



General Contractual Law: Improving the Tendering Process

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Introduction

This paper considers how the tendering process for lump sum project can be had to minimize costs for business in the long run – those that build and those who are owners. We consider the role of the Professional Quantity Surveyor; Inspectors; Owner's and General and Sub Contractors and their engineers.

I worked as a Project Manager and Estimator in the ICI Building Construction Industry in Ontario from 1991-94 [1]. I was destruct by the inefficiencies and stresses caused by the tendering process where low bidder won the bid. This left open the door for whomever made the biggest mistake, got the contract. At that time, the industry was on the rocks. There were 133 bidders at least on every project whereas under normal conditions there may have been three or four bidders. Our company, a General Contractor, had to bids 13 jobs to get one "successful" tender.

The first thing that occurred to me was that were say 13 companies bidding all doing the same quantity surveying. In the UK, they have Professional Quantity Surveyors (PQS) [2]. Why not have the owner pay once for the Quantity Surveying and provide a list of quantities for the project? That would save owners in the long run who ultimately pay for the overhead of an estimating department. Using a spreadsheet on Excel for example, the bidders could supply a unit price for each item in toto. Or they could provide a lump sum.

PQ's could be used to determine a neutral party certifying monthly progress billings. Without one, it is left to the Project manger to guesstimate how much work was done in the preceding month. This is probably the most important task the PM has since the payments are the lifeblood of the subcontractors who are sometimes under capitalized.

A second problem is the preponderance of making a mistake in the arithmetic or the bid documents. The re is a lot of contract law that has developed over the years about mistakes in tenders [3]. I will not go into it here, but D.L Marston has an excellent book in Law for Professional Engineers that cover this are extensively accessible to the layperson.

Th Supreme Court of Canada has established a unique law that there are two contracts to be formed upon the invitation to treat. Contract A is the Bid Contract; Contract B is the Building Contract. The first contract is usually accompanied with a seal and a bid bond. The seal is because there is no consideration exchanged.

The Bid Bond is a financial guarantee that the bidder will not revoke his bid if he finds the result unsatisfactory upon the opening of tenders.

Subcontractors wait until the last moment to give their best price to avoid bid shopping (which is legal) by General Contractors. This causes an opportunity for making mistakes under such pressure to meet a strict deadline for tender submission, say 3:00PM the Toronto Transit Authority Building. Late bids are not accepted and would ruin the work of estimators for days or weeks. The pressure is to be the low bidder. This creates several problems. First, it bids down wages of employees of the ICI Building Construction Industry. Second, it means that whoever makes the biggest mistake gets the contract. Third, it opens the door for bid shopping. Fourth, it drives down profits to such a level that the GC must make up a profit on disputes and claims. They do not get a fair profit. Fifth, the GC must carry the low bidder in each category,

especially the Mechanical and electrical contractors even if they are not qualified as a better company. This leads to shoddy workmanship. The owner suffers in the end with poor quality.

I suggest that there are two possible schemes that would eliminate these problems. Instead of accepting the low bidder, why not accept the bidder who comes close to the average bid . Put quantitatively, you could drop out the high bidder and the low bidder and take the average of the remaining bids (if you have at least three bids). Whomever is closest and below the average bid wins the contract.

If we use two S.D. that implies a profit for the GC of at least 4.54%. Profits during my time in Ontario were less than 2%. Many good companies failed.

So, another factor in low bidding is that it tends to drive down quality if there is not enough profit cushion in the project to allow for mistakes during construction.

To have better quality buildings, Inspectors should be hired to inspect the soil conditions and bearing capacity during excavation for a foundation; and for concrete quality as tested by cylinders and the slum test on site [4].

To improve on Mechanical and Electrical works, there could be a prior closing to the General Contractor closing. These bids could be subject to the same criteria thus getting the best quality-cost combination. It is not necessary if the General Contractor and the major subcontractors go through a pre-qualification process.

An owner may want to have the lowest possible price for the work, but it might be at the expense of a quality, well run job.

It should be law that the project managers working for the General Contractor be licensed engineers. This would help ensure better quality workmanship.

The Owner could hire Quality Assurance Engineers as inspectors for every aspect of the project. It would save in the long run and the owner would have a better-quality project that is less cost to operate [5].

These are a few ideas on how to improve the Construction Tendering Process which is chaotic at best and failing at worst.

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Conflict of Interest

None

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