Consideration/value
 - M = Mistake

5



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**

6

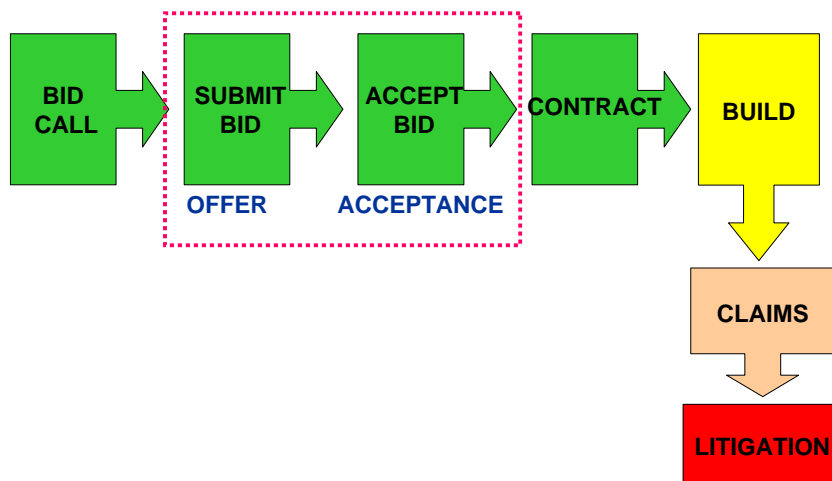
The Big Bang: Her Majesty v. Ron Engineering SCC, 1981)

- 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?

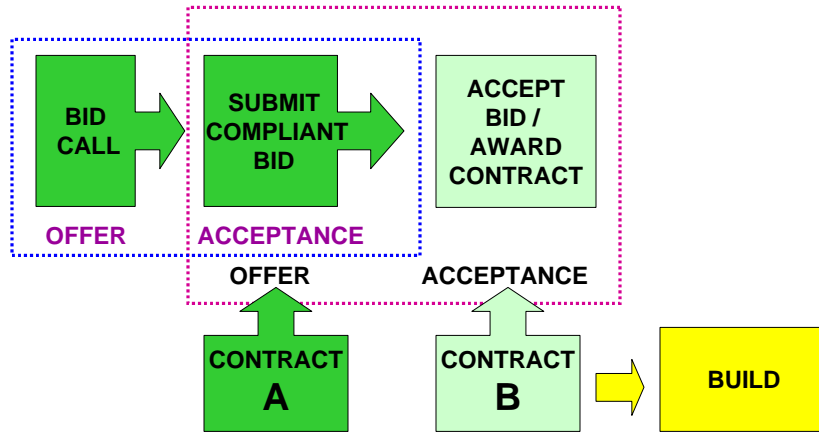
7

Bidding Until 1981



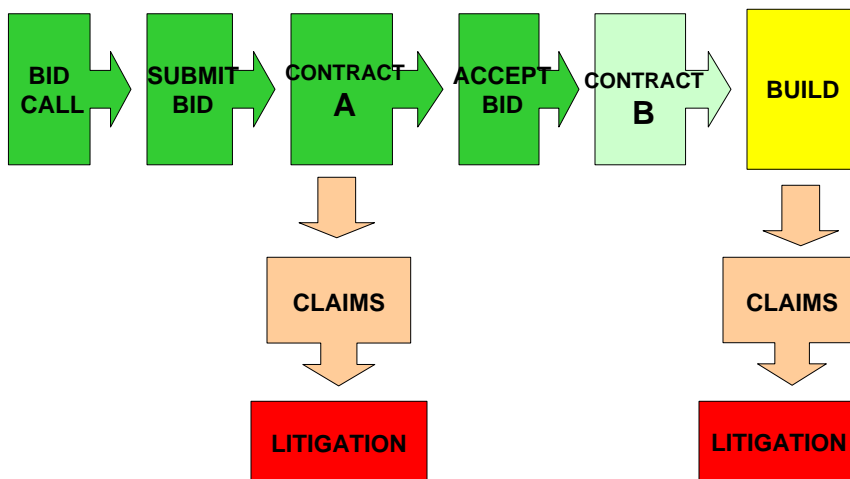
8

1981 – The *Ron Engineering* Revolution

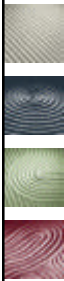


9

THE NEW WORLD ORDER



10

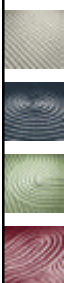


The “Privilege” Clause

- Around since mid 19th century
- “the lowest or any tender not necessarily accepted...”
- Where does this fit in Contract A?
 - Owner wildcard?
 - Or, subject to conditions?

**SETTLED (MORE OR LESS) AFTER
18 YEARS!**

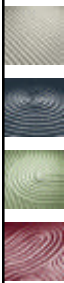
11



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

12

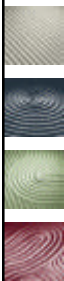


MJB v. Defence Construction (SCC, 1999) Cont'd

- SCC clarifies *privilege clause*:
 - Implied obligation to accept a compliant bid
 - No obligation to accept low compliant bid
- Permits “nuanced view of costs”
- Overriding right to cancel process
- Belief in compliance no excuse

COMPLIANCE: THE KEY ISSUE!

13

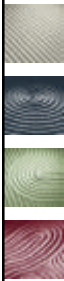


Martel Building v. Canada (SCC, 2000)

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

MARTEL: FAIRNESS IN FOCUS

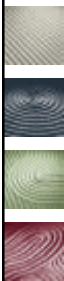
14



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

15



Martel / Contract A Claim

- Card system on M only: unfair/uneven
- But, M second anyway: foul/no harm
- Fairness established
 - Implied term of Contract A
 - Exists unless excluded
- Martel’s folly
 - Breach of Contract A proven
 - Did not cause loss (no damage)

16



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

- E calls equipment tenders in '86
 - 1980 or newer
 - Provide E equipment reg. no
 - Right to negotiate
- S bids
 - 2 machines as 1980 (not)
 - DN complains
 - S promises specified machines
 - E does not check registry

17

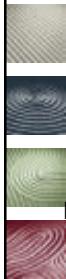


Double N v. Edmonton (City) (SCC, 2007) Cont'd

- E awards to S
- S uses older machines
- DN sues E

18

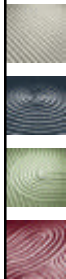
SCC on Double N.



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

19

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



- Certainty? Really?
 - 21 years to 5/4 decision
 - Two solitudes
 - New features
 - Negotiation (in Contract A)
 - No duty to investigate
 - Contract A ends at award

20



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
- Tercon says breach of Contract A

21



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

- RFP includes exclusion of liability
 - Part of Contract A
 - No compensation of any kind
- Tercon wins at trial
 - Exclusion too vague
 - Award is \$3.3 million

22



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

- Appeal court reverses trial
 - Parties on same footing
 - Clause “clear and unambiguous”
 - Don’t like? Don’t bid!

ON APPEAL TO THE SUPREME COURT OF CANADA

23



Watch for Privilege Creep!

- Remember Contract A
 - Is a contract
 - Terms in bid documents
 - Will change to adapt to law
- Discretion Clause (MJB antidote)
 - O may waive mistakes
 - O may accept non-compliant
 - Best interests language

24



Watch for Privilege Creep! Cont'd



- Omnibus clause (Martel antidote)



- All of discretion clause



- No duty to be fair

- Right to negotiate

- Liability excluded/limited

IF YOU BID, YOU HAVE ACCEPTED

25



Nice, if you win ...



- Contractors like being able to win their lost profit if their bid is, in their and the court's opinion:



- Unfairly passed over in favour of a non-compliant bidder, or



- If a compliant bid is wrongly rejected as non-compliant

- The rewards, if the bidder wins, are attractive:

- The profit on the lost job

- No work - no risk!

26



Not So Nice!



- Owner wins:
 - Accepts mistaken bid
 - Reaps windfall
- Mistaken bidder claims:
 - My bid is non-compliant
 - I can walk!



27



Very Unpleasant!

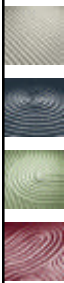


- Bidder invests money and effort preparing a bid:
 - But there is some error in bid
- Owner is conflicted:
 - Bid is low but...
 - Is it compliant or not?
- Should he accept bid and be sued by other bidders?
- Should he reject bid and be sued by low bidder?



BAD FOR OWNER, BAD FOR BIDDER

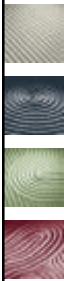
28



TERRIFYING!!

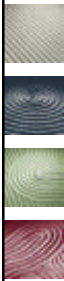
- SCC upholds *Tercon* exclusion clause
- Exclusion clauses in every bid!
- Bidders basically **SCREWED**:
 - Contract A still alive but...
 - Owner has off-ramp
 - **Bidder still bound...!**

29



PART 2 Instructions to Bidders

30

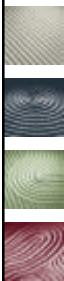


Instructions to Bidders

- Assess: Contract A or not?
 - Affirm or deny?
 - If silent, check for:
 - Irrevocable
 - Firm offer
 - Bid security
 - Agreement to bond
 - Firm submittal time
 - Work scope defined
 - Sign contract if win

**ABSENT DENIAL, CONTRACT A
FOR SURE**

31



Treat “Contract A” Like A Contract

- Follow common sense rules
 - Read it!
 - Double-check math
 - Assume owner will enforce
- Avoid obvious bid spoilers
 - Conditional bid bond
 - Conditional agreement to bond
 - Multiple trades
 - Bid qualifications

32



The IB Sing Along



- Find instructions
- Prepared by OGCA/MOHLTC/OAA
- Model document
- Will cover several sections
 - Take to SN
 - Read it with you
 - Provide case or comment

LET'S HOPE THIS WORKS!

33



Instructions to Bidders

1. Compliance



- Sn. 1.1
 - “The bidder acknowledges that by submitting a compliant bid,...”
- Few IB state this
- Contract A can be negated by:
 - Expressed contrary intent
 - Major error/condition/late
- Clarifies the process for
 - Owner and bidder
 - Arbitrator/judge

34



Instructions to Bidders

2. Bid Documents

- Sn. 2.1
“The following documents form the basis of this bid process (the “Bid Documents”):...”
- Much more than IB and forms
 - Drawings and specifications
 - Addenda
 - Ts & C of Contract
- Scott Steel example

35



Instructions to Bidders

3: Conditions of the Place of Work

- Sn. 3.3:
“Before submitting a bid, investigate the Place of the Work to fully ascertain existing conditions,...”
- Survival in contract
 - GC6.4
 - Failure to investigate limits claims
- Cardinal Construction v. Brockville
 - Careful inspection made
 - Incorrect information provided by owner
 - Due diligence by contractor demonstrated

36



Instructions to Bidders

5. Prequalification

- Sn. 5.3
“Bids received from bidders which have not been pre-qualified **shall** be returned...”
- Prequalification matters because
 - Failure is non-compliance
 - Owner acceptance is unfair
- Owner list should be short
 - GCs (max 6)
 - M&E
 - Change by addendum

**REJECTION IS MANDATORY (“SHALL”) FOR
FAILURE TO COMPLY**

37



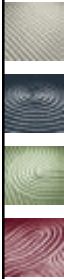
Instructions to Bidders

6. Bid and Performance Security

- Sn. 6.5
“Bids not accompanied by the required bid security and the required agreement to bond **will be** declared non-compliant and rejected.”
- Emerging bond issues are
 - Conditions as to financing
 - Conditions as to warranty
 - Condition = no bond

**MANDATORY ITEM (“WILL BE”):
PREVENTS CONTRACT A**

38

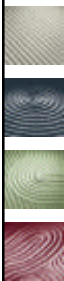


Instructions to Bidders

9. Bid Completion

- Sn. 9.4
“Bids that are not originals, are unsigned, improperly signed...**may** be declared non-compliant.”
- Gives owner discretion where
 - Minor incomplection
 - Minor condition
 - Minor item not initialed

39



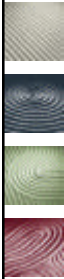
Instructions to Bidders

9. Bid Completion Cont'd

- Owner won't exercise discretion where
 - Unsigned
 - Not original
 - Major condition/incomplection
 - Scope (T&M dewatering)
 - Rejects SGCs

**OPENS THE DOOR TO
SUBSTANTIAL COMPLIANCE**

40



Instructions to Bidders

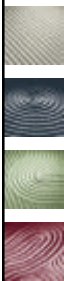
9. Bid Completion (Continued)

- Ron Engineering as authority

“It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission...
It would be otherwise...if a material fact were omitted from the tender, or if the meaning of the tender was unclear...”.

FOUNDATION FOR SUBSTANTIAL COMPLIANCE

41



Graham Industrial v. Vancouver (BCCA, January 2004)

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

OWNER ARGUES SUBSTANTIAL COMPLIANCE

42



Instructions to Bidders

9. Bid Completion

- Sn. 9.6
“...a bidder shall complete and submit (list of subcontractors), naming the Subcontractors and suppliers which the bidder will employ... Failure...to list...or the listing...of more than one...**may** result in the bid being declared non-compliant.”
- Discretion to the owner where
 - Pricing unavailable
 - Market disruption

SUBSTANTIAL COMPLIANCE? SOMETIMES

43



10. Bid Submission

- Sn. 10.3
“Bids must be received before ? ...local time...”
- A bid that is late is non-compliant because
 - Offer for Contract A expired
 - Breach of Contract A to admit
- Submission “before 2:00:00” means:
 - Delivery at 1:59:59 ok
 - Delivery at 2:00:00 late

**ALWAYS RETURN LATE BIDS
UNOPENED!**

44



12. Bid Opening and Evaluation



- Sn. 12.8



“Should the Owner receive no compliant bids, the Owner, in its discretion, may rebid...”



- Full field non-compliance may mean
 - Some valid offers some not
 - Scope or terms may be different
 - Negotiation often preferable to re-bid

45



15. Limit of Liability



- Sn. 15.1

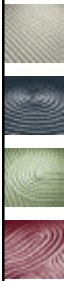


“The liability of the bidder to the Owner for loss and damage arising out of the bidder’s breach of the “bid contract” shall be limited...”



- Limit is lesser of
 - Value of bid bond
 - Actual loss to Owner
- Rationale for limit is
 - Reduce bid bond amounts (sometimes)
 - Lower bidder risk
 - Balance (more or less)

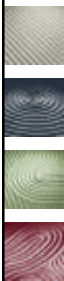
46



15. Limit of Liability

- Sn. 15.2
“The liability of the Owner to any bidder for loss and damage arising in tort or for breach by the Owner of the “bid contract” shall be limited...”
- Limit is lesser of:
 - Actual loss to bidder
 - Costs of bid preparation
- Owner limit means
 - Less enthusiasm for lawsuits
 - Compensates bidder for time and cost

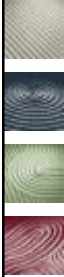
47



16. Disputes

- Sn. 16.1
“In the event of a dispute arising in connection with this bid process..., the Owner may refer the dispute to a confidential binding arbitration...”.
- Only Owner can convene arbitration
- Bidder has traditional remedies

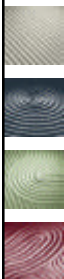
48



PART 3

Subcontractor Bids

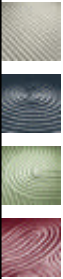
49



How Contract A Works

- The key cases
 - When you have Contract A
 - How you get Contract A
 - What Contract A means to GC and Trade

50



Naylor v. Ellis Don (SCC, 2001)

- Bid depository used for hospital job
- Pre-bid, N advises ED of union problem
- ED says bid anyway
- N “carried”/named
- OLRB ruling: N’s union a problem
- ED gets extension of N price post OLRB
- O awards to ED with N “carried”
- ED finds G to take work at N price

FIRST SUBTRADE CASE TO SCC

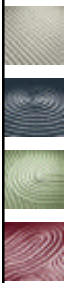
51



Naylor v. Ellis Don (Cont’d)

- SCC applies Ron Engineering
- Contract A formed when N “carried”
- N access to bid documents key
- Terms of Contract A:
 - Subcontract not automatic
 - ED “must” award to N when O awards
 - If O objects to N, ED excused
 - With “reasonable objection”, ED may drop
 - No bid shopping post closing
 - Award: extended

52

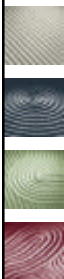


Naylor v. Ellis Don (Cont'd)

- ED claims union as excuse
- Court: union issue not “reasonable”
- Contract A breached: ED loses appeal

ESTABLISHED C/S CONTRACT A RULES

53



Gloge Heating v. Northern Construction (Alberta, 1986)

- G bids by phone: last minute
- G “carried” by N
- G discovers error: advises N
- O refuses bid adjustment
- N gets job: G refuses subcontract
- Costs N \$341,299
- Contract A makes G bid irrevocable

CONTRACT A INCLUDES IRREVOCABILITY

54



When and How to Get Contract A With Subtrade

- Contract A arises with sub when
 - Head bid creates Contract A
 - Sub has access to bid documents
- You have Contract A with sub
 - When name in bid
 - When use price in bid
 - Bid depository or not
- You can drop named sub if
 - Have good reason
 - Owner rejects sub

55



What Are terms of Contract A

- If bid successful, GC must:
 - Communicate award to sub
 - Not bid shop/negotiate
 - Not switch subs
- Carried sub must:
 - Hold price for extra day or two
 - Perform for amount bid
 - Not negotiate

**SUB AWARD MUST BE DONE
PROMPTLY**

56



Consequences of Breach of Contract A

- Contractor pays sub reasonable O&P
- Sub pays contractor cost of replacement

DAMAGES MUST BE REASONABLE!

57



David J. Harvey Holdings Inc. v. Hercules Food Equipment Ltd. (Div Ct, 2006)

- GC carries Hercules in prime bid
 - Tells Hercules carried
 - GC wins
 - Tells Hercules “working together”
 - Sends PO days later
- Hercules later refuses: busy
- At trial, no Contract A
 - Scope of work vague
 - Time of work uncertain
 - Bid not irrevocable
 - Naylor not argued

58



David J. Harvey Holdings Inc. v. Hercules Food Equipment Ltd. (Div Ct, 2006) Cont'd

- On appeal, GC fails to
 - Introduce bid documents
 - Show Contract A conditions
 - Avoid same fate as trial
- Lack of bid documents doomed GC
 - Vague scope of work
 - No trigger for Naylor
 - Div. Ct upholds trial judge

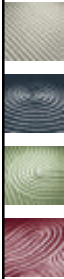
WILD CARD!

59



Part 4 Questions and Answers

60



**MILLER
THOMSON** LLP

Barristers & Solicitors
Patent & Trade-Mark Agents



DON'T WASTE YOUR BID!

**Bill Pigott
Paul Sandori**

**OGCA 6th Annual
Symposium
April 24th, 2009**

61