

THE PRIVILEGE CLAUSE

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A privilege clause in a call for bids generally includes a statement to the effect that an owner is not obliged to accept the lowest, or any bid.

Without offering an opinion as to whether or not a privilege clause should be used, concerns in the construction community have prompted the CCDC to provide the following recommended approaches by owners and bidders when dealing with a privilege clause:

- The concepts of ‘duty of fairness’ and ‘bargaining in good faith’ are fundamental to the bidding process. Do not give one contractor any undisclosed advantage over another contractor.
- Clearly disclose all criteria intended to be relied upon in evaluating and awarding bids in the call for bids. Do not rely upon any criterion not disclosed in the bid documents as a basis for contract award.
- Do not use a privilege clause to ‘bid shop’ or test the market. Only call bids where the work will proceed, provided that bids are within the predetermined budget and meet all other disclosed criteria, barring any significant change in circumstances (e.g. owner finances).
- Do not use a privilege clause to award a contract to a bidder whose bid does not comply with either the terms of the bid call or the disclosed bid evaluation and award criteria.
- When dealing with a privilege clause take care in evaluating bidders’ positions in light of all the disclosed bid evaluation and award criteria.
- As bidders, do not attempt to take advantage of any undisclosed bid evaluation and award criteria.

For additional information relating to the bid process, refer to CCDC 23 ‘A Guide to Calling Bids and Awarding Construction Contracts’.

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