

CONTRACTOR ALERT

‘ONEROUS BIDDING CONDITIONS’

Project: Renovation Work at Hart Haven, Dagg Road, Prince George
Owner: BC Housing Management Commission
Bidding Authority: BC Housing Management Commission

The BC Construction Association (BCCA) has reviewed the bidding documents and strongly advises contractors to consider the risks associated with the terms listed below. All opinions stated below are those of the BCCA and reflect the publicly-stated policies of BCCA, which can be found online:

1. Invitation to Tender (ITT) , 2.4. Stages of Bid Evaluation, Stage I – Mandatory Requirements

Risk to Contactor: The Owner has the right to waive this consideration under *ITT 3.5.1 BC Housing's Reserved Rights* (refer to separate reference for 3.5.1 herein). It is not a “Mandatory Requirement”.

2. Invitation to Tender, 2.4. Stages of Bid Evaluation, 2.4.2 Stage II

Risk to Contactor: The document refers to ‘scoring of the pricing submitted’, however the documents do not provide scoring with a list of weightings. It would appear contractors are scored under *ITT 3.5.1 BC Housing's Reserved Rights* (refer to separate reference herein):

- ITT 1.7 Canadian Free Trade Agreement (therein referenced) requires that all weightings for scoring be provided in the solicitation document.
- It is a requirement under the BC Capital Asset Management Framework (CAMF) to which BC Housing is subject, that any considerations under *ITT 3.5.1 BC Housings Reserved Rights* should be managed first through a Request for Qualifications, not an RFP.

3. Invitation to Tender, 2.4. Stages of Bid Evaluation, 2.4.2 Stage II

Risk to Contactor: States that BC Housing will undertake an ‘economic analysis of the alternative bid prices’. This indicates that alternative prices would be considered in the evaluation of the Bids, which is not fair or transparent. A preference could be used for the selection of one favoured bidder.

4. Invitation to Tender, 3.5 Reserved Rights, Limitation of Liability and Governing Law.

Risk to Contactor: These are overarching rights which should be part of a Pre-Qualification (RFQ as referenced herein). Some of these rights are exceptionally opaque and open to mischief. See the attached summary of considerations.

5. Invitation to Tender, Appendix C – Separate Prices, List of Separate Prices.

Risk to Contactor: “Prices shall remain open for acceptance by the Owner at any time before normal requirements for such work or materials’. This statement is vague and therefore open to interpretation. It is also unreasonable: it is difficult for a contractor to project what costs over an undefined time period, or to clearly understand what the Owner and Bidding Authority considers a ‘normal requirement’.

6. Invitation to Tender, Appendix D – Subcontractor List

Risk to Contactor: This list asks for ‘Years of Experience Working with Proponent’. This information is redundant unless it is being evaluated under the ‘scoring’ as referenced in item 2 herein.

Accepting terms which are onerous can harm a contractor’s profitability and undermine accepted industry standard practices, weakening the resilience and productivity of BC’s construction sector. Tendering conditions that undermine industry standards may likely be a forewarning of how a Project will progress, and historically are shown to lead to costly disagreements.

Onerous conditions such as those described in this alert limit competition. Contractors don’t bid or they bid but seek to protect themselves from perceived risk. Either outcome will raise the cost of construction. Onerous bidding conditions are not in the best interest of the tax payers of British Columbia.

Disclaimer

*The BC Construction Association has issued this Alert to contractors as a service to the members of the Association and industry at large to help educate them on the risks associated with bidding. Contractors should **not** rely solely on the information in this Alert in making decisions on whether to bid or how much to bid. BCCA recommends and expects that before making those decisions, contractors will review the relevant terms of the Bid Package, including the Instructions to Bidders, draw their own conclusions and make their own independent decisions. BCCA and its agents accept no responsibility whatsoever for the distribution, completeness or accuracy of the information contained in the Alert. Anyone who acts based on the information agrees that it does so at their own risk and will not hold BCCA or its agents accountable for any loss resulting from that action.*

| BCCA Contractor Advisory - Dagg Road -- Addendum | | | |
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| 3.5.1 BC Housing Reserved Rights; BC Housing Reserves the Right To: | | Bidders | Comments |
| a.) | Make public the names of any or all Bidders | Yes | |
| b.) | Request written clarification or the submission of supplementary written information in relation to the clarification request from any Proponent and incorporate a Proponent's response to that request for clarification into the Proponent's bid. | No | Only appropriate for a Pre-qualification when all bidders are given the same opportunity. For Bids the only consideration is price. |
| c.) | Assess a proponent's bid on the basis of: | | |
| c.) i. | A financial analysis determining the actual cost of the bid when considering factors including quality, service, price, and transition costs arising from the replacement of existing goods, services, practices, methodologies and infrastructure (howsoever originally established). | No | For Bids the only consideration is price. |
| c.) ii. | Information provided by references | No | For Bids the only consideration is price. |
| c.) iii. | The Proponent's past performance on previous contracts awarded by BC Housing | No | For Bids the only consideration is price. |
| c.) iv. | The information provided by a Proponent pursuant to BC Housing exercising its clarification rights under this solicitation process. | No | Only appropriate for a Pre-qualification when all bidders are given the same opportunity. For Bids the only consideration is price. |
| c.) v. | Other relevant information that arises during this solicitation process. | No | To vague and open to manipulation or interpretation. |
| d.) | Waive formalities and accept bids which substantially comply with the requirements of this solicitation. | No | Allows Owner to breach 'Contract A' obligations |
| e.) | Verify with any proponent or with a third party any information set out in a bid. | No | Can lead to mischief whether intentionally or mistakenly as it is undefined as the true meaning is undefined |
| f.) | Check references other than those provided by any proponent. | No | Can lead to mischief whether intentionally or mistakenly as it is undefined as the true meaning is undefined |

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| <i>g.)</i> | Disqualify any proponent whose bid contains misrepresentations or any other inaccurate or misleading information. | No | Can lead to mischief whether intentionally or mistakenly as it is undefined as the true meaning is undefined |
| <i>h.)</i> | Disqualify any proponent of the bid of any proponent or rescind the notice of selection or resulting contract award of any proponent who has engaged in conduct prohibited by this solicitation or conduct that otherwise compromises or may be seen to compromise the competitive process. | ? | Is this really necessary? An Owner has the obligatory rights under Contract Law and as such this statement only adds ambiguity to the process. |
| <i>i.)</i> | Make changes, including substantial changes, to this solicitation provided that those changes are issued by way of addenda in the manner set out in this solicitation | ? | Is this really necessary? An Owner has the obligatory rights under Contract Law and as such this statement only adds ambiguity to the process. |
| <i>j.)</i> | Select any proponent other than the proponent whose bid reflects the lowest cost to BC Housing. | No | Allows Owner to breach 'Contract A' obligations |
| <i>k.)</i> | Cancel this solicitation process at any stage and issue a new solicitation for the same or similar deliverables | ? | Our preference is that negotiation with the low bidder is the first option for over budget considerations. When not achievable the project should be put out for a public bid with amended documents. |
| <i>l.)</i> | Accept any bid in whole or in part. | ? | Subject to the conditions of negotiation and where the documents identify the process for acceptance of a part bid. |
| <i>m.)</i> | Reject any or all bids | Yes | |
| | 3.5.2 Limitation of Liability | No | Allows Owner to breach 'Contract A' obligations |
| | 3.5.3 Governing Law and Interpretation | No | Allows Owner to breach 'Contract A' obligations |