

THE LAW OF TENDERING

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A close-up photograph of a person's hands typing on a silver laptop keyboard. The person is wearing a grey sweater. The background is blurred, showing a desk and other objects. A semi-transparent white rectangular box is overlaid on the center of the image, containing the text 'What is tendering?' in a purple serif font, followed by a vertical line. To the right of the text, within the same box, is a purple magnifying glass icon.

What is tendering?



TENDERING IS CONTRACT LAW

- Premised on the concept of offer and acceptance

Example:

- Offer to sell car for \$10,000
- You accept my offer
- Binding contract to sell and buy car
- If buyer fails to complete, seller can successfully sue for loss to sell to another buyer at reduced price



POST RON ENGINEERING: BASIC PRINCIPLES

- Tendering vs. negotiation – Is it a tender?
- Contract A/Contract B + implied duty of fairness to all bidders = Tendering contract rights and responsibilities
 - i.e. Potential liability for damages for breach of Contract A
- Tendering authority (and tendering authority's consultant), for lost profit
- Tenderer, for difference from next highest bid



IS IT A TENDER?

- Tender vs. RFP
- Basic criteria:
 - Competitive procurement process
 - Period of irrevocability
 - Binding form of Contract B



Tercon Contractors v. B.C. (Min. of Transportation)

“Whether contract A is formed depends on the precise language and intention of the tender call. The court will look only to the substance of the transaction in the context of the procurement documents in order to determine whether the parties intended to enter into contractual relations....The courts have recognized several factors or terms indicative of an intent to form contract A. The irrevocability of the bid is one such factor....Other factors include the formality of the procurement process, whether tenders are solicited from selected parties, whether there was anonymity of tenders, whether there is a deadline for submissions and for performance of the work, whether there is a requirement for security deposit, whether evaluation criteria are specified, whether there was a right to reject proposals, whether there was a statement that this was not a tender call, whether there was a commitment to build, whether compliance with specifications was a condition of the tender bid, whether there is a duty to award contract B, and whether contract B had specific conditions not open to negotiation...

The label or name of the tender document is not a determinative factor....Neither is the requirement for a security deposit or the existence of established timelines....”

THE TENDER DOCUMENTS



- Invitation to Bid
- Instructions to Bidders, referencing Contract B
- Tender Form

BEFORE RON ENGINEERING

- Bid submitted, even if irrevocable and supported by a bond, was just an offer (invitation to treat)
- No consideration – bidder gave nothing in return for promise to keep irrevocable
- As result, bidder could withdraw bid with no consequences
- Owner owed no obligations to the bidder unless and until contract was awarded
- Problem: owner could bid shop; sub-contractors could withdraw



CONTRACT A & B

- Contract A is the bidding contract
(The how: the rules of the bidding process)
- Contract B is the construction contract
(The what: the project)

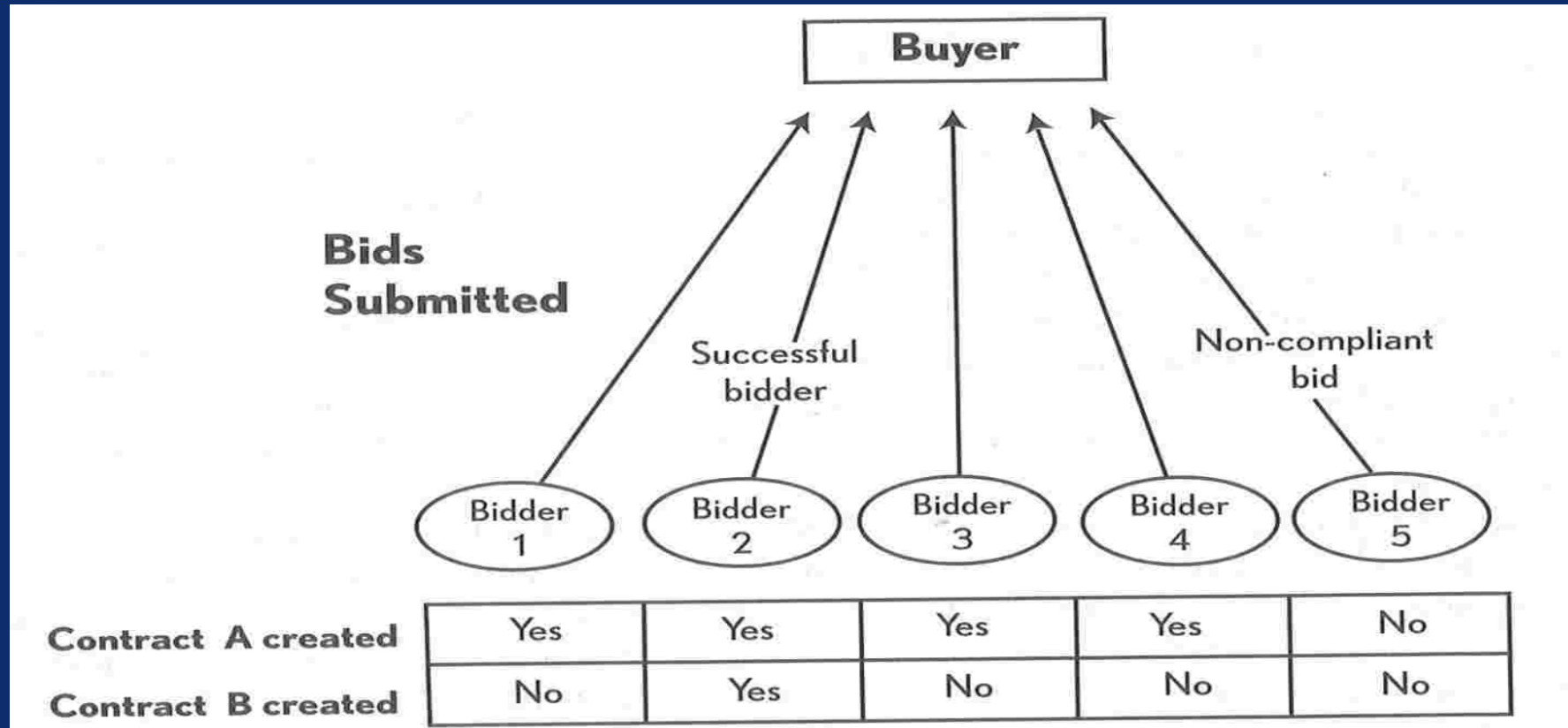
CONTRACT A

- Owner's call for bids is the offer – consideration is to enter into contract A with every materially compliant bid
- Bidder's submission of bid is the acceptance – consideration is owner's promise to evaluate bid for acceptance
- Bid filed in conformity with bid terms becomes irrevocable
- Therefore, bid now exists within contract envelope = contract A, which provides bid not withdrawn during period of irrevocability
- Owner or bidder liable if breach contract A terms

CONTRACT B

- The bid contains the bidder's offer to enter into a construction contract and perform the work
- The offer, if accepted by the owner, becomes the basis of a new contract, contract B = construction contract
- Consideration for contract B: bidder will perform the work and owner will pay

CONTRACTS



PRIVILEGE CLAUSES

- The lowest or any tender will not necessarily be accepted.
- Tender irregularity may be a cause for rejection/can be waived.
- Price + other criteria + best interest : can be taken into consideration.
- Limited or no liability for treatment of tender (*Tercon*).

NON-COMPLIANCE

- Irregularity vs. non-compliance
- Waivable non-material non-conformance vs. non-waivable material non-conformance
- Material = affecting the price or performance of Contract B

GRAHAM CONSTRUCTION

- Bidder (Graham) made \$2 million mistake calculating its bid price on \$21.5 million bid
- Revoked bid after opened but before it was “accepted” by owner
- Owner purported to accept bid
- Issue: was Graham’s bid materially compliant or non-compliant?
- Court: it was materially non-compliant, amounted to a counter-offer, which was not accepted by owner before it was revoked by Graham, and no contract A entered into
- Result: Graham escaped from a costly mistake

REMEDIES

- Owner breach of contract A - bidder recovers lost profits without performing any work!
- Tenderer breach of contract A - owner recovers cost of awarding contract to next highest bidder



SUBCONTRACT TENDERS

- Contract A/Contract B can apply
- General contractor must stick with subcontract bid if it is expressly picked up in GC's tender



BID SHOPPING

“...where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others.”



ENGINEERS and ARCHITECTS



- Receipt and evaluation of tenders
- Advice to client concerning tendering cans and can'ts
- Preparation of tender documents and contract
- Tendering for consulting contracts

GENERAL CONTRACTORS AND CONSTRUCTION MANAGERS

- General contractor as bidder
- Construction manager as administrator of trade contract tendering process/evaluator and advisor to owner/bidder



PROCUREMENT BEST PRACTICES

- Understand tendering law
- Keep it simple
- Quality control to guard against mistakes
- Comply with Contract A
- Play fairly, to maintain "the integrity of the bidding system"



440

Partners

1,800

Lawyers

4,000

Total staff

2,500

Legal professionals

50+

Offices worldwide*

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QUESTIONS ?

*includes associated offices