

Developments in the law of competitive tendering, and innovations and best practices in procurement and contract management

LOOKING FOR BALANCE BETWEEN TRANSPARENCY AND NEGOTIATION IN PROCUREMENT

Negotiated RFPs in Canada

What exactly is a ‘negotiated Request for Proposals (NRFP)’? Does it automatically mean that no Contract A applies to the procurement process? How do we accomplish such a thing?

Should we consider moving away from the traditional Contract A model? What are the implications?

Canadian organizations have always had the option to build a negotiation stage into the RFP process itself, and to conduct those negotiations within the boundaries of Contract A obligations. We have also always had the choice to stay completely out of Contract A by selecting a fully negotiated procurement model, such as a direct award or truly open-negotiation RFPs.

The question is, when should we consider these alternative approaches to procurement, and what are the associated risks and benefits?

In light of the recent Supreme

Court of Canada decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 S.C.C. 4, this debate is taking on more relevance and profile.

In the last issue of *The Legal Edge*, we explored the pros and cons of moving away from the Contract A paradigm. In this issue, we look at the various models and strategies, both within Contract A and outside of it, that are available when we need to negotiate significant items as part of a competitive procurement process.

Negotiating Within Contract A

The starting place for any discussion of competitive procurement in Canada is still the Contract A model.

The Supreme Court of Canada, in *Her Majesty the Queen in the Right of Ontario and the Water Resources Commission v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1

S.C.R. 111 and subsequent decisions, has laid out implied obligations for both sides, with attendant rights and responsibilities. Designed, in the words of our highest court, “to protect the integrity of the competitive bidding process.”

A traditional competitive procurement process usually involves little, if any, negotiation. Respondents are evaluated on the strength of their submission, in accordance with the described criteria, and no significant discussion or negotiation takes place prior to contract award. This no-negotiation process is suitable for straightforward and routine types of procurements in which the desired contract structure can be fully anticipated and described in the solicitation document.

For more complex, often service-based procurements, however, there can be items of significance that

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the buying organization needs to negotiate during the selection process. For example, perhaps your company is looking for a software developer, and you need to negotiate the terms of a software-licence agreement for the finished product. Your organization would like to have the provider sign your form of agreement, but you know from experience that this isn't likely.

Finding Flexibility

There are a number of ways to run a procurement process that respects the obligations of the Contract A model, but still allows some flexibility for such negotiations. One might be to include "proposed terms of the software-licence agreement" as a weighted criterion in the RFP. You would award the maximum number of points under that criterion to the proponent who offers the most favourable terms (i.e., the ones that most closely align with your own terms). This creates incentive for respondents to offer their best possible deal for the stated criteria when they submit their response.

Specifying Flexibility

Another way might be to identify criteria and weighting that will be used to select the frontrunner, excluding the terms of the software-licence agreement, and build in the right to negotiate the licence agreement terms with the frontrunner(s). For the public sector in particular, this will normally be through an identified consecutive negotiation process. This keeps the competitive tension in play until a deal is struck and ensures that all participants are clearly aware of the scope of negotiations, as well as the defined process for conducting those negotiations, when they are responding to the opportunity.

All Contract A obligations of

fair and equal treatment and full disclosure continue to apply to the process, but the owner has reserved unfettered discretion to negotiate an identified term or group of terms.

While typically not used in public-sector procurement because of perceptions about trade agreements and other fairness obligations, organizations in the private sector sometimes incorporate a process of simultaneous negotiation rather than consecutive negotiation. This provides incentive for frontrunners to make concessions quickly during the negotiations.

There are a number of ways to run a procurement process that respects the obligations of the Contract A model, but still allows some flexibility . . .

Best and Final Offer

With a slightly different twist, the Best and Final Offer (BAFO) process allows the buying organization to go back to frontrunners to have them improve on their initial bid or proposal offer.

As with consecutive and simultaneous negotiations, this works best if the buying organization specifies exactly which terms will be the subject of further negotiation, and limits the number of those terms.

Other reasons to limit negotiations to just those critical issues that cannot be anticipated in the solicitation? One is to reduce the workload for the buying organization. If the negotiation language is left too wide open, proponents may want to negotiate items that you aren't prepared to discuss. Another reason is to ensure that your decision is sound

and defensible as both best value and fair. If you end up in negotiations with one proponent on a particular term, without giving others the chance to negotiate that term, will you be treating all bidders fairly and equally? And how will you know that you are receiving the best possible deal?

Finally, if you use an open-ended BAFO approach within a Contract A process, proponents may simply hold back some concession(s) so that they can improve on their submission when you come to them for the 'second round'. Why not just require them to provide their very sharpest pencils in their original submission, as required by Contract A? There will be no second round of negotiations, and all parties will know that, going in.

Other Processes

There are other, anomaly processes being used in Canada that also combine the Contract A structure with significant negotiations. They are most useful when there is no 'off the shelf' solution. The Joint Solutions Procurement (JSP) process used by the B.C. government is one example. In essence, users employ a traditional Contract A approach to select a proponent, who then works with the buying organization over time to build the solution. The proponent is selected for its experience with similar projects, its references and the credentials of its key personnel, etc., rather than for a specific, proposed solution.

Summary

There will be very few procurements in which you cannot identify at least the majority of the terms that will apply to the resulting contract. So staying within the Contract A paradigm gives both the buying organization and potential respondents the greatest degree of certainty and structure of process. For

those reasons, it is likely to remain the mainstream procurement approach in Canada.

Negotiating Outside of Contract A

Some buying organizations are also exploring the concept of staying completely out of all implied obligations created by Contract A, to preserve wide open negotiation flexibility. Say you have a sound business need for comparative negotiations to achieve the best value for money: you want to be able to compare vendor A's pricing to vendor B's pricing, and then work with either or both to refine their offers. Doing this within Contract A is generally viewed as bid-shopping, the penalty for which could well be damages for breach of fairness obligations.

Stepping Out

To effectively eliminate Contract A obligations, a buying organization needs to have all prospective proponents sign carefully crafted rules of engagement before the solicitation process begins. This means that proponents sign off on their express agreement to the terms of the process, including the lack of any binding obligations whatsoever on either the buying organization or the proponent.

Considerable Flexibility

This allows complete flexibility to negotiate a final deal that is agreeable to both sides and eliminates any and all 'breach of Contract A' arguments. Generally, the process includes the latitude for proponents to rectify, withdraw or change any submitted proposals after closing, as well as while the negotiations are in progress. For the reasons identified above, more often than not, such processes incorporate either the consecutive or simultaneous negotiation model, rather than opening up all terms to free-for-all negotiation.

Significant Risks ...

This approach to procurement carries significant risks. Among them: you may not reach a deal; you may encounter serious delays because of protracted negotiations; proponents may pull out of the process as it unfolds; and your organization's actions may not be seen as truly fair and transparent.

Some buying organizations are also exploring the concept of staying completely out of all implied obligations created by Contract A, to preserve ... flexibility.

... and Merits

On the other hand, this approach does have its merits, for specifically targeted procurements. It may be the right approach if your organization: is uncertain about what proposals it might receive; needs to negotiate detailed Contract B (the Performance Contract) terms, such as software licensing, or other complex and diverse provisions that cannot be dictated in the solicitation document; needs to incorporate client preferences and negotiate different pricing bundles, discounts and demand aggregation through a comparative negotiations process; or lacks time to properly plan the procurement and resulting contract – not perhaps the most defensible reason, but it does happen.

Summary

Common features of the no-Contract A NRRFP process typically include: extensive discussion with industry before launching the procurement,

for feedback and buy-in; express rules of engagement signed by all prospective respondents before the process begins; and a deliberate and concerted effort to run the process fairly and transparently, as though Contract A did apply.

Incorporating these best practices will reduce the legal and practical risks associated with avoiding Contract A obligations, while allowing your organization wide flexibility in negotiating final contract awards.

The Bottom Line

Whether you conduct a negotiated RFP process within the Contract A paradigm or outside of it, an NRRFP process is never a substitute for thorough and effective procurement planning. Particularly in the public sector, but also applicable to private-sector organizations, whatever procurement model you choose should be defensible and conducted in a fair and even-handed manner.

Remember that, if Contract A clearly does not apply to the process, it doesn't mean you are relieved of all legal, trade agreement, policy and/or business-related requirements for treating all respondents fairly and equally. You want them to want to participate in future processes, and to feel that award was made on a fair and balanced analysis of options, in accordance with the clear rules laid out in the solicitation document.

Ineffective, indefensible and unfair procurement processes still drag vendors and buying organizations into the courts on a ridiculously frequent basis. Neither have the time or resources to waste on poorly designed or carelessly run processes. Choose wisely, and be prepared to defend your selection of procurement process. ♦

Tercon and its Aftermath: Contract A Takes a Serious Hit

For such a disappointingly narrow decision, the recent Supreme Court of Canada judgment in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 S.C.C. 4 continues to stir up controversy. About the only thing that is clear from the decision is that privilege and exclusion-of-liability clauses will be enforced by the courts under the doctrine of freedom of contract, unless there are very exceptional circumstances.

This has left procurement professionals wondering where the line in the sand is, exactly.

“Freedom of contract” was described by Madame Justice Fruman in *Prenor Trust Co. of Canada v. Nunn*, [1998] A.J. No. 130: “Business people are accustomed to weighing risks and benefits. They make bad deals all the time. A breach does not give courts license to sweeten them.”

We all know that informed business people will be held to the bargain they have struck. And that the party trying to avoid enforcement of the clause is responsible for demonstrating the “exceptional circumstances” that amount to an abuse of the freedom of contract.

The question becomes: What are those exceptional circumstances, exactly? The *Tercon* decision indicates that the court may step in and interfere with the application of an exclusion clause either where there is “unconscionability,” or where the enforcement of the clause would be “void as against public policy.”

Both of those exceptions have long been recognized as general principles of Canadian contract law. But as with most judicial rulings, the devil is in

the detail. The judges in minority (of dissenting opinion) felt that neither of these exceptions applied in *Tercon*, and therefore, the clause should be enforced. The majority of the judges, however, found that the clause was not specific enough and should be construed *contra proferentem* (i.e., an ambiguous term will be construed against the interests of the party that imposed its inclusion in the contract). The majority therefore did not have to decide if either of the exceptions came into play. And ultimately, the clause in question did not protect the B.C. government.

[A]lthough Justice Cromwell characterized the Province’s conduct as “egregious,” he danced around the topic, finding that the clause in question didn’t apply.

So, what fact pattern will convince the court to step in and override clear terms of a competitive contracting process into which the parties freely enter? We need to look at the judicial test for each of the exceptions in *Tercon*.

Unconscionability

In *Tercon* and other cases, Canadian courts have held that “inequality of bargaining power” is at the core of claims of unconscionability. As set out in the Alberta Court of Appeal decision in *Cain v. Clarica Life Insurance Co.*, 2005 A.B.C.A. 437, to establish unconscionability, a party must prove that:

1. there was a grossly unfair and improvident transaction,
2. the victim lacked independent legal advice or other suitable advice,
3. there was an overwhelming imbalance in bargaining power caused by the victim’s ignorance of business, illiteracy, ignorance of language of the bargain, blindness, deafness, illness, senility or similar disability, and
4. the other party knowingly took advantage of this vulnerability.

While a party must prove all four of these elements to succeed on a claim of unconscionability, the test really hinges on proving an imbalance of bargaining power. Judging by the case law in this area, it is very difficult indeed to establish such an imbalance. To give an extreme (and fictional) example, the contract defence of unconscionability seems to be reserved for cases such as a big multinational corporation buying Billy-Bob’s tract of land for a case of moonshine.

Arguably, in a competitive bidding process where the owner sets all the rules and the respondent can only submit or decline to submit, there is inherent inequality of bargaining power. In fact, the respondent has no bargaining power at all. And yet, as seen in *Tercon*, the very fact of a competitive process alone is not enough to meet this core element of the test for unconscionability.

Void as Against Public Policy

Basically, this means that if a contract violates an established public policy or law, it is void. That seems very straightforward. But the circumstances under which this

exception might come into play are less clear.

The Supreme Court of Canada in *Tercon* reiterated that, “conduct approaching serious criminality or egregious fraud” is a well-accepted consideration of public policy that “may override” the principles of freedom of contract.

In considering the facts, Justice Cromwell for the majority stated that the conduct of the B.C. government “strikes at the heart of the integrity and business efficacy of the tendering process,” and that the integrity factor “is particularly weighty in the context of public procurement.” And although Justice Cromwell characterized the Province’s conduct as “egregious,” he danced around the topic, finding that the clause in question didn’t apply – not because of public-policy concerns, but because of the way it was worded.

Having found that the clause, as worded, did not protect the government, the majority of the Court did not then go on to consider specific circumstances under which the public-policy argument will prevail. But the minority of the Court went much further. Not only did they conclude that the clause was, in fact, clear enough to protect the government, they went on to find that the “Ministry’s conduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion clause.” So the minority Judges concluded that the clause did apply, and that it should not be held void as against public policy. In their view, the clause should be a complete defence to *Tercon*’s claims.

The key precedent on the level of conduct that would be required to trigger the ‘void as against public policy’ defence, as referred to in *Tercon*, is the case of *Plas-Text Canada*

Ltd. v. Dow Chemical of Canada Ltd., 2004 245 D.L.R. (4th) 650. In *Plas-Text*, the Alberta Court of Appeal refused to enforce an exclusion-of-liability clause because the defendant knowingly supplied defective plastic resin, resulting in considerable damage to property and risk to human health.

[T]he importance of protecting the integrity of a competitive process . . . will not trump clearly worded and specific exclusion and privilege clauses.

In *Tercon*, the Supreme Court did not enumerate any other circumstances which might “rise to that level.”

Summary

Minority decisions of the Supreme Court of Canada are not binding judicial precedent, although they may be considered by other courts hearing similar cases.

It is therefore perhaps still arguable, under a different set of facts, that the implied obligations set out in *Her Majesty the Queen in the Right of Ontario and the Water Resources Commission v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111* that are designed to “protect the integrity of the competitive bidding process” should prevail over express exclusion and privilege clauses included by the owner. But we are hard pressed to think of such a fact pattern. When taking into account the dissenting opinion, it looks as though the Supreme Court of Canada in *Tercon* has narrowed the application of these

two rare exceptions to the doctrine of freedom of contract.

What Now?

Although the Court implied otherwise, the *Tercon* decision signals a clear judicial reluctance to make a distinction between a binding competitive process governed by the implied obligations created by Contract A, and a directly negotiated commercial contract. In many ways this is unfortunate, as they are two very different contracting environments.

It is now left to future court decisions to fill in the gaps created by *Tercon* and to determine exactly what facts constitute a compelling reason to refuse to enforce a clearly worded exclusion clause.

One conclusion we can draw from *Tercon* is that the importance of protecting the integrity of a competitive process – in the absence of a serious inequality of bargaining power or conduct bordering on criminal fraud – will not trump clearly worded and specific exclusion and privilege clauses. ♦

Editor’s note: While this important ruling may encourage some procurement professionals to engage lawyers to try and draft the perfect, bulletproof clause, we urge caution. First, we have yet to see one, so it is risky to rely on yours as having such an effect. Second, in our opinion, carefully crafted exclusion clauses are a very poor substitute for thorough market research and procurement planning. For the vast majority of procurements, the Contract A model provides familiarity, as well as certainty and protection for all parties. And keep in mind that you don’t have to worry about a bulletproof exclusion clause unless you intend to deviate from the standard of fair and equal treatment.

Post-Bid Qualification Upheld

As readers may recall, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, the Supreme Court of Canada held that the standard privilege clause (i.e., ‘lowest or any tender not necessarily accepted’) allows an owner to take a “nuanced view” of costs. But what does that really mean? How far can an owner go to uncover information after closing that will affect its decision to bypass the low bidder on an Invitation to Tender (ITT) process? These questions were addressed in *James A. Brown Ltd. v. Caisse Populaire Welland Ltée*, March 17, [2009] O.J. No. 1089 (S.C.J.).

Background

Caisse Populaire Welland Ltée is a co-operative financial institution in Ontario’s Niagara Region. The organization has ties to a federation in Quebec, from whom it must take its direction. Its business affairs are directed by a board of directors and, for the purposes of this project, the board acted on the recommendation of a four-member Building Committee.

Caisse retained an architect to prepare the plans and specifications to renovate a building on Niagara Street in Welland, and to subsequently invite tenders for the construction work. The architect invited 10 contractors, including the plaintiff, James A. Brown Construction Ltd., to submit bids. The written invitation included the following privilege clause: “The lowest tender or all tenders need not be accepted.” It also included a statement that, “the Owner may accept a tender or reject any or all tenders without explanations.”

At bid opening, Brown was the

lowest bidder, at \$1,342,172. The next bidders were Aldor Builders Ltd., at \$1,369,635, and Brouwer Construction Ltd., at \$1,379,000.

After Bid Opening

The architect for Caisse met with Brown and learned that, even though Brown had failed to include an addenda item in the amount \$25,500, Brown was still prepared to honour its bid price and perform the contract for \$1,342,172. Assuming that Brown would be awarded the contract as the lowest bidder, the architect sent a letter to its client, Caisse, confirming Brown’s willingness to honour its bid in spite of the omission, addressing some concerns that had been raised about subtrades for the project, and providing a cost analysis of the various bids.

“The defendant was performing due diligence, an exercise that decision makers are entitled to perform . . . ”

However, the Building Committee was not comfortable with Brown’s omission of the significant addenda item, and it was concerned that Brown would cut corners if it was awarded the contract. Coupled with the fact that the prices were all so close, the committee did not feel that it had sufficient information to make a recommendation to the board. The committee therefore instructed the architect to set up visits to the offices of the three bidders, so the

committee members could “get a better impression of the contractors with whom they were dealing.” The committee also wanted more corporate information from each of the three, before submitting a final recommendation to the board.

The Building Committee, and subsequently the Board, were very impressed with the details contained in Brouwer’s corporate profile, by its size, and by its extensive experience with similar construction projects. Brown, on the other hand, was a small company; James A. Brown was the only salaried employee. The chair of the Building Committee was unable to arrange an office visit with Brown, and concluded from the post-bid information submitted by Brown that Brown’s experience with similar projects was “not current.”

Overall, the decision makers for Caisse were not convinced that Brown was capable of performing a project of that size. They also had concerns about Brown’s reputation for paying its subtrades late, and about the \$25,500 omission in its bid. They decided to award the contract to Brouwer, the third-lowest bidder.

Brown challenged the decision, alleging breach of Contract A obligations of fairness, and the matter went to court.

The Decision

In this case, the Ontario Superior Court of Justice found that the owner had acted reasonably and within the discretionary powers set out in the privilege clauses.

Mr. Justice Taliano confirmed the legal principles upholding the owner’s obligation to protect the integrity of the bidding process, and

to treat bidders fairly and equally. With respect to the privilege clauses in the ITT, he noted that: “[T]he existence of a privilege clause does not exempt an owner from a duty to treat all bidders fairly, but instead provides the owner with a discretion that must be exercised fairly and objectively. A privilege clause releases an owner from the obligation to award the work to the lowest bidder only if there are valid and objective reasons for concluding that better value may be obtained by accepting a higher bid.” (*Sound Contracting Ltd. v. City of Nanaimo, B.C. Court of Appeal, [2000] B.C.J. No. 992*).

The Judge went on to note that, “when the low bidder is not the successful tenderer, any additional factors in the analysis will have to be shown to be reasonable and relevant.”

He also observed that, “In effect, this was a post-qualification process and in embarking upon it, the defendant was performing due diligence, an exercise that decision makers are entitled to perform to ensure the quality of the decision-making process.”

The defendant was engaged in a process that was applied equally to all three bidders to determine which contractor was best suited for its needs, and there is no evidence that they did not act in good faith or that they did anything to deliberately or recklessly harm Brown.

In dismissing Brown’s claim, the Court held that the owner had taken a ‘nuanced view’ of costs, as described in the *M.J.B.* decision.

Brown did not appeal the decision.

Lessons Learned

While the owner, Caisse, was ultimately vindicated, this matter did go to court, costing both sides time, resources and, likely, damage to any future working relationship. The lesson is clear: consider issues of bidder qualification and experience in the planning stage of your process. Caisse would have avoided this litigation entirely with either rigorous prequalification of bidders, or by including in its ITT strong tender language that required specific proof of ability to complete the project.

Finally, view this decision with some caution. It is not normal practice to engage in “post-bidding qualification,” and the fact that the owner narrowly escaped paying Court-assessed damages (of probably about \$135,000) illustrates the risk. ♦

THE PROS AND CONS OF NEGOTIATING IN PERSON, BY PHONE, AND ELECTONICALLY

Modes of Negotiation

by Mark Trowbridge

Today’s procurement professionals often find themselves conducting negotiations in a variety of mediums. Some complex negotiations take place in the same room as the supplier’s representation (in team or individual forums). Other negotiations take place remotely via telephone or email. Each of these modes has unique variables that the procurement practitioner must consider ... otherwise they may hand over an advantage to a skilled opponent.

Mode 1: Negotiating in Person

Negotiations are generally most productive when conducted in person. This is because the participants have the advantage of both verbal and non-verbal indicators

from the other party. And they do not suffer from the technical limitations (discussed later) inherent in telephone or email communications. Factors that help make in-person negotiations most beneficial include the following:

In-person team:

- Group synergy – The benefit of team negotiations is based upon the well-known principle that “The whole is greater than the sum of its parts.” More simply stated, a group will usually make better decisions together than would any of the individuals who comprise the group, working alone. This is extremely true in negotiations, as a well-prepared team can almost always achieve better results than a

sole negotiator.

- Strength in numbers – A team will nearly always have an advantage over a single opponent, because different members of a negotiation team can play key roles that make their approach highly effective.
- In-person team negotiations are the optimal format for multi-element, high-value, and sole/single source negotiations.
- Team negotiations are particularly important when decisions must be made during the actual negotiation process. A team comprised of key stakeholders can use quick “caucus” or “breakout” discussions to make decisions that can immediately be re-introduced into the negotiation dynamic with the other party.

In-person individual:

- Many of our negotiations are one-on-one. This is especially true for standard procurement transactions. It's just not practical to pull stakeholders out of business operations for standard negotiations. Having the procurement professional represent stakeholders in standard transactions optimizes staff time and resources.
- The downside to one-on-one negotiations is that the mode increases the responsibility of the sole negotiator for preparation, success and failure.
- This format also may require greater communication time in advance (with stakeholders, internal customers, etc.) to gain consensus.
- This format is inefficient for multiple, changing negotiation issues, as it may take too long to communicate concessions with decision makers.
- Being the sole negotiator may put the buyer at a disadvantage if the supplier brings multiple negotiators.

Mode 2: Negotiating by Phone

Many negotiations occur over the telephone, but it's important for the procurement professional to remember that things happen more quickly on the phone (than in person). Small talk is minimized, and participants are more willing to take extreme positions. People are less inclined to take extreme positions in person. So be prepared!

You lose 80 percent of the communication content (non-verbal) when speaking over the phone.

Telephone negotiations make it very important to focus on everything said. A poor connection (i.e., cell phone) may further complicate the clarity of communication. Be ready to ask the other party to repeat themselves when they've said

something critical. It is also a good idea to take notes, and confirm key discussion points via email to the other party.

Conference calls allow the other party to have advisors in room on mute, etc. You may never know the other people are there.

Conference call services also allow the host to record the conversation, sometimes without your knowledge. If that is a concern, use your own conference service and be the host.

Don't be caught by surprise by an unplanned phone call. Phone interaction allows the supplier to call you without an appointment. If a supplier phones you without warning, you may not be prepared to negotiate. Instead, ask them if a later time would be acceptable ... and schedule a time that allows you to be prepared.

However, calling a supplier by surprise can work to your advantage. The person who initiates the call is often at a distinct advantage. They have time to prepare, are not taken off guard, can prepare a checklist and can organize support data and materials. You can also use the surprise to "set the agenda" and thus control the issues being discussed.

Don't multi-task while negotiating via phone!

Mode 3: Negotiating by Email

Email is frequently used today to negotiate pricing and key points. Complicating this is the increased use of handheld communication devices, such as Blackberrys, and texting via cell phones, in which case the communications are often truncated significantly.

Email negotiations may go even faster than those on the phone, because there is less "give and take." The medium also makes interaction more "positional" because the parties are putting everything in writing. This

means there is less ability to change your position once the other party has seen your position in writing.

Email does allow exact details to be proposed and received with a good amount of certainty.

Email allows the negotiator to bypass "gatekeepers" and allows you to interact directly with a decision maker.

Email encourages prompt and direct response, and can be utilized 24/7.

Some people get in trouble because they answer too quickly via email. This is especially true in the new "texting" universe. Don't reply without thinking.

An opponent who chooses to use email can be a clue that they're not comfortable negotiating in person. They may also be escalating points to a senior decision maker before replying.

Even more so than in phone negotiations, emails lose the advantage of both body language and auditory clues.

You may technically have a legally binding "contract" if you agree to something the other party offers in an email. That's because a court can interpret a contract being formed by a written offer and acceptance.

If things aren't going well in an email exchange, pick up the phone to speak directly with the other party. Contentious subjects or complex elements are much better handled in person.

And lastly, always be aware that email communications may not be kept confidential (forwarding, bcc, etc.). ♦

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How Green is Your Coffee?

Most of us understand the importance of incorporating sustainability and equity values into our procurement decisions, and most organizations have implemented sustainability policies to guide their procurement staff. But what does that really look like for day-to-day procurement initiatives? Are you achieving your desired goals? How can you measure and demonstrate that?

Here is an example that illustrates how elusive achieving sustainability objectives can really be.

Best Intentions

A Victoria, B.C. organization that provides beverage service to its large customer base recently ran a Request for Proposals (RFP) competition to select a single coffee provider for all of its buildings for a period of five years. In keeping with its newly minted sustainability policy, the Planning Committee was very clear that it wanted

to support organic fair trade coffee. It also knew that this would be demanded by its customers and expected by stakeholders. The committee structured the RFP accordingly, putting significant weight on the provision of “organic fair trade coffee” products.

The RFP for “organic fair trade coffee” drew significant attention from major players, in large part because of the predicted volume and the lengthy contract term. A multinational coffee company won the competition, based on a 1% price advantage over its competitors. The multinational committed to providing nothing but “organic fair trade coffee” to meet the buying organization’s requirements over the term of the contract. The pricing was certainly competitive, so the buying organization awarded the contract to the multinational, which was the lowest-cost compliant proponent.

A procurement success, right?

But Not the Best Solution

As those in the coffee business know, but procurement folks may not, companies that provide coffee for end users are not designated “fair trade”; rather, it is the coffee itself that carries the designation (see sidebar). Some companies provide nothing but fair trade coffees; others carry a mixed inventory. Unfortunately, the RFP was not structured to take this into account.

About 90% of the coffee sold by the large multinational company is not fair trade coffee at all. This company does offer one coffee that is fairly traded, and that is the product promised to the buying organization for the next five years. The multinational will therefore be able to meet the technical requirements of the contract, at the lowest price. What is not factored in, however, is that on the way to delivering that fairly traded coffee, the multinational may stop at

Wake Up and Smell the Coffee Facts

- Twenty-five countries throughout Latin America, Asia and Africa produce Fair Trade Certified™ coffee.
- By linking directly with markets, farmers in Fair Trade co-operatives are able to earn three to five times more than they would receive by selling their coffee through conventional mechanisms.
- Licensed Fair Trade importers pay \$1.26/lb (\$1.41/lb if organic) to Fair Trade coffee co-operatives.
- Small farmers who work without the benefits of the Fair Trade label most often sell to middlemen, capturing a mere 2% to 4% of the retail price of coffee.
- At 2.3 billion pounds each year, Americans consume more coffee than any other nation.
- For every daily coffee drinker in the U.S., there is one worker elsewhere in the world who depends on coffee for his or her livelihood.
- Fair Trade Certified™ coffee is the fastest growing segment of the U.S. specialty coffee market: U.S. retail sales of Fair Trade Certified™ coffee grew from less than \$50 million in 2000, to nearly \$500 million by 2005.
- Approximately 85% of the Fair Trade Certified™ coffee sold in the U.S. is certified organic.
- Fair Trade certification ensures environmental stewardship and forbids the use of ISO-designated “dirty dozen” pesticides.
Source: www.coffeeresearch.com
- More than 25 million people in the tropics depend on coffee, a crop that is the economic backbone of many countries and the world’s second-most traded commodity after oil.
- Organic coffee beans have been produced without the use of pesticides or herbicides. Non-organic coffee is typically higher yielding because it is not usually shade grown. The definition of certified organic coffee can be extended to include an emphasis on recycling, composting, soil health, and protection of the environment. These are important aspects to sustainability that are both cost effective and socially responsible. That is why organic fair trade coffee and organic shade-grown coffee often go hand in hand.
- Fair trade coffee, or equal-exchange coffee, is coffee that is traded by bypassing the coffee trader and therefore giving the producer (and buyer) higher profits.
Source: www.rainforest-alliance.org

all of its other customers along the way delivering non-fairly traded coffee.

Best Practices

By contrast, one of the smaller companies that responded to the RFP carries nothing but fair trade coffee products. It works directly with coffee farmers to ensure that the farmers receive fair value for their beans and are treated equitably in all respects. This company spent a lot of time and resources trying to figure out what an RFP is and how to respond to it. The company is a leader in the fair trade coffee industry, and its ethical and environmental virtues are beyond dispute, but the idea of competing for contracts was fairly new for it.

Ultimately, the smaller company was unsuccessful in the RFP

competition because of that 1% price advantage that the large multinational could offer – the multinational that deals mostly in non-fairly traded coffee. Deeply disappointed by the RFP process, this company is unlikely to respond to another one.

Best Lessons

Do your research! While the whole area of sustainable procurement is still emerging, what this particular example shows is that purchasing organizations need to thoroughly research their procurement requirements at the planning stage. Especially when moving in any new direction with procurement activities, or exploring new and different types of contracting arrangements. At the very least, some market sounding or other discussions

with industry can uncover nuances of which even skilled procurement professionals might not be aware.

Why invest the time and resources? Two key reasons: first, without adequate research, the buying organization may not achieve its stated objectives, so would be unable to defend its decision, if challenged. Second, and perhaps more importantly, the most innovative suppliers may be shut out of major procurement activities and contract opportunities. The buying organization can't benefit from what they offer, and the suppliers won't have the business. Worse, they may not come back.

These days, research is ubiquitous, cheap (if not free), and accessible. There's no reason to not do it early and often. ♦

Frequently Asked Questions

Through our Signature Seminars and other courses, our NECI instructors regularly field a lot of questions about procurement-related topics and issues. We will include some of these, along with our answers, as a new feature in *The Legal Edge*.

What you can do: if you have procurement-related questions that might be of broad interest, we invite you to send them to our Legal Editor and Publisher, Maureen Sullivan (maureen@neci-legaledge.com).

What we can do: we can publish questions of a general nature that we think are relevant and timely. We can publish them with your name, or anonymously, as you wish.

What we cannot do: we cannot address specific legal questions, provide legal advice, or guarantee that your question will be published.

To start, we have two questions recently received from readers.

Is there such a thing as a “weighted mandatory”?

If this term strikes you as an oxymoron, you're not alone. Yet some procurement professionals in Canada are starting to use this term in solicitation documents and terminology.

The explanation, on the surface, seems like a good one: “We require them to submit certain information [let's say references]. If they don't submit any references, they will be automatically rejected. At the same time, we want to be able to do a qualitative assessment of those references, so we also ‘score’ references under the weighted criteria section of the solicitation.”

Seems like a quick and easy way of eliminating respondents who fail to include critical information, without having to proceed through to the evaluation-of-proposals stage with them.

But there are some definite flaws.

For example, why have a different treatment for a proponent who fails to submit references, and for one who includes them but scores zero on the evaluation of those references? One proponent is summarily eliminated from the process, and the other could potentially win the competition (e.g., if the weighting placed on references is so low that they can still win with scoring zero for that section).

While there is nothing inherently wrong or illegal with “weighted mandatories,” the term adds unnecessary complexity and confusion to an area of practice that already has enough industry-specific terms and acronyms. A more sensible way to accomplish the desired outcome might be to have a minimum threshold score on references. For example, a proponent must score 20 out of a total 40 possible points

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ANSWER TO YOU BE THE JUDGE

As determined in the case of *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, [2004] B.C.J. No. 5, decisions on compliance must be made “in good faith, and in a manner that can withstand objective scrutiny.” While not binding in Ontario, we suggest that this judicial test would be adopted by other courts in Canada wrestling with the thorny issue of reviewing decisions on compliance of bids.

In this case, *Bot Construction Limited v. Ontario (Transportation)*, 2009 O.C.A. 879, both levels of the court conceded that there was no suggestion that the MTO acted in bad faith or for improper purposes.

Was the MTO’s decision therefore reasonable, given all of the facts of the case? The “reasonableness test” was described as whether the MTO’s decision “falls within the range of

possible, acceptable outcomes that are defensible in respect of the facts and law.” The Court of Appeal looked closely at the information obtained from Cavanagh when the MTO sought clarification before award, and accepted the evidence that Canadian steel could be used for the entire project, including the required steel beams.

The Court went on to conclude that, even if the Cavanagh bid had declared imported steel for use on the bridge beams, it would not have affected the order of bidders, because of the large gap between Cavanagh, the lowest bid, and Bot, the second-lowest bid. The Court of Appeal overturned the trial judge’s findings, upholding the MTO’s decision on compliance of the Cavanagh bid.

While an owner is not obligated to investigate complaints by rival bidders, this case illustrates that it may in fact be prudent to do so. In the *Double N* case, for example, had the owner taken the time to investigate,

it likely would have discovered clear evidence of non-compliance (the age of the equipment), would have not awarded to a non-compliant bidder, and would have saved itself an expensive 20-year legal battle.

In *Bot*, the information elicited through the owner’s investigation of allegations by a rival bidder played a key role in the Court’s conclusions. In the view of the Court of Appeal, the investigative steps taken by the MTO after receiving Bot’s complaint satisfied any duty of fairness owed by the MTO to Bot. The investigation provided a sufficient basis to support a reasonable conclusion by the MTO that Cavanagh’s bid was compliant. Had the MTO not undertaken such an investigation, the evidence might not have been available for the Court to consider, and the judicial outcome may have been different.

Both the Ontario government and Thomas Cavanagh Construction Ltd. received court costs from Bot Construction. ♦

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in the “references” section, to move forward in the competition. In this way, a proponent with weak references cannot win the competition. If they fail to include any references, they score zero and do not meet the minimum threshold to be considered further.

Good grief, folks, let’s work at streamlining and simplifying, rather than creating more confusing terminology that adds nothing new to the selection process!

Can we use past performance reports when evaluating a company that has recently changed its legal name?

Whether by accident or design, we do see some persistently poor-performing companies dropping out

of the market, and then the same individuals show up doing the same work, with the same performance problems, as a new legal entity.

At law, it is the legal entity itself with which you have a contract, not with the individual players, unless they are specifically named. Therefore, all of your hard work doing diligent post-contract evaluations, tracking and documenting performance issues from the previous company goes to waste.

As with almost any procurement dilemma, you can avoid this one with thorough procurement planning. The following clause will allow you to reject a bid or proposal from the ‘new’ company, even though your past performance documentation relates to the predecessor legal entity.

It’s a little tricky to navigate, but read it carefully. It allows you to look behind the corporate veil to those who run the company and deliver the services or product for which you have contracted. We affectionately call this the “Don’t Play Games With Us” clause:

“The Corporation reserves the right TO DISQUALIFY from bidding:

1. an individual who has; or
2. an individual who was a shareholder or officer of a company that has; or
3. a company that has; or
4. a company with a shareholder or officer who has; or
5. a company that is, or was, a shareholder of a company that has; or
6. a company that has a

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YOU BE THE JUDGE

Struggles with Steel

As you may recall from the Supreme Court of Canada decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] S.C.C. 3, “allegations raised by rival bidders do not compel owners to investigate the bids made by others.” In other words, owners are entitled to take bidders’ assertions of compliance at face value.

So is there ever a time when the courts should interfere with an owner’s honest assessment of bidders’ compliance with mandatory tender requirements? Under what circumstances might the court step in? And when should it take a hands-off approach? Test your knowledge with the following fact pattern.

The Ontario Ministry of Transportation (MTO) issued a Request for Tender (RFT) for highway expansion work near a small town northeast of Toronto. To comply with the MTO’s steel policy, the RFT required bidders to complete a “Declaration of Declared Value of Imported Steel” form, and a statement of the value of Canadian structural steel product they would be supplying. This enabled the MTO to then apply the stated 10% preference for Canadian steel content to arrive at

each bidder’s “Adjusted Total Tender.”

Thomas Cavanagh Construction’s bid declared nil value for imported steel, so all of its steel was subject to the 10% price preference. As a result, Cavanagh’s bid was the lowest “Total Tender” (\$63 million) and “Adjusted Total Tender” (\$56.7 million).

Before the MTO awarded the contract, the second-lowest bidder, Bot Construction Ltd., wrote to the MTO stating that Cavanagh’s bid failed to declare a value of imported steel, so its tender must be rejected as non-compliant. According to Bot, the type of rolled steel beam specified in the tender was only available outside of Canada, so Cavanagh had to be using some imported steel and was non-compliant for failing to declare that fact.

Despite the *Double N* ruling, the MTO investigated Bot’s complaint. Its structural engineers were satisfied with Cavanagh’s explanation that Canadian-made, specifically welded steel beams would work and would, in fact, better meet the drawing specifications in the tender than would the imported product. The MTO awarded the contract to Cavanagh, and Bot sued for breach of Contract A fairness obligations.

While historically very reluctant to interfere with the “business decisions of an owner,” the Ontario courts had to

grapple with the fact that rolled steel beams were specified in the design drawings, and the only evidence before the court was that rolled steel beams are not available in Canada. Based on this, the Ontario Divisional Court found that the Cavanagh bid could not possibly comply with the specifications, so the MTO’s decision (that the Cavanagh bid was compliant) was unreasonable. The Court quashed the MTO’s decision to award the contract to Cavanagh.

The Province of Ontario (MTO) and Cavanagh appealed the decision.

Should the courts interfere with the owner’s honest assessment on issues of compliance? Was the trial judge correct? See page 11 for the answer. ♦

STAYING IN TOUCH

Want to know what’s happening with NECI and with *The Legal Edge* between issues? Check our website or our Facebook page, or you can now follow Maureen on Twitter @maureenNECI. You can also subscribe to our blog at <http://neci-thelegaledge.posterous.com>.

THE LEGAL EDGE

Developments in the law of competitive tendering, and innovations and best practices in procurement and contract management

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shareholder or officer who is also a shareholder or officer of another company that has;

- a. had a bid bond retained, or
- b. had all or part of a performance bond retained, or
- c. breached a contract with the Corporation, or
- d. failed to complete its obligations under any prior contract

with the Corporation, or

e. has been charged or convicted of an offence in respect of a Corporation contract.”

As when making any adjustments to your standard procurement documents, remember that you must check with your legal advisors before incorporating any new solicitation terms or requirements. ♦