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A Guide to Procurement Disputes

Procurement disputes are becoming more commonplace. This guide summarizes what owners and proponents should know about procurement, focusing on the tender and the RFP processes.

The Tender

Tenders are generally used when there is a clearly defined scope of work and the primary consideration is price.

The legal landscape of tendering is unique in Canada, as underpinned by the Contract A and Contract B framework established in *R. v. Ron Engineering & Construction (Eastern) Ltd.*[1] Contract A is the contract between an owner and a proponent that governs how the tendering process will take place. It comes into existence following the submission of a compliant bid from a proponent to a tender call. Contract B is the contract itself and comes into existence once an owner selects a bid.

There are three main ways that an owner can be said to be in breach of Contract A. First, an owner must select the bid that is the most competitive based on the criteria set out in Contract A. Second, an owner must only select a bid that is compliant with the requirements set out in the contract. *M.J.B. Enterprises Ltd. v. Defense Construction (1951) Ltd.*[2] established there is an implied term in Contract A that an owner may only accept compliant bids, unless there is express language in the tendering documents to the contrary. Third, an owner must treat all proponents fairly and equally. This principle was established in *Martel Building Ltd. v. Canada*[3] to promote the integrity of the bidding process and to benefit all the parties involved. If these principles are not followed, a proponent could argue that Contract A was breached by the owner and seek damages.

Damages for a Breach of Contract A

If it is established that Contract A was breached, then the damages payable must be ascertained. In *Tercon Contractors Ltd. v. British Columbia,*[4] the Court confirmed the well accepted principle that a proponent should be placed in nearly the same position financially as it would have been had the owner performed its obligations under Contract A. In that case, the Court held that the Ministry of Transportation and Highways breached its Contract A with Tercon by selecting a competing, non-compliant bid. To quantify damages, the Court sought to establish the contract price less the cost Tercon would have incurred had it completed the work (i.e. its lost profit). The Court also acknowledged the duty to mitigate, which results in the profit earned or costs recovered or that ought to have been earned or recovered as a result of alternative work (which would not have been earned or recovered had Tercon been selected for the project) being deducted from damages otherwise owed to Tercon.[5] In *Tercon*, the Court examined Tercon's cost estimates and compared them to the estimates and actual cost of the contractor that was selected for the project. This included expert opinion and a detailed analysis of many factors, including equipment rates, projected time, proposed designs, site conditions, labour requirements, and sub-contractor usage. The Court recognized the difficulty in coming up with such a calculation and stressed the requirement for a detailed review of the evidence. Accordingly, to support such a claim, a proponent should keep detailed records related to its bid and the methodology it uses for creating cost estimates.

An owner seeking to avoid liability from the tendering process could include a clause in Contract A that excludes or limits damages for a breach. However,

owners should be cautious that courts may reject such clauses or interpret them so narrowly that they do not apply. In interpreting such clauses, the courts analyze whether the clause applied to the circumstances, if the clause is unconscionable, and if there is an overriding public policy rationale to reject the clause.[6] Therefore, when using an exclusionary clause, owners should still be careful to act fairly during the tendering process to avoid any potential liability from disgruntled proponents.

Request For Proposals

An alternative option in procurement is for an owner to issue a Request For Proposals ("RFP"), rather than a tender. RFPs are generally chosen when there is no defined scope of work and the owner is seeking creative proposals as to how to approach a specified problem. An RFP allows an owner to consider proposals from proponents without entering in a binding contract (i.e., Contact A). An owner may then undertake further negotiations with one or more proponents whose proposals interest it. An RFP must be drafted properly to have its desired effect. When making a determination as to whether a solicitation document is a tender or an RFP, courts will look at the substance, rather than the form or label, and will examine "whether the parties intend to initiate contractual relations by the submission of a bid."[7] In *Tercon*, the Court provided some of the factors it will look at, including: the irrevocability of the bid; the formality of the process; whether there is a deadline for submissions and for performance of the work; whether evaluation criteria are specified; and whether there is a duty to award Contract B.[8] Many solicitation documents are a hybrid that contain elements of both tenders and RFPs. In such instances, there is risk that a court will determine that the documents are in a form that was unintended by the owner.

In *Mellco Developments Ltd. v. Portage la Prairie (City),*[9] the Court stated that the duty to negotiate in good faith (i.e., treat all proponents fairly and equally) should fall on a continuum, based on the intention of the parties and the process of the solicitation document. The courts will impose a higher duty on an owner where the solicitation document has more characteristics of a formal tender than a pure RFP or a process where, for example, an owner is requesting a simple quote. However, this area of law is still developing. Therefore, whether issuing an RFP or a tender, owners should follow their own policies, and seek to treat all proponents fairly and transparently. It is also recommended that owners maintain detailed written records that will provide evidence of the process followed.

Even in the event that the solicitation document of a public owner is determined to be an RFP in form and substance, it may still be challenged by an unsuccessful proponent through judicial review. In *Rapiscan Systems Inc. v. Canada (Attorney General),*[10] the Court acknowledged that the closer the connection between a procurement process and the exercise of a statutory power, the greater likelihood it will be of public interest and subject to judicial review. In *Rapiscan*, the Court ruled the Canadian Air Transport Security Authority's reliance on an undisclosed evaluation factor was detrimental to the fairness of the contract award and set the award aside.[11]

Tips

It is important at the outset of a solicitation process for owners to select the appropriate solicitation document for the purpose, and then ensure that the documents are drafted to fulfill that purpose. In preparation for the drafting of the solicitation documents, consideration should be given to what process will be used to select the successful proponent, which should be consistent with all policies. The solicitation documents should clearly communicate the process that will be followed to ensure transparency and fairness. During the procurement process, the owner should give fair consideration to all proposals (and the entirety of the proposals unless the solicitation documents set out a different process), and should act transparently and treat all proponents fairly, which includes following the processes set out in the owner's policies and the solicitation documents. It is also recommended that the owner keep detailed records which can be relied on as evidence of the process followed in the event that the process is legally challenged.

When responding to a solicitation, a proponent should review the solicitation documents carefully to ensure

that its response complies with all requirements, as a materially non-compliant response will likely be rejected. It is also recommended that a proponent keep detailed records related to its bid and the methodology it used for creating cost estimates in the event that it chooses to pursue a claim against the owner for damages as a result of a breach of Contract A.

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1. *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 SCR 111.
2. *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 at para 30 [*M.J.B. Enterprises*].
3. *Martel Building Ltd. v. Canada*, 2000 SSC 60 at para. 84 [*Martel*].
4. *Tercon Contractors Ltd. v. British Columbia*, 2006 BCSC 499 at para. 153 [*Tercon*].
5. *Ibid* at para. 194.
6. *Rankin Construction Inc. v. Ontario*, 2013 ONSC 139 at para. 87.
7. *M.J.B. Enterprises*, supra note 2 at para. 19.
8. *Tercon*, supra note 4 at para. 81.
9. *Mellco Developments Ltd. v. Portage la Prairie (City)*, 2002 MBCA 125 at para. 80.
10. *Rapiscan Systems Inc. v. Canada (Attorney General)*, 2014 FC 6 at para. 50.
11. *Ibid* at para. 131.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

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Nicholas joined Civic Legal LLP after completing his J.D. from the Peter A. Allard School of Law at the University of British Columbia. During law school, he served as the Director of Operations for the Law Students' Legal Advice Program, where he provided legal services to low-income individuals. Nicholas also volunteered with Pro Bono Students Canada and Legal Education Outreach, and has completed the Business Law Concentration.

Prior to enrolling in law school, Nicholas worked as a Recruitment Coordinator for a local start-up and completed a B.Com. specialized in finance from the Sauder School of Business at the University of British Columbia.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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