

Construction Bidding & Contract Award Best Practices

Presented by

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Principles of the Law of Competitive Bidding

- Contract A, the “bidding contract” and Contract B, the actual construction contract
- express language in the Bid Documents
- A bidder’s principal legal obligation under Contract A

Contract "B"

The "Construction Contract"

Contract "A"

The "Bid Contract"



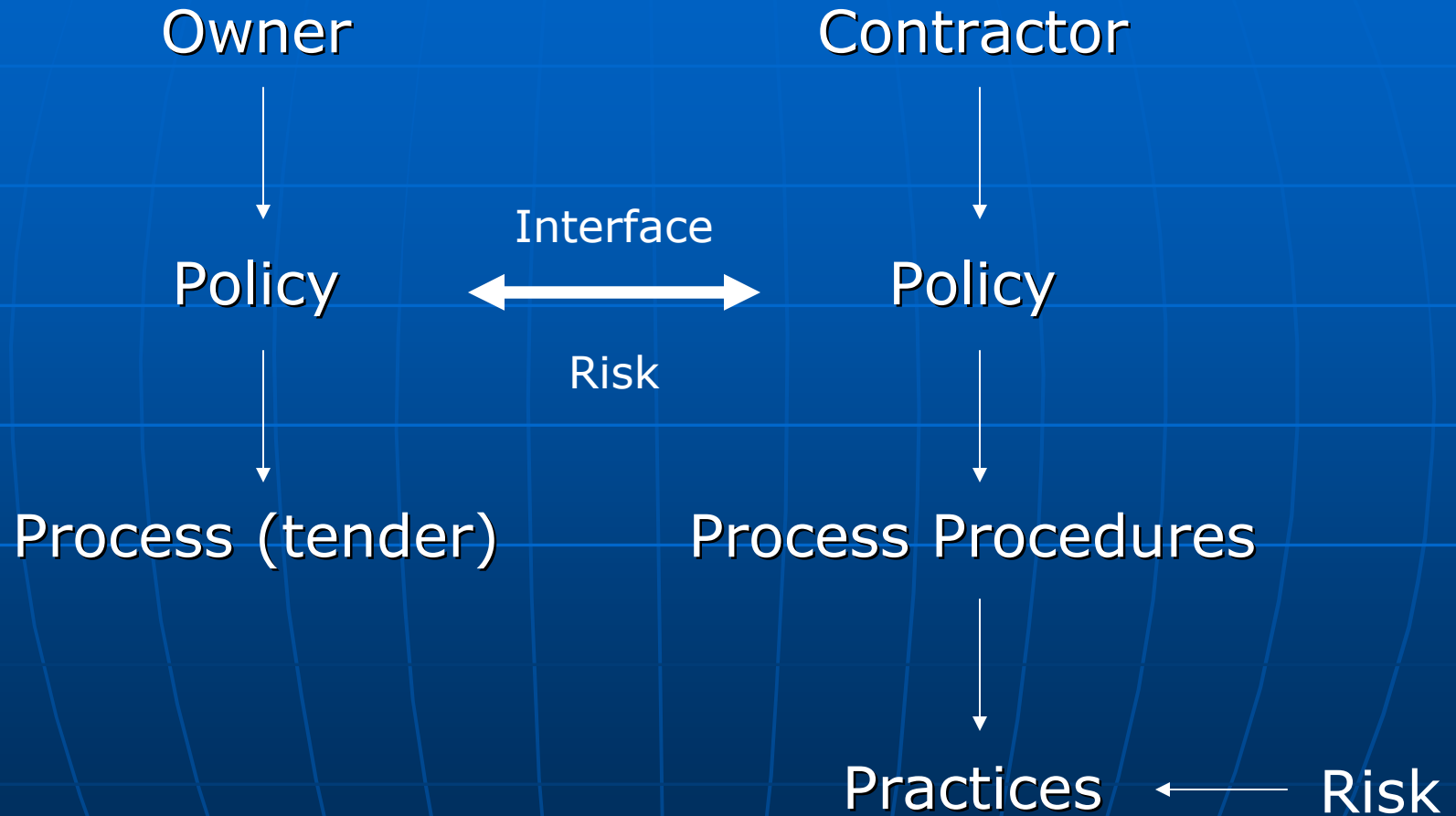
The Owner's Principal Legal Obligations

- All information relevant to the bid call must be disclosed to the bidders
- All criteria that will be applied in the selection process must be disclosed to the bidders
- Any preferences (for example, in favour of local bidders) must be disclosed

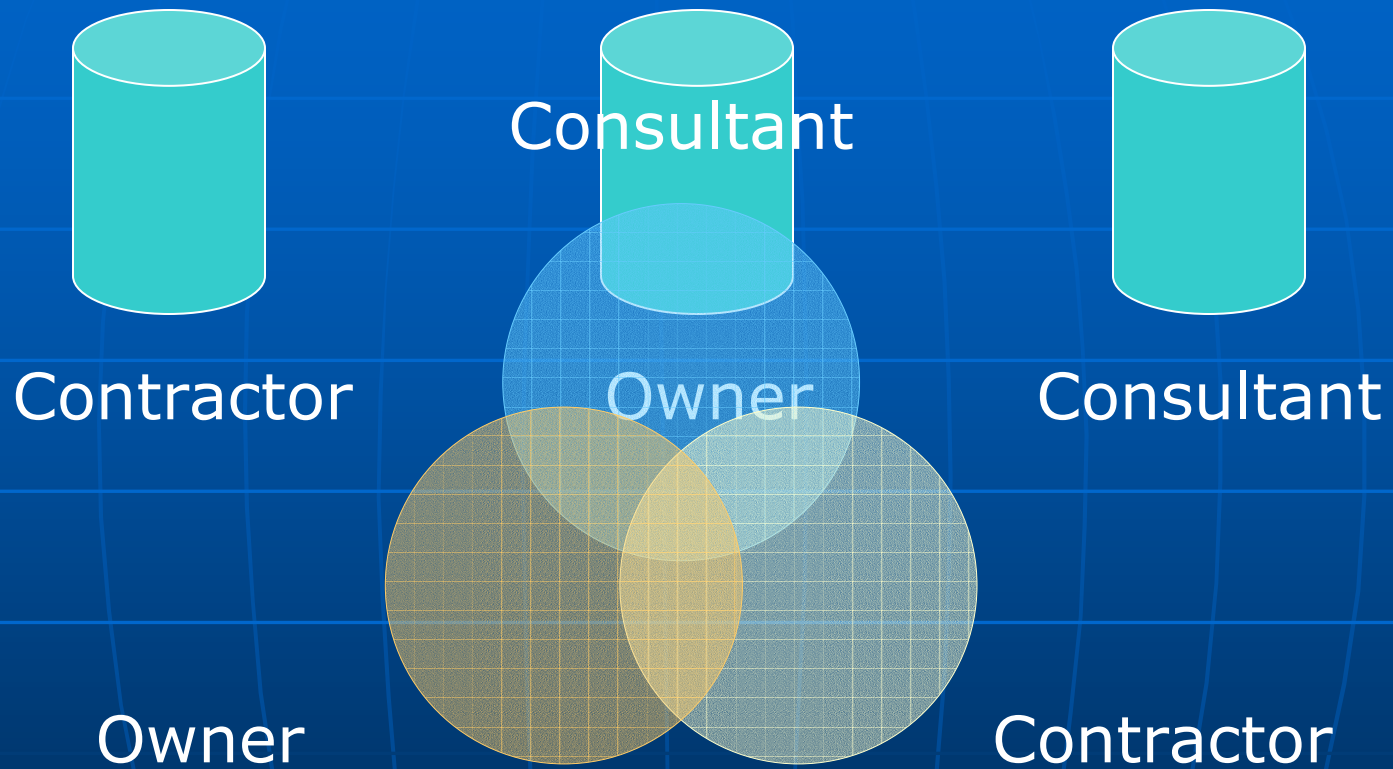
MJB Decision (per Construction Law Letter)

- MJB Enterprises v. Defence Construction went to Supreme Court
- Established a number of principles for owner
 - cannot bid shop
 - cannot award to non-compliant bidder
 - can determine award criteria
 - cannot award based on undisclosed criteria
- Other factors
 - ensure information in tender package is accurate
 - do not allow a bidder to amend tender after closing
 - act fairly, do not give one bidder unfair advantage
 - protect integrity of tendering system

The Process



The Project



Procurement

Choosing the right process

- Project Delivery Model
 - Lump Sum / Fixed Price / Stipulated Price
 - Construction Management
 - Design-Build
- Procurement Method
 - Tender vs. Request for Proposal (RFP)
- Avoid mismatching the Model and the Method or the “mine” might go off!

Prequalification

- Exercise of narrowing the field of “combatants”
- Prequalification guidelines are available
 - Developed by industry
- Criteria used my impact tender
 - Ed Brunet and Associates v. Queensway Carleton Hospital (Ont. 2002)
- Legal status of Prequalification process is uncertain ... could be the next battleground!

Problems

1. Amount of information required at the closing
2. Supplementary General Conditions
3. Poorly worded clauses
4. Late bids
5. Addenda
6. Informal tenders

Calling for Bids Solicitation

INVITATIONAL

- Pre-selected
- Prequalified
- Addresses quality and performance issues
- Use of CCDC 11 – Contractors Qualification Statement form
- Subcontractor and suppliers can also be prequalified

Process

- Preparation of tender / contract documents -- drawings & specifications
- Request tenders
 - public
 - prequalified / invited
- Bid period - prepare estimate
- Bid submission
- Acceptance / Contract Award

Calling for Bids Solicitation

OPEN

- Publicly advertised
- Traditional medium – newspapers
- Today – electronic
- Local association plans rooms
- Agreement on Internal Trade

Tender Form

- Keep it simple
- Alternative, separate, unit prices increase chance of error and complicate evaluation
- List only Major Subtrades (4 - 6) in tender, obtain others later
- Clearly define grounds for acceptance or rejection, i.e. will / may be disqualified for failure to list subtrades
- Will schedule be considered?
- Will separate prices be considered?

Contract Forms

- CCDC 2-1994 Stipulated Price Contract
- Written by Architects, Engineers, Owners, Spec Writers, and Contractors with legal advice
 - Nationally recognized standard
 - Amendments create uncertainty and / or conflict with other articles
 - changes which shift risk increase costs, discourage bidders and / or lead to conflict / litigation, i.e. subsurface conditions, hazardous or toxic substances, safety, liquidated damages, etc.
- Other standard forms available for Construction Management, Cost Plus, etc.

Instructions to Bidders

- Clear instructions as to the method, form and completeness of the Bid
- Bid, Performance and Payment securities required
- Time and place for receiving Bids
- Locations and conditions of availability of Bid Documents for General Contractors and Subcontractors
- Number of copies of the Bid necessary (one copy only is recommended)
- Details of signing, sealing and witnessing
- Instructions concerning unit, itemized, alternative and separate prices
- Instructions stating the method of amending a Bid prior to Bid closing time

Instructions to Bidders

- Owner's legal name and address
- Consultant's name, address and telephone number
- Location of the Work
- Information and governing regulations respecting Bid Depositories when they are to be used
- Identification of the sealed opaque envelope containing the Bid; giving name and full address of bidder and name of project
- Instructions stating the method of proposing substitutions or alternatives so that bidders do not inadvertently qualify their Bids

Bid Form Requirements

- Two key points that all should be aware of:
 - The Bid Price is submitted in both words and numbers. Identify what governs.
 - Bid Signing
- “authorized signing authority”.

Risk Allocation

- Does the tender contain an appropriate risk allocation?
- Is the risk being borne by the person best able to do so?
- Transfer of risk to contractor results in
 - bidders increasing their prices to cover it
 - no bidders
 - bidders will submit but will not price the risk
- Companies who regularly accept the latter on other jobs create risk for the owner on the current job.

Bidding Period

- Usually four weeks is sufficient
- Make adequate number of documents available
 - 2 sets to each general contractor
 - sets to local construction associations
 - possible set to major trades - Mech. & Elect.
- Addenda during bid period might extend closing date

Two-Stage Bid Closing

- Why?
 - Keeps process focused
 - Avoids errors that can lead to bidder disqualification
 - Use to obtain supplementary bid information such as unit prices, subtrade list
- How it works
 - After the initial closing, an agreed upon interval is allowed.
 - 2 – 48 hours

Unit, Alternate, Itemized or Separate Prices

- Unit
 - Prices that can be used to adjust the contract price for an addition or deletion to the work
- Alternate
 - prices that may be substituted on the base bid as an addition or deduction
- Itemized
 - items included in the base bid price for information purposes
- Separate
 - prices for items to be added to the Base Price if selected by the owner.

Receiving Bids

- Designate time and place
 - i.e. before 2:00:00 p.m. EST October 31, 2001
 - at Reception Desk
 - I. Design Architects
 - 17 New Street
 - Bytown, Ontario L3Y 8M0
- Designate clock to be used for time
 - Reset time early, if necessary
 - Bidders coordinate with that clock in advance
- Late bids should be returned, **UNOPENED**
- Public opening immediately after closing

Examples of Irregularities

- Late bids
- Execution of Agreements to provide performance securities -- original ink signature missing from agreement to provide performance securities
- Tender Deposits
 - Signature of Bidder and / or Bonding Company missing
 - Bid security not in the form and amount specified
- Failure to return the complete written contract documents, as identified in Bidder Check List (Document 00413)
- Tender documents which suggest that the Tenderer has made a major mistake in calculations of Tender

Contract Award

- Award promptly
- Award to lowest bidder unless there are “powerful” reasons to do otherwise
- Follow CCDC 23 recommendations if over budget
- Avoid bidding or Post Bid Addendums
- Notify all bidders of results, return bid bonds

Post Bid Addendum

- Changes contained in post bid should be negotiated with the lowest compliant bidder
- Creates a second round of competitive bidding or auction
- Whether intended or not, this is an abuse of the tendering process
- Not in the best interests of the owners, contractors or consultants.

Bid Depository

- Designed to collect and register subcontractor bids
- Usually submitted prior to tender closing
- Managed or operated by local industry associations

Surety Defined

A written agreement where one party (Surety) obligates itself to a second party (Obligee) to answer to default of a third party Contractor (Principal) in failing to perform specified acts within a stated time.

Surety is not Insurance

Surety

1. No risk transfer
2. Three party agreement
3. Fee
4. Risk depends on Contractor ability
5. "0" losses expected

Insurance

1. Risk Transfer
2. Two Party Agreement
3. Premium
4. Risk depends on law of large numbers
5. Losses expected.

How to avoid Contractor Failure

Owners avoid Contractor failure by:

- Prequalification
- Contract Wording
- Corporate Guarantee
- Security
- ✓ Letter of Credit
- ✓ Surety Bond – our focus

Why Surety?

Tier 1

Protects project Owner from financial loss due to contractor failure to perform construction contract per terms and conditions.

Tier 2

Protects General Contractor from financial loss due to subcontractor failure to perform construction subcontract per terms and conditions.

Types of Surety Bond

Bid/Tender Stage

- Bid Bond, Agreement to Bond/Consent of Surety

Contract Award

- Performance Bond
- Labour & Material Payment Bond

Other Contract Bonds

Maintenance Bond, Advance Payment Bonds, Supply Bond, Release of Holdback Bond, Lien Bonds

Agreement to Bond/Consent of Surety

- Form of Letter of Undertaking signed by Surety.
- No payment or penalty obligation.
- Surety agrees to furnish a Performance Bond and if required a Labour and Material Payment Bond on behalf of bidder if tender accepted. Usually within 30 days of award.
- Suits must be filed within a year.
- Usually (but not always) in addition to bid bond.
- Can broaden a bidder's liability beyond bond, not standardized.

Obligee Rights in Surety

As examples, obligee can recover:

- Reasonable cost of completing work.
- Balances owing to Subcontractor(s).
- Lost rental income – delay.
- Legal fees – defense of lien claims.
- Work/Defect rectification costs.
- Lost Profits
- Liquidated Damages.

Resources:

- CCDC 23 - A Guide to Calling Bids & Awarding Contracts
- Standard Industry Practices
- Professional Advice (Architect / Engineer / Contractor)
- Standard Industry Contract Forms - CCDC 2-1994 Stipulated Price Contract

Consequences:

- **Goldsmith on Canadian Building Contracts by Carswell,** lists and discusses some 2,100 Court decisions in the construction industry.
 - Many involve the tendering process or contract award
 - Others result from contract terms, conflict, performance, payment, etc.
- **Construction Law Letter by Butterworths**
 - Started in 1984, 6 issues per year, reporting on 6 - 8 significant cases per issue.
- **"Qualified" bids / fewer bids / no bids**

Electronic Tendering

- Must be efficient, cost effective and equally accessible to all Canadian suppliers
- Provide access to a wide range of information to ensure competitiveness
- Some public sectors, Federal, Municipal and Provincial, moving towards it.

Electronic Tendering

■ advantages

- equalize opportunities for contractors, subcontractors and suppliers
- eliminates the physical elements necessary to submit a tender
- faster exchange of information
- simplifies the process
- reduces paper
- may eliminate the need to qualify tenders
- greater control of documents
- more cost effective

Electronic Tendering

■ disadvantages

- Industry is not ready, many companies not set up to handle
- different systems used by different owners makes it impossible for bidders to compete.
- Cost to upgrade and obtain necessary software, licensing, anti-virus, and security are high
- Security an issue, protection of tender before, during and after the bidding process
- Integrity of the host website
- Formality of the tender process, can it preserve the formality, certainty, fairness and confidence of the system?
- Ability to deal with documents under seal, and bid security

Thank You -- We welcome Questions / Comments



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