



Recommended Best Practices for Administering Tenders with Privilege Clauses

Executive Summary:

This document has been developed to augment the Capital Asset Management Framework (CAMF). It includes a summary of existing policies and best-practices guidance in relation to capital procurement. This document is not a substitute for the application of existing policies and laws.

Related resources include:

- BC Government's Core Policy and Procedures Manual
<http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/CPMtoc.htm>;
- The CAMF and Related Guidance <http://www.fin.gov.bc.ca/tbs/camf.htm>;
- BC Bid Resources <http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources>;
- Ministry of Technology, Innovation and Citizens' Services, Logistics and Business Services Division, Procurement Services Branch
<http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/support-services/procurement-services>;
- Release of information guidance http://www2.gov.bc.ca/assets/gov/government/services-for-government-and-broader-public-sector/buy-goods-services-and-construction/how-to-buy-services/release_of_information_nov2013.pdf;
- The Vendor Complaint Review Process (VCRP) <http://www.fin.gov.bc.ca/ocg/pgo/VCRP.htm>;
- The Canadian Construction Documents Committee (CCDC), The Principles of Construction Procurement and Bidding Environment, "CCDC Bulletin 22 - The Privilege Clause",
<http://www.ccdc.org/bulletins/pdf/eng/bulletin22.pdf>;
- BC Documents Committee Document BCDC 2, 2013 Standard Documents and Guidelines for a Stipulated Price Bid for use on Publicly Funded Building Projects In the Province of British Columbia, <http://www.pccbc.com/wp-content/uploads/2013/07/Guideline-to-BCDC-2-2013-July-8-2013.pdf>; and
- Stipulated Sum Bid Form for Use in Stipulated Price Bid Documents July 8, 2013 Publicly Funded Building Projects - BCDC 2, 2013 for Online bidding), <http://www.pccbc.com/wp-content/uploads/2013/07/Guideline-for-BCDC-2E-For-Online-Bidding-July-9-2013.pdf>.

Questions regarding privilege clause best practices can be directed to:

Logistics and Business Services, Procurement Services Branch
procurement@gov.bc.ca.



Recommended Best Practices for Administering Tenders with Privilege Clauses

1. Objectives of the Guideline:

The purpose of this document is to provide a summary of existing policy and best practices regarding privilege clauses to support fair, open and transparent capital procurement.

This document will assist procuring entities to use privilege clauses in a manner consistent with applicable law and policy.

2. Context:

These best practices apply to invitations to bid (commonly used for procurement of publicly-funded capital projects) and other forms of competitive procurement, including requests for proposals and other documents that may be used for construction projects or other capital asset acquisitions.

a. Definition:

A privilege clause may be included in competitive procurement documents in order to reserve certain rights and privileges to the procuring entity, such as the right not to accept the lowest or any bid. An exclusion of liability clause, or a limitation of liability clause, is a type of privilege clause that is meant to manage the procuring entity's exposure to liability arising from the procurement process.

Privilege clauses have a role in protecting a procuring entity's interests, including situations in which unforeseen events happen such as when all the submitted proposals or compliant bids exceed the procuring entity's ability to pay for the project.

b. Legislative and Policy Environment:

Public-sector procurement must comply with applicable legislation, common law, policies and trade agreements.

The *Financial Administration Act* (FAA) states that Treasury Board may make regulations or issue directives respecting the planning, management and reporting of capital expenditures by government and government bodies. Further, under the FAA, Treasury Board has authority to create policy in relation to "government financial management and control, including expenditures and assets". The Core Policy and Procedures Manual (CPPM) is created pursuant to this authority. The CPPM applies to all ministries, offices, special funds, accounts, appropriations outlined in the FAA and independent officers of the Legislature. Crown



Recommended Best Practices for Administering Tenders with Privilege Clauses

corporations, public bodies and funded agencies are expected to follow the spirit and intent of the CPPM. The CPPM can be found at:

<http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/CPMtoc.htm>

Capital Asset Management is detailed within Chapter 5 of the CPPM, which states that CAMF contains standards, guidelines and tools to support public sector capital management. Chapter 5 of the CPPM can be found at:

http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/05_Capital_Asset_Mgmt.htm

Chapter 6 of the CPPM details procurement policy and can be found at:

http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm

If there are inconsistencies between (a) this document and (b) Treasury Board regulations or directives respecting capital procurements, the CPPM, or CAMF (collectively, the policies), the policies will govern.

c. Principles:

Government procurement of goods, services and construction are based on the principles of fair and open public sector procurement: competition, value for money, transparency and accountability.

d. Use of Privilege Clauses:

Privilege clauses have a role in protecting the Province's interests, including in circumstances in which unforeseen events happen, such as proposals exceeding the Province's budget for a procurement or no compliant bids being received. However, privilege clauses should not take the place of planning in a procurement process, including expressly stating the terms that will govern the procurement process, careful preparation of the applicable procurement documents, and implementation and administration of the procurement in accordance with the terms of the procurement documents.

3. Procurement Templates:

Procuring entities should use standard government solicitation documents, as these documents have been reviewed and approved as appropriate from policy, legal and practices perspectives. The



Recommended Best Practices for Administering Tenders with Privilege Clauses

requirement to use standard documents is embedded within Chapter 6.3.2(a)(5) of the CPPM, which states:

“Ministries must use the standard government formats for solicitation documents (e.g., SRFP, RFP, RFQ) available from Procurement Services Branch
<http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/templates-and-tools/solicitation-templates>. Ministries must obtain the approval of Procurement Services Branch and legal counsel for any changes to the standard formats. Only current versions of the solicitation documents may be used. Procurement Services Branch has developed guidelines for the selection of solicitation processes and templates:
<http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/how-to-buy-services/procurement-process/pre-award/select-a-solicitation-process-and-template>.”

4. Privilege Clauses vs. Privilege Articles:

Privilege clauses tend to be a short statement that the lowest or any quotation/proposal may not be accepted. Some procurement documents include several statements or clauses that expressly state specific instances or scenarios in which a procuring entity reserves certain rights and privileges, or outlines with greater transparency or certainty the allocation of responsibility between the procuring entity and the bidders for certain matters. These clauses, taken together, form a type of “privilege article”. These extended privilege clauses generally reflect what the underlying market or commercial context for the public projects will reasonably accept.

Currently, there are no privilege articles approved as part of the Province’s standard government solicitation documents.

Within the existing procurement templates, the following privilege clauses are found.

a. Short-Form Request for Proposals (SFRP):

“The SRFP should not be construed as an agreement to purchase goods or services. The Province is not bound to enter into a Contract with the Proponent who submits the lowest priced proposal or with any Proponent.”

b. Invitation to Quote Services (ITQS):

“Lowest or any Quotation will not necessarily be accepted.”



Recommended Best Practices for Administering Tenders with Privilege Clauses

c. Request for Proposals (RFP):

“This Request for Proposals should not be construed as an agreement to purchase goods or services. The Province is not bound to enter into a Contract with the Proponent who submits the lowest priced proposal or with any Proponent. Proposals will be assessed in light of the evaluation criteria. The Province will be under no obligation to receive further information, whether written or oral, from any Proponent.”

The templates linked from the CPPM should be reviewed on a regular basis for any updates.

An example of a privilege article employed by a number of provincial public sector organizations for stipulated price bid circumstances is provided in Appendix 1 (source BCDC 2, 2013). As this sample privilege article does not form part of the Province’s standard government solicitation documents, use of this wording or of other privilege articles requires review by legal counsel.

5. Procurement Best Practices:

Appropriate use of privilege clauses is one aspect of overall procurement best practices, many of which are requirements within CPPM.

All standard competitive solicitation processes (e.g., ITT (invitations to Tender), SRFP (Short Form Request for Proposals), RFP (Request for Proposals), ITQ (Invitation to Quote)) must provide identical information for potential bidders or proponents to the solicitation, to fairly and equally base their response. (CPPM, c. 6.3.2(a)(7))

The permitted response time to a solicitation must be sufficient to allow all potential proponents to have a reasonable opportunity to compete, taking into account the time required to disseminate information, the complexity of the procurement, and the time required to prepare an appropriate response. (CPPM, c. 6.3.2(a)(8))

Objective selection criteria for the awarding of a contract must be established prior to inviting bids and proposals and must be consistent with those specified in the solicitation documents. Selection procedures and timelines must not limit anyone from competing. (CPPM, c. 6.3.2(a)(9))

Procuring entities must award contracts on the basis of the criteria set forth in the solicitation documents. The rationale for the ranking of all proponents must be documented.

Before considering a bid or proposal, procuring entities must ensure that it meets all mandatory requirements specified in the solicitation documents. (CPPM, c 6.3.3(b))



Recommended Best Practices for Administering Tenders with Privilege Clauses

In the case of ITTs and ITQs, contracts must be awarded to the lowest-priced qualified bidder meeting the terms and conditions of the solicitation document. In the case of a SRFP or RFP, the contract must be awarded to the proponent whose proposal meets all mandatory proposal requirements, and achieves the highest overall rating of all evaluation criteria specified in the solicitation documents. (CPPM, c 6.3.3(b))

Competitive procurements that will result in a 'Contract B' must not be written in a manner that will avoid a 'Contract A' and its attendant legal obligations. Privilege clauses must not be written in a manner that will, or be relied upon to, breach 'Contract A' obligations.

6. Accountability and Transparency:

The Vendor Complaint Review Process ("VCRP") is designed to ensure that there is a process for the review of vendor complaints about a government procurement process. The intent of the VCRP is to assist government in identifying and responding to problems in the establishment and application of government procurement policy and procedures.

The objectives of VCRP policies are to define a vendor complaint review process that is accessible, consistent, fair, impartial and timely, and to identify ways to make improvements in the manner in which procurement is undertaken by government.

The VCRP policies are found at

<http://www.fin.gov.bc.ca/ocg/pgo/VCRP.htm>

<http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/reference-resources/vendor-relationships/vendor-complaints>

It is expected that the best practice guidance within this document be followed. However, it is recognized that variation may be warranted in specific circumstances. Where significant variation occurs, the rationale for the variance should be documented within the project file. Any changes from standard privilege clauses should only be made in consultation with legal counsel.

Reviews and audits of procurement practices may be undertaken or recommended by various organizations, including the following:

- The procuring ministry or crown agency;
- The ministry responsible for a crown agency;
- The Ministry of Finance;
- Office of the Auditor General; and
- Other public sector bodies as may be mandated from time to time by government.



Recommended Best Practices for Administering Tenders with Privilege Clauses

Appendix 1: Sample Privilege Article (BCDC 2, 2013)

The following is a sample privilege article from the Stipulated Sum Bid Form for Use in Stipulated Price Bid Documents July 8, 2013, Publicly Funded Building Projects – BCDC 2, 2013, used by a number of provincial entities for capital procurements.

In the sample privilege article below, section 1 is what is commonly referred to as a privilege clause. The section 1 wording is similar to that found in the Province's standard solicitation documents. Sections 1-7, taken together, form a "privilege article". As this sample privilege article does not form part of the Province's standard government solicitation documents, use of this wording or of other privilege articles requires review by legal counsel.

CLAUSE 9 - ACCEPTANCE OF THE BID

9.1 ACCEPTANCE OF THE BID.

1. The lowest or any bid will not necessarily be accepted.
2. The *Owner*, at its sole discretion, may accept or reject any or all of the Alternative Prices submitted in the Bid Documents. Alternative Prices will not be considered in determining the successful bidder.
3. Alternative Prices listed in the Bid Documents shall remain open for acceptance by the *Owner* for the period stated in the Bid Documents, from the time and date specified for closing of bids.
4. Bids which contain qualifying conditions or otherwise fail to conform to these Instructions to Bidders may, at the sole discretion of the *Owner*, be disqualified or rejected.
5. The *Owner* retains the separate right to waive irregularities in the Bid Form if, at the *Owner's* discretion, such irregularities are of a minor or technical nature and have not provided the bidder with a competitive advantage. Errors of a clerical or technical nature are not grounds for a bidder to revoke a bid. Bidding irregularities will be reviewed generally in accordance with 2.3 Guideline for Administering Bidding Irregularities of the British Columbia Documents Committee (BCDC) in effect at the time of bid closing.
6. In the event a single bid is received, the *Owner* may open the bid privately without reference to the bidder. If the bid is opened and it is in excess of the *Owner's* budget, the *Owner* reserves the right to re-issue the Bid Documents for new public re-bid without revisions being made to the Bid Documents and without disclosing the single Bid Price. The *Owner* reserves the right to accept or reject a single bid.
7. The *Owner* has the right to enter into over-budget negotiations with the lowest compliant bidder or a single bidder, without cancellation of all bids or consideration to other bidders, and to require that bidder to negotiate with Subcontractors named on their Bid Form.