

Procurement and Contract Law Seminar

for

Alberta Municipal Supervisors Association

March 18, 2015

Presented by Paul Stocco



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AGENDA

1. Tendering Law
2. Requests for Proposals
3. Construction Contracts



Questions

At any time or at the end



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1. The First Earthquake

Ron Engineering

▪ **Hallmarks of Contract A**

- terms of the tender call are very important
- owner can include any terms it wants
- the bid is irrevocable once it is submitted
- If bidder fails to sign contract, bid security is forfeited



- tender documents dictate which bids are acceptable—failure to comply means bid is non-compliant
- if bid terms are too onerous-don't bid
- no bid shopping or negotiation is allowed after the tender closing
- integrity of the tendering process must be protected to the extent that the law of contract allows





- **Contract B**

- the actual construction contract
- awarded to bidder that best responds to requirements of tender call



2. Second Earthquake

- ***MJB*** and ***Martel***
 - implied obligations on an owner
 - implied obligations can be read into Contract A based on custom and usage
 - duty of fair and equal treatment



- only compliant tenders can be accepted
- implied duties can only be defined with due regard to express terms of tender call
- damages for breaching this duty include loss of profit and costs of preparing the tender



3. The Third Earthquake

Tercon and ***Rankin Construction***

- conflict between implied duties and express terms
- duty of fairness and equal treatment vs. ability of an owner to define the terms for the tender call
- can an owner's privilege clause be used to accept non-compliant bids?



4. Tendering Checklist

1. Closing Time and Timing Device
2. Review plans, specifications, and addenda
3. Review tender form and draft contract
4. Signature and Seals
5. Review Privilege Clause and Evaluation Criteria



6. Bid bond and consent of surety
7. Insurance, WCB, CoR
8. No negotiation after tender close
9. Beware non-compliant tenders
10. Keep records



B. Requests for Proposals



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1. Hallmarks of RFP's

- Tender and RFP at ends of the procurement spectrum
- Some overlap
- “Labels don’t count”
- But proper terminology is important!



1. Hallmarks of RFP's

- Negotiation is the key!
- Parties are free to withdraw
- Flexibility vs. Irrevocable tender



1. Hallmarks of RFP's

- Owner's information package provided to firms that are pre-qualified by RFEI
- RFP sets out general requirements of the owner's concept
- Details are left to the proponent



1. Hallmarks of RFP's

- Draft construction contract or other agreement is the subject of negotiation
- RFP contains a privilege clause and evaluation clause
- Owner picks who it will negotiate with



1. Hallmarks of RFP's

- One proposal per party
- Minimum requirements
- Proposal must remain open for a period of time
- Security deposit is optional
- Closing date for proposals



C. Construction Contracts



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1. Written Contracts

- Eliminate disagreements over parties' responsibilities
- Preferred over oral contracts
- Creates record of a construction project
eg. site instructions, meeting minutes, inspections,
daily reports, schedule changes



1. Written Contracts

- Importance of paper trail
- If it is important enough to say, then it is important enough to put in writing!
- Pictures



2. Scope of Work/Change Orders

- Largest area of dispute on construction project
 - a. Owner's perspective on change orders:
 - Drawings should be complete
 - Contractor makes \$ on changes



2. Scope of Work/Change Orders

- Not willing to pay for extras at end especially if project over budget!
- b. Contractor's perspective on change orders:
- Should not bear risk of poorly drafted plans and specs
 - Financing of changes until the end of the job



2. Scope of Work/Change Orders

c. Solutions:

- Don't leave resolution of change orders to end of project!
- “Extra set of eyes” at the start
- Requirement for written authorization
- Dispute resolution mechanism



3. Penalty/Bonus Clauses

a. Penalty Clauses

- Clause can't really impose a penalty for delayed completion
- Must be reasonable
- Must bear some relation to actual costs incurred due to delay



3. Penalty/Bonus Clauses

- Concurrent delay
- Owner caused delay

b. Bonus clauses

- Similar to penalty clauses
- Savings shared on sliding scale



4. Force Majeure

- Party is relieved of contractual obligations in whole or in part
- Specified event triggers clause
- Event is beyond party's control
- No measure could have avoided the event



4. Force Majeure

- Onus on party relying on clause
- How long are contractual obligations suspended?
- What about direct losses/damages?
- What about consequential losses/damages?



5. Default and Termination

- Notice of default
- Particulars required
- Notice of termination
- Remedies upon termination



6. Dispute Resolution

a. Mediation

- Good faith negotiations
- Full and frank disclosure
- Works if parties want it to work
- Not required to attend



7. Limits on Liability and Limitation Periods

- Beware liability limited to maximum amount
- Contractual time limit for advancing a claim
- Exclusions for certain risks/claims
- Court has final say on enforceability
- Alberta ***Limitations Act*** limits right of action to 2 years



Different Contract Forms

1. Design Build Contract

CCA 14 (2000)

CCA 15 (2000)

www.cdbi.org





Questions?



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Contact Information

Paul V. Stocco

pstocco@brownleelaw.com

(780) 497-4884



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