



**Guide to
calling bids and awarding
subcontracts**

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1.0 INTRODUCTION

Prepared by the Canadian Construction Association, this guide addresses the practices involved in the procurement of Subcontractors' construction services, whereby price is the primary determinant in Subcontractor selection. Its use is intended to foster improved mutual cooperation and productivity between Prime Contractors and Subcontractors.

Prime Contractors and Subcontractors should treat each other with mutual respect, honesty and integrity.

All contractors (Prime Contractors and Subcontractors) should compete fairly for contracts, avoiding any practice that might be construed to be in violation of fair business practices or legislation. They should not seek nor accept information concerning a competitor's bid prior to bid closing nor should it attempt to modify prices after the bid closing. They should avoid any activity that could be construed as bid shopping¹, a reverse bid auction² or bid peddling³.

CCA from time to time publishes information bulletins on practice issues where subject matter and circumstances warrant. This service provides users with helpful guidance and insight into both the CCA standard documents and the issues that they address. For further information please visit the CCA web site www.cca-acc.com

¹ For the purposes of this guide, **bid shopping** is defined as any conduct whereby the one soliciting bids uses the bids submitted to it as a negotiating tool either expressly or in a more clandestine way with a view to obtaining a better price or other contractual advantage from that particular bidder or any of the others.

² For the purposes of this guide, a **reverse bid auction** is defined as a form of bid shopping in which the one soliciting bids is privy to the bid information prior to the bid closing and uses that information to encourage bidders to resubmit lower-priced bids by advising them of their ranking or relative position to the other submitted bids during the bidding process.

³ For the purposes of this guide, **bid peddling** is defined as any conduct whereby a bidder, in an attempt to secure a contract, offers to lower its previously bid price in order to undercut known bid prices from other bidders.

2.0 PRINCIPLES OF THE LAW OF COMPETITIVE SUBCONTRACT BIDDING

This guide would be incomplete without mention of the uniquely Canadian law of competitive subcontract bidding that confers legal rights and obligations on the parties involved in a competitive subcontract bidding process. These rights and obligations are normally applicable whenever a Prime Contractor receives binding offers simultaneously from multiple subcontract bidders, but will most likely not be applicable where a Prime Contractor and Subcontractor simply negotiate a subcontract without a competitive process.

The law of competitive subcontract bidding is “judge-made” law, and has been evolving in the courts since the Supreme Court of Canada decision in the landmark *Ron Engineering*⁴ case in 1981. It is a complex area of law and this guide makes no attempt to cover it in any depth. There are numerous books, newsletters, seminars, and other resources that cover this issue in considerable detail. And when circumstances dictate, there is no substitute for knowledgeable legal advice, which this guide does not purport to provide. Nevertheless, all participants in a competitive subcontract bidding process should have at least a general awareness of their legal obligations. Although the law continues to evolve with each new case decided by the courts, the following are some of the fundamental principles that are currently considered to be reasonably well established in the law of competitive subcontract bidding.

- In most competitive subcontract bidding situations, the subcontract bidding process gives rise to two separate and distinct contracts at law, which are commonly referred to as Contract A, the bidding contract, and Contract B, the actual construction contract. Most of the following principles flow from an understanding of this basic concept.
- The only Contract A to survive belongs to the Subcontractor whose bid was accepted by the successful Prime Contractor and who was named in that Prime Contractor’s bid to the Owner.
- Where a valid Contract A is formed, it confers on both the subcontract bidder and the Prime Contractor legally enforceable rights and obligations the terms and conditions of which are determined by the subcontract bid document.
- Subject to the terms of the bid documents which may include the rules set out by a bid depository, where the Prime Contractor accepts a Subcontractor’s bid and, subsequently uses that bid and names the Subcontractor in its own bid to the Owner, the subcontract bidder’s principal legal obligation under Contract A is to enter into Contract B, in accordance with its bid, should the Prime Contractor’s bid be accepted by the Owner⁵.

⁴ *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111

⁵ *Naylor Group inc. vs. Ellis-Don Construction Ltd.* [2001] 2 R.C.S. 943

- The Prime Contractor’s principal legal obligation under Contract A is the implied duty to treat all subcontract bidders fairly and equally. This does not necessarily mean that the law requires that the “rules” governing the process, as specified in the subcontract bid documents, must be fair.⁶ Rather, it means the Prime Contractor must apply those rules equally and consistently to all subcontract bidders. The express terms of the subcontract bid solicitation documents will determine the full extent of this duty of fairness, but in the absence of express language in the subcontract solicitation documents to the contrary, this duty of fairness will generally require at least the following:
 - All subcontract bidders must receive the same information.
 - All information relevant to the bid call must be disclosed to the subcontract bidders and this information must not be misleading, inaccurate or incomplete.
 - The Prime Contractor may not unilaterally change any of the terms of the subcontract bid call (Contract A) after subcontract bid closing.
 - All criteria applicable to the selection process must be disclosed to the subcontract bidders and, thereafter, consistently applied in the process. These terms and conditions may include the rules of the applicable bid depository, where specified; the ability of the Owner to reject nominated Subcontractors; and whether the Prime Contractor has any reasonable objection⁷ to using the Subcontractor.
 - Any preferences (e.g., in favour of local subcontract bidders) must be disclosed to subcontract bidders; undisclosed preferences must not be applied in the selection process.
 - Only compliant subcontract bids may be considered for award; non-compliant subcontract bids must be rejected.⁸

- Contract B is formed when the Prime Contractor accepts a subcontract bid in accordance with the terms of Contract A. The successful subcontract bidder’s primary legal obligation under Contract B is to perform the work in accordance with the subcontract bid solicitation documents.

⁶ Fairness is somewhat subjective, but preferably the “rules” established by the Contracting Authority should also be fair.

⁷ What is reasonable will depend upon the timeliness of the Prime Contractor’s objection, the actions taken by the Prime Contractor as a result of the objection, and the fairness and good faith of the Prime Contractor in its dealings with the subcontractor.

⁸ At the time of this writing, the law appears to be somewhat unclear as to whether a standard of “strict” compliance or merely “substantial” compliance is expected.

3.0 PREPARING THE SUBCONTRACT BIDDING REQUIREMENTS

3.1 Subcontract Bid Solicitation

Generally, the subcontract bid solicitation documents are the public advertisement of the bidding opportunity (in the case of an open bid call) or a letter of invitation to bid (in the case of an invitational bid call). They should provide the following information, as a minimum:

- Name and location of project.
- Name of Owner.
- Name of Prime Contractor.
- Brief description of the prime contract work.
- Time and place for receiving subcontract bids.
- How and where to obtain prime contract bid documents, including any conditions for their acquisition (e.g., refundable document deposits, hard copy, electronic, or both).
- Telephone number(s), fax number and e-mail address of person or office designated to receive inquiries.
- Time and place for receiving subcontract bids.
- Number of days that the subcontract bid is to be irrevocable and open to acceptance by the Prime Contractor. A minimum of seven days after the Prime Contractor's bid irrevocability period is recommended.
- Disclosure of all criteria and preferences that will be applied in selecting the successful subcontractor.
- A clause establishing the Prime Contractor's right to negotiate a subcontract with the named or selected compliant subcontract bidder in circumstances where the Prime Contractor needs to request an extension to the subcontract bid irrevocability period or the prime contract bids exceed the Owner's budget of the total project (see 7.2 – Subcontract Award and 7.3 – Post-Bid Negotiations and Re-Bidding).

Subcontract bid solicitation information should be brief, yet sufficiently detailed so that prospective subcontract bidders can realistically assess their interest in bidding and their capability in performing the work.

Where applicable, other items that should also be addressed include:

- Requirements for use of a bid depository.
- Mandatory pre-bid meeting or site visit requirements.
- Subcontract bid security requirements.
- Instructions concerning submission of alternative prices, unit prices or itemized prices.
- Where alternative prices are requested, the basis for determining the lowest subcontract bidder should be disclosed. That is, whether the lowest subcontract bidder will be determined based on the base bid only or by considering the selected alternative prices.
- Special qualification requirements (e.g., requirements for safety certification, gold seal certification).
- Any extraordinary subcontract bid closing process requirements.

3.2 Information Available to Subcontract Bidders

The Prime Contractor should ensure subcontract bidders have access to all prime contract bid documents.

4.0 PREPARING THE SUBCONTRACT REQUIREMENTS

4.1 Agreement, Definitions and General Conditions

CCA 1 ‘Stipulated Price Subcontract’ is the standard subcontract form between Prime Contractor and Subcontractor where payment is based on a stipulated or fixed price. Users can choose between the refer-by-reference to the prime contract or stand-alone subcontract approaches simply by completing either page 2A or 2B (not both) and discarding the other page.

CCA 1 is copyrighted and is familiar to the Canadian construction industry. The subcontract bid solicitation documents should identify CCA 1 by reference. The Prime Contractor and successful Subcontractor should sign a CCA 1 that is affixed with a CCA 1 copyright seal.

4.2 Supplementary Subcontract Conditions

Any additions, deletions or other modifications to CCA 1 should be clearly identified and included in the subcontract bid solicitation documents as “Supplementary Subcontract Conditions.”

Modifications should be undertaken with great care and only by individuals with the appropriate expertise. Unnecessary or unsuitable modifications may have serious and unforeseen consequences. CCA 1 reflects the experience and knowledge of Prime Contractors, Subcontractors, insurance advisors, surety advisors, legal advisors, and other experts. There is also a history of judicial precedents based on the language used.

4.3 Specification Sections and Trade Definitions

Prime Contractors and Subcontractors should be aware of differences between specification sections, local trade definitions and scope bidding. Such differences may cause omission or overlapping of subcontract work.

The Prime Contractor has total control in delivering the complete project and is responsible for coordinating and verifying the scope of subcontract work.

5.0 CALLING FOR SUBCONTRACT BIDS

5.1 Methods of Bid Solicitation

There are two basic methods for Prime Contractors to solicit bids from Subcontractors: open (or public) and invitational.

Open Bid Call by the Prime Contractor

Under an “open” bid call, the subcontract bidding opportunity is publicly advertised, traditionally in newspapers and trade or association publications and on electronic systems.

Invitational Bid Call by the Prime Contractor

Under an “invitational” bid call, prospective subcontract bidders are pre-selected by the Prime Contractor and invited to bid.

5.2 Bid Depository

A bid depository is a system for the receipt of sealed bids from trade contractors. Where a bid depository system is in regular operation, it is an alternative to the call-in bidding system.

Flowing from this stated purpose is the requirement that Prime Contractors name their selected trade bids on their bid form and upon being notified of being the successful Prime Contractor, enter into a subcontract with bidders whose bids have been properly deposited and received by the Prime Contractor through the bid depository system. Following the submission of Prime Contractors bids, substitution or replacement of the selected trade bidders is subject to specific approval of the Owner, based upon valid reason or circumstances which were not reasonably evident or assessable prior to the close of Prime Contractor bids.

Normally, subcontract bids must be submitted to the bid depository by a closing time that is earlier than the prime contract bid closing time (e.g., 24, 48, or 72 hours in advance). To ensure the success of the bid depository system, all of its users must abide by its rules. All parties that use a bid depository should be familiar with its operations, including all rules and regulations. Bid depositories are typically managed and operated by local industry associations. For more information on bid depositories, visit the website: <http://www.cca-acc.com/biddepository/>

5.3 Prime Contract Bid Documents Availability

It is important for subcontract bidders to be able to access prime contract bid documents at the Prime Contractor’s office or plan rooms operated by local construction associations. Distribution of Prime Contract Bid Documents via “electronic plan rooms” is of particular benefit to prime contract bidders and subcontract bidders who otherwise have to make a trip to their local construction association plan room to access a hard-copy. As well, increased and more efficient exposure of the drawings, specifications and addenda to bidders at all levels indirectly benefits the project, through increased competition.

6.0 RECEIVING SUBCONTRACT BIDS

6.1 Subcontract Bid

The Subcontract Bids should always include the following:

- Name and location of the prime contract work.
- Scope of the subcontract work.
- Prime Contractor's name and address.
- Subcontract bidder's name and address.
- Reference to prime contract bid documents and addenda, if applicable.
- Base subcontract bid price.
- The subcontract bid irrevocability period (a minimum of seven days after the Prime Contractor's bid irrevocability period is recommended) or a statement that indicates the subcontract bidder's willingness to conform with the Prime Contractor's irrevocability period for its prime contract bid.
- If required by law, proof of authority of the person(s) signing the subcontract bid (e.g., a certified copy of a resolution naming the person(s) authorized to sign subcontract bids on behalf of a corporation or partnership is to be submitted with the subcontract bid).

Where applicable, other items that should also be included:

- Subcontract bid security.
- Alternative prices, unit prices or itemized prices.
- Confirmation of mandatory qualifications (e.g., requirement for safety certification, gold seal certification).

6.2 Scope Letter

Each subcontract bidder should submit a written scope letter to the Prime Contractor at least 24 hours before the prime contract bid closing. The scope letter should contain all the information that the Prime Contractor requires and information that the subcontract bidder considers relevant to the Prime Contractor's evaluation of the subcontract bid, e.g. the subcontract bidder's proposed scope and if applicable, alternatives, unit prices, addenda. The scope letter should include reference to specific divisions or sections and specifically identify any omissions or additions.

6.3 Subcontract Bid Closing Time

Each subcontract bidder should submit its bid price and any necessary clarifications to the Prime Contractor in sufficient time prior to the prime contract bid closing.

The Prime Contractor should establish a preferred time for receiving subcontract bids and make it known and reject all subcontract bids received after the prime contract bid closing time.

6.4 Receipt of Subcontract Bids

All subcontract bids should be received as in accordance with the conditions established by the Prime Contractor. The following methods are recommended for receipt of bids in writing:

1. physically delivery of paper documents by hand;
2. facsimile; or
3. electronically, e.g. through an email.

While verbal agreements are generally enforceable, they are difficult to prove. In particular, in the absence of a written agreement, it is difficult to provide evidence of the actual details and terms of an agreement. Therefore, it is recommended that, at a minimum, the parties should subsequently record or confirm the terms of any verbal agreement in writing.

6.5 Subcontract Bid Modifications (or Withdrawal)

Subcontract bidders should be permitted to modify (or withdraw) their subcontract bids prior to the prime contract bid closing time, provided there is sufficient time for the Prime Contractor to modify its prime contract bid. These bid modification processes should ensure that the fundamental principles underlying the subcontract bid receipt process are maintained.

Bid modifications (or withdrawal) after the prime contract bid closing time must not be permitted.

6.6 Subcontract Bid Results

Prime Contractor should inform all subcontract bidders at the earliest practical time the results of the bid evaluation by the Prime Contractor.

Upon request, unsuccessful subcontractors should be granted a debriefing session.

7.0 AWARDING THE SUBCONTRACT

7.1 Subcontract Award

As discussed in 2.0 – Principles of the Law of Competitive Bidding, Prime Contractors are obligated to treat subcontract bidders fairly.

Subcontract bidders appreciate prompt award decisions, regardless of the length of time subcontract bids are specified to be open for acceptance. If, due to extraordinary and unforeseen circumstances, the Prime Contractor is unable to make an award prior to expiry of the subcontract bid acceptance period, the Prime Contractor may, prior to the expiry date, ask the named or selected subcontract bidder (only) to confirm, in writing, its willingness to extend its subcontract bid irrevocability period for a specified period of time. The subcontract bidder can normally be expected to agree with this request unconditionally but may not agree, if the subcontract bidder anticipates a significant impact on cost or time as a result of the extension. However, where such extension cannot be successfully negotiated with the named or selected subcontract bidder, the Prime Contractor may negotiate with other subcontract bidders. It is important that the subcontract bid solicitation documents include a clause giving the Prime Contractor the right to negotiate with the named, selected or other subcontract bidder in this circumstance.

Subcontract bidders are obliged to honour their subcontract bid price and to fulfil their security obligations only if their bids are accepted by the Prime Contractor within the specified acceptance period or an agreed extension.

The Subcontractor should not commence the subcontract work until award of that subcontract has been communicated to the Subcontractor by the successful Prime Contractor.

7.2 Post-Bid Negotiations and Re-Bidding

If the Prime Contractor's bid exceeds the Owner's budget, and the Owner is unwilling or unable to award a contract to the Prime Contractor at the prime contract bid price but is unwilling to abandon the project, the Prime Contractor should negotiate with the named or selected subcontract bidder (only) to identify changes in the scope or quality of the subcontract work and their corresponding subcontract bid price reduction. Where the Prime Contractor and named or selected subcontract bidder agree on acceptable changes and a corresponding subcontract bid price reduction, the changes should be documented as a post-bid addendum and the subcontract, based on the negotiated reduced price, should be awarded to the named or selected subcontract bidder. However, where acceptable changes and a corresponding subcontract bid price reduction cannot be successfully negotiated with the named or selected subcontract bidder, the second step should be to negotiate with the other subcontract bidders or to re-bid on modified scope under a new bid call.

Re-bidding should be avoided whenever possible because of the additional time and costs incurred by all parties. Where a re-bid is unavoidable, the subcontract bid solicitation documents should be sufficiently modified to achieve a reduced subcontract bid price acceptable to the Prime Contractor.

A standard “privilege clause” in the subcontract bid solicitation documents would give the Prime Contractor the right to not accept any subcontract bid if the Prime Contractor’s bid exceed the Owner’s budget, thereby permitting the Prime Contractor to either abandon the project or reject all subcontract bids, and subsequently invite a re-bid on modified scope under a new bid call. However, since it is recommended that the Prime Contractor negotiate with the named or selected subcontract bidder in some circumstances, it is important that the subcontract bid solicitation documents include a clause giving the Prime Contractor, if necessary, the right to negotiate a reduced subcontract bid price with the named or selected subcontract bidder and if such negotiation is unsuccessful, with other subcontract bidders.