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**Avoiding Contract “A” -- the RFP Trend  
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## Question:

Are owners, particularly public ones, trying to escape the perceived inabilities/restrictions that ***Ron Engineering/Contract A*** places upon them by using RFP's and similar procurement processes?

Does it work? What are the consequences?



2. What are the perceived restrictions that **Ron Engineering/Contract A** impose on Owners:

i. Receipt

- Formal requirements for time, place, and delivery



## ii. “Structural” Review

- Compliance with mandatory requirements e.g. completion of forms with necessary information, signatures, corporate seals
- Bid security and consent of surety
- Irrevocability of bid
- Defects in bid
- a. Flexibility with *Substantial Compliance* test



### iii. “Nuanced” Review - Evaluation criteria

- Avoiding the “lowest price is the law”
  - a. Permitted by trade agreements affecting public sector owners  
e.g. CFTA and NWPTA
  - b. Undisclosed criteria not permitted
- Discretion clauses re: acceptance



iv. Negotiation and bid shopping are prohibited

- Violate the integrity of the tendering process/system

v. Damages for breach:

- Loss of profits or bid preparation costs



vi. Implied obligation - duty of good faith and fair/equal treatment

Is this the perceived problem ***Ron Engineering*** /Contract A creates?





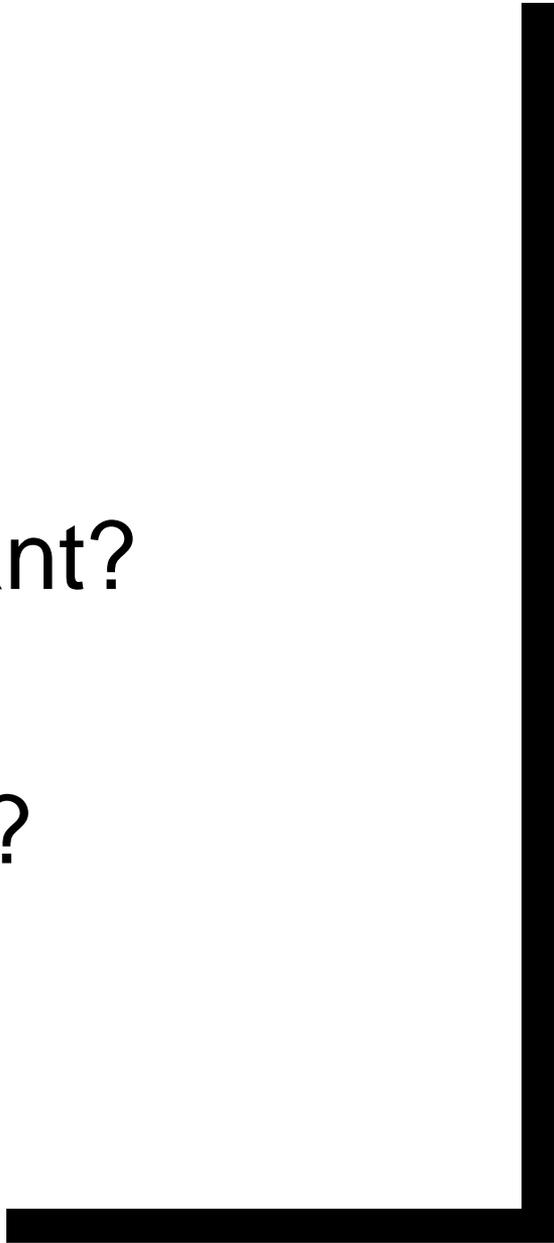
Question:

What do Owners want?

Is this achievable?



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# Answer:

## Broadly worded discretion clauses:

*Notwithstanding the foregoing, the Owner shall be entitled to accept a Tender in such form as the Owner in its sole discretion deems acceptable irrespective of irregularities or whether the tender is conforming.*



As it is the purpose of the Commission to obtain the tender most suitable and most advantageous to the interests of the Commission, notwithstanding anything else contained within the Tender Documents, the Commission reserves the right in its sole and unfettered discretion, to reject or accept any Tender, including the right to reject all Tenders. Without limiting the generality of the foregoing, any tender which,

- a. is incomplete, obscure, irregular, or unrealistic;
- b. is non-compliant or conditional;
- c. has erasures or corrections;
- d. omits a price on any one or more items in the Tender;
- e. fails to complete the information required in the Tender;
- f. is accompanied by an insufficient certified cheque, irrevocable letter of credit or by a Bid Bond in an unsatisfactory form,

may at the Commission's sole and unfettered discretion be rejected or accepted. Further, a tender may be rejected or accepted on the basis of the Commission's unfettered assessment of its best interests, which includes a Commission's unfettered assessment as to a Bidder's past work performance for the Commission or for anyone else or as to the Bidder's financial capabilities, completion schedule, or ability to perform the Work, or the Commission's desire to reduce the number of different contractors on a construction site at any given time. The Commission reserves the right to negotiate after the Closing Time with the Bidder that the Commission deems has provided the most advantageous Tender; in no even will the Commission be required to offer any modified terms to any other bidder prior to entering into a Contract with the successful Bidder and the Commission shall insure no liability to any other Bidders as a result of such negotiation or modification.



(emphasis added)

# Answer:

## No Implied Obligations:

*No implied obligation of any kind by or on behalf of the [Owner] shall arise from anything in the Tender Documents, and the express covenants and agreements contained in the Tender Documents and made by the [Owner], are and shall be the only covenants and agreements that apply.*



## The Alberta Court of Appeal held

“...that accepting non-compliant bids is inherently unfair to tenderers submitting compliant bids...it was open to the parties to expressly override the duty of fairness if the owner’s discretion clause was precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract, and not unconscionable to public policy.”

(emphasis added)



In ***Double N Earthmovers v. Edmonton (City)***, the Alberta Court of Appeal, stated:

*The tender documents govern the terms, if any, of contract A... It follows that, if the terms so permit, a non-compliant bid may be acceptable, so long as there exists a clause explicitly allowing non-compliant bids. Such a clause would have to be very clear, and must be read restrictively when attempting to determine if non-compliant bids are permissible.*

(emphasis added)



# Answer:

Maybe broad discretion clauses can't eliminate implied obligations in Contract "A"



# New Approach:

## Limitation of Liability Clauses:

*“...no [bidder] shall have any claim for compensation of any kind whatsoever as a result of participating in this [procurement] and by submitting its [bid] each [bidder] shall be deemed to have agreed that it has no claim...”*



Limitation of liability clauses are generally enforceable provided they satisfy ***Tercon*** test:

1. Does the clause apply to the fact scenario?
2. Was it unconscionable at time of contract formation?
3. Any public policy reasons to not enforce it?



## ***Rankin case***

*The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender, or by reason of any delay in acceptance of a Tender, except as provided in the tender documents.*



## The Court of Appeal in *Rankin* states:

The language is in my view clear ...To interpret para. 11.3 as not applying where a breach by the MTO of the tender documents is alleged would effectively render it meaningless. Paragraph 11.3 is a commercial response to the increased litigation faced by owners arising out of the acceptance, and corresponding non-acceptance, of bids.

The relevant commercial context also includes that bidders are sophisticated parties and are free to choose not to submit a tender in the face of a broad exculpatory clause in the tender documents. And if, faced with such a clause, desirable bidders do not respond to requests for tenders, market forces will drive the owner to modify the terms of its tender documents to stimulate competitive tenders. For example, an owner might choose to limit an unsuccessful bidder's damages to its costs of preparing its tender, instead of barring claims for profits lost as a result of the award of the tender to a competitor.



# Question:

Are things really that bad for public sector  
Owners who use the tendering system?



# How are RFP's different?



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i. Receipt

- Requirements for time, place, and delivery

ii. “Structural” Review

- Compliance with mandatory requirements
- Proposal security – uncommon
- Consent of surety
- Defects in proposal

- a. Flexibility with the *Substantial Compliance* test



iii. Evaluation criteria

a. Commonly used

b. Undisclosed criteria not permitted

iv. Discretion clauses re: acceptance

v. Irrevocability of proposal to allow for  
Owner review and negotiation



## Typical template clauses: “Not a Tender”

*This 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 RFP shall not give rise to any “Contract A” – based tendering law duties or any other legal obligations arising out of any contract or collateral contract; and (b) no Proponent shall have the right to make any claims against [owner] with respect to the award of a contract, failure to award a contract or failure to honour a response to the RFP. No legal relationship or obligation shall be created between any Proponent and [owner] until the successful conclusion and execution of an Agreement.*



# Key RFP Differences

- v. Negotiation - hallmark of a true RFP
- vii. Consequences of breach - loss of opportunity to enter into a negotiation so damages might be more speculative



## Limitation of Liability clauses

...in the event that [owner] is found to be liable in any respect under this RFP or with respect to the related procurement process, the Proponent agrees that [owner] 's liability to the Proponent and the aggregate amount of damages recoverable against owner for any liability related to or arising out of this procurement process whether based upon an action or claim in contract, warranty, equity, negligence, intended conduct, or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of [owner] , shall be the lesser of:

- (1) The Proposal preparation costs that the Proponent seeking damages from [owner] can demonstrate; or
- (2) Five Thousand Dollars (\$5,000.00)



## Courts will look to substance – not labels:

- is submission irrevocable - can parties walk without incurring liability
- are contract terms found in the procurement documents
- are the contract terms negotiable or fixed
- is there evidence of an intention to create contractual relations upon proposal submission- “*no tender clause*”
- is compliance with specifications mandatory



Implied duty of good faith and fair/equal treatment –the slow advance of tendering law principles into the RFP world

- **Mellco:** bids and RFPs are on a continuum; duty on owner to conduct itself fairly, in good faith, and with equality; consider proposals fairly; without some fairness, proponents incur costs in futile system
- **Buttcon:** obligation of fair consideration

**However**

- **Martel:** no duty to negotiate in good faith





What does this mean for public  
sector owners?

Where to now?



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# Questions



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