

*Prepared by the Winnipeg Construction Association, and intended as a guideline to increase awareness of recommended industry practice*

## **PRACTICE BULLETIN #5**

January 2022

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### **SUBJECT: PRIVILEGE CLAUSE / EXCLUSIONARY BID PRACTICE / BIDDER BARRING**

The WCA has been made aware that certain public owners are adopting protocols or language in their procurement materials that result in disqualifying a potential bidder from participating in a bidding opportunity on the basis of past contractual claims or ongoing disputes with the public owner.

The WCA has considered the effect of such a policy very carefully and is aware that in certain instances courts of law have supported exclusionary policies to ensure that public owners do not become ensnared in contractually binding relationships with bidders with past patterns of poor performance or bidders who are unethical or unduly litigious.

The WCA takes no issue with exclusion on the basis of unsatisfactory past performance or proven allegations of unethical practice. The WCA does, however oppose exclusionary policies that extend to exclude and therefore penalize potential bidders who pursue legitimate avenues of dispute resolution available to them under contract and at law. A blanket policy to this effect is against principles of fairness, the right to a fair hearing and determination of bona fide claims. Not every claim is unjustified or an indication of a frivolous or vexatious litigant.

The WCA urges public owners therefore to temper their bid barring policies in respect of a bidder's claim history. Fault may be apportioned between the public owner and the claimant. Such a practice will serve to inhibit proper use and reliance on contractual avenues of dispute resolution and may also have the consequence of reduced competition in the marketplace.