

INDUSTRY ALERT: REMOVAL OF “CONTRACT A”

The BC Construction Association (“BCCA”) issues this Alert as a service to the members of the Regional Associations and industry at large to help educate them on the risks associated with changes in procurement. All opinions stated below are those of the BCCA and reflect the publicly-stated [policies of BCCA](#).

This Industry Alert was drafted and reviewed with the assistance of legal counsel.

Issue

Some public sector owners have started writing their procurement documents, whether Request for Proposals (“RFPs”), Invitations To Tender (“ITT”) or Requests for Qualifications (“RFQ”), with terms that expressly avoid those owners having to act fairly. They are doing this by writing into their procurement documents clauses that remove “Contract A.”

In the opinion of BCCA, the removal of “Contract A” is the most significant violation of public sector procurement processes that the construction industry has seen to date. It means that those who work in the construction industry cannot proceed on the assumption that procurement is “business as usual” where “Contract A” is removed. With the removal of “Contract A”, combined with other poor or eroding procurement practices, the construction industry can no longer assume they are participating in fair, transparent and competitive procurement.

Each general contractor, subcontractor and supplier needs to understand the impact the removal of “Contract A” represents in order to make informed business decisions: deciding if pursuing these projects is worth the risk.

Background: What is “Contract A”?

Whether they realized it or not, for the last 40 years, owners, contractors and subcontractors all knew where they stood in procurement because of a court case called *Ron Engineering*. As a result of the actions of some owners now, that is no longer the case.

Since 1981, when the Supreme Court of Canada delivered its reasons for judgement in the *Ron Engineering*¹ case, courts across Canada have universally relied on the law of contract to protect the integrity of the procurement process.

¹ *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111

Before *Ron Engineering*, procurement was chaotic, where bidders were subject to the misconduct of unscrupulous owners, and owners did not know their position with non-compliant bidders. All of that changed in *Ron Engineering*, where the Supreme Court of Canada established the existence of a bidding contract between the owner and compliant bidders, which it referred to as "Contract A".²

Since *Ron Engineering*, courts across Canada have used the "Contract A" analysis to ensure that the procurement process was fair for everyone involved by setting "bidding rules" that needed to be followed and awarding monetary damages to both bidders and owners where the other party failed to play by those rules.

With the establishment of "Contract A," the Owner generally has a duty to treat all bidders fairly and equally, which means they must review all qualifying bids and reject any that do not meet the stated requirements. This puts a big responsibility 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.

What Has Changed

[A growing number of public owners](#) in British Columbia³ are opting to disregard the concept of a bidding contract established by *Ron Engineering* and thus undermining the concept of protecting the integrity of the procurement process.

They are doing it by including in their Instructions to Bidders and RFPs language which says expressly that no "Contract A" will ever come into existence through the procurement process. The actual language used differs slightly between the owners,⁴ and may not stand out amongst the pages and pages of procurement material provided, but the effect of that language is shocking to those who believe the procurement process should be fair for everyone.

What It Means

Without "Contract A", general contractors and subcontractors have no legal recourse for being treated unfairly and should not assume that they *will* be treated fairly. By removing "Contract A", public sector owners do not have to follow their own procurement documents, a hallmark of "Contract A" and *Ron Engineering*.

² To distinguish it from the actual construction contract, which the Supreme Court of Canada referred to as "Contract B". Not particularly imaginative perhaps, but effective in distinguishing the two.

³ This group includes several Municipalities, a Crown Corporation, a School District and an individual post-secondary institution.

⁴ Schedule "A" to this Alert provides some actual examples of language being used by public owners engaged in in this behaviour.

Firms choosing to submit and to do business with these owners are faced with:

1. *No Fairness* – those public owners have no obligation to treat bidders fairly or consistently.
2. *Bias* – those public owners may award contracts based on secret preferences.
3. *Bid Shopping* – those owners may now disclose your bid to the other bidders, or to people who did not even bid in the first place, in an effort to get somebody to offer an even lower price to do the work.
4. *What are the Rules?* There aren’t any enforceable rules.

With the removal of “Contract A”, there is no legal basis to rely on to hold those owners accountable for their actions, even those actions that would be considered unprincipled.

Construction firms cannot proceed on the assumption that it is “business as usual” with these public owners, and any others choosing to abandon “Contract A” and its inherent binding obligations.

Implications for Industry

The removal of “Contract A” results in additional significant issues, for which there is currently little legal precedent to offer guidance.

For example, removing “Contract A” could mean:

1. Submissions can be withdrawn at any time.
2. Submissions can be changed at any time.
3. Submissions can be qualified, resulting in an “apples” vs. “oranges” situation
4. There may be no obligation on trade subcontractors or suppliers to keep their prices firm.
5. There may be no binding bid security.
6. The underlying construction contract terms are open for negotiation, so that bidders could all be bidding on different terms and conditions for different scopes of work.

This is an Issue for Subcontractors too

When an owner removes “Contract A,” the bidding subcontractor is faced with the same risks described in this Industry Alert. This is not just an issue for general contractors.

Recommendations

BCCA recommends individual firms proceed with extreme caution in the face of this unprecedented legal landscape resulting from the removal of "Contract A."

1. Ask yourself if you want to pursue and bid on a project with an owner who starts a project by removing an obligation to act fairly and with integrity in its dealings with you.
2. Read all the procurement documents carefully:
 - Do not assume they are the same as previously used by that Owner.
 - Understand the intent and consequences of all the procurement and contract terms.
3. Use the RFI process during procurement to question the intent of the Owner's procurement process.
4. Contact BCCA and your regional construction association to signal a case of "Contract A" removal by using BCCA's Public Sector Transparency Tip Line at <https://bit.ly/BCCATipLine>
5. Consider qualifying your bid as long as you know the risks associated with doing that and are prepared to accept the consequences.
6. Consult an experienced construction lawyer.
7. Consult with your surety and broker.

Disclaimer

This Industry Alert is only the opinion of BCCA, and others may have a different opinion. Readers should not rely solely on the information in this Industry Alert in making business decisions. BCCA recommends and expects that before making decisions, firms will review the terms of the procurement and contract documents, seek independent legal advice, draw their own conclusions and make their own independent decisions.

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Schedule A

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.

The below are actual examples of language used by public owners to avoid Contract "A."

Examples of Language Used by Public Owners to Avoid "Contract A"

- **City of Prince George:**

2.0 RFP PROCESS

This RFP is a mere invitation to treat; it is a solicitation to vendors to come forward with competing offers regarding a Contract, and/or to compete for an opportunity to negotiate a Contract. This RFP itself does not constitute an offer in relation to the formation of any contract, including any bid contract, preliminary contract, collateral contract, or "Contract A". No agreement of any kind (express or implied), including any Contract A or implied terms (including any implied duty of fairness) shall result upon submission of a proposal.

Nevertheless, proposals submitted to the Bidding System in relation to the formation of a performance Contract are offers capable of acceptance by the City (whether or not the proposal is non-compliant or includes Exceptions and Clarifications, for example, but provided that the Mandatory Requirements are met), with or without negotiations, in order to form a performance Contract, as described in 2.7, 3.1 and 3.4 and elsewhere in this RFP. The City shall not have any legal or actionable obligation to anyone as a result of this RFP except under Plan Taker Terms of Service and/or the performance Contract, if any, created by the parties according to the process described in this RFP.

- e) "Contract" means the written agreement substantially as defined in Schedule A, including the CCDC standard prime contract specified in Schedule A, resulting from this ITT, if created by the City and the Contractor according to the process described in this ITT. For greater certainty,

"Contract" does not refer to any bid contract or other preliminary contract relating to the evaluation process (and commonly referred to by Canadian courts as 'Contract A'), but refers only to any performance contract relating to Work (and commonly referred to by Canadian courts as 'Contract B');



- **City of Kelowna:**

- Procurement Process Non-Binding**

- a) No Contract A and No Claims**

- This procurement process is not intended to create and will not create a formal, legally binding bidding process and will instead be governed by the law applicable to direct commercial negotiations. For greater certainty and without limitation:

- this opportunity will not give rise to any Contract A–based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and
 - neither the submitter nor the City will have the right to make any claims (in contract, tort, or otherwise) against the other with respect to the award of a contract, failure to award a contract or failure to honour a submission submitted in response to this opportunity.

- **College of New Caledonia:**

- 3.6 Procurement Process Non-binding**

- 3.6.1 No Contract A and No Claims**

- This procurement process is not intended to create and will not create a formal, legally binding bidding process and will instead be governed by the law applicable to direct commercial negotiations. For greater certainty and without limitation:

- (a) this RFQ will not give rise to any Contract A–based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and
 - (b) neither the respondent nor CNC will have the right to make any claims (in contract, tort, or otherwise) against the other with respect to the award of a contract, failure to award a contract or failure to honour a quotation submitted in response to this RFQ.

- 3.6.2 No Contract until Execution of Written Agreement**

- This RFQ process is intended to solicit non-binding quotations for consideration by CNC and may result in an invitation by CNC to a respondent to enter into the Agreement. No legal relationship or obligation regarding the procurement of any good or service will be created between the respondent and CNC by this RFQ process until the execution of a written agreement for the acquisition of such goods and/or services.

- 3.6.3 Non-binding Price Estimates**

- While the pricing information provided in quotations will be non-binding prior to the execution of a written agreement, such information will be assessed during the evaluation of the quotations and the ranking of the respondents. Any inaccurate, misleading or incomplete information, including withdrawn or altered pricing, could adversely impact any such evaluation or ranking or the decision of CNC to enter into an agreement for the Deliverables.



- **BC Securities Commission:**

- 3.6 No Contract A and No Duties or Obligations shall be Implied**

This procurement process is not intended to create and shall not create or give rise to any "contract A"-based tendering law duties or a "contract A" or other legal obligation binding upon BCSC. As stated above, this RFP does not constitute an offer by BCSC. No contract results from the issuance of this RFP or receipt of Proposals except only that each Proponent by submitting a Proposal: (i) agrees that its Proposal will be irrevocable for the period specified in the Proposal Submission Form of 60 days as set-out in Attachment B of this RFP; and (ii) accepts and agrees that the stipulations and provisions set out in this RFP shall govern and apply. No duties or obligations on the part of BCSC shall be implied. Anything contained in a Proposal that contradicts or is at variance with any of the terms of this RFP is not accepted by and will not be binding on BCSC.

- **BC Transit:**

- 3.6.1 No Contract A and No Claims**

This procurement process is not intended to create and will not create a formal, legally binding bidding process and will instead be governed by the law applicable to direct commercial negotiations. For greater certainty, and without limitation:

- (a) this RFQ will not give rise to any Contract-A-based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and
 - (b) neither the respondent nor BC Transit will have the right to make any claims (in contract, tort, or otherwise) against the other with respect to the award of a contract, failure to award a contract, or failure to honour a quotation submitted in response to this RFQ.

- **Cowichan Valley Regional District:**

- 3.6 Procurement Process Non-Binding**

- 3.6.1 No Contract A and No Claims**

This procurement process is not intended to create and will not create a formal, legally binding bidding process and will instead be governed by the law applicable to direct commercial negotiations. For greater certainty and without limitation:

- (a) this RFQ will not give rise to any Contract A-based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and
 - (b) neither the respondent nor the CVRD will have the right to make any claims (in contract, tort, or otherwise) against the other with respect to the award of a contract, failure to award a contract or failure to honour a quotation submitted in response to this RFQ.



- **BC Housing**

- **Municipality of Saanich**

- Procurement Process Non-binding**

- 4.5.1 No Contract A and No Claims**

- The procurement process is not intended to create and shall not create a formal legally binding bidding process and shall instead be governed by the law applicable to direct commercial negotiations. For greater certainty and without limitation: (a) the RFPQ shall not give rise to any “Contract A”-based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and (b) neither the Respondent nor BC Housing shall have the right to make any breach of contract, tort or other claims against the other with respect to the award of a contract, failure to award a contract or failure to honour a response to the RFPQ.

- 4.5.2 No Contract**

- The RFPQ process is intended to pre-qualify suppliers eligible for the second stage of the procurement process. No legal relationship or obligation regarding the procurement of any good or service shall be created between the Respondent and BC Housing by the RFPQ process.

- **Municipality of Saanich**

- 3.6 Procurement Process Non-Binding**

- 3.6.1 No Contract A and No Claims**

- This procurement process is not intended to create and will not create a formal, legally binding bidding process and will instead be governed by the law applicable to direct commercial negotiations. For greater certainty and without limitation:

- (a) this RFQ will not give rise to any Contract A-based tendering law duties or any other legal obligations arising out of any process contract or collateral contract; and
 - (b) neither the respondent nor the District will have the right to make any claims (in contract, tort, or otherwise) against the other with respect to the award of a contract, failure to award a contract or failure to honour a quotation submitted in response to this RFQ.