



## What Does a Bidder Conflict of Interest Mean to *Your* Organization?

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Why is it that the person with a conflict of interest is often the last to see it? Maybe it's due to a fundamental tendency among humans to deny they are in a conflict or maybe they don't understand what it means to be in a conflict. There's definitely some fuzziness around the concept of conflicts so it's not surprising that bidders often leave conflict-of-interest forms blank even when they shouldn't,

### ***What is a "bidder conflict of interest"?***

Merriam-Webster's dictionary defines a conflict of interest as "a conflict between the private interests and the official responsibilities of a person in a position of trust." This definition is consistent with how a conflict of interest is traditionally understood. While this traditional definition fits well within the corporate law and ethics contexts, it doesn't apply perfectly to the competitive bidding process – potentially creating fuzziness for bidders.

In the competitive solicitation process, procurement professionals generally understand a bidder conflict of interest as a situation that may give a bidder an unfair advantage over the other bidders. This advantage could be access to information that isn't available to other bidders or it could also be that the bidder has a personal relationship that could bias the evaluators.

Why is this important? Allowing a bidder with a conflict of interest participate in the process could represent a breach of the owner's duty of fairness and could compromise the integrity of the procurement process, so everyone involved in the solicitation has an interest in ensuring the definition of conflict of interest is clear to bidders from the outset. Failure to do so could lead to bid rejection or a legal challenge from a losing bidder complaining about the winning bidder's unfair advantage.

### ***What's the best way to keep conflicted bidders out of the process?***

The best way to keep conflicted bidders out of the process is to define what your organization considers a 'bidder conflict of interest' so that the circumstances that will lead to disqualification are crystal clear to potential bidders.

The definition of "conflict of interest" could take many forms. For example, a procuring entity may define a disqualifying conflict of interest in the RFP by stating "all parties who were *directly or indirectly* involved in preparing the RFP shall be deemed to be in a conflict of interest and ineligible to bid".

Alternatively, some entities may permit bidders to use parties involved in the preparation of an RFP as subcontractors under certain specified conditions.

Once the parameters of the definition are defined, the entity should communicate it to prospective bidders by setting out a clearly drafted definition in the RFP and provide examples of the type of conflicts that will lead to disqualification. Armed with a clear understanding of what will keep them in the process, bidders will be better able to avoid an unintended pitfall.

***Is there a difference between apparent, potential and actual conflicts of interest?***

Yes, there is a difference between what is an apparent, potential and actual conflict of interest – and the distinction is important. Employees, corporate directors and public officials are generally expected to disclose all of these conflicts of interest and to recuse themselves from decision-making where there is any conflict.

In competitive bidding, however, the default threshold that will lead to disqualification is not this clear. Courts and the Canadian International Trade Tribunal will look to the terms of the RFP when considering a dispute over a bidder conflict of interest. If the RFP says *apparent* conflicts will result in disqualification, then that is the threshold the courts will apply.

***What if the RFP is unclear on the type of conflict of interest that will lead to a disqualification?***

If the RFP is silent on conflicts of interest or unclear on the types of conflicts that will lead to disqualification (apparent, potential or actual), the owner is assuming a heavy responsibility. In the absence of clarity, it will be up to the owner to determine, often only after the bid is submitted, what qualifies as the type of conflict of interest that will tip the scales in favour of rejection.

In the absence of a clear definition, the prevailing view at Common Law is that there needs to be a reasonable apprehension of bias/conflict before an owner can validly reject a bid. According to the analysis applied by the courts, something more than optics is needed; owners must be able to explain what factual circumstances gave rise to the reasonable apprehension of an unfair advantage or conflict.

***What's the takeaway?***

The common definition of the term 'conflict of interest' doesn't fit the procurement context perfectly so owners shouldn't assume all bidders will naturally understand what to disclose on a conflicts disclosure form. Without a clear definition in the RFP that includes examples, some bidders are sure to misunderstand what's expected. This will leave owners in the unenviable position of having to teach them about conflicts of interest in procurement the hard way - by disqualifying the bid.

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