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At the recent CDBI conference on October 2nd and 3rd, there was a discussion on the current trends of tendering law as they apply to design-build projects. In this regard, we are pleased to be able to expand on that discussion with the following article which reviews the mitigation of legal risks associated with "request for proposal" process.

The Risk Management Committee of the Canadian Design Build Institute will continue to circulate articles of this nature to members as they become available. We trust this will be found to be of interest and beneficial.

Requests for Proposals for Design-Build Projects:
Identifying and Mitigating Select Legal Risks

by Denis Chamberland

It is widely accepted that low-bid procurement – which relies on a single measure, cost – is not the optimal procurement methodology for design-build projects. Owners who prefer such a commodities-based approach to competition fail to take advantage of several attributes that contractors may bring to the equation, such as quality and performance. As a result, the Request for Proposals (RFPs) has become the procurement methodology of choice for services as complex as design and construction. Indeed, most owners welcome the opportunity to review proposals that are based on their own distinctive needs, and where they are more likely to arrive at the best combination of value.

The use of RFPs on design-build projects is not without risks, however. This is especially so in Canada where, since 1981, the laws on competitive tendering have been significantly revised. A unique and distinctive framework has emerged that bears little resemblance to the pre-1981 competitive tendering framework or, for that matter, to the tendering laws currently in operation in the United States and the United Kingdom. Despite the added complexity and risks, some things can be done to mitigate the risks while achieving best value within the context of a credible and defensible RFP process.

The Competitive Procurement Framework

The hallmark of the Canadian competitive bidding laws is the so-called Contract A/Contract B paradigm, where compliant bids submitted in response to an RFP or tender are deemed to create a notional Contract A (or bidding contract) between the owner and each compliant bidder. As the Supreme Court of Canada noted in its 1981 decision in *The Queen (Ont) v. Ron Engineering*,[1] the program requirements set out in the owner's RFP along with the solution described in the bidder's proposal together form the contents of Contract A. Whether Contract A comes into existence depends, in each case, on the specific language of the RFP, including whether the parties intended to create contractually binding relations. Where the RFP is simply a mechanism to identify a negotiating partner (for example, where most of the key business

[1] [1981] 1 S.C.R. 111.

terms are absent) and the document makes clear there is no intention to create such legally binding relations, Contract A will not arise.

A recent decision by the Supreme Court of Canada shows that RFPs for design-build projects are not exempt from the application of Contract A, despite the many details left to be settled before the execution of Contract B (the contract for the work).[2] Owners should carefully review the language of their RFPs to ensure it creates only the intended legal consequences (note that mechanically recycling an RFP template passed on from another owner is not likely to achieve the desired result).

The existence of Contract A triggers the application on the owner of a variety of duties in the conduct of the RFP process, including the duty to make full disclosure, the duty to conduct a fair process, and the duty to award as described in the RFP. The duties that flow from Contract A impose a heavy burden on an owner to conduct a process that is 'fair, open and transparent'. Since 1981 the courts across Canada have had much to say about what constitutes such a process. A key area of focus with design-build RFPs is the discretion available to an owner during the RFP process. The courts have often found the numerous broad reservation of rights scattered across most RFPs to be overly broad in scope, and indefensible. They expect a more nuanced application of the rights reserved for the benefit of owners. Because the design-build delivery model implies a dynamic process where some of the main attributes of the proposed facility do not become settled until well after the proposal submission deadline, RFP processes for such projects are particularly vulnerable to challenge by disappointed bidders.

It is noteworthy that, even where Contract A is found not to exists, some courts have been prepared to find a free-standing duty of fairness where bidders are entitled to have their proposal considered fairly by owners.[3] It is therefore prudent for owners to assume that such a duty may be found to apply by the courts and to conduct their RFP processes accordingly. The rationale for finding a duty of fairness is that bidders often spend considerable resources in preparing their bids. This is especially true with design-build delivery projects where a substantial effort is typically needed to prepare a proposal. Owners should therefore assume that the courts will closely scrutinize RFP documents for language indicative of an intention to create legally-binding relations.

The Design-Build Project Delivery Method – Select Risks

Establishing the scope of work on a design-bid-build project is relatively simple. The plans and specifications are confirmed by the owner to be one hundred percent complete, and the successful bidder's price is based on such documents. Perhaps the only question related to scope of work that often arises in this context is whether something could be said to have been reasonably inferred, or implied, in the contract documents even if it was not expressly articulated in the documents. A significant body of laws sheds light on what may or may not amount to an implied term.

[2] The decision of the Supreme Court of Canada in *Design Services Ltd. v. Canada 2008 SCC 22* (May 2008) also includes some helpful advice to design-build team members on protecting their individual interest when the RFP process is not conducted fairly by an owner.

[3] See *Buttcon Ltd v. Toronto Electric Commissioners,* [2003] O.J. No. 2796 (S.C.J.).

Bid Repair

In a design-build project, establishing the scope of work is not so straightforward. It is defined by the terms of the RFP, the design-builders proposal and by the several iterations of plans and specifications developed after contract execution. A legal risk an owner faces arises when helping a design-builder "repair" a design proposal that does not meet some fundamental or mandatory aspect of the RFP specifications but is worthy in many other important ways. As the courts have frequently noted, bid repair is not acceptable. A bid that needs to be repaired is a non-compliant bid, and it should be disqualified.

Scope Change

A related risk in a lump sum design-build project arises where the non-performance components of the facility are not sufficiently set out in the RFP, or if they are set out and the detailed design specifications are set out in the RFP, the design-builder did not pay careful attention to precisely and literally what was being identified in the RFP. Either way, a scope dispute can develop, with the result that the project that is ultimately awarded differs in some material respects from the project described in the RFP, or the price submitted by the proponent is disregarded in favour of open direct negotiations. Some degree of change is to be expected in a design-build RFP process (as the value engineering review suggests). However, where the changes are substantial, as was noted above, the courts will typically not support the broad RFP language that purports to entitle an owner to do as it pleases during the evaluation process.

Transparency and Value

Another high-risk – but routinely applied – practice in RFP processes is to avoid disclosing the sub-evaluation criteria, which are often developed by the evaluation team after the release of the RFP. The rationale offered by owners and their advisors for disclosing only the high-level evaluation criteria in the RFP is to reserve a significant amount of discretion to select the best proposal. On its face, this might seem a reasonable practice in a design-build procurement. However, aside from the fact that this practice may be seen to undermine the objective of 'transparency' in the tendering process, it also invites abuse of process by the owner, suspicion by the proponents, and disputes. Owners and their advisors should resist the temptation to limit disclosure in this area. While adequate disclosure should be made (as it will help the owner achieve greater value), careful drafting of the evaluation component of the RFP will also help to ensure that the owner retains the flexibility it needs to avoid a distorted result.

Mitigating the risks noted above will go far in avoiding tendering disputes between owners and contractors, and in achieving greater value.

Recent Contentious Court Decision

A recent court decision has generated significant uncertainty in the law of tendering, and is worth acknowledging. In the December 2007 decision of the British Columbia Court of Appeal in *Tercon Contractors Ltd v. British Columbia*,[4] the Court enforced a limitation of liability provision set out in a government RFP for a design-build project. The Court reversed a trial decision that had originally awarded $3,293,998.00 in damages against the government.

[4] Docket CA033983.

At trial, the government was found to have awarded a road construction contract to a non-compliant proponent. The court refused to allow the government to rely on a limitation of liability provision that denied any compensation as a result of participating in the RFP process. The British Columbia Court of Appeal saw things differently and found the limitation provision enforceable, allowing the government to avoid all liability after accepting a non-compliant proposal. The Court of Appeal acknowledged the important public policy implications of allowing government agencies to receive binding bids while contracting out of their corresponding legal duties under Contract A, but said the answer rests on bidders refusing to bid on such tendering processes.

The Court of Appeal's decision is draconian, as it arguably sets aside more than 25 years of decisions at all levels of courts in Canada that have sought to balance the rights of owners and bidders in the tendering process. The decision appears inconsistent with a fundamental principle established by the Supreme Court of Canada in 1999. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd,*[5] Canada's highest court found that the privilege clause cannot permit an owner to accept non-compliant bids, and that an owner's discretion is normally restricted to the pool of compliant bids received. In other words, the court said that language in the RFP cannot be relied on to evade the duty on an owner to act fairly towards compliant bidders.

The Supreme Court of Canada has granted leave to appeal the decision of the British Columbia Court of Appeal, so the Supreme Court is set to rule on whether the fine balancing of the rights that has been achieved so far will continue. Until the situation is clarified by the Supreme Court, a prudent approach for owners and contractors engaged in a tendering process is to continue to deal with each other fairly, on the basis that each has enforceable rights.

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[5] [1999] 1 S.C.R. 619.