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Construction File:

Post Closing Over Budget Negotiations

The rationale of the tender process is to replace negotiation with competition and, subject to the terms of the tender documents, negotiation is generally not permitted in the tender process. One of the primary reasons why negotiation is not permitted is to prevent bid shopping. Generally, where the tender documents expressly permit negotiation, negotiation is only permissible so long as it is consistent with what is expressly provided in the tender documents.

It is not uncommon for owners to include a provision permitting negotiation with the lowest compliant bidder where all compliant bids received by an owner are over budget. There are, however, potential (unintended) consequences that should be considered when including negotiation clauses in tender documents and in proceeding with post-closing over budget negotiations.

The tender process between an owner and general contractors typically comes to an end when one of the following events occurs:

- (a) all bids are rejected;
- (b) when one bid is accepted and the construction contract is entered into; or
- (c) when the period of irrevocability expires.

The conclusion of the tender process between the owner and general contractor also has the result of releasing the carried subcontractors from an obligation to enter into construction contracts with the general contractor. Accordingly, and subject to the terms of tender documents, if the owner rejects all tenders submitted by general contractors as being over budget, the owner is generally free to negotiate with a general contractor if there was no improper purpose for the rejection and the procedures to bring about an end to the tender process were not abused. If this occurs, the general contractor's obligations to all subcontractors who

submitted compliant tenders, including the carried subcontractors, are terminated, as are any obligations owed by the subcontractors to the general contractor.

If, however, the owner does not specifically reject all general contractor bids but enters into a course of negotiations with a general contractor after the close of tenders and in accordance with the terms of the tender documents, an issue that may arise is whether the owner has complied with the tender documents and, in the circumstances, whether general contractor remains bound to enter into the construction contract with the carried subcontractor based on those negotiations.

If the negotiations between the owner and general contractor are properly characterized as a request by the owner, and an agreement by the owner, to the modification of a general contractor's tender (within the clause in the tender documents permitting negotiation), the general contractor's tender would continue in effect, as amended, and would not result in the release of the general contractor's obligation to enter into construction contracts with the carried subcontractors, and vice versa. However, if the negotiations are properly characterized as a rejection by the owner of the general contractor's tender and the making by the owner of a counter-offer to the general contractor (outside the domain of the negotiation clause), the tender process would have been terminated, along with the general contractor's obligation to enter into construction contracts with the carried subcontractor, and vice versa. This could be an unintended consequence of the negotiations between owner and general contractor.

Public owners face additional issues regarding over budget negotiations and a potential cancellation of a tender process as they must also be cognizant of what potential impacts post-close negotiations may have on their obligations under relevant trade agreements, including the New West Partnership Trade Agreement.

Some industry organizations have issued best practices guidelines in response to the challenges posed by post-close over budget negotiations. These are, however, guidelines and, by their nature, are not rules of law and the courts will always examine the substance of the negotiations between the owner and general contractor in order to determine what actually happened.

CCDC 23 – 2005 A Guide to Calling Bids and Awarding Contracts

The Canadian Construction Document Committee has published a process for post-tender negotiations between owner and general contractor where all tenders submitted are over budget (see: [CCDC 23 – 2018: A Guide to Calling Bids and Awarding Contracts](#)). Pursuant to this process, where the amount by which the bid price must be reduced by less than 15% of the lowest compliant bid, the first step is to negotiate with only the lowest compliant bidder in order to identify changes in the scope or quality of the work and the corresponding bid price reduction(s). Where agreement is reached, it should be documented as a post-bid addendum and the contract, based on the negotiated reduced price, should be awarded. Negotiations should be limited exclusively to the lowest compliant bidder. Where agreement cannot be reached, the second step is to invite only the three lowest compliant bidders to re-tender on modified tender documents under a new invitation. Where the amount by which the bid price must be reduced exceeds 15% of the lowest compliant bid, the owner may immediately undertake either of the preceding steps, at its discretion. As recommended in this Guide, re-bidding should be avoided whenever possible because of the time and costs incurred by all parties. Where a re-bid is unavoidable, the Bid Documents should be sufficiently modified to achieve a reduced bid price acceptable to the Owner.

In the view of BCCA, the owner may negotiate changes with the lowest compliant general contractor as long as the negotiations are with that bidder only and between that bidder and its carried subcontractors only. Further, if the negotiations do not produce a price acceptable to the owner, or if negotiations are impractical, all tenders should be rejected, the tender documents revised and a new tender called. Critical to this process is that the general contractor can only negotiate with the subcontractors it carried in its tender to the owner.

If negotiation is authorized by the tender documents, bid shopping during that process must be avoided. Bid shopping encompasses conduct where a bid is used as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded and with a view to obtaining a better price or other contractual advantage. For example, the disclosure of a contractor's or subcontractor's price to a competitor during post-close negotiations will be viewed as creating a sham tender process and attract the sanction of the courts. Further, the entering into negotiations by the owner with the lowest compliant general contractor can lead to the shopping of subcontractors' bids. Accordingly, the owner should consider putting in

place a proper process for general contractor / subcontractor negotiations in its tender documents. For example, the [BC Documents Committee](#) expressly provides in its bid documents that owner has the right to enter into over-budget negotiations with the lowest compliant bidder, without cancellation of all bids or consideration to other bidders, and to require that bidder to negotiate with subcontractors named on their Bid Form (see: *BCDC 2 – 2022 Standard Documents and Guidelines for a Stipulated Price Bid for use on Publicly Funded Building Projects*).

In conclusion, terms permitting post close negotiation in over budget situations should be drafted with care and specifically with attention to the maintenance of the integrity of the tender process. Any negotiations that take place based on an express negotiation provision must be followed. The potential exists for unintended consequences through negotiation during the tender process, which can be avoided through properly drafted negotiation clauses and properly conducted over-budget negotiations.

This Construction File includes information provided by Jenkins Marzban Logan LLP.

BCCA Comments:

Notwithstanding the information as outlined above BCCA believes there are other considerations in over budget negotiations:

1. Trade Contractors and Suppliers play a significant role in projects often completing a substantial amount of the work. Ensuring they are treated fairly in over-budget negotiations is important. If a bid process is cancelled rather than including language in the Instructions to Bidders to allow negotiation, then there is likely no contract obligation to the Trade Contractors and Suppliers, which potentially creates opportunities for bid shopping.
 2. Under the New West Partnership Trade Agreement (NWPTA), if a bidding process is cancelled the post-close negotiations may be considered a new bid process where the owner is then subject to a new public bid process. As such that post-close negotiation may be considered as single sourcing, giving rise to a formal complaint under the new bid-dispute process that comes into effect July 1, 2015. To ensure NWPTA compliance we would recommend including language in the Instructions to Bidders which accommodates post bid closing over-budget negotiation.
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