

WHY BOTHER: BUSINESS CHALLENGES TO MEETING PUBLIC PROCUREMENT REQUIREMENTS

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Public Procurement: Why Bother

- procurement is a significant source of business
- can lead to long term profitable relationship
- public/private partnerships and contracting out are an increasing trend
- evolution of the law and legislation to protect integrity and objectivity of process

Perceived Challenges to Meeting Public Procurement Requirements

- fairness of process
- fairness = defined rules applied in a consistent manner
- same rules are disclosed prior to the bid submissions and are applied equally to all
- evaluation criteria need to be as objective as possible

Perceived Challenges (cont'd)

- award of contract must be free of bias or appearance of bias
- integrity of process must be maintained: *Selex Sistemi Integrati v. A-G Canada* (2014), *Tercon Contractors Ltd. v. British Columbia* (2010)

Perceived Challenges (cont'd)

- issues with fairness
 - compare apples to apples, decision makers have to understand the product or service
 - overcoming the advantages of incumbency
 - real or perceived bias
 - compliance: different rules for different bidders
 - conflict of interest

Perceived Challenges (cont'd)

- less flexibility now with non-governmental agencies
 - new requirements governing procurement under *Broader Public Sector Accountability Act, 2010*
 - challenge for businesses to understand whether caught by new government directives

2. Procurement: the Rules and Regulations

A. Federal Government

- Public Works and Government Services Canada oversees procurement activities of federal government
- Procurement at the federal level principally carried out pursuant to the following major statutes:
 - *Department of Public Works and Government Services Act*
 - *Financial Administration Act*, and *Government Contracts Regulation SOR/87-402*
 - *Defence Production Act*
 - *Federal Accountability Act* - issues of conflict of interest

2. Procurement: the Rules and Regulations (cont'd)

- *Procurement Ombudsman Regulation SOP/2008-143*
- *Access to Information Act*
- Policy on Green Procurement - promote sustainability through environmentally preferable goods and services
- Procurement Strategy for Aboriginal Businesses

Procurement: the Rules and Regulations (cont'd)

B. Provincial Government (Ontario)

- *Ministry of Infrastructure Act, 2011* - all contracts to follow Management Board Guidelines
- *Freedom of Information and Protection of Privacy Act* - Part II exemptions including for economic interest
- *Broader Public Sector Accountability Act, 2010*

Procurement: the Rules and Regulations (cont'd)

- BPS: hospitals, school boards, universities/colleges, purchasers of goods and services for such organization, every publicly funded organization that received public funds of \$10 million the previous fiscal year
- response to Ornge and E-Health spending scandals - BPS required to comply with Management Board directives
- *Broader Public Sector Procurement Directive 2011* - prescriptive, mandatory, requirements for procurement policies and procedures

Procurement: the Rules and Regulations (cont'd)

C. Provincial Government (Other Provinces)

- all provinces have established legislation and procurement policies
- unique examples include British Columbia's Aboriginal Procurement and Contract Management Guidelines
- objective is to procure “culturally – appropriate service delivery” to Aboriginal people by government Ministries

Procurement: the Rules and Regulations (cont'd)

D. Municipal Government (Ontario)

- *Municipal Act, 2001* - s. 270: municipalities to adopt and maintain policies with respect to the procurement of goods and services
- *City of Toronto Act, 2006* - s. 212
- *Municipal Freedom of Information and Protection of Privacy Act* - ss. 6-14 exemptions including for economic interest

Procurement: the Rules and Regulations (cont'd)

- *Municipal Conflict of Interest Act* - affects decisions by Council - check to see if any municipal policies or by-laws affecting staff conduct
- *Discriminatory Business Practices Act* - s.2 prevent discrimination on the ground of geographical location of persons employed in or engaging in business

Procurement: the Rules and Regulations (cont'd)

E. Municipal Government: Local Examples

i. City of Toronto

- Municipal Code Chapter 195, Purchasing - staff to follow code of ethics in purchasing established by the national institute of Governmental Purchasing Inc. and the Purchasing Management Association of Canada
- large raft of procurement policies
 - fair wage
 - declaration of non-discrimination
 - environmentally responsible
 - no slave labour
 - no live animal testing
 - no purchase of goods made at sweatshops

Procurement: the Rules and Regulations (cont'd)

- Social Procurement - emerging initiative to use City's buying power to maximize City's policies, practices and experiences to contribute to "a fairer, more ethical, and more sustainable city"
- coming before Council for approval in 2015

Procurement: the Rules and Regulations (cont'd)

Municipal Government: Local Examples (cont'd)

ii. City of Ottawa

- Purchasing By-law No. 50 of 2000 - comprehensive and wide ranging, and permits:
 - co-operative purchasing with other agencies/public authorities
 - prohibition of suppliers based on past performance
 - strategic sourcing
 - substantive compliance for low bidders

Procurement: the Rules and Regulations (cont'd)

Municipal Government: Local Examples (cont'd)

ii. City of Waterloo

- Purchasing By-law #2011-043 - sets as objectives:
 - avoidance of conflicts including with City staff
 - respect for human rights and fair labour practices
 - conservation of the natural environment
 - promote *Accessibility for Ontarians with Disabilities Act, 2005*
- prescriptive in approvals and signing authority
- Green Procurement Policy

3. Examples of RFP issues

- i. Bidding on RFP for Professional Services
 - RFP stipulated that lowest price services should be set out, including ways in which fees could be further lowered (use of associates, bundling services)
 - at interview stage with municipal staff, one contender offered municipality a further discount on fees if that firm was chosen for all legal services in the RFP
 - firm chosen on this basis

3. Examples of RFP issues (cont'd)

- incentive not included in bid package or proponent response and staff did not ask other firms bidding to match offer or to improve their bids in this respect
- issue of compliance and/or fairness?

Examples of RFP issues (cont'd)

ii. Bidding on RFP for Professional Services

- RFP stipulated that provider of (specialized) services had to be within 30k of municipal offices
- could team up with a local office within geographic limit, but had to provide name of professional from local office who would be a local contact
- issue of finding local professionals with that expertise
- contrary to the *Discriminatory Business Practices Act*?

Examples of RFP issues (cont'd)

- iii. Bidding on Contract to provide Snow Clearing Equipment
 - two principal makers of particular equipment required
 - Company A offered a lower price
 - Company B had a reputation for being litigious, challenging contracts awarded to Company A
 - Company B starts winning contracts based on this reputation

Examples of RFP issues (cont'd)

- staff have to search for reasons Company B is awarded contract
- integrity of system compromised - lowest price bidder has no assurance it will get contract in the absence of a reasonable justification

Examples of RFP issues (cont'd)

iv. Bidding on the Design and Implementation of a Metering Program to update existing system

- RFP and evaluation matrix prepared by staff
- two bids received:
 - Company A provided product which was same as existing system.
 - Company B had lower price and advised its technology had been successfully used with this type of system in another municipality. It provided references for this claim.

Examples of RFP issues (cont'd)

- Company A chosen as the successful proponent by municipal staff
- staff report advising Council on decision erroneously claimed staff had not been able to confirm information provided by Company B on alternate system
- Company B threatened to sue the municipality

Examples of RFP issues (cont'd)

iv. Bidding on Any Services where Well Established Incumbent

- established service provider, knows client and system well
- able to succeed on RFPs on basis of reputation and known quality
- not necessarily lowest price but bid prices may be hidden as confidential information

Examples of RFP issues (cont'd)

- undermines the integrity of the procurement process?
- does government get best service for money?

4. Mitigating Risk and Ensuring Success

- Read the proposal document(s) carefully, then read them again and again
 - what are the requirements/specifications? Can they be understood?
 - are there inconsistencies or areas that are vague
 - what does the document say about compliance with the requirements/specifications?
 - how objective is the evaluation criteria?
- How is the government agency or PBS entity insulating itself?

4. Mitigating Risk and Ensuring Success (cont'd)

- Respond to RFPs – practice makes perfect
 - build a precedent that can be modified
 - modify precedent to fit each circumstance
 - demonstrate that you understand RFP and are responsive to particular requirements
 - provides an opportunity to get into door
 - once established can build on this reputation

4. Mitigating Risk and Ensuring Success (cont'd)

- Response should set business apart from others
 - tailor fees and prices to size of public entity – lowest price should generally be determinative
 - review proposal – do you meet fair wage and environmental standards?
 - can you distinguish your business on this basis?
 - what specific features i.e. free seminars can be included as a “value add”

4. Mitigating Risk and Ensuring Success (cont'd)

- Review proposal to ensure:
 - sensitive business information is specifically marked as confidential – exempt from freedom of information requests
 - IPC Ontario Order No. 1559: expectation of confidentiality must be reasonable, objective and clearly communicated
 - Are you compliant? Can you be substantially compliant?
 - Is there room for negotiation? i.e. fees?
 - Is your response accurate: Contract A
 - Is your team ready for an interview?

Mitigating Risk and Ensuring Success (cont'd)

- If not chosen and problems are apparent with process
 - use complaints process
 - consider filing a freedom of information request
 - weigh benefits and risks of litigation
 - costs
 - reputation
 - proving wrong decision made

5. Why Bother: Conclusion

- procurement still fraught with issues despite scrutiny over process integrity
- evaluation criteria allows for some subjectivity
- favours incumbents
- gives staff discretion over choice
- important to understand procurement documents and policies in place
- big business and big opportunity – should spend time and effort on response
- make it as “bullet proof as possible”
- if issues with award of contract, successful proponent should be scrutinized to ensure bid was compliant

THANK YOU!

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