

Construction File –

## **Building Back Smarter: Restoring Confidence in BC's Public Procurement Methodology for Construction Services**

The rise of subjectivity in procurement practises is a blight on the construction sector that adds unnecessary risk for all parties, from owners to contractors and service providers. It's not too late to fix what ails us, but first we need to admit we have a problem and refocus on best practices and norms.

There is new urgency: as infrastructure projects lead our economic recovery after COVID-19, public sector procurement should be conducted according to the best practises that help to ensure every taxpayer dollar goes as far as it possibly can.

The trusted standards of the past – those that ensure a fair, open and transparent solicitation process - have eroded substantially, raising serious concerns across the industrial, commercial, and institutional construction industry. Only a decade ago, subjectivity in proponent selection was unheard of. Today it's all too common, resulting in a steadily decreasing pool of contractors willing to bid on public projects and an escalating cost of services as those who do bid seek to mitigate their risk.

So, what has changed? There are a few causes to point to, such as the completeness and quality of design documents, the lack of use of standard documents, the inclusion of extensive supplemental conditions, and the emergence of social procurement priorities as well as complex new procurement methods that push risk down the food chain from owners to contractors. Not to mention the large number of retiring experts in construction procurement whose successors are far less experienced in this complex area.

At the BC Construction Association (BCCA), we think the true change is also coming from a fundamental shift in the accountability of public owners. That shift, combined with the scarcity of procurement expertise and complex new methods of solicitation, has eroded standards to the breaking point.

Public owners increasingly believe that their "right" to choose a successful proponent on their own terms outweighs the need for fairness. In fact, the very definition of fairness is evolving to accommodate the erosion of best practises and standards. For the record, here's what it means:

***Fairness* - Noun: "impartial and just treatment or behaviour without favoritism or discrimination."**

Some public owners increasingly define fairness in terms of what they consider fair to them, the buyers of the services, rather than what is fair to the contractors competing to deliver those services or to the taxpayers who are footing the bill. This is where procurement problems take root.

Let's take a look at some of the problem areas and illuminate reasons that fair, open, and transparent standards are necessary for the health of our sector and for the optimum investment of taxpayer dollars in construction projects. These standards are relevant whatever the project and whatever social impacts are sought. and for the optimum investment of taxpayer dollars in construction projects.

## **Requests for Qualifications (RFQ)**

BCCA's policy states that whenever a contractor's qualifications are being considered in a solicitation for construction services, regardless of the delivery model there must first be a Request for Qualifications (RFQ). As such, where qualifications are a consideration, the final stage of a tender/bid or a Request for Proposals (such as in a Design Build or Construction Management) must first be preceded by a separate RFQ.

This is the truest method of ensuring a fair, open and transparent solicitation process.

## **Does “Fair, Open and Transparent” Really Matter?**

Yes. Fair, open and transparent public sector procurement is a realistic expectation. It's been the accepted standard before and can – should - be so again. Tendering done with integrity, using standard documents and best practises, leaves less room for risk and cost overruns. Adhering to best practises is what professionals do, understanding that these practises protect both the owners and the bidders and that a successful construction project is built on the solid foundation of a professional procurement process. If, as an owner, you don't feel the need to be fair, open and transparent when procuring construction services, think hard about what you'd rather not share - and why.

Public owners can start doing things better today. Right now. There is no need to create or reinvent the process. Use the processes and documents that have already been developed and are proven to work, processes in which both parties share an appropriate portion of the risk using a procurement model that exhibits verifiable fairness and transparency.

Ironically, the more that Owners try to avoid risk by going off-script to increase their ability to select a preferred contractor, the more the costs and risks increase. This does not serve the best interests of the taxpaying public or the owner.

## **The Role of FOI (FOI) Requests and the Release of Bid Submission Information**

An FOI request can be made from a contractor to the public owner to ensure a fair, open and transparent process, with the emphasis on “open”. A contractor should be comfortable turning to an FOI request when the owner is not publicly disclosing bid results because that disclosure is a standard part of the process. As a public owner, any information that can be obtained through an FOI should be published or disclosed proactively and in a timely manner: don't wait for the official request if you want contractors to consider you an owner of choice. For more information on the role of FOI in construction procurement, go here:

<https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/freedom-of-information/submit-a-general-freedom-of-information-request> .

BCCA Policy - <https://www.bccasn.com/resources/procurement/construction-files/construction-file---proactive-release-of-project-information-for-the-construction-industry>

Remember, any information in a document deposited in response to a public procurement solicitation and being used in the evaluation of a submission is already **public information as per** the CAMF Guidance for the Release of Information&/or Documents Related to Competitive Procurement

Opportunities. Owners are expected to post the procurement documents where they can easily be found and viewed.

### **Quality of Design Documents**

The completeness and quality of design documents is one of the fundamental reasons the industry is jeopardized by unfair procurement practices and delivery models. All parties on a project, from owner to consultant to contractor, are impacted by the quality of design documents because if these documents are incomplete, lack important information, are ambiguous, or have other flaws, the resulting bids will also be flawed, leading to projects plagued by delays, cost increases, and reduced productivity.

BCCA supports the use of Quality Based Selection in choosing consultants. This helps to ensure that consultants are hired based on a skills and experience rather than fees, which in turn increases the likelihood that complete and high-quality documents are provided for the procurement process. For more information on the QBS process visit the ACECBC website. <https://acec-bc.ca/2020/09/user-guide-to-implementing-qualifications-based-selection/>

### **Maintaining Contract A**

A contractor's response to a procurement solicitation is known as Contract A. (Contract B is the owner's acceptance of the offer.) There is an unwelcome trend toward public owners removing Contract A from the procurement process. The inclusion of Contract A, which holds the details of the terms of the solicitation, such as the time bids need to be delivered, is essential for a fair, open and transparent process.

Public owners, from the elected leaders through to the Project Managers, must be aware that Contract A protects them from cost risks and ensures their procurement team is accountable.

Taxpayers should be concerned when Contract A is removed because without it there are no written rules for the procurement process.

Notwithstanding other considerations for maintaining Contract A, when bidding on a project the construction industry is essentially providing a free estimating service that can cost contractors thousands of dollars to prepare. In return, the owner has a responsibility and commitment to provide clear terms and conditions around the process – this is done with Contract A.

### **Low Bid Considerations**

We often hear from public owners that they don't want to have to accept the low bid for the prime contractor. However, on most projects where the low bid objection is raised, 80-90% of the work is done by trade contractors who are themselves selected by low bid. Given this reality, is qualification of the prime contractor delivering the desired result?

If contractor performance is a priority over price, then perhaps trade contractor performance should also be a consideration for the owner (for example, requiring bonded trades).

### **Trade Contractors and Trade Agreements**

The procurement of any contract by an owner or a construction contractor acting on an owner's behalf is subject to the terms of Trade Agreements. Therefore, trade contractors whose work is procured under a Construction Management model (where their selection was not part of the CM's solicitation process) are also subject to Trade Agreement thresholds.

Owners must take the lead in providing guidance on what process needs to be followed with trade contractors. Too often, once the Owners are distanced from the project (after awarding a project to a General or Prime Contractors), public procurement requirements are not applied in the selection of trade contractors. Public Owners have an important role to play in ensuring that fair, open, and transparent processes, including adherence to Trade Agreement processes, are maintained across the project ecosystem.

### **Standing Pre-qualification Lists**

When a purchaser of construction services offers pre-qualification for a group of projects over an extended period of time, these lists are required to be maintained in accordance with Trade Agreements. Lists must be refreshed once a year; however, in order to maintain a truly 'open' process proponents should be allowed to pre-qualify at any time for a broader scope of opportunities (as recommended by the BC CAMF).

### **The Hidden Influence of Human Psychology in Procurement**

Human psychology plays an invisible role in evaluation due to the biases that we all hold. Different types of bias can exert their influence during a decision-making process of any kind, including:

- Unconscious bias: underlying attitudes that affect how we engage with a person or group.
- Anchoring bias: relying too much on pre-existing information when making a decision.
- Confirmation bias: the tendency to interpret or recall information in a way that supports a decision you already made or wanted to make.
- Left digit bias: making an evaluation based disproportionately on the left-most number in a price.

Another invisible influencer is "decision fatigue". It occurs when the quality of decision-making erodes after the person making the decisions has been working for a long time, and it can be one of the main causes of irrational trade-offs in getting to a final decision.

To avoid these psychological influences on decision making in construction procurement, it is crucial that evaluators not see the fees and financial components of the bid before they evaluate the "written" or qualification components.

Owners must provide clear instructions and details regarding the scoring methods to be used in the evaluation process to both the evaluators and proponents. Evaluators need to schedule the process over an appropriate time and should not have access to financial components prior to completing their evaluation of other criteria. Procurement training can also help to avoid evaluation bias.

Blind evaluation is also a possibility. Although rarely done in procurement it is becoming more common in human resources hiring. The owner would simply assign each proponent a number, replacing the company name with a number on all documents so that scoring could be completed without the bidder being identified. While this would add complication, it will help to reduce bias.

### **Receiving Bids Efficiently in the 21<sup>st</sup> Century**

To support our industry's evolution to more efficient procurement methods, BCCA led construction procurement into the digital age with the introduction of online bidding and submission of proposals. We were ahead of the curve, and we were comfortable being there because we could see that technology would nearly eliminate non-compliant submissions. This has proven true, yet paper and

email bids are still far too common. Why aren't contractors more proactive, insisting owners drop the old methods paper methods that are inefficient and contain needless risk?

Today, in the midst of pandemic, when digital tools are literally keeping our economy – and our essential industry – going, there has never been a more urgent time to make the move to digital procurement.

[https://www.bccasn.com/media/Receiving%20Bids%20in%20the%2021st%20Century%20\(Formatted%20V2.1\).pdf](https://www.bccasn.com/media/Receiving%20Bids%20in%20the%2021st%20Century%20(Formatted%20V2.1).pdf)

### **In Conclusion**

The erosion of industry best practices in public construction procurement serves no one. Public owners will receive fewer bidders on their work because contractors will seek out other projects where there is less risk. Owners whose bidding practices continue to stray from trusted industry standards will pay higher prices, because any remaining bidders will price to compensate for their risk. Using unfair construction procurement practices in public solicitations will also lead to more disputes, delays, and legal issues. Always, the outcome is more cost, more risk, time delays, and bruised reputations.

The public owners who use fair, open and transparent procurement processes will be the ones to succeed. They will get the best value for the taxpayer dollars they spend, and will be known as an "Owner of Choice", attracting the highest quality contractors to their projects and delivering the best outcomes. And who doesn't want that?