Managing
RFP and Tendering Risks

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Overview

• Contract Fundamentals
• Tender Law Before Ron Engineering
• Tendering Law After Ron Engineering
• Practical Issues
  • Open or closed procurement?
    • Internal policies?
  • Request for Qualifications/Expressions of Interest
  • Request for Tenders
  • Request for Proposals
  • Multi-stage procurement (BAFO)
Contract Fundamentals and Tendering Law
Contract Fundamentals and Tendering Law

• **Five basic elements required for a contract:**
  • Intention to be bound
  • Offer and Acceptance
  • Compliance with Formalities
    • Consideration or under seal
    • Statutory requirements, if applicable
  • Capacity to Contract
  • Legality of Object

• **Tendering law principles generally dictated by the second element:** Offer and Acceptance
Contract Fundamentals (cont’d)

• What is an Offer?
  • Definite and final expression of a willingness to be bound
    • Need not use the word “offer”
  • Remains open until:
    • Expiry within time specified
    • Expiry within reasonable time
    • Receipt of counter-offer

• Invitation to Treat as Distinct from an Offer
  • Invitation to do business
  • Merely solicits an offer (e.g. “send me a price list”)

• Acceptance
  • Must be clear and unequivocal
Tendering Law
Before Ron Engineering
Prior to the 1981 decision in Ron Engineering, Canadian common law was the same as English common law

Call for Tenders = Invitation to Treat

- *Dickinson v Dodds* [1876] 2Ch. D. 463 (C.A), followed in Canada
  - *Belle River University v Kaufmann Co.* (1978), 87 CLR 9#d) 761 (CA)

Then along came Ron Engineering…. which radically changed the common law of tendering in Canada
Tendering Law
After Ron Engineering
• The *Queen v Ron Engineering* (1981) SCC
  • $2.7 million bid in Ontario with bidder submitting bid security of $150,000 by certified cheque
  • Minutes after closing, bidder discovered error in calculation and that bid was $750,000 too low
    • Mistake *not* obvious from reading bid document
  • Bidder immediately requested bid be withdrawn but owner refused and awarded contract to bidder
  • Contractor refused to sign contract
  • Owner awarded to another and kept bid security
  • Contractor sued to recover bid security
  • Owner counter-claimed for damages
• SCC held if Request to Bid was merely an Invitation to Treat, bid security and irrevocability of bid were meaningless

• SCC developed unique “Two Contract” theory
  • Contract A:
    • Unilateral contract to keep bid open for fixed period of time
    • Formed when owner’s invitation to tender (SCC’s “offer”) is accepted by tenderer, by submitting tender in response to invitation to bid
  • Contract B:
    • Bilateral contract to perform the work
    • Created when owner accepts tender
Tendering Law – Ron Engineering (cont’d)

Three key terms of Contract A:
- Only a compliant tender can be accepted by owner
- The lowest compliant tender should be accepted
- The owner owes bidders a duty of fairness in analyzing tenders

Initial trickle of tender cases became a flood
- Many cases boil down to court’s view of whether contractor was treated “fairly” in the eyes of the court
- In each case Courts essentially wrestle with tension between:
  - “The Courts will protect the integrity of the bidding system ..where under the law of contracts it is possible to do so” (SCC in Ron)
  - Court’s need to “protect the public purse” (i.e. failure to award to lowest bidder)
  - Court’s view of “fairness”
Disputes over validity and enforceability of tenders has been a thriving business for lawyers


- Contractor bound by mistake in bid not evident on face of tender
- Court applied Ron Engineering, confirming it as the law in Canada

- Privilege clause did not empower authority to accept a non compliant tender but would allow it to accept a compliant tender that was not the lowest
- “… the privilege clause is incompatible with an obligation to accept only the lowest compliant bid”
- Court implied a term into Contract A based on presumed intention of parties that only compliant bids would be accepted.
- Owner can decline to accept any tender based on reasonable and relevant grounds
M.J.B. Enterprises (cont’d)

- Court stated (emphasis added):

“It is always possible the Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, **all of this depending upon the terms and conditions of the tender call.**”
Tendering Law – Post Ron Engineering (cont’d)

Chinook Aggregates Ltd. v. Abbotsford (1989), 40 B.C.L.R. (2d) 345, 35 C.L.R. 241 (BCCA)

- Local preference policy not disclosed to bidders
- Court held:

“It is inherent in the bidding process that the owner is inviting bidders to put in their lowest bid and that the bidders will respond accordingly. If the owner attaches an undisclosed term that is inconsistent with that tendering process, a term that the lowest qualified bid will be accepted should be implied to give effect to that process.”
Martel Building Ltd. v. Canada [2000] 2 S.C.R. 943

• Issue over process of evaluation of bids and whether process breached implied obligation to “act fairly”
• Absent express contrary terms in Contract A, court recognized obligation to treat all bidders fairly without using undisclosed criteria
• Court stated:

  “Implying an obligation to treat all bidders fairly and equally is consistent with the goal of promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids, or ultimately avoid participating in the tender process.”
Naylor Group Inc. v. Ellis-Don Construction [2001] 2 S.C.R. 943

- Issue over whether prime contractor obligated to subcontractor if it carried subcontractor’s bid in its tender
- Court held that when prime contractor carried subcontractor’s bid in prime contractor’s tender, it committed itself to subcontract to that subcontractor “in the absence of reasonable objection”.
Graham Industrial Services Ltd. v. Greater Vancouver Water District, 2004 BCCA 5

- Bid submitted was materially non-compliant
- Court held materially non-compliant bids not capable of being accepted
- Test of whether materially non-compliant is an objective test
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116

• Call for tenders required all equipment to be newer than specified year (1980)

• Bid on its face is compliant
  • BUT if owner had investigated it would have found the listed equipment was older than the specified year

• Second low bidder sued City for awarding contract to low bidder that did not meet requirements for equipment, alleging breach of duty of fairness
Double N Earthmovers (cont’d)

- Court said although City was allowed to cancel award if bid was false, City was not obligated to do so if it learned that tender indeed was false.
- Court held bid was compliant on its face and City could accept without breaching the duty of fairness to others.
  - City not obligated to investigate beyond representations in bid
- Under “Contract B”, City could compel bidder to provide required equipment
- Split decision of Court 5/4
Tendering Law – Post Ron Engineering (cont’d)

Tercon Contractors Ltd. vs. British Columbia (Transportation and Highways) 2010 SCC4, [2010] 1 S.C.R. 69

• ANOTHER 5/4 split by SCC
• Province issued an RFP for Kincolith Highway
• Province originally proposed Design/Build and short-listed proponents
• Province then changed methodology to Design/Bid/Build but issued ministerial direction to the effect that only the originally short-listed proponents could participate
• RFP also stated Province would not contract with a joint venture
Tercon (cont’d)

• One short-listed proponent B was strong on Design/Build but weaker on D-B-B
• Company EA was not interested in Design/Build and so had not participated in original REOI but was now interested in D-B-B
• Proposed forming a joint venture with B
• Disclosed proposed joint venture with B
Tercon (cont’d)

- Province said they could not accept a proposal with a joint venture, but could have nothing to say if EA was a subcontractor to B.
- When preparing the contract with B, Province wrote in language that essentially said if B defaults they have rights to go directly to EA and EA will complete.
- Court found that, notwithstanding the language, EA/B was a joint venture arrangement and that was known to the Province.
Tendering Law – Post Ron Engineering (cont’d)

Tercon (cont’d)

• Tercon could not have had a better set of proven facts
  • The characterization of the conduct of the Province in this case was critical
  • The majority of judges found the conduct of the Province troublesome
• Courts are typically loathe to uphold or support egregious conduct
Tercon (cont’d)

• Focus of commentators and analysis has been on applicability of exclusion/limitation of liability clause in RFP:

  • “Except as expressly and specifically permitted in these Instructions no Proponent shall have any claim for 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 it has no claim.”
Tercon (cont’d)

- At the end of the day, only issue was whether the exclusion clause applied to allow the Province to avoid a claim from Tercon
- SCC split 5:4 on the exclusion clause point with both Justices Binnie and McLachlin in the minority
- Court agreed on correct analysis, but divided on interpretation of exclusion clause
Tercon (cont’d)

- Framework of analysis:
  - Does the exclusion clause apply?
    - If yes, is the exclusion clause unconscionable?
    - If yes, should the exclusion clause not be enforced due to public policy concerns?
  - Majority (5) decision: exclusion does not apply
  - Minority (4) decision: exclusion clause applies
  - Court left open possibility that a well crafted exclusion clause could limit liability, including duty of fairness
    - But exclusion clauses will be narrowly interpreted
Tercon (cont’d)

- You know you’re in trouble when the court starts its judgment by stating:

  “The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed.”

Opening words of the majority judgment of the Supreme Court of Canada
Tendering Law – Post Ron Engineering (cont’d)

Tercon (cont’d)

• The majority decision nuanced the language of the exclusion clause:

  “the clause only applies to claims arising ‘as a result of participating in the RFP’, not to claims resulting from the participation of other ineligible parties. Moreover, ..the clause is not effective to limit liability for breach of the Province’s implied duty of fairness to bidders.”
Tercon (cont’d)

• The minority decision would have applied the exclusion clause in favour of the Province.

“..The Ministry’s misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract. …”
Tercon (cont’d)

- Court considered following circumstances in holding that tendering law applied to the RFP:
  - RFP invited proposals from closed list of eligible proponents
  - Requirement that proposals comply with specs
  - Mandatory form of contract was attached
  - Proposals were irrevocable for 60 days
  - Proponents were required to post security
  - Implied requirement to negotiate in good faith
- Court looked to “substance” and held RFP process intended to and did create binding contractual relationship
Tendering Law – Summary

- Tendering disputes continue to feed a large number of lawyers and add uncertainty and risk to both authorities and contractors
- Knowledge of tendering law is critical
- Failure to properly address tendering law issues in the invitation to tender and instructions to tenderers can:
  - Expose owner/tendering authority to liability
  - Expose consultant who prepared tender documents to liability
  - Disrupt and delay entire project
  - Feed the families of many lawyers
General Practical Issues
Some Practical Procurement Risks for Owner

- Receive no bids/proposals
- Receive non-compliant bids/proposals
  - Some non-compliant or All non-compliant
- No competition
- All bids/proposals exceed budget
  - Budget unrealistic
  - Contract terms, scope, specifications poor/ambiguous
  - Too much risk transfer
    - Owners/consultants don’t assess/price risk same as contractors
- Potential need to disclose evaluation criteria
- Expensive procurement process
- Failed process and/or litigation
General Practical Issues (cont’d)

Some Practical Procurement Risks for Contractor

- Rejection of non-compliant bid/proposal
- Compliant bid/proposal rejected in favour of non-compliant bid/proposal
- Unacceptable risk allocation
  - Forces Contractor to qualify bid and risk non-compliance
  - Consider abandoning process
- Uncertainty over owner’s evaluation criteria
- Expensive procurement process
  - Bid/proposal costs may be included in contract price rather than considered general overhead
- Failed process
- Mistake in bid/proposal
General Practical Issues (cont’d)

• Numerous procurement processes available
  • Request for Expressions of Interest (REOI)
  • Pre-qualification Process (RFQ)
  • Request for Quotes
  • Request for Tenders (RFT or RFB)
  • Request for Proposals (RFP)

• Poor process and/or poor risk allocation may be obstacles to finding pool of interested and qualified bidders or lead to non-compliance

• Consider doing market research before finalizing process for major projects
General Practical Issues (cont’d)

• **Selection of Procurement Process may be constrained and/or influenced and/or dictated by:**
  - Stakeholder requirements/policies
  - Regulatory/environmental permitting and approval processes
  - First Nation issues
  - Public owner vs. private owner
  - Contract type (design-bid-build, design-build, P3, BOOT, etc.)
  - Pricing model (fixed price, unit price, hourly rates, etc.)
Pre-Qualification Process Issues
RFQ vs. REOI

Request for Qualifications

• Purpose?
  • To limit bidders/proponents to those who are qualified
  • To short-list eligible bidders/proponents to increase competition or facilitate evaluation

• When appropriate?
  • Perhaps for design-bid-build vs. design-build
  • When there is little to distinguish one pre-qualified bidder from another and owner considers them interchangeable

• When not appropriate?
  • When differences in qualifications, resources, reputation, etc. can influence success of project and final cost to owner (quality, schedule/delays, etc.)

• If selected, deemed qualified
Request for **Expressions of Interest**

- **Purpose?**
  - To gauge interest of market
  - To short-list eligible bidders/proponents to increase competition or facilitate evaluation

- **When appropriate?**
  - As flexible alternative to RFQ
  - When small differences in qualifications/resources can influence ultimate success of project
  - When success of project dependent on key people

- **When not appropriate?**
  - When bidders/proponents interchangeable and owner indifferent provided minimum qualification threshold met
RFQ vs. REOI (cont’d)

Will RFT or RFP take into account and evaluate qualifications, experience and resources?

• If yes:
  • Consider using REOI rather than RFQ
  • Clearly state in RFQ or REOI that purpose is for initial screening only and detailed evaluation, scoring and ranking of relative qualifications, experience, resources, etc. will take place during RFT or RFP process
  • Will original RFQ/REOI submissions be used during subsequent RFT/RFP or will selected bidders/proponents have to re-submit same material with bid/proposal?

• If no:
  • Use either RFQ or REOI
Request for Tender/Request for Proposal Issues
Request for Tenders/Proposals

Threshold Issue: Use RFT or RFP?

- Want mandatory use of same contract/performance requirements?
- Willing and able to entertain bilateral meetings and change commercial terms prior to closing?
- Allow departures from contract requirements?
  - In tender/proposal?
  - In negotiations following identification of highest-ranked submission?
- Want submissions to be fixed price & irrevocable?
- Want “bid security”? If so, what kind, for what purpose and how will it be enforced?
Request for Tenders/Proposals (cont’d)

Request for Tenders

• Definition: tendering process to which tendering law applies

• Contract “A” and Contract “B”

• Contract “A” imposes obligations on Owner

• Limits
  • Flexibility
  • Discretion
  • Negotiations

• Imposes risk and potential liability on Owner if Owner attempts to exercise discretion
Request for Proposals

• Solicitation of interest (i.e. back to “Invitation to Treat”)
• Very flexible
• Limited obligations created (other than those under the terms of the RFP)
• Generally leads to negotiations
• Negotiation risk on Owner high after selection of preferred proponent
• Difficulty in enforcing any proposal security or obligation on Contractor to enter “Contract B”
Use of term “RFP” or “Request for Tenders” is not conclusive and courts consider:

- Are words “tender”, “bid”, “bidder” etc. used anywhere in documents, correspondence, etc.?
- Are proposals required to be “Irrevocable”
- Are proposals required to give fixed price?
- Are proposals required to conform to contract and specifications issued by owner without exception?
- Do tender documents refer to “award” of contract?

- Growing number of cases holding RFPs are RFTs and/or also subject to tendering law principles

- RFP to developers for design-build-lease of clinics
- “Invitation to Tender” advertisement & RFP documents used mixed language
- **Held:** Tender call and tender rules apply
  - Particularly because ad required offers be irrevocable

- RFP to provide modern office space in Fredericton for Federal Government
- No overall standard of evaluation in RFP
- Khoury applied for basis of scoring of its proposal

**Held: Tendering rules apply.**

- Owner must demonstrate it acted fairly and disclose evaluation/scoring of proposal

• RFP issued for cable plant & ethernet hubs in 88 elementary schools & contemplated negotiation
• Board met with 3 lowest proponents and then awarded to other than Cable
• Held: Board had duty to be fair to all “bidders” and to act in good faith
• Held: Cable was treated fairly as RFP did not limit negotiations to preferred proposal
Mellco Developments Ltd. v. Portage la Prairie (City) 2002 MBCA 125

- RFP for sale and development of land for residential dwellings.
- Plaintiff argued RFP was call for tenders and that winning bid was non-compliant due to ambiguity
- Court looked at intention -- City's intention was to negotiate with party with most attractive proposal.
- None of the final terms required for a bid were in the defendant's RFP.
Tercon Contractors Ltd. vs. British Columbia (Transportation and Highways) 2010 SCC4, [2010] 1 S.C.R. 69

- Discussed in previous slides
- Province originally proposed Design/Build and short-listed proponents
- Province then changed methodology to Design/Bid/Build but issued ministerial direction to the effect that only the originally short-listed proponents could participate
- RFP also stated Province would not contract with a joint venture
• **Tercon (cont’d)**
  
  - Court considered following circumstances in holding that tendering law applied to the RFP
    - RFP invited proposals from closed list of eligible proponents
    - Requirement that proposals comply with specs
    - Mandatory form of contract was attached
    - Proposals were irrevocable for 60 days
    - Proponents were required to post security
    - Implied requirement to negotiate in good faith
  
  - Court looked to “substance” and held RFP process in this case intended to and did create binding contractual relationship
BAFO Processes

• RFP’s increasingly combine elements that are typical of both RFPs and true tendering processes to produce “hybrid” processes

• **Hughes Aircraft Systems v Airservices Australia (1997) 146 ALR 1**
  - RFP process involved staged deliverables with short listed proponents being asked for a ‘best and final offer’.
  - **Held: Contract A did not arise until the submission of BAFO**
    - Does corollary then hold that proponent could withdraw without any penalty any time before BAFO submission?
Summary:

• Tendering Law can and often does extend to RFP
  • Court looks to substance not “style”
  • Duty of fairness may apply
  • Terms of RFP and conduct of owner may be determinative whether tendering law applies to the RFP

• Practice Tip:
  • If using RFP, draft RFP as true RFP - but then treat it and act as if a court will hold it to be a Request for Tenders
Summary (cont’d)

• First question is whether by its express and implied terms the process evidences an intention to create legal relationship
  • Virtually every RFP and RFT as drafted indicates some level of contractual commitment
  • In most of the reported cases the courts use the words tender and proposal interchangeably
• In a true RFP process, the intention is to get to a point where contract can be negotiated – maximum flexibility even if sometimes the only thing to be negotiated is the price
• Differences summarized in following slide
<table>
<thead>
<tr>
<th>Tenders</th>
<th>RFP’s</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Mandatory closing time</td>
<td>• Mandatory Closing time not required (“open invitation”)</td>
</tr>
<tr>
<td>• Mandatory bid security</td>
<td>• Form of Contract and Specifications included only as basis for negotiation</td>
</tr>
<tr>
<td>• Stipulated tender form</td>
<td>• Contractor may take exceptions</td>
</tr>
<tr>
<td>• Mandatory signatures</td>
<td>• Revocable without penalty</td>
</tr>
<tr>
<td>• Mandatory deliverables</td>
<td>• Alternates and alternative proposals considered</td>
</tr>
<tr>
<td>• Irrevocable</td>
<td>• Negotiation expressly contemplated</td>
</tr>
<tr>
<td>• Form of contract set out in tender documents</td>
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<tr>
<td>• Stipulated evaluation criteria</td>
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<tr>
<td>• Obligation to contract if awarded work</td>
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<tr>
<td>• No room for negotiation</td>
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</table>
Practice Tips

• Owners should act fairly and rely on exclusion and privilege clauses only as last resort
• Decide what information is critical for the tendering authority to receive
• Mandatory conditions lead to non compliance and then require judgment call on whether the non compliance can be waived
  • Eliminate any and all unnecessary ‘mandatory’ conditions including mandatory use of prescribed forms
Practice Tips (cont’d)

• Clearly define the ‘must haves’
• Ask only for what is essential and will really influence outcome or is essential input to contract
• Define what you would like to see but omission won’t be grounds for disqualification
  • Make it permissive not mandatory.
  • Document can state that the quality and completeness of the submission can be considered as a factor in evaluation
• Realize that even the best and tightest drafting will likely not withstand challenge if the facts show conduct characterized as intentional bad faith
Practice Tips (cont’d)

• Drafting Exclusion/Privilege Clauses
  • If it is a public authority:
    • Will the clause as drafted be so broad as to lead to public criticism and industry push back – less of a concern for private owner in a buyers market
    • Will clause be inconsistent with internal or applicable procurement policies
  • Consider that a broadly drafted clause may be challenged as inconsistent with standard industry practice as evidenced in documents like CCDC 23 (A Guide to Calling Bids and Awarding Construction Contracts)
    • Consider expressly excluding the application of such documents, industry practice, custom of the trade, etc.
Practice Tips (cont’d)

- SCC in Tercon left open the possibility that a properly crafted exculpatory clause would be upheld.
- BUT: when the facts reveal an owner acting in bad faith, deliberately and intentionally attempting to by-pass or undermine principles of fairness and equal treatment, a Court will go to some lengths to get around any exculpatory clause.
Miscellaneous Procurement Issues
Restricted Eligibility

RFQ, REOI or RFT/RFP process documents often limit participation only to eligible bidders/proponents

- What happens if:
  - Some drop out and owner wants to then invite new players?
  - An eligible player wants to strengthen itself by adding others as JV or consortium members (shades of Tercon!)
  - An eligible JV loses one member?
    - Can it continue?
    - Can it replace the departed member?
Restricted Eligibility (cont’d)

Should procurement process allow bidder/proponents and/or design-build and/or P3 teams flexibility to change members/arrangements?

• Change in circumstances of one JV or consortium member may force withdrawal/rejection of remainder
• If change allowed, is it fair to other proponents/bidders?
• If change not allowed, is it fair to remainder of failed JV / consortium – especially on design-build or P3 procurement
Short-Listing Non-existent Entities

What are ramifications on process of:

- “Short-listing” or “pre-qualifying” entities that do not exist until contract awarded?
  - Often the case in design-build and P3 projects
    - Use of “pre-bid” agreement may not preclude one member from refusing to enter into final JV or consortium agreement

- Changes in composition of proponent teams?

- Changes in internal contractual structure from that on which proponent was short-listed?
  - E.g. Invited 3 member consortium, but prior to closing they restructure to 2 member consortium with third as subcontractor
Financial Capacity/Experience

What financial capacity/experience is evaluated for entities not yet in existence?

• Is evaluation of consolidated financial statements fair to those who submit financial statements on non-consolidated basis?
  • Are you evaluating the entities named, or really only their parent companies through consolidated financial information?
  • If parent doesn’t give parent guarantee, what is financial strength of the subsidiary/shell company?
Consider whether alternates are or should be permitted

• Issues:
  • Evaluating alternates within base proposal?
  • Evaluating alternates as alternative proposals?
  • Defining winning criteria - base proposal or alternate proposal?
  • Opportunity for others to match alternates?

• Issue of fairness and whether court holds process is RFT rather than RFP
Priced Options

• Consider using priced options to:
  • Minimize non-compliance of bid/proposal where some options are expected
  • Test market for appetite for alternate risk allocations
    • Submission of priced options can be mandatory or optional
  • If optional, contractors/suppliers who have no appetite for them can simply decline to price (if submission optional) or price extremely high (if submission mandatory) and still be compliant
  • Consider whether evaluation excludes or includes the prices of priced options
“Bid” Security

• Big issue for non-North American firms

• Bid bonds & Consent of Surety
  • Applicability of bid bonds to non-standard design-bid-build contracts?
  • May be difficult or impossible to enforce if parties negotiate changes to bid/proposal as submitted
  • Questionable security or value in other than traditional tendering situation
  • Perhaps useful for use as pre-qualification tool

• Bid Bonds vs. Alternate Security
  • Alternate security often suffers from same enforcement problems as bid bonds
“Bid” Security (cont’d)

Competition/Participation Agreements:

• Contractual commitment by proponent to submit conforming proposal, backed by appropriate proposal security (e.g. L/C)
• Contractual commitment by owner to pay honorarium (if applicable)
• Addresses owner entitlement to use ideas/designs of unsuccessful proponents
Mandatory Submission Requirements

• Consider expressly clarifying and confirming which and only which submittal requirements are mandatory

• For non-mandatory items:
  • Avoid provisions stating an item is “required” or that submission “shall” or “must” include an item
  • Consider whether item is even needed:
    • Will it influence the outcome?
    • Will it be included in the contract?
    • If the answer to the above is “no”, why ask for it?

• Timing and need for “hard” and/or “digital” copies
Structure of Submission

• Structure procurement process to require matching of submittal requirements to scoring matrix/elements to facilitate:
  • Drafting of submittal requirements/guidelines
    • “Is there anything else that might influence a preference for one proposal over another?”
  • Receipt of compliant bids/proposals
  • Evaluation by panel
    • Increases ability of panel to take into account all material submitted relevant to a scoring element
  • Panel’s ability to obtain input from advisors
  • Ability of non-technical Process Monitor to confirm criteria applied equally
References

- Reference checking is essential, but not always done even when references requested!
  - Consider privacy issues and potential need for consents signed by individuals where reference checking relates to personnel
  - Consider inclusion in procurement document of confidentiality/non-disclosure provision to obtain frank comments from references
    - Consider issue of “fairness”

- Can/should you consider references:
  - From other sources?
  - From own experience and/or of panel member’s experience?
Bilateral Meetings During Competition

- Reduces risk of non-compliance
- Especially useful where:
  - “standard” contract documents are being used for a “non-standard” procurement
  - contract documents overly onerous and may cause receipt of bids with qualifications and clarifications
- May lead to adjustments to risk allocation and specific provisions that reduce contingencies or improve pricing (e.g. through greater use of ‘standard’ design/components)
Pre-Tender Minutes, Q&As and RFCs

- When unclear and ambiguous can cause non-compliant bid/proposal
- Limit risks inherent in Q&A’s and RFCs
  - Answers/Responses should either:
    - Provide reference to provisions in procurement document that already provide the information
    - Provide reference to Addendum that will be issued to revise procurement document to provide information
- Confidential Q&As given to everyone?
- Purpose of pre-tender minutes?
- Inclusion of Q&As and pre-tender minutes can form basis of claims regardless of “order of precedence” clause
Addenda Abuse

• Too many/too large can make non-compliant bid/proposal inevitable

• Regardless of process, minimize amendments to process/tender documents
  • If substantial deficiencies/conflicts in design or specs discovered, consider canceling tender call
  • Draft to facilitate conformance of documents
  • Numerous and/or voluminous addenda almost guarantee future problems for one or both parties
  • Avoid any major addenda within 1 week of closing unless accompanied by significant extension of closing time

• Minimize risk/disputes by conforming addenda into contract prior to execution
Schedule

- Allow sufficient time for preparation of bids/proposals to minimize non-compliance
- Consider addressing in advance how receipt of proposals with schedules assuming an “early contract award” date will be dealt with:
  - In evaluation process
  - In terms of impact on schedule and price if contract awarded after assumed date
Damages

- Indemnities and damage clauses often lead to non-compliant bids/proposals

- Three categories of damages can impact procurement process in terms of available bidders and likelihood of qualifications/exceptions to bid documents
  - Unlimited Liability
  - Liquidated Damages
  - Consequential Damages
Unlimited Liability

• Can operate to exclude some potential bidders or lead to qualified bids/proposals

• Particularly an issue for:
  • Major publicly traded companies
  • European privately held companies
  • Non-North American companies

• NOTE: Owner bears ultimate risk if company fails, so consider necessity of unlimited liability
Liquidated Damages

• May be threshold bidding issue for bidders

• Liquidated Damages vs. Penalties

• Two edged-sword – maximum amount recoverable if event to which tied occurs

• Sample Contract Definition:

  Liquidated Damages” are not a penalty but represent the amount(s) agreed to be paid by the Contractor to the Owner as the result of the happening of a specified event, which amount(s) the parties have agreed to be not a penalty but to represent a genuine and reasonable pre-estimate of the damages that the Owner will suffer as a result of the happening of the specified event, and which the parties have agreed in advance would be difficult or impossible to quantify upon the happening of the specified event.”

• Relief from forfeiture
Consequential Damages

• May be threshold bidding issue for bidders

• Difficult to find definitive legal definition of “consequential damages”

• If project’s sole purpose is to be a revenue-generating facility, if it fails to work/produce product is the loss “consequential damages” or direct damages?
  • Any difference if, for example, you characterize project as a “profit centre” whose sole purpose is to produce a product/revenue to provide a return on investment?

• Consider extent to which loss is insurable if caused by property damage
Consequential Damages (cont’d)

• Example of clause

“Neither party shall be liable to the other for special, indirect, consequential or punitive damages resulting from or arising out of this Contract, including without limiting the generality of the foregoing any loss or damage resulting from loss of use, revenue, profit or opportunity…”

• Often inconsistent with Liquidated Damages

• No universal definition of “consequential damages”!

  • In the absence of a universal definition, difficult to assess exposure/risk to parties
Thank You

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