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Barristers & Solicitors

EMERGING TRENDS
IN MUNICIPAL LAW

Procurement Law: Overview and Best Practices



Braden Nehring

Associate

Brownlee LLP | Construction and Commercial Litigation

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Introduction

- For public sector procurement, owners can procure services through tendering or a Request for Proposals (“RFP”).
- The tender process and the RFP process are **different**; and impose differing obligations upon an owner.

Tender Process

- Tendering contract created when bidder submits bid in response to owner's tender call (Contract A)
- Duty to treat all bidders fairly and equally
- Unfair treatment of a bid can expose an owner to a claim for loss of profits

Tender Process

- Bid security is required to “hold” the bid (Bid Bond)
- Once submitted, the bid is irrevocable
- Construction contract awarded to bid that best responds to requirements of tender call (Contract B)

Tender Process

- Must only evaluate a compliant bid
- Tender documents dictate mandatory requirements for a compliant bid
- Evaluation based upon undisclosed criteria is prohibited
- Subject to applicable trade agreements

RFP Process

- Owner has more flexibility with evaluation and non-compliant proposals
- Think of the RFP process as a negotiation process

RFP Process

- Owner may negotiate with Proponents (before construction contract is executed):
 - Contract terms
 - Pricing
 - Schedule
 - Scope of Work

RFP Process

- Subject to applicable trade agreements
- Proper preparation and drafting is crucial

Tender Advantages

- Owner can evaluate bids for a clearly defined and fixed scope of work
- Bidders cannot withdraw bids following bid closing without consequence
- Time and cost efficient

Tender Disadvantages

- Prevents negotiation (lower cost alternatives)
- Once tender has closed, process is not very flexible
- Greater potential for exposure to claims by unsuccessful bidder

RFP Advantages

- Owner may pursue lower cost options
- Negotiation directly with proponents
- More flexibility in dealing with non-compliant bids
- Owner may become aware of preferable modifications to scope of work or construction methodology

RFP Disadvantages

- No bid security
- Negotiation can be time and resource consuming

Tendering Best Practices

- This listing is not exhaustive
- Specify closing time clearly
- Include privilege clause
- Clearly define evaluation criteria and scoring system
- No undisclosed criteria

Tendering Best Practices

- No fax submissions
- Conduct thorough review of all mandatory requirements
- Do not negotiate with any bidder after tender closing
- Prepare a written evaluation and recommendation
- Keep a record

RFP Best Practices

- This listing is not exhaustive
- Substance over form. Following should be negotiable:
 - (a) Design specifications
 - (b) Scope of work/materials

RFP Best Practices

(c) Contractual terms

(d) Proposal modifications allowed

- If treated as a tender – greater potential for liability

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QUESTIONS?

Braden Nehring, *associate*

Brownlee LLP

Email: bnehring@brownleelaw.com