



## **INDUSTRY ALERT: PROCUREMENT FAIRNESS CLAUSE REMOVED FROM MANY TAXPAYER-FUNDED CONSTRUCTION PROJECTS**

BCCA warns the public and contractors of unacceptable levels of risk following the explicit removal of “Contract A” by many public owners

**June 18 2024, Victoria BC** – The BC Construction Association (BCCA) has issued a province-wide industry alert following the confirmation of cases of removal of “Contract A” from the procurement process [by a growing list of public owners](#), including some municipalities, school districts, universities, and crown corporations. In the absence of “Contract A”, general contractors and trade contractors should not assume that they will be treated fairly and probably have no legal recourse for being treated unfairly.

In Canadian contract law, “Contract A” ensures fairness, openness and transparency between the owner and each compliant bidder who responds to a procurement call. “Contract A” typically includes terms and conditions such as deadlines, evaluation criteria, privilege clauses and often the requirement for bid security. It serves to protect the legitimate expectations and interests of all parties.

“The removal of “Contract A” is the most significant violation of public sector procurement processes that the construction industry has seen to date. It is a serious concern for industry associations and should be of equal concern to BC taxpayers,” says BCCA President Chris Atchison. “When a public sector owner willfully removes an obligation to act fairly in its dealings with you at the start of a project, you have to ask yourself: do you really want to bid on that project and work with that government entity?”

The absence of “Contract A” undermines the integrity of the procurement process, and may result in:

- Lack of transparency;
- Bid shopping;
- Unequal treatment;
- Increased risk for bidders;
- Legal vulnerabilities;
- Reputational damage to the public sector owner.

“Contract A” is a legal convention that was created in 1981 by the Supreme Court of Canada in *The Queen (Ont.) v. Ron Engineering*. This landmark decision is the cornerstone for fair, open and transparent procurement, providing a mechanism to protect both owners and bidders from unfair practices. It forms the basis of an understanding that all owners have a duty of fairness

towards compliant bidders. Through the use of the “Contract A” bidding contract, *Ron Engineering* has brought certainty to the procurement process.

“Those who actually do the work in the construction industry cannot proceed on the assumption that it is ‘business as usual’, given the deliberate removal of ‘Contract A’ by certain public owners,” says Michael Demers, legal counsel for BCCA. “Before *Ron Engineering*, procurement was the wild west, where bidders were subject to the misconduct of unscrupulous owners, and owners did not know where they stood legally with bidders. After 40 years of relative clarity in procurement rules, and a legal basis to ensure both owners and bidders followed the rules, it appears some public owners want to take us all back to the old days where they can’t be held to account for their wrongdoings. It’s a sad day for an industry that is already under so much pressure to perform for the benefit of British Columbians.”

BCCA recommends construction firms proceed with extreme caution in the face of the unprecedented implications of the removal of “Contract A”. Contractors are advised to:

- read all procurement documents carefully.
- use the RFI process to question the intent of the Owner’s procurement process in cases where “Contract A” has been removed.
- seek legal advice when they have questions or concerns about procurement and contract conditions.
- consider qualifying their bid only once they have fully evaluated the associated risks and are prepared to accept the consequences.
- advise their Regional Construction Association and BCCA of any irregularities in the procurement process through the BCCA Public Sector Transparency Tip Line.

“When public sector owners remove “Contract A”, they break the covenant of trust, integrity and transparency that it represents,” says Atchison. “Public sector owners must be held to a higher standard in procurement. We urge public owners to commit to fairness by maintaining “Contract A”. When it comes to the construction projects British Columbians rely on, it’s in the public interest.”

There are over \$160B in construction projects currently underway in British Columbia, with another \$170B scheduled. Construction contributes 10.3% of BC’s GDP and is the #1 employer in the province’s goods sector with a workforce of approximately 229,000.

To access the full Industry Alert on “Contract A” removal, visit: <https://bit.ly/4eqvXfm>

To signal a case of “Contract A” removal by a public owner, access BCCA’s Public Sector Transparency Tip Line at <https://bit.ly/BCCATipLine>

A webinar on the implications of the removal of “Contract A” will be presented on June 25<sup>th</sup>, at 10 a.m. To register visit: <https://bit.ly/ContractAWebinar>

BCCA issues this Industry Alert, in partnership with the Regional Construction Associations, as a service to its members and to industry at large to help educate them on the risks associated with changes in procurement. It is not intended to provide legal advice. All opinions stated in this Industry Alert are those of the BCCA and reflect the publicly stated policies of BCCA.

## **About the British Columbia Construction Association**

The British Columbia Construction Association (BCCA) is a non-partisan and non-profit organization, working with four Regional Construction Associations (NRCA, SICA, VICA and VRCA) to serve more than 10,000 employers in the province's industrial, commercial, institutional, and residential multi-unit (ICIR) construction industry regardless of labour affiliation. BCCA advocates on behalf of all employers to ensure British Columbia's construction sector remains productive and resilient. For more information about BCCA, visit: [bccassn.com](http://bccassn.com)

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## Stakeholder Quotes:

<p>Nicole Bryant CEO Northern Regional Construction Association (NRCA)</p>	<p>"This industry alert raises a red flag as we see a trend where public owners are increasingly opting for the explicit removal of "Contract A" in procurement, undermining the duty to fairness. This trend heightens risk and erodes the bedrock of open, fair, and transparent bidding practices, veering away from the established precedence set forth by <i>Ron Engineering</i>. As an association we owe it to our members to stand firm to uphold integrity and equitable opportunities within our construction community."</p>
<p>Clifford Kshyk CEO Southern Interior Construction Association (SICA)</p>	<p>"When public owners integrate "Contract A" and "B" into tender documents, they demonstrate a proactive commitment to upholding transparency and fairness to the industry. This streamlined procurement process facilitates efficient project delivery, safeguarding public funds and interest. Excluding these standardized contracts risks undermines the crucial foundation of trust, collaboration, and accountability between public owners and stakeholders. Prioritizing the adoption of these standardized contracts is crucial to ensure that taxpayers ultimately benefit from well-executed projects."</p>
<p>Rory Kulmala CEO Vancouver Island Construction Association (VICA)</p>	<p>"Public Owners have a duty to uphold the principles of fair, open and transparent procurement of construction services. Maintaining "Contract A" provides contractors with a level of assurance as they proceed to invest both time and money to prepare a bid and that their bid will be fairly evaluated. This not only puts clear responsibilities on owners involved in "Contract A" to be very careful in their actions and follow their own stated procurement requirements, but also binds bidders to enter into the construction contract ("Contract B") if they are selected in accordance with the procurement documents."</p>
<p>Jeannine Martin President Vancouver Regional Construction Association (VRCA)</p>	<p>"As the industry moves toward increased collaboration and working together to tackle the challenges of today's increasing costs and decreasing labour force, issues like a lack of fair procurement are an unneeded distraction. The removal of "Contract A" adds unnecessary uncertainty and risk that could increase project costs and impact the construction of critical infrastructure needed to support BC's economy and communities."</p>

<p>Rodrigue Gilbert President Canadian Construction Association</p>	<p>“The Canadian Construction Association is a staunch champion for equitable procurement practices. Projects thrive when partnerships are based on trust, fairness, and transparency. The removal of “Contract A” risks taking the industry back to a time when bidders were not adequately involved from the beginning of a project, potentially compromising the integrity of the process, which ultimately impacts taxpayers the most. CCA continues to advocate for a balanced procurement process, where risk is shared, competition is fair, and innovation is encouraged.”</p>
<p>J. Suzanne Powell, Ph.D., P.Eng. Chair, Association of Consulting Engineering Companies – BC</p>	<p>“Partnership between design, construction, and project owners is based on a foundation of trust, fairness, and transparency. ACEC-BC members stand with the construction industry in their position that removal of “Contract A” is unfair, introduces bias, violates the principles of trust and transparency, and will deter otherwise qualified bidders. ACEC-BC continues to encourage widespread adoption of Qualification Based Selection, which consistently demonstrates benefit for construction project outcomes.”</p>
<p>Roger Yager, P. Eng., GSC Vice President Knappett Projects Inc. Co-Chair, DMIIF Chair of BCCA’s Industry Practices Committee</p>	<p>“The <i>Ron Engineering</i> case was a landmark decision with regards to fair, open and transparent tendering, and the basis for the understanding of all parties having a duty of fairness to each other. After decades of working within industry and with Government on protocols and practices like CAMF to ensure that public entities act appropriately in their procurement activities, it is a travesty that Public Owners are negating “Contract A” in their documents. Public Owners must be held to a higher standard in procurement and ensure that fairness to all parties. The public interest is paramount.”</p>
<p>Matt MacInnis President, Electrical Contractors Association of BC</p>	<p>“The construction industry is being asked to do more than ever: building community infrastructure, healthcare facilities, schools, public transit, record amounts of housing and enabling the clean energy transition. It is essential at this time that public owners commit to fair and reasonable procurement practices and contract structures. The removal of “Contract A” is step backwards, fails to provide the transparency British Columbians expect for public projects, and shifts a disproportionate amount of risk onto contractors throughout the supply chain, the majority of which are small and medium sized businesses.”</p>

<p>Bryan L. Wallner CEO Roofing Contractors Association of British Columbia</p>	<p>“RCABC continues to be disturbed by the lack of transparency and fairness that has crept into public sector procurement. The removal of "Contract A" is a flagrant example of this. RCABC members support BCCA and the entire construction industry in placing a bright light on this practice. The removal of “Contract A” is unfair, introduces bias, and violates the principles of trust. RCABC supports fair, open and transparent procurement, including prompt notice of award, and full use of on-line procurement portals on public projects.”</p>
<p>Steve Ness President Surety Association of Canada</p>	<p>“BCCA has touched a nerve with this Industry Alert; the issue of "Contract A" removal has long been an irritant for the Surety Association of Canada. We have encountered this many times over the years: a construction buyer trying to contract out of <i>Ron Engineering</i> by simply inserting language to that effect. In our mind, it’s the equivalent of trying to lift yourself off the floor by pulling up on the top of your socks! We urge contractors to consult with their surety and broker when they see this language to discuss the risks to their submission and company.”</p>