

Construction Alert

A Publication for the Buyers of Construction Services

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SICA At-A-Glance - Regional News

First Electronic Bidding System Closing in the Interior

SICA would like to thank Fairbanks Architecture and the Regional District of Kootenay Boundary for being the first project in our region to use the new Electronic Bidding System (EBS) to close Bid Depository. The Administrative Office Addition and Renovations in Trail closed using EBS on March 15, 2010, with 9 confirmed General Contractors receiving 7 bids for 2 trade sections. Since then, we have had 3 more EBS closings:

- Kamloops TRU Old Main Code Upgrade, closed March 22, with 3 electrical bids submitted to 2 confirmed Mechanical Prime Contractors.
- Kamloops RIH ICU Renovations, Phase 2, closed May 21, with 8 confirmed General Contractors receiving 6 bids for 3 trade sections.
- Oliver Southern Okanagan Secondary School Addition & Renovation, closed May 28, with 5 confirmed General Contractors receiving 42 bids for 21 trade sections.

For information on how you can utilize the Electronic Bidding Module, contact SICA.

Is It a "Letter Of Intent" or "Letter of Bid Acceptance"

....depending on how it is worded can determine whether you have a contract or not. To help understand the difference, here is the wording from CCDC 23:

"Unless the bidding requirements (Contract A) indicate otherwise, the construction contract (Contract B) is typically created when the Owner communicates its unconditional acceptance of the bid to the bidder. Subject to any provisions of the bidding requirements, this communication may take any form, including electronic; however, a "letter of bid acceptance," signed by the Owner and accepting the bid as it stands without alterations or qualifications (conditions), is recommended. In this case, the subsequent signing of the Agreement by the parties is a mere formality.

However, where the Owner issues a "letter of intent," which does not provide for unconditional acceptance of the bid, the contract may or may not be created at that point, depending on the wording of the letter. A letter of intent should only be used where significant issues are yet to be negotiated or where the bidder has not yet formally agreed to some conditions. Depending on the nature of the outstanding issues, the contract may not be created until the Agreement is signed. No bidder is obligated to commence work before being satisfied that the contract actually exists, and does so at its own risk. The Owner may also be at risk in this situation should a dispute arise."

SICA- At-A-Glance

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Contract Law Hasn't Caught Up To BIM Yet

The advent of Building Information Modeling (BIM) has a myriad of implications from both a legal and contractual perspective, says Toronto construction law specialist Geza Banfai. The reality,

Presentation of Consultant Owner Award:

SICA would like to congratulate Mike Demers from Jenkin Marzban Logan LLP on receiving the Consultant Owner Award, which was presented to him by the Board Chairman Terry Brown at the CCO Workshop, this past February. SICA has been very fortunate to not only have been given the wisdom of his trade in many teaching environments, but he also actively consults with us on our Civil Infrastructure Committee by giving us insight into the issues. Thanks Mike!



he said, is that contractual arrangements in construction “have not caught up to BIM”. Read more: <http://www.dcnonl.com/article/id38224>

Reminder: Don't Forget To "Seal The Deal"

Gold Seal Certification Promoted At UBC

Members of the CCA Gold Seal Committee were in Kelowna, BC recently to showcase the benefits of Gold Seal certification. The still-unfinished engineering and management building at the University of British Columbia's (UBC) Okanagan campus was selected to showcase the benefits of certification. In collaboration with the Southern Interior Construction Association (SICA) and Dominion Fairmile Construction, workers on the construction site in Kelowna were encouraged to consider Gold Seal certification. This project is being used to raise awareness about the national Gold Seal Program. Read more: <http://www.joconl.com/rss/id38783/ohs>



CCDC Copyright Seals are required to be used with the printed electronic versions of CCDC documents. Failing to do so could risk a potential breach of contract later on in the proceedings.

A Copyright Seal's application is a representation that the document has not been changed from its original form, with the exception only of additions or modifications as may be set forth in supplementary conditions.

A Copyright Seal must be used on all CCDC documents to be executed from printed electronic versions. For example, if there are three copies to be executed, such as one each for the contractor, the owner and the consultant, each copy must first have a Copyright Seal before being signed. A printed electronic CCDC Document with an affixed Copyright Seal is equivalent to an original CCDC hard-copy document.



On April 29, 2010 at UBCO in Kelowna, SICA and the National Gold Seal Committee honored Dominion Fairmile Construction Ltd. and the UBCO Engineering and Management Building for their commitment to quality and building excellence through Gold Seal Certification.

HST Implementation: Addressing PST Credits and More

SICA has been fortunate to receive information from the Ontario General Contractors and the Ontario Association of Architects on recommendations for addressing HST. There is great language for bidding between now and July 1st and administering Contracts that span the transition to HST on July 1, 2010. While some of the language is specific to Government consultations about implementation and THEIR PST of 8%, the generic information is good advice for us.

SUMMARY

The “Contract Price” in a standard CCDC construction contract includes PST. The standard CCDC contract also includes a clause which provides that any change in costs due to changes in included taxes (like the PST) will increase or decrease the Contract Price accordingly. As a result, because of the transition to HST on July 1, 2010, depending on the terms of the contract, there should be a credit due to Owners for the amount of PST included in the work to be done after July 1, 2010. The document titled "**OAA-OGCA Practice Tip re HST and Projects Spanning Transition March 26th Final.pdf**" (www.sica.bc.ca/pdf/hstguidelines.pdf) is a suggested

procedure for establishing the appropriate credit.

The administration of the credit could result in an onerous amount of work. In that case, Architects and Contractors may be entitled to additional fees depending on the nature of their contract.

The Second Document "**Bulletin 10-16 Joint OAA OGCA Bulletin on HST**" (www.sica.bc.ca/pdf/hstupdate.pdf) provides advice on:

- **Clear wording on how to address in the Instructions to Bidders** - The Instructions to Bidders should be amended by adding the following paragraph:

Bidders should factor into their bid price and any other prices submitted as part of the bid, the transition to the Harmonized Sales Tax on July 1, 2010, including the removal of the provincial sales tax (PST) on those line items of cost for which PST will cease to be payable after June 30, 2010.

- Secondly, **the general conditions** should be amended to make it clear that the contract is already based on the HST coming into effect on July 1st and that the introduction of HST will not be considered a change in taxes for the purposes of calculating an extra or credit of construction.

For a complete listing of HST information, visit:
<http://www.sica.bc.ca/tendering.taxes.shtml>

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BCCA At-a-Glance - Provincial News



My Take On Tercon

Some Editorial Comments from Manley McLachlan—BCCA President
“Egregious behaviour”. Behaviour seen as “an affront to the integrity and business efficacy of the tendering process”. Those were the words used by the Supreme Court of Canada in its reasons for judgment in the recent Tercon Contractors Ltd. Appeal. They were referring to the actions of a public owner, in this case the BC Ministry of Transportation and Highways, during the tendering phase of a public construction project. The case involved an RFP for the construction of a highway and only six, previously qualified, bidders were allowed to submit a bid. Despite having clearly laid out the rules of engagement, the Ministry allowed and ultimately awarded the contract to a bidder that was not one of those qualified six. This was clearly a pretty big transgression in the tendering process, however the Ministry planned to rely on its cleverly drafted exclusion clause to escape liability. It almost worked. Fortunately it did not. In a five to four decision the Supreme Court gave the win to Tercon.

The case was clearly an important one for the construction industry. There are some fundamental truths to the public construction tendering process that we would all be wise to pay attention to if we want to promote the economy of this province and protect the tax-payers of British Columbia.

We all know that the construction industry is full of risk. Recognizing and managing that risk is part of doing business. Finding the right balance of liability, from start to finish, provides the best opportunity to complete a construction project properly, on time, on budget, and with the parties left standing at the end of the day. The tendering process is the beginning of this contractual relationship and it sets the tone for the entire project.

When the two parties do not have equal bargaining powers the potential for liability to be unfairly skewed rises considerably. In the public construction arena this is pretty much guaranteed. No matter how sophisticated a contractor might be, they will never be equal to the power wielded by the government.

Read the full article: <http://www.bccassn.com/documents/bullet175.pdf>

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New BCCA Policy on Qualification of Bidders

On public funded projects of \$100,000 or more a contractor's ability to bid is determined solely by the bidder's capability to provide bonding. A clause requiring a bidder to submit details of their experience or financial status in the bid documents, should not be included. BCCA believes that all qualified firms, without limiting the number of bidders, should be permitted to bid on publicly funded projects of \$100,000 or more, and that on such projects, bidders' lists should not be restricted to an "invited" list. If the contract is awarded, it is awarded to the lowest compliant bidder.

BCCA policies can be viewed on line at www.bccassn.com

It's A New West

British Columbia, Alberta and Saskatchewan have signed the New West Partnership, an agreement designed to create Canada's largest interprovincial barrier-free trade and investment market. One of the components of the economic agreement is to remove remaining barriers to trade, investment and labour mobility in an effort to further enhancing the competitiveness of



Canada's Western Provinces. Information on this agreement can be found at: www.gov.bc.ca

Federal Deadline for Stimulus Projects

March 31, 2011 is the Federal deadline for substantial completion of infrastructure stimulus project. Below are CCA's answers to common questions regarding this issue:

Liquidated Damages: Does CCA support the use of liquidated damages clauses for federally funded infrastructure stimulus projects?

- *CCA does not support the use of liquidated damages clauses to recover funds from contractors for projects extending beyond the March 31, 2011 deadline.*
- *CCA has issued a bulletin to members advising them of the potential liability issues involved with work on federally funded infrastructure stimulus projects. For more information, please visit www.cca-acc.com.*

Impact of Liquidated Damages: What impact will the application of liquidated damages have on project costs?

- *Particularly for contracts currently out for tender, many contractors may decide not to bid or build into their price a significant risk premium to cover any liability related to not completing the project prior to the March 2011 deadline.*
- *From a taxpayer perspective, this means there will be less competition among contractors, fewer bidders, and likely higher overall construction prices for these projects.*

The Withdrawal of Stimulus: Is CCA advocating additional stimulus measures or just an extension to the existing stimulus deadline?

- *CCA is not advocating additional stimulus measures beyond those announced in Budget 2009.*
- *CCA is advocating that the government eliminate the March 31, 2011 deadline, and thereby provide contractors with assurance that the federal funding WILL NOT be withdrawn should a project extend beyond the March deadline.*
- *CCA believes a more tapered approach to the withdrawal of stimulus is required. Not only will this create a more natural transition for the industry from government funded infrastructure work to what we hope will be increased private sector demand, but it will also help mitigate against an increase in unemployment should private sector demand not be as robust as hoped come April 2011.*

A Contract is a Contract – So what's the issue? Contractors freely bid on these projects knowing there was a possibility that funding would be withdrawn if the project exceed the federal deadline. Why should the government adjust its policy to accommodate contractors?

- *Many contractors bid on these projects with the understanding that the work was "shovel-ready". In some cases, once awarded the project, contractors have been surprised to learn that additional engineering or design work was necessary before construction could begin.*
- *Unfortunately, under these circumstances, even working extended hours, some projects will not be completed by the March 2011 deadline. Moreover, with the bulk of these projects commencing in 2010 (more than 50 percent of the approved projects), there is significant concern that any slippage due to weather or additional design work will push a high number of projects beyond the federal deadline.*
- *The goal of this federal program was to help stimulate the economy through infrastructure construction, not through the legal community, which will benefit considerably if contractors and governments end up before the courts arguing liability issues related to projects that exceed the deadline.*

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KPMG Survey Finds Construction Companies Optimistic

A global survey of construction companies reveals that most expect profits to increase or at least maintain current levels by the middle of this year, business consultancy KPMG International says. "Despite the deepest recession in 60 years, the construction industry is surprisingly positive about its future prospects," reported KPMG's 2009 global survey. Read more: <http://www.joconl.com/article/id38622>