



Procurement

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20 Things to Look for in Your Bidding Documents and Process

by *Judy Wilson*

1. Is there a conscious “tender/no tender” process decision?

It is not unusual for owners to inadvertently enter the realm of public tenders. Owners may only be interested in market reconnaissance for a particular task; however, they may use documents that look very much like public tender documents to carry out their investigations. A framework of public tender rules may then descend upon a transaction originally intended to test the marketplace.

Therefore, before an owner issues documents which the marketplace may understand to be public tender documents, it is important to consciously address the owner’s intention to embark upon a public tender process. If the owner does intend to seek out binding competitive offers for a defined task, then it is likely that a public tender approach should be used. If, however, an owner is truly just engaging in market investigations, then it becomes very important to ensure the documents that prompt that investigation do not inadvertently trigger the public tender rules.

2. Are the bidding documents full of junk information?

It is a very important principle to remember that bidding documents are contract documents and, like any other contracts, should not contain extraneous information. The bidding documents themselves should contain only the terms and conditions of “Contract A”. This does not mean that traditional information for bidders is not provided, it simply means that this information should not be part of the “Contract A” documents. It is relatively simple to separate out this extraneous information and put it in either an information package for bidders or in the data room.

3. Does the structure of the bidding documents make sense?

It is particularly important that bidding documents, including attached draft contracts, be well organized and readable. Disorganized bidding documents may lead to bids that are not fully responsive to the owner’s requirements. A good organizational framework allows bidders to readily find information needed to submit a fully responsive bid. The following helpful hints can improve the organization and structure of bidding documents:

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Tender Law in Canada: Practical Implications

by Joel Richler

There are three Supreme Court of Canada cases which presently inform the law of tender in Canada.

The first, and seminal case, is *The Queen (Ont.) v. Ron Engineering & Eastern Construction (Eastern) Ltd.*, where the Supreme Court first articulated the “Contract A”/“Contract B” analysis. Contract “A” is the tender contract that is made when a bidder submits a bid in response to an invitation to tender. Contract “B” is the agreement that will be formed between the authority or owner and the winning bidder.

The second case is *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, in which the Supreme Court clarified that Contract “As” can only be formed between an owner and compliant bidders; only compliant bids can be accepted. At the same time, the Court recognized and accepted that owners are entitled to consider “nuanced” views of price, and are therefore not bound as a matter of principle to accept only the lowest of compliant bids.

The third case, *Martel Building Ltd. v. Canada*, affirms that there is a duty owed to treat all compliant bidders fairly and equally, but always with regard to the terms of the tender call. At the same time, the Court held that tender requirements are not negotiable, that owners have the right to reserve privileges and impose stipulations and that there is no duty of care owed in respect of the preparation of tender documents.

A reading of these Supreme Court cases, and the many cases decided since *Ron Engineering* in trial and appeal courts throughout Canada, suggests three somewhat competing principles.

First, the law imposes obligations on both the owners and the bidders. Owners must at all times adhere to the terms and conditions of their tender documents. They cannot accept any non-compliant bids, no matter how attractive they may be. As well, owners must act towards all compliant bidders equally and in good

faith, particularly during the tender evaluation process. They cannot ultimately make their decisions to award or reject tenders based on criteria that are not expressed or implied in the terms and conditions of their tenders. Bidders, for their part, cannot revoke their tenders once opened, unless permitted to do so by the terms and conditions of the tender.

Second, the law at the same time permits owners to create the terms and conditions of Contract “A” as they see fit. Thus, privilege clauses are recognized as fully enforceable and, if properly drafted, allow owners to reserve to themselves the rights to award contracts to bids that may not be for the lowest price, or not to award contracts at all. As well, owners are free to impose any number of criteria on bidders such as prior similar work experience; the absence of claims or prior litigation; local contracting; scheduling criteria; composition of construction teams, and so on. The list can be endless.

Third, and perhaps somewhat contradictory of the foregoing, the courts have made it clear that the tender process is designed to replace negotiation with competition. This may mean that, no matter how broadly drafted, there may be a point at which a court will say that a tender process is by design unfair, or that a privilege clause may not be enforceable by an owner. Here, public policy concerns may come into play. There are as yet no such cases, but the language of the trilogy of Supreme Court cases suggests that the courts will have regard to the essential nature of tendering. The line is not yet defined, but there is reason to believe that owners will not have “carte blanche”.

As an immediate consequence of *M.J.B.*, superior and appellate courts have followed the Supreme Court and accorded owners a high degree of flexibility in preserving rights under properly written privilege clauses. In *Sound Contracting Ltd. v. Nanaimo*, the British Columbia Supreme Court allowed an owner, in exercising its rights

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under a broadly drafted privilege clause, to accept a tender based on greatest value based on quality, service and price. The owner was permitted to reject a tender based upon anticipated extra expenses based on prior experience with that bidder, provided that the evaluation of the tender was shown to be fair and in good faith, and that the reasons for rejection were reasonable and relevant.

Similarly, in taking a nuanced view of price, an owner is entitled to consider which of the bidders is more reliable and is, in this regard, entitled to act upon information obtained from others having had experience with bidders (*Sound Contracting Ltd. v. Hood Point Improvement District*).

For every successful bidder in a tender process, there are several losers. The perennial problem faced by owners and other tendering authorities is the risk of complaints made by “bitter bidders”. These complaints are expensive and time-consuming to resolve, and the risk of a deficient tender process can be as broad as liability for a plaintiff’s lost profits. From a bidder’s perspective, engaging in a tender process is expensive, and bidders have a legitimate interest in expecting owners to adhere to their contractual obligations as defined by the tender documents and as preserved by the courts.

Given the state of the law, owners can take steps to protect themselves. Always bearing in mind that tender terms and conditions are contractual, owners can enhance their rights in the process by adopting the following prudent policies.

First and foremost, great care should be taken in the drafting of tender documents. The more that is expressed, the less the need and the risk of a court imposition of implied terms. Words should be used consistently. For example, the difference in meaning between “informality” and “irregularity” should be made clear. Better, of course, would be the use of one word to describe the grounds upon which an owner can exercise its right to reject a tender. Where the owner wishes to retain discretion, the bases upon which discretion may be exercised should be made as clear as

possible, and the owner should accurately describe the discretion that it seeks to retain. Tender documents are typically comprised of many types and sets of documents (including the invitations to tender, the instructions to bidders, the tender forms, addenda, site meeting minutes, the form of ultimate contract, contract general conditions, contract special conditions, and so on), and care should be taken to ensure the internal consistency of all such documents.

Second, prudence and care have to be exercised in the tender evaluation process. Staff have to be familiar with their own documents, and they also have to be aware of the degrees of discretion that they have and, to some extent, the legal principles that apply. Treating all bidders equally and in good faith does not mean that all bidders have to be treated the same. Some tenders will invoke more attention than others. Nevertheless, care has to be taken that in the evaluation stage, no bidder is given an advantage over the others.

Third, given the contentious aspect of the entire tender process and, given the degree of enquiry that is permitted of public authorities under freedom of information legislation, great care must be taken to ensure all of the evaluation and decision making processes are properly, accurately and fairly documented.

From the bidders’ perspective, there are corollary principles. Bidders should be keenly aware that they are bound to strictly comply with tender terms and conditions. This means, typically, that tenders have to be complete and unambiguous. Complex contracts will engender ambiguity and confusion. Tender documents should be read carefully and completely upon receipt, and clarification of tender requirements should be sought on a timely basis well in advance of the opening of the bids. During any evaluative process, to the extent and degree that owners ask for post-submission clarifications, responses should be timely and clear. Bidders should be vigilant, while recognizing that they are in a competitive, rather than a negotiating, environment.



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Procurement Law at a Glance

by Robert Maisey and Graham McLeod

The extent of litigation since the Supreme Court of Canada's seminal 1981 decision in *Ontario v. Ron Engineering* ("Ron Engineering") shows that disputes about tender awards have not abated and that the law has grown more complex. The following provides a quick reference to some procurement principles based on cases from common law jurisdictions across Canada.

What is a tender? What is an RFP?

- The tender or RFP is usually, but not always, an offer to consider bids for a contract. A bidder submitting a bid or proposal accepts that offer, resulting in Contract "A". Whether or not Contract "A" is formed depends on the terms and conditions of the tender document. Contract "B" is the agreement contemplated by the tender process.

Ron Engineering and M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited ("M.J.B.").

- One court found that Contract "A" did not arise where a clause in the tender documents provided that the tendering authority was not obligated to a proponent whatsoever until a written agreement was executed relating to an approved proposal.

Maple Ridge Towing (1981) Ltd. v. Maple Ridge (District).

- Another court has found that Contract "A" was not formed when an RFP contained a clause stating it was an invitation for proposals and not a tender call and the parties were to negotiate Contract "B".

Melco Developments Ltd. v. Portage La Prairie (City).

What are the terms of Contract "A"?

- The terms of Contract "A" are determined by the terms and conditions of the tender document. Almost always, it will be a term of Contract "A" that a bid

cannot be accepted by a tendering authority unless that bid is compliant with all of the terms and conditions of the tender documents. In other words, the offer to consider bids is an offer to consider only compliant bids.

Ron Engineering and M.J.B.

- It is an implied term of Contract "A" that all bidders will be treated fairly and equally, with due regard to the contractual terms incorporated into the tender call. The duty to be fair and consistent is defined and limited by the terms of the tender documents.

Martel Building Limited v. Canada ("Martel").

- No duty of fairness to a bidder will arise unless there is a Contract "A".

Midwest Management (1987) Ltd. v. British Columbia Gas Utility Ltd. ("Midwest").

What is the Effect of a Non-Compliant Bid or Proposal?

- At best, a non-compliant bid is a counter-offer to the offer made in the tender documents.

Midwest and Labrador Airways Ltd. v. Canada Post Corp. ("Labrador Airways").

- Where a non-compliant bid is accepted, a tendering authority may be exposed to a damages claim by compliant bidders, even where the tendering authority has acted in good faith.

M.J.B.

What is the law on privilege clauses?

- A tendering authority has the right to reserve privileges to itself and impose stipulations and restrictions on bidders. Privilege clauses are enforceable and are incompatible with an absolute or customary obligation to award a contract to the lowest compliant bidder. A privilege clause is not incompatible with an implied term that only compliant tenders will be accepted.

Martel and M.J.B.

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- A tendering authority may exercise discretion in pricing evaluation, if it is disclosed in the tender, to accept bids to account for the fact that the lowest bid will not always mean the lowest actual cost. Many factors impact upon the ultimate cost of a contract, and tendering authorities are entitled to take a more nuanced view of the cost and prices that are quoted in the bids.
M.J.B.
- In exercising rights under a broad privilege clause that gives a tendering authority the right to accept a tender based on the greatest value for quality, service and price, a tendering authority may reject a bid based upon anticipated extra expenses which are foreseen due to prior experience with the bidder, provided that the analysis of the bids is shown to be fair and in good faith and that the reasons for rejection are reasonable and relevant. In taking a nuanced view of price, a tendering authority is entitled to consider which of the bidders is more reliable and is, in this regard, entitled to act on information obtained from others having experience with the bidder.
Sound Contracting Ltd. v. Nanaimo and Sound Contracting Ltd. v. Hoodpoint Improvement District.
- Where a tender stated that an award would be made based on “commercial, financial and operational requirements”, that evaluation criterion may be interpreted broadly.
Labrador Airways.
- A tendering authority is not required to disclose the weight given to evaluation factors used in tender evaluations.
Acme Building and Construction Ltd. v. Newcastle (Town) and W.I.B. Co. Construction v. Central Okanagan School District No. 23 (“W.I.B. Co.”).

How to use references and investigations in the evaluation process?

- A tendering authority is entitled, but not required, to ask for clarifications of tenders that have been submitted, and this does not negate the authority’s right to deny the existence of a compliant tender or the existence of Contract “A”.
Midwest.
- An evaluator of a tender does not have to exhaust all avenues of investigation.
W.I.B. Co.
- An unsuccessful bidder has no right to be told of evaluations or references received or to reply to such information.
Cegeco Construction Limiteé v. Ouimet and W.I.B. Co.

Can irregularities in a bid be waived and how do they affect compliance?

- The bidder’s failure to sign a bid bond is not a mere informality. It renders the bid not compliant.
Magna Contracting and Management Inc. v. Newfoundland.

How much disclosure of the evaluation process is required?

- A tendering authority may breach its obligations of fairness when it awards a contract based on undisclosed criteria.
Tarmac Canada Inc. v. Hamilton-Wentworth.



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Federal Government Procurement

by Gordon Cameron

When purchasing goods or services, the federal government is subject to special rules. Knowing those rules is important if your company wants to win a contract with the federal government or if, somewhere along the line, you feel that the contracting process is flawed or you have been treated unfairly relative to other bidders. These rules are legally enforceable (not just policies) arising out of our domestic and international trade agreements, and the Canadian International Trade Tribunal (“CITT”) is a fast and effective forum for litigating federal government procurement disputes. Generally, these rules are more thorough and rigorous in ensuring fair and open competition than the law applicable to private procurements.

The Rules

Notification of the Procurement: The government’s intention to acquire the goods or services in question must be well advertised so that all potential bidders have notice of how to obtain the tender documents.

What the Government is Buying: The government’s requirements (scope of work, specifications for goods, etc.), must be set out clearly and precisely in the tender documents, i.e., you must be able to determine exactly what you are bidding on.

Who Wins the Contract: The government must clearly specify the selection factor that will determine the winner (lowest price, best value, or other measure of ranking bids).

How Bids are Ranked: The government evaluation criteria used to choose the winner must be clearly set out. The tender documents must state which requirements are mandatory and which are “desirable”. If bids are scored, the “weighting” of areas (past experience, product performance, financial stability, etc.) must be set out.

You Must Be Told How to Win the Contract: The tender documents must tell potential bidders exactly what to do to submit a compliant bid and win the contract. It is then up to the bidders to make sure their bid is compliant and competitive.

Exceptions: If the government intends to rely on an exception to these rules and award the contract directly to a particular supplier (that supplier may be the only company able to perform the contract), the government must give notice of its intention. You can challenge the decision if you feel your company is capable of providing the goods or services in question.

When Things Go Wrong

If you think that the procurement specifications, evaluation criteria, or the people running the procurement, are unfairly biased in favour of one bidder (or against you), you can object and seek a level playing field.

If you are not satisfied with the response to your initial request or objection, you must assert your rights at that time. You cannot bid into a procurement that you think is vague, error-ridden, or biased against you, and then wait to see if you win before complaining.

If you believe that the evaluation and/or award to another bidder was unfair, you must act on it immediately. If you decide to lodge an objection with the government, you must do so within 10 business days from the date on which you became aware of the problem. If the response to your objection is unsatisfactory, you have 10 business days to file a complaint with the CITT. When you complain to the CITT, you can ask for an order preventing the contract award until your complaint is decided, and this order will often be granted by the CITT. The government can over-rule such an order on grounds of urgency, but rarely does so.

If your complaint is upheld, the CITT can make one of several orders, depending on the circumstances of the case. They can order a new procurement to take place. If the contract should have been awarded to you, the CITT can order the contract to be awarded to you or, if it is too late to award you the contract, you can be awarded damages based on your lost profit.



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20 Things to Look for

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- Introduce the bidding documents with an overall description of the project.
- Always provide bidders with a list of the “bidding documents” so they can be sure that they have all the documents.
- Prescribe a format for the bidders to use when submitting their bids. This makes evaluation considerably easier and saves the bidders time. It is helpful to have bidders include pre-printed literature on their firm in a separate volume.
- Have one timetable in the bidding documents where all relevant dates appear. This has two advantages. First, if you change the various applicable times and dates, they only have to be changed in one spot in the bidding documents and, second, the bidders need to review only one section to understand all of the deadlines in the bidding process.
- The bidding documents should describe the bidding process from start to finish (from the issuance of the bidding documents to the award and signature of the contract).
- Always paginate your bidding documents with “page x of y” so the bidders know that they have received all of the pages.
- Always put a table of contents in your bidding documents and subtables for long sections of the documents.
- Follow the traditional structure of bidding documents in your industry so that bidders are familiar with the approach and better able to find their way around the documents.
- Provide bidders with acceptable forms for such documents as the performance security or bid security.

4. Are contract clauses hidden in the general information?

When owners review the tender documents they routinely use, they should look very carefully at the “general information” that we suggest be extracted from the bidding documents. Before “extraction”, owners should be very sure that there are no significant contract clauses tucked away in the general information. It is not unusual to see important technical requirements

hidden in the middle of general technical information about the project. Contractual terms should be readily apparent to any reader and not “hidden” where an unwitting bidder might miss them completely.

5. Are tender or RFP documents being used to “market” the transaction?

It is not unusual for owners to attempt to “market” or “sell” their transaction using the tender or RFP document. This approach arises when drafters forget the bidding documents are, in fact, contract documents and ought to be treated as such. Therefore, tender or RFP documents should not be used as marketing tools to attract bidders. This type of marketing approach might be used during the bidders meeting or in meetings with bidders before the project begins. Marketing should not, however, find its way into the drafting of the bidding documents themselves.

6. Is the type of tender/bidding process clear in the document?

There are several different types of tender or bidding documents commonly used at various stages of bidding processes. Owners may use: requests for expressions of interest; requests for pre-qualification; requests for proposals; or public tenders.

Each of these documents tends to have a different role in the bidding process and it is important to use both the right label and the right approach in documentation. For example, requests for expressions of interest are really initial forays into the marketplace to develop a “mailing list” of firms or individuals who may be interested in providing the goods, works or services that the owner requires. Requests for pre-qualifications are generally used when the owner wishes to provide bidding documents to only a short list of pre-qualified bidders. Requests for proposals traditionally were used when owners wanted to give respondents considerably more flexibility than a traditional tender document. The Request for Proposal device has evolved significantly since this approach and is now used in several circumstances

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20 Things to Look for

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and it is often very difficult to tell the difference between an RFP and a tender.

Owners should keep in mind that there are accepted approaches to each of these processes and should understand the distinctions among them.

7. Are bidders submitting to a draft contract?

There are a number of ways for owners to receive bids. In many traditional bidding documents, a bidder is expected to sign a contract exactly as it has been attached to the bidding documents. In this regard, the most important thing that the bidder submits is its price. In other circumstances, bidders may submit a proposal based on a general description of the terms and conditions which are to be imposed in the subsequent contract. It is important that owners decide at the outset whether they intend to attach a fully completed draft contract binding the successful bidder or a set of basic terms fundamental to the contract, with the remaining contract to be negotiated between the parties.

8. Is the language “crisp”, consistent, clear and contractual?

Prior to *Ron Engineering* in the early 1980s, it was possible for the language of bidding documents to be relatively flexible and in a narrative style. With the imposition of Contract “A” in the bidding process, it becomes very important for bidding documents to be drafted with the crisp, clear, consistent and contractual language used in any other contract. For example:

- Drafting in the bidding documents should be consistent in the use of the terms “may”, “shall”, “will”, “should”, “must” and similar terms so that the nature of obligations for both parties is clear.
- Where bidding documents use “passive voice”, such expressions as “the supplies shall be purchased promptly” create serious drafting problems as they do not indicate who will carry out the action.

- Generally, you can improve the clarity of documents by dividing long segments into parts, subparts and by using appropriate headings where necessary.

A very useful book to outline some simple legal drafting rules is Robert C. Dick’s book entitled, *Legal Drafting in Plain Language*.

9. Does the format for submission match the evaluation criteria?

It is very helpful in bidding documents for the drafters of the documents to understand their evaluation criteria before they prescribe a format for the bidders to follow when submitting their bids. This is because it is very useful to link the prescribed format of the bid and the evaluation criteria so that each part of the bidder’s submission is related to a certain type of evaluation criteria. If the evaluation criteria relate to technical experience, staffing and a business plan, then the bidders should be asked to format their submission in three parts, entitled technical experience, staffing and business plan. This kind of approach significantly eases the burden of the evaluation process.

10. Are the evaluation criteria clear?

Two key decisions should be made when drafting bid documents. First, the drafters should decide how much detail to disclose to bidders regarding the evaluation criteria since both the owner and bidders have a vested interest in a clear and common understanding of the basis for evaluating submissions. Bidders may focus their efforts in developing their bids to showcase the skills which meet the evaluation criteria established by the owner.

There is a balance between disclosing the criteria on which the bidders will be evaluated and disclosing so much detail about the evaluation process that the owner is unnecessarily constrained. One thing is clear, however, and that is that owners cannot arbitrarily apply a criterion not disclosed to the bidders during the bidding process.

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Second, it is important that the evaluation criteria and the process for evaluation be established and understood by the owner and its evaluation team *before* any bids are reviewed so the owner is protected from accusations of having skewed the evaluation criteria to benefit a particular bid.

11. Are the criteria for rejection too strict? Are they clearly articulated?

This is one of the most important factors in bidding documents and bidding processes. One common mistake made by owners is to set up a rigid set of requirements that will cause an automatic rejection in the event that the requirements are not met. At the time of drafting, this is usually done because the owner wants to emphasize to the bidders that it wants bids to be submitted in a very particular way. However, the marketplace is filled with imperfect bidders who submit imperfect bids. If the rejection criteria are too strict, the owner may have backed itself into a very serious corner if a significant number of the bids do not comply with the strict criteria. It is also quite clear from the case law that if strict criteria for compliance are set, the owner will be held to those compliance criteria during the bidding process.

12. Are standard protection clauses in place? Do you have a checklist?

Each owner should have a checklist of standard clauses that is included in all of its bidding documents. For example:

- cost of bidding clauses indicating that the bidders will pay their own costs;
- disclaimers with respect to the quality of information;
- provisions outlining the period of validity of the bidders' submissions;
- distinct timetables;
- submission deadline clauses;
- modification and withdrawal clauses;
- clear processes for clarification of the bidding documents;
- rules with respect to contacting the owner and lobbying the owner's firm;
- up to date privilege clauses (the "right to accept or reject" clauses); and
- clauses outlining the contract signing procedures.

In addition to the standard clauses, each owner is likely to have particular clauses that it wants to include in all of its bidding documents.

13. Is the price bid an "evaluated" price or a straightforward comparison? If evaluated, are the rules for evaluation clear?

In many circumstances, the prices submitted by various bidders are not directly comparable since the prices must first be evaluated. It is important to make it very clear to all bidders whether or not the owner is reserving the right to evaluate the price submitted by bidders. This is a matter which frequently upsets bidders, particularly because when prices are read orally at a public opening, a bidder may assume that it has won if it has the lowest price.

14. Is the process for clarifying the bidding documents clear?

All bidding documents, regardless of how conscientiously or well they have been prepared, contain mistakes or ambiguities of various types. Therefore, it is very important to give bidders a reasonable opportunity to submit requests for clarifications to the owner with respect to the bidding documents. Equally important during this clarification process is that all bidders receive the same information from the owner. Therefore, it is helpful to have a relatively formal and well-defined clarification process that is spelled out in the bidding documents.

15. Is the process for clarifying the bidder's submissions clear?

During the bidding process, it is likely that the owner will want to clarify a submission which has been made by a bidder. This is a very sensitive issue because clarifications, if taken too far, can actually give a bidder a right to modify its bid after the submission deadline. For obvious reasons, this is contrary to principles of fair bidding and could cause serious problems for the owner. It is very important to set out in the bidding documents what the process is for clarifying a bidder's submission and to set out what parameters and restrictions apply to that process of clarification.

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20 Things to Look for

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16. Are the bid security provisions clear? Is an acceptable bid security form attached to the documents?

Every owner engaging in a bidding process should ensure it receives reliable bid securities from each of its bidders. In the absence of a good enforceable bid security, it may be very difficult to require the low bidder to enter into its contract based on the terms and condition of its bid. It is also necessary to ensure that the provisions of the bid security itself are acceptable to the owner. The easiest way to achieve this is to prescribe a form of bid security for the bidders as a part of the bidding documents.

17. Have provisions regarding joint ventures been added?

In bidding processes, responses may be submitted by a group of parties who jointly can meet the requirements of the bidding documents. When more than one party is involved in the submission of the bids, it is important to impose a set of rules upon the joint venture or group of parties submitting a bid. Owners should consider:

- Which one of the parties in the joint venture is in a position to bind all parties to the terms and conditions of both Contract A and Contract B?
- What are the rules about changing the members of the joint venture?
- Will the joint venture have to establish a joint venture company before submitting a bid or is it sufficient to have the joint venture establish a joint venture company only after it has won the bidding process?
- Is there a limit to the number of parties who can participate in the joint venture? Will the owner accept a joint venture made up of 20 or 30 members each with a very minor percentage of the work?
- Are parties permitted to be involved in more than one joint venture responding to the bidding documents?

18. Are there specific provisions dealing with acceptance of “alternative” bids? What consequences are there in submitting an alternative bid if that type of bid is prohibited?

An owner may wish to know if there are alternatives to how it has prescribed the project to be carried out. The owner must be able to make an “apples to apples” comparison among the bids it receives. Also, if the owner has a preference as to how the project is to proceed, it may want to prohibit the bidding of alternatives so as not to undermine its own future plans.

The most important issue is that owners must be specific in setting out whether or not the owner will accept alternative bids, what the consequences of an alternative bid are and how alternative bids will be compared with “base bids” in the process.

19. Is it clear when “Contract B” comes into existence?

Because of the existence of Contract A and Contract B in a bidding process, it is important for the owner to articulate the point at which Contract B will come into existence. This can be achieved relatively simply by describing the process by which Contract B is signed and the event which will cause Contract B to become effective.

20. Should you use generic documents?

For owners who engage in repeated bidding processes, it is both prudent and efficient to develop generic bidding documents which can be used for a range of different project types. This can be done as there are a number of various standard clauses that should be included in any bidding process, irrespective of the project type. Therefore, owners should seriously ask whether there is a more reasonable business approach to develop a standard set of bidding documents which could be specialised on a case by case basis.

Professional NOTES

A sampling of recent appointments, publications and presentations by Blakes Procurement Group

Joel Richler, speaker, “The Future of Construction Litigation”, *Law Society of Upper Canada Seminar: The Six Minute Construction Lawyer*, May 15, 2002.

Joel Richler, speaker, “Implications of Deemed Trusts and Statutory Liens for Your Recovery Strategy”, *Canadian Institute Seminar: Enforcing Creditors’ Rights*, May 9, 2002

Joel Richler, speaker, “The Art & Science of Civil Litigation”, *American College of Trial Lawyers and Advocates’ Society Seminar*, May 3, 2002.

Joel Richler, speaker, Hail Mary Pleas: “The Hail Mary Plea of Non-Justiciability”, *Ontario Bar Association Seminar*, May 1, 2002.

Robert Maisey and **Graham McLeod**, speakers and co-presenters, “Bidding & Tendering: An Overview & Recent Developments”, *Avoiding Legal Traps in the Bidding Process*, Blake, Cassels & Graydon LLP, Toronto, April 16, 2002.

Joel Richler, of our Litigation Group, speaker, “Legal Principles”, *Avoiding Legal Traps in the Bidding Process*, Blake, Cassels & Graydon LLP, Toronto, April 16, 2002.

Judy Wilson, speaker, “20 Things to Look for in Your Bidding Documents and Process”, *Avoiding Legal Traps in the Bidding Process*, Blake, Cassels & Graydon LLP, Toronto, April 16, 2002.

Gordon Cameron, of our Ottawa Procurement Group, speaker, “Government Procurement and the CITT”, *Avoiding Legal Traps in the Bidding Process*, Blake, Cassels & Graydon LLP, Toronto, April 16, 2002.

Judy Wilson, author, “Managing International Risk in Drafting Commercial Agreements”, *Atlas Information (Canada): Negotiating and Drafting Major Commercial Agreements and Transactions*, Vancouver, April 2002.

Judy Wilson, author, “Ontario’s New Municipal Act – User Fees and New Ways of Doing Business” *Insight Information: Ontario’s New Municipal Act*, Toronto, April 2002.

Joel Richler, speaker, “Standard of Review”, *Administrative Law and Practice, Beyond the Basics: Law Society of Upper Canada Seminar*, March 21, 2002.

Judy Wilson, author, “Success in International Procurement Processes—Some Things you Should Know to be Successful”, *Federated Press*, April 2001.

Judy Wilson, author and presenter, “The Problems with Water and Wastewater in Developing Countries – Is There a role for Lawyers in the Solution?”, *InterPacific Bar Association Tenth Annual Meeting and Conference*, April 28th - May 2nd, 2000.

Avoiding Legal Traps in the Bidding Process

On April 16th, Blakes’ Procurement Law Group hosted a morning seminar for clients in Toronto. Lawyers from our Toronto and Ottawa offices examined Bids, Tenders, RFPs and Procurement Processes.

Robert Maisey and **Graham McLeod** co-presented “Bidding & Tendering: An Overview & Recent Developments”.

Joel Richler, of our Litigation

Group, spoke on the importance of “Legal Principles in the Tender Process”.

Judy Wilson listed “20 Things to Look for in Your Bidding Documents and Process”.

Gordon Cameron, of our Ottawa office, discussed “Government Procurement and the CITT”.

For seminar materials, please contact Lynn Spencer of our Marketing at lynn.spencer@blakes.com

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