Helping Clients Get the Most from the Procurement Process

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Competitive procurement is an inherently risky activity. In the public sector, owners calling for bids for goods or services often face difficult and stressful award decisions. On top of worrying about meeting project budgets and program delivery dates, satisfying end users, and achieving high quality and performance, owners have to be mindful of the ever-present threat of the multi-million dollar lawsuit from a disgruntled unsuccessful bidder. One misstep in the handling of the procurement process can have huge financial and political consequences, often following years of expensive and uncertain litigation.

Examples of procurement processes gone horribly wrong are easy to find in the law reports. For instance, in the recent case of *Tercon Contractors Ltd. v. British Columbia Ministry of Transportation and Highways* a bidder lost out on a highway tender to another contractor. Unhappy with the outcome, Tercon took the Ministry to court. Tercon won its case at trial and lost on appeal. The case was then heard by the Supreme Court of Canada. Nine years after the original tender had taken place, the SCC restored the earlier trial judgment, awarding Tercon almost C$3.3 million in damages because the Ministry should have given the highway contract to Tercon instead of the other contractor. The Ministry was left having to pay two contractors on the same job.

How can owners reduce the chance of one of these nightmare scenarios happening? The answer seems obvious, but is surprisingly uncommon in practice: early and timely legal advice. Getting an experienced lawyer engaged in the project at its initial stages and then involving that lawyer throughout the project can pay significant dividends. This legal advisor for the project – or "project lawyer" – can play a key role in identifying, managing, minimizing, and hopefully avoiding many of the significant risks associated with the procurement process.

The Legal Framework

The starting point for any appreciation of how a procurement process should be handled is the landmark decision rendered by the SCC in 1981 called *Ontario v. Ron Engineering and Construction (Eastern) Ltd.* In that case, the court created an entirely new legal framework for the law of bidding and tendering in Canada. Based on that decision, the call for tenders and the submission of a response by a bidder create a binding contract, called "Contract A". That contract governs the bidding process and imposes duties and obligations on both the owner and the bidder. These duties and obligations are derived from the express terms of the tender documents, as well as assumed terms implied by law.

Once the owner selects a successful bidder, those two parties enter into the contract that is the actual subject of the procurement ("Contract B") and the procurement process comes to an end.

In the 30 years following *Ron Engineering*, the courts have fleshed out the content of Contract A. Originally created to prevent a bidder from withdrawing its bid if it realizes that it has made a mistake in its price, Contract A has since been used by the courts to impose owners with duties of good faith, fairness, and equal treatment in the way owners treat bidders during the bidding process.

The owner who selects the successful bidder based on a local preference rather than lowest price, for example, may be found guilty of breaching the duty to be fair to all bidders if that preference was not described in the tendered documents as being a relevant criterion. Since the duty to be fair is an implied contractual term of Contract A, the owner may be held liable to the out-of-area lowest bidder for damages for breach of contract, including lost profits and overhead.

Another common implied term of Contract A is the obligation on the owner to accept only compliant bids. In *M.J.B. Enterprises* v. *Defence Construction*, the SCC held that it is an implied term of Contract A that a non-compliant bid — that is, one that failed to properly respond to the tender call in some way — should be disqualified. By accepting the non-compliant bid, the owner breaches the duty of fairness owed to the other bidders. In the *M.J.B.* case, the owner was found liable to the second lowest bidder for damages when it accepted the lowest, but non-compliant, bid.

Not every procurement gives rise to Contract A and its associated obligations. The courts look at the nature of the procurement itself, such as the degree of formality of the process being used, to determine the true intentions of the parties. Although the label "Request for Proposal" or "RFP" is often used on procurement documents by owners to try and avoid the procurement being treated as a formal tender involving Contract A, the underlying character of the process is the determining factor. Some RFPs are really merely tenders in disguise, and will be analyzed as such by the courts in the event of a claim.

The Contract A/Contract B framework to the procurement process is unique to Canada and has led to literally hundreds of reported cases since *Ron Engineering* was decided. A project lawyer meaningfully advising a client on the procurement process must be familiar with the key principles and leading decisions in this difficult area of law.

The "Front End"

Ideally, the project lawyer will be brought into the picture at a very early stage in the process. Successful procurements require good planning, and timelines are usually critical. By having the lawyer on board from the outset, sufficient time for document preparation and review can be accommodated in the project schedule.

The experienced project lawyer can give critical input into the type of project structure being procured. In construction projects, for example, there is a wide range of possibilities: fixed price or lump sum, "cost plus fee", design-build, public-private partnership, and so on. Determining the appropriate model prior to the procurement is crucial; the method of procurement must suit the model. For example, procuring the contract for a project being performed on a fixed price basis will usually be carried out using a formal tender process. A large design-build project may better involve a multistage selection process applying both objective and subjective criteria. Avoiding a mismatch between the project type and the procurement process used is imperative.

One of the key documents to be developed for the procurement is the form of contract, containing the essential terms and conditions the owner wants to have. This document is typically attached to the tender so that all bidders are bidding to the same form of contract. With sufficient lead time, the owner may choose to consult key players in the relevant industry regarding the proposed terms and conditions being considered, particularly if some are atypical. Although this approach is not usually considered by the owner, the benefits can be significant. Through constructive feedback the terms can be refined and the revised form included within the tender, thereby minimizing the possibility of bidders taking exception to onerous provisions at the time of tender and making the comparisons of bids difficult or impossible.

Once the structure of the project, the method of procurement, and the form of contract are settled, the project lawyer can provide invaluable assistance in the drafting of the proposal or tender documents which will go out to market. Clear, consistent, and plain language is essential to avoid the risks of ambiguity and the potential of misunderstandings. The project lawyer can challenge the client about intention and meaning as drafts are created, so that the final document communicates the opportunity and the rules governing the process in as clear a way as possible.

The benefit of simplicity in the procurement process cannot be overstated. The odds of bidders failing to submit fully compliant bids increases greatly as the required responses become more and more complex. Requiring multiple lists of pricing (unit prices, hourly rates, alternative pricing, itemized pricing, *etc.*), schedules, lists of trades, plans for the work, for safety or for environmental risks, and other requirements deemed to be "mandatory" all create the very real risk that no bidder is capable of submitting a fully compliant bid. Question what is the essential information needed to award the contract, and stick to it.

Aside from helping to ensure that the procurement documents are clear and well-drafted, the project lawyer's biggest contribution will likely be the terms and conditions of the procurement itself. Ever since *Ron Engineering* created the notion that the bidding process is a contract, lawyers have been inserting provisions into procurement documents often taken from other commercial contracts. A project lawyer has to be a commercial lawyer too.

Aside from the typical privilege clause ("the lowest or any tender not necessarily accepted") or discretion clause ("the owner reserves the right to waive irregularities"), limitation of liability and inclusion of liability clauses are becoming more and more common in tender documents. In *Tercon*, the SCC was faced with the question of whether the following exclusion clause was effective to protect the Ministry from liability:

> Except as expressly and specifically permitted in these instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting

a proposal each Proponent shall be deemed to have agreed that is has no claim.

While the judges comprising the minority of the close five-to-four decision of the SCC felt that this wording fully protected the Ministry, the majority held that the wording was not broad enough to capture the possibility of the Ministry awarding the contract to a bidder who was not eligible to receive the contract. Careful thought must therefore be given to the drafting of such specialized clauses, coupled with a full appreciation of the applicable case law.

Project lawyers providing advice to public owners should also be aware of any applicable statutory, regulatory, and policy requirements. In Canada, for example, the provisions of the North American Free Trade Agreement or the Agreement on Internal Trade may dictate how procurements are to be conducted by the owner.

The Evaluation Process

Once the tender documents have been issued and the responses to the call are received, the real challenge begins. The most common issue is the problem of the "non-compliant bid".

The determination of whether a bid containing some kind of omission or flaw should be disqualified is a very difficult task. Early in the development of tendering law following *Ron Engineering*, the test to be applied in these circumstances was easy: "strict compliance". In other words, if the bid had *any* kind of mistake or omission it should be disqualified for being non-compliant. Through a series of more recent court decisions, the approach has evolved into the current test of "*substantial* compliance". This test involves an assessment of whether the problem with the bid gives that bidder an unfair advantage over the other bidders. Put another way; does the flaw in question make a difference? If the answer to that question is "yes", than the bid should be deemed non-compliant and rejected.

Unfortunately, the exercise of making such an assessment is difficult to put into practice, and in many cases the question of whether a particular bid should be declared non-compliant in a given case has even been the subject of judicial disagreement up through the various levels of the courts in the same case. While the safest course of action is usually to award the contract to the lowest defect-free bidder, if the potentially non-compliant bidder has submitted the lowest bid overall, the problem can be acute and the pressures to accept such a bid are great.

The project lawyer's job in these circumstances is to clearly lay out the significant risks faced by the client in accepting such a bid. Often the potential cost savings are far outweighed by the costs of litigating with the second lowest bidder in a possible lawsuit.

During the evaluation stage the project lawyer's function is to ensure not only that the evaluation is conducted in a fair manner and that the result can be justified, but to ensure that the record is preserved in the event the decision is challenged. Score sheets and notes will form evidence in any subsequent court case, and the lawyer should educate the client about such a possibility prior to the evaluation itself being carried out. Inappropriate remarks noted in the margin of an evaluation sheet could be damaging to the client's defense of a questionable contract award.

Finally, once the award is made, the project lawyer must ensure that the proper formal requirements for the contract are in place, such as insurance and a bonding, and formal execution and delivery of the contract itself. Any misunderstandings about the contract terms or scope of work should be identified and addressed at the very outset before performance of the work begins.

With these considerations in mind the project lawyer will become an invaluable part of the project team and help achieve the goal of a successful project carried out with minimal risk. ■

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