



BULLETIN

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A Fine Day to be a Lawyer

Who needs ambulances now? The Ministry of Finance has just opened the door to all kinds of work—legal work, that is.

A week or so ago the aforementioned Ministry released the Capital Asset Management Framework guidelines, outlining the manner in which various levels of government should manage their capital assets and handle procurement issues. It is a permissive document, long on guidelines and short on requirements. The document 'suggests' rather than 'demands'. It is nurturing, not patriarchal. It basically allows the public owner free reign, particularly when it comes to tendering procedures. Speaking from a lawyer's perspective it has a lot of potential!

Why, you ask, is this so? First of all one of the most stabilizing achievements in public construction in the past decade was the development of, **and requirement to use**, a standard provincial contract. It was not a perfect contract, and certainly it caused its own share of headaches over the years, but it provided contractors, design professionals and owners alike with something they all knew and understood. Use of a standard provincial construction contract was something all industry stakeholders fought for in the years prior to its inception because it solved many problems. Gone (*for the most part*) were the onerous, one-sided, ingeniously-drafted-so-as-to-be-incomprehensible contracts with their 40 page supplemental conditions and with them the opportunity for duelling lawyers (*assuming the contractor had the funds to*

fight) prior to contracts being executed. Gone was the excessive red tape and business impediment that comes with having a different contract and a different process to review and comply with on every project worked upon. Now, however, with the release of the new guidelines there is no longer any requirement to use a standard document, only a polite suggestion that the CCDC2 might be a good choice and the promise of some **examples** of supplemental conditions to come in the future. Forget simply fixing any problems with the existing contract, or **requiring** the use of CCDC2 with defined supplemental conditions. It is so much simpler to toss the baby out with the bath water. For the lawyer looking to bill some hours—it's time to hone up the contract drafting skills.

Many contractors simply cannot afford to hire a lawyer up front to review and make recommendations on every new contract the various public owners' lawyers will now so carefully draft. However, there will surely be ample opportunity for legal action down the road. The contract will likely protect the public owner from as much risk as possible and in the process will load all manner of liability on to the contractor. It is equally likely that the contractor will sign anything since he needs the work. Historically such poorly weighted contracts have resulted in more conflicts between the parties and have led to increased litigation. Also, if the contractor goes bankrupt from the liabilities that have been

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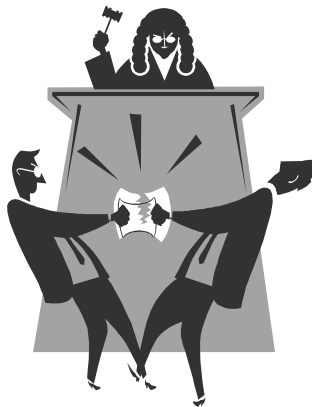


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A Fine Day to be a Lawyer (cont')

imposed upon him, there could easily be some work to do mopping up the potential third party lawsuits. Time to hone up the litigation skills.

The Capital Asset Management Framework has thrown out more than the requirement to use standard documents. It has also thrown out the requirement to use Bid Depository. Again the legal beagle smells work. Historically, Bid Depository was developed and implemented across Canada to combat the level of illegal bid-shopping tainting the tendering process. Today, the purpose of a bid depository is to present a fair and equitable process for the reception of bids. A uniform bidding system prevents last-minute bids, incomplete bids, unqualified bids, the shopping of bids, and decreases the risks to the prime contractors while protecting the owner's investments. Nevertheless the Ministry of Finance, in its wisdom, has decreed that



the use of Bid Depository is now optional. Will it still be used? Possibly. It is somewhat like imposing an optional curfew on a teenager. The sensible teenager (*if such a creature exists*) will likely observe it. Just how much money would you like to bet on that happening? Along with the optional use of Bid Depository, there are now more options on choosing a delivery method for the project, on whether or not to pre-qualify, on pretty much every aspect of the procurement process. So--welcome to the wild west of construction procurement. Can this be anything but good news for a lawyer in need of work?

The Ministry of Finance has created a reasonable and oh-so-pretty framework from which the various levels of government are free to pick and choose ideas at will. Be fair, it quietly admonishes, be transparent, be efficient--**but do whatever the heck you want**. And who will the losers in this free-for-all likely be? Why, the taxpayer of course! Who else foots the bill for public construction blunders?

Speaking of Standard Documents....

CCDC is the process of developing standard Construction Management Documents.

CCDC 5- "Construction Management Contract Between Owner and Construction Manager as Agent" will provide for construction management in its purest form, whereby all contracts with trades are between Owner and trades. A working draft will be released in December 2002.

CCDC 5A - "Construction Management Contract Be-

tween Owner and Construction Manager as Constructor" provides for the construction manager who will construct the building as a contractor but who will be a part of the management team at or near the beginning of the project. A working draft is expected to be released in the spring of 2003.

CCDC 17- "Owner/Trade Contractor Contract (under a construction management setting). A working draft to be released in the summer of 2003.



BC Construction Association

210-174 Wilson St., Victoria, B.C.V9A 7N6

Phone: 250-475-1077

Fax: 250-475-1078

Email: bcca@bccassn.com



The mission of the BCCA is to provide leadership and excellence in the representation of and service to British Columbia's construction industry