



# The Procurement Process.

Planning, Strategy and Legal Implications – Part 1

**Tendering for contracts, whether as procurer or supplier, is difficult and requires each party to consider a number of different factors. In this article, we discuss the key considerations that procurers and suppliers must have prior to the release of a tender.**

## Procurement Planning

Procurement planning is an essential first step in the tender process and will assist in achieving desired procurement outcomes and in mitigating negative legal implications. When approaching the market for the delivery of a service, product or works, there are a multitude of questions that a procurer should seek to answer. These questions will depend on the specific circumstances of the project and the market, but the broad questions that procurers should (at minimum) be asking themselves are as follows:

- do we know the specifics of what products, services or works we require or do we need input from suppliers to determine these?
- are we asking for the right service, product or works to suit our needs?
- have we properly scoped the service, product or works?
- what can we do during the procurement stage to ensure the best chance of the successful tenderer delivering on time and within budget?
- what can we do to encourage competition and get the best value that we can?
- what are our key risks for this project and how can their management be implemented into the contract?
- what is the most appropriate delivery strategy for this project?
- what will be the outcome if there are no preferred bids?

The tenderer on the other hand should ask themselves the following:

- do the benefits of being successful outweigh the cost of the process to submit a tender?
- who is our competition and how can we stand out?
- what is the likelihood of being successful?
- what do we need to do to submit a compliant tender and do we have the capacity to submit a compliant tender?
- what does the project involve and are we able to deliver it?
- what documentation is in place to ensure that our tender is fairly assessed?
- can our ideas be used by the procurer even if we are not successful?
- can we negotiate the contract terms if we are the preferred tenderer?
- what are the timeframes for the tender process? When will we be notified of whether we have been successful?

When procurement processes are simple, prescriptive and largely input based, such as a tender for the construction of a fully designed building, tenders can be assessed on a relatively objective basis of compliance. The assessment of tenders may be more difficult where the procurer seeks to procure a contractor to design and construct a building or infrastructure facility where a complex set of performance (output based) criteria are the relevant benchmarks. No matter the complexity of the project or the assessment requirements, it is essential that all procurement processes are adequately planned. If not properly planned, a procurement process can take much longer than expected and involve extensive negotiations which may give rise to potential legal and probity consequences.

Commercial difficulties may also arise, such as the deal or the market conditions changing, therefore forcing consideration of whether the process still offers the best chance of achieving value for money. To avoid legal and probity concerns, procurers need to be proactive in the planning process.

### Tender documents

One way to be more proactive and to avoid legal implications in the planning process is to consider the questions noted above in developing the tender documentation. Tender documentation, including any information about the product, services or works and what is required should be very clear. Practically, this looks like a clear scope (if that is known), response forms that ask the correct questions and that correspond with pre-established evaluation criteria and pricing schedules that account for all aspects of the project. If contract terms are to be released with the tender, these should reflect the requirements for the project. For example, if the tender documents suggest that the successful contractor is to obtain the relevant approvals, the contract terms need to reflect this.

### Risk profiling

It is not uncommon for departures to be proposed by a contractor. In order to encourage speedy negotiations, both the procurer and the tenderer should ensure that they are aware of the risks associated with the product, services or works being procured, how these risks are dealt with under the contract and the extent to which they are willing to negotiate on these terms.

### Procurement plans

Given the higher level of accountability, particularly for government entities, procurement plans are an essential step and tool to ensure that the procurement process is well documented and followed. Procurement plans should be completed prior to the release of any tender documents and will cover the different stages of the process (such as an EOI stage followed by a tender stage) and the documents to be prepared throughout the process. The plan may be amended at a later date due to changing circumstances, provided that a paper trail of the changes is kept.

### **Process Contracts**

A process contract arises when a statement or term

of an RFT constitutes an offer which, when accepted or complied with (e.g. when a tenderer submits a tender) results in a binding contract. Process contracts, and the relevant case law, predominantly concern government processes as a result of the need to ensure integrity of the process for government contracts.

In relation to public sector procurement, there is a willingness by courts to impose obligations on the procurer to act in the way that they say they will in the RFT, and an obligation to act fairly. The implications of this are far reaching, requiring procurers to pay close attention to the various aspects of the process and draft the RFT to reduce the risk. The procurer should:

- consider whether it wants the tender process to form a binding legal relationship;
- pay attention to the terms of the criteria for selection (and exclusion) of a tender (this is where most disputes will arise);
- ensure the RFT is drafted so there is no presumption that if a tenderer complies with certain criteria, that a binding contract will arise; and
- draft disclaimer clauses clearly and consistently with the terms of the RFT.

If a process contract is not to be entered into, which is common in the private sphere, procurers must clearly express that intention in the RFT to void a finding of a contractual relationship.

Process contracts, or if no process contract is used, RFT's, should include waivers and conditions, such as:

- the ability to accept non-conforming tenders;
- the ability to accept late tenders;
- the ability not to accept the lowest priced tender;
- the ability not to accept any tender;
- the ability to vary the tender process; and
- limitation of liability and exclusion of remedies, to the extent possible.

If you need assistance with the procurement process, whether as a procurer or contractor, we are here to assist. We will also be presenting on this topic at our upcoming seminar series. Keep an eye out for Part 2 of this article series where we will discuss legal and probity implications, strategies for procurers and tenderers after the tender documents have been released, conforming and non-conforming bids, and closing the deal.



**Paul Muscat**  
Director  
+61 408 234 289  
paul.muscat@muscattanzer.com.au



**Craig Tanzer**  
Director  
+61 403 408 200  
craig.tanzer@muscattanzer.com.au



**BJ Doyle**  
Senior Associate  
+61 419 104 996  
bj.doyle@muscattanzer.com.au



**Joseph Sammut**  
Senior Associate  
+61 428 834 096  
joseph.sammut@muscattanzer.com.au



**Claudia Lizzio**  
Associate  
+61 429 378 593  
claudia.lizzio@muscattanzer.com.au



**India Bennett**  
Associate  
+61 459 684 170  
india.bennett@muscattanzer.com.au



**Sian Phelps**  
Lawyer & BD Manager  
+61 409 688 169  
sian.phelps@muscattanzer.com.au



**Hugo Sherlock**  
Lawyer  
+61 466 662 121  
hugo.sherlock@muscattanzer.com.au



**Kayla Webb**  
Graduate  
+61 473 586 473  
kayla.webb@muscattanzer.com.au



**Darcey Bidwell**  
Law Clerk  
+61 447 921 222  
darcey.bidwell@muscattanzer.com.au



**Layla Montefiore**  
Law Clerk  
layla.montefiore@muscattanzer.com.au



**Isabel Rusovan**  
Office Manager  
+61 473 749 259  
isabel.rusovan@muscattanzer.com.au



**Gillian Want**  
Legal Assistant  
+61 411 469 480  
gillian.want@muscattanzer.com.au



**Jackie White**  
Accounts & Compliance Manager  
+61 409 972 735  
jackie.white@muscattanzer.com.au