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Canadian Design-Build Institute

RFP wording could expose owners to tender law obligations, lawyer warns

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Although requests for proposals are gaining increasing favour with owners, care needs to be taken to avoid unnecessary "drama" and exposure to unintended risks, says Edmonton lawyer Paul Stocco.

"RFPs are becoming more popular because this procurement model provides owners with more flexibility than the tendering process, which is governed by a series of very strict and very specific rules," says the associate in Brownlee LLP Barristers & Solicitors.

However "careful consideration should be given to the express wording contained in RFP document," Stocco warns in a paper prepared for the Canadian Design-Build Institute's national design-build conference in Toronto.

In a presentation entitled "Avoiding RFP Dramas: An Owner's Perspective," Stocco points out terms that are synonymous with the tendering paradigm often are "mistakenly" incorporated into an RFP document.

"This can be problematic for an owner in that tendering law obligations are very different than those in the RFP paradigm. Simply labeling the procurement documents as an RFP will not be enough.

"In other words, an owner can become subject to tendering law obligations and potentially be exposed for significant damages if the RFP is poorly worded."

Stocco said the courts in fact "look beyond the title of the procurement document to the substance of the procurement request in order to determine whether the procurement is a true tender or an RFP. "An owner can unwittingly become liable for significant damages if its RFP mistakenly contains tender-like concepts and terminology." Stocco is a former chair of the construction law subsection of the Canadian Bar Association and a frequent lecturer on issues related to construction and procurement. His clients include municipalities and other public sector owners.