

restrictive trade practices
commission

USE OF BID
DEPOSITORIES IN
THE
CONSTRUCTION
INDUSTRY

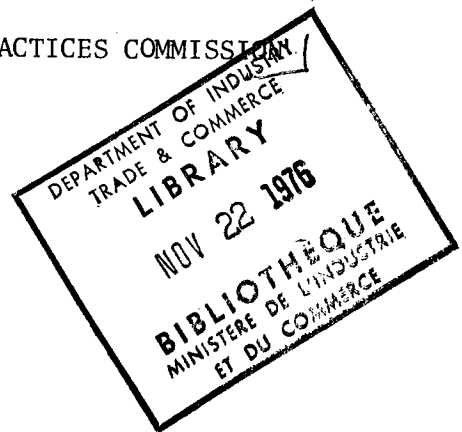


Consumer and
Corporate Affairs

Consommation et
Corporations

Canada.

RESTRICTIVE TRADE PRACTICES COMMISSION



USE OF BID DEPOSITORIES IN THE
CONSTRUCTION INDUSTRY

Report in the Matter of an Inquiry under Section 47 of the Combines Investigation Act in connection with the Establishment and Operation of Bid Depositories and other Systems Employed for the Transmission of Tenders from Trade Contractors or Suppliers of Material or Equipment to General Contractors and other Contract Awarding Authorities in the Construction Industry

Ottawa

1976

RTPC No. 55
(Series 1959)

© Minister of Supply and Services Canada 1976

Available by mail from

Printing and Publishing
Supply and Services Canada
Ottawa, Canada K1A 0S9

or through your bookseller.

Catalogue No. RG53-1976/55 Price: Canada: 3.00
ISBN 0-660-00563-8 Other countries: 3.60

Price subject to change without notice.

RESTRICTIVE TRADE PRACTICES COMMISSION

Vice-Chairman	L.-A. Couture, Q.C.
Member	R. S. MacLellan, Q.C.
Member	F. Roseman



October 14, 1976.

The Honourable Anthony C. Abbott,
Minister of Consumer and Corporate Affairs,
Ottawa.

Sir:

I have the honour to transmit to you the French and English texts of a report by the Restrictive Trade Practices Commission entitled "Use of Bid Depositories in the Construction Industry".

The report follows from an inquiry carried out under section 47 of the Combines Investigation Act relating to the establishment and operation of bid depositories and other systems employed for the transmission of tenders from trade contractors or suppliers of material or equipment to general contractors and other contract awarding authorities in the construction industry.

Yours very truly,

L.-A. Couture,
Vice-Chairman.

TABLE OF CONTENTS

	Page
CHAPTER I - AN OVERVIEW OF THE ORGANIZATION OF THE BUILDING CONSTRUCTION INDUSTRY	1
Industry Specialization	1
Types of building construction	1
Work specialization	2
Contract Formation in the Building Construction Industry	9
Contracts entered into by owners	9
Mechanics of price determination	15
Trade Contractors and Their Sub-Contractors	22
Types of Buyers and Use of Bid Depositories	28
CHAPTER II - BID DEPOSITORIES	39
History and Development	39
Characteristics of Bid Depositories	43
The Organization of Major Bid Depositories	55
Policy and management	56
Local differences: scope, bonding and the interpretation of rules	59
Scope	59
Interpretation of rules	61
Geographic coverage	62
The Organization of Major Bid Depositories in Ontario	63

	Page
Scope of bid depositories	63
The approach of the general contractors	64
The formulation of Standard Rules	66
Local discretion	68
Geographic coverage	69
Quebec Bid Depository System . . .	69
Relation of Sub-Bid and Specialty Depositories to the Major Bid Depositories	75
The Operation of Bid Depositories .	77
CHAPTER III - DECLARATION OF BID DEPOSITORY . . .	82
CHAPTER IV - PRE-QUALIFICATION OF BIDDERS	89
Pre-Registration	89
Bonding	90
Trade contractor, general contractor and owner interest in bonding	91
Bid bonds	96
Performance bonds	102
CHAPTER V - VIOLATIONS AND ENFORCEMENT OF BID DEPOSITORY RULES	108
Evaluation of Tenders	108
Unsolicited alternates	113
Combined bids	118
Bypassing of Bid Depositories . .	119
Enforcement	126

	Page
CHAPTER VI - WITHDRAWAL OF TENDERS	143
CHAPTER VII - NUMBER OF BIDDERS	160
CHAPTER VIII - APPRAISAL OF THE EFFECTS OF BID DEPOSITORIES ON THE PUBLIC INTEREST AND RECOMMENDATIONS	169
Declaration of Bid Depositories	170
Pre-registration	172
Bonding	173
Withdrawals	174
Tenderers' Access to Bids	176
Financing of Bid Depositories	177
Evaluation of Tenders	178
Overall Appraisal	180
APPENDIX A - Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects	190
APPENDIX B - Sample Declaration Form Saskatoon, Prince Albert or Swift Current	194
APPENDIX C - Witnesses and Appearances	195

No.	TABLES	Page
I	Mechanical Trade Work Performed by Types of Mechanical Trade Establishments, 1972	24
II	Indexes of Specialization of Mechanical Trade Output and Establishments, 1972	25
III	Government Purchases of Non-Residential Building Construction in 1972	30
IV	Government Non-Residential Building Construction, 1968-74	32
V	Categories of Bid Depository Users	33
VI	Disposition of Alleged Complaints of Violations of Q.B.D.S. Rules of Procedure	130
VII	Number of Tender Disqualifications, Projects and Trade Calls in Several Major Bid Depositories in 1968	134
VIII	Withdrawals	148
IX	Frequency Distribution of Number of Bids Edmonton Bid Depository, 1968	164
X	Frequency Distribution of Number of Bids Nova Scotia Bid Depository, February, 1973 to February, 1975	165
XI	Frequency Distribution of Number of Bids Ottawa Valley Bid Depository, 1973	165
XII	Frequency Distribution of Number of Bids for a Sample of Projects Quebec Bid Depository System, 1973	166

TABLES

		Page
A	[Classification of Work]	4
B	Classification of Bid Depositories	46
C	Bid Depositories in Canada - 1975	49

CHAPTER I

AN OVERVIEW OF THE ORGANIZATION OF THE BUILDING CONSTRUCTION INDUSTRY

Industry Specialization

Types of building construction. Construction activity is divided by Statistics Canada into the two broad areas of building construction and engineering construction.¹ Based on the dollar value of output, the respective breakdown over the period 1966-74 has been roughly consistent at 60:40. Bid depositories have been important in only some kinds of building construction. The main categories of building construction in 1972-73-74 were:

	<u>1972</u>	<u>1973*</u>	<u>1974*</u>
	<u>\$'000</u>	<u>\$'000</u>	<u>\$'000</u>
Residential	5,870,649	7,133,030	7,863,618
Industrial	926,741	1,075,846	1,275,259
Commercial	1,706,146	2,089,069	2,598,143
Institutional	1,249,292	1,151,466	1,240,096
Other Building	574,699	680,086	833,728
Total	<u>10,327,527</u>	<u>12,129,497</u>	<u>13,810,844</u>

* The figures for 1973 and 1974 are preliminary and subject to modification.

This division of building construction reflects end-use of the structure and thus, to some extent, indicates the nature of the buyer initially responsible for construction; i.e. households; governments, for own use or rental; non-profit organizations, for own use; business firms, for own use; business firms, for sale or rental. The nature of the buyer along with the size and complexity of building structures are the most important determinants of how contracts for the performance of work are arranged, which is the consideration that lies at the heart of the creation of bid depositories.

With the possible exception of large apartment buildings, residential buildings tend to be smaller and

less complex than other types of building construction. One indication of the difference in size and complexity between residential and non-residential building construction is the relative importance of the mechanical and electrical trades.² Based on the percentage of contract work performed by these trades in residential and non-residential building construction, the mechanical trades were more than three times more important in non-residential construction and the electrical trades more than four times.³ Residential building construction is also set apart on the demand side. Because the demand for accommodation provides a continuing mass market, it is possible for firms to build based on estimates of demand rather than wait for orders for particular buildings, which is characteristic of most non-residential construction. This mass market plus the relative simplicity of the structures has led toward methods of organization of residential construction which do not foster the use of bid depositories. In particular, builder-developers account for much of the large-scale residential building projects, whereas use of bid depositories is most widespread where the owner enters into a lump-sum contract with a prime contractor.

Before exploring how different buyers, and in particular governments at all levels, affect the methods and conditions under which construction contracts are entered into, it is important to see why construction contracts are a crucial aspect of the building construction industry--an aspect that results from the organization of the industry.

Work specialization. A completed structure is the result of the input of a large number of specialists, which is not unusual for most industries in a developed economy. What is exceptional about building construction is the extent to which the specialists are employed by different firms. It is in this sense that the industry is widely considered to be fragmented. While the existence of a wide range of specialist firms is sometimes considered unfortunate, because it is held to lead to instability, it is easily seen that the formation of specialist firms is a rational response of business units to the conditions of demand and the scheduling of work on building projects. On the demand side, buildings are constructed to order, to meet the plans and specifications established by the buyer.

Most industries estimate demand and adjust their production accordingly, that is, they produce for inventory rather than to order. There are exceptions such as are found particularly in the fields of heavy manufacturing engineering. Contrary to these exceptions, in the construction industry specialists having to perform at different points in the building sequence must be at work on different projects if they are all to be employed at the same time. For example, a firm with its own foundation specialists and painters could not employ them at the same time on any single project since these specialists enter at opposite ends of the building sequence. However, in an environment with a number of firms the chances would be slight for any single firm to be able to obtain projects of a kind and in a sequence which would permit each of its specialist units to move in an uninterrupted flow from project to project.

The co-ordination problem is only present in the case of complete integration: where not only is there common ownership but each specialist exclusively provides inputs for other units in the firm. The units are brought together to form parts of a single production team. A less restrictive and risky form of integration occurs where, although there is common ownership of the specialist units, each of them is operated more or less independently of each other. Sometimes work will be sought for all of the units together (as in the case of negotiated work or when the electrical and mechanical divisions of a company such as Comstock International Ltd. bid exclusively to its general contracting division) and sometimes separately. Nevertheless, though there are some instances of the complete or loose integration of several specialties, the widespread practice and continuing trend is for firms to be formed to fit into fairly narrow specialties.⁴

The various areas of work required to bring a building project to completion are indicated in Table A. The classification of work into 16 divisions is standard across the country. The divisions represent "broad general headings" of "related units of work called 'Sections'." "A 'unit of work' is defined as a single entity that generally describes a particular material or product and its installation."⁵

TABLE A

DIVISION 1 - GENERAL REQUIREMENTS

Summary of Work	Quality Control
Alternatives	Temporary Facilities &
Project Meetings	Controls
Submittals	Material & Equipment
	Project Closeout

DIVISION 2 - SITE WORK

Subsurface Exploration	Site Drainage
Clearing	Site Utilities
Demolition	Paving & Surfacing
Earthwork	Site Improvements
Soil Treatment	Landscaping
Pile Foundations	Railroad Work
Caissons	Marine Work
Shoring	Tunneling

DIVISION 3 - CONCRETE

Concrete Formwork	Specially Finished Concrete
Expansion & Contraction	Specially Placed Concrete
Joints	Precast Concrete
Concrete Reinforcement	Cementitious Decks
Cast-in-place Concrete	

DIVISION 4 - MASONRY

Mortar	Masonry Restoration &
Masonry Accessories	Cleaning
Unit Masonry	Refractories
Stone	

DIVISION 5 - METALS

Structural Metal Framing	Metal Fabrications
Metal Joists	Ornamental Metal
Metal Decking	Expansion Control
Lightgauge Metal Framing	

DIVISION 6 - WOOD & PLASTICS

Rough Carpentry	Wood Treatment
Heavy Timber Construction	Architectural Woodwork
Trestles	Prefabricated Structural
Prefabricated Structural	Plastics
Wood	Plastic Fabrications
Finish Carpentry	

DIVISION 7 - THERMAL & MOISTURE PROTECTION

Waterproofing	Membrane Roofing
Dampproofing	Traffic Topping
Insulation	Flashing & Sheet Metal
Shingles & Roofing Tiles	Roof Accessories
Preformed Roofing &	Sealants
Siding	

DIVISION 8 - DOORS & WINDOWS

Metal Doors & Frames	Wood & Plastic Windows
Wood & Plastic Doors	Special Windows
Special Doors	Hardware & Specialties
Entrances & Storefronts	Glazing-
Metal Windows	Window Walls/Curtainwalls

DIVISION 9 - FINISHES

Lath & Plaster	Resilient Flooring
Gypsum Wallboard	Carpeting
Tile	Special Flooring
Terrazzo	Floor Treatment
Acoustical Treatment	Special Coatings
Ceiling Suspension Systems	Painting
Wood Flooring	Wall Covering

DIVISION 10 - SPECIALTIES

Chalkboards & Tackboards	Lockers
Compartments & Cubicles	Protective Covers
Louvres & Vents	Postal Specialties
Grilles & Screens	Partitions
Wall & Corner Guards	Scales
Access Flooring	Storage Shelving
Specialty Modules	Sun Control Devices
Pest Control	(Exterior)
Fireplaces	Telephone Enclosures
Flagpoles	Toilet & Bath Accessories
Identifying Devices	Wardrobe Specialties
Pedestrian Control Devices	

DIVISION 11 - EQUIPMENT

Built-in Maintenance Equipment	Laundry Equipment
Bank & Vault Equipment	Library Equipment
Commercial Equipment	Medical Equipment
Checkroom Equipment	Mortuary Equipment
Darkroom Equipment	Musical Equipment
Ecclesiastical Equipment	Parking Equipment
Educational Equipment	Waste Handling Equipment
Food Service Equipment	Loading Dock Equipment
Vending Equipment	Detention Equipment
Athletic Equipment	Residential Equipment
Industrial Equipment	Theater Equipment
Laboratory Equipment	Registration Equipment

DIVISION 12 - FURNISHINGS

Artwork	Furniture
Cabinets & Storage	Rugs & Mats
Window Treatment	Seating
Fabrics	Furnishing Accessories

DIVISION 13 - SPECIAL CONSTRUCTION

Air Supported Structures	Nuclear Reactors
Integrated Assemblies	Observatory
Audiometric Room	Prefabricated Buildings
Clean Room	Special Purpose Rooms & Buildings
Hyperbaric Room	Radiation Protection
Incinerators	Sound & Vibration Control
Instrumentation	Vaults
Insulated Room	Swimming Pool
Integrated Ceiling	

DIVISION 14 - CONVEYING SYSTEMS

Dumbwaiters	Turntables
Elevators	Moving Stairs & Walks
Hoists & Cranes	Pneumatic Tube Systems
Lifts	Powered Scaffolding
Material Handling Systems	

DIVISION 15 - MECHANICAL

General Provisions	Fire Protection
Basic Materials & Methods	Power or Heat Generation
Insulation	Refrigeration
Water Supply & Treatment	Liquid Heat Transfer
Waste Water Disposal & Treatment	Air Distribution
Plumbing	Controls & Instrumentation

DIVISION 16 - ELECTRICAL

General Provisions	Lighting
Basic Materials & Methods	Special Systems
Power Generation	Communications
Power Transmission	Heating & Cooling
Service & Distribution	Controls & Instrumentation

Source: Specification Writers Association of Canada,
Uniform Construction Index; 1973, p. 1.3.

In the terminology of the Specification Writers Association of Canada, the sections shown in Table A are known as "broadscope sections", which are often sufficiently narrow to describe a unit of work. But each broadscope section may be further sub-divided in the specification of the project depending on the complexity of the particular areas of work. As an example of further sub-division the specification format of the *Uniform Construction Index* treats the broadscope section "refrigeration" in the mechanical division (No. 15) as follows:

"This Broadscope Section encompasses, but is not limited to, the items listed below for source refrigeration including process refrigeration; the installation and testing of equipment; and system testing, balancing, and adjusting.

Refrigeration Accessories
Chillers
Compressors
Condensing Units
Cooling Towers
Air-cooled Condensers
Evaporative Condensers
Heat Exchangers
Special Cooling Devices and Systems." 6

One of the most important reasons for providing fine detail in the specifications of a project is to give potential suppliers sufficient information on which they can base a cost estimate. Of course there are other good reasons for breaking units of work into fine detail--disputes between supplier and buyer may thus be avoided and record-keeping for maintenance and other purposes is facilitated. But all of the foregoing is encompassed in the recognition that a building is defined by its specifications and plans--inadequate specifications means that the product has not been fully defined.

For many of the trades the scope of the specialist firms roughly corresponds to the division tables. But within the mechanical and electrical divisions there are firms whose area of specialization is most closely described by broadscope titles, such as insulation, refrigeration and fire protection (more commonly, sprinklers). In addition,

there are audio (electrical) specialists whose scope falls within a broadscope section and sheet metal firms whose scope cuts across broadscope sections. While all of the foregoing are separately organized trades, it is not uncommon for a large mechanical contractor to do its own sheet metal work.

The two most important divisions by dollar volume are mechanical and electrical. They accounted for 24.1 per cent and 14.2 per cent, respectively, of total contract work in non-residential construction in 1972.⁷ Furthermore, the contribution of the electrical and mechanical contractors is considerably greater than suggested by these figures when it is seen in terms of work performed under sub-contract for general contractors. Although a census of other trade contractors is not yet available from Statistics Canada, an indication of their combined value can be obtained indirectly. In 1971, the non-residential general building contracting industry paid out roughly 60 per cent of its revenue to sub-contractors. Thus, the mechanical and electrical trades accounted for 64 per cent of the payments to sub-contractors by general contractors.

This estimate of the importance of the mechanical and electrical trades is consistent with the evidence presented to the Commission. In particular it is confirmed by the value of bids for the various trades passing through bid depositories.

Contract Formation in the Building Construction Industry

Contracts entered into by owners. The existence of numerous specialized firms creates the related problems of arranging contracts with each of the firms and coordinating their efforts. The traditional solution for owners in Canada has been the "lump-sum contract". In this approach, the owner engages an architect (or an engineer) to prepare a design and a set of plans and specifications which are sufficiently detailed to permit the preparation of cost estimates for the various parts of the work. The architect then issues a call for tenders, either from a pre-qualified list of firms or from all firms who might care to bid. Firms entering into contracts with the owner are

referred to as prime contractors and any firms engaged by the prime contractor to perform part of the work are known as sub-contractors, who, in turn, may engage sub-sub-contractors, as is the case, for example, when a mechanical contractor engages a sheet metal contractor. General contractors have tended to be the prime contractors, but sometimes one of the major trade contractors, such as mechanical or electrical, will be engaged as the prime contractor and the completion of the foundation and the shell are then performed under sub-contract.

The main advantage of the lump-sum contract from the viewpoint of the owner is that the price of the product is determined in advance and thus provides a basis on which to base a decision as to whether to proceed with, abandon, or modify the project. If the first course is adopted, the risk and responsibility for performing the work are borne by the prime contractor. However, the owner does not wholly escape risk because there is always the possibility that the prime contractor will, through bankruptcy, not be able to fulfill its responsibilities. To protect himself against that possibility, the owner may require the prime contractor to provide surety bonds covering performance of the work and payment of materials and labour.

The disadvantages associated with lump-sum contracts stem from the fact that the desired building must be fully defined before firms will provide fixed-sum bids. The need for early definition is a disadvantage when speed of completion is desired. In many cases it may be possible to design and specify the project on a continuing basis after construction has been started, and the lump-sum contract does not lend itself to this matter of proceeding. Additionally, lump-sum contracts are risky instruments during periods of rapidly changing prices since costs, for many trades, must be estimated well in advance of the time that the work is to be performed.

An important alternative to the lump-sum contract goes under the title of "construction management". Under this approach the owner engages a construction manager to perform the tasks of finding specialists and co-ordinating the performance of their work. The risks due to variations from estimate in the cost of the building are assumed by the owner. The features and advantages of construction

management are summarized by The Canadian Construction Association as follows:

"The Construction Management Contract is essentially a team approach to the Construction Process. The concept joins the Owner along with the Architect and/or Engineer(s), and Contractor in a team concerned with the common objective of providing the Owner with the desired project within the shortest possible time, consistent with budget limitations.

This form of contract differs from more traditional forms in that the Contractor is selected by the Owner when a decision to undertake a project is made, or simultaneously with the appointment of the Architect and/or Engineer(s). In this way all the knowledge skills and experience possessed by a Contractor are used to full advantage during the design phase of the project. These firms, once selected, together with the Owner, form the Construction Management team with each member of the team having precedence and exercising leadership in his own field of operations. The Architect and/or Engineer(s) have prime responsibility for concept, functional use of space, aesthetics, quality of design and production of drawings and specifications. The Management Contractor's role during the design stage is to advise the Architect and/or Engineer(s) on alternative methods of construction and materials that would satisfy the Owner's needs and offer an approach that is more economical to construct. From his up-to-date knowledge of building costs, he is in a position to provide accurate budget figures in the various stages of design and thus exercise overall budget control. Additionally he can provide information and guidance on Government approvals, safety requirements, bonding and insurance, and realistic time schedules for the construction phase. Additionally, because of a Contractor's knowledge of the industry he is in a position to recommend the Trade Contractors best qualified for a particular project.

Because the Contractor is part of the team, he is placed in a position to act in the best interest of the Owner. His fee is established at the outset for

the responsibilities and services as outlined in the Agreement. The advantages of competitive bidding are not lost since all the major portions of the work are tendered on the regular lump sum basis to specialty contractors.

During the construction phase, the Management Contractor's role differs very little from the normal role of a General Contractor. He provides on-site organization and supervision over all phases of the project, up-dates schedules, checks shop drawings and change orders, provides cost statements and progress billings.

Under the Construction Management method there is less chance of dispute over the cost of changes in design or additions or deletions to the work as the Trade Contracts are called progressively thereby giving the Owner more time to select his requirements. This, of course, makes it an ideal contract where it is advantageous to start work before the design and drawings are complete, or where it is recognized that methods may have to be adopted as work progresses to meet the demands of keeping an existing facility in service; where jobs are difficult to estimate; or where existing labour agreements are due to expire midway through the project; or for crash programs in general."⁸

A modification of construction management is known as "project management":

"The main difference between PROJECT MANAGEMENT and CONSTRUCTION MANAGEMENT is that the Project Manager has a contract with a client and in turn employs the architectural and engineering consultants to form his group, whereas under the Construction Management aspect the owner engages the architectural and engineering consultants, and at the same time or shortly afterwards engages the services of a Construction Manager. The Owner forms this team usually under his own chairmanship."⁹

As in the case of construction management, the client still bears the risk for the cost of the project,

but is relieved of the task of forming a design and construction team.

Yet another approach to building construction is known as the "design-build method". It combines features of the lump-sum contract and project management:

"Under the Design-Build Method, the Client makes known that he requires a certain facility and, in general terms, outlines the parameters relating to Architectural and/or Engineering design, social-system site planning, time of occupancy, together with the basic structural, mechanical and electrical requirements. The Proponents then submit preliminary designs including sketch drawings and outline specifications together with a price for the project. From the proposals the Client selects one proposal to be developed and constructed.

Unlike the lump sum tendering system, the Proponents are not making proposals on a common set of fixed plans and specifications. Each Proponent must decide how best to satisfy the Client's needs using his skills to produce the facility placing emphasis on those factors he considers most desirable to the Client. It is then up to the Client to choose which proposal gives the best value. Due to the fact that each Proposal will have its own advantageous features, the assessment of Proposals and the selection of the successful Proposal is most difficult. . . .

. . . .

Once the Owner has selected the successful Proponent, a Contract is entered into and working drawings and specifications completed within the parameters of the selected proposal. Actual on-site operations can commence almost immediately allowing final design and production of working drawings to proceed concurrently with construction."¹⁰

Each of the methods has been described in "pure form"; variations and modifications are possible and to be expected in practice. For instance an owner may seek some protection against soaring costs by including a maximum cost figure in a construction or project management contract,

with the manager accepting responsibility for any over-runs. Alternatively, the manager may be offered the opportunity to share in any cost savings.

Figures on the relative use of each of the various methods are not available. However, some limited information is available for the year 1971 which suggests that lump-sum contracts were predominant. There was \$4.4 billion of non-residential building construction in that year, consisting of \$3.9 billion performed under contract and \$0.5 billion accomplished by the work forces of the owners ("own account labour forces").¹¹

Excluding a small amount of residential and engineering construction by non-residential general building contractors, the reporting establishments did non-residential building contract work equal to \$2.6 billion.¹² They thus accounted for approximately two-thirds of that type of construction performed under contract. While some part of the work performed by the non-residential building contractors may have been in the form of the design-build method, it was probably very small. Accordingly, all of the \$2.6 billion is assumed to have taken the form of the standard lump-sum contract.

By a process of elimination, the remaining \$1.3 billion of non-residential construction was done by developers, and by trade contractors under direct contract, with or without the use by the owners of the services of a construction or project manager.¹³ Where one or a small number of trades account for the greatest part of the total value of a project, the owner may call tenders for each of the trades without using the services of a construction or project manager. If one trade accounts for a large part of the total value, a lump-sum contract may be entered into with a trade contractor acting as the prime contractor, using other trade contractors, and perhaps a general contractor, as sub-contractors. It is not known how the value of projects constructed under these conditions compares with those where a project or construction manager was employed, or with those where development companies acted as managers on their own behalf.

Real estate development companies represent still another legal arrangement for organizing the participation

of construction, manufacturing and distribution firms in the construction of a large building. Developers are active in shopping centres and office buildings, as well as residential construction. In some instances, firms with large and continuing real estate needs have established separate companies or divisions to act as real estate development companies.¹⁴ When developers are owners acting on their own behalf, they participate directly in the co-ordination of building activities and bear some or all of the financial risk.

The evidence presented to the Commission strongly indicates that there has been a recent movement away from lump-sum contracts in favour of construction or project management. Inflation has been the principal reason for the change. Awarding authorities have found it difficult to obtain firm price bids, for work to be performed sometime in the future in the face of the price experience of the past few years.¹⁵ Under the construction or project management approaches, prices can be obtained close to the time that the units of work have to be performed.¹⁶

Other arguments favouring the management approaches are that they allow a more scientific approach to the many problems to be faced in arranging for and co-ordinating the inputs into a building project.¹⁷ Also a representative of an important awarding authority felt that a management approach resulted in an improved product.¹⁸

Except where bid depository use is imposed on the owner, as is the case in the Province of Quebec and isolated instances, bid depositories are mainly used where global lump-sum tenders are called. Thus any move away from that approach will tend to reduce the use of bid depositories. A second crucial determinant of their use is whether the funds for building are from public or private sources, since government funded projects form the majority of those going through depositories.

Mechanics of price determination. Individual buildings are unique insofar as their cost estimation is concerned because, not only are costs affected by specifications and design, but also by the time and place of construction. Therefore, a potential buyer or supplier does not have easy reference to a market or "going" price. While

experience derived from the cost of other structures may provide a good guide in estimating the cost of a building or the parts thereof,¹⁹ nevertheless, separate estimates are required for each structure. Moreover, the translation of accounting costs into prices by any firm is affected by how busy it is, thus leading to considerable variation in supply prices between firms.

Initially price formation on work performed by trade contractors under contract to prime contractors entering a lump-sum bid will be discussed. There are two broad sets of cost-information required by a prime contractor in preparing a lump-sum bid: he needs an estimate of that part of the work he intends to perform with his own forces, and he must know the cost of that portion of the work he intends to have done under sub-contract. The latter information is usually obtained through the general contractor inviting tenders from trade contractors. Bid depositories have had their origin in the efforts of trade contractors to prescribe the conditions under which they submit their bids to general contractors.

Bid depositories are facilities for receiving written bids from sub-contractors addressed to prime contractors. The universal motive for establishing bid depositories has been to eliminate price negotiations (or, in effect, successive rounds of bidding) between prime contractors and trade contractors. The means used for accomplishing this objective have included measures to ensure that all firms submitting bids on a project bid on exactly the same specifications and that all firms have access to the bids of their competitors. This creates pressure on the prime contractors to accept the lowest bid submitted through the depository, thereby satisfying the primary purpose for its existence. While in the Commission's view this brief summary is true to the essential features of bid depositories, it is intended only as introductory background information at this point. Most of the remainder of this Report is devoted to exploring the ways in which bid depositories differ with respect to: how and when prices are divulged; the types of rules aimed at ensuring comparability of bids and how the rules are implemented; a

number of other areas, such as administration of depositories which cannot easily be separated from the above topics, and other areas which are important from a policy standpoint but which can be divorced from the essential purpose of bid depositories. Included in the latter category are rules on bonding, withdrawal of bids, pricing of depository services, scope of depositories and pre-registration of bidders. In a separate category in terms of public policy importance is the question as to who determines whether bid depositories are used, buyers or sellers of building construction.

There are numerous ways in which price negotiation can occur in the absence of bid depositories and without trying to list all possibilities, there are several broad variants that figure prominently in the literature on bid depositories and in the briefs and testimony in this inquiry which can usefully be explored. The classification of types of price negotiation are based on who initiates the negotiations, the sub-contractor or the prime contractor, and on whether the negotiations occur before or after the award of the prime contract. If the sub-contractor initiates the negotiations they are labelled bid peddling, and if the general takes the initiative they are referred to as bid shopping. (While other usages of the terms bid peddling and shopping have been placed before the Commission, the foregoing distinction appears to be the most widely used.)

In bid peddling, information on competitors' bids and the sources of information may vary. A sub-contractor calling the prime contractors in order to revise a bid may not have any information on competitors' bids; he may simply be having second thoughts on the competitiveness of his bid. Alternatively, the sub-contractor may know his competitors' bids. Assuming that he would not learn this information from competing firms, it has to come from general contractors or their employees. Whatever the source of the information and the reason it is provided, it is unlikely that all trade contractors would have equal access to it.

In bid shopping, the prime contractor seeks a reduction in the prices of one or more sub-contractors by referring to a real or imaginary bid of one of their competitors. If his efforts are successful, he may be able to obtain more favourable bids than his competitors and thereby

improve his chances of obtaining the prime contract. However, a sub-contractor who had been induced to change his bid by one prime contractor would probably revise his bid to other prime contractors as well. It is difficult to see what a prime contractor gains from any widespread bid shopping. A gain to a prime contractor is easier to see where the prime contractor shops or reveals the bids of firms that it would prefer not to work with in the hope that a preferred firm will agree to meet its price.

One of the ways that trade contractors protect themselves against price negotiations in the absence of a bid depository is by submitting their bids very close to the time that the prime contractors have to submit their own bids, thereby telescoping the time available for negotiations. This practice creates a hectic situation for the prime contractors in the last hour or so before they have to submit their bids. Bid depositories eliminate the last-minute submission of bids and this is considered to be one of their important advantages in a number of briefs received by the Commission.

The description of price negotiations to this point assumes that all price arrangements entered into prior to the submission of bids by prime contractors resulted in the naming of sub-contractors whose bids the prime contractors were carrying in their own bids, and that the successful prime contractor was bound to the firms it named. In the absence of these conditions further price negotiations could take place after the contract had been awarded, as the successful prime contractor "shopped" the market for still more favourable prices.²⁰ Such post-award price negotiations are considered particularly offensive by most segments of the construction industry, because once the prime contractor has been awarded the contract his bargaining power becomes stronger than that of the trade contractors, and may be used in a repressive manner. It is also generally considered that immediate benefits from such price negotiations flow to the prime contractor since the price and other conditions of the prime contract have already been settled and were presumably based upon the bids of sub-contractors received by the successful prime contractor before he submitted his own.

The Commission obtained only a limited picture of how trade contractor prices are determined outside bid

depositories in different market contexts. However, the information which was obtained is helpful in making more concrete the general and somewhat stereotyped descriptions presented above.

Mr. A. W. Thurston, who is Manager of Contract Administration of E. G. M. Cape & Co. Ltd., provided a clear description of how incoming bids are handled by a large general contractor engaged in all types of building construction as well as the construction management business:

"Q. . . . I just want to leave it sort of open to tell the Commission just how you go about assembling a bid, how much bid shopping there is and what you do in this last hour or two before submitting your bid to the owner, as a general?

A. Without the services of a bid depository the bids come into the general contractor's office. His estimating department, if it is well organized and experienced, will be ready and set up in such a manner that it can receive these phone calls that come in.

On many occasions and generally difficult trades, like precasts, miscellaneous iron and trades like this, have submitted a qualifying letter ahead of time as to exactly what their bid will include.

This has been reviewed by the contractor and analysed and questions asked so that, when the price comes in, he is fully aware as to the intent of that bid and the content of it.

He would also have spread sheets on which various trades are itemized so that comparisons can be made as these prices come in.

. . . .

The qualifying letter would originate from the subtrade. On a very large project, we would

take the trouble to write or canvass the sub-trades ahead of time and ask them to submit the qualifying letter as to their intent on their bid, in other words, what they wish to include.

. . . .

Therefore, this progressed to spread sheets where, on miscellaneous iron, for instance, we would have a list of the items, we would have the names of the contractors at the top, we would mark from his letter what he was including. Where he was not including, we would submit our own prices in there to get a balance and then all that would be necessary at the time of receiving his price was to add to the last line and then you would have a complete comparison of miscellaneous tenders all on an equal basis and this would apply to certain other trades such as excavation, backfilling, precasts, windows and this sort of thing.

. . . .

- Q. Earlier now, two or three minutes ago, you made a reference to phone calls coming in. Is this what you meant, they phone in their prices?
- A. Generally yes, sir, the prices are phoned in within the last two hours of the tender time to the general contractor and he records them and enters them and puts his bid together. He has done all his work beforehand and he just has a list of the subtrades to which he wants to enter the lowest price and five or ten minutes before the bids close, that is added up and added to his other figures and that gives him the result of his tender which he submits.
- Q. Why would they be added up five or ten minutes before the bid closes, when they come in up to two hours before?

- A. They start two hours before but they continually come in. You don't get them all. So I would say ten minutes before, ten to five minutes is when you receive the last bid.
- Q. You enter these prices on the spread sheet as they come in?
- A. Yes, we have a check sheet. We have one sheet there which is carrying the current low price each time. This system varies slightly in other contractors' organizations, but basically, this is the principle."²¹

The possibility was raised with Mr. Thurston that the organizational ability of his company to handle the rush of bids in the final hours and minutes was due to its large size. Mr. Thurston did not think that this was the case, as based on his contact with estimators and managers of other companies and his knowledge of several smaller companies with which Cape had entered into joint ventures, he had found that other companies operated "on the same basis as Cape, but on a smaller scale."²² It would appear that, while there is considerable pressure in a general contractor's office immediately prior to the time it submits its bid, workable procedures are available for the orderly last-minute incorporation of bids.

There still remains the question, however, whether earlier transmission of bids, and in writing, leads to improved performance of general contractors in preparing their bids. A common characteristic of bid depositories is that they provide for written bids, usually 48 hours before the prime contractors are required to submit their own bids. Mr. Thurston did not find any feature of bid depositories to be an advantage to his company. However, other general contractors placed considerable weight on what might be termed the post-office function of bid depositories.

It is necessary to note that the context in which the above statements were made leaves unclear whether the witnesses believe that the post-office function provided an important improvement over non-depository practices, or whether proposed bid depositories with an exclusive

post-office function were considered acceptable in comparison with existing bid depositories which had wider functions.

The degree to which bid depositories reduce the last minute rush for the prime contractor depends on the number of trades included in a bid depository. Most of the bid depositories have very wide scope and cover a large number of trades. There are some very important exceptions: Toronto, a number of other Ontario depositories, and the Montreal Depository of the Quebec Bid Depository System. In these areas, most bids are received outside the bid depositories and thus, except for the most important trades, the last minute rush is not avoided.

Trade Contractors and Their Sub-Contractors

In the same way that a general contracting firm enters into agreements with trade contractors for parts of the work it cannot perform itself, trade contractors may enter into similar agreements with firms specializing in parts of the work. Specialization has reached important proportions within the mechanical division; is present to a limited extent within the electrical division; and does not appear to be an important factor in other areas of work insofar as contractual arrangements between trade contractors and sub-trade contractors are concerned. Electrical contractors paid out 1.8 per cent of their revenue to sub-contractors in 1972, and this figure increases to 2.4 per cent for electrical contractors with billings equal to or greater than one million dollars. This last group derived about 87 per cent of its revenue from non-residential construction compared with the industry-wide average of 70 per cent. The recognized area of specialization within the electrical division is communications and electrical firms receive bids for this specialty through bid depositories in Toronto and the six branches of Alberta Bid Depository Ltd.²³

Mechanical contractors paid out 10.3 per cent of their revenue to sub-contractors in 1972, and this rose to 12.5 per cent for firms with billings of at least one million dollars. As is the case in the electrical division, the largest firms in the mechanical division are the

most active in non-residential building construction, with 82 per cent of their building construction revenue derived from that source compared with a total industry figure of 70 per cent. The recognized sub-trades with whom mechanical trade contractors enter into sub-contracts are sheet metal, automatic sprinklers, commercial refrigeration, environmental controls and insulation. Apart from insulation, which is classified as "other trade work" by Statistics Canada, the extent to which these kinds of work are performed by specialist firms is shown in Tables I and II. Table I sets out indexes of the degree of specialization for several kinds of work which are performed by the specialist firms. For example, the output of automatic sprinklers is highly specialized, with \$36.6 million out of \$45.1 million (81 per cent) being produced by establishments classified under automatic sprinklers. A second measure of specialization compares the total output of establishments with their level of primary output. To continue with the example of automatic sprinklers, it is shown that establishments in that classification virtually confined their output to that single area of specialization (\$36.6 million out of \$36.9 million). Very high degrees of commodity output and establishment specialization for commercial refrigeration and environmental controls are also demonstrated. While process piping is also highly specialized, the bulk of this work is performed in connection with engineering and industrial construction which usually do not go through bid depository. In the case of sheet metal work, establishments in that sub-trade produce 61 per cent of the output but branch out into other areas of mechanical work for about 30 per cent of their volume.

The high figure for commodity specialization in plumbing can be misleading unless considered along with the relative importance of plumbing within the mechanical trade and the extent of specialization of plumbing establishments. Plumbing is by far the largest activity in the mechanical trade and it is to be expected that when establishments engage in subsidiary activities they will be classified to plumbing for statistical purposes. Thus plumbing establishments also produced roughly 44 per cent of dry heating and gas piping output, 40 per cent of wet heating and air conditioning and 21 per cent of sheet metal work in 1972.

There is a strong positive correlation between the degree to which trades are specialized and the extent to which their output is concentrated in non-residential construction. Overall, non-residential construction

TABLE I

MECHANICAL TRADE WORK PERFORMED BY TYPES OF MECHANICAL TRADE ESTABLISHMENTS, 1972

<u>ESTABLISH- MENT CLASSIFICA- TION</u>	<u>COMMODITY OUTPUT CLASSIFICATION</u>									<u>TOTAL BY TRADE ESTABLISHMENTS</u>
	Plumbing	Dry Heating & Gas Piping	Wet Heating & Air Conditioning	Sheet Metal Work	Process Piping	Automatic Sprinkler Systems	Commercial Refrigera- tion	Environ- mental Controls	Other Trade Work & Not Specified	
Plumbing	413,277,123	56,112,876	90,283,864	38,486,101	12,873,971	6,601,737	2,489,221	1,596,077	25,243,293	646,964,263
Dry Heat. Gas Piping	10,313,735	54,345,344	5,666,870	10,200,087	1,807,926	33,903	427,491	231,789	6,251,503	89,278,648
Wet Heat. & Air Con.	31,434,979	4,681,476	110,153,048	15,070,293	2,971,084	868,600	2,842,935	661,923	9,987,871	178,672,209
Sheet Metal	11,716,608	9,400,403	14,223,208	114,021,289	853,937	208,317	2,011,455	382,126	10,322,263	163,139,606
Process Piping	8,419,486	2,832,804	5,612,105	4,778,900	93,820,860	605,525	629,363	111,740	13,614,127	130,424,910
Auto. Sprinkler	64,406	6,378	50,121		31,193	36,558,304			234,208	36,944,610
Commercial Refrig.	60,154	141,297	1,407,656	415,017	35,639		29,932,007	14,826	894,634	32,901,230
Env. Cont.							48,169	36,606,637	867,265	37,522,071
Other Trade	598,623	263,836	55,454	3,946,267	2,462,042	227,009			60,332,458	67,885,689
<u>COMMODITY TOTAL</u>	<u>475,885,114</u>	<u>127,784,414</u>	<u>227,452,326</u>	<u>186,917,954</u>	<u>114,856,652</u>	<u>45,103,395</u>	<u>38,380,641</u>	<u>39,605,118</u>	<u>127,747,622*</u>	<u>1,383,733,236</u>

Source: Statistics Canada, The Mechanical Contracting Industry, 1972, Catalogue 64-204, Table 8.

* Based on official, but unpublished Statistics Canada data. The total includes \$38 million insulation output for which data by establishments classified in that specialty are not available.

TABLE II

INDEXES OF SPECIALIZATION OF MECHANICAL TRADE
OUTPUT AND ESTABLISHMENTS, 1972

<u>CLASSIFICATION</u>	<u>ESTABLISHMENT SPECIALIZATION</u>	<u>COMMODITY SPECIALIZATION</u>
	%	%
Plumbing	63.9	86.8
Dry Heating & Gas Piping	60.9	42.5
Wet Heating & Air Conditioning	61.7	48.4
Sheet Metal Work	69.9	61.0
Process Piping	71.9	81.7
Automatic Sprinkler Systems	99.0	81.1
Commercial Refrigeration	91.0	78.0
Environmental Controls	97.6	92.4

Source: Calculated From Table I. "Other Trade Work" and "Not Specified" are included in the totals.

accounted for about 43 per cent of building construction in 1972 and 63 per cent of mechanical work. The dependence on non-residential construction rises to 77 per cent for sheet metal, to 82 per cent for wet heating and air conditioning, and is almost total (well over 95 per cent) for environmental controls, automatic sprinkler systems, process piping and commercial refrigeration. Only plumbing and dry heating and gas piping divided their work volume in roughly the same proportions as the division between the value of residential and non-residential construction. However, industry totals mask considerable differences within the latter trades, in that the smaller establishments are concentrated in residential construction and highly specialized, while the largest establishments tend to be in non-residential construction and produce across a wider spectrum of the mechanical trades. Plumbing establishments grossing \$1,000,000 or more derived 66 per cent of their construction revenue from non-residential construction. The corresponding figure for dry heating and gas piping establishments is 87 per cent.²⁴

The least specialized establishments (classified to plumbing, dry heating and gas piping, or wet heating and air conditioning) are the most likely to bid on the total mechanical work for a non-residential building project. Such establishments are usually required to contract with more specialized firms to complete all parts of mechanical work, and the pressures resulting from this fact give rise to price negotiation between general contractors and trade contractors and specialists in their trade. Local associations of insulation, sheet metal and commercial refrigeration firms have been active in establishing bid depositories for their own trades in several parts of the country. Such depositories are known as sub-bid depositories, to distinguish them from main depositories. In Alberta and Quebec, most notably, sub-trade bids are submitted through the same depositories as trade bids, only somewhat earlier.

There are no depositories for the sub-trades in the Atlantic Provinces and several other parts of the country. The testimony heard in Fredericton was mixed regarding the existence of price negotiation pressures at the sub-trade level. One view expressed was that the number of firms at the sub-trade level was too small for the protection of depository facilities to be required:

"A. We are also speaking of a very limited number of companies when we are talking about sub-sub trades. In fact, using an example, electrical may have a sub-sub in the form of an alarm system, and it is quite possible that, within this one area there is only one company in the alarm-systems business.

Q. That is true for electrical but I think it would be less true if you were looking at something like sheet metal or insulation.

A. With sheet metal, you usually--you get the contractor himself, the mechanical contractor usually has his own sheet metal shop.

Q. But there are some specialists as well? Are there no firms who specialize in that area?

A. There are some, but they are very few in number. What I am saying is that they command their own price to the sub-trades."²⁵

A similar view regarding numbers of firms in any sub-trade specialty was expressed in the Statement from the Province of New Brunswick, dated September 30, 1974, (p. 7):

"We have no experience in the operation of sub-bid depositories, but assume they constitute an effort on the part of the construction industry to control bid peddling one step farther down the line. We doubt if there are sufficient numbers in any one part of one trade to justify this type of control in our area."

According to Statistics Canada there were five automatic sprinkler, 13 commercial refrigeration and 14 sheet metal establishments which specialized in non-residential building construction in the Atlantic Provinces in 1972.

Another witness, Mr. J. F. Dobbelsteyn, appearing for the Standard Practices Committee of the Canadian Construction Association, commenting on the occurrence of price negotiations, said:

"A. The negotiations, as a rule, . . . might take place at a lower level between, possibly, even a supplier of sheet metal or a sheet metal contractor for a particular contractor. There are negotiations, there is peddling. It takes place."²⁶

There do not appear to be general technical reasons which require that a single firm assume overall responsibility for mechanical work. In many instances an owner will divide the mechanical work in the tender call so that separate bids can be made on, say heating (either dry or wet) and plumbing. Bids on automatic sprinkler systems, in particular, are often submitted directly to the general contractor. In fact the Canadian Automatic Sprinkler Association recently announced that, as a matter of industry policy, they would no longer bid to mechanical contractors.²⁷ However, scheduling and co-ordination considerations make it unlikely that the specialists in sheet metal work and insulation would be able to follow the example of the automatic sprinkler system firms. To the extent that they or other specialists should desire and be successful in by-passing primary mechanical contractors, negotiations concerning the prices for their work would take place with general contractors or the representatives of the owners. Whether the specialists would be better off or not would depend on the relative competitive pressures in bidding to mechanical contractors as against general contractors' or owners' representatives. Only when the owner is some level of government could price negotiations be completely avoided, since public policy invariably relies upon the awarding of contracts based upon the receipt of competitive tenders.

Types of Buyers and Use of Bid Depositories

The major users of bid depositories over the years have been federal, provincial and municipal departments of government, and school, university and hospital boards, most of which are responsible for government-owned institutions or are heavily dependent on government funds. Private users of bid depositories have primarily been buyers of commercial construction of which the largest components are office buildings, stores and hotels. Bid

depositories play virtually no role in residential and industrial building construction except in the Province of Quebec, where there is no freedom of choice for the buyer of construction with respect to the use of bid depositories. Thus the use of bid depositories outside of Quebec is dependent upon the level of Commercial, Institutional and Other Building Construction, and in particular upon the government-demand components of these categories.

The breakdown of government building construction in 1972 is shown in Table III. The largest component is institutional construction which includes schools, universities, hospitals, sanatoria and clinics. The major part of construction associated with health and education is not under the direct control of government departments, but under that of independent boards, which are classified by Statistics Canada under the heading, "Residential and Institutional Services". This classification also encompasses religious building and a sizeable miscellaneous component. However, "Schools and other educational buildings" and "Hospitals, sanatoria, clinics, first-aid stations, etc." account for almost 95 per cent of Residential and Institutional Services Building Construction. Although universities, schools and hospitals classified as provincial or municipal accounted for only about 74 per cent of building investment in those types of structures, it is evident that, in a large number of cases, large institutions classified as "private" are highly dependent on government grants.²⁸ A considerable volume of office building construction by the various levels of government is reflected in commercial construction. Included in the open-ended category, "Other building construction", are passenger terminals, laboratories, armouries and various kinds of communication buildings.

As the result of a decline in governments' institutional building construction, there has been an appreciable change in the relative importance of government demand for building construction since the initiation of this inquiry. Over the period 1968-74 the value of building construction increased by 90 per cent. The largest increases occurred in residential, commercial and other building construction each of which more than doubled

TABLE III

GOVERNMENT PURCHASES OF NON-RESIDENTIAL BUILDING CONSTRUCTION IN 1972

	Purchases by Departments of Government			Hospitals Schools & Universities	TOTAL Government Purchases	Governments' Share of Total Non-Residential Construction
	Federal	Provincial	Municipal			
	(\$'000)					%
Industrial	11,193				11,193	1.2
Commercial	132,317	62,496	109,454		304,267	17.8
Institutional	38,652	65,901	36,007	1,036,206	1,176,766	94.2
Other Building Construction	93,473	56,155	29,255		178,883	31.1
Total	275,635	184,552	174,716	1,036,206	1,671,109	37.5

Source: Statistics Canada, *Construction in Canada 1972-74*, Tables 14-17.

in value over the period, while industrial construction increased 71 per cent. A notable exception to this pattern was the area of institutional construction, which was below the level set in 1968 in all years save that of 1971. The impact of the decline in institutional construction on the level of government building construction is evident in Table IV. Although purchases by departments of government at all levels more or less kept pace with the overall increase in building construction, there was only a very modest increase in the total value of government building construction because the increases in demand by government departments were partially offset by the decline in the construction of hospitals, schools and universities. Governments' share of non-residential building construction thus fell from 43.9 per cent in 1968 to 31.7 per cent in 1974, the lowest figure since bid depositories began to flourish in the mid-1950's.

One effect of the relative decline in governments' demand for non-residential building construction has been a drop in the relative use of bid depositories and, as noted earlier, there are other forces operating in the same direction. These are the increased use of management contract techniques by both the private and public sectors, and the probable growth in importance of development companies in non-residential construction. Figures on the dollar value of projects going through bid depositories are not available to determine whether, and to what extent the anticipated decline in bid depository usage occurred. However, information on the number of projects is available for a number of centres and these are shown in Table V.

Another expected result of the recent pattern of governments' demand for non-residential building construction is a drop in their importance as users of bid depositories compared to the private sector. Once again the only information that is available on private and public sector usage of bid depositories relates to respective numbers of projects. This information is shown in Table V. In this instance the results run counter to expectations.

The relative use of bid depositories by the public and private sectors is a sensitive one because failure of

TABLE IV

GOVERNMENT NON-RESIDENTIAL BUILDING CONSTRUCTION, 1968-74

	<u>Direct Purchase by Departments of Government</u>			<u>Indirect Purchase by Governments</u>	<u>TOTAL Government Purchases</u>	<u>Governments' Share of Total Non- Residential Construction</u>
	<u>Federal</u>	<u>Provincial</u>	<u>Municipal</u>	<u>Hospitals, Schools, Universities*</u>		
	(\$'000)					%
1968	220,803	112,993	88,508	1,188,839	1,611,143	43.9
1969	217,743	116,362	99,519	1,156,414	1,590,038	41.5
1970	222,306	174,888	112,411	1,110,063	1,619,668	39.6
1971	264,444	195,817	134,370	1,207,396	1,802,027	41.0
1972	275,635	184,552	174,716	1,036,206	1,671,109	37.5
1973**	349,120	204,499	181,827	931,386	1,666,832	33.4
1974***	409,594	249,724	249,826	977,610	1,886,754	31.7

Source: Statistics Canada, *Construction in Canada*, Catalogue 64-201.

* Classified under the heading "Residential and Institutional Services".

** Preliminary figures.

*** Based on estimates.

TABLE V
CATEGORIES OF BID DEPOSITORY USERS

DEPOSITORY	YEAR	GOVERNMENT	PRIVATE	NOT SPECIFIED	TOTAL
EDMONTON	1973	70	10	6	86
	1974	61	22	-	83
VANCOUVER *	1973	144	32	12	188
	1974	119	20	11	150
TORONTO	1968	231	98	-	329
	1972	107	27	-	134
	1973	88	28	-	116
	1974	-	-	-	133
WINNIPEG	1973	73	18	-	91
FREDERICTON	1969	29	4	-	33
	1970	19	8	-	27
	1971	11	1	-	12
	1972	17	3	-	20
	1973	24	4	-	28
	1974	19	3	-	22
OTTAWA VALLEY	1973	57	22	3	82

Source: Information submitted to the Restrictive Trade Practices Commission.

*Projects from all parts of British Columbia are included in Vancouver figure.

an awarding authority to use an available bid depository can be regarded as a kind of evaluation. To quote the Director's Statement of Material, "Moreover, the rather widespread lack of support for bid depositories by private tender-calling authorities suggests that the [construction] industry is more concerned about post-bid price negotiation than are many of its clients." ²⁹ In turn, the brief of the Canadian Construction Association (C.C.A.) argues that, ". . . we are informed from across the country that private owners have become increasingly aware that when they proceed via the bid depositories more competition ensues and it is to their advantage to use them even in those cases where construction Management and other negotiated methods prevail."³⁰ The evidence does not generally support this claim by the C.C.A. Rarely was it indicated in testimony that bid depositories were voluntarily used by the private sector in cases where lump-sum contracts were not employed. In any event, the number of private sector projects going through bid depositories is relatively small.

I NOTES

1. Included in engineering construction are: marine construction such as docks, canals, harbour dredging; highways and aerodromes; waterworks and sewage systems; electric power construction; railway, telephone and telegraph lines; gas and oil facilities, mine shafts, bridges, subways and various miscellaneous categories that round out to \$6,961 million of engineering construction in 1972. In 1973 and 1974, the figures are approximately \$8,009 million and \$9,342 million. (Statistics Canada, *Construction in Canada 1972-1974*, Catalogue 64-201 Annual. Only the information shown for 1972 is final; for 1973 and 1974 it is preliminary.) Also included under engineering construction are outdoor swimming pools. A number of swimming pool projects do go through bid depositories and it is possible that they include some outdoor pools.
2. The Quebec Bid Depository System refers to these trades as the "engineering trades".
3. Statistics Canada, *The Mechanical Contracting Industry 1972*, Catalogue 64-204 Annual, p. 11, and Statistics Canada, *The Electrical Contracting Industry 1972*, Catalogue 64-205 Annual, p. 11.
4. See W. F. Barnicke, *The Industrial Organization Dimensions of Cycles in the Construction Industry*, Discussion Paper No. 14 (Economic Council of Canada), October 1974, p. 3-3 to 3-21 for a full discussion of why vertical integration has not emerged in the building construction industry. See also the evidence of Mr. A. W. Thurston, Manager, Contract Administration, E. G. M. Cape & Co. Ltd. at p. 4001 of Transcript.
5. Specification Writers Association of Canada, *Uniform Construction Index*, p. 0.4.
6. *Ibid.*, p. 1.22.

7. Statistics Canada, *The Mechanical Contracting Industry 1972*, Catalogue 64-204 Annual, p. 11 and Statistics Canada, *The Electrical Contracting Industry 1972*, Catalogue 64-205 Annual, p. 11. Also, the brief of the Association of Consulting Engineers of Canada, Appendix "A", presented figures on the relative importance of the mechanical and electrical trades for a "typical" non-residential building that are very close to those provided by Statistics Canada.
8. The Canadian Construction Association, *A Guide to Construction Management Contracts*, Revised October 1974, p. 2 and 3.
9. *Ibid.*, p. 3. More detail is available in *Performance Standards for Project Management and Scale of Fees for Project Management Services*, the Canadian Construction Association.
10. The Canadian Construction Association, *Guidelines for the Design-Build Method of Construction*, Revised 1973, p. 2 and 3.
11. Own account labour forces tend to be used more often for repair work than for new construction, running 35 per cent in one case and about 6 per cent in the other. Statistics Canada, *Construction in Canada 1971-1973*, Catalogue 64-201, Table 9 and *The Non-Residential General Building Contracting Industry 1971*, Catalogue 64-207, p. 7.
12. Statistics Canada, *The Non-Residential General Building Contracting Industry 1971*, Catalogue 64-207, Table 5.
13. Another possibility is that the census did not capture some general contractors who performed non-residential building construction work.
14. Examples are Marathon Realty Company Ltd. (Canadian Pacific Investments) and Ivanhoe Corporation (Steinberg's Limited).
15. Evidence of Mr. G. L. Giles, Deputy Minister, Department of Public Works of the Province of British Columbia, Transcript p. 757 and 762.

16. In a situation where a considerable risk premium is demanded by firms as payment for early quotation of prices, it is probably not wise for governments, who can more easily bear the cost of price changes than can private firms, to buy, in effect, insurance in the form of early lump-sum contracts.
17. Evidence of Mr. Matthew H. Parry of Time Audit Limited, Transcript, p. 1304.
18. Evidence of Mr. T. A. Qureshi, Chief Engineer appearing for the Board of Education of the Borough of Scarborough, Transcript. p. 4251-52.
19. See for example the ambitious effort by David K. Lansdowne & Partners Limited, *Lansdowne's Construction Cost Handbook*, McGraw-Hill Ryerson Limited, Toronto, 1974, which sets out average cost experience in great detail for different parts of Canada.
20. The term "bid shopping" is reserved, in the brief of the British Columbia Construction Association, for post-award price negotiation.
21. Transcript, p. 3989-3994.
22. *Ibid.*, p. 4071.
23. In fact, communications is divided into seven possible specialties in Alberta. It is not known, however, the extent to which the specialties fall into separate industries.
24. Statistics Canada, *The Mechanical Contracting Industry 1972*, Catalogue 64-204, Table 8. A small volume of engineering construction is excluded.
25. Evidence of Mr. A. Clarke of the Construction Association of New Brunswick, Transcript p. 3084-85.
26. Transcript, p. 3078.
27. Letter from the Canadian Automatic Sprinkler Association to the Association of Consulting Engineers of Canada, dated December 18, 1974, Transcript, p. 4440-41.

28. See Statistics Canada and the Department of Industry, Trade and Commerce, *Private and Public Investment in Canada, Outlook 1974 and Regional Estimates*, Tables 6 and 8, for information on the share of provincial and municipal institutions.
29. Green Book, p. 130.
30. The Canadian Construction Association brief, 1974, p. 6.

CHAPTER II

BID DEPOSITORIES

History and Development

The Director, in the Green Book, went into the history and development of bid depositories, as disclosed by returns of information he requested from local builders' exchanges and construction associations in 1969 and from oral evidence of witnesses during hearings held in 1970. While this information may not be numerically precise, the Commission is satisfied that it is broadly accurate.

It seems that clearing houses for construction tenders, having the name and general characteristics of modern bid depositories, are a phenomenon of the last twenty-five years. The forerunner of the present Fredericton Construction Association, then known as the Capital Builders Exchange, had set up a bid depository in 1951 to receive bids from the mechanical and electrical trade contractors for submission to the general contractors. There were also other early depositories in Vancouver, Calgary and the Lakehead, operating in 1953, 1954 and 1955 respectively. Not much is known about these early depositories and the exact dates of their establishment is not clear.

It was in the middle 1950's that the Canadian Construction Association and its affiliated groups began to seek for a method of resolving a pervading dissatisfaction among trade contractors with the conditions surrounding their tendering to general contractors on building construction. These conditions, referred to somewhat derisively as bid "shopping" and "peddling", are discussed extensively elsewhere in this Report. A committee known as the Contractor Relations Committee was formed in January 1954 during the convention in Vancouver to look into the matter and report to a subsequent convention. It was noted at the time that there was a growing tendency for some provincial and municipal authorities to call for separate tenders from the various construction trades and

to award contracts directly instead of following the traditional system of calling tenders from general contractors charged with organizing the job and dealing with the individual trades. This practice was alleged to be actively promoted by the associations of some of the leading trades. At all events the Committee presented its report, which the Association approved at its Quebec City convention in January 1955, suggesting the following procedure:

- "1. Competitive tenders should be opened at a fixed time and in the presence of the tenderers or their representatives;
2. A contractor should neither seek nor accept information concerning a competitor's bid prior to the opening of tenders;
3. An owner should not re-call tenders unless there is a substantial change in the scope of the work, in market conditions, or other factors affecting cost; in such cases only the three lowest tenderers should be invited to tender again;
4. A contractor should use tenders only from qualified sub-contractors;
5. A contractor should never make known the tender of any sub-contractor to any other sub-contractor before the closing of tenders;
6. A contractor should never use the tender of a sub-contractor in order to secure a lower proposal from another bidder;
7. Sub-contractors should be advised immediately after the close of general contract tenders as to whether their tender was or was not used in the making up of the contractor's tender;
8. A contractor should award each sub-contract to the qualified sub-contractor tendering the lowest price; if the award is made to any other sub-contractor, it should be at the latter's tendered price;

9. A contractor should pay all sub-contractors and others as promptly and in like proportion as he is paid for his contract work;
10. All services performed by one contractor for another where payment is required should be recorded and signed for daily; agreement with regard to the payment for such job services should be reached and recorded in writing before work commences."¹

The Committee recommended to the C.C.A.:

- "1. That if this report be accepted, the Canadian Construction Association solemnly accepts the attached 'Code of Good Practice for the Construction Industry' for the use of all its members;
2. That the Management Committee be instructed by this Annual Meeting to consider ways and means by which this Code can be made fully effective;
3. That in keeping with this suggestion the Association be requested to initiate discussions at the earliest possible time with engineers and architects with a view to their acceptance of the principles embodied in the Code;
4. That in order to bring the Code to the attention of all members of the Association, copies be suitably printed in a convenient form for reference and sent to all members of the Association;
5. That this report with its appendices be made available in mimeographed form for convenient reference;
6. That local construction associations be encouraged to sponsor discussions between general and trade contractors, architects and engineers designed to improve tendering practices in accordance with the spirit and contents of the Code."²

At its 1957 convention the Canadian Construction Association, by resolution, formally endorsed the bid depository system "as an effective means of improving contractor relations within the industry"³ and declared its intention to support such operations in major construction centres throughout Canada. It carried out this policy in the sixties by various means including resolutions as in the 1961 Convention, urging "all governments, public bodies and private owners to stipulate the use of a bid depository when calling tenders for construction work in an area where a bid depository is in regular operation and approved by the local Affiliates for those trades served by that depository,..."⁴ It undertook to provide assistance to local groups desirous of establishing a bid depository or extending the scope of an existing one.

Among its activities was the promotion of liaison between federal government officials representing the Department of Public Works and representatives of the major bid depositories across Canada, which culminated in the publication in 1963 of the *Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects*, which is found in Appendix A. The Department of Public Works began to specify the use of bid depositories in the spring of 1964 and sometime after that they were also being specified by Defence Construction (1951) Limited. Also, Atomic Energy Control Board, Central Mortgage and Housing Corporation and The St. Lawrence Seaway Authority had made some limited use of bid depositories for some of their construction projects.

The Canadian Construction Association continued to endorse the bid depository system by resolutions passed at its annual meetings, as exemplified by the following resolution passed in 1969:

"The use of Bid Depositories should be specified when tenders are called for construction work in an area where they are in regular operation and endorsed by the industry-wide affiliated Construction Associations for those trades served by them. Bid Depositories should be governed by a joint committee representing both General and Trade Contractors."⁵

The promotion of bid depositories by the Canadian Construction Association, whether or not initiated by similar activities of provincial and local construction associations (notably Toronto), led to the establishment of bid depositories throughout Canada or to the reorganization of similar facilities already in existence. By 1960 bid depositories were operating in the larger cities throughout the country. However, although the Canadian Construction Association has provided a forum for a national dialogue on bid depositories and was probably instrumental in the decisions of several federal government departments to use them, the impetus for the establishment of bid depositories and the locus for their control has been local and provincial. The organization and management of the major bid depositories are discussed province-by-province in a later section.

Characteristics of Bid Depositories

A bid depository is an organization that has an office, an administrator, and a set of rules which trade bidders and general contractors are expected to observe when trade bids are processed through it. The Green Book provides a balanced general description of the procedures of bid depositories:

"All bid depositories provide for the reception of sealed tenders from trade contractors before a stated time and for their delivery to the general contractors to whom they are addressed. The trade contractor compiles his tenders and places them in small envelopes of a given colour, each addressed to a general contractor to whom he wishes to bid. In addition, he places copies of these bids in small envelopes of a different colour for retention by the bid depository. Sometimes copies of each tender are also addressed to the tender-calling authority and are placed in an envelope of yet another colour. All the coloured envelopes are sealed and are placed in a large white envelope which is also sealed. The large envelope is addressed to the bid depository and has on its cover an indication of the project for which the tenders have been prepared. After it has been time stamped,

the white envelope is deposited in a locked box at the bid depository until the closing time.

. . .

The envelopes required by the trade contractors are supplied by the bid depository at prices which are frequently at levels required to finance the bid depository. Tenders submitted in any other envelope are not accepted. In some instances, tender forms available from the bid depository must be used.

After the closing of the bid depository, the tender box for a particular project and the white envelopes contained in it are opened by the bid depository staff. The envelopes addressed to the various general contractors and the tender-calling authority are forwarded to the addressees. The bid depository retains those envelopes intended for itself. Any tenders received after the closing time are not forwarded by the depository.

While trade contractors are never permitted to alter their bids after the closing of the depository, they are frequently free to withdraw them. The period during which withdrawals are permitted varies from depository to depository. Generally, the trade tenders close at a specified time before the closing of the general contract, often 24 or 48 hours before. The purpose of this provision is to give the general contractors sufficient time to prepare their own tenders. A trade contractor who wishes to withdraw his tender may do so until a specified number of hours prior to the closing of the general contract.

A general contractor who bids on a project called through the bid depository is expected to use in his own tender a trade bid submitted to him through the depository, although this point is seldom made explicit in the rules. The system would not work if the general contractor entertained any trade bids except those received through the bid depository."⁶

After the close of the bid depository, bidders are provided with access to the prices submitted in their trade. This access is known as "tabulation". In some bid depositories there is a price sheet or compilation prepared by the bid depository staff, which shows the names of the bidders and the amounts bid to the general contractors. Many bid depositories dispense with the compilation and make the tenders themselves available to the bidders. The timing of the tabulation varies from almost immediately following the close of the bid depository to after the general contract has been awarded. In the latter case only trade contractors who submitted tenders to the successful prime contractor are given access to the bidding information.

As will appear later, however, the methods of operation of particular bid depositories are more complex than the foregoing broad description would indicate. Many of the complexities are due to the presence in all bid depositories of procedures for ensuring that tenders are identical as to content of work, in order to simplify the all-important comparison of bid prices.

For the purposes of this Report, the Commission has distinguished four types of bid depositories operating in the building construction industry: specialty, sub-bid, main, and all-inclusive. This classification is based, in the first instance, on whether the firms submitting bids are all from the same trade or closely related groups of trades, or from a number of unrelated trades. Secondly, it takes into account who receives the bids: whether prime contractors or owners or owners' agents, on the one hand, or other trade contractors on the other. The classification is summarized in Table B.

The key feature of a specialty bid depository is that it is operated to serve the bidders from a single trade. Sometimes a sub-bid depository may also possess this feature, in which case the difference between a specialty bid depository and a sub-bid depository revolves around who receives the bid. In a sub-bid depository the bid recipient is another trade contractor. In a specialty depository a prime contractor receives the bid when the project calls for a lump-sum contract; otherwise an owner or his agent is the recipient. Specialty bid depositories have been

few in Canada because the principal approach has been to organize multi-trade facilities serving from as few as two trades to over thirty. Multi-trade depositories which serve only major trades--that is, trades which bid directly to the prime contractor or owner--are referred to as main depositories, and those which receive bids addressed to trade contractors as well as prime contractors are labelled "all-inclusive". This last term has been introduced by the Commission to distinguish multi-trade depositories which incorporate sub-bid services from those which do not. Main and/or all-inclusive bid depositories are often referred to as "major" bid depositories.

TABLE B

CLASSIFICATION OF BID DEPOSITORIES

	SPECIALTY	SUB-BID	MAIN	ALL-INCLUSIVE
Who bids:	single trade	single trade or small group of related trades	several major trades	C S D O U E M B P B - O I B S N I I A D T T O I & R O I N M E A S O I F N
Who receives bids:	prime contractors, owners or their agents	other trade contractors	prime contractors, owners or their agents	
Trade examples:	lathing and plastering, masonry, roofing	sheet metal, commercial refrigeration	mechanical, electrical, lathing and plastering, masonry	

The four types of depositories are all designed to perform the same functions and there is no apparent reason why they should differ other than with respect to who bids and who receives bids. However, there is an essential difference from which other differences have followed; that is, those responsible for policy and management have represented much narrower interests in specialty and sub-bid depositories than in main and all-inclusive depositories. The rule in specialty bid depositories has been for control to reside with representatives of the industry from which bids are drawn. All sub-bid depositories known to the Commission receive bids from specialists in the mechanical division addressed to mechanical contractors. The management and policy of sub-bid depositories generally reside with members of the trade group(s) submitting bids, while mechanical contractors receiving bids participate as members of an "advisory group" whose duties involve settling disputes among bidders. There is thus some degree of wider participation in sub-bid than there is in specialty bid depositories. Mechanical and electrical contractors are both the largest bidders and major participants in the control of main and all-inclusive bid depositories. They are joined in varying degrees by other trade contractors, design authorities and general contractors.

Bid registries are closely related to bid depositories. They too are designed to regulate bidding procedures. A bid registry, as used in the Director's Statement, ". . . refers to a procedure whereby the bidders, while bidding direct to the tender-calling authority, register the amounts of their bids with a central agency",⁷ whereas in a bid depository all bids are transmitted through the depository.⁸ For purposes of classification and discussion it is simplest to group the only known bid registry (Quebec Master Roofers Association) with specialty bid depositories since they are both variants of attempts by single trades to regulate bidding practices in their industry.

The distribution of sub-bid, main and all-inclusive depositories varies by province. Main bid depositories exclusively are operated in Newfoundland, Nova Scotia and New Brunswick. In Quebec, there is a single management and a common set of rules and physical facilities used by the mechanical and electrical sub-trades in tendering to principal mechanical or electrical contractors and by the major

trades in tendering to prime contractors or others. Ontario presents a mixed situation with main, sub-bid and all-inclusive depositories operating at the same time. In the Prairie Provinces the approach has been to combine bid depository facilities and management for the trades and sub-trades. In Manitoba the mechanical contractors receive their bids for sheet metal, insulation and commercial refrigeration work through the same depositories in which they bid to prime contractors. In Saskatchewan only one single sub-trade, insulation, is represented in the Saskatchewan depositories, but the approach can be said to be in the direction of an all-inclusive depository, since we know of no sub-bid depositories in the province. The most integrated system of sub-trade (both electrical and mechanical) and trade bidding is found in the six all-inclusive depositories which form Alberta Bid Depository Ltd. In British Columbia there are eight main depositories throughout the province and sub-bid depositories for sheet metal, insulation and commercial refrigeration in the Vancouver Area. The distribution of bid depositories by province and type is shown in Table C.

A specialty bid depository which operated through part of the 1960's has not been shown in the table. This is the Lathing and Plastering Bid Depository of Toronto, established in 1963, which was discontinued soon after eleven members of the Contracting Plasterers' Association of Toronto pleaded guilty in 1969 to charges of being parties to an agreement to prevent or lessen competition unduly, contrary to Section 32 of the Combines Investigation Act.⁹

TABLE C

BID DEPOSITORIES IN CANADA - 1975

1. Main and All-Inclusive Depositories

NAME/PLACE	OPERATED BY	NUMBER OF TRADES
<p><u>ALBERTA</u></p> <p>Calgary Branch</p> <p>Edmonton Branch</p> <p>Grande Prairie Branch</p> <p>Lethbridge Branch</p> <p>Medicine Hat Branch</p> <p>Red Deer Branch</p>	<p>The following local associations, according to the rules of the Alberta Bid Depository Ltd.:</p> <p>Calgary Construction Association</p> <p>Edmonton Construction Association</p> <p>Grande Prairie Construction Association</p> <p>Lethbridge Construction Association</p> <p>Medicine Hat Construction Association</p> <p>Red Deer Construction Association</p>	<p>28 trades</p> <p>5 sub-trades to mechanical trade</p> <p>7 sub-trades to electrical trade</p> <p>Plus 1 sub-trade to mechanical trade</p>
<p><u>BRITISH COLUMBIA</u></p> <p>Dawson Creek - Ft. St. John Bid Depository</p> <p>Kamloops Bid Depository</p> <p>Kelowna Bid Depository</p> <p>Nanaimo Bid Depository</p> <p>Penticton Bid Depository</p> <p>Port Alberni Bid Depository</p> <p>Prince George Bid Depository</p> <p>Vancouver & Lower Mainland Bid Depository</p> <p>Victoria Bid Depository</p>	<p>The following associations, according to rules set by the British Columbia Construction Association Bid Depository:</p> <p>Dawson Creek Construction Association</p> <p>Southern Interior Construction Association</p> <p>Southern Interior Construction Association</p> <p>Nanaimo Construction Association</p> <p>Southern Interior Construction Association</p> <p>Credit Bureau Alberni District</p> <p>Prince George Construction Association</p> <p>Amalgamated Construction Association of B. C.</p> <p>Construction Association of Victoria</p>	<p>19 trades or as specified by the architect</p>

NAME/PLACE	OPERATED BY	NUMBER OF TRADES
<p><u>MANITOBA</u></p> <p>Brandon Bid Depository</p> <p>Winnipeg Bid Depository</p>	<p>The following associations according to own local rules:</p> <p>Brandon Builders' Exchange Inc.</p> <p>Winnipeg Builders' Exchange</p>	<p>34 trades, or as specified by the design agent</p> <p>34 trades, or as specified by the design agent</p>
<p><u>NEW BRUNSWICK</u></p> <p>The New Brunswick Bid Depository</p>	<p>The following local associations, in accordance with rules and regulations of the Construction Association of New Brunswick, Inc.:</p> <p>Fredericton Construction Association Inc.</p> <p>Moncton Construction Association Inc.</p> <p>Saint John Construction Association Inc.</p>	<p>As called for in the specifications</p>
<p><u>NEWFOUNDLAND</u></p> <p>Newfoundland and Labrador Bid Depository</p>	<p>Newfoundland and Labrador Construction Association, St. John's</p>	<p>17*</p>
<p><u>NOVA SCOTIA</u></p> <p>The Bid Depository of Nova Scotia</p> <p>Cape Breton Island Bid Depository</p>	<p>Construction Association of Nova Scotia, Halifax</p> <p>Cape Breton Island Construction Association, Sydney (which has agreed to follow the rules and regulations of the Bid Depository of Nova Scotia)</p>	<p>As called for in the specifications</p>

NAME/PLACE	OPERATED BY	NUMBER OF TRADES
<u>ONTARIO</u>		
<p>The following local associations, in accordance with the Ontario Bid Depository Standard Rules:</p>		
Barrie and District Bid Depository	Barrie Chamber of Commerce	4 trades 1 sub-trade to mechanical trade*
Belleville Bid Depository	Quinte Construction Association	2*
Chatham Bid Depository	Chatham Builders' Exchange	2*
Grand Valley Bid Depository	Grand Valley Construction Association	2
Hamilton Bid Depository	Hamilton Construction Association	2*
Kingston Bid Depository	Kingston Construction Association	2*
London Bid Depository	London and District Construction Association	2*
Niagara Peninsula Bid Depository (St. Catharines)	Niagara Construction Association	2*
Oshawa Bid Depository	Oshawa & District Commercial Construction Exchange	2 trades 3 sub-trades*
Sarnia Bid Depository	Sarnia Construction Association	2*
Sault Ste. Marie District Bid Depository	Sault Ste. Marie Builders Exchange	According to the architect's specifications*
Sudbury Bid Depository	Sudbury Construction Association	According to the architect's specifications*
Thunder Bay Bid Depository	Construction Association of Thunder Bay	26 trades 3 sub-trades*
Toronto Bid Depository	Toronto Construction Association	4
<p>The following associations, according to own local rules:</p>		
Ottawa Valley Bid Depository	Ottawa Construction Association	5
Peterborough Bid Depository	Peterborough District Construction Exchange	2*
Windsor Bid Depository	Windsor Construction Association	2*
<p><u>PRINCE EDWARD ISLAND</u> No bid depository</p>		

NAME/PLACE	OPERATED BY	NUMBER OF TRADES																												
<p><u>QUEBEC</u></p> <p>Quebec Bid Depository System **</p>	<p>Quebec Bid Depository System, an organization set up by:</p> <p>La Fédération de la Construction du Québec (Quebec Construction Federation)</p> <p>The Corporation of Master Electricians of Quebec and The Corporation of Master Pipe-Mechanics of Quebec with The Construction Association of Montreal and of the Province of Quebec (as fourth member) pursuant to a complementary agreement providing participation in operations in Montreal area . . .</p> <p>12 regions and office in each, with direct participation of each regional construction association as follows:</p> <ol style="list-style-type: none"> 1) Quebec Region, Quebec City; 2) Metropolitan Region, Montreal; 3) Lanaudière Region, Joliette; 4) Mauricie Region, Trois-Rivières; 5) Central Quebec Region, Drummondville; 6) Eastern Townships Region, Sherbrooke; 7) Outaouais Region, Hull; 8) North-West Region, Rouyn; 9) Saguenay, Lac St-Jean Region, Arvida; 10) Lower St. Lawrence Region, Rimouski; 11) North-Shore Region, Hauterive; 12) North-Shore Region, Sept-Iles. 	<p>Mechanical and Electrical, with a varying number of structural and architectural specialties in accordance with Agreements with Construction Associations, as follows:</p> <table style="width: 100%; border: none;"> <tr><td>Rimouski</td><td style="text-align: right;">25</td></tr> <tr><td>Chicoutimi</td><td style="text-align: right;">26</td></tr> <tr><td>Hauterive</td><td style="text-align: right;">25</td></tr> <tr><td>Quebec</td><td style="text-align: right;">25</td></tr> <tr><td>Trois-Rivières</td><td style="text-align: right;">12</td></tr> <tr><td>Central Quebec</td><td style="text-align: right;">25</td></tr> <tr><td>Bagot-Rouville</td><td style="text-align: right;">12</td></tr> <tr><td>Sherbrooke</td><td style="text-align: right;">25</td></tr> <tr><td>Hull</td><td style="text-align: right;">25</td></tr> <tr><td>Montreal</td><td style="text-align: right;">8</td></tr> <tr><td>Joliette</td><td style="text-align: right;">14</td></tr> <tr><td>Duplessis</td><td style="text-align: right;">25</td></tr> <tr><td>(Sept-Iles)</td><td></td></tr> <tr><td>North-West Region</td><td style="text-align: right;">NIL</td></tr> </table>	Rimouski	25	Chicoutimi	26	Hauterive	25	Quebec	25	Trois-Rivières	12	Central Quebec	25	Bagot-Rouville	12	Sherbrooke	25	Hull	25	Montreal	8	Joliette	14	Duplessis	25	(Sept-Iles)		North-West Region	NIL
Rimouski	25																													
Chicoutimi	26																													
Hauterive	25																													
Quebec	25																													
Trois-Rivières	12																													
Central Quebec	25																													
Bagot-Rouville	12																													
Sherbrooke	25																													
Hull	25																													
Montreal	8																													
Joliette	14																													
Duplessis	25																													
(Sept-Iles)																														
North-West Region	NIL																													

NAME/PLACE	OPERATED BY	NUMBER OF TRADES
<u>SASKATCHEWAN</u> Moose Jaw Branch Prince Albert Branch Regina Branch Saskatoon Branch Swift Current Branch	The following local associations, according to the rules of the Saskatchewan Bid Depository Incorporated: Moose Jaw Construction Association Prince Albert Construction Association Regina Construction Association Saskatoon Construction Association Swift Current Construction Association	23 trades 1 sub-trade to mechanical trade

2. Other Bid Depositories

NAME/PLACE	OPERATED BY
<u>SUB-BID DEPOSITORIES</u> Grand Valley Bid Depository Insulation Sheet Metal Air Conditioning/Refrigeration Hamilton Sheet Metal Sub-Bid Depository * Hamilton Insulation Bid Depository * London Insulation Bid Depository * London Sheet Metal Bid Depository * Ottawa Valley Sheet Metal Sub-Bid Depository Ltd. Toronto Sub-Bid Depository Sheet Metal and Air Handling Bid Depository Refrigeration Bid Depository Insulation Bid Depository Windsor Sheet Metal Bid Depository *	Grand Valley Construction Association Mechanical Contractors' Association of Hamilton Mechanical Contractors' Association of Hamilton London and District Construction Association London and District Construction Association Ottawa Construction Association Mechanical Contractors Association of Toronto Toronto Sheet Metal and Air Handling Group Ontario Refrigeration and Air Conditioning Contractors' Association Master Insulators' Association of Ontario Inc. Windsor Construction Association

NAME/PLACE	OPERATED BY
<p><u>SUB-BID DEPOSITORIES</u> (Continued)</p> <p>Vancouver and Lower Mainland Refrigeration Contractors Bid Depository Vancouver and Lower Mainland Ventilation Contractors Bid Depository [Vancouver] Insulation Contractors Bid Depository</p>	<p>Mechanical Contractors Association of British Columbia</p> <p>Refrigeration Section</p> <p>Ventilation Section</p> <p>Insulation Section</p>
<p><u>SPECIALTY BID DEPOSITORIES</u></p> <p>Architectural Millworkers of Ontario Bid Depository*</p> <p>Lathing and Plastering Bid Depository of Oshawa and District*</p> <p>Masonry Bid Depository [Winnipeg]</p> <p>Quebec Master Roofers Association Bid Registry [Montreal]*</p>	<p>Architectural Millworkers of Ontario</p> <p>Contracting Lathing and Plastering Association of Oshawa & District</p> <p>Masonry Contractors' Association of Manitoba</p> <p>Quebec Master Roofers Association</p>
<p>Source: Returns of Information in 1969 and the most recent rules of procedure of the various bid depositories. In the case of Newfoundland and a number of Ontario bid depositories the information is based on the situation at the end of the late 1960's and some changes may have occurred since then.</p> <p>* Based on information for the late 1960's.</p> <p>** This tableau is explained further in this chapter.</p>	

The Organization of Major Bid Depositories

As noted earlier, bid depositories are a mix of local and provincial organizations. The pattern that developed was for bid depositories to be started by local building exchanges or associations and, after several years of operation, for policy formulation to be placed with a provincial body. The first province where this development occurred was Alberta. The brief of the Alberta Construction Association describes the history and present organization of bid depositories in that province as follows:

"Bid depositories have been operating in Alberta for a number of years, the first one being in Calgary in 1954. These were initiated basically by trade contractors, but over the years the general contractors, as well as the design authorities have been actively participating in the establishment of the rules.

In the early 1960's there were five bid depositories operating from local construction associations in Alberta, as well as one for provincial government projects, all under different rules. The Alberta Construction Association at that time convened many meetings of the local construction associations operating bid depositories to investigate and establish a set of uniform rules for use in Alberta.

There are presently six branches operating in Alberta, each administered by a local construction association. Each local construction association has a management committee, who administers the system in their particular area. Representation from each of these local management committees constitute the provincial committee, who are responsible for all provincial rule changes. Alberta Bid Depository Ltd. is not local, but provincial in nature."

The existence of a common set of rules for provincial government projects prior to the establishment of Alberta Bid Depository Ltd. may provide one of the

background facts explaining the provincialization of bid depository rules in Alberta and other provinces. It is shown in Table III that provincial governments are very large buyers of construction, partly in the form of direct purchases by provincial departments and partly through provincial government authority over construction in the large segment of building construction comprised by hospitals, universities and schools. It is easy to see pressure for the formulation and application of a uniform set of rules for all provincial government projects coming from either government departments or the construction industry. This factor was probably of more importance in the provinces where there was a relatively early adoption of provincial rules.

The adoption of standard provincial rules in chronological order of occurrence is listed below:

Alberta	1964
Saskatchewan	1966
Quebec	1967
New Brunswick	1969
British Columbia	1973
Nova Scotia	1973
Ontario	1974

Quebec and Ontario are each discussed in separate sections.

Two major bid depositories are operated in Manitoba: one in Winnipeg and one in Brandon. Though there is no central policy body which ties the two depositories together, the importance of the Winnipeg depository is such that most projects going through Manitoba bid depositories are subject to a common policy and administration.¹⁰ The details of the administration of the Winnipeg Bid Depository which is operated by the Winnipeg Builders' Exchange are similar to those discussed below for other bid depositories.

Policy and management. The basic organization of bid depositories in most of the provinces is similar to that of Alberta. Rule-making authority is usually vested in a committee organized by the provincial construction association and responsibility for management of the

depositories resides with the local construction association. In Alberta and Saskatchewan, the provincial bid depository structures are formalized by a corporate charter.

The rule-making authority in Alberta is the Bid Depository Committee. It consists of representatives appointed by each of the local construction associations which operate a bid depository (four representatives each from Edmonton and Calgary, and two representatives from Lethbridge, Medicine Hat, Red Deer and Grande Prairie, plus a Chairman appointed by the Alberta Construction Association). Half of the representatives certified by each construction association must be general contractors and the other half trade contractors. In each bid depository the application of the rules is the responsibility of the bid depository management committee, which consists of at least five members of the local construction association. The composition of the management committee is at the discretion of the local construction association, but it is recommended that there should be an equitable balance between general contractors and trade contractors.¹¹

A similar kind of regional representation is required for the rule-making body in Saskatchewan, which is the Board of Directors of the Saskatchewan Bid Depository Incorporated. Unlike Alberta, the representation of general and trade contractors is left open. The by-laws require each of the five bid depositories to be operated by a Bid Depository Management Committee consisting of three members, in accordance with the rules established by the Board of Directors. There is a similar proviso to that found in Alberta regarding the desirability of an equitable balance of trade and general contractors on the Management Committees.¹²

Rule-making authority in British Columbia, New Brunswick and Nova Scotia, respectively, is vested in the provincial construction association.

The provincial rules adopted by Nova Scotia consist of a modified version of the Halifax-Dartmouth Bid Depository. Since there are only two bid depositories in the province, the major effect of the adoption of provincial rules is to extend the Halifax-Dartmouth rules

to the Cape Breton Island Bid Depository, which accepts bids for projects on the Island. The bid depository in Halifax-Dartmouth is operated by the Construction Association of Nova Scotia at its office in Halifax, under the guidance of a Joint Advisory Council made up of a committee of nine members including architects, engineers, general contractors, and trade contractors. The function of the Council is to investigate complaints regarding violations of the rules of procedure and to make recommendations to the Directors of the Construction Association of Nova Scotia.¹³ As a practical matter the Council is unlikely to be able to service the Cape Breton depository and we assume that it has its own body for dealing with complaints.

The Board of Directors of the British Columbia Construction Association has authority over the rules of all depositories in that province and may be advised by an Architect-Engineer-Contractor Joint Advisory Committee regarding changes in the rules. The Association is made up of four regional associations,¹⁴ but the nine bid depositories are operated by local construction associations.¹⁵ The rules adopted for the British Columbia depositories are almost the same as those which had been used by the Vancouver and Lower Mainland Bid Depository, except for a major change in the bonding requirements.

The rules of the New Brunswick bid depositories are established by the Construction Association of New Brunswick, Inc. and the depositories are operated by the local construction associations. The provincial association maintains a Bid Depository Advisory Committee consisting of a general contractor, two trade contractors and a supplier. In New Brunswick, as in other provinces, the practice is for the local association to appoint a bid depository committee to deal with complaints.¹⁶

The routine tasks associated with a depository, such as selling envelopes, receiving and sorting tenders and tabulating prices are performed by an employee of the construction association. There may also be a bid depository administrator who engages in public relations, and brings problems to the attention of the bid depository committee, and serves as secretary at its meetings. Whether the administration and clerical staff perform solely bid depository functions or engage in tasks associated with

the operation of a building exchange or local construction association depends on the number of bid depository projects.

Local differences: scope, bonding and the interpretation of rules. The existence of a provincial rule-making body does not necessarily mean that all depositories in a province operate in exactly the same fashion with respect to such matters as scope, bonding, closing hours, and the interpretation of common rules. Bonding will be discussed in a later chapter and differences in closing hours do not appear of such moment to require further elaboration. The possibility of differences in interpretation of common rules is discussed below, but the detailed treatment of penalties and the function they serve in bid depositories are taken up in Chapter V.

In Alberta, certain subjects are set out within which individual depositories may be allowed to depart from the standard rules. The subject of individual bid depository discretion is treated in Section 75 of the Rules and Regulations:

"The bid depository management committee of a bid depository with the approval of the Alberta Bid Depository Committee may prescribe supplemental rules and regulations applicable only to its own bid depository, to provide for problems peculiar to that bid depository relating to the following subjects, namely:

- (a) Scope;
- (b) Bonding;
- (c) Closing hours."

Although there is no explicit treatment of individual bid depository discretion in the rules, as a matter of practice, local construction associations in Saskatchewan are also permitted to determine their own scope and bonding rules. Considerable differences in bonding requirements have developed among depositories in Saskatchewan and, to a lesser extent, in Alberta.

Scope. The scope of a bid depository refers to the trades which may (or must) be called through it. Also included in scope is the delineation of boundaries around the work which falls within the responsibility of each of

these trades, but most bid depositories do not become involved in scope at such a refined level, leaving this matter to be determined by the plans and specifications for each project and the practices of construction firms. Alberta is an exception, and one of the distinguishing features of Alberta Bid Depository Ltd. is the comprehensive trade index it has compiled. The definitions allocate responsibility for units of work to each of the trades and thus the Alberta construction industry has gone furthest to try to ensure that all tenders from a particular trade are comparable in all respects save price. The standard rules list 28 trades that bid to general contractors, five sub-trades that bid to mechanical contractors and seven sub-trades that bid to electrical contractors. The list has been slightly amended in the Edmonton and Grande Prairie bid depositories.

A word of caution is in order regarding use of a number of trades which may (or must) be tendered through a depository as a measure of its scope. Because the way trades are listed may vary from province to province, the number of trades is only a rough guide in making scope comparisons among bid depositories. For example, tile, terrazzo and marble are treated as one trade in Alberta and as three by the Winnipeg Bid Depository, while elevators, escalators and dumbwaiters are listed as separate trades in Alberta and as one in Winnipeg. With this warning in mind, Table C may be taken to show that outside of Ontario the number of trades included in bid depositories is large and indicates an open-door policy to the admission of trades.

The Saskatchewan Bid Depository lists 23 trades and one sub-trade which may be called through any of the five depositories. Though individual depositories are allowed discretion with respect to scope, they have in the last few years given up some of the small individual differences that had existed.¹⁷

The British Columbia Construction Association Bid Depository Rules of Procedure (Section 3) lists 19 trades but adds that:

"At the discretion of the authority specifying the Bid Depository, additional trades may be subject

to Bid Depository. Sub-sections of trades may also be subject to Bid Depository bids at his discretion. Depository bids may also be called on the basis of divisions and sections of the specifications."

Thus, though all bid depositories list the same trades, those called through the bid depositories may vary from project to project, depending on the approach taken by the responsible architects.

Nova Scotia and New Brunswick do not list the trades which may go through the bid depositories but accept tenders for all trades listed in the specifications to be called through bid depository. This approach is essentially the same as that taken in British Columbia, the one difference being that in the Atlantic Provinces particular trades are not individually listed in the rules and regulations.

Interpretation of rules. It appears from the oral and documentary evidence that the standard rules in British Columbia, New Brunswick and Nova Scotia are meant to apply in all respects to each depository. Where differences among bid depositories may arise within these provinces, as well as in Saskatchewan and Alberta, is in the interpretation of the rules. The possibility of conflicting interpretation arises principally in determining whether there has been a violation of the rules which justifies disciplinary action, which in the provinces under discussion takes the form of disqualifying the tender of an offending firm or of suspending it from use of the bid depository.

Saskatchewan has attempted to avoid discrepancies in interpretation by requiring that:

- "1. Each Bid Depository Management Committee shall submit to the Saskatchewan Bid Depository Committee a report in writing outlining each complaint or recommendation and its decision or recommendation concerning the application, interpretation or any alleged violation of these rules.

2. The Saskatchewan Bid Depository Committee shall review these reports, advise the Bid Depository Management Committee and adopt such measures as appear necessary to ensure consistent and uniform operation of all Bid Depositories."¹⁸

However, the testimony of Mr. David Wagg, staff member of the Saskatchewan Construction Association and former Secretary-Manager of the Bid Depository, and Mr. Vic Sedula, a general contractor from Regina who was Honorary Secretary-Treasurer of the Saskatchewan Construction Association and a Past-President of the Regina Construction Association, indicates that the reporting requirement is not enforced. It is left up to the local bid depository committees to determine whether they should report. Furthermore, there is no evidence that the reports which are submitted are studied for the purpose of formulating and issuing guidelines to the individual bid depositories.¹⁹

The Alberta rules also require a central committee to review reports involving violations of the rules and to "advise the bid depository management committee and adopt such measures as appear necessary to ensure consistent and uniform operation of all bid depositories."²⁰

Geographic coverage. Although it has happened in Ontario at least twice, British Columbia and Quebec are the only provinces whose rules provide for the deposit of tenders for any one project in more than a single depository.²¹ Such a system can obviously be a convenience to bidders.

Alberta and Saskatchewan attempt to influence the distribution of projects among bid depositories based on the location of the projects. Saskatchewan is divided into five zones and a project is routed through the bid depository located in its zone unless the architect specifies a different bid depository.²² The Alberta rules (Section 11) provide that the bid depository closest to the project is to be used unless the architect should choose a different one.

One of the features of Nova Scotia bid depositories that stands out is the limited geographic coverage provided by the two depositories. Although there may be insufficient

interest and building activity outside of Cape Breton and Halifax-Dartmouth to justify additional bid depositories, other methods for depositing bids outside of these two locations may be feasible so as to minimize any competitive disadvantage which this may entail for the trade contractors located elsewhere in the province.

The Organization of Major Bid Depositories in Ontario

The idea of creating a provincial network of major bid depositories in Ontario goes back to 1955 when a bid depository was first formally organized in Toronto. If successful, this bid depository was meant to serve as a pilot project for bid depositories throughout the province,²³ presumably all operating under uniform rules. It is not known whether there were any organized attempts to arrive at uniform provincial rules during the 1950's, although the bid depositories established during that period throughout the province were all operated under local rules and management.

There were unsuccessful attempts to formulate uniform provincial rules in the early and late 1960's. According to Mr. E. R. Fenton, Executive Director of the Ontario General Contractors Association (O.G.C.A.) this organization had taken the initiative in these attempts.²⁴ However, it was not until the forceful prodding of the Ontario Government in 1972 that sufficient momentum was developed for a set of Ontario Bid Depository Standard Rules to be created. Seven bid depositories adopted the Standard Rules during October 1974 and they were followed by other depositories in December and January. At the end of the Hearings in April 1975, all but three of the 17 major bid depositories had either adopted the Standard Rules or were committed to doing so. Before discussing the events which led to the formulation and widespread adoption of the Standard Rules, it is necessary to review some features of the development of bid depositories in Ontario.

Scope of bid depositories. The major Ontario bid depositories are much more limited in scope than those in other provinces. Of the 18 bid depositories which filed returns of information for 1968, 12 were limited to receiving bids from the mechanical and electrical trades

and another three received bids from only four trades. Only three bid depositories (Thunder Bay, Sault Ste. Marie and Sudbury) accommodated a large number of trades. The Standard Rules do not deal specifically with scope and this aspect of bid depository organization will continue under local discretion.

A brief highly critical of the Ottawa Valley Bid Depository (O.V.B.D.) was submitted by the General Contractors Association of Ottawa (G.C.A.O.). According to the brief,²⁵ one of the points at issue between this Association and the O.V.B.D. relates to the admission of the painting trade, on a probationary basis in 1972 and permanently in October 1974. The existing members in the O.V.B.D., which included the mechanical, electrical, and lathing and plastering, and acoustic tile trades admitted the painting trade over the strenuous objections of the general contractors. The minority voice of the general contractors on the matter of scope was further weakened with the addition of the painting trade.

The opposition of Ontario general contractors to the use of bid depositories for other than the mechanical and electrical trades probably goes far to explain the limited scope of most bid depositories.²⁶ In addition, the Ministry of Government Services in Ontario (the department directly responsible for much of the provincial building) has provided powerful support for the position of the general contractors through its decision, initially taken in 1958, that it would adopt the use of bid depositories, but only for the mechanical and electrical trades.²⁷

The approach of the general contractors. The opposition of general contractors in Ontario to the widening of the scope of bid depositories shows that they have not granted the same level of acceptance to bid depositories as is apparent in other parts of the country.²⁸ In the words of the brief of the O.G.C.A., "The Ontario General Contractors Association historically has not been an advocate of the Bid Depository system . . .". Nevertheless, the general contractors have joined in the operation of bid depositories at the local level and participated in the drawing up of the Ontario Standard Rules. Mr. E. R. Fenton expressed the approach of the O.G.C.A. towards bid depositories as follows:

"Q. Is it fair to say, in your endorsement of the Ontario Standard Rules, it means that you have decided bid depositories are going to be here and you might as well have the best set of rules that can be worked out?

A. I think that has been the posture historically as well as recently. The Association represents people who are doing business in the marketplace, Mr. McDonald. The Association represents people who are doing business in the marketplace and [there] enters into that marketplace something called the bid depository--as I said before, it inserts itself between the buyer and seller, the trade contractor and the general contractor. It inserts itself at the behest of the architect, or engineer acting on behalf of an owner. It inserts itself at the behest of the Department of--the provincial or federal government who says in its tendering instructions 'Mechanical, electrical tenders shall be submitted through such-and-such bid depository', and so on and so forth.

Given those circumstances, the Association says 'We have something with us in the marketplace which is called the bid depository and it affects the process by which we do business because, instead of the trade contractor tendering to me directly, he now routes it through the bid depository which has certain rules and procedures and so on. I am interested in that because I am on the receiving end of those bids ultimately.'

Rather than remain aloof from the creation of those rules or their revision or their administration, as a pragmatic situation, as a business response, a businessman's response, he enters into the process of creating those rules and administering them in order to influence them insofar as his ability, as he has ability to do so, and with the considerations in mind which are uppermost in his mind, considerations which affect how he tenders to the owner, how the owner receives his offer to do work, so I hope that helps you to understand."29

The formulation of Standard Rules. The steps taken to formulate Standard Rules have been traced to a letter by Mr. T. R. Hilliard, Deputy Minister, Department of Public Works, Ontario, dated January 28, 1972, which was sent to all bid depositories in Ontario and to the Mechanical Contractors Association of Ontario. The complete text of the letter is shown below. Of particular interest is the penultimate paragraph which specifically calls for uniform bid depository rules in Ontario:

"It is my understanding that the prime purpose of the Bid Depository System is to protect the 'sanctity of the bid.'

While the position of the Department of Public Works has been that responsibility for a clean house in the construction industry rests with the industry, we have been trying to co-operate in this regard by utilizing the services of the Bid Depositories for certain trades.

In the past, and again recently, there have been occasions when a Bid Depository ruling on a technicality has been made by the local Depository which, in our opinion, was not in the best interest of the Department or the public, particularly where sanctity of the bid was not in question.

One of the problems in utilizing the Bid Depository system lies in the fact that rules and procedures vary considerably from area to area. We find rulings on technicalities being made without reference to the Department which are in conflict with the management goals of the Department.

I therefore take this opportunity to advise you of our future position in the use of Bid Depositories.

While we will make every endeavour to utilize the service of the Depository System in the interests of both parties, the Department of Public Works must reserve the right to make its own determinations and decisions on technicalities as they relate to the public interest.

I think that the time is appropriate to suggest that the Ontario Bid Depositories make a serious effort to develop, adopt and adhere to uniform rules and procedures in order that the construction industry, the professional jurisdictions, the owners and the labour force may be better served by the Depository System. We would be pleased to participate in any deliberations which could lead to this result."³⁰

A description of the progress towards uniform bid depository rules that followed from Mr. T. R. Hilliard's letter was presented in testimony by Mr. F. C. Whyte, Executive Director of the Mechanical Contractors Association of Hamilton and Secretary of the Ontario Bid Depository Advisory Council. The Mechanical Contractors Association of Ontario (M.C.A.O.) set up a bid depository committee which held meetings at intervals from March to October 1972. During this time, the Electrical Contractors Association of Ontario (E.C.A.O.) had also started work on a set of standard bid depository rules and procedures. Joint meetings of the bid depository committee were started in October 1972 and continued into February 1973, when after a request by the O.G.C.A., they were joined by representatives of that organization. A draft of a standard set of rules was completed in August 1973 and submitted to the three associations for endorsement. This version of the Standard Rules has been referred to as the first edition. Mr. Whyte further stated:

"On November 29th, 1973, each of the three associations or their representatives advised that their associations had endorsed the standard rules as they had been written and at that meeting also was formed the Ontario Bid Depository Advisory Council, which consists of two members, two representatives from OGCA, one representative from MCAO and one representative from ECAO. At that point in time, we had not yet contacted the other organizations which now sit on the Council."³¹

It was also decided at that meeting to request the Ontario Association of Architects (O.A.A.) to nominate a representative to the Advisory Council. In addition, the O.A.A. and the Association of Professional Engineers of Ontario were asked to endorse the Standard Rules and to

agree that the Standard Rules would apply on specified bid depository projects. Endorsement was received from the architects' and engineers' associations in March and April, respectively, following which endorsement was received from the Minister of Government Services of Ontario.

A meeting with representatives of 17 of the 19 major bid depositories was held at the end of May to discuss the Standard Rules as endorsed. Following this meeting changes were made and this led to the second edition of the Standard Rules. This is the edition which has been adopted by most of the Ontario bid depositories.

As of the conclusion of the Hearings in April 1975, the bid depositories in Ottawa, Peterborough and Windsor had not agreed to adopt the Standard Rules. The rules of each of these bid depositories differ from the Standard Rules in one or more important ways. Differences exist in the rules on bonding, in the timing of the opening of envelopes after the closing of the depository, and in the procedures for declaring bids informal and for withdrawing tenders. These topics are discussed in a later chapter.

Local discretion. The operation and interpretation of the Ontario Bid Depository Standard Rules and Procedures is under the control of the local bid depositories which adopt them. There is room in Ontario, as there is in the other provinces with uniform provincial rules, for differences to develop among bid depositories regarding what constitutes a violation of the rules.

It has already been noted that scope is a matter of local discretion. It is a subject not treated in the Standard Rules. The Counsel for the Director raised the point during the Hearings that there was nothing in the Standard Rules which prevented local depositories from adding amendments as long as they did not conflict with any of the provisions of the Standard Rules. This possibility was granted by Mr. J. C. Carson, Q.C., Counsel appearing on behalf of the Mechanical Contractors Association of Toronto, Electrical Contractors Association of Toronto, Electrical Contractors Association of Ontario, and the Ontario Sheet Metal and Air Handling Group, but he argued that such local discretion was not the intent

of those who drafted the Standard Rules. Mr. F. C. Whyte, Secretary of The Advisory Council, testified that, in his opinion, once the Standard Rules have been adopted by a local bid depository it does not have the authority to make amendments.³²

Geographic coverage. The Ontario Bid Depository Standard Rules and Procedures do not make any mention of the receipt of tenders in more than one bid depository for any project. An example of a joint closing in the Hamilton and Toronto bid depositories after the adoption of the Standard Rules was cited in the testimony of Mr. F. C. Whyte.³³ Another example of a joint closing in Ottawa and Toronto, which do not operate under the Standard Rules, was introduced by Mr. George Collins, Administrator of the Ottawa Valley Bid Depository.³⁴ However, the existence of uniform rules should make it easier to arrange for joint closings even if the arrangements for co-ordinating the closings have to be made on an *ad hoc* basis in each case.

Quebec Bid Depository System

In January 1957 the Corporation of Master Pipe-Mechanics (plumbing and heating contractors) of Quebec and the Corporation of Master Electricians of Quebec organized the Montreal Bid Depository (also known as the Bid Depository Office of Montreal) to receive bids mainly in the electrical and plumbing and heating trades, in the Montreal area, if its use was requested by the tender-awarding authorities.

In 1960 the Corporation of Plumbing and Heating Contractors, the Corporation of Master Electricians and the Builders' Exchange entered into an agreement to maintain a "system of receiving and protecting competitive bids made by Trade Contractors in the region of Montreal." The Builders' Exchange acted as the Trustee of the system.

Another agreement followed in 1966 between the Corporation of Master Pipe-Mechanics of Quebec, the Corporation of Master Electricians of Quebec and the Montreal Construction Association, the corporate successor in 1962 to the Builders' Exchange, which became in 1974

the Construction Association of Montreal and the Province of Quebec.* The jurisdiction of the Montreal Bid Depository was described as extending to "all contracts of electrical installation, a) the total price of which is \$5,000 or over, material and labour included; b) on which more than one bid is invited; c) for performance within the territorial jurisdiction of the Decree relating to the Construction Industry and Trades of the District of Montreal under the Collective Agreement Act."³⁵ The jurisdiction also covered "all plumbing and/or heating work as defined in the Law governing the Corporation of Plumbing and Heating Contractors (13 George VI, Ch. 109, 1949)" with the same provisions as in the case of electrical installations save that the minimum limit was given as \$10,000. Piping installations include heating, refrigerating, plumbing, oil or natural gas burner, and automatic sprinkler systems. The Montreal Bid Depository was made obligatory for the two major trades but other trade contractors were invited to use the system when its use was specified by the awarding authority. A similar type of agreement was entered into between the two trade corporations and the Quebec Construction Association. A bid depository thus functioned in the Quebec City region until it was absorbed in a province-wide system. Attempts to "provincialize" the system were made but without too much success although bid depositories were operated in Hull and Trois-Rivières using the facilities of a trust company.

In 1964 the two major trade corporations had sought and obtained amendments to their organic acts to grant the power to their respective provincial council of

* This last change came as a result of a split, in 1972 between the Quebec Construction Federation and the Montreal Construction Association, the latter now covering the province. For the purposes of this inquiry, the two organizations made a joint common submission in which they stated that the reason for the split was not connected with this inquiry. As related in *Le Soleil* of January 31, 1972 (p. 26) and of February 9, 1972 (p. 50), it would seem, however, the larger Montreal-based general contractors' resistance to the widening of the "scope" of compellability of Q.B.D.S. in the Montreal region caused the break.

administration to "make an agreement with any builders' association or a fiduciary for the establishment of a bid depository" and thereafter to make regulations to provide for the enforcement of the agreement through penalties in the event of violations of the bid depository rules.³⁶

Thus enabled, the two trade corporations and the Construction Federation of Quebec reached an agreement in April 1967 to establish the Quebec Bid Depository System, here referred to as Q.B.D.S. The Montreal Bid Depository continued in separate existence until January 1972 when it was merged with the Q.B.D.S. The system is a private organization jointly "created" by the common will of the parties, operating bid depositories for certain types of work, in a given area or region, under prescribed rules of procedure as well as regulations for its management and the conduct of all aspects of its business.

Once a bid depository was established, it became imperative that all members of the Corporation of Master Electricians and of the Corporation of Master Pipe-Mechanics not "tender in any manner for the carrying out of work included in the categories defined by any agreement, otherwise than in the manner which it prescribes." Any member contravening this provision of a corporation's enabling statute rendered himself liable to any civil recourse that arose from the offence or to the disciplinary penalties provided by the regulations. In practice, disciplinary measures range from censure, verbal or written, publication in the trade paper of the censure, a fine of \$50 to \$500 for the first offence and not exceeding \$1,000 for each subsequent offence, suspension and finally, exclusion from the Corporation. Section 29 of the Master Electricians Act provides as follows:

"Every person who has obtained, contrary to the provisions of the agreement, a contract to carry out work falling within any category mentioned in the agreement, commits an infraction of this act and is liable to a fine equal to 5% of the contract price.

The fine shall be recoverable upon an action instituted in accordance with section 30; but the fine cannot be imposed except to the exclusion of any other penalty or proceeding."

The Quebec Master Pipe-Mechanics Act is to the same effect and also provides for a fine equal to 5% of the contract price. All types of disciplinary measures have been imposed in numerous instances by corporations representing the plumbing and electrical contractors. In a recent incident the Corporation of Master Pipe-Mechanics successfully proceeded through the Superior Court to collect the maximum fine, (*Corporation des Maîtres Mécaniciens en Tuyauterie du Québec vs Emile Séguin & Fils Ltée* [Superior Court, District of Hull, No. 17,277 - May 6, 1974]). This case illustrates that the electrical and plumbing corporations can invoke the force of civil law to enforce mandatory use of bid depositories according to the rules and regulations of bid depositories.

Use of bid depositories by other than the mechanical and electrical trades was at the request of the awarding authority until December 1970, when the two corporations entered into an agreement with the Construction Federation of Quebec (C.F.Q.). Under the agreement, local construction associations affiliated with the C.F.Q. may make use of the bid depository mandatory for any works (or trade specialties) by adopting a resolution which is then approved by the C.F.Q. and accepted by the Q.B.D.S. for inclusion as an integral part of the latter's scope. Numerous trades have taken advantage of the agreement and the range of works covered under the System is extensive in most parts of the province, as shown in Table C. However, perhaps because of opposition from general contractors, only eight trades are covered in Montreal.

The 1964 amendments to the incorporating acts of the two major trades had hence paved the way to the agreement with C.F.Q. In this respect, the relevant provisions of the Master Electricians Act provide:

"25. The council [of the Corporation of Master Electricians of Quebec] may make an agreement with any builders' association or a fiduciary for the establishment of a bid depository for tenders submitted respecting certain categories of work in a given territory.

After such an agreement comes into force, no member may, without being guilty of an act derogatory to

the honour of the trade and liable to the disciplinary penalties provided by the regulations, subject to any civil recourse which may arise from such offences:

- a) tender in any manner for the carrying out of work included in the categories defined by any agreement, otherwise than in the manner which it prescribes;
- b) contract for the carrying out of such work otherwise than at the price and upon the conditions of his tender submitted in accordance with such agreement;
- c) grant any reduction on the price of his tender or pay any commission, rebate, participation or other advantage having the effect of reducing the true price;
- d) endeavour to obtain information respecting a tender before it is opened.

. . . .

27. The parties to the agreement may authorize the bid depository to furnish, on such conditions as they have decided, the same services to persons exercising another calling or carrying on another trade.

28. For the purposes of section 27, the corporation may make agreements with groups, associations or companies."

A possible reading of section 27 is that the rules of the Q.B.D.S., and in particular its mandatory use under certain circumstances, are imposed on individual members of trades as a result of an agreement between the Corporation of Master Electricians and a group such as the Construction Federation of Quebec. If this interpretation is valid the Quebec Master Electricians Act (or the Quebec Master Pipe-Mechanics Act) results in an Act granting the privilege of self-regulation to one trade extending without any apparent limit to other trades in the construction industry. To the knowledge of the Commission, this possibility has not been tested in the courts.

However, apart from any sanctions resulting from a failure to follow bid depository rules found in the acts governing electricians and the mechanical trades, any tenderer, whether or not a member of one of the two corporations, wishing to bid through the Q.B.D.S. either because it is called for in the specifications or has been made mandatory by a construction association, must enter into an "Obligation" whereunder he undertakes, "when tendering, to act in strict conformity with the Code [Rules] as set forth in the agreement constituting the Q.B.D.S. . . . and to follow all the regulations . . ." applicable. He also states that he undertakes [promises], should he commit an infraction to the regulations, "to pay as liquidated damages", if he obtains the contract, a penalty equal to 5% of the price of the contract. Where there is a complaint to Q.B.D.S. the latter investigates the matter and its operating committee prepares a file, but the same is forwarded to the appropriate principal, i.e., corporate body.*

The province is divided into twelve regions with an office maintained in each region, but there is a chief executive responsible for overall direction of the Q.B.D.S. As was stated previously, the offices receive bids with respect to all mandatory works or in all cases where bidding through the system is specified. Tender envelopes may be received at any of the offices and are delivered to the place chosen by the addressee. Bidding information is transmitted to all regions to facilitate tendering by "outside" contractors. Q.B.D.S. staffs seven offices but supervises the work of all depositories. The personnel is completely independent from the trades and must not be connected or have been connected with the construction industry.

*It appears significant to the Commission that during the period from October 1, 1972 to September 30, 1973, in the Montreal Region, out of a total of 303 complaints, only two were referred to the Montreal Construction Association.

There are operating and advisory committees at both the provincial and the regional levels. The operating committee is responsible for the management and administration of the bid depository at its level. The regional committee also handles all complaints. It is constituted of three representatives each of the two trade corporations and three representatives of the relevant construction federation or association. The members of this committee sit on the advisory committee which also includes the presidents of the three founding bodies, three architects named by the Order of Architects of Quebec, three consulting engineers named by the Order of Engineers of Quebec, three general contractors named by the Construction Federation and others who may be invited, such as government officials representing departments, viz. education, municipal affairs, public works. . . . The evidence is not too clear as to the input of the provincial advisory committee in the course of the last four years.

Relation of Sub-Bid and Specialty Depositories to the Major Bid Depositories

Sub-bid depositories operate in the Vancouver Area and in a number of locations in Ontario. With respect to specialty bid depositories, the masonry bid depository in Winnipeg is the only one known to be currently operating. Each of the foregoing bid depositories operates under its own rules and management independently of the major bid depositories in its area.

The Vancouver sub-bid depositories and the Masonry Bid Depository in Winnipeg decide which projects shall be tendered as bid depository projects. In contrast, the British Columbia and Winnipeg major bid depositories leave the decision to the owners. As a result of this difference in approach the majority of the projects claimed for these sub-bid and specialty bid depositories do not go through major bid depositories. Moreover, although masonry is one of the numerous trades from which the Winnipeg Bid Depository accepts bids, the members of the Masonry Contractors' Association of Manitoba, which operates the Masonry Bid Depository, submit their tenders through their own depository even when projects are specified as bid depository jobs by the owner.³⁷

The rules of the Toronto Bid Depository (8th edition, section 15.(f)) which had been employed for a number of years prior to the adoption of the Ontario Standard Rules, required that, if the owner specified that bid depository procedures should be used, mechanical contractors receive sheet metal, insulation and refrigeration tenders through the sub-bid depository. A similar requirement has been incorporated in the Ontario Standard Rules, but a possibly significant qualification has been added. The supplementary instructions to mechanical and electrical bidders in sections 14(d) and 15(c) state the following:

"Where Bidding Instructions specify Bid Depository Procedures these shall be deemed to include the requirement that Mechanical [or Electrical] Contractors shall receive their sub-trade tenders only through [space for name of] Sub-Bid Depositories, if these exist, provided said Sub-Bid Depositories are governed by the Ontario Bid Depository Standard Rules and Procedures."

While the mechanical contractors are not required to receive sub-trade tenders through sub-bid depositories which are not governed by the Standard Rules, they are free to do so. This mild attempt to bring sub-bid depository rules into conformity with the Ontario Standard Rules has, so far, not been successful. The Toronto Sub-Bid Depository Rules of Procedure which are used by the mechanical sub-trades were drawn up in December 1973 when the three separate sub-bid depositories were formed into a single bid depository under a common set of rules. Though these rules differ significantly from the Ontario Standard Rules, the evidence is that mechanical sub-trades do not feel compelled to bring their depository rules into conformity with the Standard Rules. Nor is there any evidence that other sub-bid depositories have moved to adopt the Standard Rules.³⁸

According to the testimony of Mr. L. Cianfarani, there is interest on the part of his association in a common set of rules and negotiations were underway. However, the other sub-trades, insulation and refrigeration, are not a party to the negotiations.³⁹

At present the major point of contact between the Toronto bid and sub-bid depositories is in their sharing of common facilities.

The Operation of Bid Depositories

All bid depositories share the same basic objective which is to prevent price negotiation, but they do not all try to achieve it in the same way. The list of bid depository operating features is, therefore, lengthened to the extent that different means are employed to arrive at the same or comparable ends. The list is further lengthened because some bid depositories have adopted additional rules and practices which are not related to the basic objective in any identifiable way. The operation of bid depositories is discussed in the succeeding chapters.

II NOTES

1. Canadian Construction Association, Proceedings of the 37th Annual General Meeting held in Quebec, January 16-19, 1955.
2. *Ibid.*
3. Exhibit T-27, February 27, 1970 (exhibits were filed in 1970 during the course of the Director's investigation, and these exhibits are referred to by their exhibit number and the year in which they were filed in order to distinguish them from the exhibits filed during the course of the Commission's Hearings).
4. Exhibit T-28, February 27, 1970.
5. Exhibit T-29, February 27, 1970. Canadian Construction Association, 51st Annual General Meeting, Montreal, (1969).
6. Green Book, p. 38-39.
7. *Ibid.*, p. 123.
8. The way insulation contractors tender in Vancouver is considered a registry procedure by Mr. E. H. McCaffery of the Mechanical Contractors' Association of British Columbia. An insulation contractor submits a single bid for any project to the office of the insulation bid depository or bid registry and all mechanical contractors receive the same bid from any insulation contractor. The main distinction between a bid depository and bid registry drawn by Mr. McCaffery is that differential bidding to different contractors is not possible in the latter. (Transcript, p. 1055.)
9. *R. vs Norman Lathing Limited et al.*, Supreme Court, Ontario, November 20, 1969, (Hughes J.). Green Book, p. 112-14.
10. According to the returns of information for 1968, 122 projects went through the Winnipeg Bid Depository compared to 15 for Brandon.

11. Alberta Bid Depository Ltd., Memorandum of Agreement and Articles of Association, Articles 99, 100, 104 and 105.
12. Saskatchewan Bid Depository Incorporated: By-Laws, Articles II (section 2) and V.
13. The Bid Depository of Nova Scotia, Regulations and Rules of Procedure, Section 2.(a) and (b); Section 11.
14. The Amalgamated Construction Association of B. C., which covers the Lower Mainland; Northern B. C. Construction Association; Southern Interior Construction Association; and the Vancouver Island Construction Association. These associations cover all parts of the province save the Kootenays.
15. Evidence of Mr. J. W. Bishop, consultant retained by the British Columbia Construction Association (previously General Director of British Columbia Construction Association), Transcript, p. 952-53, and Sections 1.(a) and 4 of Rules of Procedure.
16. Bid Depository Rules and Regulations New Brunswick, Revision I, September 1973, Sections 5, 6 and 20.
17. Based on a comparison of the scope revisions shown in the Saskatchewan Bid Depository Regulations for August 1970 and January 1975.
18. Saskatchewan Bid Depository Regulations, January 1, 1975, Appendix 3, Sections 1 and 2.
19. Transcript, p. 3454-55.
20. Alberta Bid Depository Ltd., Rules and Regulations, Section 82.
21. British Columbia Construction Association, Bid Depository Rules of Procedure, A Guide to the Rules and Principles of Bid Depository Operation, 2.(c).

22. In the event a different bid depository is selected, there is a formula for it to provide some financial compensation to the bid depository located in the same zone as the project. (Supplement to Appendix 3 of Saskatchewan Bid Depository Regulations.)
23. Green Book, p. 18.
24. Transcript, p. 1136-37.
25. This matter is dealt with in Appendix I of the Brief of the General Contractors Association of Ottawa.
26. *Ibid.*, p. 2; and the Green Book, p. 21.
27. Evidence of Mr. R. G. Clarke, Contract Control Coordinator, Ministry of Government Services of the Province of Ontario, Transcript, p. 4361. The one exception to the Ontario government policy is the use of bid depository for the structural steel trade in Toronto (letter dated November 12, 1974 from Mr. Robert Welch, Provincial Secretary for Justice and Attorney General).
28. Though there is evidence that general contractors in the Montreal area share some of the reluctance of general contractors in Ontario, the record in other parts of the country is one of stated support by general contractors' associations or the absence of any evidence of opposition.
29. Transcript, p. 1168-69.
30. *Ibid.*, p. 1683-85.
31. *Ibid.*, p. 1689.
32. *Ibid.*, p. 1731 and following.
33. *Ibid.*, p. 1764.
34. *Ibid.*, p. 1766.
35. 1966 Agreement.

36. Master Electricians Act, Chap. 153, R.S.Q. 1964, art. 25 and 26, and art. 89, 90 and 143 of the Corporation's By-Laws. Quebec Master Pipe-Mechanics Act, Chap. 155, R.S.Q. 1964, art. 23 to 29 inclusive and art. 105 of the Corporation's By-Laws.
37. Evidence of Mr. L. Copetti, Past-Chairman of the Bid Depository, Masonry Contractors' Association of Manitoba, Transcript, p. 3241.
38. Mr. L. Cianfarani, Executive Director, Toronto Sheet Metal and Air Handling Group, testified that to his knowledge none of the sheet metal bid depositories were operating under the Standard Rules. Transcript, p. 3936.
39. Transcript, p. 3948.

CHAPTER III

DECLARATION OF BID DEPOSITORY

One of the first and most important steps in the processing of tenders through a depository is the making of the decision that a project will in fact go through a bid depository. The most common approach is to leave this matter to the discretion of the owner. Where the bid depository route is selected this decision is incorporated in the call for tenders and in the project's specifications; the prime contractors are thus instructed to receive their trade bids through a depository.

Within the prescribed scope, the owner is usually free to select which trades shall go through the depository. As shown in Table C the choice is very wide.

Alberta's written depository rules are the only ones which do not give the owner the freedom to select the trades which will go through the depository once the depository route has been selected. Thus owners are faced with an all-or-nothing situation: if they should want only some of the trades to go through the depository, they must decide whether it is better to have the additional trades covered in the depository's scope or to do without the depository for their selected trades. Testimony was offered in Edmonton by Messrs. Gordon Alexander and J. A. Norton, of the Alberta and Edmonton Construction Associations respectively, to the effect that the rule was not enforced. Mr. Norton cited a recent project in which an architectural firm from Toronto, acting on behalf of the owner, specified that only the mechanical and electrical trades, and the sub-trades to

these trades, go through the depository.¹ On the other hand, it should be noted that in a survey of the members of the Alberta Association of Architects, conducted by the Association, one of the questions put was:

"The rules of Bid Depository list all trades that must bid through the Depository. Do you feel the Owner should have the privilege of selecting which trades he prefers to bid on any given project?"²

This suggests that the architects, who are important users of bid depositories as agents for the owners, have not been informed that an option is created by the failure of the management of the bid depository to enforce this rule.

A similar situation to that found in Alberta exists in Saskatchewan where the policy is not to offer owners the option of using the bid depository for only some of the trades included in its scope. The approach in both provinces is in conflict with the Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects which requires that:

"Federal Government Contracting Departments will only recognize Bid Depositories for those trades named in the tender advertisements."³

Referring to this rule, Mr. J. E. Chase, Executive Vice-President of the Saskatchewan Construction Association, said:

". . . we would attempt to have them use the entire scope. I don't think we have ever said that they have to stick to that scope. But I don't remember any request, other than the federal government, wanting to go with those national bid depository standard procedures."⁴

A brief digression on rules and practices is in order here. The Alberta example is typical of a number of instances where a bid depository rule was presented in testimony as being unimportant or irrelevant because it was not enforced. This line of argument is not convincing. The absence of evidence of enforcement may stem from there being no perceived need to enforce the rule. Alternatively, a rule may not be enforced because it is considered impolitic to do so. Therefore, while the evidence that a rule is not being enforced is useful additional information to the Commission, the presence of the rule remains a fact to be taken into account--whether it represents an unattained objective or a signal that is strictly followed.

The opposite extreme to free choice in the use of bid depositories is found in Quebec. Here the electrical and mechanical trades are forced to bid through the Quebec Bid Depository System under the provisions of their trade corporation acts. For other trades, there are the threat of civil action or disciplinary measures by their association where the trade is listed in their construction association's agreement with the bid depository. From the viewpoint of owners and their agents, these controls over the trades effectively eliminate their choice in the use of bid depositories. In many instances, however, the owners specify the use of bid depositories. The extent to which bid depository use is successfully imposed is illustrated by comparing the number of projects passing through the Montreal Bid Depository (1,300)⁵ with that going through the Toronto (133), Vancouver (150),⁶ Edmonton (83), and Winnipeg (91) main or all-inclusive depositories.⁷

Mandatory use of bid depositories shares a very important feature with the situation where the owner specifies use of bid depository. In both cases the management of the bid depositories or the relevant

trade associations can rely on external support in enforcing their rules. In Quebec, when the bid depository has not been specified, and is otherwise mandatory, ultimate recourse is to the courts or the trade associations, while in other parts of the country owners are expected to support bid depository decisions on the illegitimacy of bidders' conduct. Although such support has not always been forthcoming, overall it has been an important source of bid depository authority. Where outside of Quebec, bid depository use is imposed on the owners (or the owners do not exercise the veto power offered them in some situations), the authority of the bid depository rests on the collective discipline of the firms which use the bid depository.

Owners are not consulted on the use of specialty bid depositories. In fact one of the reasons why a trade may choose to operate its own specialty depository is in order to maintain control over the decision whether its bids will be entered through a main or all-inclusive bid depository. That the number of projects can be substantially affected is illustrated by the fact that 296 projects went through the bid depository operated by the Masonry Contractors' Association of Manitoba in Winnipeg in 1968 compared to only 122 projects dealt with by the Winnipeg Bid Depository,⁸ some of which, moreover, would not involve masonry work.

All sub-bid depositories contain a provision which allows the management of the sub-bid depository or the bidding firms to declare any project a sub-bid depository job. The exact approach varies from depository to depository. When the mechanical sub-trades in the Vancouver Area set up bid depositories in 1965 they took the approach used by the specialty bid depositories--they unilaterally decided which projects would be sub-bid depository jobs. This is still done, but now a list of forthcoming sub-bid depository projects is sent to the design authorities, with the project(s) for which they are responsible underlined in red. If objections are received from the design authorities, the project is

taken out of the sub-bid depository. Over the years there have been two protests, and in one case the protest was withdrawn after the purpose of the sub-bid depository was explained.⁹ However, most design authorities probably do not know that the decision by a sub-trade to put a project through the sub-bid depository is reversible. The rules of procedure are silent on how projects are selected for the sub-bid depositories and on what can be done to have them removed, and this information is not provided along with the list of sub-bid depository projects sent to the design authorities.

In Ontario reliance is placed on the specification of the use of the bid depository by the tender-calling authorities. A project is considered a sub-bid depository job whenever the main bid depository is specified. In Hamilton, for example, the Insulation Bid Depository requires that:

"In addition, the Insulation Bid Depository Advisory Committee shall have the right to declare any project a Depository project . . ."10

or

". . . a voluntary Depository may be established at the request of either the receivers or the bidders in a trade by a majority vote, in the requesting trade, of all Contractors known to be intending to receive or submit bids."11

The main Ontario bid depositories which provide for "voluntary" bid depository in their rules of procedure require a majority vote by both the bidding firms and the recipients. The wording in the current Ontario Bid Depository Standard Rules and Procedures reads:

"Where the Tender Calling Authority has not specified Bid Depository procedures, and a majority of the known Prime Contractors and a

majority of the known Trade Contractors are in favour, a Voluntary Bid Depository can be proclaimed subject to the approval of the Tender Calling Authority."¹²

The last condition was never a part of the rules of the Ontario depositories until they adopted the Standard Rules.

The rules of the Ottawa Valley Bid Depository, one of the few main bid depositories which have not agreed to accept the Ontario Standard Rules, make no mention of "voluntary" bid depository. However, the following statement was made in a brief by the General Contractors Association of Ottawa:

"We further submit that in Ottawa the matter of Voluntary Bid Depository, in cases where the Owner or tender calling authority has not called any or some trades through the Bid Depository, is arbitrarily decided by the O.V.B.D. itself, and without consultation with the Owner and the General Contractors."

In the absence of any rebuttal by the O.V.B.D., the Commission notes that this is an instance in which a practice has apparently been followed which is not covered in the written rules. Such departures, which have been remarked elsewhere as well, have the effect of reducing the confidence in conclusions based upon a study of the formal rules.

III NOTES

1. Transcript, p 3582-83.
2. Alberta Association of Architects Report of Task Force on the Bid Depository System, February 20, 1975, Appendix A.
3. Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects, General Conditions, (a).
4. Transcript, p. 3477.
5. Excluded from this total are a large number of projects in the Montreal area for which bids were received in bid depositories located outside Montreal, as well as in the Montreal bid depository.
6. Projects from all parts of British Columbia are included in the Vancouver figure and this fact makes comparison with bid depository figures in other cities difficult.
7. Winnipeg and Montreal figures are for the year 1973 and for the other cities they are for 1974.
8. Data obtained from 1968 Returns of Information.
9. Evidence of Mr. E. H. McCaffery, of the Mechanical Contractors' Association of British Columbia. Transcript, p. 1034-41.
10. Rules and Regulations for the Hamilton Insulation Bid Depository, December 1, 1969, Rule 13.
11. Toronto Sub-Bid Depository Rules of Procedure, December 1973, Rule 6.03.
12. Ontario Bid Depository Standard Rules and Procedures, Rule 9(a).

CHAPTER IV

PRE-QUALIFICATION OF BIDDERS

Pre-Registration

Pre-qualification of bidders refers to the conditions established by a bid depository which bidders must meet before the depository will accept their bids. The two forms of pre-qualification which are imposed are pre-registration and bonding, with pre-registration a rare practice and bonding required or encouraged in much of the country. Pre-registration is discussed below and the more involved topic of bonding, which involves both pre-qualification and other aspects, is treated in the following section.

The Ottawa Valley Bid Depository is the only major bid depository which has a rule on pre-registration. It is:

"Trade Contractors intending to submit tenders on any project must notify the Secretary-Treasurer at the Bid Depository not later than 10 a.m. of the working day preceding tender close. Failure to do so will render your tender unacceptable at the Bid Depository."¹

The Commission does not know the reason for this rule, but the fact that bid depositories are generally operated without a pre-registration requirement indicates that it is not necessary to achieve the conventional purpose of bid depositories, namely, the elimination of price negotiation. In any event, regardless of the purpose of the O.V.B.D. rule on pre-registration, its effects are likely to be restrictive of competition in two principal ways. Firstly, it constitutes somewhat of a barrier to

out-of-town bidders on small jobs; and secondly, it informs bidders about the identity of rival bidders and enables them to adjust their bidding strategy accordingly.

A strict rule on registration (Rule 10) used to be part of the Governing Rules and Regulations of the Toronto Sheet Metal Bid Depository prior to the introduction of revised Toronto Sub-Bid Depository Rules of Procedure in December 1973. Firms were required to deposit a \$500 certified cheque when they registered, which could be forfeited if a firm failed to bid (or withdrew its bid). Once again the intent of this rule is not known, but its effect was to ensure that firms submitting tenders knew the identity of their rivals. However, the practice was not included in the formal rules after the 1973 revision.

The Hamilton Insulation Bid Depository requires registration in person if they are to be kept informed about the specifications:

"This will assure the Insulation Contractors of receiving late decisions or pertinent information. Failure of the Contractor to register will relieve the Depository of the responsibility of notification."²

While firms are not prevented from tendering if they do not register, they do run the risk of having their tenders disqualified by the bid depository should they fail to take into account all relevant addenda. Given this risk, the requirement that registration must be in person is a restrictive feature that penalizes firms located outside of Hamilton.

Bonding

The different types of bonds used in the construction industry were explained by Mr. B. C. Gordon, Chairman of the National Surety Committee, Insurance Bureau of Canada:

"The principal bonding documents are the bid bonds, the performance bond and the labour and material payment bond. The Surety's obligation under a bid bond in the event of default is

to pay the owner [or to the prime contractor where the tenderer is a sub-contractor] [*] the difference in money between the amount of the bid and the amount for which the owner [or prime contractor] legally contracts with another party to do the work. The Surety's liability cannot exceed the amount of the bid bond.

Performance bonds are usually written in an amount equal to fifty per cent or one hundred per cent of the contract price. The performance bond guarantees the performance of a contract and in the event of a default on the part of the contractor protects the owner [or prime contractor] against financial loss up to the amount of the bond. It also automatically covers the usual guaranteed maintenance clause of the contract.

The labour and material payment bond is basically a guarantee that the sub-trades and suppliers to a project will be paid for the work and materials that go into it."³

Rules and procedures on bonding are found in most bid depositories. The usual practice is to require each bidder to secure a bid bond and to attach it to the outside of the envelope containing his tendering documents. The depository staff then examine the bond to determine whether it meets all requirements. If it does not, the tender is regarded as "informal" and is not passed on to the addressees. This practice is followed whether bonding of bidders is specified by the awarding authority, which is often the case, or by the depository itself.

Trade contractor, general contractor and owner interest in bonding. According to many witnesses the interest in bonding trade contractors stems from the prime contractors and from the trade contractors themselves. In Vancouver, for example, Mr. W. Shaw, Executive Director, Amalgamated Construction Association, was of the view that trade contractors were most concerned:

[*] Additions in square brackets have been inserted by the Commission.

"Q. . . .

Where does the pressure from bonding come from? What segments, generals, the trades or the small trades or the big trades, where is the pressure from the industry which leads to bonding?

A. I might say, Mr. Chairman, if I may, that the pressure of bonding came originally from the subcontractors. The subcontractors felt that it was a system of pre-qualification of tenders, if that is a good word. There is no system of pre-qualification right now in Canada and they felt this was a system of pre-qualification. Basically, what happens, you probably know, but I will repeat it, the contractor, to get a bid bond to start with, has to give a financial statement to the bonding company. The financial statement is looked at by the bonding company, plus his past experience, his performance, and so on.

Then the bonding company, on the basis of that financial statement will say 'You are bondable to \$100,000', or whatever the figure is. That is that that sub-trade is bondable to that figure, bondability-wise.

I think it was the sub-trades themselves that brought this in because of the fact that, what was happening was, the sub-trade that should be figuring a \$10,000 job is figuring a \$100,000 job and he got himself in trouble. He goes financially bankrupt and the general contractor is stuck."⁴

The Director's Statement, on the other hand, cited the following conclusion and evidence:

"In general, it is the large rather than the small trade contractors who favour compulsory bonding of all trades. Mr. J. W. Bishop [then Executive Director of the Amalgamated Construction Association of British Columbia] explained why the large trade contractors are in favour of bonding. He said:

'As a general rule the large substantial trade contractors are in favour of bonding because they can get bonds of course and it does tend to eliminate the smaller people who shouldn't be in that field. The smaller ones are not universally in favour of it because it may exclude them from jobs that they think they are capable of doing which in fact they are not.'⁵

Mr. Allan Marsh, a mechanical contractor from Yarmouth, Nova Scotia, discussed the experience of trade contractors in a smaller center. Much of their difficulty in meeting bonding requirements appears to be due to a lack of familiarity with how to obtain a bond:

"Q. Is it difficult to get a bond?

A. Extremely difficult for the small contractor. Now, you take a fellow who is geographically 250 miles away from the centre of business, which is Halifax, and we have one man down there who does the majority of these, one insurance agent, and that is for four to five man shops who have the ability to do the job, but bonding is beyond their knowledge through ignorance of the Association. This is going to be rectified by our meetings of the Association down in that area. They don't know what to do, but the project comes up to be bonded and they want to bid the job, they ask for it to be bonded and the bonding company says 'You have to submit your financial statements for the last three years and you have to do this and you have to do that'. He has three weeks to do the job and by the time he gets all this information to the bonding company he can't possibly get a bond.

Q. All he would have to do is file this information once and establish his reputation with the bonding company?

A. Right, but in the smaller areas that we have with a population of 10,000 people this isn't done. There is definite discrimination and there is no doubt about it."⁶

Mr. Marsh expressed the view that the minimum size of project for which bonds were required by the Nova Scotia Bid Depository (\$20,000 for mechanical, electrical and structural steel, and \$10,000 for the other trades) and the Nova Scotia Department of Public Works (\$10,000 for all trades) were too small. He also questioned why contractors were not given the option of using other forms of security such as government bonds or certified cheques in place of surety company bonds.⁷

The Green Book also quotes Mr. E. R. Riley, a director of the Ontario General Contractors Association, in support of the proposition that, from the viewpoint of the general contractor, compulsory bonding of trade contractors offers the advantage of discouraging incompetent trade bidders without placing any one general contractor at a competitive disadvantage:

"A. As a general contractor we would like to see compulsory bonding of all trades because we feel it is a form of qualifying a sub-trade's position and his ability to fulfill that contract on which he is tendering. We receive bids from people we don't know, we have never heard of them, they are just a name and an address or a voice on the telephone or a letter coming in, and if he has a bond we know that somebody has systematically and thoroughly gone through and checked and said in the field he is financially and probably company-wise capable of performing the job he is bidding. Now, without it, we have to do our own assessment and we generally only have 20 minutes or half an hour to make that assessment.

Q. Yes. Now does what you just said refer just to projects processed through a depository or does it apply to all projects?

A. It would apply to all projects but the bid depository where it is set up, has machinery whereby you can require a mandatory bond and all trades must then have the bond when they do it. We, as a contractor, could say to any

of our sub-trades that you have to have a bond before you bid our company and you must provide the cost of that bond in your tender or we will provide it, it wouldn't make any difference. If we do that, it makes us non-competitive with our competitors. We are putting money into our tender that our competitors will not have in and it lessens our chance of getting the contract, even though we are providing almost a positive guarantee that the owner will receive the product that he is paying for and that the project will not go bankrupt. . . . and thereby cost him more money and us too."⁸

Mr. E. R. Fenton, Executive Director of the Ontario General Contractors Association, explained that, while views among general contractors on bonding varied, the official position of his Association was that bonding should not be compulsory.⁹ However, the position of the General Contractors Association of Ottawa, expressed through the testimony of its spokesman, Mr. D. Baldock, is that compulsory bonding is necessary in order to protect general contractors from the risk of having to work with unknown firms--a risk which is created by the pressure to use the low bid when tenders are received through a bid depository.¹⁰

How the interests of prime contractors, sub-contractors and owners are affected depends on the specific bonding rules in effect. There is an important difference between rules which make performance bonds mandatory and those which leave the prime contractor the choice between waiving them or requiring them at his own expense. It is understandable why large trade contractors may want bid bonds as a form of pre-qualification. However, the further requirement that performance bonds be provided does not raise the standards for pre-qualification as long as it is known, through a letter of surety consent or otherwise, that the bonding company is willing to provide a performance bond. But, as expressed by Mr. Baldock, it matters to general contractors whether or not performance bonds are compulsory. Where they are, the bidders are usually responsible for payment, and that ends the matter for the prime contractor--except for the important consideration

that his risk situation has been improved. Where performance bonds are optional the prime contractor must decide, when preparing his bid, whether to include their cost in his tender. He must balance the need to remain competitive, which depends on what other bidders are likely to do, against the danger of incurring costs not covered in his bid, which could happen if the identity of the low sub-contract bidders made performance bonding desirable when its cost had not been fully included in the tender of the prime contractor. While the uncertainties related to bonding are minor when compared to others that arise in preparing a bid, compulsory performance bonding probably makes life somewhat easier for prime contractors.

Owners obtain their protection through the bonding of prime contractors. The contractors must look for protection to bonds made out to them in respect of their sub-contractors, and so on down the line. An owner does not obtain any additional protection when sub-contractors or sub-sub-contractors post bonds. The only possible direct advantage to the owner is that bonding constitutes a form of pre-qualification, although bid bonds by themselves are sufficient for that purpose. Nevertheless, a number of provincial departments of public works have adopted strict bonding requirements for sub-contractors. Often the regulations respecting bonding have been in effect for many years and the reasons why they were adopted were not known to officials who made themselves available during Hearings of the Commission.

Bid bonds. The ordinary purpose of a bid bond is to protect the receiver of a tender against withdrawal of that tender, but the evidence shows that many bid depositories do not require bid bonds principally for that purpose. The decision of a surety firm to supply a bid bond implies a judgment concerning the company's ability to undertake the project successfully. It is widely accepted that a firm which has a bid bond should have no difficulty in obtaining a performance bond from the same surety. Thus a bid bond has come to be regarded as a means of separating qualified and unqualified bidders. A performance bond is a guarantee by the surety firm that work undertaken by the company granted the bond will be completed. If the company fails, the bonding firm is

ultimately liable for the costs of completing the work. In the words of Mr. B. C. Gordon:

"When we issue a bond we are saying to the obligee that in our opinion this contractor is qualified to do this job. If we felt he was not qualified, we would not issue the bond."¹¹

A number of main and all-inclusive bid depositories have rules favouring bid bonds or making them mandatory. For example, in British Columbia:

"UNLESS OTHERWISE STIPULATED in the specifications, all deposited sub-trade bids over the amounts shown below are to be accompanied by a bid bond . . ."¹²

The Alberta rules state that:

"The trade contractor or sub-trade contractor shall enclose in the white envelope containing his bids . . . A bid bond, if his tender is in excess of \$10,000, . . ."¹³

This flat instruction is qualified in the present Supplement to Rules and Regulations of the Alberta Bid Depository as follows:

"The clauses referring to bonding in the Rules and Regulations will apply unless specifically deleted by the tendering authority."¹⁴

The previous edition of rules and regulations had made bonding compulsory.

Three of the five Saskatchewan depositories require bid bonds or a certified cheque (Rule 10). The fact that a certified cheque is acceptable means that the rule is more likely intended to serve the role of bid bonds outside of depositories than to operate as a device to pre-qualify bidders.

In Ontario there is mandatory bonding by the Windsor and Ottawa Valley bid depositories, two of the three bid depositories which do not accept the Ontario Standard Rules. Where the Standard Rules apply, however, bonding is at the option of the awarding authority.

Rules of the Bid Depository of Nova Scotia stipulate that:

"The suggested clause in the Rules and Regulations for bonding will apply unless otherwise stipulated by the Owner or Tender Calling Agent."¹⁵

A bid bond is required for mechanical, electrical or structural steel where the tender is in excess of \$20,000 and when it is in excess of \$10,000 for other trades (Rule 12.(a)(1)). Bonding had been mandatory in the previous rules for the Halifax-Dartmouth area.

Bonding is compulsory in several sub-bid depositories. The Vancouver and Lower Mainland Ventilation Contractors Bid Depository requires, in part, that bidders shall:

"Be able, by reputation, by completed installations, and by bid bond [to] prove that they are financially and mechanically equipped to complete this contract. . . . Where the total value of the tender is less than \$3,000.00 and is so certified on the large white envelope, the requirement for a bid bond shall not apply."¹⁶

Since the wording of this rule implies that the pre-qualification requirement exceeds the ability to obtain a bond, Mr. E. H. McCaffery, an official of the depository, was questioned on this point:

"Q. Let's say somebody comes in with a bid bond, and has a horrible reputation by somebody's standards. Then is he able to do it?

A. Yes.

. . .

I don't ever recall having refused a bid."¹⁷

The Toronto Sub-Bid Depository Rules of Procedure, introduced at the end of 1973, added a bonding clause which takes the following form:

"Where a Tender Calling Authority requires a Bid Bond and/or Agreement to bond from a receiving trade, the bidders to that trade shall provide at their own expense a Bond and/or Agreement in respect of their own bid, . . ."¹⁸

Where mandatory bonding is required by bid depositories, it is usually only applicable to contracts above a stated value. The Windsor Sheet Metal Bid Depository, however, required a five per cent bid bond on all bids according to its Rules of Procedure, effective March 30, 1964.

Under the Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects, the system is to accept the local rules, as appears from the following extract:

"In those areas where the local Bid Depository has established a system whereby each Trade Contractor's tender must be accompanied by a form of security, the local Bid Depository Regulations in this regard shall apply."¹⁹

It is clear that most bid depositories either require or slant their rules in favour of bonding. One reason is the conventional one associated with the use of bid bonds: to protect bid recipients against withdrawal of bids after they have incorporated them in their own bid submission. This purpose, but not that of pre-qualification, could equally be served by a certified cheque or other form of guarantee instead of a bid bond. Only in Saskatchewan is a substitute for a bid bond allowed. In parts of that province, bid security in the form of a certified cheque or other acceptable guarantee is required where a bid reaches \$5,000 and regardless of the value of the bid, the declaration form reproduced in Appendix B must be signed. A witness in Regina, Mr. J. W. McLellan, electrical contractor

from Regina and past-president of both the bid depository and the Saskatchewan Construction Association, stated the reason for the bid security requirement (applicable to Saskatoon, Prince Albert and Swift Current, but not to Regina and Moose Jaw) as follows:

"A. . . .

So what happens, really, with regard to this tendering security, it is really there for the protection of the prime contractors bidding a job to ensure them that the person who is bidding them will follow up with a subcontract.

Q. Has there been a decision by the Construction Association, or whatever, in Regina and Moose Jaw that they do not want this sort of rule to apply to them?

A. Yes, I was the chairman when there was considerable discussion and consideration given. The bid depository committee is made up, the Saskatchewan committee, is made up of representatives and the directorship is made up of representatives from each of these areas.

There were people in the three areas that had it and the majority of people felt that this was a requirement for their areas. They obviously must have a high incidence of people renegeing in order to justify the need for that procedure.

However, the people in the Regina area have assessed the thing and determined that the expense of it could not be justified because there is not a high incidence -- it is just not needed.

So, and I suppose it depends on the nature of the subcontractor in that specific area, whether you have got a high incidence of people who are trying to renege on the bid they have made, so one

area may need it and one area may not. It is left to the discretion of the people in that area to determine whether it is needed or not."²⁰

The failure of sub-contractors to live up to their bids, implicit in the above explanation, was not encountered anywhere else by the Commission. On the contrary, the evidence was that, while some bidders might try to negotiate about the scope of their tender, fulfilment of the contract at the tendered price is almost an article of faith in the construction industry. It might also be noted in passing that a sub-contractor who reneges on his tender is liable to civil action. However, because of the expense and time involved, prime contractors may not choose to rely on this remedy.

Trade contractors of Saskatchewan are charged \$25 per bid bond.²¹ The cost of a certified cheque varies with its size and the duration for which it is held. For unsuccessful bidders this is about one week, while for successful bidders it is subject to the length of time awarding authorities take to announce the successful prime contractor, since contracts between the prime and the sub-contractors must be made.

Calculations based on an interest rate of 12 per cent, give a gross interest cost of \$1.15 per week for a \$5,000 bid. Using this last amount as price unit, the costs are as follows:

<u>Period</u>	<u>Amount of bid</u>		
	<u>\$10,000 bid</u>	<u>\$20,000 bid</u>	<u>\$50,000 bid</u>
4 weeks	\$9.20	\$18.40	\$46.00
8 weeks	18.40	36.80	92.00

The net cost is lower where an arrangement is made to have the funds thus tied held in an interest-bearing account. Under these circumstances, the net cost on a certified cheque for a 4-weeks \$50,000 bid would be \$32.20 and for 8 weeks, \$64.40.

Insofar as interest costs are concerned, a certified cheque is cheaper than a bid bond where the bidder is fairly certain that he will be unsuccessful or where the bid does

not much exceed \$10,000. A bidder on a large project who does not, or cannot, obtain a bid bond will experience higher costs, but not at a burdensome level relative to the value of the project. Based on the evidence of one witness, Mr. J. Remail, general contractor of Saskatoon and President of the Saskatchewan Bid Depository, regarding the relative use of certified cheques and bid bonds:

" . . . earlier it used to be certified cheques, but it is generally probably half and half, very roughly speaking.'22

Included in the declaration form is an undertaking by the trade contractor to obtain a 50 per cent performance bond if required to do so by the successful general contractor, the cost of the bond to be borne by the general contractor. A firm using a certified cheque because it was unable to obtain a bid bond could be pulled up short if the prime contractor required a performance bond. However, the condition simply makes explicit the widely recognized right of a prime contractor, within and without bid depositories, to require a performance bond from his sub-contractors at his own expense.

Performance bonds. Only a few bid depositories explicitly require performance bonds. According to the information available to the Commission, these include the Alberta depositories (whenever bid bonds are required), the main Windsor and Ottawa Valley bid depositories, and the Windsor Sheet Metal Bid Depository (where both bid and performance bonds are compulsory). Prior to the last rule changes in British Columbia, both bid bonds and performance bonds were needed when the awarding authority specified bonding of trade contractors. Both bid and performance bonds had been compulsory under the rules of the Halifax-Dartmouth Bid Depository, and while Rule 13 on performance bonds had been dropped when the Nova Scotia rules were adopted, Messrs. W. A. Rozon and I. C. MacInnes stated that in practice there had been no change and that the rule had not been actually enforced except with regard to Public Works contracts of the Provincial Government.

The Ontario Bid Depository Standard Rules favour the obtaining of a commitment by the surety company

to issue a performance bond whenever the awarding authority requires a bid bond. Rule 8 declares:

- "(d) If the Tender Calling Authority deems the circumstances warrant the requirement that specific Trades provide Bid Bonds with their Tenders, the following clause may be added: 'The (named) Trade Bidders shall provide Bid Bonds with their Tenders submitted to the Bid Depository, in the amount of (stated) (\$), naming the Owner of the project as the Obligee and carrying a commitment to provide a Performance Bond for % (per cent) of the sub-contract with the Contractor selected by the Owner or his Agent.'"

Mr. B. C. Gordon, a representative of the surety industry, stated that bonding companies are opposed to performance bonds being optional where bid bonds are or may be required:

"A. The cost of writing a bid bond to us, an individual bid bond, we figure is somewhere around \$25, and if we are only charging \$10, which is the standard charge, we are actually losing money on every bid bond we issue. We would be better off not to charge anything. It would cost us less money because of the bookkeeping involved, the reporting of the business.

Q. Does it not mean that, actually, a bid bond will not be issued unless you are going to issue the performance, or other bonds?

A. That is right, and that is one of the problems we have had with bid depositories in the past, the fact that they have made bonding compulsory, but only for bid bonds and, therefore, we would be providing a service, you might say, for nothing, and nobody would ever ask for a final bond, or in very few instances. They would leave it

up to the discretion of the prime contractor to call for a performance bond, which he would only do in maybe half the cases or less, so this was a tough situation for our industry.

Q. Then I gather you would be very much opposed to a system in which only bid bonds were compulsory?

A. Right. We are even opposed to a system where bid bonds are elective, because the type of system we would want would be where a bid bond is required, bonding is required and that final bonding is mandatory. In other words, once they make the election to require bonding on a particular job, then they must follow through.

Q. I gather from what you are saying, sometimes there is an election for bonding and performance bonds are not picked up, so to speak?

A. Right.

Q. Where does this tend to happen most? We have heard some of this in British Columbia.

A. It happens in situations where final bonds are not mandatory under the rules of procedure of the various bid depositories; in other words, some bid depositories make bid bonds compulsory, but they have no similar requirements for contract bonds."²³

Since bid depositories do not have procedures for learning whether performance bonds were issued, the incidence of cases where bid bonds were required but performance bonds not picked up is not known.

Bonding of the trades and sub-trades as well as the prime contractor results in what might be termed "multiple coverage"--that is, the same work is bonded more than once. Multiple coverage occurs, for example, when the mechanical contractor holds a bond covering the performance of the sheet metal work, the prime contractor is protected by a performance bond for the mechanical work, which includes the sheet metal, and the owner is protected by a bond guaranteeing the performance of the entire project by the prime contractor. The owner's bonding protection is not increased by the bonds taken out by the sheet metal and mechanical contractors, nor does the prime contractor benefit from the bonding of the sheet metal work, since the prime contractor's protection is derived from the bonding of the overall mechanical work.

The cost of a performance bond which provides 50 per cent coverage is \$3.50 per thousand dollars of the tendered amount, with a discount of up to 30 per cent available to preferred-risk customers. 24 25

The way that the surety companies have taken the reduced risk situation of general contractors into account, where there is widespread performance bonding of trade contractors, is by increasing the bonding limit of the general contractors. A possible alternative response that was explored with Mr. Gordon when he gave evidence was that of a reduction in the price charged for performance bonds, which for a bond providing 50 per cent coverage is \$2.50 per thousand dollars of the tendered amount for preferred-risk customers and \$3.50 per thousand for other customers. 26 . However, these rates have been in effect for several decades and it is obvious that other variables are relied on by surety firms in responding to changes in market circumstances.

IV NOTES

1. Ottawa Valley Bid Depository Inc., Rules and Regulations (Revised March 1972), section 7.1(h).
2. Rules and Regulations for the Hamilton Insulation Bid Depository, section 14, Edition of December 1, 1969.
3. Transcript, p. 1421.
4. *Ibid.*, p. 1005-06.
5. Green Book, p. 97.
6. Transcript, p. 2861-62.
7. *Ibid.*, p. 2876-77.
8. Green Book, p. 96.
9. Transcript, p. 1259-63.
10. *Ibid.*, p. 4442-45.
11. *Ibid.*, p. 1520.
12. British Columbia Construction Association Bid Depository Rules of Procedure, 11(a).
13. Alberta Bid Depository Ltd., Rules & Regulations, Part II, 39.
14. *Ibid.*, Supplemental to Rules and Regulations.
15. The Bid Depository of Nova Scotia, Regulations and Rules of Procedure, Revised November 23, 1973, section 12.
16. Vancouver and Lower Mainland Ventilation Contractors Bid Depository Official Tender Manual, section 19(a).
17. Transcript, p. 1070-71.

18. Toronto Sub-Bid Depository Rules of Procedure, section 6.06.
19. Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects, Rule 12.
20. Transcript, p. 3440-41.
21. Evidence of Mr. J. Morgan, Transcript, p. 3511-12. The cost of bid bonds cited in evidence by Mr. B. C. Gordon, a representative of the surety companies, was \$10. This testimony is quoted in this section.
22. Transcript, p. 3511.
23. *Ibid.*, p. 1545-47.
24. Evidence of Mr. B. C. Gordon, Transcript, p. 1441-55.
25. Though these figures are regarded as standard by the surety industry, the evidence of Mr. Marsh, a mechanical contractor in Yarmouth, suggests that rates may go higher in some places. (Transcript, p. 2861.)
26. Transcript, p. 1441-45.

CHAPTER V

VIOLATIONS AND ENFORCEMENT OF BID DEPOSITORY RULES

Violations of bid depository rules can be broadly divided into two types. The first type is committed when firms tender outside the bid depository or engage in price negotiations after tendering through the bid depository. These situations are uncommon. The second and more usual type of violation is related to the submission through the bid depository of what are judged to be improper tenders, in the sense that they are contrary to the rules in one or more respects. The procedures used for dealing with the latter type of violation are discussed immediately below.

Evaluation of Tenders

All bid depositories have procedures for ensuring that bids are comparable. These procedures are one of the fundamental aspects of bid depositories because they ensure that the prices made available to tenderers relate to exactly the same work: a point repeatedly made in oral evidence and in written briefs. Once comparability is taken for granted, the access of tenderers to information on the amounts bid results in pressure on bid recipients to use the lowest bid or to be suspected of having engaged in secret price negotiations.

Another reason why comparability is considered important by supporters of bid depositories is that it eliminates the need for bidders and bid recipients to communicate with each other in order to clarify the specifications underlying a tender, since a discussion on that topic can lead to price negotiations.¹ In fact, it is probably inevitable that discussions for purposes of clarifying tenders will include mention of the values

attached to the parts of the work under discussion, and since tenderers generally know the value of bids submitted in their trade, the opportunity to clarify a tender can be turned to unfair advantage.

The instructions to trade and sub-trade contractors in bid depository rules of procedure provide the basis for tenders to be declared in violation of the rules. Some deal with specific matters such as whether the bidder may submit unsolicited alternate specifications, whether combined bids on two separate trade sections are permitted, and how such combined bids must be prepared if they are allowed. Others provide their instructions in more general language. For instance, the rules of the Saskatchewan Bid Depository state that:

". . . trade quotations shall be submitted in accordance with the plans, specifications and addenda, . . ." 2

The rules of the Alberta Bid Depository, on the other hand, set down the same requirement with express sanctions:

"If a trade contractor or sub-trade contractor deviates from, varies or fails to comply with any of the provisions of these rules and regulations relating to his tender and has thereby, in the opinion of the management committee, gained an unfair advantage over his competitors, his tender shall be rejected." 3

The Winnipeg Bid Depository and the Ontario Standard Rules⁴ contain similar language to that of the Alberta rules, while that of other major bid depositories⁵ is like Saskatchewan's. However, it does not appear that these differences in wording necessarily affect decisions by the various bid depositories as to what constitutes improper tenders.

The more important differences that exist among bid depositories with respect to ensuring comparability are found in the procedures followed, the timing of the evaluation, and the penalties imposed for violations. These matters are most easily treated together.

Apart from Q.B.D.S., one of the following three methods is used by bid depositories to deal with improper tenders:

1. A committee opens the tender envelopes soon after the closing of the depository, examines the tenders and declares "informal" those not considered to be consistent with the plans, specifications and addenda. Such tenders are not passed on to the general contractors.
2. A review of specific tenders is instituted only after complaints have been received. The complaint has to be made and the review completed several hours before the close of tenders for the prime contractors. If the tender is found to be improper, there is then sufficient time to inform the primes that they should not use this tender in the preparation of their estimates.
3. No attempt is made to prevent the use of improper tenders. Complaints are received and a review instituted only after the award of the prime contract. Firms found to have submitted improper tenders are subject to suspension from the bid depository.

All bid depositories use a modification of the first approach when dealing with bid bonds. The modification is that, since determining whether the appropriate bid bond has been submitted is a straightforward matter, it is the staff of the bid depository rather than a committee of contractors that make the inspection.

Apart from bid bonds, there are two major bid depositories, Peterborough and Ottawa Valley, whose written rules contain provision for declaring tenders informal before they are passed on to the addressees.⁶ In the view of the General Contractors Association of Ottawa this feature of the Ottawa Valley Bid Depository is a serious defect:

". . . a bid depository should not, on its own initiative, be able to decide whether tenders are informal or otherwise. The O.V.B.D. is out

of order and quite often out of competence, to rule on 'informalities' of its own initiative. Trivial and detrimental informality rulings, . . . can be the result of such unorthodox action. Objections, complaints and informalities should be initiated only by the tendering Trade contractors or the recipient Prime contractors."⁷

The O.V.B.D. does not rely solely on the initial screening of tenders. Its rules also provide for complaints regarding improper tenders to be submitted after the tenders have been passed on to the prime contractors.

Although the written rules of the New Brunswick Bid Depository do not spell out a procedure for evaluating tenders before they are passed on to the addressees, the oral evidence of Messrs. J. Burrows and J.F. Dobbelsteyn, at Fredericton, indicates that it is the practice to conduct such an evaluation.⁸ Tenders found to be improper are withheld from addressees. The written rules also provide that complaints regarding infractions of bid depository rules are allowed up to twenty-four hours after the bid depository closing. Failure to follow the rules can result in the tenders of the bid recipients, as well as those of the tendering firms, being disqualified.⁹

Alberta, Nova Scotia, Saskatchewan and the bid depositories operating under the Ontario Standard Rules do not examine tenders prior to passing them on to addressees. The initiative for complaints rests with trade and general contractors submitting and receiving tenders. The rules require their complaints be made and considered in sufficient time to prevent the incorporation of improper tenders in the prime contractors' bids.¹⁰ If an improper tender were used by the prime, the cooperation of the owner would be required to have it disqualified. The procedures of the bid depositories appear designed to avoid the expenditure of time and potential embarrassment associated with this step.

In the British Columbia and Winnipeg bid depositories, allegations regarding the submission of improper tenders are investigated after the award of the prime contract. Instead of disqualifying the tender, the deterrent is the threat of suspension from the use of the

bid depository. It cannot be said as a general matter which penalty is more severe, since this depends upon such facts as the length of time for which a firm is suspended, the tender closings occurring during suspension and the work schedule of the firm being penalized.

An additional consideration is the frequency of suspensions relative to the disqualifications of tenders. Between 1965 and 1968 suspensions from the Winnipeg Bid Depository were one or two per year. In British Columbia, there is no record of any formal complaints regarding the content of tenders and the few complaints and resulting suspensions in recent years appear to have related to price negotiations that took place outside the bid depository. The experience of these two bid depositories is in contrast to those which rely on disqualification. The record in British Columbia, in the view of Mr. W. Shaw, Executive Director of the Amalgamated Construction Association of B.C., is due to the prolonged length of time between the submission of tenders through the bid depository and the award of the contract by the awarding authority, with the interval serving as a "cooling-off" period.¹¹ Another likely reason is that, in British Columbia and Winnipeg, the complainant stands to gain only satisfaction, whereas in bid depositories which disqualify tenders the complaining firm stands to gain a contract. The frequency with which penalties are imposed for the improper content of tenders and other violations is discussed subsequently.

In the Q.B.D.S. all complaints are channelled to regional committees of the parties to the agreement setting up the Q.B.D.S. which issue warnings, publicly rebuke offenders in their trade papers, or impose suspensions and monetary penalties which are paid by offenders to their association. The general contractors or owners may also be asked not to use trade contractors' tenders found to be in violation of the bid depository rules. However it appears that, as in British Columbia and Winnipeg bid depositories, the emphasis is on the deterrent effect of punishment rather than on the disqualification of tenders.

In the sub-bid depositories, complaints are received and dealt with before the close of the primes'

tenders. As in the major bid depositories, the emphasis is on acting before the informal or improper tenders are incorporated in the tenders of the addressees.¹²

Unsolicited alternates. One of the bidding practices affected by procedures for ensuring comparability of tenders is that of the offering of unsolicited alternates. Awarding authorities often request tenders to show alternate pieces of equipment or material to those mentioned in the plans and specifications, as additions to or subtractions from the base price. An unsolicited alternate is one shown at the sole initiative of the tenderer. Whether or not alternates are requested, the decision as to their acceptability rests with the owner or his agents.

The general practice of bid depositories is, implicitly or explicitly, to disallow unsolicited alternates on the ground that they destroy comparability of tenders. This matter was explored at some length¹³ with Mr. B. L. Blaine, a general contractor and Chairman of the Board of the British Columbia Construction Association, and Mr. J. W. Bishop, the former Administrator of the Vancouver Bid Depository:

"Q. . . . As you know, one of the opinions formed in the Director of Investigation and Research's office with respect to bid depositories is that these rules of comparability that bid depositories really require, remove or take this incentive to innovate out of the competitive tendering process. I mean, he can't use that as part of the process of competition in designing his price and put that in his tender, and that, in that way, it affects the incentive and restrains innovation.

In that sense, is there any way you can see within the bid depository structure that that incentive to innovate, or his ideas can be used to help him get the contract?

MR. BISHOP:

- A. No, I don't, because if he goes and asks for an addendum, that puts him in the open field and his competitors would have the opportunity of bidding on that addendum. No, the only way he can do it is to be the successful bidder and then suggest the changes which he feels may save the owner money and make a better job.[14]

. . .

- A. The most important point is the one Mr. Blaine made and that is, unless the owner has authorized the design authority to write the specifications in such a way as to allow for alternate prices on innovative ideas or what-have-you, that they are not to be put in and can give rise to disqualification of the bid, not only the sub-contractor's bid, but also the general contractor's bid.

- Q. Why do owners require that? I would have thought, as long as they have bids on the specifications -- why wouldn't they welcome any other idea that anybody wants to submit?

- A. I would think, again, Mr. Blaine touched on this, and that is that some people think they know what they want. In fact, they are sure they know what they want, and they don't want any interlopers interfering with it.

- Q. But what about from an owner's point of view, take the electrical work in the instance I was talking about, an owner wouldn't care, so long as he had light and heat, or whatever electricity does.

- A. He might.

- Q. In the wires that are hidden in the wall somewhere that don't affect the function of the building, if he could save a certain amount on the building, I would have thought basically

he would be interested. I mean, I find it very difficult to think that there are some owners who would not want any idea to come forward. Some may have a very definite idea of what they want and they are more attached to a design, or some other particular thing, than others, but there must be a number of features in a building that might very well have an idea that could perform exactly the same function at a lower cost?

MR. BLAINE:

- A. Mr. McDonald, if I might just be allowed, I think it would be untrue to say that any owner is not interested in any savings he could make, but there are proper ways to do this. The first way you do it is, first of all, to establish who was the legitimate low bidder. From that point on, the owner and the general contractor and the legitimate low sub-trade contractor, can save all they want to save, and it just goes through the normal process and makes deductions to the contract amount.

The reason why we are probably speaking quite strongly on this particular subject is, a few years ago in this area, it was not unusual for the bidding authorities to call tenders on a large project and on the tender form there would be as many as 250 alternate prices required, all potential additions or reductions, and it was felt by the industry that in the best interests of the industry, that this was simply too much room for manoeuvrability. You could make any of ten general contractors low by simply manoeuvring 250 additions and reductions. The industry took a very dim view of this and as a result of it, the Architectural Institute tried to confine the potential adds and deducts at bidding time to a minimum, only to those very important items they very definitely were going to give consideration to,

but it is not unusual, in a multi-million dollar contract, at the end of the job, to have had 400 additions and deductions to the contract, brought about by savings, et cetera.

Q. I was really thinking of unsolicited ideas.

A. There are many unsolicited ideas coming from the sub-trades. Once they get the contract, they come forward. What bothers them, if they do it before the contract is signed, they think they get more than they do afterwards. I don't believe that.

Q. Once he becomes the sub I can see him doing all sorts of things, but what I am interested in is bringing his innovative ability, or whatever it is, to bear on the process of him becoming the established subcontractor, somehow.

When you spoke earlier about once he becomes legitimately established as the subcontractor, by 'legitimately' in that sense, you mean he bid according to the specifications and according to the addendum?

A. He has won the award because his price is right, comparing apples and apples, not apples and bananas and grapefruit, and so on.¹⁵

The matter of unsolicited alternates was also taken up with Mr. D. Baldock, a general contractor in Ottawa:

"Q. . . . As a matter of experience, how often are unsolicited alternatives offered? That is outside depositories.

A. I have an answer and I am trying to relate that to to say how often and it is like saying how often does it rain and it rains as often as it likes and just about often enough. In this case, again I am going to relate to a project of some substantial value and it would be a rather rare occasion when you put the whole

thing together. . . . there was [not] an unsolicited alternate which required some consideration. To this extent I could say 100 per cent of the time, at the risk of being completely misconstrued by the Commission But, certainly in the reception of, we will say, a job that has forty trades on it or thirty to forty trades, and assuming I am going to get a reasonable bit of competition in those trades that is five or six bids. By simple multiplication you are looking at anywhere from 150 to 200 quotations and I don't think I ever saw 150 to 200 quotations in one pile without at least one or two unsolicited alternates.

Q. Would that not to a large extent depend upon the specs?

. . . .

Q. The unsolicited ones could come if the specs allowed that. If your specs are so complete, so detailed that there is no place for alternates, would not then your unsolicited innovations or suggestions be precluded?

A. No, I would not say so. Again, the designing authority acting on behalf of an owner, or an owner, is rarely so rigid in his specifications, and I am thinking, for example, of a trade like painting. I am thinking of a project where the particular paint that was specified is not made in Canada, it is American, and as a result a gallon of it has only a little more than three quarts in it and the luxury of importing and paying duty on a gallon of paint and getting it here and finding out that it isn't a gallon of paint, resulted in an unsolicited alternate for an equivalent quality of paint of Canadian manufacture that has a gallon of it in a can. The owner in his wisdom decided to be quite flexible and realized that even though his company owned the company which manufactured this paint, he was still better off to buy his

paint from a competitor than he was to try and bring his own across the border."¹⁶

Combined bids. Another restriction on tendering practices resulting from bid depository rules of procedure relates to the combining of bids for two or more trades or sub-trades. The issue in this instance does not appear to be associated with comparability of tenders. Restrictions on combined bidding are found in Ontario, New Brunswick and Quebec.¹⁷ Although bid depositories in other provinces have specific rules on making or withdrawing combined or lump-sum bids, they are permitted.¹⁸

One of the effects of a prohibition against combined bids is that it becomes more difficult for bidders to reflect savings in administration and supervisory costs which may result when a contract is obtained for more than one sub-trade (e.g. plumbing and heating) or more than one trade (e.g. mechanical or electrical). If the anticipated savings are divided and reflected on the tenders for each of the trades, the tenderer might find himself low bidder in only one case, on the basis of the bid that took into account savings resulting from obtaining the total package of work for which tenders were submitted. In contrast, where combined bids are allowed, the anticipated savings can be reflected in the value of the combined bid, with the result that some of the bids for each of the trades are less than the combined bid. The spread of the cost of supervision over more than one trade is probably of greatest importance when a firm is bidding on an out-of-town project.

Only in the case of the Q.B.D.S. are reasons provided for the prohibition against combined bids.¹⁹ The first reason is to ensure that the awarding authority "will receive various tenders from several bidders, in accordance with his specialty list." In addition:

"If the Q.B.D.S. agreed to a decrease of the price grouping several specialties, it would conspire to the elimination of bidders, thereby reinforcing the bigger ones and allowing within a few years a possibility of complete control."

It is relevant to note that there is no evidence in Quebec or in other provinces that the competitive position of smaller firms is so fragile that the protection against combined bids is required. Moreover, if such information were available, the inability of smaller, more specialized firms to compete would raise serious questions regarding their relative efficiency.

Bypassing of Bid Depositories

Any widespread occurrence on bid depository projects of tender awards as a result of discussion outside bid depositories would represent a breakdown in their functioning. The available evidence indicates that this has not taken place. The most open threat to bid depositories occurs when bids are not put through the bid depository. This conduct is practically unheard of outside of bid depositories which consult owners on their use. A fair number of tenders are not submitted through the masonry bid depository in Winnipeg, but this only occurs with firms who are not members of the association that operates the bid depository. Many cases of firms tendering outside the bid depository show up in the record of violations of the Q.B.D.S. rules which is discussed later in this chapter.

Another avenue to the arrangement of contracts outside bid depositories is opened when prime contractors tender to themselves. Under most bid depository rules, prime contractors are required to give notice to the bid depository when they intend to tender to themselves so that sub-contractors can take this information into account in deciding whether to bid to them. For the most part, sub-contractors avoid bidding to prime contractors who tender to themselves, since it is generally understood that such prime contractors intend to use their own work force if they are successful in obtaining the contract. In some instances, however, use of the bid depository is avoided because the prime contractor in fact arranges for the work to be done by a trade contractor. This sub-contractor, who agreed to the arrangement, then becomes a party to a violation of bid depository rules. The incidence of such conduct is reduced by the high degree of specialization in the construction industry, which makes the naming of

own forces implausible for most trades. Furthermore, it is generally known to the sub-trades whether a prime contractor has the capacity to perform the work itself. The evidence from most bid depositories is that prime contractors do not make a practice of tendering to themselves unless they are vertically integrated. For instance, there are several mechanical contractors who always tender to themselves through the Toronto Sheet Metal Sub Bid Depository, and the mechanical and electrical divisions of integrated firms often tender to their own general contracting division.

There is some question whether the marked incidence of general contractors who bid to themselves in New Brunswick is explained by vertical integration. The rules require that:

"A General or Prime Contractor intending to use his own forces or a subsidiary company for one or more of the complete trade sections shall deposit his bid in accordance with the Regulations of the Bid Depository.

A General or Prime Contractor intending to bid himself on a trade called through the Bid Depository must notify the Bid Depository in writing. This notice must be received 5 calendar days prior to closing of the Bid Depository."²⁰

According to the brief of the New Brunswick Government and the oral evidence of witnesses, the option of tendering to themselves, which is available to general contractors, is regarded as a safeguard against the submission of excessively high bids by sub-contractors. However, in the view of a trade contractor witness, it is unlikely that general contractors tendering to themselves always have the capacity to perform the work and when they do not it is assumed by trade contractors that they make an arrangement outside the bid depository.²¹ It is significant that the bid depository has not received any complaint about general contractors bidding to themselves in trades in which they are not actively engaged. This would suggest that the general contractors have not fully accepted the bid depository and that the compromise between the trades and the general contractors takes the form of a wide interpretation of the bid depository rules.

The brief of the Nova Scotia Government²² and the evidence that two general contractors were suspended during a three-year period, because they specified their own forces and then contracted out the work,²³ suggest that general contractors in Nova Scotia may have made a practice of using this device to by-pass the bid depository. In order to gain an appreciation of the extent of the practice, the tabulations for all projects going through the Halifax bid depository from February 1973 to February 1975 were examined for instances where prime contractors bid to themselves. This evidence shows that, relative to the activity through the bid depository, use of own forces was infrequently specified. Considering the two major trades separately, there was one instance out of 126 mechanical and electrical trade calls when a prime contractor bid these specialties. But since the firm in question is an integrated national company, it undoubtedly did the work itself. Out of roughly 397 trade calls in the other specialties there were only 15 instances in which own forces were specified, which represents the maximum number of cases that this means could have been used to by-pass bid depositories. These figures indicate that specification of own forces is rarely used by prime contractors to avoid bid depositories and the suspension of general contractors shows that the bid depository has taken action against such conduct.

In contrast to the New Brunswick situation are the rules of the Windsor Sheet Metal and Winnipeg bid depositories. If enforced, the rules of the Windsor depository would create an arms-length relationship between the mechanical and sheet metal sections or divisions of single firms:

"Any Mechanical Contractor having his own Sheet Metal department or company must place his bid through the Sheet Metal Depository and must quote his sheet metal price to two other Mechanical Contractors bidding the job and also be prepared to award the sheet metal work contract to the lowest sheet metal bidder."²⁴

The Winnipeg bid depository gives the general contractor more latitude than other bid depositories, in permitting him to do the work with his "own forces" without first

announcing his intention to do so. But as seen in the rule quoted below, a very strict interpretation of the term is used:

"A general contractor may accept or reject any bid received. If a general contractor rejects all bids for a Bid Depository sub-trade, he must perform the work with his own forces. 'Own forces' will mean labour on the payroll of the firm bidding the general contract. He may not sublet the work to a subsidiary company or a separate division of the parent company. He may not perform the work by contract labour or by labour only sub-contract."²⁵

Another way in which contracts may be awarded contrary to bid depository rules is through negotiations between prime contractors and sub-contractors who have tendered through the bid depository. On the face of it, there is nothing to stop a sub-contractor and a prime contractor from engaging in secret post-bid negotiations even when bids are submitted through a bid depository. The Manitoba Masonry Contractors Bid Depository is the only bid depository covered by the evidence that has procedures explicitly designed to deal with secret price negotiations:

"In the event that a complaint is received after a tender has been accepted that payment has been wrongfully made at a greater or less amount than the tendered sum the bid depository committee shall have the right to require a chartered accountant from any of the undermentioned firms to examine the books and records of the person who is the subject of that complaint ('the chargee') and to certify to the committee what discrepancies if any there is between the price bid and the price actually paid, and the difference between payments made or credits allowed respecting the additions to or deletions from the contract and the actual cost thereof to the chargee. Any person refusing to permit such an audit or who is guilty of wrongful bidding practices or refuses to pay the cost of such an audit in the event that it is adverse to him, shall be guilty of a breach of these regulations."²⁶

However, the possibility of secret price negotiations is eliminated when the low bidder is selected. None of the bid depository rules deposited with the Commission requires that the contract be awarded to the low bidder, and the Alberta, Quebec and Saskatchewan rules each contain a statement that relieves the prime contractor of the responsibility of selecting the lowest bidder.²⁷ This statement is presumably a recognition that there may be good reasons why a prime contractor may not want to work with a particular sub-contractor. Although bid depositories do not require that the low bid be selected, A Guide to the Rules and Principles of the British Columbia Bid Depository appears to express the views of trade contractors:

"Ordinarily the General Contractor will name the qualified sub-contractor tendering the lowest price, but if another sub-contractor is named and ultimately receives a contract, it should be at his tendered price."²⁸

Furthermore, unless there are good reasons, such as lack of competence, unsuccessful low bidders may receive the support of provincial awarding authorities, as described in an example cited by Mr. J. F. Dobbelsteyn of Fredericton, a member of the C.C.A. Standard Practices Committee:

"A. I think, in answer to your question regarding whether or not there has been shopping ---

Q. Price negotiations.

A. Yes. Say in the electrical, not currently, but over the years there have been problems where bids have been received through the bid depository and the low bidder was not accepted.

Now, having bid through the bid depository, some contractors get the feeling that they have some sense of security that their bid will be accepted, but there is nothing in the bid depository rules and regulations that say that the low bidder will be accepted, or any bid. So we have had occasion where

the electrical contractor, . . . was low bidder and he is a most reputable firm, and yet he did not get the project. They took the next highest bidder.

The case was taken before the tendering authority and, for no just reason was his bid turned down, and the decision was reversed. The second-highest bidder was dropped and the contractor was made to pick up the low bid because he didn't have a good reason for not taking him in the first place, other than probably the fact that he probably would sooner work with so-and-so.

Q. So, in most cases the low bidder is used, that is, within your trade?

A. I would say pretty well 100 per cent."²⁹

The fact that many governments are required by law to award contracts to the lowest bidder must be an important factor in their approach to any appeals launched by unsuccessful low bidders. Of interest in that connection is the reference in the brief of the Manitoba Government to "the almost sacred right of the low bidder to the award of the contract."³⁰

The possibility of other than a low bidder being awarded the contract was often raised by witnesses, but it was their experience that this happened very rarely, and figures of the order of 99 per cent were used in referring to the success-rate of low tenders submitted through the bid depository. However, complete records on this matter are maintained by the Q.B.D.S. and the Ottawa Valley Bid Depository because they are mainly financed through a levy on successful bidders.³¹ The experience of low bidders through the O.V.B.D. in 1973 is summarized below, with "Yes" indicating that the low bidder was successful and "No" that he was not.³²

Trade	Yes	No
Mechanical*	62	2
Electrical*	63	3
Plaster	45	-
Accoustic	28	1
Total	198	6

*Two mechanical and one electrical trade calls where the successful bidder had tendered to himself were excluded, as well as three which were unclear.

Thus, 97 per cent of the awards were to low bidders.

Low bidders in Quebec are far less successful than in other parts of the country. The ranking of successful bidders has been compiled by the Q.B.D.S. for tenders received in 1972:³³

"Bidder's Rank	Number of Bidders	%
Lowest	3,274	80.7
2nd	532	13.1
3rd	146	3.6
4th or higher	107	2.6"

If trade calls when there was only one tenderer were included in the table, the success of low bidders would be overstated. In any event, the roughly 19 per cent of trade calls in which other than the low bidder received the award represents a substantial proportion of trade calls in which tenderers could not be certain that negotiations did not occur. An examination of the tabulation sheets for projects³⁴ in three bid depository regions does not suggest any obvious explanation for the wide disparity between the Q.B.D.S. and other bid depositories. One hypothesis that was systematically explored was that owners who did not specify the bid depository would feel freer than prime contractors to select other than the lower bidder. However, the sample of projects clearly indicates that for the three regions taken together prime contractors are not less reluctant than owners to pass over the low bidder.

Enforcement

The nature and incidence of bid depository penalties and the manner in which they are imposed are further discussed in this section. Outside of Quebec and the Manitoba Masonry Contractors Bid Depository, penalties for breaking bid depository rules consist of disqualification of tender and/or suspension. In Quebec, fines, suspensions (in the case of the Corporation of Master Electricians) and public censure in trade newspapers are used, and under the rules of the Masonry Bid Depository firms may be fined or suspended.

The procedures for dealing with violations in a number of bid depositories only relate to disqualification of tenders. The Ontario Standard Rules and those of Alberta, New Brunswick, the Windsor Bid Depository, and all sub-bid depositories save those in Vancouver, contain procedures solely related to achieving comparability of tenders. Seemingly there is no concern for violations which go beyond the submission of improper tenders, but all bid depositories probably reserve the right to suspend firms which violate bid depository rules, and the absence of a record of suspensions may mean that serious challenges to bid depository authority have not occurred. A condition of eligibility to use any bid depository (save those in Quebec, where bid depository authority is maintained in a different way) is that the rules must be observed. In the words contained in the Ontario Bid Depository Standard Rules, section 7:

"The facilities of the Bid Depository shall be available to all Owners, Prime and Trade Contractors submitting and/or receiving tenders on projects utilizing the Bid Depository, providing that these Rules and Procedures are observed together with relevant Federal and Provincial legislation. . . ."

However, whether there is any additional deterrent value in the foregoing beyond that provided by the effective organization of trade contractors is not known. That is, a general contractor faced with the prospect of not receiving tenders from trade contractors, should it become known that he engaged in price negotiations on a bid

depository job, may find the penalty of being denied access to the bid depository redundant. In any event, there have been no instances in which firms were denied use of a bid depository because their eligibility was affected by their failure to adhere to the rules. Where suspensions have occurred, they have been from bid depositories whose rules specify that measure.

In Saskatchewan, the declaration form that firms must sign in Saskatoon, Prince Albert and Swift Current (where bid security is required for bids in excess of specified values) requires that signatories "acknowledge that suspension of Depository privileges may result from infraction of the Regulations." However, according to officials of the Saskatchewan Bid Depository, there have not been any instances in which firms have been suspended from a Saskatchewan bid depository.

The term "disciplinary action" appears in the rules of the Nova Scotia and Ottawa Valley bid depositories. In the case of the O.V.B.D., there are procedures for disqualifying tenders both before and after they are passed on to addressees, and disciplinary action appears as a separate response to violations of the rules. While the context suggests that the term is meant to encompass suspension, the available evidence does not indicate that this penalty has been imposed. In Nova Scotia, there is no express reference to specific penalties, which have taken the form of infrequent disqualifications of tenders and suspensions.

In Nova Scotia complaints are addressed to the Joint Advisory Council, which is a mixed body consisting of trade and general contractors and design authorities. It may appoint a jurisdictional committee, consisting of a general contractor, a trade contractor and a third party, to evaluate tenders. The opinion of the committee must be unanimous for a tender to be disqualified. Regarding suspensions, the Joint Advisory Council may recommend this action to the Directors of the Construction Association of Nova Scotia.³⁵

The responsibility for opening bid depository envelopes and evaluating tenders in order to determine whether they should be passed on to general contractors

in the O.V.B.D. resides with at least two of the following officials: the Secretary-Treasurer of the O.V.B.D., and the General Manager or the Secretary of the Ottawa Construction Association.³⁶

The Peterborough Bid Depository contains provisions for disqualification of tenders and lengthy suspensions (three months for the first offence) for more serious offences. In 1969, the year for which it filed a return of information, it suspended a general contractor for using a tender that did not come through the bid depository. A committee consisting of one electrical, one mechanical and one general contractor evaluates the tenders before they are passed on to the general contractors. Tenders can be disqualified by majority opinion.³⁷

In British Columbia there is no procedure for disqualifying tenders. All violations, including the submission of improper tenders can lead to suspension. In British Columbia there has never been a formal complaint against improper tenders and so the bid depository has never been required to act against such conduct. Each of three cases of suspension during a three-year period involved attempts to by-pass the bid depository. In two instances, general contractors used bids they received outside the bid depository and both the general and trade contractors were suspended. In the third instance, a trade contractor changed his bid, which had originally been made through the bid depository, and two of the four general contractors tendering on the project incorporated the changed bid. The trade contractor and the two general contractors were suspended.³⁸

The main depository in Winnipeg also has no procedure for disqualifying tenders. From 1966 through the early part of 1969, there were seven instances in which one or more firms were suspended. The first resulted from the failure of a withdrawing firm to inform the successful general contractor of his withdrawal, and the second because a plumbing firm did sheet metal work itself after accepting bids for this specialty from the bid depository. Under the rules, it should have informed the bid depository of its intention to perform the work

itself. In the remaining five instances, tenders were submitted which did not exactly conform to the specification. In two cases the tenderer clarified his bid and this led to the suspension of the prime contractor as well as the tenderer. In the remaining three, only the tenderer was suspended.³⁹

In British Columbia disciplinary powers are exercised by the Bid Depository Committee of the regional construction association. Firms suspended by such a committee may appeal the decision to an Appeal Board appointed by the Board of Directors of the Construction Association.⁴⁰ A similar procedure is followed in Winnipeg, where the initial decision is made by the Bid Depository Committee of the Winnipeg Builders Exchange and the appeal body is the Executive of that organization.⁴¹

Complaints against alleged violations of the Q.B.D.S. Code or rules of procedure are initially received by the Q.B.D.S., and are then passed on to local management committees, who forward the complaints to the corporations and associations that are parties to the agreement establishing the Q.B.D.S.⁴² Regional committees of the electrical and mechanical contractors (that is, the Corporation of Master Electricians of Quebec and the Corporation of Master Pipe-Mechanics of Quebec) enforce the codes of conduct contained in their respective acts. Discipline for the other trades is imposed by the Construction Association of Montreal and Quebec (C.A.M.Q.), and regional committees of the Construction Federation of Quebec (C.F.Q.). Information submitted to the Commission shows the number of complaints of alleged violations of the bid depository rules between October 1, 1972 and September 30, 1973. Unfortunately, there were a number of places where the information provided to the Commission was difficult to interpret. The main source of the difficulty was that the outcome of all the complaints originating from a single project were physically squeezed together in the presentation of the information and were consequently difficult to interpret. This accounts for the number of "not known" in the last column of Table VI, which refers to the Commission's inability to interpret the data rather than to the absence of a record in the Q.B.D.S. and the respective corporations and associations. Difficulties

TABLE VI

DISPOSITION OF ALLEGED COMPLAINTS OF VIOLATIONS
OF Q.B.D.S. RULES OF PROCEDURE

October 1, 1972 to September 30, 1973

ASSOCIATION	DEFENDANTS *	REJECTED	LETTERS	FINED	FINES **	SUSPENDED	NOT KNOWN
C.F.Q.	447	55	223	53	\$10,732	2	121
C.M.P.M.Q.	169	60	22	74	13,090	13	10
C.M.E.Q.	206	38	64	76	21,850	13	29
TOTAL	822	153	309	203	\$45,672	28	160

Source: Information provided by the Quebec Bid Depository System.

* The total number of defendants is less than the sum of the various dispositions of the complaints, because some defendants were both fined and suspended, or both sent letters and fined.

** Eight additional fines are not shown in these figures as they were only noted by a percentage figure; one of the fines was imposed by the C.F.Q. and the others by the C.M.E.Q.

of interpretation also means that there were no doubt occasions when incorrect decisions were taken regarding the meaning of the information. Accordingly, the numbers shown in the table should be read as reasonable approximations of enforcement activity rather than as completely accurate measures.

Most complaints in trades other than mechanical (C.M.P.M.Q.) and electrical (C.M.E.Q.) were either rejected or resulted in a reprimand. In contrast, 40 per cent of the firms who came before one of the two corporations suffered a monetary penalty. However, the average level of fines imposed by the C.F.Q. (\$202) fell midway between those set by the C.M.P.M.Q. (\$177) and the C.M.E.Q. (\$288). As indicated by the average level of fines, rarely is the full five per cent penalty, which is allowed under the acts of the two corporations and set out in the "obligation" firms submitting tenders through the Q.B.D.S. are required to sign, exacted. But in addition to severe penalties by way of substantial fines, 13 mechanical and 13 electrical contractors were suspended from their respective corporations and hence were barred from bidding for work. The suspensions were generally for periods of several months.

Only nine complaints were brought to the C.A.M.Q. and these have been included with those received by the C.F.Q. in Table VI. Since more than half of the complaints were based on projects in the Montreal region, the almost total bypassing of the C.A.M.Q. may reflect the reservations toward the Q.B.D.S. by the Montreal-based association that is discussed in Chapter II.

The data from which Table VI was prepared do not show the nature of the alleged violations. Such a breakdown is shown in material provided by the two corporations for the period April 1, 1973 to March 31, 1974. The breakdown shown by the mechanical corporation follows the sections of the Q.B.D.S. rules and that provided by the electrical corporation is set out under verbal descriptions which closely correspond to sections of the rules. A summary of successful complaints is shown in tabular form below.⁴³

	<u>Electrical</u>	<u>Mechanical</u>
Tendering outside bid depository	49*	22
Change in conditions of tender	3	2
Violations involving tender recalls	7**	2
Improper tenders	12	67
Other	1	-

* Included are three complaints for which no information on the nature of the offence was provided. In each instance the maximum monetary penalty of five per cent was obtained and we assume this is most likely to be done when a firm tenders outside the bid depository.

** In three of these instances the complainant also charged that there were changes in the conditions of the tender.

The most frequent violation of the Code by electrical contractors concerned section D-1, which is as follows:

"All tenders subject to the conditions of the application of the Code (Chapter B), and copies thereof and/or other required documents, are to be sent to addressees through the Q.B.D.S. only." 44

This rule must be particularly difficult to enforce when the amount tendered is close to the maximum amounts established by the Code which permits the bid depository to be by-passed: \$5,000 for electrical work and \$10,000 for the mechanical and other trades. A number of the tabulations examined by the Commission showed one or two bids slightly above these values, with a notation on the tabulation sheet that another tender had been submitted directly to the owner or prime contractor. In many of these instances a complaint is made against the tenderer who bypassed the bid depository on the grounds that his bid exceeded the allowable maximum. A second violation which involves the bypassing of the bid

depository is a change in the conditions of a tender submitted through the bid depository. In total, this occurred in five instances. The most frequent violation by mechanical contractors concerned the submission of improper tenders. However, firms which failed to tender through the bid depository were clearly considered to be the more serious offenders, as reflected in the fact that they accounted for about 24 per cent of the successful complaints and paid almost 45 per cent of the \$10,650 worth of fines levied against mechanical contractors. There is a stronger tendency for tendering firms to by-pass the Q.B.D.S. than other bid depositories even when allowances are made for the greater volume of activity in the Q.B.D.S.

Quebec experience with regard to improper tenders is not atypical. As the evidence presented below indicates, while the number of complaints against improper tenders in Quebec is clearly on the high side, it is well within the range of experience of bid depositories such as the O.V.B.D. and Regina.

The number of tenders disqualified in several major bid depositories, as reported in returns of information for 1968, is shown in Table VII. Late tenders and those rejected because of problems with bid bonds are not included. Most bid depositories did not report this information, but the extent to which bid bonds can be a source of disqualification in some centers is illustrated by Calgary (23 instances) and Edmonton (15), where bid bonds were compulsory. Since low tenders are most likely to be the object of complaints and disqualifications, the number of trade calls is the most relevant base against which to measure the frequency of disqualifications. Unfortunately, the number of trade calls was not always provided and in some instances had to be estimated (roughly) from the scope of the bid depositories.

Consideration has been given to the probable reasons for the great variation between Halifax and Toronto, on the one hand, and the O.V.B.D. and Regina on the other. Numerous disqualifications may indicate a large number of instances in which non-comparable bids were submitted and/or the application of very strict standards in judging comparability. Several reasons may account for a low frequency of complaints against submission of non-comparable tenders. One of these, a small

TABLE VII

NUMBER OF TENDER DISQUALIFICATIONS,
PROJECTS AND TRADE CALLS IN SEVERAL
MAJOR BID DEPOSITORIES IN 1968

BID DEPOSITORY	NUMBER OF DISQUALIFICATIONS	PROJECTS	TRADE CALLS
Saint John	N.A.*	14	**
Halifax	0	59	**
Toronto	2***	237	474
Ottawa Valley	36****	110	326
Regina	108	38	380
Saskatoon	13	45	450
Calgary	8	61	1,830
Edmonton	25	101	1,621

Source: Returns of Information.

* The bid depository did not keep records of the number of disqualifications.

** Not estimated because information not necessary.

*** There were 13 complaints, of which two were successful.

**** Seven of the disqualifications occurred on a single tender call for which there was a total of eight tenders.

number of bidders in any trade call, is applicable to Halifax. (The experience of the Halifax and other bid depositories with regard to the number of tenders received and their rules on this matter are discussed in a later chapter.) Other factors are the quality of bidders and the plans and specifications. The effectiveness of enforcement against non-comparable tenders may also be a factor, but it is one that could operate either way. Where non-comparable tenders are the result of honest mistakes, effective enforcement probably enlarges the number of rejected tenders, and clearly discourages non-comparable tenders submitted in an attempt to gain an advantage over competitors. While it is not possible to determine the importance of these factors, it is useful to recognize them as a means of maintaining a broad perspective.

The criteria used in determining non-comparability and the procedures followed in judging tenders are also likely to be sources of variation among bid depositories in the number of rejected tenders. With regard to criteria, at one extreme any deviation from the plans and specifications is regarded as cause for disqualifying a tender; and at the other extreme, only deviations that can yield the tenderer an unfair advantage are used as grounds for rejecting a tender. The latter approach was followed by the Toronto Bid Depository over a number of years and is now incorporated in the Ontario Bid Depository Standard Rules. As mentioned earlier, the rules in Alberta, and Winnipeg (which does not have a procedure for disqualifying tenders) also call for the same consideration to be used in evaluating tenders.

The procedures and criteria used may complement each other. It is obvious that the practice of evaluating tenders before they are passed on to addressees is more likely to lead to the disqualification of tenders for purely technical reasons--that is, deviations from the plans and specifications which do not afford a tenderer with an unfair advantage over his competitors. The failure of firms to sign their tender or to name general contractors, examples which were raised in Fredericton at the Commission Hearings, are examples of technicalities used to disqualify tenders.⁴⁵ Another example of a technicality led the Ontario Government to

intervene and reinstate a tender which had been ruled informal by the O.V.B.D. As far as can be determined, the fault with the tender was the absence of a list of all addenda, even though the missing addenda had no bearing on the bid of the trade concerned.⁴⁶

Mr. R. G. Clarke, Contract Control Coordinator, Ministry of Government Services of the Province of Ontario, commented on this aspect of a number of Ontario bid depositories:

"A. . . .

Originally they did not open the tenders or screen them in the bid depository unless there was a complaint or informality. It appeared that it was becoming a common practice to open the bids, screen them, in cases where they felt a bid was informal, not forwarding it on to the contractor but reeling it out right there.

It was our view, and in other cases, they declared tenders informal for very, very minor technicalities, meaning it was a valid, basic bid, but because a tenderer had not dotted an 'i' or crossed a 't', they would rule it out.

It was our opinion that they had to get away from this as far as we were concerned, and furthermore, we felt that, as the owner, we should have the final decision on a matter of an informality, rather than have it screened and rejected before it even got to us.

Q. Was this problem a fairly frequent one that you ran into up to 1972?

A. Not too frequent.

Q. Just frequent enough to make them change the policy?

A. It happened maybe once or twice a year and when we had a fair number of tenders, so the incidence wasn't high, but the fact that this was creeping in and that tenders, good and valid tenders,

were being tossed out for very minor technicalities--unfortunately, whether it was coincidence or not, it appeared that every time a tender was declared informal, he was somebody from out-of-town, at least in the vast majority of cases, and it looked as though--it had the appearance of local people sort of abusing the bid depository."⁴⁷

Since an exercise of judgment is necessary in order to determine when a departure from the plans and specifications yields an advantage to a tenderer, the procedures followed in arriving at a decision assume some importance. Additionally, as demonstrated by the "Procedure re Alleged Informal Tenders" of the Ontario Standard Rules and Procedures shown below, the ease or difficulty in making complaints against informal tenders is an important dimension of procedures:

"(f) Procedure re Alleged Informal Tenders.

- i Informality. - A tender shall be declared informal if such tender creates the opportunity for manipulation of the total tendered price.
- ii Allegation of Informality. - Any trade or Prime Contractor, tendering the project, may make an allegation of informality against any tender. This may be done by telephone but must be confirmed in writing accompanied by a certified cheque made payable to the Bid Depository in the amount of 1/10 of 1% of the protested tendered price; the minimum amount payable shall be twenty-five (25) dollars and the maximum two hundred and fifty (250) dollars. The Bid Depository shall then notify the alleged informal bidder of the complaint.
- iii Hearing. - The complaint shall be heard by a Local Judicial Committee at least three (3) hours before the Prime Contractors' closing time. The Judicial Committee shall be composed of persons whose firms are not involved in the project in question and

shall be one contractor from the trade concerned, one Prime Contractor and a third party. A tender shall be declared informal only by the unanimous decision of the Committee.

- iv Informal Ruling. - In the event that the Committee declares an informality, it shall immediately advise the informal bidder, the concerned Prime Contractors and the Tender Calling Authority by telegram, which shall state the nature of the informality and shall also advise the Prime Contractors that the tender in question is informal.
- v Formal Ruling. - In the event that the Committee rules the tender to be formal the deposit shall be forfeited and shall be credited to the general funds of the Bid Depository.
- vi Appeal. - The ruling of the Judicial Committee may be appealed to the Bid Depository Operating Committee whose decision shall be communicated to the Tender Calling Authority."

In Alberta, "the members of the bid depository management committee or any official they designate may examine all tenders, envelopes or other documents relevant to the complaint" for the purpose of determining whether a tender should be disqualified.⁴⁸ There is no appeal procedure.

A similar approach is followed in Saskatchewan where the bid depository management committees of the local construction association have the authority to disqualify tenders.

V NOTES

1. Evidence of Mr. E. H. McCaffery of the Mechanical Contractors Association of British Columbia, Transcript, p. 1060.
2. The Saskatchewan Bid Depository Regulations, January 1, 1975, section 9(B).
3. Alberta Bid Depository Rules and Regulations, section 37.
4. Rules of the Winnipeg Bid Depository, section 7(g); Ontario Bid Depository Standard Rules and Procedures, Second Edition, Revised June 10, 1974, section 12(f)(i).
5. British Columbia Construction Association, Bid Depository Rules of Procedure Revised September 1, 1973, section 5(b); Bid Depository Rules and Regulations, New Brunswick, Revision 1, September, 1973, General Conditions; The Bid Depository of Nova Scotia, Regulations and Rules of Procedure, Revised November 23, 1973, section 8(d).
6. Ottawa Valley Bid Depository Rules and Regulations, 7.4) and Peterborough Bid Depository Rules of Procedure, under the heading "Procedure to be Followed by the Bid Depository."
7. General Contractors Association of Ottawa, Critique of the O.V.B.D. Rules and Regulation, p. 4, para. 6.
8. Transcript, p. 3107-08.
9. New Brunswick Bid Depository Rules, section 20.
10. Rules and Regulations of the Alberta Bid Depository, Nos. 78-81; Nova Scotia, rule 11; Halifax-Dartmouth, rules 11 and 12; Saskatchewan Bid Depository, rule 13; and Ontario Standard Rules, 12(f). The old rules of the Halifax-Dartmouth Bid Depository are useful in giving a fuller understanding of the Nova Scotia rules on matters where there is no change in policy because the old rules provide more detail.

11. Transcript, p. 885-86.
12. Rules - Vancouver and Lower Mainland Refrigeration Contractors, 16.(b); Vancouver and Lower Mainland Ventilation Contractors, 16.(b); Hamilton Insulation Bid Depository, 19; Ottawa Valley Insulation Sub Bid Depository 23 and 24; Ottawa Valley Sheet Metal Sub Bid Depository, 23 and 24; Toronto Sub-Bid Depository, 18.
13. Transcript, p. 904-25.
14. *Ibid.*, p. 906-07.
15. *Ibid.*, p. 914-17.
16. *Ibid.*, p. 482-84.
17. Ontario Bid Depository Standard Rules and Procedures, 10(d); Windsor Bid Depository, rule 12; Quebec Bid Depository System, rule A-7.
18. Rules of: British Columbia Construction Association Bid Depository, 5(f); Alberta Bid Depository, 24(1); Saskatchewan Bid Depository, 9(A) and 9(I); Winnipeg Bid Depository, 7(c) and 11(b); and The Bid Depository of Nova Scotia, 8(b).
19. Study of the Q.B.D.S., page 17, Appendix 1.
20. Bid Depository Rules and Regulations, New Brunswick, section 15.
21. Evidence of Messrs. J. Burrows, A. Clarke, J. F. Dobbelsteyn and M. J. McKenzie, Transcript, p. 3176-90.
22. Brief of the Nova Scotia Department of Public Works.
23. Evidence of Mr. W. A. Rozon, Executive Vice-President and General Manager of the Construction Association of Nova Scotia and Administrator of the Bid Depository operation, Transcript, p. 2838.

24. Windsor Sheet Metal Bid Depository, Rules of Procedure, Effective March 30, 1964, under heading "Information to Mechanical Contractors."
25. Rules of the Winnipeg Bid Depository, 9(d).
26. Manitoba Masonry Contractors Bid Depository Regulations, rule 7.
27. Bid depository rules - Alberta, rule 61; Quebec, rule I-1; and Saskatchewan, rule 11(d).
28. British Columbia Construction Association Rules of Procedure, "A Guide to the Rules and Principles of Bid Depository Operation."
29. Transcript, p. 3173-75.
30. Brief of the Manitoba Department of Public Works, p. 2.
31. The Manitoba Masonry Contractors Bid Depository is financed in the same manner, but the figures are clouded by non-members of the trade association who by-pass the depository.
32. The information is derived from material supplied to the Commission by the Ottawa Valley Bid Depository.
33. Study of the Q.B.D.S. concerning the Inquiry under Section 47 of the Combines Investigation Act, p. 51.
34. The sample consists of all projects during 1973 closing through Abitibi and Drummondville Q.B.D.S. branches and every fortieth project closing in the Montreal branch.
35. Regulations and Rules of Procedure of the Bid Depository of Nova Scotia, Revised November 23, 1973, section 11(d) and 1967 edition, section 11.
36. Ottawa Valley Bid Depository Inc., Rules and Regulations (Revised March 1972), section 7(4).
37. Peterborough Bid Depository, Rules of Procedure, November, 1968, under heading, "Procedure to be Followed by the Bid Depository."

38. Evidence of Mr. W. Shaw, Executive Director of the Amalgamated Construction Association of B. C., Transcript, p. 886-87.
39. Returns of Information.
40. British Columbia Construction Association, Bid Depository Rules of Procedure, Revised September 1, 1973, section 8.
41. Rules of the Winnipeg Bid Depository, section 13.
42. Quebec Bid Depository System, Rules for Tendering, Chapter J.
43. Numerous complaints, and particularly those to the mechanical corporation, were made under two section headings. Because we have used a broad classification system, in most instances both sections fall within one of our categories: e.g., improper tenders. There are a small number of instances where this does not hold and the placement that was followed must be regarded as arbitrary. However, a footnote warning has been given for the one category where the number of cases is significantly affected.
44. Quebec Bid Depository System, Rules for Tendering, Chapter D-1.
45. Transcript, p. 3139-43.
46. Testimony of Mr. R. G. Clarke, Transcript, p. 4402.
47. *Ibid.*, p. 4363-64.
48. Alberta Bid Depository, Rules and Regulations, section 80.

CHAPTER VI

WITHDRAWAL OF TENDERS

It is fundamental to the purpose of bid depositories that bids may not be altered after their closing; the one course of action permitted bidders unhappy with their tender is for them to withdraw it, and all bid depositories known to the Commission have a rule which permits withdrawal of a bid prior to a period that ranges from 2 to 24 hours before the closing of the bid-recipient's tender. ✓

The rationale that is widely offered in favour of a withdrawal provision is that it is desirable to release from his tender a contractor who has made a serious error. In the words of Mr. S. D. C. Chutter, General Manager of the Canadian Construction Association, who is quoted on page 83 of the Green Book:

"Normally, there is no particular advantage to an owner to hold a contractor to a bid if that tender incorporates a serious mistake. If the contractor has made an error and the compilation of a construction tender is a complex thing, and if an error of serious consequence is included and the contractor later discovers it before the contract is awarded, to hold him to that tender and make him start off with a potential serious loss is a poor way of starting a contract and experienced owners recognize this, including the federal government.

Similarly, so far as the general contractor is concerned, he knows very well that if he receives a bid from a sub-contractor which contains an error on double-checking, there is no great advantage to him to try and hold that sub to a price which, let us say, is starting right off the bat with a 10 percent loss for the sub-contractor.

. . .

Withdrawals, basically, whether they are by a general contractor from an owner or from a trade contractor to a general contractor, I think should be stressed are not necessarily bad. They are healthy and it is a safety valve whereby poor bids, in effect, can be withdrawn before the various parties concerned get into trouble. . . ."

It has been recognized by industry sources that bidders will attempt to use the rule on withdrawal for purposes other than that for which the rule was intended. One such use of the rule that has been mentioned is the submission of bids which are not based on serious estimation procedures: if the bid is low and close to other bids, it is permitted to stand; if it is much lower, it is withdrawn. Bidders who engage in such conduct are able, for the price of bid depository envelopes, to take advantage of the estimating costs incurred by their competitors. This kind of conduct is referred to by Mr. H. Weizel, who was Chairman of the Winnipeg Bid Depository Committee in 1970, when he explained the reason for the bid depository's attempt to police bid withdrawals. He is quoted on page 87 of the Green Book:

"I think the reason for that was that we found new sub-contractors using the bid depository to put in prices and we felt that they were putting them on a trial and error basis because we could find that for a period of maybe 3 or 4 jobs in a row they would withdraw their price after it has gone in. So we considered this as being irresponsible bidding because normally a person doesn't withdraw."

Also quoted in the same connection by the Green Book are the views of Mr. E. R. Riley, who was a director of the Ontario General Contractors Association when he testified in 1970:

"Q. As a general contractor, what purpose do you think it serves to have this period of withdrawal without penalty?"

A. It gives the sub-trade the opportunity, if he is low, to review his tender and if it is too low, withdraw it.

Q. If it is too low in relation to what?

A. In relation to his competitors. I mean the only mark of how low my tender is if my competitors are all \$100,000 and I am \$75,000, I am too low. We are not making 25 percent profit in the industry, so we are too low.

The bid depository system provides a climate through which people can operate and submit tenders. Most people, sub-trades, submit realistic and well-prepared tenders, but there are people in the industry, because of the set-up of bid depository, who can submit tenders without doing an actual qualified take-off and an actual class basis of assessing that take-off and submit it. They will bid every job there is to bid and to do this realistically you would need a staff of about 35 estimators at the most [least] which means they are not giving the proper time to take off quantities and the actual pricing and assessment of the job itself.

Q. Is it your view in those situations that they are relying on the withdrawal privilege to save them from their own mistakes?

A. It is my personal view there are firms using the withdrawal procedure for irresponsible bidding, completely irresponsible bidding."¹

The key to the withdrawal of bids, for whatever motive, is the tendency for information on the amount tendered to become quickly available to all bidders after tender closing. Without this information a firm submitting a tender based on a very rough estimate would have no way of checking it against more carefully pre-

pared tenders, nor would a firm which had conscientiously prepared its tender have any reason to suspect an estimating error. The position taken by the Canadian Construction Association in its brief to the Commission strongly indicates that the trading of price information after the closing of tenders is an accepted normal practice:

"It is not morally wrong for sub-contractors to discuss amongst themselves the bids that have been submitted to the Depository. The discussion takes place after the event. What candidate having sat an examination does not discuss the proceedings after completing his paper? Certainly, general contract bidders discuss their bids, after having submitted them. All of these people must do so in order to determine (or at least to try and determine) where they erred."²

In effect bid depositories create the opportunity for trade and sub-trade contractors to withdraw their bids. When bidding occurs outside a bid depository, tenders are usually submitted at the last minute and there is not sufficient time for individual bidders to learn where they stand relative to others. Furthermore, should a firm learn that its bid was well below those submitted by the other tenderers it might be given the opportunity to change its bid.

From a legal standpoint bid depositories do not create the right to withdraw, they merely recognize it. Under contract law a bidder is free to withdraw his tender until such time that he is notified that it has been accepted, with acceptance in the usual case being conditional on the prime contractor being awarded the contract. However, to the extent that withdrawals are a product of bid depositories, the key point is not whether bid depository rules reiterate existing legal rights but the ways in which they limit the right to withdraw.

Most bid depositories do not undertake to police the reasons for withdrawal. The typical rule on withdrawals is concerned with establishing the period during

which they are permitted and who is responsible for notifying the firms which received the withdrawn bid. For example, the instructions to bidders on these matters in the New Brunswick Bid Depository are:

"Tenders may only be withdrawn up to three hours prior to the tender closing time for General Contractors and must be confirmed prior to the General Contractors' closing time. The responsibility of proof of time of effective withdrawal rests with the bidder. It is the Trade Contractor's responsibility to notify the Bid Depository, Architect and/or Engineer and all General Contractors affected of his decision to withdraw."³

Around 1970, all withdrawals were disallowed from the Toronto Sheet Metal Bid Depository subject to forfeit of the required \$500 registration fee. It is not known how stringently the rule was applied or how long it remained in effect. Under the rules of procedure of the Toronto Sub-Bid Depository now in effect which apply to sheet metal and other mechanical sub-trade contractors, withdrawal, subject to a time constraint, is treated as a matter of right. As shown in Table VIII, sheet metal withdrawals in 1974 had fallen considerably from the levels they had reached prior to 1970.

At present the British Columbia Construction Association Bid Depository and the Winnipeg Bid Depository, among the major bid depositories, the Hamilton Insulation Bid Depository, among the sub-bid depositories, and the Winnipeg Masonry Bid Depository, which is a specialty bid depository, contain rules which apparently attempt to treat withdrawal of tenders as a privilege rather than a right. Section 9 of the Hamilton sub-bid depository rules contains the warning that:

"Any misuse whatsoever of the withdrawal provisions will be dealt with by the Insulation Bid Depository Advisory Committee."⁴

However, when Mr. F. C. Whyte, the administrator of the depository, was questioned about this he did not feel that he could offer an interpretation, nor could he recall any

TABLE VIII

WITHDRAWALS

<u>BID DEPOSITORY (TRADE)</u>	<u>PERIOD</u>	<u>PERCENTAGE OF LOW BIDS WITHDRAWN</u>		
		<u>Total Calls</u>	<u>Withdrawn</u>	<u>%</u>
<u>Ottawa Valley Bid</u>				
<u>Depository</u> *, **				
Mechanical	1973	69	4	5.8
Electrical	1973	67	7	10.4
Plasterers	1973	45	3	6.7
Acoustic	1973	29	1	3.4
<u>Toronto Sub-Bid</u>				
<u>Depository</u> ***				
Sheet Metal	1968	231	21	9.1
Insulation	1968	223	28	12.6
Refrigeration	1968	73	5	6.8
Sheet Metal and Air Handling Group	1974	119	6	5.0
<u>Masonry Contractors</u>	Sept/74	63	8	12.7
<u>Association of</u>	Jan/75			
<u>Manitoba</u>				

Source: Returns of Information: Ottawa Valley Bid Depository 1973 projects; Toronto Sub-Bid Depository 1968 projects; Toronto Sub-Bid Depository 1974 projects; Masonry Contractors Association of Manitoba five-month period September 1974 to January 1975.

*Not all tender calls are shown, only those which it makes sense to relate to the number of low withdrawn bids. Missing from the Ottawa Valley totals are tender calls on which a single bid was received, which is the most common reason for omission, and tender calls where the prime contractors bid to themselves. These two reasons account for 16 out of the 20 tender calls omitted for the trades included in the table.

** Second low bid and above account for an additional three withdrawals. Figures for smaller trades were not included in calculations, however, there was one additional low withdrawal in the painting trade.

*** An additional 23 withdrawn bids in the three Toronto sub-bid depositories (1968) are categorized as follows: 15 withdrawn bids were second, higher, or showed no figures; 7 bids were the lower of multiple withdrawn bids, and 1 "split" bid was not included in the above table. The Sheet Metal and Air Handling Group (1974) showed 1 additional withdrawn bid which was the lower of a multiple withdrawal.

occasion when it had been invoked.⁵ The revised regulations of the Manitoba Masonry Contractors Bid Depository introduced on July 1, 1974, also contain a clause which calls for the policing of withdrawals. Section 6 reads in part:

" . . . A tender may be withdrawn in the event that it does not comply with tender requirements, or if the bidder shall prove that the bid was made in error and demonstrates that error."

According to the Submission of the Masonry Contractors Association of Manitoba Inc. there were six withdrawals which occurred under this rule out of 105 projects, with four as a result of estimating errors and one due to an error in calculating.

The rules of the Vancouver and Lower Mainland Bid Depository had contained a provision allowing for the investigation of withdrawals which was carried forward into the rules of the British Columbia Construction Association Bid Depository. Presently in British Columbia, section 5(e) of the Rules of Procedure includes the following:

" . . . All cases of withdrawal will be investigated. Where it is found that withdrawal has been for other than valid reasons, such withdrawal will be regarded as a violation subject to penalty, . . ."

According to the former and present administrators of the bid depository, each withdrawal is investigated and there have not been any withdrawals which were considered to constitute a violation.⁶ Based on information received from the Vancouver and Lower Mainland Bid Depository subsequent to the Hearings, there is an examination in the sense that written notification is sent by the withdrawing firm to the bid depository. Where reasons for the withdrawal are included these are accepted as a matter of course by the bid depository staff. Of 21 bids that were withdrawn from January 1 to August 25, 1975

17 notifications of withdrawal were sent to the bid depository, and 14 of these notifications contained a reference to some error in the preparation of tenders.

A record of written reasons for withdrawal is also available from the Winnipeg Bid Depository. Section 11(a) of its rules contains the following:

" . . . Sub-contractors who withdraw their bid must explain the reason for their withdrawal in writing to the Bid Depository Committee. Should the Bid Depository Committee decide that irresponsible bidding is causing repeated withdrawals by any sub-contractor, disciplinary action may be taken against that sub-contractor, as outlined in Section 13 of these Rules."

The written reasons submitted to the Winnipeg Bid Depository for withdrawals in 1968 show that in the majority of cases the bid depository was simply informed that the bid was being withdrawn. It is clear that the Winnipeg Bid Depository does not insist on receiving reasons for withdrawals. Where a reason was provided it generally was to the effect that there had been an error in bidding, but without any specific information as to where it occurred in the preparation of the tender. Rarely was the reason one which could easily be checked.

The only disciplinary action connected with withdrawals taken by the Winnipeg Bid Depository in 1968 was a three-month suspension of a firm that failed to inform the successful general contractor that it was withdrawing its bid.

Although the Quebec Bid Depository System rules do not require firms to justify withdrawals, the administrator of the Q.B.D.S., Mr. G. Gagné, has undertaken through interviews conducted by his staff to ascertain the reasons for their occurrence. A report is prepared for each withdrawal that includes: the trade specialty; the name of the withdrawing firm; the amount of the withdrawn bid, the lowest standing and the average bids; the number of tenders submitted; and a one or two sentence statement on the reported reasons for withdrawal. An examination by the Commission of the reports prepared

over the last few years shows that a fairly common class of reasons relates to concern over prices and/or availability of: labour, material, or part of the work that was to be parcelled out under sub-contract. Failure, for one reason or another, to allow for some part of the work falling under the responsibility of the specialty was perhaps the most commonly expressed type of reason. A firm may have allowed for one coat of paint when two were required, or have failed to take into account transportation of workers to an out-of-town construction site, or have even forgotten to include one or more walls.

In dealing with the reasons reported to Q.B.D.S., as with those discussed above for other depositories, it is perhaps useful to reiterate that the reasons are reported after the withdrawals have occurred. The trigger for the withdrawals can safely be assumed, in most cases, to be knowledge of the other bids. The reported reasons are rationalizations of past behaviour. It is highly doubtful whether bid depository staffs or the Commission are in a position to determine whether the reported reasons are accurate representations of the causes of the discrepancies between the value of the withdrawn tenders and those left to stand. This problem is reflected in the following question put by a Member of the Commission to Mr. Gagné, Administrator of the Quebec Bid Depository System:

"Q. . . . One can always invoke some motives for withdrawing, but are these motives for withdrawal valid, . . .

A. . . . But there is a way . . . to analyse the relationship between bids, the reasons; we do have a way and it resides in complaints; . . . imperfect documents account for the main percentage of withdrawals; an incomplete bid. If we look at the complaints, the majority of the technical complaints are complaints relating to incomplete bids. The bidder has freely chosen as between withdrawing his bid and facing disciplinary action. . . ."7

Mr. Gagné takes the position here that the majority of the withdrawn tenders are incomplete and thus are in violation of the bid depository rules; if permitted to stand they might result in successful complaints.

A careful reading of the reported reasons set forth in the documents indicates that a fairly small percentage of them point to the tenders being incomplete according to the Quebec Bid Depository System rules.

Questions regarding the cost to consumers of the withdrawal provision in conjunction with other Q.B.D.S. rules and the availability of price information through trade sources are raised in a number of instances by several of the reported reasons:

1. The withdrawn bid, which was of the order of \$15,000, was approximately half that of the next lowest bid. The reported reason in that instance was: ". . . [name of owner of withdrawing firm] advises us that they and their estimator have checked all figures and have not found anything."
2. The withdrawn bid, which was of the order of \$85,000 was \$14,500 lower than the next lowest bid. The reported reason for withdrawal was to the effect that the estimate had neglected to include something worth about \$8,000. If there had been some way for the low tenderer who withdrew to add the \$8,000 to his bid this would have resulted in a saving of about \$6,500 to the owner.
3. Out of a sample of fifty-eight instances of withdrawals which were analyzed by the Commission, there are six similar examples to the one cited in 2 above. The sum of the withdrawn bids plus the reported value of omitted work is about \$57,000 less than the sum of the next lowest bids.
4. The rules require that if a firm chooses to withdraw its tender from one or more prime contractors, it must withdraw it from all.

In the case in point, the reported reason for withdrawal was that the firm had decided to withdraw its bid from a specific general contractor. The withdrawn bid was of the order of \$50,000 and was \$10,000 less than the next lowest bid.

What each of the examples have in common is that the tenderer who withdrew was, after taking the errors into account, willing to do the work for less than the other firms that submitted bids. The absence of comparable detail from other depositories has precluded the analysis of withdrawals from this point of view.

Another kind of reason for withdrawal which firms could not be expected to report is covered by the Green Book:

"There was some evidence that the right of bid withdrawals, in addition to encouraging irresponsible bidding, is also conducive to collusive practices. Withdrawals are permitted at a time when the bidders know one another's prices and the temptation to press the lowest bidder to withdraw must sometimes be present. Mr. Riley stated:

'Q. . . . So from what you say, am I correct in gathering that the trade bidders usually know what the bids were while they still have the right of withdrawal?

A. That is correct.

. . . .

Q. Do you know, then, if the trade bidders get together and discuss among themselves whether the low bidder should withdraw or anything?

A. I have never had any direct knowledge that they ever actually did meet.

Q. Do you have any indirect knowledge?

A. We have heard of occasions where people did discuss the prices but not, I suppose, to the point of saying where it was fixed that somebody would withdraw.

Q. I see.

A. The machinery is there for it.

Q. What do you mean by that, Mr. Riley, I don't quite follow that?

A. As long as you have a group of people who are a known group of people, a specific number of people and everybody knows who the specific number is, and there is no way, shape or form that that number can change, you have provided an atmosphere where people can get together.

Q. Do you think this privilege of withdrawal without penalty contributes to this environment you just described?

A. It would help to contribute to it, yes. '118

None of the witnesses who appeared before the Commission were able to identify instances of withdrawals occurring as a result of collusion or some form of pressure being applied on the low bidder.

The By-laws of the Masonry Contractors Association of Manitoba submitted to the Commission contain a clause which could, on its face, lead to pressure on low bidders to withdraw:

". . . all tenders below the estimated costs of the lowest bidder of the members of the Corporation who had submitted a tender shall be identified as being below estimated costs of costs of construction for the purpose of advising all concerned that the tender may be an irresponsible one or one made in error."⁹

However, Counsel for the Association told the Commission that, although this clause had been part of the first edition of the regulations of the bid depository, it had been removed as a result of negative comment from officials of the Bureau of Competition Policy when they were consulted on the regulations.¹⁰

A unique feature of the Windsor Bid Depository is its rule on withdrawal. Under the procedures followed by this depository, the envelopes containing the tenders are opened soon after the closing of the bid depository. The rules then provide that:

"(15)(d) Following the above, the green envelopes, will be opened and announced in the presence of all the responsible Contractors, submitting bids. Architects, Engineers, or their respective accredited representatives.

(e) At this point all bidders are to be given a period of one hour or less to announce their intention of either

(1) allowing their tender to stand.

(2) withdrawing their tender.

During this one hour period no bidder will be allowed any communication outside of the room in which the opening is taking place.

If any Tenderer:

(1) Leaves the premises without announcing his intention

or

(2) Fails to make any decision

then the tender submitted will be considered to stand.

- (f) Under no conditions may a bid be altered or resubmitted."

This kind of arrangement can provide a climate in which pressure to withdraw can be placed on firms who have submitted tenders considered to be excessively low by the other bidders.

A question which arises in connection with withdrawals is their numerical importance relative to some measure of bid depository activity. In referring to the experience of the Ottawa Valley Bid Depository, the administrator of the depository, Mr. G. Collins, said:

". . . There were sixteen withdrawals and fourteen informalities. So, if you work it out percentagewise it is nil. The number of bidders was 5,935 and the number of bids was 1,136."¹¹

The Quebec Bid Depository System, in its brief to the Commission¹² and the Vancouver sub-bid depositories¹³ also took this approach to measuring the relative importance of withdrawals. We find that the best measure of withdrawals is obtained by comparing the number of withdrawn bids which are low as a percentage of the total number of low bids or projects. This alternative is more meaningful since low bids account for the great majority of withdrawals and only rarely is the withdrawn bid other than the low bid. Obviously a firm that has entered a high bid that is out of line in comparison with other bids generally has no reason to withdraw it. In addition, it is only the withdrawal of low bids that has an impact on the market.

The experience of several bid depositories with respect to withdrawals is summarized in Table VIII. In considering this table, it is helpful to consider first the withdrawals by mechanical contractors who bid through the Ottawa Valley Bid Depository. There were sixty-nine

projects for which mechanical tenders were submitted, and in four instances, or 5.8 per cent of the projects, the low tender was withdrawn. In most, but not all, instances it was the lowest bid that was withdrawn. These are the withdrawn bids shown in the table because it was in these trade calls that the owner might be considered to have lost the benefit of a low bid. Occurrences of withdrawal of other than the low bid are shown in footnote references. Another type of omission is based on multiple low tender withdrawals, that is when the lowest, second lowest and perhaps even third lowest tenders are withdrawn. Since the number of withdrawals of low tenders is being related to the number of projects in the table, only one withdrawal is included when there are multiple low tender withdrawals. The frequency of this occurrence is also shown in footnote references. For example, taking into account multiple low tender withdrawals, there were eight withdrawals from the Toronto Refrigeration Sub-Bid Depository, with the three lowest bids withdrawn in one instance and the two lowest in another. The approach followed in constructing Table VIII results in fewer withdrawals being shown from the Toronto Sub-Bid Depository in 1968 as compared to the number shown in the Green Book (Table V-1).

The percentages of low bids withdrawn shown in Table VIII appear to be on the high side compared to some other bid depositories for which the data are not sufficiently complete to permit tabulation. Based on somewhat incomplete information the percentage of withdrawals of low bids from the Edmonton bid depository in 1968 was of the order of five per cent,¹⁴ and between two-and-one-half to three-and-one-half per cent of eligible trade calls through the Q.B.D.S.¹⁵ Eligibility refers here to the regulation of the Q.B.D.S. which permits withdrawals only when prime contractors have been named by the awarding authority, with withdrawals prohibited on projects where the owner is acting as its own prime and directly receiving the trade tenders.

VI NOTES

1. Green Book, p. 87.
2. Brief of the Canadian Construction Association, p. 11.
3. Bid Depository Rules and Regulations, New Brunswick, section 12.
4. Hamilton Insulation Bid Depository, rule 9.
5. Transcript, p. 1920-23.
6. Evidence of Messrs. J. W. Bishop and W. Shaw, Transcript, p. 925-29.
7. Transcript, p. 4151-55.
8. Green Book, p. 88.
9. By-laws of the Masonry Contractors Association of Manitoba Inc., sub-section 45.(2)(d).
10. Transcript, p. 3290.
11. *Ibid.*, p. 531.
12. Quebec Bid Depository System brief, p. 51.
13. Transcript, p. 1041-42.
14. There were 101 projects consisting of 1,621 separate trade calls through the Edmonton bid depository in 1968. It has been assumed that withdrawals did not occur when only one bid was submitted, as occurred in 176 trade calls. There were 85 withdrawals or roughly 5.9 per cent of the 1,445 remaining trade calls. To allow for multiple withdrawals and withdrawals of bids which were not low, the estimate has been rounded off to five per cent. (Source: returns of information.)
15. There were 11,902 trade calls through the Q.B.D.S. between October 1, 1971 and September 30, 1973.

During the same period there were 201 withdrawals. (Source: submission of Q.B.D.S., p. 51.) According to the oral evidence of Mr. Gagné (Transcript, p. 2716), withdrawals are allowed under the rules in roughly half of the projects, those in which the owners are not acting as their own prime contractor. The number of withdrawals works out to 3.6 per cent of the estimated trade calls on which withdrawals were allowed. When the necessary qualifications are taken into account, the percentage of eligible low trade bids withdrawn is probably close to three per cent.

CHAPTER VII

NUMBER OF BIDDERS

One of the matters explored during the course of this inquiry is the number of competing tenderers on bid depository projects. Most bid depositories, it has been seen, provide easy access to trades and there is no indication that the state of competition has ever been a criterion for the admittance of a trade to a bid depository. In other words, the idea that there might be "too little" as well as "too much" competition does not appear to have been raised as an issue by the policy-setting bodies of bid depositories.

Also relevant in this connection are the policies of bid depositories with respect to the number of bidders. Generally, bid depositories require that as long as there is at least one tender the prime contractors are required to use it. However, Nova Scotia and Quebec give the owner the option of not using a single bid.¹ In Nova Scotia this means that, should the owner choose not to use the bid, the prime contractor selected by the owner would be considered free to make an arrangement outside the bid depository. In Quebec, should the owner not agree to the use of the single bid, there would have to be another call for tenders through the bid depository. When a single bid is received by the Q.B.D.S., the tenderer is informed so that he has the opportunity to withdraw his bid.² The basis of this policy is that the tenderer has the right not to risk exposing his bid in the event the owner decides not to use it.

At the time of the Hearings in Halifax, the Nova Scotia Department of Public Works was negotiating with the Nova Scotia Construction Association in an effort to bring about changes in the rules of procedure of the bid depository. One of the changes it was requesting was that prime contractors not be bound to use a bid unless there were at least three tenderers.³ As shown in Table X, the number of bidders going through the Nova Scotia bid depository is usually very small,

indicating that concern of the Nova Scotia Department of Public Works is firmly based.

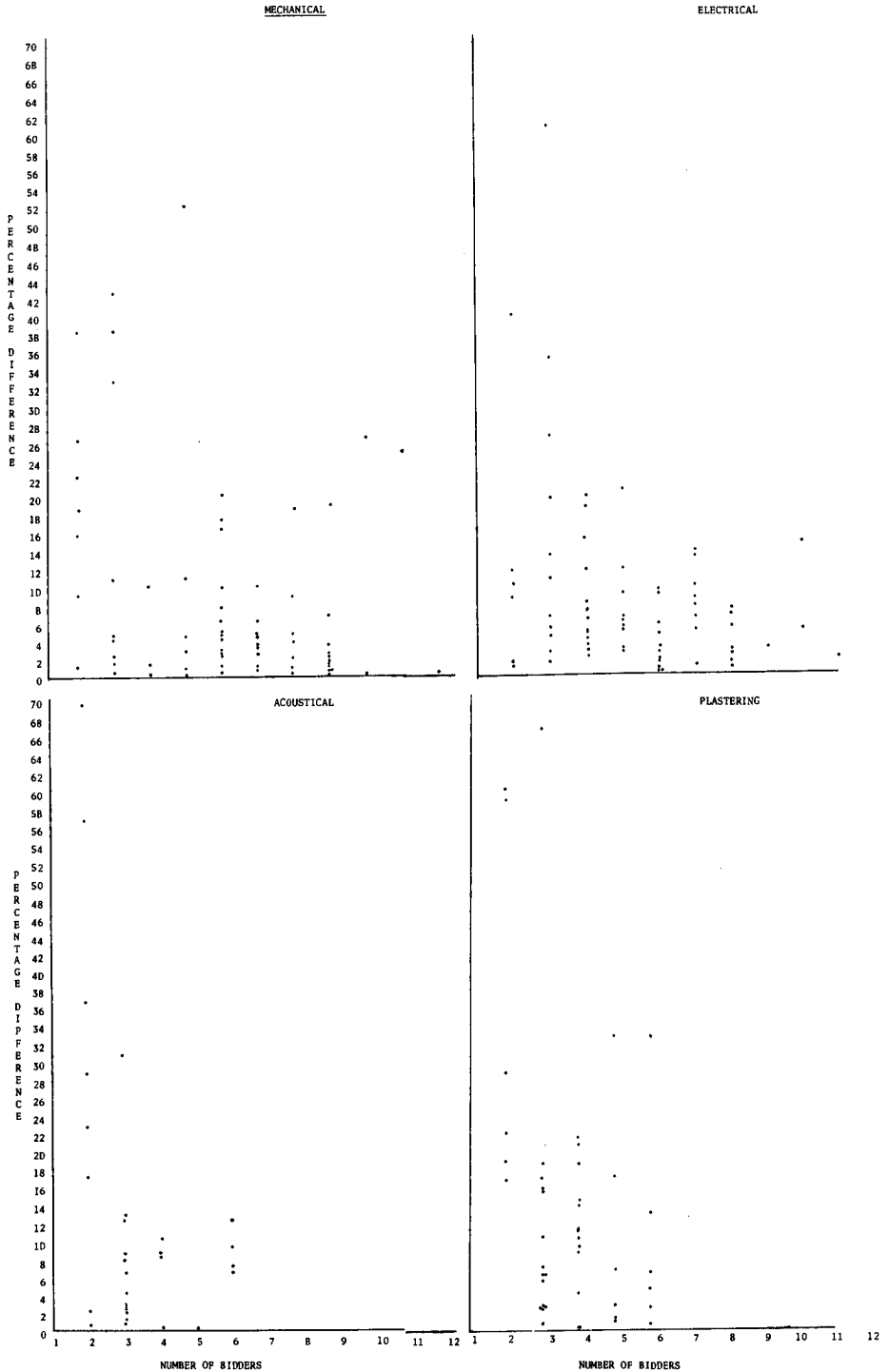
A number of witnesses were questioned regarding the minimum number of bidders required to ensure adequate competition. While some of the witnesses took pains to point out that considerations other than numbers were important in determining the degree of competition, when other factors were allowed for and only the number of bidders was considered their answers were of the order of three to six tenderers.⁴ The manual on bidding practices prepared by the Mechanical Contractors Association of Ontario for use by its members indicates that the degree of competition, as measured by the percentage difference between the lowest bid and the second lowest bid, increases with the number of bidders.⁵ Without access to the cost estimates prepared by tenderers which would allow an examination of the profit margins used by them, one is forced back on the kind of rough indicator of competition used in the manual. As the percentage difference in the value of bids by the lowest and second lowest tenderers falls, it is reasonable to expect that, over a number of projects, the firms anxious to obtain a contract will feel it necessary to shade their profit margins.

Information provided by the Ottawa Valley Bid Depository was used to explore the relationship between the number of bidders and the percentage difference between the value of the lowest and second-lowest bids. The results of this investigation are shown in Graph A. While the patterns are far from regular, it does appear that there is a sharp drop-off of the percentage difference as the number of bidders exceeds two or three. In any event, it is clear that there is not a simple linear relationship between the measure of competition and the number of bidders.⁶

Information available from several bid depositories has been presented in Tables IX to XII to show the number of bidders. Nova Scotia offers a striking case of a consistently small number of bidders, with there being two or fewer tenders 69 per cent of the time and three or fewer 89 per cent of the time. The figures suggest that most of the construction trades in Nova Scotia are highly concentrated. A limited number of bidders is also seen to

GRAPH A

NUMBER OF BIDDERS AND PERCENTAGE DIFFERENCE
BETWEEN LOWEST AND SECOND LOWEST BIDDERS
Ottawa Valley Bid Depository, 1974



SOURCE: Information supplied to the Commission
by the Ottawa Valley Bid Depository.

occur frequently in other parts of the country. With regard to the Q.B.D.S., for the sample drawn there were one or two bidders in 44 per cent of specialties. Moreover, in the case of smaller projects closing in a single Q.B.D.S. office, the corresponding figures are 67 per cent and 61 per cent for projects in Abitibi and Drummondville, respectively. Overall there were one or two bidders in 27 per cent of the specialties in the Edmonton bid depository. However, grouped at the top of the table are ten trades in which the number of bidders was generally low. For this group there were one or two bidders on 50 per cent of the projects and three bidders or fewer on 84 per cent of the projects. On projects going through the O.V.B.D., there were one or two bidders and three or fewer bidders in 16 per cent and 33 per cent of the cases respectively.

While there is obviously more to a competitive climate than the number of bidders, the small number of bidders found to exist in many instances does raise a serious question as to whether bid depositories are not often used in situations where competition in the form of price negotiations or otherwise ought to be encouraged.

TABLE IX
 FREQUENCY DISTRIBUTION OF NUMBER OF BIDS
 EDMONTON BID DEPOSITORY
 1968

TRADES	NUMBER OF BIDS						TOTAL
	1	2	3	4	5-7	8+	
Curtain Wall	3	2	2	1			8
Glass & Glazing	22	22	9	10	3		66
Special Windows	10	26	11	6	6		59
Elevators & Escalators	2	6	7				15
Automatic Temperature Controls	14	20	34	3			71
Refrigeration	5	6	6	3	4		24
Sprinklers	1	10	7	1			19
Sound Systems	4	17	21	4	2		48
Communication Systems	3	3	3				9
Chimneys & Incinerators	2	6	16	2			26
Masonry	1	3	4	6	42	31	87
Structural Steel	9	10	6	9	22	4	60
Reinforcing Steel	13	10	15	9	22	15	84
Millwork	8	12	15	22	20	2	79
Roofing & Flashing	2	8	19	26	33	1	89
Metal Entrances & Storefronts	8	4	13	7	6		38
Acoustic Tile	1	9	15	11	23		59
Special Wall Coatings	16	16	10	3	2		47
Painting	8	12	22	18	25	5	90
Resilient Floor Covering	2	4	14	14	33	2	69
Tile, Terrazzo & Marble	5	8	15	17	26		71
Seamless Flooring	9	4	10	5	1		29
Lath, Plaster & Stucco	12	8	7	7	24	4	62
Carpeting	1	6	7	13	18		45
Mechanical	3	11	9	14	39	19	95
Electrical	1	6	11	13	39	22	92
Sheet Metal	3	5	8	8	31	37	92
Insulation	8	7	14	12	42	5	88
TOTAL	176	261	330	244	463	147	1621

Source: Return of Information to the Director by the Alberta Bid Depository Ltd.

TABLE X
 FREQUENCY DISTRIBUTION OF NUMBER OF BIDS
 NOVA SCOTIA BID DEPOSITORY
 (February, 1973 to February, 1975)

TRADES	NUMBER OF BIDS							TOTAL
	1	2	3	4	5	6	7	
Mechanical	20	17	7	3	5	1	1	54
Electrical	9	15	13	3	3	3	2	48
Sprinkler	11	10	3					24
Other*	131	150	82	26	8			397
TOTAL	171	192	105	32	16	4	3	523

Source: Information provided to the Commission by the Nova Scotia Bid Depository.

*All trades or specialties shown in the design authorities specifications may tender through the Nova Scotia Bid Depository. The number of trades included in the "other" category may be substantial on some projects.

TABLE XI
 FREQUENCY DISTRIBUTION OF NUMBER OF BIDS
 OTTAWA VALLEY BID DEPOSITORY
 1973

TRADES	NUMBER OF BIDS							TOTAL
	1	2	3	4	5-7	8-10	11+	
Mechanical	1	7	7	5	29	21	3	73
Electrical	4	5	11	11	31	12	2	76
Plaster		4	13	15	13			45
Acoustic	7	8	10	5	6			36
TOTAL	12	24	41	36	79	33	5	230

Source: Information provided to the Commission by the Ottawa Valley Bid Depository.

TABLE XII
 FREQUENCY DISTRIBUTION OF NUMBER OF BIDS
 FOR A SAMPLE OF PROJECTS
 QUEBEC BID DEPOSITORY SYSTEM
 1973

TRADES	NUMBER OF BIDS											TOTAL
	1	2	3	4	5	6	7	8	9	10	11	
ABITIBI												
Mechanical	6	15	3	1	1							26
Electrical	6	4	6	3	1							20
Other	-	-	-									-
DRUMMONDVILLE												
Mechanical	3	7	7	1								18
Electrical	7	8	3		3	2	1					24
Other	5	3	4									12
MONTREAL												
Mechanical	2	4	6	5	4	6	2					29
Electrical	1	3	4	3	5	1	1	1			1	20
Sprinklers	1		1			1						3
Other	4	7	7	2	1	1						22
ABITIBI (SP)*												
Mechanical	10	3	10	5	2		1					31
Electrical	4	5	5	4	4							22
Other					1							1
DRUMMONDVILLE (SP)*												
Mechanical	7	4	5		5	4		1	1			27
Electrical	4	4	4	3	2	4			1	1		23
Sprinkler							1					1
Other	7	9	10	11	7	3	1	2	2		1	53
SUB-BID												
Mechanical	3	7	2	6	2	2			2			24
Electrical	5	3	2	1			1					12
Sprinkler		1	1			1						3
Other	1		1	1		1	1	1	1			7
TOTAL	76	87	81	46	38	26	9	5	7	1	2	378

Source: Information provided to the Commission by the Quebec Bid Depository System.
 *SP indicates that the project was closed in more than one bid depository office.

VII NOTES

1. The Bid Depository of Nova Scotia, Regulations and Rules of Procedure, section 9(g).
2. Q.B.D.S. Rules for Tendering:

"E-3 Insufficient number of tenders

When, as the result of a law, an Order in Council, or a Government regulation, a minimum number of tenders is required in order to allow the awarding of the contract, the Q.B.D.S. proceeds as follows:

- b) When several tenders are received, but the depository realizes that their number is insufficient, he prepares the final list of all the tenders received, notifies the originator of the call for tenders and confirms this fact by telegram within two hours following the bid depository closing time.

The Awarding Authority is then free to exercise his right to accept or reject said tenders.

If the tenders are accepted, only the tenderers concerned may contract and this, always according to the regulations of the present Code. If rejected, the Q.B.D.S. hands back to the tenderers the unopened white envelopes, requesting the return of the corresponding stamped and numbered receipts. When the immediate handing over is not possible, he returns them by Registered Mail."

3. Letter to the Commission, dated February 10, 1975, from Mr. D. J. Power, Deputy Minister of the Nova Scotia Department of Public Works.
4. Transcript, p. 52 and 117 (Mr. S. C. Ings); p. 226-27, 235-236 (Mr. G. W. Goodkey); p. 451-52 (Mr. D. Baldock); p. 544-45 (Mr. A. G. Bland).
5. Mechanical Contractors Association, Toronto, *Mechanical Contracting Methods Manual*, 1969, p. 17-7:

"An analysis of bids over, say, a period of a year will reveal to the contractor many significant facts. One of them is that if he won all the jobs he bid at the price at which they went, he would probably have been already bankrupt. Another revelation he would find is that on jobs that had about two or three bidders the profit contribution at which the jobs were let was usually higher than if there were a greater number of bidders. He may also find from such an analysis that the more bidders, the narrower the spread between the lowest and the second next bidder."

- 6 A number of regressions were run with the percentage difference between the lowest and the second lowest bids as the dependent variable (denoted P), and the number of bidders (denoted N), the value of the median bid and a dummy variable for the occurrence of the withdrawal of the low bid as explanatory variables. The size of the project, as measured by the median bid, was not statistically significant; not a surprising result given the nature of the dependent variable. The dummy variable was statistically significant for the mechanical, electrical and acoustic tile trades, but not for plastering. Thus the percentage difference between low withdrawn bid and next lowest bid was, on average, larger than the percentage difference between low standing bid and the next lowest bid. The number of bidders was statistically significant in all cases by the usual tests. However, this finding is weakened by the evident non-linear relationship between P and N. In order to allow for the possibly diminishing importance of the number of bidders as their numbers increased, N was replaced by its inverse ($1/N$). The result of this substitution was that, for all save electricity where there was a slight decline, there was a sharp increase (of the order of 40% for "t") in the measurement of the statistical significance of the size variable. Visual inspection of the scatter diagrams (not shown) for P and $1/N$ indicates that the transformation of N had the effect of eliminating the non-linearity noted above, but that the reliance to be placed on the test of statistical significance is weakened by the presence of heteroskedasticity in the error term.

CHAPTER VIII

APPRAISAL OF THE EFFECTS OF BID DEPOSITORIES ON THE PUBLIC INTEREST AND RECOMMENDATIONS

It should be clear from the previous chapters that bid depositories share common characteristics, but also that there are important differences among them. Some of these differences arise from the apparent desire in some associations to go beyond the objective of preventing post-bid price negotiations. Other differences stem from the adoption of alternative approaches to accomplish the same goal, as exists, for instance, in the procedures for evaluating tenders. Some bid depositories are set apart by the way in which projects for the bid depository are selected. A general appraisal of bid depositories is possible only with respect to and to the extent of their common features. Even then it is necessary to recognize that, while the direction of the effects on the public interest of certain bid depository features are likely to be the same in all bid depositories, the magnitude of the effects depends on the market environment of firms bidding through the bid depositories.

In spite of the differences among bid depositories, it would be unnecessarily repetitious to appraise each of them separately. The evaluation of bid depositories follows the approach used throughout the Report, with the focus placed on the various rules of procedure. The appraisal of specific bid depositories and of bid depositories in general is arrived at through this means since the appraisal of any particular rule of procedure applies to the bid depositories where it is employed.

Before proceeding with the review of bid depository features, it is useful to discuss some considerations which enter into the evaluation. One of the dangers of a rule-by-rule review is that sight may be lost of the relations between the rules. To guard against this danger, the basic purpose for which bid depositories were

established and how individual rules relate to that purpose must be kept in mind. In instances where there is no identifiable relationship it is appropriate to evaluate the rule solely with reference to its own merits and drawbacks. Where a rule is seen to play a role in reducing the risk of price negotiations, it is important to inquire as to the extent it reduces that risk, since severe restrictions on market behaviour may be associated with a limited inhibition of price negotiations. Finally, following the review of individual aspects of bid depositories, an overall assessment of major alternative features must be undertaken. The conclusions of that assessment are indicated immediately below in the discussion of who determines whether a project shall go through a bid depository.

Declaration of Bid Depositories

The paramount conclusion that has emerged from this inquiry is that awarding authorities must not be confronted with a *fait accompli* or organized pressure in the matter of the use of bid depositories. While this conclusion draws on the general principle of free consumer choice as an essential condition for economic efficiency, it is also clear that the application of the principle to bid depositories is sound. In the first instance, awarding authorities must be free to avoid the use of bid depositories where they find that this is likely to yield results inferior to those obtainable outside depositories. A number of positive and negative effects have been claimed with respect to the operation of bid depositories. It is evident that the effects depend on specific bid depository rules and market conditions, which at any time may vary by region and trade specialty. Buyers must be free to determine how these varying conditions interact with their own circumstances in deciding whether or not to use bid depositories. This is one of the central points that emerged from the briefs of the architects' associations. Secondly, awarding authorities who are large buyers of building construction, such as provincial and federal departments of government, if they choose to continue to use bid depositories, should exert their considerable bargaining power to eliminate objectionable features from bid depositories. The example already set by the Ontario Government indicates that buyers are capable of having an

important influence on the operation of bid depositories. In effect, this appraisal of bid depositories is predicated on the existence of free choice for awarding authorities as to their use.

Although, apart from the Q.B.D.S., use of major bid depositories is not imposed upon awarding authorities, they are nevertheless subject to restrictions and pressures. A number of major bid depositories with wide scope either do not make it clear to awarding authorities that they are permitted to choose which trades shall tender through them or they explicitly do not allow this choice. In order to ensure that discretion and responsibility for the use of bid depositories rests with the awarding authorities, a statement such as is found in British Columbia is required:

"The following trades are subject to Depository bids at the discretion of the authority specifying the Bid Depository and who shall delete those trades which are not applicable:-

. . .

At the discretion of the authority specifying the Bid Depository, additional trades may be subject to Bid Depository. Sub-sections of trades may also be subject to Bid Depository bids at his discretion. Depository bids may also be called on the basis of divisions and sections of the specifications."¹

The presence of procedures for declaring a "voluntary" bid depository is generally a signal that, on any project, the decision on the use of the bid depository may be taken away from the awarding authority. This is not always the case, since under the Ontario Standard Rules "a Voluntary Bid Depository can [only] be proclaimed subject to the approval of the Tender Calling Authority."² Even though the ultimate decision in this situation rests with the owner, the request for a voluntary bid depository is an undesirable form of pressure on the owner, given that he had already taken the decision not to put the project through the bid depository.

Discretion as to the use of specialty and sub-bid depositories should also rest with the awarding

authority. In practice this should mean that these types of bid depositories would only be used when the awarding authority explicitly specified their use. It is perhaps necessary to expand this statement. In Ontario, whenever the owner specifies that mechanical tenders are to go through a bid depository, this is interpreted as extending to the mechanical sub-bid depositories. This interpretation may not always be consistent with the owners' wishes, particularly when the rules of the major and sub-bid depositories differ. But, even where there is an all-inclusive bid depository, sub-trade tenders as well as trade tenders should only go through the bid depository when required in the tender call or the specifications.

The availability of unequivocal free choice for the owner in the use of bid depositories is of sufficient importance that legislation to ensure that freedom is warranted. The most serious problems are found in the mechanical sub-bid depositories in Vancouver, the Manitoba Masonry Contractors Bid Depository, the major and sub-bid depositories in Ontario with procedures for voluntary bid depository, and trades other than mechanical and electrical in Quebec. However, the Quebec electrical and mechanical corporations are empowered by provincial legislation to impose use of bid depositories on their members and hence on the buyers of building construction.

Pre-registration

Pre-registration as a condition for tendering through a bid depository is a restrictive device that does not serve any identifiably useful purpose in the operation of bid depositories. The only bid depository which is known to practise this form of pre-registration is the Ottawa Valley Bid Depository. Pre-registration for other purposes, such as receiving information on addenda, is only defensible when the tenderers who may choose to avail themselves of this service are not required to register in person, which is a requirement imposed by the Hamilton Insulation Bid Depository.

Bonding

Bonding is an important form of protection that is available to owners and construction firms. However, this fact is largely irrelevant in appraising the role of bid depositories in determining when bonding takes place, and it should be noted that bonding as such is not at issue.

Rules strongly favouring bonding or making it compulsory are present in a number of bid depositories. Such rules are favoured by large trade contractors since bonding reduces the number of firms able to tender on any project. Some general contractors also approve of bonding because the ability of a trade contractor to obtain a bond means that his financial and technical competence has been screened. The benefits for large trade contractors and general contractors occur even when only bid bonds are required. When performance bonds are also required, general contractors are protected should a trade contractor not be able to fulfill his contract.

The reasons for the involvement of bid depositories in bonding, as well as the fact that not all bid depositories have moved in that direction, indicate that bonding is not a critical ingredient in the main purpose of bid depositories. Nevertheless, it may be seen by some as necessary in order to safeguard the interests of owners or contractors who might otherwise be hurt by the use of bid depositories. With anyone free to tender through a bid depository and pressure for the low bid to be used, unqualified tenderers may be selected. This possibility exists even though there are no reported difficulties in bid depositories where the rules are not slanted in favour of bonding. But wholesale measures to deal with the possibility are obviously not required. The major risk to owners is eliminated when the prime contractors are required to post payment and performance bonds. Owners may also require that sub-contractors provide bid bonds as a form of pre-qualification.

It should be clear in all bid depositories that the prime contractor has the right to require sub-contractors to provide a performance bond. Then each prime contractor has the choice of: absorbing the risk

associated with using an unbonded sub-contractor; selecting a higher bidder; or paying a bonding company to assume the risk. The available information is not sufficient to determine whether these options are now present in all bid depositories.

The initiative and the decision as to whether sub-contractors are required to post bonds should rest with the awarding authorities in the first instance and with the prime contractors in the second. In the latter event, there is no justifiable role for the bid depository. However, bid depository involvement in examining bid bonds, when they are specified by the awarding authority, can perhaps be defended on grounds of convenience as long as tenders are not disqualified as a result of the examination. Under no circumstances should bid bonds be required unless specified by the owner. Bid depositories in Alberta, British Columbia and Nova Scotia which require bonding unless the owner specifies otherwise are exceeding their proper authority, as are all bid depositories which unilaterally set bonding conditions. The worst situations exist in the Windsor, Ottawa Valley and Vancouver and Lower Mainland Sheet Metal and Ventilation bid depositories where bonding is compulsory. The three Saskatchewan bid depositories which require bid security are also out of order. If prime contractors in Saskatchewan are worried about the trustworthiness of particular sub-contractors, they should seek their own guarantees.

The bonding companies are opposed to the use of bid bonds as a pre-qualifier unless performance bonds are also required. It is their position that the charge for bid bonds is well below their cost to the bonding companies. Bid bonds are regarded by the surety industry as part of a package that includes performance bonds, and hence the industry has not adjusted the price of bid bonds to reflect a situation where they are separately sold. However, the bonding companies are free to adjust the price of bid bonds as long as they proceed independently.

Withdrawals

Withdrawals are an unavoidable complication created by bid depositories. The tendency in the industry

for the amounts bid to become known soon after the close of the bid depository means that tenderers are provided with an opportunity to re-evaluate their bids. This opportunity is usually not present outside a bid depository because tenders are submitted close to the time when prime contractors have to submit their tenders.

There are detrimental effects of withdrawals upon owners. The direct effect is that the owner is denied a low bid. The indirect effect is the impact that withdrawals have on future bids, since the pattern of successful bids in the past is often utilized in developing bidding strategy. Thus the effect of a withdrawal of a low bid from one project extends to future projects.

People in the construction industry argue that withdrawals are necessary to release firms from serious bidding errors. Although this is a valid argument, the difficulty is that the possible reasons why firms withdraw are numerous and it is extremely difficult for anyone outside the withdrawing firm to know why the withdrawal occurred. Bid depositories which request reasons for withdrawal accept the reasons they are given without investigation, and it is difficult to see how they could do otherwise. The distribution of bids which the Commission has examined for a number of trades and bid depositories often shows that the low bidder, for both withdrawn bids and those permitted to stand, is considerably below the second-lowest bidder. Firms which withdraw because they are significantly below other tenderers may in fact not have made an estimating error, but revise their view of profit prospects in the industry after they learn the amounts tendered by other firms.

Since the reasons firms withdraw are best known to themselves, any attempt to deal with withdrawals should directly affect the withdrawal decision. Under current procedures on withdrawals, the interests of tendering firms and prime contractors are safeguarded and those of the owner effectively ignored. Perhaps the best way to bring about a balance is through the imposition of a monetary penalty payable to the owner. Trade contractors would then be treated the same way as prime contractors tendering to awarding authorities. A penalty of from three to five per cent, or the difference between the

withdrawn bid and the lowest standing bid, whichever was less, would serve to improve bidding and withdrawal practices without being excessively punitive against firms which made an estimating error. Prime contractors are usually subject to a penalty up to 10 per cent of their withdrawn bid.

Unfortunately, the implementation of a penalty on withdrawing firms could create more problems than it avoids. Under no circumstances should firms be required to submit a bid guarantee which could lead to the rejection of tenders by the bid depository.

Tenderers' Access to Bids

The most plausible reason why, at some point, all bid depositories provide tenderers with access to the bids in their trade is because tenderers want accurate information on the position of bidders. The effect of what is widely referred to as "tabulation" is that prime contractors are under pressure to use the low bid. Failure to do so means the low bidder is antagonized and, if the prime contractor does not have what is widely recognized as a good reason for rejecting the low bidder, there is also likely to be suspicion that the prime contractor entered into an arrangement with the firm selected. Outside of Quebec, the low bidder is almost universally chosen, and in that province the low bidder is successful about 80 per cent of the time. Tabulation can be defended as a necessary bid depository procedure to prevent cheating.

Unfortunately, there are costs to the practice. One of the effects of tabulation is that differential bidding is discouraged. Differential bidding occurs when a tenderer submits different bids to various prime contractors, depending on the favourable or unfavourable experiences he had in working with them. To the extent that a prime contractor receives lower bids because he pays promptly or is better organized, differential bidding is equitable and leads to increased efficiency. However, a tenderer may be understandably reluctant to express openly such preferences and the available evidence indicates that differential bidding through bid depositories is a rare event. It is unfortunate that the extent of the practice outside bid depositories is not known. Although the Canadian

Construction Association argued strongly in a brief to the Federal Government on competition policy that it would be undesirable for differential bidding to be prohibited in the construction industry, quantitative information on the extent of the practice is not available.³

Other reasons against tabulation have been advanced by the Director. It has been argued that knowledge of prices reduces the pressure on tenderers to keep their prices down. Additionally, price tabulations along with other bid depository practices are seen as a means of policing collusive agreements.

Given the present purpose of bid depositories, it can be argued that the minimum information a tenderer is entitled to is whether he was the low bidder to the successful prime contractor. With the industry grapevine, even this amount of information may be sufficient for it to become known whether there was differential bidding, as for instance where a trade contractor bids low to the successful prime and is not low in its bids to the other prime contractors. Even this limited information could be sufficient to police a collusive agreement.

However, the kind and amount of price information made available cannot be determined separately from other aspects of bid depositories, and in particular the question of the role of bid depositories in evaluating tenders and in policing the conduct of bidders.

Financing of Bid Depositories

All but three bid depositories rely for financing on the sale of envelopes. The Q.B.D.S. and the O.V.B.D. depend primarily on a percentage levy on the successful bidder, and the Manitoba Masonry Contractors Bid Depository charges successful bidders a flat \$20.⁴ In Quebec, firms are charged one quarter of one per cent of the value of their tenders, with a minimum levy of \$15 and a maximum of \$300. Tenderers also pay a small amount for envelopes.⁵ Successful bidders in Ottawa are charged one tenth of one per cent of their bid, up to a maximum of \$250,⁶ with the charge for envelopes by the O.V.B.D. being about twice as high as that charged by the Q.B.D.S.

As a general matter, it is preferable that the amount charged each tenderer be closely related to the cost of the service provided to him. Since there is no difference in the service provided to successful and unsuccessful tenderers, there is no evident justification for a difference in charges. A possible defence of the method of financing used by the Q.B.D.S. and the O.V.B.D. is that lower prices for envelopes encourage more firms to tender. However, firms seriously interested in competing for the contract are unlikely to be deterred by the relatively small additional cost of envelopes; the significant cost in bidding is the time spent in preparing an estimate and firms encouraged to tender by the nominal cost of envelopes are not likely to be serious bidders.

Evaluation of Tenders

The principal enforcement effort in all bid depositories is directed toward ensuring that tenders are comparable. Most bid depositories have procedures for evaluating and disqualifying tenders before the close of tenders for the prime contractor. The remaining bid depositories consider complaints only after the award of the prime contract and have imposed suspensions, and in one case a fine, against firms found to have submitted non-comparable tenders. The fact that procedures for evaluating tenders are found in all bid depositories (or bid-depository-related bodies, such as the construction associations in Quebec) suggests that comparability of tenders is considered an essential bid depository feature. It serves two related purposes: it prevents the need for communication between a tenderer and tender recipients in order to clarify a tender when such communication can provide the tenderer with an unfair advantage over other tenderers (because he usually knows the amounts they have bid and can interpret his bid in a way that makes him the low bidder); and it facilitates price comparisons. Whether prices are "tabulated" by the bid depository or obtained through the industry grapevine, the amounts bid cannot easily be ranked unless the tenders are comparable.

All of the industry briefs in support of comparability of tenders either explicitly or implicitly equate comparability with uniformity. However, there is no logical

necessity for the two to be equated. Tenders covering somewhat different parts of the work can be compared by a tender recipient if the work included in each of the tenders is clearly spelled out and the tender recipient has access to estimates of the value of the non-overlapping parts of the tenders. The task of comparing non-uniform tenders is often performed by tender recipients on projects not going through bid depositories. Nevertheless, it is easy to see that outside parties might have considerable difficulty in making such comparisons, and that their decisions would leave much room for controversy. It is understandable why bid depositories have set uniformity as the goal of comparability of tenders.

The arguments against bid depositories assuming the role of evaluating tenders relate, in part, to the criteria and procedures used by bid depositories. A basic problem with self-regulation--conflict of interest--is obvious in some procedures for evaluating tenders. The terms "informal" or "non-comparable" can be given broad interpretation and there is an intolerable opportunity for abuse when a small committee has the power to determine the status of tenders without the benefit of feedback from addressees or a hearing at which all concerned parties can present their points of view. The Ottawa Valley, Peterborough and New Brunswick bid depositories make a practice of opening tenders and withholding from the addressees those they deem to be informal or non-comparable.

Even in bid depositories that rarely disqualify a bid because of the procedures and standards of evaluation used, an objection to compulsory comparability remains because, as explained above, it is a means of reducing competition. It also has the effect, in some cases, of preventing the allocation of work among firms in accordance with their capacities. Although few examples of the latter effect have been presented, the stultifying effect of a compulsory allocation of work on the adoption of new methods of work must be given weight. While it is necessary for the design authorities clearly to specify the required work in a lump-sum contract, it does not follow that the distribution of that work between different specialties should thereby be determined.

Overall Appraisal

A review of individual rules shows that many bid depository practices involve interference with free market forces. It is also clear that many of the practices have little or nothing to do with the stated purpose of bid depositories, which is the prevention of price negotiation. However, even after the practices of existing bid depositories have been pared down to their basics, which include procedures for ensuring comparability of tenders and the tabulation of bids, restrictions on conduct remain which can lead to losses of efficiency.

In bid depositories where there is stress on due process in evaluating tenders, and tenders are not lightly disqualified, the costs are primarily those associated with inflexibilities. Differential bidding to prime contractors is inhibited and prime contractors are discouraged from selecting firms they would choose to work with if there was not pressure on them to select the lowest recorded tender. Insistence on comparability of tenders limits possible adjustments in the scope of work to best meet the circumstances of particular firms. Finally, a serious inflexibility exists because prime contractors are forced to use a bid submitted through the bid depository when they might be able to get the work done much cheaper, either by doing it themselves, a possibility that exists in some specialties, or through negotiation with another firm. Although many bid depositories allow prime contractors to do the work themselves, they only permit this if the prime contractors have given notice of their intention. However, they would only know whether it was cheaper for them to do so after receiving bids. Not included in the foregoing is any consideration of the problems associated with withdrawals, pressure from bid depositories for bonding or rules which require pre-registration, matters which have already been discussed.

Numerous negative effects have been identified by those who oppose successive rounds of price negotiation, whether bid shopping or bid peddling, as a means of arriving at lump-sum contracts. A collection of these arguments which appears in an article widely cited in other studies on bid depositories is as follows:

"(a) The preparation of a bid involves the time and costs necessary to analyze the job, to estimate the price of required materials and labor, and to calculate the bid quotation in the light of those factors and of the competitive situation. Parties who engaged in bid peddling or shopping may use such bid quotations prepared by others for bargaining purposes, without going to the trouble of preparing their own, independent calculations. Hence, bid peddling and bid shopping are said to increase the risk that the contractor who actually prepared a bid may lose his investment therein.

(b) General contractors are interested in obtaining subbids timely enough to prepare their own bids to the awarding authority on the basis of the best subbid available. However, in many instances when bid shopping is feared, general contractors are said to be handicapped in preparing their bids by delays in the submission of subbids. For '[every subcontractor] holds his bid until the last minute so there will be no time for [bid] shopping.'

(c) There is evidence that some subcontractors refrain from submitting bids for jobs on which they anticipate bid shopping. To that extent, competition among subcontractors is diminished.

(d) If bid shopping is expected by the subcontractors, they may pad their bids to allow for reductions in the course of further negotiations. Hence, it has been said, bid shopping tends to make bids too high.

(e) After the general contract has been awarded, the successful general contractor has strong bargaining powers. Prior to the award the pressure upon general contractors and subcontractors is about equal, and the plurality of competing general contractors tends to diffuse their power over subcontractors. With the general contract in his pocket, however, the general contractor has something to give to a subcontractor willing to settle for less than the lowest subbid.

(f) Situations may arise in which a prime contractor submits his bid to the awarding authority on the

basis of subbids received by him, obtains the general contract on that basis, then succeeds through bid shopping or bid peddling in having the subcontractor's work done at a reduced price. Such a price reduction may create a windfall profit for the prime contractor, instead of a savings for the awarding authority or owner. Those are the principal arguments adduced by parties interested in condemning and suppressing bid shopping and bid peddling. . . ."7

Each of these arguments has been made at some time during the course of the inquiry, either in briefs or in testimony before the Commission. Unfortunately, apart from point "(b)", which is easily verified through testimony, concrete evidence on these matters was not presented to the Commission.

In contrast to the problems created by successive rounds of price negotiations are the claimed benefits resulting from the use of bid depositories. These have been ably summarized by the Counsel for the Director as follows:

1. There is an improvement in the quality of buildings because prices do not tend to go to excessively low levels which create financial pressures on contractors to cut corners.
2. Contracting procedures are smoother because bids are received in writing well in advance.
3. In addition, comparison of bids is facilitated. Subcontractors are selected in a much fairer way. This also tends to preserve experienced contractors.
4. Competition is improved as firms are more willing to submit bids on a bid depository project. There is also a positive effect on competition because newcomers to a trade are more likely to have an opportunity to bid.

The argument regarding quality came from a number of sources and particularly from the associations representing mechanical and electrical engineers. This applies primarily, but not exclusively, to mechanical and electrical

specialties. It is a difficult argument to deal with in the absence of evidence such as might be obtained by a comparison of bid and non-bid depository projects. In fact, the engineers are arguing that their professional task of ensuring that quality standards set out in the plans and specifications are met is made easier in the absence of strong pressures on price. It might be noted that a negative relationship between strong price competition and quality has often been made in other industries as a reason for limiting price competition. This observation is not intended to invalidate the arguments made with respect to the construction industry. However, the history of such an argument has caused the Commission, in the absence of factual evidence, to be cautious about its validity.

The other arguments regarding the positive effects of bid depositories have been discussed at a number of points throughout the Report and will not be repeated here.

In examining, from the point of view of efficient resource allocation, the sum of the arguments favouring use of bid depositories as opposed to permitting unlimited price competition, it is difficult to see how a general case can be made in favour of use of bid depositories. Most of the negative effects claimed to arise from unlimited price negotiations relate to questions of equity as between firms in the same trade or between sub-contractors and prime contractors. The positive effects claimed for bid depositories relate more directly to efficient resource use. However, the only unquestionably positive result is that tenders are submitted in writing well in advance of the time that the prime contractor has to submit his bid.

A general theme running throughout the Hearings is that government projects should be considered as a special case. One of the arguments put forward for the use of bid depositories on government projects is that this results in the same treatment for sub-contractors as is afforded prime contractors. The latter are able to rely on public opening of tenders and award of the contract to the lowest bidder. The reason for public opening of prime-contract tenders on government projects is in order to ensure honest dealing in the use of government funds and the same argument does not apply with respect to the

relationship between prime contractors and sub-contractors. Prime contractors gathering sub-contractors' bids in preparing their tender for a government project are not in a position of public trust. They are engaged in a purely commercial transaction that is no different than would occur for a private building being constructed under a lump-sum tendering contract arrangement. A somewhat different argument is that competition for government business should be conducted in an environment which affords all participants equal opportunity. This is essentially a political question that cannot be answered by the Commission. However, the history of bid depositories in Canada (and the United States as well) indicates that, for whatever reasons, governments have accepted the idea that it is proper to place limitations on the forms of price competition permitted in bidding on government contracts.

The considerations which lead government awarding authorities to choose bid depositories have also led them to adopt other methods to prevent price negotiations. In Saskatchewan, prior to the use of bid depositories, tenders by trade contractors were deposited with the provincial department, which then selected the trade contractors to be used by the successful prime contractor. Assuming that the same standards of comparability are used by a government department as by the bid depositories, the direct receipt of tenders by the government would result in at least as serious inflexibilities as are found in bid depositories. Not even the possibilities of differential bidding or a prime contractor selecting other than the low bidder are open when tenders are deposited with the government department. The federal Ministry of Transport requires prime contractors to name their sub-contractors when they submit their tenders. The effect of such a requirement is to eliminate post-award shopping by prime contractors. As these two examples show, the rules established for sub-contractors tendering on government projects may be more or less restrictive than those found in bid depositories.

Two concrete proposals have been placed before the Commission respecting procedures for sub-contract tenders. Mr. J. C. Carson, Q.C., appearing for four Ontario contractors' associations,⁸ proposed that, if the

Commission could not agree to the continuation of bid depositories, it recommend that prime contractors be required to name their sub-contractors when they submit their tenders: as noted, this is the approach now used by the Ministry of Transport. Secondly, the Director, through his Counsel, has stated his view of an acceptable bid depository. It is a facility that would function exclusively as a post office and would thus capture one of the generally accepted public interest advantages of bid depositories: tenders are submitted in adequate time to allow prime contractors to prepare their bids. In addition, it would be expected that the prime contractor would generally, but not always, select a tenderer from among those proceeding through the bid depository. The Director's approach is obviously not intended to inhibit negotiations initiated by either the prime or trade contractors before or after the contract.

Bid depositories which inhibit price negotiations necessarily entail interferences with market forces. This observation requires that it be recognized that constraints on tendering practices by sub-contractors, for reasons of fairness or in order to reduce friction between different segments of the industry, entail potential costs. Thus any bid depository which assumes more than a post-office function involves some sacrifice of free-market flexibility. Many of the problems with existing bid depositories are that they were created without any concern for this sacrifice. Some bid depositories started with little more than a post-office function, but then additional rules were added to limit participation to those who could obtain a bond and to close off possible routes to price negotiation.

In the light of this background, the key question that has confronted the Commission is whether it is possible to eliminate the most serious restrictions on market freedom now found in bid depositories while preserving something which is considered worth keeping.

The bid depository rules outlined below are not intended as a blueprint for an "ideal" bid depository, nor are the procedures intended to eliminate the opportunities for price negotiation, though they should remove some of the major complaints against the forms of

unrestricted price competition that arise in the absence of bid depositories. The bid depository would have only the following rules:

1. All tenders must be deposited X hours before the closing of prime tenders.
2. The successful tenderers must be selected from those who tendered through the bid depository.
3. The prime contractor must provide, at the time he submits his tender, the names of the sub-contractors to whom he would award each of the trade contracts in the event he is the successful tenderer.
4. For any trade, tenders submitted to the successful prime contractor are made available for inspection to the firms that bid to him.

The major difference between the rules set out above and existing bid depository rules is the absence of any authority for a bid depository management to enforce comparability of tenders or to set and enforce standards of tendering conduct. Any policing required should be in the hands of the awarding authority, who should have no difficulty in dealing with situations in which a prime contractor fails to name the sub-contractors he intends to use, names a sub-contractor that did not tender through the bid depository, or attempts to use a different sub-contractor than the one named.

The personnel of the bid depository would engage in purely clerical functions, such as accepting and time-metering envelopes, storing envelopes for safekeeping until the prime contractor has been declared, and making available copies of the tenders of the successful sub-contractors that were submitted to the successful prime contractor. On projects for which the owner required bid

bonds from the sub-contractors, the staff of the bid depository would not be exceeding their proper function if they examined the bid bonds and indicated on the envelopes addressed to the prime contractors whether or not a proper bid bond had been submitted. This would permit the general contractor to examine the bid bond and decide whether he wanted to use a tender accompanied by a questionable bid bond.

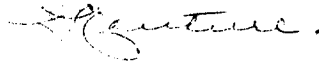
In spite of the significant change in the role of the bid depository in the tendering process, several significant restrictions on competition result from the rules that have been set out. These are:

- elimination of post-award price negotiations;
- limitation of sub-contract awards to firms which tendered through the bid depository;
- inhibition of price negotiations between the time tenders are submitted and prime contractors submit their tenders and name their sub-contractors.

It is, therefore, important to note that these restrictions are not recommended as desirable or required features in the tendering process. Rather, they are what remain after various existing and unacceptable rules of procedure have been eliminated.

The elimination of authority by the bid depository over the conduct of tenderers makes it very difficult to deal with withdrawals. After considering various alternatives, it was concluded that it would be best if the bid depository did not have any function in recording or policing withdrawals. Once a tender had been submitted through the bid depository, any changes affecting the status of that tender would have to be communicated directly by the sub-contractors to the prime contractors. Ultimate policing power here, as elsewhere in the tendering process, would reside with the owner or his agents. Excessive or unwarranted withdrawals might be used as a signal that the bid depository should not be specified for those trades where such activity was taking place.

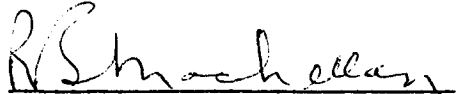
In the view of the Commission, since there remain market restrictions in even so simple a bid depository as has been discussed, owners must recognize the responsibility they are exercising when they specify bid depository for any trade. They are making a decision that should be taken only after due consideration of the characteristics of the trade and the prevailing market conditions.



Vice-Chairman



Member



Member

Ottawa,
October 14, 1976.

VIII NOTES

1. British Columbia Construction Association Bid Depository Rules of Procedure, Rule 3.
2. Ontario Bid Depository Standard Rules and Procedures, Second Edition, Rev. June 10, 1974, section 9(a).
3. Brief submitted to the Minister of Consumer and Corporate Affairs, dated December 19, 1973, regarding proposed Bill C-227, by the Canadian Construction Association.
4. Manitoba Masonry Contractors Bid Depository Regulations, section 21.
5. Q.B.D.S. Rules for Tendering, 1-7.
6. Ottawa Valley Bid Depository Rules, section 12.
7. George H. Schueller, "Bid Depositories," *Michigan Law Review*, Vol. 58, No. 4, February 1960. Six footnote references, which are part of the above quotation, have been omitted.
8. The Mechanical Contractors' Association of Toronto; the Electrical Contractors' Association of Toronto; the Electrical Contractors' Association of Ontario; and the Ontario Sheet Metal and Air Handling Group.

APPENDIX A

**STANDARD CANADIAN BID DEPOSITORY
PRINCIPLES AND PROCEDURES FOR
FEDERAL GOVERNMENT PROJECTS**

Note: The following basic rules bear the approval of the Canadian Construction Association Business & Contractor Relations Committee.

Second Edition

April 1, 1970

Copyright 1963

**STANDARD CANADIAN BID DEPOSITORY
PRINCIPLES AND PROCEDURES FOR
FEDERAL GOVERNMENT PROJECTS**

GENERAL CONDITIONS

The following General Conditions will apply to all bids received through Bid Depository.

- (a) Federal Government Contracting Departments will only recognize Bid Depositories for those trades named in the tender advertisements.
- (b) The tender advertisement will determine the closing time and date for the Prime Contractors' and Trade Contractors' tenders.
- (c) The Bid Depository specified in the Tender Advertisement will be the only Bid Depository to receive tenders.
- (d) Federal Government Contracting Departments and Agencies will not become involved in the internal administration or disputes of Bid Depositories.
- (e) Federal Government Contracting Departments and Agencies will not recognize complaints from individual contractors; all complaints must be made by or endorsed by either the Bid Depository or the Canadian Construction Association.
- (f) Federal Government Contracting Departments and Agencies will take appropriate action in respect to irregularities only in the following cases:
 - (i) where there is an irregularity by the Prime Contractor, e.g. the Prime Contractor does not use a sub-trade bidding through the Bid Depository.
 - (ii) in any other event where an irregularity has been brought to the notice of the Contracting Department or Agency before the closing time of the Prime Contractors' tenders.

1. DEFINITION AND PURPOSES

The Bid Depository is a system designed to improve tendering practices in the construction industry. It provides for the reception of sealed tenders from Trade Contractors whereby the sanctity of bidding is protected and those receiving their tenders obtain firm quotations in writing and in adequate time to compile their bids completely and accurately. The procedures are in the best interest of owners, architects, engineers and contractors.

2. MANAGEMENT

The Bid Depository is operated under the auspices of the local Construction Association or Builders' Exchange with the co-operation of associations of architects and engineers and under the supervision of a joint committee representing General and Trade Contractors.

3. SCOPE AND ELIGIBILITY

The facilities of the Bid Depository shall be available to all Prime and, in the trades affected⁽¹⁾, Trade Contractors submitting their tenders on projects for which the Bid Depository is being used providing they adhere to these regulations and relevant provincial legislation and whether or not they are members of any Association and regardless of their geographical location. No preference in any way shall be shown by the Bid Depository management to any local or other bidders in the operation of the depository.

4. PRINTED RULES

These Rules in printed form covering all phases of the operation shall be generally available and specifically for the information of bidders, architects, engineers and owners.

5. TENDER CLOSINGS

The tender closing times used in Bid Depositories shall be so arranged as to give contractors sufficient time for the preparation and submission of their own tenders following the receipt of tenders from Trade Contractors. In no case shall there be less than 24 hours between the two tender closing times. (See GENERAL CONDITIONS (b))

6. ENVELOPES AND FEES

Bid Depositories should be financially self-supporting on the basis of the fees received for the service provided. All Trade Contractor tenders must be submitted in official envelopes purchased from the Bid Depository.

7. RECEPTION OF TENDERS

All white tender envelopes received by the Bid Depository shall be time-stamped. Those that are received after the appointed closing time shall be retained unopened by the Bid Depository.

8. PROCEDURE FOR TRADE CONTRACTORS

The procedure to be followed by Trade Contractor bidders shall be as follows:

- (a) Separate prices shall be provided for each complete trade section specifically requested in the tendering documents. A lump sum price may be quoted for two or more complete trade sections, but only if a separate price has been quoted on each trade section listed under Scope as determined by the specifications.
- (b) The above sub-trade quotations shall be based on the plans and specifications; where alternatives are specifically called for a separate price for the material in question shall be clearly shown as a deduction from or addition to the separate prices quoted in 8(a) above.

⁽¹⁾ Refer to GENERAL CONDITIONS (a) Tender Advertisement will list trade(s) to be called through Bid Depository.

(c) Trade Contractors' tenders shall be placed in official envelopes as follows:—

- a complete quotation as described in (a) and (b) above in a pink envelope addressed to each Prime Contractor by name (one tender per pink envelope).
- a copy of each quotation to be retained by the Bid Depository (one copy per green envelope).
- the above pink and green envelopes shall all be enclosed in a designated white envelope delivered to the Bid Depository, bearing the name of the Trade Contractor, and the project being bid, together with the total number of the green and pink envelopes enclosed.

(d) Written advice (including delivered telegrams) concerning amendments to Trade Contractors' tenders may be submitted to the Bid Depository provided that each amendment and the white envelope are received prior to the Bid Depository closing time. A copy of each amendment should be addressed to each Prime Contractor concerned and duplicates filed with the Bid Depository.

(e) Tenders shall not be altered or amended in any way after the Bid Depository closing time.

(f) When a Trade Contractor has inadvertently missed bidding to a Prime Contractor, if he wishes to bid:

(a) he shall, not later than four hours prior to the closing date for the prime contractor send a telegram to the Bid Depository where tenders are being received, reading as follows:

"We missed bidding to (Black Construction) on (ABC Project). Please consider our bid addressed to (White Construction) as if it were submitted to (Black Construction).

(Signed), Trade Contractor"; and

(b) he shall, after sending the telegram to the Bid Depository, advise (Black Construction) by telegram or in writing confirmation of the price he submitted to (White Construction).

(g) Tenders may only be withdrawn up to _____ hours¹² prior to the tender closing time for Prime Contractors and must be confirmed prior to the Prime Contractors' closing time. The responsibility of proof of time of effective withdrawal rests with the bidder. It is the Trade Contractor's responsibility to notify the Bid Depository and all Prime Contractors affected of his decision to withdraw.

9. PROCEDURE FOR CONTRACTORS RECEIVING BIDS

The procedure to be followed by the Prime Contractor receiving tenders from a Bid Depository is as follows:

- (a) It is the Prime Contractor's responsibility to advise Trade Contractors that he is bidding and requires prices submitted through the Depository.
- (b) The Prime Contractor shall advise the Bid Depository if he wishes the tenders mailed to him, in which case the Bid Depository assumes no responsibility for delivery. Otherwise, it is assumed that the Prime Contractor will arrange to pick up his envelopes.
- (c) A Prime Contractor need not accept an unsolicited tender and may return it unopened to the Bid Depository. He is bound to place a sub-contract with one of the bidders who uses the Bid Depository, but not necessarily the lowest. A Prime Contractor intending to use his own forces or a subsidiary company for one or more of the complete trade sections shall deposit his bid in accordance with the Regulations of the Bid Depository even if he bids only to himself.

10. DISPOSITION OF ENVELOPES AND INFORMATION

- (a) Immediately after the Bid Depository closing time, the tender box shall be opened by an official of the Bid Depository and the white envelopes opened. The information shown on the green envelopes shall be checked against the information shown on the pink envelopes and the pink envelopes made available to each addressee contractor. The green envelopes will be retained unopened in the Bid Depository safe until the prime contract has been awarded.
- (b) At this stage, the Bid Depository shall select all of the green envelopes addressed to the successful Prime Contractor and tabulate them by trade sections. All other green envelopes shall be destroyed unopened. Only those Trade Contractors whose tenders were accepted by the Bid Depository may then examine the tabulated list of prices for their trade(s). No one else is entitled to see the tenders except the members of a committee investigating a complaint.

11. COMPLIANCE AND COMPLAINTS

The Prime Contractor or the Trade Contractor tendering shall tender according to the Standard Canadian Bid Depository Principles and Procedures for Federal Government Projects or their tender may be disqualified.

¹² Minimum of 48 hours when there are 96 or more hours between tender closing times for Trade and Prime Contractors.

11. COMPLIANCE AND COMPLAINTS (cont'd)

Complaints concerning any irregularities shall be made formally in writing to the Bid Depository. Refer to — "General Conditions — (d), (e), (f), (i) and (ii)."

12. BONDING

In those areas where the local Bid Depository has established a system whereby each Trade Contractor's tender must be accompanied by a form of security, the local Bid Depository Regulations in this regard shall apply.¹³⁾

CAUTION — BONDING OF SUB-TRADES IS MANDATORY IN CERTAIN BID DEPOSITORIES.
IT IS THE RESPONSIBILITY OF THE BIDDERS TO DETERMINE THE BONDING REQUIREMENTS.
CHECK WITH BID DEPOSITORY LISTED IN TENDER ADVERTISEMENT FOR LOCAL REQUIREMENTS.

APPENDIX B

SAMPLE DECLARATION FORM
SASKATOON, PRINCE ALBERT OR SWIFT CURRENT

TO: _____ TO: _____
RE: OUR TENDER FOR: _____

(Name of Project)

Gentlemen:
As required by the regulations of the Saskatoon, Prince Albert or Swift Current Bid Depository Incorporated.
[] Our total tender does not exceed \$5,000. Therefore no Bid Bond or Certified Cheque is enclosed.

OR
We enclose herewith:
[] a Bid Bond naming as obligee the successful general contractor issued by the _____

(Co.)

OR
[] A certified Cheque payable to _____ \$.....
being:
(1) 10% on the first \$20,000.00 tender \$.....
and
(2) 5% in the excess over \$20,000.00 being \$.....

TOTAL _____

The said Certified Cheque shall be subject to the requirements (indicated below) for Certified Cheque, Bid Bond and Performance Bond.

BID BOND OR CERTIFIED CHEQUE to be held in escrow and dealt with as follows:

- (i) In the event of our quotation not being named on the tender of the apparent low general contractor our bid bond or certified cheque will be released five days after the date of General Contract Tender Opening.
- (ii) In the event that I/we are named as a sub-contractor on the apparent low general contractors tender, I/we agree that our certified cheque or bid bond may be held for a period of time three working days longer than the term set out in the general conditions and/or the tender form for the acceptance of the general contractors proposal.
- (iii) In the event of this tender being accepted and our entering into or offering to enter into a contract complying with the general conditions and appended specifications and plans with the successful general contractor our Bid Bond or certified cheque uncashed will be returned to us forthwith.
- (iv) In the event of this tender being accepted within the time as set out in (iii) above and our declining, neglecting or failing to enter into a contract with the successful general contractor for the amount of our tender, or in the event of our failing to produce a performance bond if requested by successful general contractor and the general contractor suffering damage attributable to such declining, neglect or failure, the management committee of the construction association shall have the power on our behalf to settle the damage, if any, up to the amount of security, suffered by the general contractor by
 - (a) In the case of a certified cheque to instruct the trustee holding the same to cash it and remit the proceeds in full thereof to The Saskatchewan Bid Depository Incorporated (..... Branch) for this purpose, and to pay the balance, if any, to us within ten days.

OR

- (b) In the case of Bid Bond to deliver our Bid Bond to the successful general contractor for his further action.
- (v) Regardless of anything stated above upon acceptance of a contract by ourselves, and the provision of a performance bond if requested, certified cheque or Bid Bond will be released immediately.

PERFORMANCE BOND

If required by the successful general contractor, we shall execute within 15 days a bond for 50% of our tender price to ensure full and satisfactory completion of the contract.
The bond shall be submitted for approval and shall have any alterations executed to make the bond satisfactory to the general contractor. The cost of the bond to be borne by the general contractor.

This declaration is applicable only to those general contractors to whom we have submitted tenders on this project
We agree to accept the reasonable decision of the Management Committee established to administer the operation of the Bid Depository System in matters relating to the Rules, Regulations and Conduct of the Bid Depository. We acknowledge that suspension of Depository privileges may result from infraction of the Regulations.

DECLARATION

I _____ of the City of _____ in the Province of _____ do declare that I am _____ (Pres., Man. etc.) of _____ and as such am the legal agent and have authority to sign for and on behalf of the said _____ for this purpose and have complete and personal knowledge of all contents referred to and am authorized to make this Declaration and submission

Mailing Address of Company: _____
Signature of Authorized Agent _____

APPENDIX C

WITNESSES

Ottawa - December 10, 11, 12 and 13, 1974

Mr. S.C. Ings	Director of Contract Policy and Administration, Department of Public Works, Canada.
Mr. G.W. Goodkey	Consulting Engineer, Association of Consulting Engineers of Canada.
Mr. G.R. Hobbs	Chief, Policies and Procedures Group, Materiel Management Branch, Transport Canada.
Mr. D. Baldock	Civil Engineer; President, Baldock Engineering and Construction Limited, Ottawa. (Past President of the General Contractors Association of Ottawa and Past President of the Ottawa Construction Association.)
Mr. H. Vander Noot	President, Franki of Canada Limited and Member of the Board of the Canadian Construction Association; Chairman of the Standard Practices Committee of C.C.A. (Past Director and Past Vice- President of the Montreal Construction Association.)
Mr. A.G. Bland	President and General Manager, Defence Construction (1951) Ltd.

Vancouver - January 13, 14 and 15, 1975

Mr. A.M. Moore	Professor, Department of Economics, University of British Columbia.
Mr. J.W. Bishop	Consultant, British Columbia Construction Association. (Previously General Director of B.C. Construction Association.)
Mr. G.L. Giles	Deputy Minister, Department of Public Works, Province of British Columbia.
Mr.S. Edgcombe	Senior Officer, Department of Public Works, Province of British Columbia.
Mr. J. Glenwright	Director of Hospital Construction and Planning, British Columbia Hospital Insurance Service.
Mr. E.H. McCaffery	Executive Vice-President, Mechanical Contractors Association of British Columbia.
Mr. B.L. Blain	General Contractor and Chairman of the Board of the British Columbia Construction Association.
Mr. B. Shaw	Executive Director, Canadian Construction Association.

Toronto - January 28, 29, 30 and 31, 1975.

Mr. E.R. Fenton	Executive Director, Ontario General Contractors Association.
Mr. V.P. Colizza	President, Canada Decorating & Painting Company Limited.
Mr. M.H. Parry	Owner-Director, Time/Audit Ltd.
Mr. F.J. Horgan	Director, Engineering Division, Department of Works, The Municipality of Metropolitan Toronto.
Mr.B.C. Gordon	Chairman, National Surety Committee, Insurance Bureau of Canada and Assistant Manager, U.S. Fidelity Guaranty Company.
Mr. K.H. Candy	Chief Architect, Ontario Hydro.
Mr. J.H. Toms	Administrator, Toronto Bid Depository.
Mr. F.C. Whyte	Secretary, Ontario Bid Depository Advisory Council and Executive Director, Mechanical Contractors' Association of Hamilton.
Mr. B. Parks	Executive Director, Ontario Association of Architects.

Toronto - February 6 and 7, 1975

Mr. F.C. Whyte	Secretary, Ontario Bid Depository Advisory Council and Executive Director, Mechanical Contractors' Association of Hamilton.
Mr. D.R. Kewarth	Manager, Electrical Department for Southern Ontario, Comstock International. (Past Chairman of the Toronto Bid Depository Advisory Committee.)
Mr. C. Milne	Govan, Kaminker, Keenleyside, Wilson, Milne, Praetorius, Slauen, White, Stevenson, Architects.
Mr. P. Ostapec	Mechanical Contractor, Donnelly-Ostapec Mechanical Contractors.

Montreal - February 11, 12 and 13, 1975

Mr. N.G. Tanguay	President, Canadian Council of Professional Engineers.
Mr. L.M. Nadeau	General Manager, Canadian Council of Professional Engineers.
Mr. P. Gérin-Lajoie	Member of the Order of Engineers of Quebec and of the Canadian Council of Professional Engineers.

Montreal - February 11, 12 and 13, 1975 (cont'd)

Mr. I. Goudreau	Architect and Vice-President, Quebec Order of Architects.
Mr. L. Johnson	Member, Corporation of Master Pipe- Mechanics of Quebec.
Mr. R. Lizotte	Member, Corporation of Master Electricians of Quebec.
Mr. G. Gagné	General Manager, Quebec Bid Depository System.
Mr. A. Roméo	Electrician - Montreal, Member of the Corporation of Master Electricians of Quebec.

Halifax - February 18, 1975

Mr. W.A. Rozon	General Manager and Executive Vice-President, Construction Association of Nova Scotia and Administrator, Bid Depository of Nova Scotia.
Mr. P. Hebert	Member of the Joint Advisory Committee of the Bid Depository of Nova Scotia.
Mr. C. Day	Member of the Joint Advisory Committee of the Bid Depository of Nova Scotia.

Halifax - February 18, 1975 (cont'd)

Mr. I.C. MacInnes	President, Nova Scotia Construction Association.
Mr. A. Marsh	Mechanical Contractor, Yarmouth and Member, Construction Association of Nova Scotia.

Fredericton - February 19 and 20, 1975

Mr. J.M. Burrows	P. Eng., Eastland Construction Ltd., General Contractors & Engineers and Director, Fredericton Construction Association Inc.
Mr. A. Clarke	President, Construction Association of New Brunswick.
Mr. J.F. Dobbelsteyn	Member, Standard Practices Committee of the Canadian Construction Association.
Mr. N.J. McKenzie	Manager, Fredericton Construction Association Inc.

Winnipeg - March 4, 1975

Mr. N. Patscha	J. Prall Construction Ltd.
Mr. L. Copetti	Masonry Contractors' Association of Manitoba Inc.

Winnipeg - March 4, 1975 (cont'd)

Mr. E. Keller	President;
Mr. G.L. Greasley	Executive Vice-President;
Mr. W. Ptolemy	Legislation Chairman,
Mr. H. Kummén	Winnipeg Builders' Exchange.
Mr. S. Luzny	
Mr. A. Neustaedter	Summit Masonry and President, Masonry Contractors' Association of Manitoba Inc.

Regina - March 5, 1975

Mr. J. Remai	President, Saskatchewan Bid Depository Incorporated.
Mr. M.G. Bourne	Secretary-Manager, Saskatchewan Bid Depository Incorporated.
Mr. A. Nobert	Mechanical Contractor, Regina; Past President of the Mechanical Contractors' Association of Saskatchewan.
Mr. V. Sedula	General Contractor, Regina; Honorary Secretary-Treasurer, Saskatchewan Construction Association and Past President, Regina Construction Association.

Regina - March 5, 1975 (cont'd)

Mr. J.W. McLellan Electrical Contractor
and
Past President,
Saskatchewan Bid Depository
Incorporated;
Past President,
Saskatchewan Construction
Association.

Mr. L. Hossman Westeel-Rosco Limited;
Director,
Regina Construction
Association.

Mr. J.E. Chase Executive Vice-President,
Saskatchewan Construction
Association.

Mr. D.A. Wagg Staff Member of the
Saskatchewan Construction
Association
and
Former Secretary-Manager,
Saskatchewan Bid Depository
Incorporated.

Mr. R. Bing-wo Registrar,
Association of Professional
Engineers of Saskatchewan.

Edmonton - March 6, 1975

Mr. W.G. Alexander General Manager,
Alberta Construction
Association.

Mr.A. Thormann Electrical Contractors'
Association of Alberta.

Mr. R. Anderson Anderson Plumbing - Calgary
and representing the
Calgary Construction
Association.

Edmonton - March 6, 1975 (cont'd)

Mr. T. Douglas	Administrator, Contracts Branch, Department of Public Works, Alberta.
Mr. A.H. Preston	Specification Supervisor, Architectural Branch, Department of Public Works, Alberta.
Mr. J.A. Norton	General Manager, Edmonton Construction Association.
Mr. H. Curtis	The Mechanical Contractors' Association of Alberta.
Mr. C. Skakun	Chairman, Task Force on Bid Depository System, Alberta Association of Architects.

Ottawa - March 17, 18, 19, 20 and 21, 1975

Mr. R.E. Nuth	General Manager, Montreal Construction Association.
Mr. L. Cianfarani	Executive Director, Toronto Sheet Metal and Air Handling Group.
Mr. A.W. Thurston	Manager, Contract Administration, E.G.M. Cape Co. Ltd.
Mr. G. Gagné	General Manager, Quebec Bid Depository System.

Ottawa - March 17, 18, 19, 20 and 21, 1975 (cont'd)

Mr. T.A. Qureshi	Chief Engineer, Board of Education of the Borough of Scarborough.
Mr. C.W. Irvine	International Vice-President, Operative Plasterers' and Cement Masons' Union.
Mr. R.G. Clarke	Contract Co-ordinator, Ministry of Government Services, Ontario.
Mr. G. Collins	Administrator, Ottawa Valley Bid Depository.

APPEARANCES

<u>Counsel</u>		<u>Representing</u>
J.W. Scott, Q.C.	)	Canadian Construction
	)	Association
J.C. Carson, Q.C.	)	Mechanical Contractors
	)	Association of Toronto;
	)	Electrical Contractors
	)	Association of Toronto;
	)	Electrical Contractors
	)	Association of Ontario;
	)	Ontario Sheet Metal and
	)	Air Handling Group
D.C. Matheson	)	Ontario General Contractors
	)	Association
A. Kennedy	)	Insurance Bureau of Canada
E.H.S. Piper, Q.C.)	
R.F. Wilson, Q.C.)	
D.C. Davenport	)	B.C. Chapter Sheet Metal &
	)	Air Conditioning National
	)	Association;
	)	B.C. Insulation Contractors
	)	Association;
	)	Refrigeration and Air
	)	Conditioning Contractors
	)	Association of B.C.;
	)	Mechanical Contractors
	)	Association of B.C.
W.C. Newman, Q.C.	)	Masonry Contractors
	)	Association of Manitoba Inc.
L. Le Bel	)	Corporation of Master
	)	Electricians of Quebec;
	)	Corporation of Master Pipe-
	)	Mechanics of Quebec;
	)	Quebec Bid Depository System

Counsel

Representing

M. Dion	)	Quebec Construction Federation
J. Théoret	)	Construction Association of
	)	Montreal and the Province
	)	of Quebec

The Director of Investigation and Research was represented by:

B.C. McDonald
R. Leclaire

HD
3626
.C2A4
no.55
Author/Auteur

Canada. Restrictive Trade Practices
Commission.

Title/Titre
Use of bid depositories in the construction
industry; report...

Date	Borrower Emprunteur	Room Pièce	Telephone Téléphone
2039/76	M. Shaw (35)	323	5-1570

0133-34.3 (10/70) 7530-21-029-4581

