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PROCUREMENT: TIPS AND PITFALLS

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Procurement

- Procurement is an important process for municipalities to ensure they obtain competitive bids and proposals representing the best available opportunities
- Also ensures compliance with obligations under Trade Agreements



Procurement

- However, it is also a common source of litigation and exposes a municipality to risk of liability
- So important to choose the right procurement method appropriate for the particular project, with the proper contractual protections for the municipality.



Tendering

- A tender is a contract, but the law of contract has developed a number of unique rules and concepts which are not necessarily applicable in other contexts.



The “Contract A / Contract B” Analysis

- Contract A:
 - Tender is Acceptance of Offer
- Contract B:
 - Construction Contract



Why is This Important?

- Because it is important to remember that tender law is contract law; therefore, each tender governed by unique terms of offer to tender. Not necessarily governed by “custom” or industry standards.



Tendering - Duty of Fairness

- For policy reasons (integrity of the tendering process) the Courts have imposed a Duty of Fairness on owners
- When owner issues an invitation to tender, it is an offer to all who respond, to enter into a contract with the successful bidder.



Tendering - Duty of Fairness

- The law therefore implies a term into the contract (a) that the owner will treat all bidders fairly
- The owner's duty is therefore to review and consider all of the bids fairly and objectively
- If a bid is not treated fairly, the bidder can sue.
- If successful, the bidders damages may be equal to their loss of profits.



Tendering - Local Preferences

- One example is in regard to local preferences
- Prior to the *New West Partnership Trade Agreement (NWPTA)* or *Agreement on Internal Trade (AIT)*, and as a result of the Duty of Fairness, the Courts applied restrictions on local preference rules.
- If a local preference rule was to be utilized, it was required to be disclosed.



Tendering - Local Preferences

- Rationale:
 - Local preferences are discriminatory, and if they were to be utilized, the bidders must be made aware of it so that they can choose whether or not they wish to bid, given those circumstances.
 - If an out of town bidder was aware that they would have to beat a local bid by 5%, they might choose not to waste the time and money on submitting a bid.



Tendering - Rejection of Lowest Bid

- It is generally assumed, and the law will presume, that the owner wishes to obtain the lowest price possible.
- In order to reject the lowest bid, at a minimum, the invitation to tender, and the contract (a) itself, must contain words, which effectively state that “lowest or any tender not necessarily accepted”.



Tendering - Rejection of Lowest Bid

- In reality, the clause should be much more extensive than this (this type of provision is known as the “privilege” clause.)
- In reality, the lowest contract price is not necessarily the determining factor. This is especially true where there will be significant maintenance costs, or other costs which could follow.



Tendering - Rejection of Lowest Bid

- The reality however is that, if you wish to award a tender contract on some basis other than lowest cost, the tendering documents must be drafted accordingly.
- At the end of the day, much depends on exactly what the contract documents say.



When Can a Bid be Rejected as Non-Compliant?

- Depends on the wording of the tender. If there is no privilege clause, must award to the lowest bidder.



When Can a Bid be Rejected as Non-Compliant?

- It is often said that non-compliant bids can be rejected, and irregular bids can be accepted.
- However, there is no commonly accepted definition of the terms, and this area of law is frequently changing and evolving.
- It all depends on the wording of the contract



When Can a Bid be Rejected as Non-Compliant?

- Terms should be defined, so their meaning is certain.
- A “non-compliant” bid is thought of as a bid which does not comply with the tender documents, in a material fashion, whereas an irregular bid is one which may be technically out of compliance, but not in a material fashion.



When Can a Bid be Rejected as Non-Compliant?

- Without definitions, you put the issue into the hands of a judge to decide, and encourage litigation.



Potential Lawsuits

- Not accepting low tender
- Accepting non-compliant tender
 - Alternative price structure
 - Late submission
 - Incomplete or missing information
- Wrongly rejecting or disqualifying a tender
- Sometimes, through no fault of the municipality, becomes a case of “pick your lawsuit”.



Damages

- If a bidder sues successfully, they are entitled to their loss of profits (even though they did not do the work.)
- When an unsuccessful bidder sues, they must be in a position to show a court that they should have been successful with their bid.
- Usually they complain because, they say, the owner did not comply with its duty of fairness.



Damages

- E.g., if the Plaintiff bidder was the third lowest bidder, they must be able to convince a judge that the two bidders ahead of them, should not have received the work.
- The most common way of doing this, is to suggest that the two low bidders submitted non-compliant bids which should have been rejected, without consideration.



Damages

- Also note that it is possible, in an “up” market, for the low bidder to take the position that their own bid was non-compliant, and should not therefore have been accepted.



What Can Be Done to Reduce the Risk?

- In the procurement documents (instructions to tender, RFP, etc.), can mitigate risk through contractual terms.
- Privilege clauses and caps on liability



Privilege Clauses

- The lowest or any tender will not necessarily be accepted
 - Can be combined with clearly articulated scoring criteria including components other than price
 - Can specify that municipality will award to bidder that it deems most advantageous, regardless of price, and include other general criteria (without scoring.)



Privilege Clauses

- Right to waive irregularities, correct calculation errors, or accept non-compliant tenders.
 - But be careful with this last point - courts often conclude accepting non-compliant tender is fundamentally unfair
 - Use of that clause should not lead you to accept non-compliant bid (certainly not without seeking approval and legal advice)



Privilege Clauses

- Right to negotiate with one or more bidders after receiving their proposals (particularly applicable to RFPs as we will discuss later)



Liability Cap

- As a second layer of protection, include a cap on liability for the municipality.
 - Damages shall be limited to thrown away costs of preparing the bid, to a maximum of \$X.
 - Waiver of any claim to lost profits or other additional compensation as a condition of submitting the bid



Other Kinds of Procurement Documents

- Tender
- RFP (Request for Proposals)
- RFQ (Request for Quotations)
- RFPQ (Request for Pre-qualification)



Difference Between a Tender and an RFP

- A tender is a two step process involving Contract A and Contract B. The expectation is that a contract will be awarded as a result of the process.



Difference Between a Tender and an RFP

- An RFP, does not contain the same expectation. Proposals are requested, and will be considered, but strictly speaking, there is no requirement to award a contract, or an expectation (objectively) that a contract will automatically follow.
- Technically, what is expected to follow is some discussion and / or negotiation which eventually may lead to a contract.



Difference Between a Tender and an RFP

- However, in determining whether a document is a tender or request for proposal, courts will look at substance, not form.
- Simply calling something an RFP, does not make it an RFP.
- Many RFPs we review would fail the test. Most are really tenders under a different name, and courts would apply the duty of fairness, as well as other tendering rules.



Difference Between a Tender and an RFP

- Furthermore, courts have found a duty of good faith applies to RFPs as well (*Bhasin v. Hrynew*)
- *Elan Construction Limited v. South Fish Creek Recreational Association*



Difference Between a Tender and an RFP

- For RFPs or other procurement documents, the same kind of privilege clauses and restrictions on liability should be included



Scoring Systems

- Use caution in preparing a scoring system
- Courts will hold you to account for applying the scoring criteria you set out:
 - Cannot consider criteria not established
 - Must have objective basis for scoring
- Sometimes, less is more in point systems.



Relationship Between Tender / RFP and Final Contract

- One area that causes confusion and issues for the municipality is the content of the final contract to be awarded to the successful bidder
- The contract, particularly for a tender with clear and express scope of work requirements, can be prepared in advance.
- Form of contract and terms included with tender; with tender response included as a schedule.



Relationship Between Tender / RFP and Final Contract

- Ensures the municipality can specifically dictate the contractual terms - submitting a tender binds the contractor to those express terms
- Avoids having to start a second set of negotiations - a successful proponent can rightfully refuse to accept contractual terms not expressly set out in the tender or RFP documents (not part of “Contract B”)



Relationship Between Tender / RFP and Final Contract

- For example, tender package might include scope of work, mandatory performance security and even details such as the minimum insurance requirements.
- But likely would not set out the specific terms on an indemnity the municipality would want the contractor to provide in a contract



Relationship Between Tender / RFP and Final Contract

- In an RFP where there are ambiguities about what will be provided, can be impossible to prepare a contract in advance.
- But can still create a form of agreement with general terms and conditions, leaving blanks or schedules to be filled in with specific details (i.e. - price, scope of work, timing of delivery, etc.)



Relationship Between Tender / RFP and Final Contract

- Emphasizes the need to make tender or RFP instructions clear, because it can be confusing for bidders to determine what must be completed and included with their bid / proposal, and what are the precise terms included in the contract.



NWPTA

- *New West Partnership Trade Agreement*
- Objective, like *AIT* and *TILMA* before it, is to promote an open and public procurement process, and to liberalize trade, investment and labour mobility (or to eliminate barriers and avoid discrimination.)



NWPTA

- Applies to Alberta municipalities
- Requires open and nondiscriminatory procurement practices
- Sets out specific rules for procurement that exceeds certain minimum threshold values



NWPTA

- Procurement values triggering obligations under the *Agreement*:
 - \$75,000 or greater - procurement of goods or services
 - \$200,000 or greater - construction



NWPTA

- For purchases and contracts which exceed those thresholds, the municipality must use a public procurement process, posted through an electronic tendering system:
 - Alberta Purchasing Connection
 - COOLNet Alberta (Alberta Construction Association website)
 - etc. (no specified website or process dictated)



NWPTA

- Exceptions:
 - Must consult agreements for specific exceptions
 - Services provided by lawyers and notaries
 - Sole source exception (where it can be demonstrated that only one supplier is able to meet the requirements of the procurement)
 - Emergencies



NWPTA

- To date there have been no complaints under *TILMA* or *NWPTA*
- There have been some legal cases under *AIT*, but for the most part, those have involved large federal government contracts.



Conclusion

- Public procurement inevitably creates a risk of litigation, but cannot be avoided as a result of the *NWPTA*.
- Useful to create one or more policies to ensure staff responsible are familiar with the requirements



Conclusion

- An area where legal advice will be important; particularly in circumstances where a municipality is forced to consider disqualifying or rejecting a bid - or wanting to select something other than the low bidder.

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Thank You For Your Attention Questions Are Welcome

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