

**Canadian Securities Administrators' Staff Notice 62-305
Varying the Terms of Take-Over Bids**

As used in this notice, the term “Bid Regime” has the meaning ascribed to it in National Policy 62-203 *Take-Over Bids and Issuer Bids*.

The Bid Regime is designed to protect the bona fide interests of offeree security holders while establishing a transparent, even-handed and predictable framework for the conduct of formal bids. An important underpinning of the Bid Regime is that offerors make offers that they are prepared to honour. Upon commencement of a formal take-over bid, the market price of the securities of the offeree issuer may be affected. This creates a legitimate expectation among security holders, other potential offerors, the offeree issuer and other market participants that the bid will be completed at the specified price provided that the conditions of the bid are satisfied.

This notice sets out the view of the staff of the Canadian Securities Administrators (CSA staff) regarding the ability of an offeror in a formal take-over bid to vary the terms of a bid in a manner that makes the bid less favourable to offeree security holders (a “negative variation”). Variations of this nature may include cases where the offeror:

- (a) lowers the consideration offered under the bid,
- (b) changes the form of consideration offered, other than to add to the consideration already offered,
- (c) lowers the proportion of outstanding securities subject to the bid, or
- (d) adds new conditions.

CSA staff are concerned that some market participants have expressed the view that an offeror is entitled, at its discretion and at any time, to withdraw a bid or to vary a bid by reducing the offer price or otherwise making the bid less favourable to offeree security holders.

Does an offeror have the right to reduce its offer price or add new offer conditions for any reason, and at any time, prior to expiry of the bid?

The Bid Regime provides that the bid shall remain open for acceptance for at least 35 days and that securities are to be taken up and paid for under the bid, at the bid price, if the conditions of the bid have been satisfied or waived. The Bid Regime requires that an offeror have the funds in place to pay the consideration offered.

Accordingly, in the view of CSA staff, the Bid Regime does not contemplate the unilateral “withdrawal” of a formal take-over bid, or if all terms and conditions of a bid have been satisfied or waived, the offeror varying the offer price downwards or introducing new conditions.

CSA staff have noted that offer documents and bid circulars occasionally contain language to the effect that the offeror may vary the bid at any time in its sole discretion, including by reducing the consideration offered. CSA staff are of the view that such language may be inconsistent with the requirements of the Bid Regime.

Does an offeror have the right to reduce its offer price or add new conditions where all of the conditions of the offer have not yet been satisfied, or in response to the failure of a condition?

Where the terms and conditions of an offer have not been satisfied, an offeror is entitled to allow its bid to expire and not take up and pay for securities deposited under the bid. The offeror is then entitled to make a new offer on different terms. Where the terms and conditions of an offer have not been satisfied by the expiry of the bid or clearly will not be satisfied during the offer period, staff will not object to an offeror varying its bid by adding new conditions or reducing the consideration offered, provided such variation is not prejudicial to security holders.

National Policy 62-203 *Take-Over Bids and Issuer Bids* provides that negative variations are subject to review to ensure such variations are not prejudicial to security holders. In determining whether to challenge a negative variation, CSA staff will consider whether such a variation: (a) is in response to the failure of a bona fide condition of the offer; (b) is effected as an alternative to allowing the bid to expire unsuccessfully; (c) provides sufficient procedural protections to offeree security holders and other market participants affected by the variation; and (d) would not be abusive to offeree security holders.

In reviewing such a variation, CSA staff may request submissions and confirmation from the offeror as to the circumstances justifying the position that a bona fide condition of the offer has not been or will not be satisfied. This includes whether the offeror has informed the market in a timely manner as to such failure of a condition and the events giving rise to the failure, and the reasonableness of the procedural protections being put in place for the benefit of the offeree security holders and other affected market participants. The notice of variation to be filed by the offeror should disclose this information.

Where the onus is being placed on security holders to take active steps to withdraw securities tendered to an offer following a variation of that offer, there is a risk that some security holders may not become aware of the variation and would not have tendered on the varied terms. An offeror should consider and address this risk in deciding whether to vary a bid rather than to commence a new bid and in implementing the procedural protections to be provided to offeree security holders in the event it elects to proceed with a negative variation. The procedural protections, including period of extension, should also provide the offeree board of directors with sufficient time to assess the revised offer and communicate its views to its security holders. The time period must also provide

sufficient time for other potential offerors to evaluate the revised offer and determine whether to participate in an auction for the offeree issuer.

In CSA staff's view, the offeror's conditions to a formal take-over bid should be bona fide, and should be interpreted in good faith and on a reasonable basis. If they are not, staff may take the position that reliance on a condition undermines the statutory requirement that shares be taken up under an offer where the terms and conditions have been satisfied. Where the failure of a condition is being relied upon to vary a bid or where a condition is expressed such that the offeror has sole judgment or discretion as to whether the condition has been satisfied, staff may intervene where necessary to ensure that such judgment or discretion is exercised in a reasonable manner. This is irrespective of whether it is stated in the bid circular that the offeror has sole discretion as to whether conditions are satisfied. In CSA staff's view, an offeror reserving "sole discretion" with respect to a condition should act honestly, in good faith and on reasonable grounds such that the exercise of such discretion is not capricious or arbitrary.

A negative variation should not be used to avoid the obligation on the offeror to have funds available to pay the consideration offered under a bid. For example, it would be a contravention of the Bid Regime to commence a bid at a specific price, but arrange financing at a lower price with the intention that the bid price will ultimately be reduced. In examining negative variations, staff may request documentation evidencing that funds were available to pay the initially offered consideration at the time the offer was made.

Questions

Questions may be referred to:

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