

PROCUREMENT DAY

October 21, 2013

www.ProcurementProject.ca

MEETING REPORT

"Seek first to understand, then be understood."

- Stephen J. Covey

Kingbridge Conference Centre
King City, Ontario

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Welcome and Overview

OGCA President Clive Thurston welcomed participants to the second annual Procurement Day. He commented how it was wonderful such a broad cross-section of procurement, design, and construction professionals would be willing to give up an entire day from busy schedules to come together and discuss ways to find common ground and understanding in what at times is an adversarial playing field.

Mr. Thurston, who is also chair of the Construction and Design Alliance of Ontario, provided the group with a brief history and overview of Procurement Day and its goals. The event aims to improve lines of communication amongst general contractors, government, architects, designers, subcontractors, owners and buyers of construction. It is an opportunity for all those involved in the infrastructure construction procurement process to better understand each other's issues, and work collaboratively to find solutions.

He outlined some of the successes that have emerged within the industry since the inaugural Procurement Day event was held in April, 2012. Some of these include but are not limited to:

- Improved communications between some large public owners and the providers of construction and design services.
- A significant reduction in the volume of supplementary conditions being required by some Ontario school boards.
- The creation of a bundling protocol for Infrastructure Ontario projects.
- Local knowledge provisions being added to Infrastructure Ontario bid documents.
- City of Toronto has agreed to use CCDC 2 as its standard contract document.

OPBA Member Survey Results

One of the suggested 'next steps' emerging from Procurement Day 2012 involved the conducting of a survey to gather statistical information around topics such as Quality Based Selection and use of standard documents. Members of the Construction and Design Alliance of Ontario (CDAO) in consultation with the Ontario Public Buyers Association (OPBA) issued a survey to OPBA members in February, 2013. Procurement Day 2013 Co-Chair Saskia Martini-Wong, summarized the survey findings for the group.

Overview of Survey Results

- 67% of respondents work in the municipal sector.
- While 50% of respondents have 1 to 5 people in procurement, 19% of respondents have 16 or more employees working in procurement.
- Although the distribution of time spent on procurement of design and/or construction services was even in respondents, the majority of attendees at Procurement Day spend more than 50% of their time on the procurement of design and/or construction services.

- 84% of respondents indicated that their agency's procurement documents reflect the difference between the purchasing of goods and the purchasing of design and construction services

Use of Standard Documents

A listing was provided to survey participants of standard industry documents and guides (Appendix A). While many survey respondents skipped the question, the most commonly used document was CCDC 2, followed by CCDC 11 and then OAA 600. As a more fulsome discussion on standard documents was scheduled for later in the day, no additional time was spent discussing the use and/or preferences of clients or the merits and drawbacks of particular standard documents. (See Use of Standard Documents, pg. 8)

Satisfaction with the Procurement Process

While many respondents were fairly happy with the procurement process for design and/or construction services, respondents were asked what topics and/or issues they would like to discuss at Procurement Day which may improve their satisfaction. Handouts were provided to attendees with comments provided by survey respondents. Attendees were encouraged to look at the comments and discuss them throughout the day. (Appendix B)

Notable Mention

Respondents were asked: "For the most part, when evaluating proposals, what weighting percentage does your agency give to a combination of qualifications, quality and technical merit?"

While 67% of survey respondents were from the municipal sector, there was no consensus from respondents in this question as to the percent weighting an agency gave for qualifications, quality and technical merit. Members of [CDAO \(Construction Design Alliance of Ontario\)](#) advocate for [Quality/Qualifications Based Selection \(QBS\)](#). Attendees at Procurement Day were asked to consider that when procuring engineering and architectural professional services, to recognize that professionals are not pencils and therefore, their services should not be chosen based on lowest price. A video was shown to demonstrate you get what you pay for. View the video [here](http://youtu.be/sM14C_9nN4Q). (http://youtu.be/sM14C_9nN4Q)

You can view Ms. Martini-Wong's complete presentation [here](http://youtu.be/LdzxOe2PtNU) (<http://youtu.be/LdzxOe2PtNU>)

Case Studies

Feedback from Procurement Day 2012 identified participants would be interested in working through case studies to better understand some of the stresses experienced by all sides of the procurement process. Glenn Ackerley, a partner with the law firm of WeirFoulds LLP in Toronto, and Geza R. Banfai, a senior partner with the Toronto office of Heenan Blaikie, presented separate case studies.

Case Study 1 – Banfai

Geza Banfai presented the details of the case (Appendix C) without disclosing the actual name of the proponents. The group discussed the merits of the case and voted on who they felt should be the winner.

The case was revealed to be Tercon Contractors Ltd v British Columbia (Transportation and Highways). It was heard first by the British Columbia Supreme Court which ruled in favour of Tercon. The decision was appealed to the British Columbia Court of Appeal which ruled in favour of British Columbia. That decision was appealed to the Supreme Court of Canada and split decision (5-4) ruled in favour of Tercon.

Case Study 2 – Ackerley

Glenn Ackerley presented the details of the case (Appendix D) to be reviewed by the group. Each conference table, consisting of a diverse cross-section of participants, was asked to address the following points for discussion purposes.

- (a) How should the procurement process for tendering work be best undertaken in these circumstances?
- (b) How should the possibility of errors in the tender documents be handled? Does including an “exclusion of liability” work? What other approaches can be taken?
- (c) What about the engineers and their incomplete drawings? Are they responsible? How should they protect themselves?
- (d) How should reliance on information provided to bidders be dealt with? Should bidders “satisfy themselves”? What are the consequences if nothing is said?
- (e) In terms of methods of construction, is it better to tell contractors what to do, or let them figure it out? What are the benefits and risks of each approach? When would each approach be appropriate?
- (f) Should contractors “warn” owners in advance about problems they see with the design? If so, how and when should that happen?
- (g) The key consideration is this: who should bear what risks and why?

The following is a summary of themes, opinions and findings of the group, broken down into four key areas of Risk, Responsibilities, Communication, and Documentation / Scope. These were presented and discussed during a plenary session.

Risk

- Risk is best assumed by the party that is in the best position to manage it.
- Employ 'appropriate risk transfer'. You should only take on risk of that which you are in control of.
- Risk can be broken down into responsibilities: owner = scope; owner & consultant = design; contractor = final built form
- Good risk management is defined by balance for parties (the owner, designers, and contractor) and not by 'transferring' risk down the relationship chain. It is just going to cost you more in the future if you foster an adversarial process.
- Risk elements need to be quantified in the tender documents in order to 'put a fence around liability'.
- RFP should clearly identify risks so they can then be appropriately priced out.
- Risk responsibility should be stipulated in the contract and assigned to who can best manage it but they should also be compensated for managing/assuming that risk.
- Good risk management is a balancing act. It is not always best to transfer the risk down the 'relationship chain' with the final link in the chain assuming all the risk just because it was dumped on them. Not because they are the best suited to assume/manage/control it.
- Risk has to be borne by the person best able to assume to the risk.
- Define an agreed to approach to manage the known (and anticipated unknown) risks that may occur.
- If the conditions are well known, and the scope is well defined, a prescriptive approach to the documents is not required. In the absence of all that, it is not okay to 'just let them figure it out.' There needs to be a defined division of risk.
- An owner or buyer of construction services very often doesn't appreciate they are by far the best body to keep some of the risk. It is a common misconception that it is best to just keep passing on the risk down the line. This results in the risk being borne by an individual who is not best suited to assume that risk.
- Best to do a 'cost/benefit' and if it is reasonable to pass on the risk then do so. Sometimes there is a 'better economy' to keep some of that risk.
- Owners need to understand and appreciate the 'risk environment' they are proposing with any given project and be prepared to compensate appropriately for the taking on of that risk or decide they are the best party to keep the risk.

Responsibilities

- Each party is responsible for their piece of the pie: Consultant = design; Owner = soils, location; Contractor = construction of finished product.
- Risk can be broken down into responsibilities: owner = scope; owner & consultant = design; contractor = final built form

- Method of construction should be up to the contractor. The owner should set the criteria/constraints but the best method should be determined by those with expertise in the process.
- “There is at times a tendency for designers to design and then dictate what should happen,” says Ackerley. Sometimes the best construction method is not always selected as the process doesn’t allow for the conversation and discussion between designer and constructor.
- Long-term planning by owners/funding bodies is required to stop the ‘feast or famine’ mentality. The worst possible funding method is ‘do nothing, nothing, nothing’ and then throw everything out at once, says Ackerley.
- Politics can’t drive the timelines of projects. Desired impact of funding policies must be determined to allow for a rational allocation of risk / reward.
- Procurement officials must appreciate buying construction and design services are not akin to buying pencils. Procurement specialists in construction and design are required.
- Select a contract method after you know the character of the project and don’t force a square project into a round methodology because that is what you determined it should be prior to any discussion with outside experts.
- There is a need for more education for the public sector who procures design/build instead of design/bid/build.
- Three variables: money, time, scope. Time constraints often drive people to make irrational decisions.
- To take on a project with tight timelines and many assumptions, you are already building in a disaster formula.
- Scheduling has to be realistic otherwise you are setting yourself up for failure.
- Projects need an appropriate timeframe for success completion which in turn will help drive the project model selection.
- The selection of the project model also depends on the complexity of design and the confidence of the contractor.
- Construction means and methods should not be specified unless there are special circumstances i.e. environmental sensitivities. Specifying means and methods eliminates any innovation or expertise a contractor could introduce that may result in a better or more economical project.

Communication

- Willingness to speak the truth and provide full disclosure is key to communication imperative.
- Full disclosure should be provided throughout the process.
- The desire to ‘say yes’ to irrational demands/expectations leads to problems.
- If you don’t ask the questions upfront, you can’t expect to have all the answers after the fact.
- You need the right construction model for the project. One model does not fit all and if you try to make it fit, it will lead to problems.
- Realistic and appropriate timeline must be allowed for procurement process. A rushed process will lead to errors and omissions.
- Key timeframes must be ‘realistic’ and ‘doable’.

- The procurement process should be ‘right-sized’ for the timeline and complexity.
- There is a mutual obligation to notify all parties once errors are identified and not use it as an opportunity to take advantage of one another.
- Upfront, open lines of communication between all stakeholders helps identify problems early and throughout the project as they occur.
- All parties are better served with ‘full disclosure’ of all information.
- There needs to be a strong information flow between owners (owner’s representatives / procurement specialist) and the design and construction community.
- Make sure all groups are co-operating and working as a team as opposed to the adversarial approach where fingers are pointed and statements such as, “That is your fault. That is your problem” are made, leading to delays and litigation.
- Pre-construction meetings and regular meetings through project construction is critical.
- Establish a conflict resolution process up front.

Documentation/Scope

- The need for contingencies is elevated when drawings/documents are rushed or incomplete.
- Accuracy and quality of bid documents is critical. If bidders cannot rely on info provided in documents, many qualified and competent vendors will not bid, resulting in increased costs and greater risk all around.
- Allow for a contingency schedule.
- Allow appropriate time for all reports/drawings/documents to be fully prepared. Forewarned is fore-armed.
- Incomplete scope will open the door to additional costs at all stages of the project.
- Dispute resolution mechanism should be defined upfront.
- ‘No one has ever been served well by going to tender with an incomplete set of drawings and documents.’ Dealing with ‘change’ and ‘claim’ is not a good alternative to waiting a week for a complete set of documents.
- Pre bid meetings/site visits should be mandatory but they also have to be valuable for all parties concerned.
- Problems occur when people who don’t understand the complexity of construction are the ones stipulating the money, the time, and the scope before they know anything about the work.
- The more certainty in tender documents, the better the outcome.
- Need good practical guides around design/build.

Use of Standard Documents

Geza Banfai, of Heenan Blaikie, provided a brief overview of the Canadian Construction Document Committee mandate, membership and operations. (Background on CCDC can be found at www.CCDC.org). CCDC forms are by far the prevalently used construction documents in the industry, he noted. The documents “are not perfect,” he conceded, but “they are a great starting point.” He encouraged those using standard documents to be careful how many supplementary conditions are being added. If you do add supplementary conditions, keep them short, to the point and project specific.

Mr. Banfai outlined the benefits of using the CCDC suite of standard documents including:

- Before a CCDC document is put into circulation or before any changes can be made to an existing document, there must be consensus from all CCDC committee members (owners, designers, contractors, specification writers).
- Achieving consensus can take time. Because of this hard and fast rule of achieving consensus, it can take a long time to put out or update a CCDC document.
- Requiring consensus results in a ‘balanced contract’ that is not ‘friendly’ to one side or another.
- Using standard documents reduces transaction costs.
- CCDC also produces ‘Guides’ to assist in the procurement process.

Mr. Banfai also provided an update on what the committee is currently working on, including:

- Releasing a Pre-Qualification Guide.
- The development of a Procurement Guide.
- Modifying CCDC 40: Rules for Mediation and Arbitration of Disputes.
- CCDC 2 2008 Standard Form is currently under review. Part of this review includes researching commonly used supplementary conditions for possible inclusion in the standard document.
- Researching possible introduction of Integrated Project Delivery (IPD) standard contract.

The CCDC operation is also going through a type of metamorphosis in the way it executes its mandate. Some examples Mr. Banfai noted include:

- The committee is becoming more ‘open’ and ‘inclusionary’ as it actively seeks input from the broader industry using CCDC documents
- The committee is becoming more ‘proactive’ in its activities as opposed to its traditional passive or reactive role of responding to industry needs.

Mr. Banfai’s entire presentation can be viewed [here](http://youtu.be/ZZWdek_ioGw) (http://youtu.be/ZZWdek_ioGw).

CCDC 2: An Owners' Perspective

William (Bill) Pigott, a Partner with Miller Thompson, has focused on construction law for nearly 30 years. His services concentrate on the “front end” including procurement and project execution strategies, preparation of design and construction contracts, alternative dispute resolution (as a preventative) and early claim resolution through negotiation/mediation.

Mr. Pigott identified areas within CCDC 2, from an owner's perspective, that could or should be modified. The following are some highlights from his presentation:

- Like buying a suit off the rack, CCDC 2 provides all the basics you will need, but it does require ‘tailoring’ to make it fit specific projects and owner needs.
 - Project size and complexity may dictate required changes.
 - Adjust some risk transfer elements
 - Better defined best practices
 - Update administration clauses
- Do not try to ‘bullet proof’ yourself with supplementary conditions.
- Owners should look at the following sections within CCDC2 worth modifying
 - Notices
 - Drop A-6 (other electronic communication). Make notification method ‘unique’
 - Occupational Health and Safety
 - Sections 3.2 and 9.4
 - Propose ‘Standard of Care’ clause. (currently not include in CCDC2)
 - Includes sections 3.4, 6-4, 10.2
 - Schedule
 - Section 3.5 is ‘thin’. A good schedule is an essential planning tool and is an important delay claim guide.
 - Finances
 - Suggest dropping 5.1 (due diligence), 5.5.3 (Construction Lien Act does not require a Trust), 7.2.3.1 (tied to 5.1 but avoid harassment)
 - Termination
 - Propose no default for set off – Section 7.2.2.3
 - Liens
 - There are no provisions in CCDC2 on what to do if a lien is put on. Put in a clause to ‘codify’ what is common practice to eliminate the lien.
- CCDC 2 is not a ‘one size fits all’ solution for construction contracts. It is a wonderful document but it is not perfect. It is a good starting point.

A copy of Mr. Pigott's presentation can be downloaded [here](http://procurementproject.ca/wp-content/uploads/2014/01/CCDC-2-Owners-Perspective-Bill-Pigott.pdf). (<http://procurementproject.ca/wp-content/uploads/2014/01/CCDC-2-Owners-Perspective-Bill-Pigott.pdf>) A video of his presentation can also be viewed [here](http://youtu.be/fl970qoVTHs). (<http://youtu.be/fl970qoVTHs>)

Closing Summary Comments

The theme of the Second Annual Procurement Day was ‘Dealing with Risk’ from a broad perspective. The objective and goal of the initiative was to foster and facilitate ongoing discussions with professionals, from all sides of the equation, involved in the public procurement of design and construction services.

Based on discussions evolving out of the case studies and various sessions, there appears to be a cross-sector agreement that “risk should be borne by the party most responsible for the risk and the party who has the greatest ability to control and manage that risk.”

As noted by CDAO Vice-Chair Kristi Doyle: “A lot of our issues could be resolved with better communication.”

It was CDAO’s hope that all Procurement Day participants took something away from the event including more insight and perhaps understanding of the roles, responsibilities, and stresses of those sitting across the table in procurement process.

Ms. Doyle reminded Procurement Day participants that the Construction and Design Alliance of Ontario and its individual members are available to act as a resource for procurement professionals, to clients and to owners. CDAO’s contact information is available at www.CDAO.ca.

You can view Ms. Doyle’s comments [here](http://youtu.be/H-9WwAKgcSM). (<http://youtu.be/H-9WwAKgcSM>)

APPENDIX A

Sample listing of Standard Contacts and Guides

The following is a sampling of standard contract documents and guides available for use in the procurement of construction and design services:

1. ACEC Document 31 - Engineering Agreement between Client and Engineer
2. Guide to ACEC Document 31 - Engineering Agreement between Client and Engineer
3. CEO/MEA Standard Agreement - Client/Consultant Agreement for Municipal Works
4. OAA Document 600 - Contract between Architect and Client
5. CCA-1 Stipulated Price Subcontract
6. CCDC 2 - 2008 Stipulated Price Contract (including CCDC 41 'CCDC Insurance Requirements')
7. CCDC 3 - 1998 Cost Plus Contract
8. CCDC 4 - 2011 Unit Price Contract
9. CCDC 5A - 2010 Construction Management Contract – For Services
10. CCDC 5B - 2010 Construction Management Contract – For Services And Construction
11. CCDC 11 - 1996 (R2006) Contractor's Qualification Statement
12. CCDC 17 - 2010 Stipulated Price Contract For Trade Contractors On Construction Management Projects
13. CCDC 18 - 2001 Civil Works Contract
14. Document 14 - 2000 Design-Build Stipulated Price Contract (CCA, CSC, RAIC)
15. Document 15 - 2000 Design-Builder/Consultant Contract (CCA, CSC, RAIC)
16. CCDC 20 - 2008 A Guide to the Use of CCDC 2 - 2008 Stipulated Price Contract
17. CCDC 21 - 2000 A Guide to Construction Insurance
18. CCDC 22 - 2002 A Guide to Construction Surety Bonds
19. CCDC 23 - 2005 A Guide to Calling Bids and Awarding Contracts
20. CCDC 24 - 1996 A Guide to Model Forms and Support Documents
21. CCDC 40 - 2005 Rules for Mediation and Arbitration of Construction Disputes
22. CCDC 43 - 1998 A Guide to the Use of CCDC 3 - 1998 Cost Plus Contract
23. CCDC 45 - 2011 A Guide to CCDC 5A Construction Management Contract - for Services
24. CCDC 46 - 2011 A Guide to CCDC 5B Construction Management Contract - for Services and Construction
25. CCDC 47 - 2011 A Guide to CCDC 17 Stipulated Price Contract Between Owner and Trade Contractor for Construction Management Projects
26. CCDC 48 - 2002 A Guide to the Use of CCDC 18 – 2002
27. CCDC 9A - 2001 Statutory Declaration of Progress Payment Distribution by Contractor *(requires the purchase of a CCDC 9 copyright seal)
28. CCDC 9B - 2001 Statutory Declaration of Progress Payment Distribution by Subcontractor *(requires the purchase of a CCDC 9 copyright seal)

APPENDIX B

Procurement Process Issues

The following is a summary of the some issues identified by OPBA members that, if discussed and/or resolved, may increase the satisfaction level with the procurement process. The issues were noted during a February, 2013 online survey.

1. Improved scope of work
2. Reasonable allocation of risk
3. Client communication with consultant
4. Consultant fees for multi-year contracts
5. Vendor prequalification
6. Design/Build process
7. Prime Consultant RFP template (in process)
8. Procurement involvement early in the project
9. Adequate time
10. Levels of bonding requirements consistent across municipal governments
11. Understanding the use of CCDC documents
12. Evaluation methodology for non-price factors
13. Education
14. Rushed timelines
15. Improved internal communication
16. Architects/consultants meeting expectations of document development
17. Tools for training internal project managers
18. Consultant accountability and responsibility.
19. Better upfront planning
20. More time spent on specs and drawings at the department level, causing less addendums
21. Training (for both sides)
22. Evaluation criteria / scoring
23. Length of time the contract is out for
24. Suppliers' understanding of process
25. Clear rules of the bid process
26. Purchasing (department) involvement
27. Broader choice of consultants
28. Very basic education re: the purchase of the service
29. Contractors to adhere to the requirement for questions to be addressed to the purchasing contact, be in writing and arrive on or before the deadline to receive questions.
30. Document review
31. Quality of work
32. Contract non-compliance
33. Effective evaluation process and adherence to the process
34. proper evaluation criteria
35. spec writing
36. roles and responsibilities of who keeps what paper work
37. prejudgement of bidders
38. Project owner lack of expertise

39. Hiring competent project Consultants / managers
40. Better management of contract performance issues
41. better contract (wording)
42. Form of tenders completed in their entirety with original signatures and all addendums acknowledged
43. Fee breakdown
44. Simplified wording of contracts
45. Partnership attitude between consultant, contractor and owner
46. Continued communication among stakeholders (ie agency, associations)
47. Broaden choices of general contractors
48. Timing required for the procurement process
49. Pre-qualification process for construction contractors
50. Contract administration & change orders
51. Consultant-provided specifications need to be improved
52. Use of standard contracts / documents
53. Clear scope of work
54. Supplemental conditions
55. Supplementary conditions for use by the public sector
56. Early involvement of senior management representatives from all sides
57. Unclear scope, changing of scope
58. Training on risk management
59. Procurement (officials) need to be included in the preliminary planning phase
60. Information of the benefits of a pre-qualification process
61. Planning and coordinating the acquisition of consultants with the construction services.
62. Better communications
63. Questions from bidders to come in writing on or before the question deadline.
64. Specifications content
65. Addendums being issued too close to the bid closing date
66. Reduction in the number of contract forms available for use
67. Open communication for (better sharing of) information
68. Uniformity and consistency of documents
69. (More) planning lead time
70. BPS compliance and the purchase of the service
71. Photocopies of bid bonds and signatures leading to non-compliance

APPENDIX C

Case Study 1 - Banfai

Owner wishes to construct a dam project, including access roads. Owner undertakes a proposal call for the design and construction of the project. Although billed as a design-build project, the owner's requirements for the design are so highly developed that there is little, if any, room left for the preparation of any significant design by the proponents, and the project is effectively a "draw-build".

The Owner's selection of the successful proposal will be based upon essentially only two things: price and schedule compliance.

Given the size and complexity of the project, owner undertakes a pre-qualification process, as a result of which 6 pre-qualified teams emerge as pre-qualified.

Owner then issues its RFP which contains, among other things:

- A statement that only the 6 pre-qualified teams shall be eligible to submit proposals.
- a draft agreement containing all salient terms, and indicating that while the owner may, in its discretion, be prepared to discuss amendments to some ancillary terms (e.g. insurance coverage, modified payment terms, etc.), the essential terms in the draft agreement are non-negotiable.
- A disclaimer clause saying that by participating in this process and submitting a proposal, each proponent agrees "that it shall have no claims of any kind whatsoever as a result of participating in the selection process, and that each such proponent waives any claims it might have and shall be deemed to have agreed that it has no claim."

One of the 6 qualified proponents submits to the owner its proposal as a joint venture. The joint venture participants are the qualified proponent and another party, who is not part of the group of 6 pre-qualified, but who will primarily responsible for the roadworks portion of the project and who is otherwise well qualified to do that portion of the work. The joint venture remains jointly and severally liable to the owner in all respects, and its proposal is otherwise compliant with the terms of the RFP.

The proposal submitted by this joint venture is very attractive to the owner, and the owner would like to accept it.

The owner, however, is concerned about owner whether or not it can legally accept this proposal submitted by the joint venture, and seeks legal advice. The legal advice given to the owner is that it is indeed able to accept this proposal, and in any event, even if there were some legal problem inherent in accepting the joint venture's proposal, the owner was well protected by the disclaimer clause, which was clear and unambiguous.

Owner then accepts the proposal submitted by the joint venture, and a contract is then negotiated and signed substantially in the terms of the draft agreement attached to the RFP.

The proponent who submitted the second lowest priced proposal (who is otherwise completely compliant) finds out that owner has contracted with the joint venture, and promptly sues.

This second lowest proponent takes the position that the proposal was submitted by an unqualified entity (the joint venture), the owner was therefore disentitled from considering it or awarding it, and had the owner acted properly, the contract would have gone to this second lowest proponent. He sues for his lost profits on the contract he was prevented from executing and performing.

At trial, the Owner takes the (weak) position that the joint venture was legally qualified, but more strenuously argues that in any event, it didn't matter, that there was express disclaimer clause in the RFP which constituted part of the terms of this procurement, all proponents including the second lowest one were experienced and sophisticated parties, and everyone went into this procurement with their eyes wide open. By the disclaimer clause, which was an express part of the terms of the RFP which governed the procurement call, all unsuccessful; proponents including the second lowest one, expressly agreed that they had no claims and waived whatever claims they might have had, including the very claims arising out of the owner's consideration and acceptance of a non-compliant proposal.

The second lowest proponent argues that what the Owner did here was patently and transparently unfair, and an obvious violation of its own procurement rules. It was the Owner who set those rules, and a key part of the process was that only 6 proponents were allowed to bid for this project. By accepting a proposal from a joint venture which included a party who was not one of these 6, the Owner ignored its own rules to the detriment of the second lowest proponent.

Who Wins?

THE RESULT:

The case, known as Tercon Contractors Ltd v British Columbia (Transportation and Highways), was heard first by the British Columbia Supreme Court which ruled in favour of Tercon. The decision was appealed to the British Columbia Court of Appeal which ruled in favour of British Columbia. That decision was appealed to the Supreme Court of Canada and split decision (5-4) ruled in favour of Tercon.

	OWNER (BC)	CONTRACTOR (TERCON)
Dillon J. (B.C.S.C.)		X
Donald J. (B.C.C.A.)	X	
Mackenzie J. (B.C.C.A.)	X	
Lowry J. (B.C.C.A.)	X	
Binnie J. (S.C.C.)	X	
McLachlin J. (S.C.C.)	X	
Abella J. (S.C.C.)	X	
Rothstein J. (S.C.C.)	X	
Cromwell J. (S.C.C.)		X
LeBel J. (S.C.C.)		X
Deschamps J. (S.C.C.)		X
Fish J. (S.C.C.)		X
Charron J. (S.C.C.)		X
Overall ...	7	6
But in S.C.C.	4	5

APPENDIX D

Case Study 2 - Ackerley

Fact Situation

The City of Hogtown had neglected to invest in its aging infrastructure for many years. As a result, the need for repairs to crumbling roads and bridges and upgrades and replacements to services like wastewater systems was becoming critical. Economic growth was being affected and safety was becoming a real concern for residents. (Damage to automobiles due to potholes was at an all-time high!)

Thankfully, the National Government recognized this need (which in fact existed in many municipalities across the country) and, for the good of the country, decided to make billions of dollars available for funding infrastructure projects at the local level. The only catch was that the money had to be spent within the 18 months—to coincide with the timing of the next National election.

Hogtown wanted to take full advantage of this marvelous opportunity. Immediately following the announcement of the funding, the City management made up a lengthy list of projects to be undertaken. Engineering firms were hired by the City to design the projects and get tender packages out to bidders. Time was of the essence. Bidders were typically required to submit their bids within two weeks of the tender being posted.

When geotechnical studies were needed in relation to any of the projects, the barest minimum of investigative work was carried out. To protect the City from legal liability, staff (in consultation with the City's legal department) ensured that the tender documents clearly stated that the bidding contractors should "satisfy themselves" with respect to the information being provided. As for the designs themselves, the engineers were rushed, to say the least, in putting together the necessary project drawings and specifications. Given the deadlines associated with the funding, a number of tender packages were issued with designs that were less than 100% complete.

Concerned about the possible consequences of these less-than-tender-perfect packages, City staff were once again careful to include an "exclusion of liability clause" in favour of the City which said that representations in the tender were "merely for the general information of bidders and weren't warranted or guaranteed by the City."

In some cases, the engineers specified the method to be used to perform a portion of the work. For example, in one of the sewer projects, the specifications called for a crossing under a railroad to be done using the "jack and bore" method. In other cases, whether due to time constraints or not, the engineers simply left it to the contractor to figure out how to perform the work. In yet other cases, such as with respect to asphalt performance, the contractor was asked to provide a "guarantee" of workmanship and materials for an extended period.

Perhaps not surprisingly, many of the projects ran into major problems during the course of construction. In hindsight, the "successful" bidders seriously wished they hadn't "won" their tender and, watching from the sidelines, the losing bidders were grateful they'd lost. The

essential issue was the difference between what the contractor understood the work entailed and what turned out to be the case.

In one instance, the contractor assumed from the information provided in the tender that the contractor's plan to divert water in a river to allow bridge construction would be feasible. Unfortunately nothing in the tender documents warned the contractor that special permits were required for that work which were not available from the authority in the time allotted. As a result, the contractor had to proceed using a different method, a great additional cost.

In the case of the "jack and bore" tunnelling, the soils turned out to be filled with boulders, making that method impossible. The contractor had to spend a large amount of time and effort, at significant expense, to use a much more labor-intensive method.

The poor quality of many of the design packages led to difficulties and frustrations overall. Many projects faced change order requests by contractors who found that the designs were not capable of being constructed, at least without considerable modifications in the field as construction progressed. The lawyers will be busy sorting things out for a long time to come.

The Challenge

As a blue-ribbon task force struck to analyze the poor outcomes of this infrastructure program, you are being asked to make recommendations for the future.

In your review, you should consider the following questions:

- (a) How should the procurement process for tendering work be best undertaken in these circumstances?
- (b) How should the possibility of errors in the tender documents be handled? Does including an "exclusion of liability" work? What other approaches can be taken?
- (c) What about the engineers and their incomplete drawings? Are they responsible? How should they protect themselves?
- (d) How should reliance on information provided to bidders be dealt with? Should bidders "satisfy themselves"? What are the consequences if nothing is said?
- (e) In terms of methods of construction, is it better to tell contractors what to do, or let them figure it out? What are the benefits and risks of each approach? When would each approach be appropriate?
- (f) Should contractors "warn" owners in advance about problems they see with the design? If so, how and when should that happen?
- (g) The key consideration is this: who should bear what risks and why?

APPENDIX E

Speaker Profiles

Geza Banfai

Geza R. Banfai is a senior partner with the Toronto office of Heenan Blaikie, practicing in their Infrastructure – Construction practice group. He is certified by the Law Society of Upper Canada as a Specialist in Construction Law, is a Fellow of the Canadian College of Construction Lawyers, and is listed The Leading 500 Lawyers in Canada (Lexpert/American Lawyer), Best Lawyers in Canada (Woodward/White) and International Who's Who of Professionals.

In his extensive construction law practice, he has represented participants at every level of the construction pyramid, from negotiating and drafting construction and related contracts (including alliancing and joint venture agreements, and P3 and similar lender-driven arrangements) to claims and disputes of many kinds.

He is a director of the Canadian Construction Association, and his past directorships include Consulting Engineers of Ontario and Toronto Construction Association. He remains active on the Construction Industry Leaders Forum of the CCA, and sits as the ex-officio legal representative on the Canadian Construction Documents Committee.

Glenn Ackerley

Glenn Ackerley is a partner with the law firm of WeirFoulds LLP in Toronto. With almost 25 years of experience, Glenn practices exclusively in the area of construction and procurement law, representing clients from across the construction industry—including public and private owners, contractors, subtrades, suppliers, and design consultants.

Glenn is a Fellow of the Canadian College of Construction Lawyers and in terms of procurement, he has been named in the International Who's Who of Public Procurement Lawyers, and the Chambers Global directory for Public Procurement for Canada.

He is active in the construction industry, having been Chairman of the Board of the Toronto Construction Association, and currently serving on the Board of the Canadian Construction Association.

He taught Construction Law at Ryerson University's Department of Architectural Science for many years, and continues as an instructor at the Admission Course of the Ontario Association of Architects. Glenn speaks and writes regularly on construction and procurement matters for legal and industry conferences, seminars and publications.

William (Bill) Pigott

William (Bill) Pigott, a Partner with Miller Thompson, has focused on construction law for nearly 30 years. His services concentrate on the “front end” including procurement and project execution strategies, preparation of design and construction contracts, alternative dispute resolution (as a preventative) and early claim resolution through negotiation/mediation.

While much of Bill’s work is for the owners and their consultants, he is a “contractor’s kid”, so he understands the contractor’s side of the equation and provides advice in connection with contract negotiation, bud issues and claims resolution.

Bill is a guest lecturer at U of T for both the engineering and architectural & design faculties and an instructor in the certificate program at the OAA.

In 2013, Bill was honoured by Martindale-hubbell AV Preeminent Rated Lawyer as well as by Canadian Legal Lexpert Directory of leading lawyers for construction law.

APPENDIX F

Welcome Letter

Dear Procurement Day Participant

The Construction Design Alliance of Ontario would like to welcome you to the 2nd Annual Procurement Day. This the follow-up to our successful inaugural event of April, 2012, which saw more than 100 influential construction, design and procurement professionals come together in the spirit of collaboration for a candid discussion of the issues being faced by all sides of the procurement equation. The day-long event fostered good will, saw barriers fall, improved understanding of perspectives, and communication began to freely flow.

The Alliance is proud to be one of the founding sponsors of this great event. CDAO is a collaborative alliance of 14 associations and organizations, representing a broad cross-section of professions which design and build infrastructure projects in Ontario. CDAO's primary goal is to advocate for infrastructure investment and provide municipal and provincial governments a collective forum to seek input and advice from stakeholders. You can read more about CDAO activities and initiatives at www.CDAO.ca

Procurement Day is a natural extension of our mission as we continue to foster an understanding of infrastructure procurement issues and seek solutions in a collaborative forum. Since we last came together 18 months ago, incredible progress has been seen on numerous fronts.

The relationships and understanding fostered during Procurement Day 2012 have continued to grow. Creative solutions have been found to ongoing challenges related to the public procurement of design and construction services, some of which will be outlined today. On behalf of CDAO, thank you for taking the time out of your busy schedules to attend today's event. We look forward to participating in the stimulating discussion that is about to take place and adding to the exchange of ideas.

Now is the time to keep the momentum moving forward. Together, with an open mind, we can push through to a higher level of understanding and collaboration.

(Signed)
Clive Thurston
CDAO Chair

(Signed)
Saskia Martini-Wong
Procurement Day Chair

APPENDIX G
Procurement Day Sponsor List



APPENDIX H

Procurement Day 2013 Attendees

Organization	First Name	Last Name	Title
AECOM	Andrew	Philip	Vice President, Transportation
Alberici Constructors Limited	Bud	Freeze	Director
Association of Registered Interior Designers of Ontario	Sharon	Portelli	Registrar
BBCG Claim Services Limited	Edouard	Chasse	Senior Adjuster - Surety
CBRE Limited	Lisa	Barroso	Team Lead - GTA
CBRE Richard Ellis	David	Thompson	Director of Project Management
CH2M Hill	Carolyn	Francis	Director of Contracts, Canada
City of Brantford	Robin	Nechelput	Coordinator of Purchasing - Capital Projects
City of Kitchener	Larry	Gordon	Director of Supply Services
City of Mississauga	Lydia	Kowalyk	Senior Buyer
City of Vaughan	Asad	Chughtai	Director of Purchasing Services
City of Vaughan	Mary	DiGiovanni	Manager of Purchasing/Contract Services
Conestoga College	Raymond	Chung	Director, Project Services
Construction and Design Alliance of Ontario	Patrick	McConnell	Communications Consultant
Consult Construction Consulting Services Ltd.	Tom	Vivian	President
Consulting Engineers of Ontario	Saskia	Martini-Wong	Manager, Operations & Corporate Services
Consulting Engineers of Ontario	Barry	Steinberg	Chief Executive Officer
Consulting Engineers of Ontario	David	Zurawel	Manager, Stakeholder Relations
County of Simcoe	Catherine	Payne	Procurement Professional
Delcan	Nick	Palomba	Vice President
ECA Ontario	Eryl	Roberts	Executive Vice President/Labour Relations
Encon Group Inc.	Stephen	Panciuk	Vice President

Eramosa Engineering	Tim	Sutherns	President
Fitzpatrick Electric	Garry	Fitzpatrick	Owner
Geo. A. Kelson Co.	John	Will	V.P. Design/Build
Gottesman Associates	Deborah	Gottesman	Principal
Grand Valley Construction Association	Martha	George	President
Greater Toronto ECA	Robert	O'Donnell	Executive Vice-President
Guild Electric Ltd.	Dan	Camilleri	Project Manager
Guild Electric Ltd.	Stephen	Lengyel	Project Coordinator/Estimator
Heavy Construction Association of Toronto	Eric	Lewis	Executive Director
HEENAN BLAIKIE LLP	Geza	Banfai	Partner
Holaco Installations Limited	Dan	Lancia	President
IBI Group	Fouad	Mustafa	Director
Infrastructure Ontario	Tracie	Bell	Director, Vendor and Contract Management
Infrastructure Ontario	Steve	Dyck	Vice President, Communications & Stakeholder Relations
Infrastructure Ontario	Rosa	Mauro	Senior Legal Counsel
Infrastructure Ontario - Corporate Legal Services	Michael	Inch	Vice President, Strategic Sourcing
Interior Systems Contractors Association of Ontario	Ron	Johnson	Deputy Director
Inzola Construction Ltd.	Sam	Cutruzzola	OGCA Chair
John B. Salmon Technical Consulting	John	Salmon	Owner
Kasian Architecture	Janine	Grossmann	ARIDO President
KBH Interiors	Victoria	Horobin	Registered Interior Designer
London & District Construction Association	Dave	Baxter	Executive Director
McKay Cocker Construction Ltd.	David	Blake	Past OGCA Chair
McLauchlin & Associates	Rob	Kennaley	Partner
Mechanical Contractors Association of Ontario	Steve	Coleman	Ex-Vice President
Metrolinx	Paul	Davidson	Manager, Procurement - Client & Vendor Relations
Metrolinx	Cheryl	Scitthelm	Contract & Procurement Liaison
MHPM Project Managers Inc.	Franklin	Holtforster	President & CEO
MHPM Project Managers Inc.	Gordon	Kack	Vice President, Operations
Miller Thomson LLP	Bill	Pigott	Partner
Ministry of Government Services	Jennifer	Churchill	Senior Manager, Stakeholder Relations

Ministry of Transportation - Contract Management and Operations Branch	Sherry	Marr	Head, Contract Award, Qualification Control Section
Ministry of Transportation - Contract Management and Operations Branch	Gustavo	Rojas	Head, Consultant Contracts
Ministry of Transportation - Highway Standards Branch	Alain	Beaulieu	Head, Engineering Specifications & Standards Management
Net Electric Limited	Ove	Bakmand	President
NORR	George	Bitsakakis	Vice President, Operations Ontario
Ontario Association of Architects	Kristi	Doyle	Executive Director
Ontario Association of Architects	Sheena	Sharp	Vice President, Strategic
Ontario Association of Architects	Adam	Tracey	Policy Analyst, OAA
Ontario Construction Secretariat	Perry	Chao	Senior Policy Analyst
Ontario Electrical League	Stephen	Sell	President
Ontario General Contractors Association	David	Frame	Director, Government Relations
Ontario General Contractors Association	Clive	Thurston	President
Ontario Society of Professional Engineers	Lee	Weissling	Manager of Policy and Government Relations
Pro-Demnity Insurance Company	John	Hackett	Vice President, Practice Risk Management
Public Works & Government Services Canada	Paul	Hastings	Councillor, OAA
R.J. Burnside	Dave	Bannister	Senior Vice President
RCCAO	Andy	Manahan	Executive Director
Region of Halton	David	Ohashi	Manager, Wastewater Design and Construction
Region of Peel	James	MacIntyre	Director, Purchasing & Project Management
Region of Peel	Diane	Mortimer	Technical Assistant
Region of Peel	Anthony	Parente	Manager, Water Capital - Transmission & Distribution
Regional Municipality of Niagara	Dan	Augustine	Purchasing Agent
Regional Municipality of Niagara	Andrea	Maleszyk	Manager, Purchasing Services
Regional Municipality of York	Stan	Gal	Director, Supplies & Services
Regional Municipality of York	Tina	Gardiner	Manager, Insurance & Risk
Regional Municipality of York	Susan	Hope	Senior Purchasing Analyst

Regional Municipality of York	Jerry	Paglia	Senior Counsel, Construction
Romag Contracting	Magdy	Sidhom	
Simcoe Muskoka Catholic District School Board	Glenn	Clarke	Controller of Plant
SNC-Lavalin Operations & Maintenance Inc.	Pascale	Ladouceur	Senior Manager, Project Account and Vendor Management
SNC-Lavalin Operations & Maintenance Inc.	Sylvie	Weaire	Manager Vendor Compliance
Surety Association of Canada	Steven	Ness	President
T. Lloyd Electric	Mark	Lloyd	President
The Guarantee Company of North America	Paul	Hollingworth	VP Contract Surety, Central & Atlantic Region
Toronto Catholic District School Board	Vince	Artuso	Supervisor, Contract Administration
Toronto Construction Association	John	Mollenhauer	President & CEO
Toronto Transit Commission	Heinz	Hustedt	Manager of Construction Contract Administration
Toronto Transit Commission	Mike	Piemontese	Director - Project Procurement Section
Toronto Transit Commission	Renata	Wojteczko	Construction Contract Administrators
Town of Caledon	Amedeo	Valentino	Manager of Purchasing & Risk Management
Town of Halton Hills	Simone	Gourlay	Manager of Purchasing - Corporate Services
Town of Milton	Leslie	Williamson	Manager, Purchasing and Risk Services
Town of Newmarket	Gord	Sears	Manager, Procurement Services
Town of Richmond Hill	John	Wu	Procurement Advisor
Travelers Canada	Devon	Maltby	Vice President, Surety
University of Toronto	Brenda	McCabe	Associate Professor of Civil Engineering
WeirFoulds LLP	Glenn	Ackerley	Partner
Western Surety Company	Mark	Skanes	Eastern Regional Manager
WGD Architects Inc.	Richard	Dabrus	Principal
X-Design	Gregg	Quinn	ARIDO President Elect
XL Insurance	Vasyl	Shuhayev	AVP Regional Claims Manager