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# Procurement and Tendering

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### Note About Slides and Video Presentation:

- **Video Slides:** The Video Presentation focuses only on the following slides: 4, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 44, 57, 59.
- **Additional Slides:** The other slides, including case comments, are intended to be a source of future reference, giving more detail on specific topics about Contracts than could be covered in this brief Video.

## Why Tenders?

- Most projects, whether public or private, are implemented by contracts awarded through some form of competitive procurement

## Procurement: A process for an owner to select a contract party and award a Contract

- In previous lecture we described manner in which Contract is formed:
  - Offer and Acceptance:
    - A party "accepts" and Offer presented by the other party.
    - Offer and acceptance occurs through negotiation until a live Offer is accepted.
- In general no special rules about exchanging offers and giving an acceptance – and creating Contracts – "freedom to Contract"
- Problem: often (usually) the owner is interested in receiving the "best" (eg lowest price) offer –
- The Objective of Procurement: how to obtain the most advantageous Contract?

## Overview

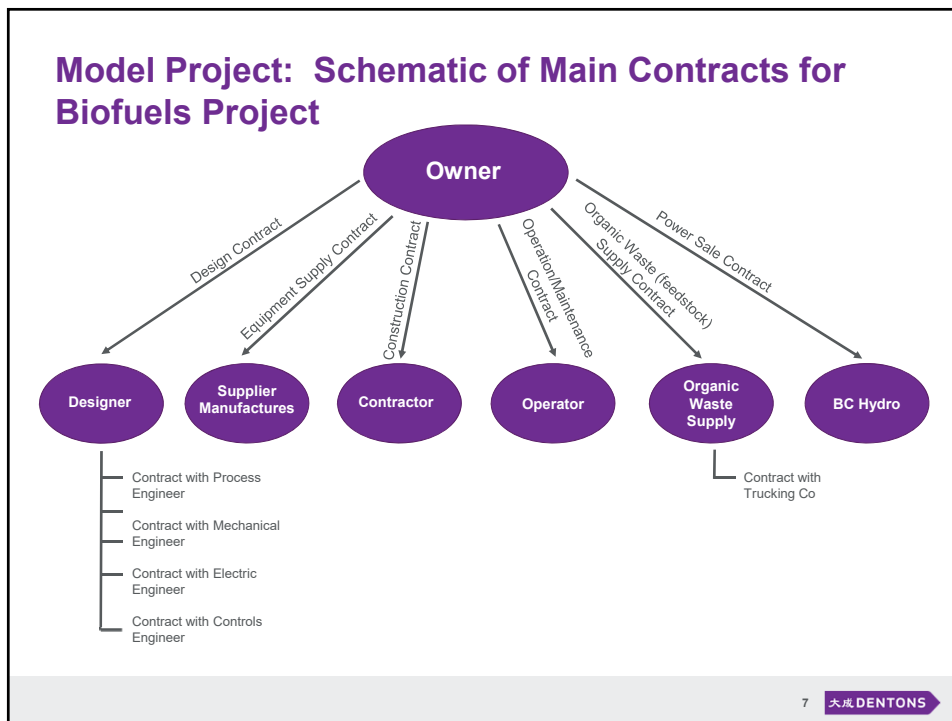
- 1) Procurement: A process for an owner to select a contract party and award a Contract
- 2) Need for competitive offers – to obtain the best Contracts
- 3) If a person decides to select by Tender (usually no obligation) – ie wants to receive competitive bids then in Canada special legal rules will apply – the set of rules is the “Law of Tender”
  - 1) Judge made law – Ron Engineering v. The Queen
- 4) Tender – impose some formalities - Very common in Engineering and Construction business
- 5) Common law rules – always evolving
- 6) Fairness
  - 1) Pure Heart no defence
- 7) Tender vs RFP
- 8) Practical Tips

## Tender Golden Rules

***“the integrity of the bidding system must be protected”***



***“The rationale for the tendering process...is to replace negotiation with competition.”***



### List of Owner's Main Contracts for the Biofuels Project:

- **Design Contract**
  - Process Engineering/controls
  - Electrical
  - Mechanical
  - Geotechnical
- **Equipment Supply Contract** Contract with
- **Construction Contract**
  - Subtrades: electrical, mechanical, geotechnical, systems
- **Operation/Maintenance Contract:** Subtrades: cleaning; landscaping
- **Organic Waste (feedstock) Supply Contract**
  - Trucking Contract
- **Power Sale Contract**



## Need For Competitive Offers

- Benefit is seen on large projects, such as our Model Project, or in larger Contracts – important for owner to have confidence that the prices and Contract terms are competitive
- Question: How can the owner have a chance to get the best Contracts?
- Answer: Owner holds a competition between possible contractors to see who will offer the best Contract (best price/terms/options etc)

## Competition for Contracts

- For convenience in running Contract competition Owners have developed some standard approaches – these include:
  - 1) As a matter of organization, and to guard against bidders playing games, bids are required to be submitted by set day and time ("bids close at 2:00 pm Tuesday)
  - 2) To give the Owner time to analyze bids, bids are to be irrevocable for xx days (often 30 or 60 days)
  - 3) The criteria that the Owner is looking for is announced in advance – "eg lowest price wins
  - 4) To provide security that the best bidder won't change its mind, bids are required to be accompanied by a deposit that the Owner can claim if a winning bidder declines to enter into the Contract.

## Process to Create Tender Documents

- Starting point – consider the Owner's needs or objectives for the Contract:
  - Express the Owner's needs or objectives in a draft contract
  - The draft contract should, at a minimum:
    - **Scope:** Have a place in the Contract where the final scope of responsibility will be clearly defined (scope of construction work/scope of professional services/ description of equipment to be supplied etc)
    - **Price:** Have a place in the Contract where the Contract Price (or a number of applicable prices) will be set out that will be the payment for the performance of the Scope
    - **Schedule:** Have a place in the Contract where the performance/delivery times are clearly described
- At the end of the procurement this draft Contract will be completed with the winning bidder's prices and other information and will become the "Contract" – ie Contract "B"

## 3. Judge-Made Law – Ron Engineering v the Queen

- In 1981 the Supreme Court of Canada decided the case of *Ron Engineering* and changed the law around competitive procurement in Canada
  - Unique to Canada
  - Different from USA, England, Europe and the rest of the world
  - Put more duties on Owner who are inviting competitive bids for the purpose of competition in awarding a Contract

### Facts in *Ron Engineering*

- Bidder refused Construction Contract award because of mistake;
- Bidder had included a Bid Bond to secure bid;
- Owner retained bond and awarded to next low bidder
- Bidder sued government to recover bid bond
- **Bid Content:**
  - Bid irrevocable for 30 days
  - Bid security to cover owner's loss if bidder rejects award
  - Other terms such as promise to use certain subcontractors

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### Parties' Rights Upon Submission of Bid

- Court asked: "if the parties have enforceable rights that come into life when bids are submitted, how do those rights arise?"
- **Answer:** there is a "preliminary contract" that arises between each bidder and the owner that explains and governs all bidders' and the owner's rights and obligations between time when bids are submitted and the award of the contract

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#### 4. Result of Ron Engineering In Canada

- Contract “A”: If there are outstanding obligations created by the submission of a bid (such as the obligation to hold prices for a specified time) then a Contract “A” forms between the Owner and each bidder that submits a valid bid – the terms of the Contract “A” are as described in the invitation (Instructions to Bidders/Request for Proposals) document.
- Contract “B”: The ultimate contract that the owner awards to the winning bidder
- A major source of litigation in construction and engineering has been claims that an owner has failed to comply with the requirements of a Contract “A” in a procurement.

#### Basic Principles of Tender Law

- A Contract A may arise with each bidder when bid is submitted
- Main terms of Contract A are in the tender documents
- Contract A protects the integrity of bidding process
- Once the bids are in, you are in a contract!



### Basic Principles of Tender Law

- Contract A arises only if acceptance is on the terms of the offer in the tender documents (compliance)
- A qualified bid – one that doesn't conform to tender documents – does not create a Contract A
- Breach of Contract A results in: an award of damages = lost profits (\$\$\$)
- Applies to GC – subcontractor relationship too

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### Basic Principles of Tender Law

Owner obligations:

- Duty to follow express terms of Contract A
- Duty to treat all bidders fairly and equally
- Duty not to accept non-compliant bid
- Not to negotiate (competition replaces negotiation)

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## A Word on Fairness

- In the Canadian law of tender, the courts have identified that bidders are dependent on owners administering procurements in a way that does not improperly favour or prejudice any one bidder, as compared to other bidders – this is **Duty of Fairness**
- Duty of Fairness is imposed on any owner that elects to proceed by tender
  - Owner will receive the benefit of competitive bids
  - By doing so the Owner is electing to “replace negotiation with competition – ie the tender process”
  - Owner must apply the rules as described in the procurement documents fairly
  - **It is no defense for the Owner to try to justify a violation of the rules on basis that public is better served**

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## Duty of Fairness

*Martel Building*, SCC, 2001

- Scope of duty of fairness depends on express terms of Contract A
- Owner can reserve rights and privileges in tender documents:
  - privilege clause
  - discretion clause
  - exclusion/limitation of damages clause

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## Privilege Clause

*MJB, SCC, 1999*

- *“The lowest or any bid need not necessarily be accepted”*
- Reserves the right not to accept lowest or any bid
- Overrides custom of award to lowest bid and allows “nuanced” approach to price
- Cannot use to accept non-compliant bid or to breach duty of fairness
- Can use to reject all bids (for the right reasons), but careful not to breach Contract A – get advice

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## Discretion Clause

- Reserves the right of the owner, in its sole discretion, to waive minor irregularities and defects in a bid (i.e. non-compliant bids)
- Important Note: Sole discretion clause does not prevent later court review (*Graham*)
- Does not allow owner to enforce a contract with a **materially** non-compliant bid
- Reason: no Contract A arises

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## Exclusion Clauses - Do They Work?

- *No proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.*

Tercon, BCSC, 2006 – avoided the clause

BCCA, 2007 – upheld the clause

SCC, 2009 - ??

## Tender vs Request for Proposals (RFP)

- Classically a “tender” is a competition where the design and scope of the construction/service etc is fully defined in the draft contract, and the only material point of competition is price
- A competition where the Owner invites alternate design or scope solutions, with price or other related issues such as schedule to vary according to the design offered, is an RFP
  - Basically the same legal rules (Contract “A” and Contract “B”) apply to both tenders and RFP’s

## RFPs

*Tercon Contractors*, BCSC, 2006

- A Contract A arose because of intention to contract based on: irrevocability, formal process, bid security, commitment to build, specific scope of work, agreement attached, etc.

BCCA, 2007

- Only issue: upheld exclusion clause

SCC, 2009 (still waiting)

- Was there a breach of Contract A?
- Enforceability of exclusion clause
- (Whether a Contract A arose in the RFP)

## RFPs

*Budget Rent-A-Car*, BCCA, 2009

- *This RFP does not constitute an offer. No agreement shall result upon submission of Proposals...[Owner] will not have any obligation to anyone in connection with this RFP unless [Owner] executes...an agreement in writing...*
- RFP held not to be a contract, but unusual facts

## Process to Create Tender Documents

- To prepare the actual Instructions to Bidders/RFP documents the elements of the invited competition need to be clearly understood
  - Only price?
  - Proposed performance schedule?
  - Strength of bidder's team
- The "rules" for the competition are then set out in the Instructions to Bidders/RFP
  - Content for bids/proposals/submissions
  - Deadlines for delivery of bids
  - Location for delivery of bids
  - Any restrictions on who can bid
  - Bid Bond or other security required
  - Criteria for selection and review of bids
- Collectively the Instruction to Bidders/RFP are the terms of the Contract "A"

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## Practical Tips: Tip #1 – Request Only Essential Information

- Requesting unnecessary information increases:
  - Increases risk of non-compliance
  - Increases cost for bidders
  - Confuses evaluation – inference is that everything requested is relevant

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### Practical Tips: Tip #2: - Minimize “Mandatory” Information

- Missing any information specified as mandatory will result in non-compliance (*Graham*)
- (Be sure the owner will want to reject a low/attractive bid that misses a specified mandatory provision)
  - “Must” submit 10 copies
  - “Must” be delivered in a sealed envelope addressed as “X”
  - Revision “must” be signed by same person as signed original

### Practical Tips: Tip #3: - Tender Documents are “last chance”

- Once bids close the documents commit the owner for the entire project – therefore check it over carefully
  - Through the tender (duration of contract “A”)
  - Through the construction contract (contract “B”)
  - One person should check it as a whole – (too often different people write different parts for different purposes – eg commercial terms vs specifications)

### **Practical Tips: Tip #4: - Draft as an “Operating Agreement**

- Should provide answers to likely questions during bid preparation, submission, evaluation and award

### **Practical Tips: Tip #5 - Make it difficult to be Non-compliant**

- Make sure Tender Form has place for all information being requested
  - Eg – separate line for taxes



### Practical Tips: Tip # 6 – Follow Procedures Designed to avoid Problems

- Specify that all questions must be addressed to one identified person
- One representative avoids risk that two different answers will be given to the same question
- Not an office or firm

### Practical Tips: Tip # 7 – Draft for Clarity/Consistency and Organization

- Follow policy of stating any issue only once in the tender documents
- (lawyer's rule of interpretation - if you say it twice you will say it differently)

### Practical Tips: Tip # 8 – Amendment/Clarifications/Addenda

- Specify that no oral advice may be relied on – amendments may only occur by formal written addenda

### Practical Tips: Tip # 9 – Evaluation/Selection Criteria

- Courts require fairness
- Courts will respect any process/criteria selected, but whatever is selected MUST be strictly followed
- Corollary is don't specify process that owner is unlikely to follow

### Practical Tips: Tip # 10 – Post Award

- Cover duties and obligations between notice of award and execution of contract
- Can/must contractor start work?
- Any documents (wcb, insurance, bonds, schedule) required before work can start?

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### Caution!! Tender Rules Not Static – Can Change

- A strength of “common law” (which is law as defined and developed by judges) is that it can evolve and change over time to meet the community needs
- However, common law is never static and in theory is constantly changing.
- The law of tender in Canada is judge-made law and is therefore not static
  - Engineers and other parties who work in the area of procurement therefore need to take expert advice from qualified persons as to the most current procurement requirements

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## Current Issues in Tender/RFP

- Mistake
- Compliance
- Bid Shopping
- Evaluation
- Extent of Duties
- Cancellation of Tender

## Mistake

- *Ron Engineering* – risk of mistake in calculation of bid price is bidder's – can't withdraw bid
- *Vachon* – mistake on face of bid can create uncertainty as to price so no Contract A (price in numbers different than price in words)
- *Canvar* – owner can't accept obvious mistake regarding price, apparent on face of tender (bid bond amount not 5% of bid price)

## Compliance

*Graham Industrial, BCCA, 2004*

- Graham's bid was \$5 million lower than next lowest bid
- \$2 million calculation error – tried to withdraw (*Ron Eng.* won't allow)
- GVWD awarded Contract B to Graham, relying on discretion clause to waive minor discrepancies

## Graham Industrial

*"If a Tender contains a defect or fails in some way to comply with the requirements of the Tender Documents, which in the sole discretion of the Corporation is not material, the Corporation may waive the defect and accept the Tender."*

### ***Graham Industrial***

Graham argued its own bid was non-compliant:

1. Tenderer *shall* provide a 3 page discussion covering mitigation of impacts to neighbours regarding noise, air emissions and road safety, etc.
2. Tenderer *shall* include a 5 page outline of its intended Environmental Protection Plan, including...

### ***Graham Industrial***

- Court held Owner couldn't rely on discretion clause because no Contract A arose
- Bid was **materially non-compliant**:

*“one which fails to address an important/essential requirement or with an omission significant in owner deliberations”*

### ***Kinetic Construction, BCCA, 2004***

- Compliant bidder (with a Contract A) complained about award to non-compliant bidder – who failed to include price for 4 years of insurance
- Court said no breach of Contract A – privilege clause allowed owner to do this

### ***Kinetic Construction, BCCA, 2004***

- *The Owner may however, in its sole discretion, reject or retain for its consideration Tenderers, which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers.*

## Compliance

*Double N Earthmovers v. Edmonton*, SCC, 2007

- An “informality” that can be waived is an omission or error not materially affecting price or performance of Contract B
- No duty on owner to investigate whether bidder can comply
- Once Contract B is awarded, the duties under Contract A are at an end

## Compliance

*Thales v. TTC*, Ont SC, 2009 (injunction)

- Okay for TTC to reject a bid as non-compliant when submitted letter from bank that “under current conditions and expectations, we envision being in a position to issue” an LOC, rather than a firm Agreement to Provide a LOC



## Compliance

*St. Lawrence College v. Canada*, FC, 2009

- Bidder's application for declaration that its bid was compliant was denied
- Cover letter in response to an RFP that attached the contract to be entered into reserved the right to negotiate the terms of the final contract
- A clear qualification on the bid per *J. Oviatt*, and so non-compliant

## Compliance

*Halifax v. England Paving*, NSSC, 2009

- Whited out and corrected tender price not initialled was a minor non-compliance capable of waiver because price was found elsewhere in bid
- But missing Schedule of Quantities and Prices was substantial non-compliance, so owner could not accept the bid (note: dispute over whether bidder failed to submit it or owner lost it)

## Compliance

*N.A. Construction v. York, Ont SC, 2009*

- ITs say must attach all addenda to bid (!!)
- Bidder asks if must attach the attachments to the addenda too
- Owner answers “No”
- Second low bidder attaches all attachments (a box) and complains when sees low bidder’s bid
- Court says it is a minor deficiency and allows waiver

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## Compliance

*Bot Construction v. MOT, Ont SC, 2009*

- Bid for “all Canadian steel” but mandatory rolled steel was not available in Canada –accepted by MOT
- Other bidder challenged successfully
- Accepted bidder argued rolled steel was .26% of tender price so it was a minor non-compliance that could be waived
- Problem: MOT didn’t waive, treated it as a change proposal that would be accepted under Contract B

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## Compliance

*Coco Paving v. MOT, Ont CA, 2009*

- Electronic tendering
- “Bid must be received by MTO servers before 3 pm”
- Bid received at 3:28. “Computer glitch”. “Internet traffic jam”. Cause not clear
- Bid closing time is “sacrosanct”
- No clause allowing acceptance of late bid

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## Compliance

*Cambridge Plumbing v. Owners, BCSC, 2009*

- 60 day Consent of Surety was not materially non-compliant with a 90 day requirement – not essential to tender
- Owner’s behaviour is relevant to whether non-compliance is material

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## Compliance

*Maystar v. Newmarket*, Ont CA, 2009

- Owner wrongly accepted bid with error in bid price, GST, and/or total price
- After public opening, bidder advised his true price was the lower bid price – displaced low bidder
- Owner not allowed to correct bid. It was uncertain as to price and non-compliant
- Owner acted in good faith, but that's not a defence
- Privilege clause did not specifically allow acceptance of a non-compliant bid

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## Compliance

*Russell v. Dalcon*, Ont SC, 2009

- Consultant recommends rejection of low bid due to errors, informalities, weak experience
- Both low bidders threaten to sue
- Township asks court to bless its rejection of low bid
- Court declines. ITs give discretion to Owner to correct errors and waive irregularities and Court won't make decision
- "Listen to competent legal counsel and apply the many legal principles"

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## Bid Shopping

*Stanco Projects, BCCA, 2006*

- After public opening, consultant issued Post-Tender Addendum to get price on one tank
- Bid shopping = “nefarious practice of using bids as negotiating tool before award to get better price”
- Bid shopping is breach of Contract A
- Consultant found 100% liable to Ministry

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## Post Closing

- Owner/consultant generally has less freedom than is thought
- To be permissible, negotiation must be clearly allowed by tender documents – careful of bid shopping
- Keep in mind obligations to all bidders
- Careful of “clarifications” – don’t let bidders fix a non-compliance with mandatory requirements or add significant new information after closing

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## Evaluation

*Continental Steel, BCCA, 2007*

- GC's decision to reject low subcontractor bid because of history of claims and disputes upheld by Court

## *Continental Steel*

- Trial Judge wrongly substituted his own analysis – privilege clause gave GC a discretion and GC exercised it fairly and objectively
- GC entitled to take nuanced view of cost
- Not a case of undisclosed criterion or hidden preference
- GC entitled to act in own best financial interests, provided its process was not unfair
- Reasonable exercise of business judgment

### **Hub Excavating, BCCA, 2009**

- Low bidder claimed owner had no good faith intention to proceed when project cancelled because bids over budget
- Post-closing, Consultant gave inaccurate information suggesting Hub would get the contract
- No duty of fairness before Contract A – Fairness means consistent and even treatment
- No court interference with owner's business decisions
- No reasonable reliance on Consultant's statements – bidder took business gamble not to bid on next project

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### **Evaluation**

*Cherubini v. N.B. Power, NBCA, 2009*

- Okay to pick second low bid based on experience of subcontractor (bidder argued we will supervise him)
- **No requirement to disclose weightings of criteria** (see also *Elite*)

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## Evaluation

*James A. Brown v. Caisse*, Ont SC, 2009

- Owner entitled to investigate reliability of information provided by bidders, including site visits (to all 3)
- No duty to allow bidder to reply to negative information collected
- Evaluation process not done perfectly, but not unfair

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## Evaluation

*Force Construction v. N.S.*, NSCA, 2009

- Breach of duty of fairness for owner to make post-closing demand (with short time fuse) from low bidder for an assurance of supply of windows from a new supplier, and then to reject for failure to do so

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## Extent of Duties

- No duty by owner to subcontractor/JV team member: *Design Services*, SCC, 2008
- No duty by owner to the public in bid selection *Heyes* (Canada Line), BCSC, 2009

## Cancellation of Tender

- Assume duty of fairness and good faith will survive
- Careful how you structure this. Best to:
  - Reject all bids, re-design and re-tender; or
  - Reject all bids and negotiate to de-scope (start with the low compliant bidder)

**DON'T NEGOTIATE IN THE TENDER!**

## Cancelling the Tender

*R. v. Crown Paving*, 2009, Nfld CA

- Okay to cancel tender and enter into an extension of the existing contract when all bids were over double the budget

## Cancelling the Tender

*Amber Contracting v. Halifax*, 2009, NSCA

- When prices were well over double available budget, it was okay to cancel tender and several months later, retender substantially the same work
- Relied on specific language of privilege clause allowing owner to reject all tenders if none is satisfactory and to cancel the tender and not award the work for any reason

## Cancellation of Tender

### *Cambridge Plumbing*

- Owner entitled to reject all bids when all over the provided funding available and okay to start negotiation with bidders – provided tender was clearly ended
- Unsuccessful bidder argued tender wasn't ended before negotiation began. Court found tender ended first

## Thank you



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