



SURROGATE BIDDING

“Surrogate bidding” in the context of a BC Timber Sales (BCTS) auction can mean different things to different people. But for BC’s logging contractors, it can mean an opportunity to generate additional revenue through collaboration with major licensees, private landowners and timber management companies (herein referred to as “Majors”).

Of course, anyone eligible to register as a “BC timber sales enterprise” under the BC Timber Sales Regulation (the “Regulation”) is free to pursue BCTS timber harvesting opportunities regardless of whether they work with a Major. But the rules that govern the BCTS program provide incentives for contractors and Majors to work together.

The Regulation deems that a person otherwise registered as a BC Timber Sales enterprise is no longer a registrant for so long as that person holds three active BCTS licences. In other words, regardless of its capacity, a registrant may only hold three BCTS licences at one time. On the other hand, capacity constraints may limit participation of other registrants in the BCTS program. While the requirements of registration are not onerous, the BCTS auction process imposes substantial financial and legal obligations on an “applicant” (a registrant who submits a bid or “application” in a BCTS auction). An applicant will typically have to lodge a bid deposit with its application. If something goes sideways and the applicant does not enter a licence agreement (typically a “Timber Sale Licence”) with BCTS when its application is “approved” (that is, when it submits a winning bid), the registrant forfeits its bid deposit, and BCTS will impose higher licence deposit requirements upon that registrant going forward.

Once the winning bidder enters a TSL agreement with BCTS, substantial obligations are imposed upon the winning bidder, now licensee. These include payment of a substantial licence deposit, financing a logging operation, management of a logging operation that complies with legislative and contractual requirements, payment of stumpage and waste assessments, and marketing of timber. And there is also the risk that the TSL may not turn out as advertised and strain the economics of the operation.

For contractors, management of a compliant logging operation is not of much concern—it’s what they do. On the other hand, management of the obligations and risks associated with timber harvesting operations is what Majors do. So, there is potential for alignment of the interests of a Major in search of incremental fibre but who cannot bid in a BCTS auction, and a contractor in search of a source of incremental revenue but who is unable or unwilling to assume the risks of a BCTS harvesting opportunity.

In such a relationship, the Major would agree to purchase the timber harvested from a TSL awarded to the contractor in a BCTS auction. The purchase price may include a volumetric rate paid to the contractor, or an agreement to use the contractor to perform the logging work, or both. Typically, the Major will agree to provide the licence deposit and possibly the bid deposit on behalf of the contractor, and may agree to provide working capital for the logging operation. The Major should otherwise agree to ensure that the harvesting opportunity is completed in accordance with regulatory and contractual requirements, including payment of stumpage and waste, and agree to indemnify the contractor

for any liability the contractor incurs as a result of the TSL.

In any such collaboration, the parties need to avoid anti-competitive behaviour—they cannot do anything that may suppress bids in a BCTS auction, or suppress the price of timber or logs. Related to this, the agreement or arrangement that the parties come to should not have the Major agree not to bid on the TSL (this issue should not arise if the Major already holds three active TSLs), and the contractor should prepare the TSL application and determine the bid independently of any such agreement or arrangement. That is not to say that the contractor cannot seek information from a potential Major collaborator (the price that the Major is willing to pay for the timber, the logging rates it’s willing to pay, and so on), but the Forest Act prohibits “agreements or arrangements” whereby a party agrees not to bid on a TSL, or whereby the bid particulars and the amount of the bid “are decided.”

Finally, the contractor’s protection from legal liability associated with the TSL is usually the Major’s agreement to indemnify the contractor. But unlike a typical contractor’s operation, primary liability under the TSL is imposed upon the contractor since they are the “licensee.” And, as the saying goes, an indemnity is only as good as the person who gives it, so all the legal rights in the world do not replace the value of a trusted working relationship.▲

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