

COMPETITIVE PROCUREMENT FOR LOCAL GOVERNMENTS

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Competitive Procurement for Local Governments

Outline:

- Forms of Competitive Procurement
- Why Competitive Procurement?
- Local Government Procurement – Statutory Framework/Legal Requirements
- Invitation to Tenders
- RFP's
- Competitive Procurement Do's and Don'ts



Competitive Procurement for Local Governments

Competitive procurement, broadly speaking, could include any process by which:

- offers are solicited/obtained from multiple suppliers for the supply of goods, services, construction services, etc.; and
- owner selects the most favourable offer

In contrast to “sole source” procurement



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Forms of Competitive Procurement

- Request for Quotations
- Request for Expressions of Interest
- Request for Proposals
- Invitation to Tender



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Why Procure Through Competition?

- Better assurance of value for money
- May eliminate or reduce need for negotiation
- Openness/transparency
- Promotes public confidence
- Builds confidence among private sector participants
- May be a requirement under procurement policies/bylaws
- May be required under Trade Agreements:
 - Agreement on Internal Trade
 - Northwest Partnership Trade Agreement

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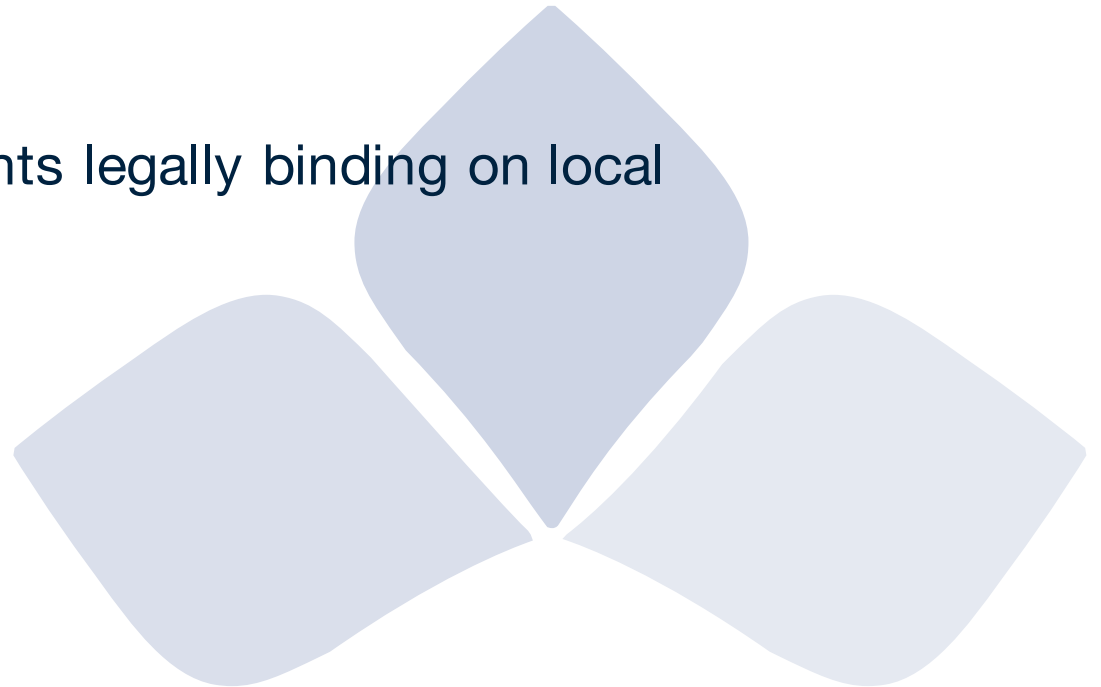
Statutory Framework

- Sources of local government procurement powers:
 - Municipalities – natural person powers
 - Regional Districts – broad corporate powers
 - Powers must be exercised for a lawful purpose
 - Limitations on delegation of powers, duties and functions
 - Limitations on powers to contract – e.g. capital liabilities under an agreement that is for more than five years (electoral approval required)
 - Expenditures must be authorized under the financial plan
- No statutory obligation for local governments to procure goods and services through a competitive process

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Inter-Governmental Trade Agreements

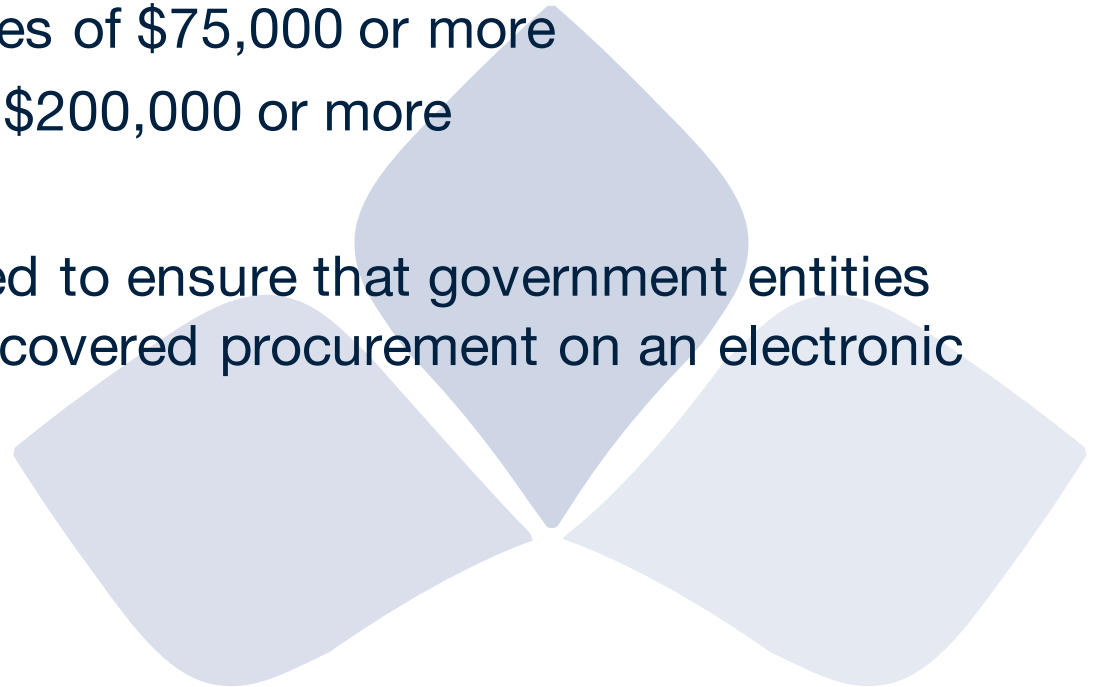
- Both AIT and NWPTA include requirements for open and competitive procurement practices on the part of local governments
- Are these agreements legally binding on local governments?
 - No, but...



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Inter-Governmental Trade Agreements

- Under NWPTA the Province of B.C. has agreed that local governments must provide “open and non-discriminatory access to procurements” for:
 - goods or services of \$75,000 or more
 - construction of \$200,000 or more
- B.C. has also agreed to ensure that government entities post notices for all covered procurement on an electronic tendering system



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Inter-Governmental Trade Agreements

NWPTA provides certain exemptions, including:

- Procurement from a public body
- From philanthropic organizations, prison labour, persons with disabilities
- Health and social services
- Sporting/convention facilities that are subject to commercial agreements inconsistent with NWPTA
- Where it can be demonstrated that only one supplier can meet requirements
- Unforeseeable situations of urgency
- Acquisitions of a confidential or privileged nature
- Legal or notary services

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Inter-Governmental Trade Agreements

- NWPTA now includes a “bid protest mechanism”
 - Suppliers may protest local government procurement decisions, if the supplier believes the decision was not in accordance with NWPTA
 - May lead to arbitration
 - Arbitrator has authority to award:
 - Up to \$50,000 in costs of the arbitration
 - Up to \$50,000 as a “recoupment award” for costs incurred in putting together the supplier’s tender
 - Compliance may be a condition of grant funding from senior levels of government
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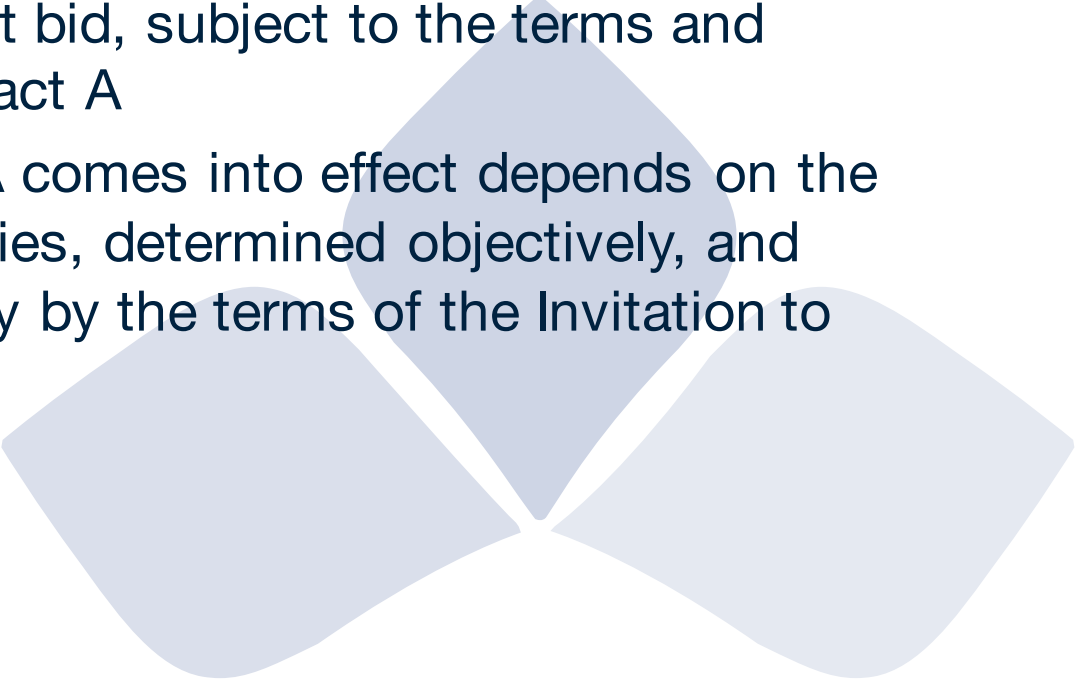
Invitations to Tender

Courts in Canada have articulated the following legal principles that govern contract tendering:

- By issuing an invitation to tender, and by accepting a bid that complies with the terms and conditions of the invitation to tender, the owner enters into “Contract A” with the bidder
- Contract A is a legally binding contract that governs the tendering process, and is distinct from the contract for goods or services the owner intends to enter into with the successful bidder – that contract is “Contract B”

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Invitations to Tender

- Contract A may provide that bids are irrevocable for a period of time, and may oblige the bidder whose bid is accepted to enter into Contract B with the owner
 - Contract A may impose a qualified obligation on the owner to accept the lowest bid, subject to the terms and conditions of Contract A
 - Whether Contract A comes into effect depends on the intention of the parties, determined objectively, and determined primarily by the terms of the Invitation to Tender
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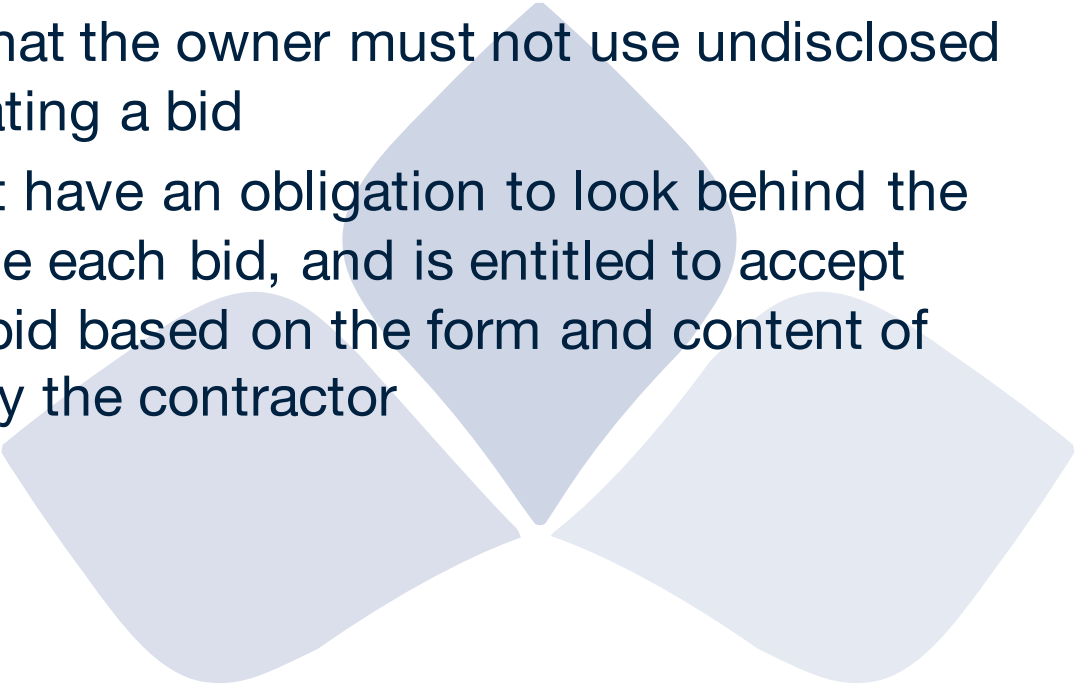
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Invitations to Tender

- The terms and conditions of Contract A are for the most part as expressly set out in the Invitation to Tender
- But, Contract A may include certain implied terms:
 - that the owner will only accept a “compliant” bid;
 - that the owner will treat all bidders “fairly”
- The “privilege clause”, that the lowest or any tender will not necessarily be accepted:
 - does not allow the owner to accept a non-compliant bid
 - allows the owner to take a “nuanced view of cost”

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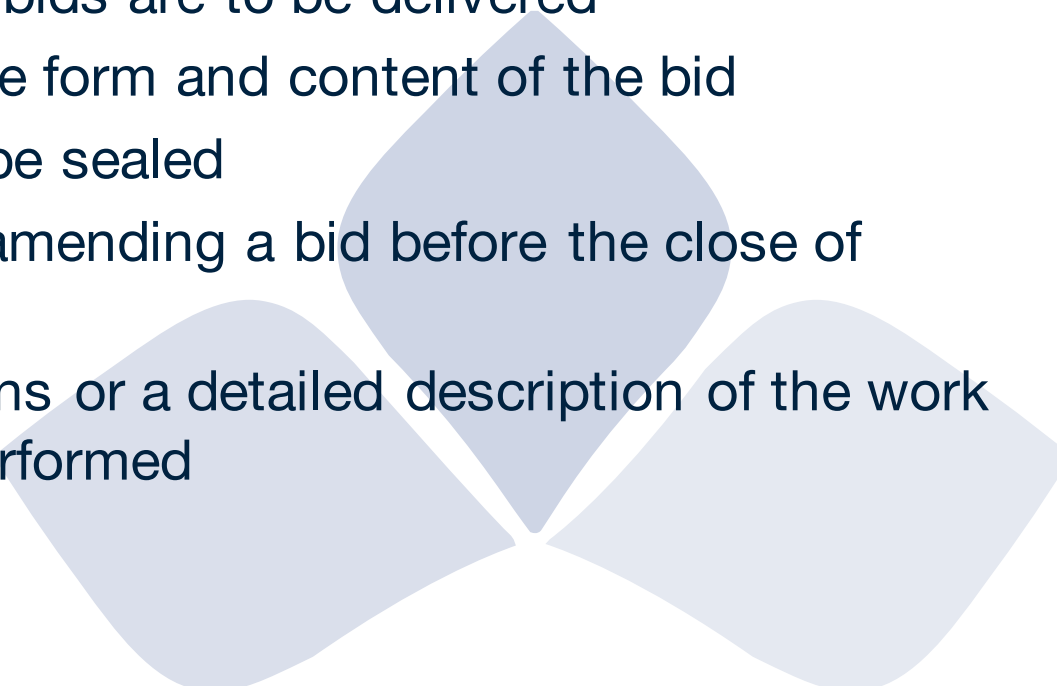
Invitations to Tender

- Scope of the duty of “fairness” – analyzed in light of express terms of Contract A
 - “Fairness” means applying the rules of the tender equally to all participants
 - “Fairness” means that the owner must not use undisclosed criteria when evaluating a bid
 - The owner does not have an obligation to look behind the face of or investigate each bid, and is entitled to accept and evaluate each bid based on the form and content of the bid submitted by the contractor
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Invitations to Tender – Typical Terms

A typical Invitation to Tender will include:

- A process for submission of bids
 - Deadline for submission
 - Indicates where bids are to be delivered
 - Will prescribe the form and content of the bid
 - That bids must be sealed
 - Procedures for amending a bid before the close of tenders
 - A set of specifications or a detailed description of the work the owner needs performed
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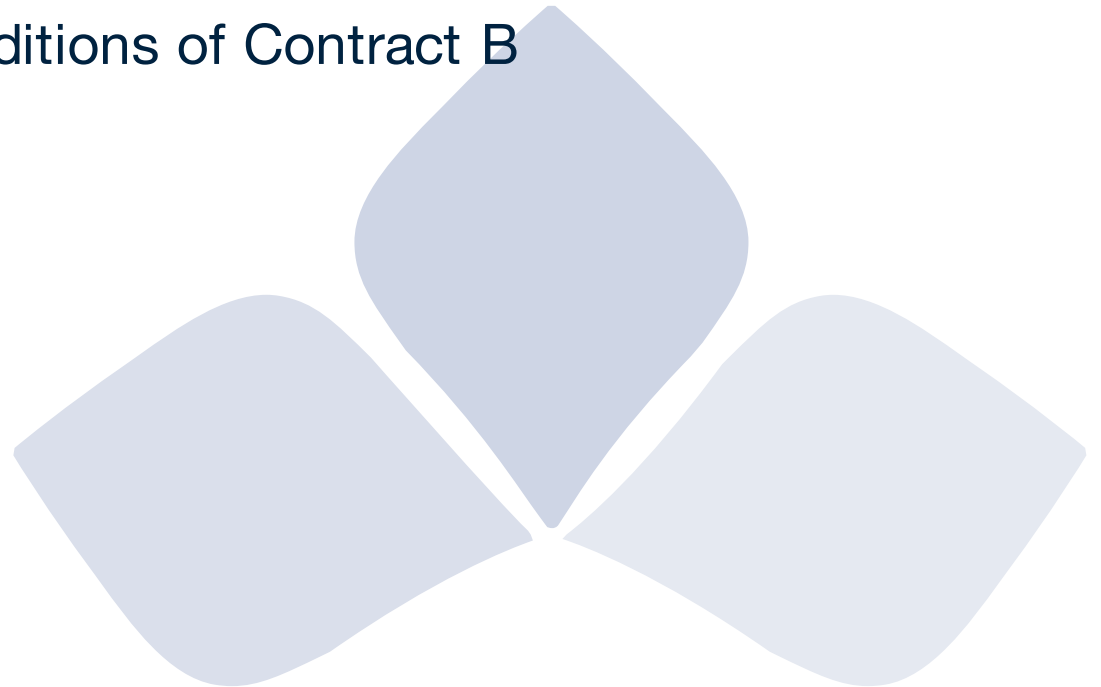
Invitations to Tender – Typical Terms

- A statement that bids are irrevocable for a specified period of time
- A statement reserving the owner's right to waive "informalities" in a bid
- A requirement for bid security
- Requirements for other information the owner thinks relevant – contractor's experience, references, list of sub-contractors, evidence that the contractor can provide a performance bond, list of equipment or key personnel
- In some cases, the evaluation criteria the owner will use (if price is not the only consideration)

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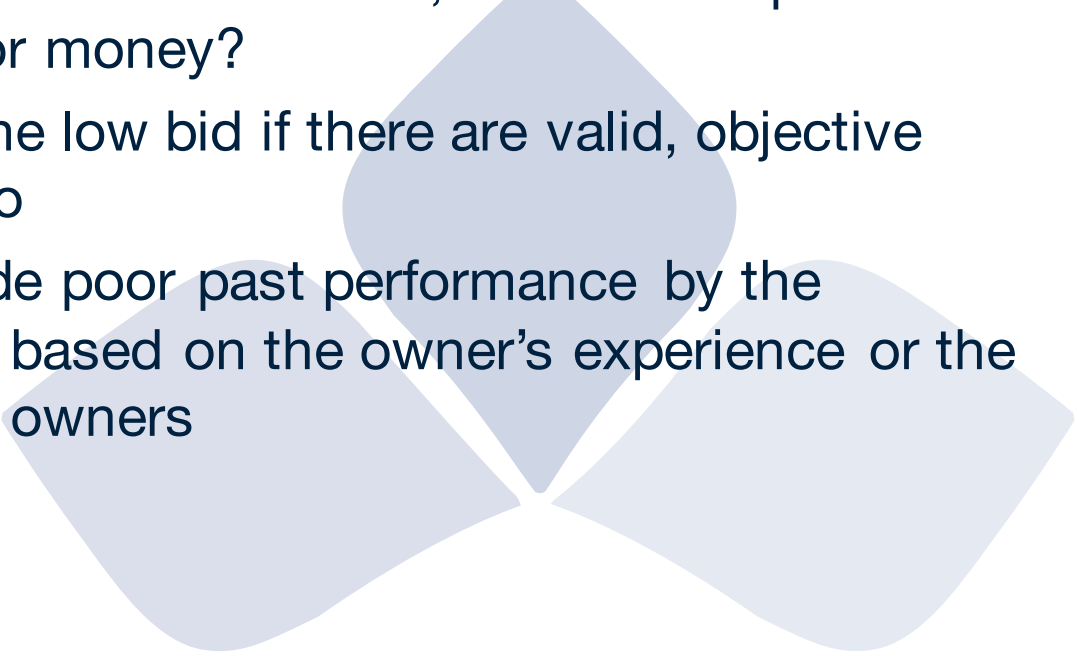
Invitations to Tender – Typical Terms

- A “privilege clause” – that the lowest or any bid will not necessarily be accepted
- A limitation of liability clause protecting the owner from claims for breach of Contract A
- The terms and conditions of Contract B



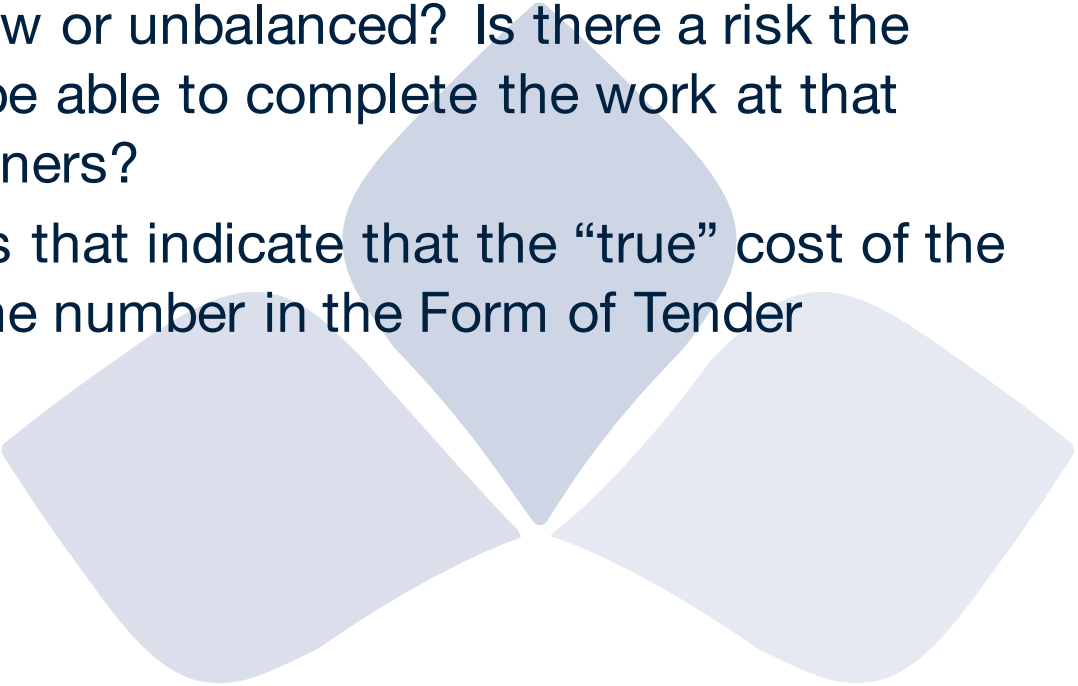
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Invitations to Tender – The Privilege Clause

- Owner can't rely on privilege clause to accept a non-compliant bid
 - “Nuanced view of cost” allows the owner to look behind the dollar value of the bid and to ask, which bid represents best overall value for money?
 - Owner may reject the low bid if there are valid, objective reasons for doing so
 - Reasons may include poor past performance by the contractor, whether based on the owner's experience or the experience of other owners
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Invitations to Tender – The Privilege Clause

- Does the contractor have a history of making spurious claims for extras to try to make up for its low-ball bid?
 - Does the contractor require a lot of extra supervision?
 - Is the low bid too low or unbalanced? Is there a risk the contractor will not be able to complete the work at that price, or will cut corners?
 - Other similar factors that indicate that the “true” cost of the bid is higher than the number in the Form of Tender
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Invitations to Tender – The Privilege Clause

- Owner is entitled to act in its own best financial interests so long as its decision is not “unfair”
- Courts have held the privilege clause supports a “reasonable exercise of business judgment” by the owner



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Invitations to Tender – Bid Compliance

- Default test for compliance is “material” compliance
- Where the test is material compliance – discrepancies, errors or omissions that do not affect the integrity or fairness of the bidding process, or the price or performance of Contract B, may be waived
- Owners can up the ante by requiring “strict” compliance
- If strict compliance is required - defects in the tender cannot be waived
- Strict compliance should be avoided without good reason
- Watch for use of “shall” or “must” in the invitation to tender

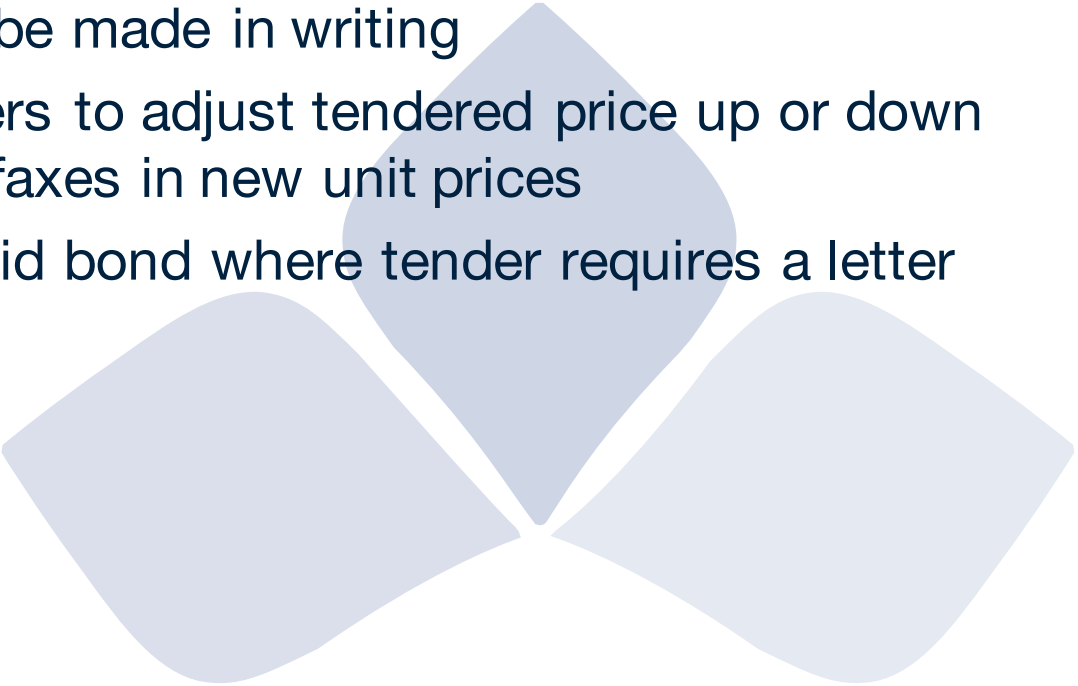
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Invitations to Tender – Bid Compliance

- Materiality is determined objectively – according to the courts, the is not a proper matter for the owner's discretion
- Must consider objectives underlying the tendering process, and the reasonable expectations of the parties, especially other bidders
- Test for materiality:
 - Does the defect in the tender undermine fairness of the competitive process, impact the cost of the bid or performance of Contract B, or create a risk of action against the owner by other bidders?

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Material Compliance Scenarios

- Bidder fails to fill in blanks in tender form but information required is found elsewhere in the bid
 - Bidder phones owner just before closing to advise of arithmetical error – owner makes correction – tender says changes to bids to be made in writing
 - Tender allows bidders to adjust tendered price up or down by fax, but instead faxes in new unit prices
 - Bidder provides a bid bond where tender requires a letter of credit
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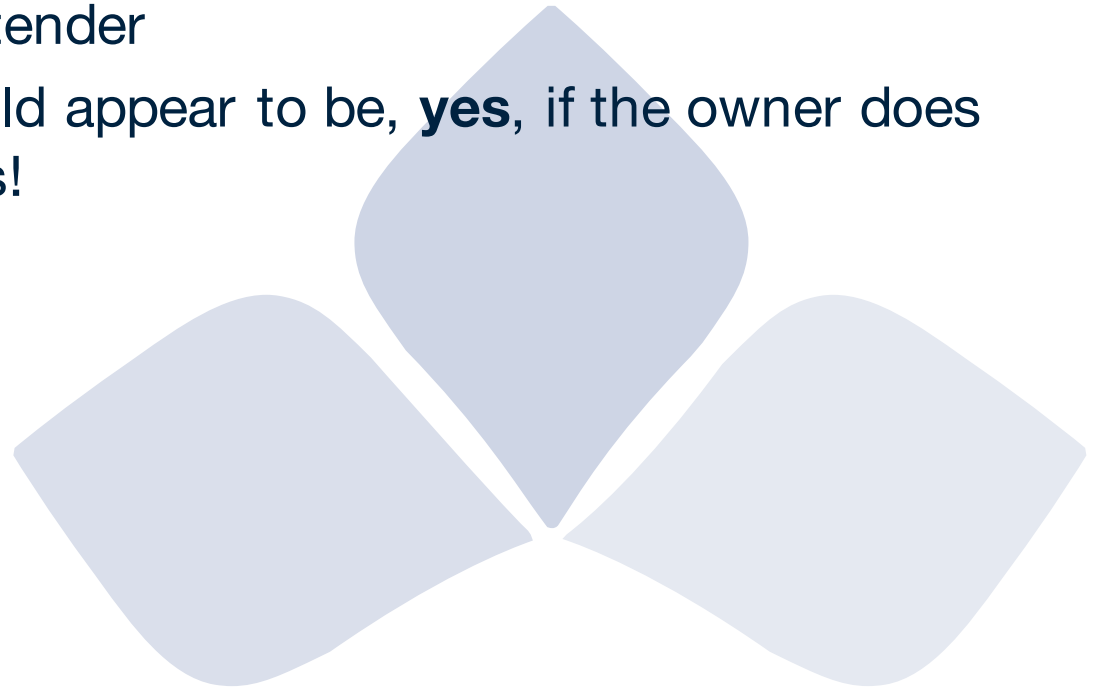
Material Compliance Scenarios

- Bid states the price in numbers and in writing – there is a discrepancy – bidder advises owner at the tender opening that the lower price is the correct amount
- Bidder fails to include vehicle registration numbers in schedule of equipment
- Bidder fails to complete list of subcontractors, or writes in “TBD”
- Bidder submits pro-forma, incomplete tender in a sealed envelope, then faxes in its complete bid an hour before the closing
- Corporate bidder does not apply corporate seal to its bid, although tender requires this

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Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- Tendering law is contract law
- Courts have confirmed that the terms and conditions of the tender are primarily determined through the express terms of the invitation to tender
- So the answer would appear to be, **yes**, if the owner does so in express terms!



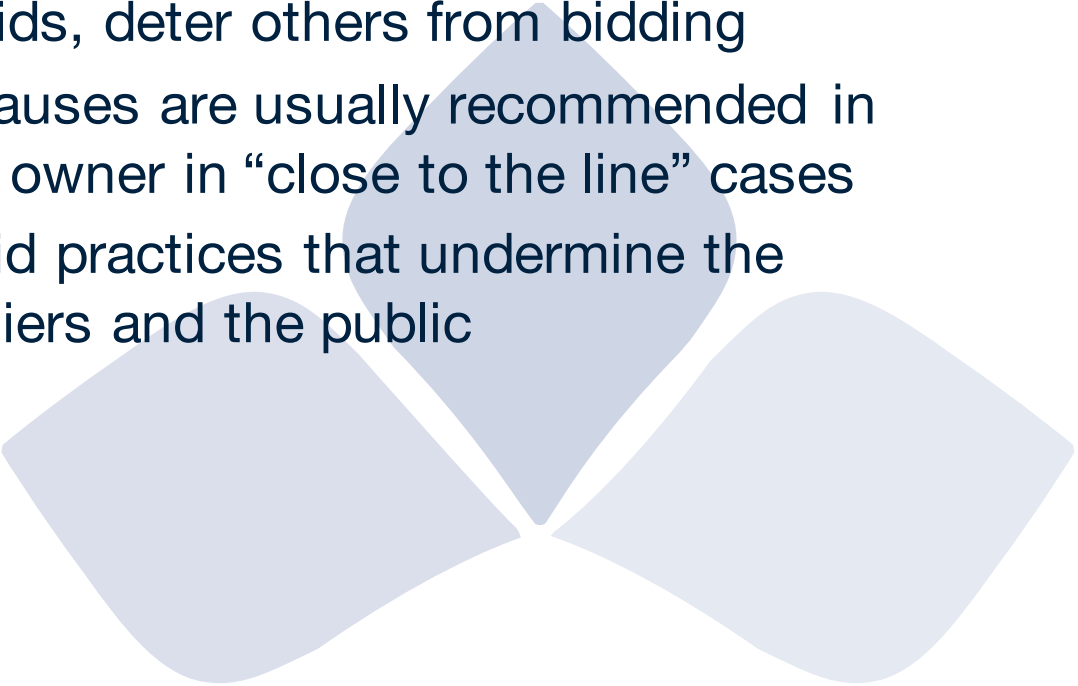
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Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- *Kinetic Construction*
 - owner expressly reserved right to retain and consider non-compliant bids. Court characterized the non-compliant bid as a counter-offer, found that given the clause, owner could consider the bid, but had to act “fairly” when comparing that counter-offer to the other compliant bids.
- *Graham Industrial Services Ltd.*
 - owner cannot reserve to itself the sole discretion to decide whether a defect is “material” or not

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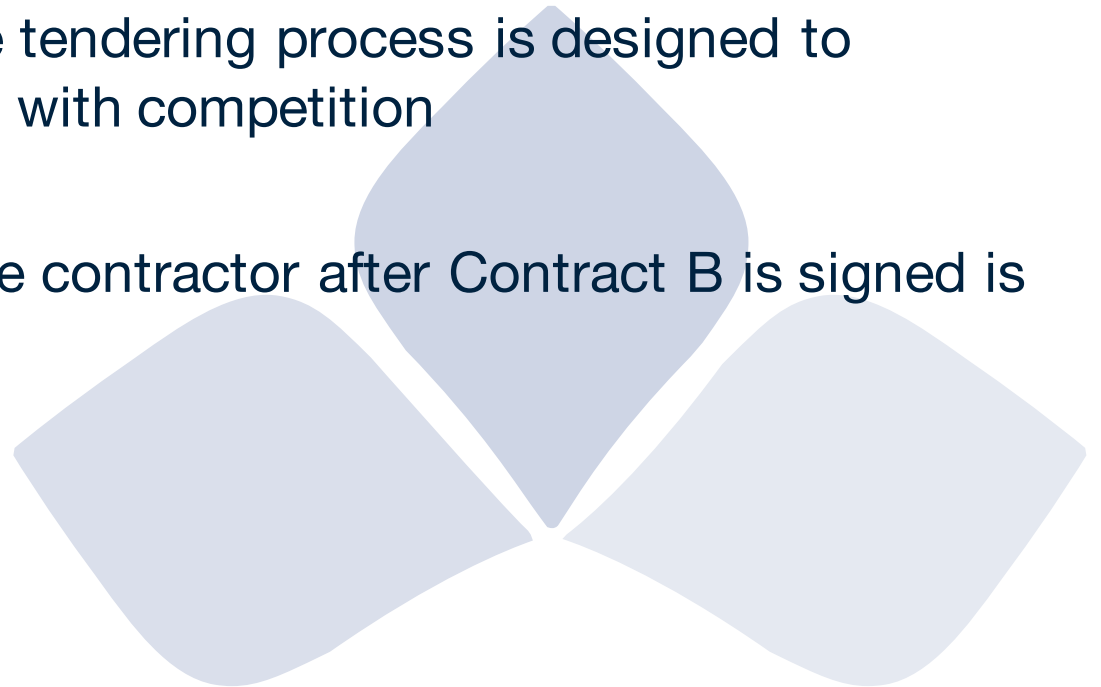
Can the Owner Reserve the Right to Accept a Non-Compliant Bid?

- But, **should** the owner reserve this discretion to itself?
 - Potential bidders might perceive clauses that are too owner-friendly as creating an un-level playing field – might affect the price of bids, deter others from bidding
 - Owner discretion clauses are usually recommended in order to protect the owner in “close to the line” cases
 - Owners should avoid practices that undermine the confidence of suppliers and the public
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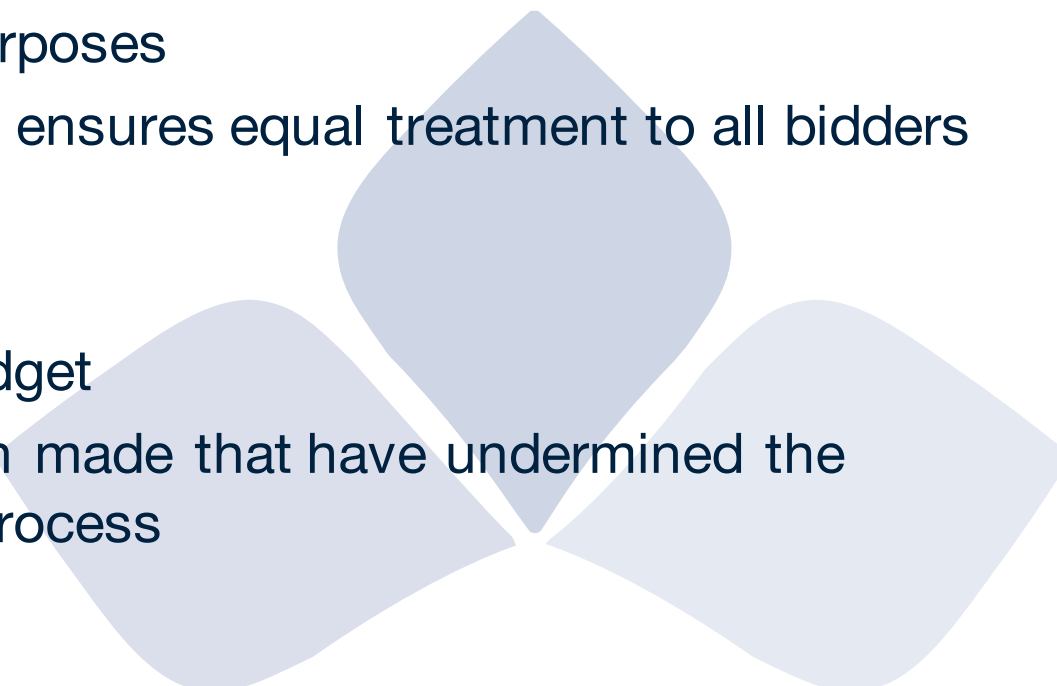
Can the Owner Negotiate With the Low Bidder?

- Not unless the invitation to tender expressly allows for this, and then only as expressly permitted
- Remember that the tendering process is designed to replace negotiation with competition
- Negotiation with the contractor after Contract B is signed is another matter



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Can the Owner Cancel the Tender?

- The privilege clause allows the owner to cancel the tender if the decision is made:
 - in good faith
 - for legitimate purposes
 - in a manner that ensures equal treatment to all bidders
 - Examples:
 - All bids over budget
 - Errors have been made that have undermined the fairness of the process
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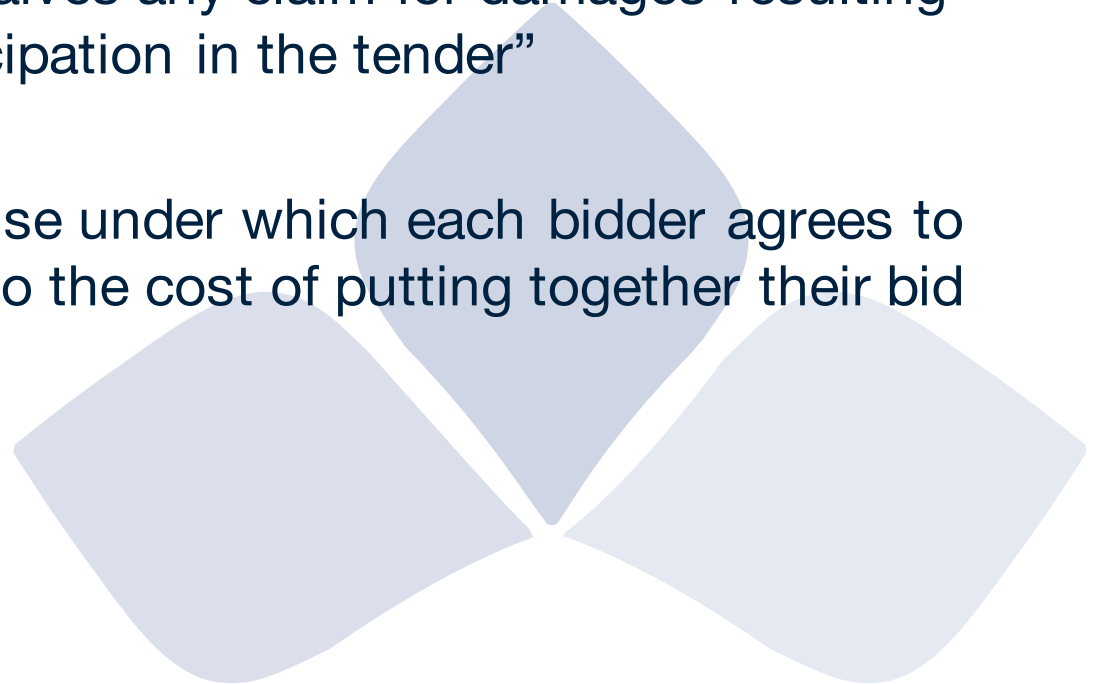
Tendering - Risks to Owner

- Owners can be sued by any of the unsuccessful bidders for breach of Contract A
- Owners have been sued, successfully, for:
 - Awarding Contract B to a non-compliant bidder
 - Using undisclosed evaluation criteria such as a local preference policy
- Courts may award damages for breach of Contract A amounting to:
 - The plaintiff's costs in putting together its bid
 - If the court is satisfied that but for the breach the owner would have awarded the contract to the plaintiff, damages for loss of profit on Contract A

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Exclusion/Limitation of Liability Clauses

- Owners have tried to limit their liability by:
 - Including in the invitation to tender clause such as:
“each bidder waives any claim for damages resulting from their participation in the tender”
 - Including a clause under which each bidder agrees to limit any claim to the cost of putting together their bid



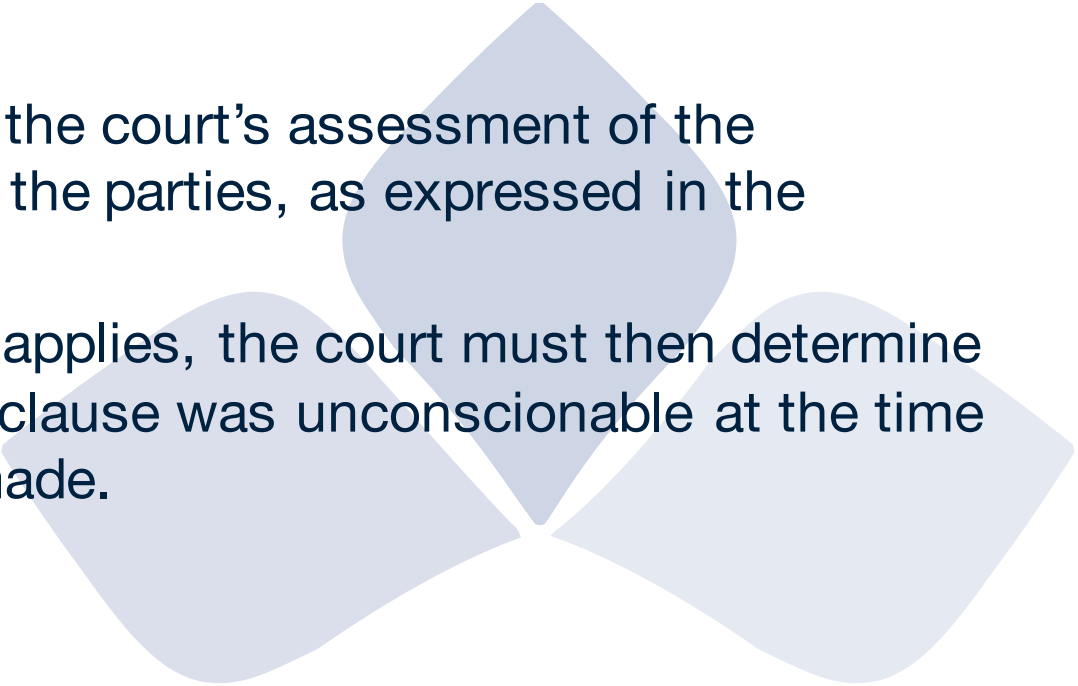
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Exclusion/Limitation of Liability Clauses

- Courts have taken a rather narrow approach to the interpretation of these clauses
- *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2010 SCC 4:
 - Clause limiting liability for anything arising from “participation in this tender” did not protect against claims for award to a non-compliant bidder

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Exclusion/Limitation of Liability Clauses

- When determining if an exclusion clause applies:
 - The court interprets the clause to determine whether it applies to the circumstances established in evidence.
 - Depends on the court's assessment of the intentions of the parties, as expressed in the contract.
 - If the clause applies, the court must then determine whether the clause was unconscionable at the time that it was made.
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Exclusion/Limitation of Liability Clauses

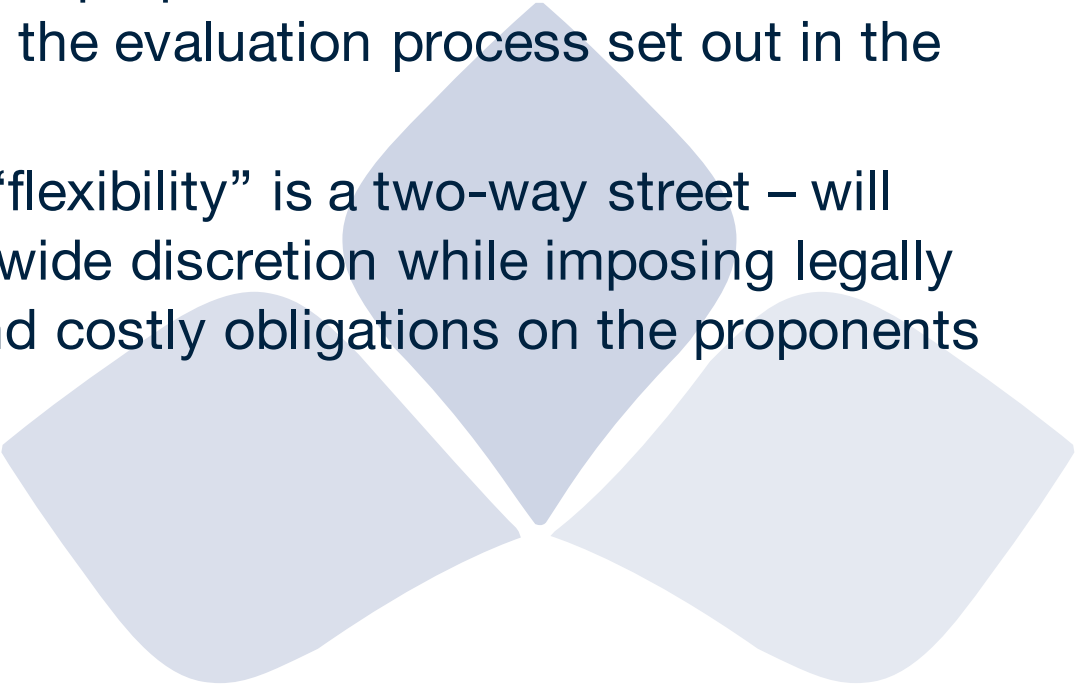
- If the clause is applicable and valid, the court must consider whether it should nonetheless refuse to enforce it because of an overriding public policy (to be proven by the party seeking to avoid enforcement of the clause) that outweighs the very strong public interest in the enforcement of contracts.



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RFP's

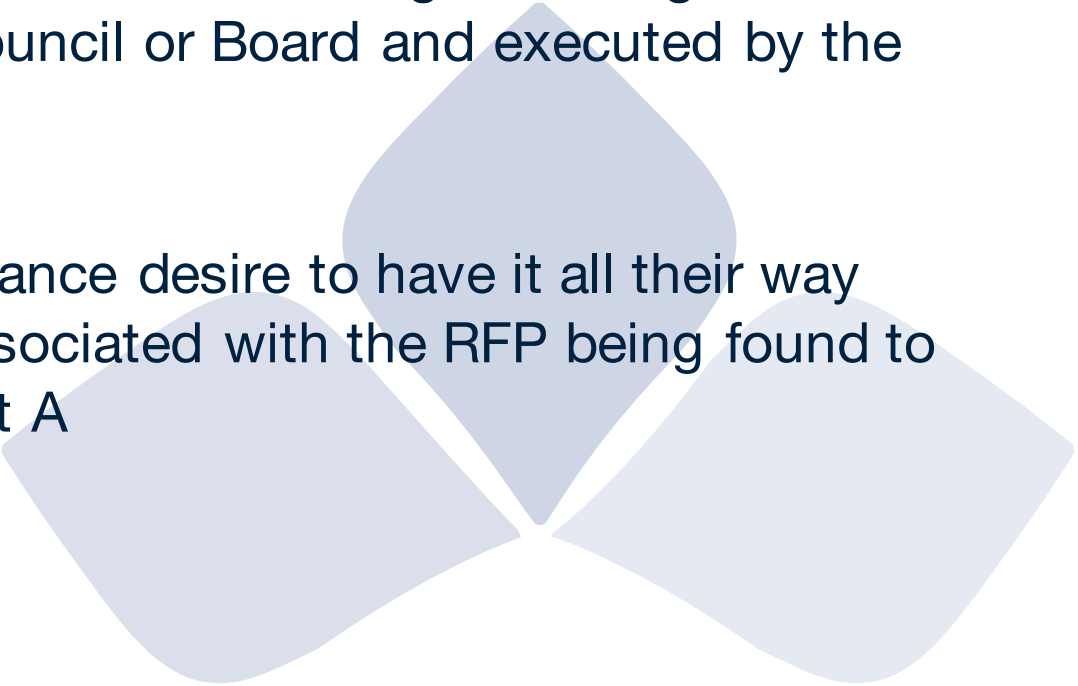
“True RFP”:

- Gives the owner flexibility to negotiate with the proponent that has put forward a proposal the owner considers most desirable, based on the evaluation process set out in the RFP
 - Will recognize that “flexibility” is a two-way street – will avoid giving owner wide discretion while imposing legally binding, onerous and costly obligations on the proponents
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RFP's

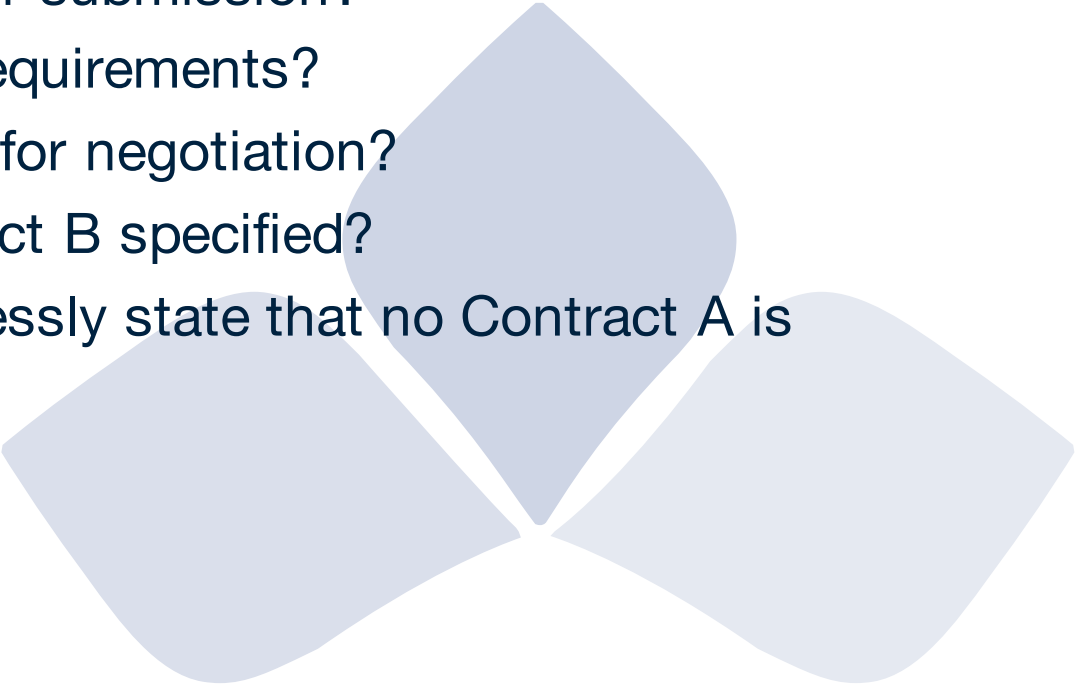
“True RFP”:

- Will state that the owner has no contractual obligation to any proponent unless and until a negotiated agreement is approved by the Council or Board and executed by the parties
 - Owners need to balance desire to have it all their way against the risks associated with the RFP being found to give rise to Contract A
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RFP's – Does Contract A Arise?

Courts will look at:

- Are proposals irrevocable?
 - Formality of the procurement process
 - Formal deadlines for submission?
 - Financial security requirements?
 - Limited or no room for negotiation?
 - Are terms of Contract B specified?
 - Does the RFP expressly state that no Contract A is intended?
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Do's and Don'ts

- Whether you are using a standard form tender document such as MMCD, or whether you had a consultant prepare the invitation to tender, make sure you read it and understand its terms before issuing the tender. Same holds true for RFP's.
- Consider whether in the circumstances you want Contract A to arise, and make sure the wording of the document reflects your intention.
- If an RFP, avoid imposing legally binding requirements on the proponent (security, irrevocability of proposal, etc.) if you do not want Contract A to arise

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Do's and Don'ts

- Avoid unnecessary use of terms such as “must” and “shall” to avoid the “strict compliance” test for tender compliance.
- Use “must” or “shall” for requirements that are essential to the fairness and integrity of the process.
- Avoid unnecessary, antiquated or impractical requirements for execution and submission of tenders.
- Try to achieve a reasonable balance between the interests of the owner and the bidders
- Consider whether the scope of the owner’s discretion needs to be expanded. Does the owner want the discretion to accept a non-compliant bid? Keep in mind that the more “owner-friendly” or unbalanced the process is, the more reluctant suppliers may be to participate.

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Do's and Don'ts

- If evaluation factors other than cost are to be used, disclose them.
- Consider including an exclusion/limitation of liability clause – have your lawyer review the wording!
- Make sure that all local government staff/elected officials involved in the process understand the legal requirements of the process.
- Follow the process you have set out in the invitation to tender or RFP – even if it means you have to reject a very competitive bid.
- Remember to look beyond the award of the contract - preserving your reputation and the integrity of your procurement process is extremely important