

## **PRACTICE BULLETIN #1**

December 1, 2001 - New

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### **SUBJECT: FAIRNESS IN THE TENDERING PROCESS & THE PRIVILEGE CLAUSE**

All parties involved in the tendering process should be aware the Supreme Court of Canada has ruled that the inclusion of a privilege clause (Le. “the lowest or any tender may not be accepted” etc.) in a tender package does not give the party calling for tenders an unfettered discretion in awarding the contract. In order to protect the integrity of the tendering process, the following edicts are applicable and should be followed:

1. The party calling for tenders should not accept a non-compliant tender;
2. The contract should not be awarded on the basis of some undisclosed criteria;
3. The replacement of negotiation with competition is the main tenet of the tendering process. Accordingly, once the tender has closed, the party calling for tenders should not then commence negotiations with the tenderers, except in strict compliance with the provisions of the technical bulletins as they relate to over-budget projects. The privilege clause will not serve as a justification for bid shopping or procedures akin to bid shopping;
4. A party calling for tenders cannot award the contract to a non-compliant tenderer or a tenderer which did not submit a tender through the tendering process, although they can award the contract to any compliant tenderer and need not necessarily award it to the lowest compliant tenderer, provided the award is not made on the basis of some undisclosed criteria;
5. The party calling for tenders has the right to list the criteria upon which the award will be made, failing which the court will imply that the only criteria is price;
6. The party calling for tenders must ensure the information contained within the tender package is accurate;
7. The party calling for tenders cannot allow a person submitting a tender to alter or amend that tender once the time for tenders has closed;

8. The party calling for tenders must act fairly, bargain in good faith and not give any tenderer an unfair advantage over the other tenderers;

9. All parties submitting tenders should ensure that their tender is submitted in strict compliance with the requirements of the tender call and should be aware that the submission or inclusion of any unsolicited qualifications, stipulations or revisions to the tender documents may result in the disqualification of their bid.