



The Procurement Process.

Planning, Strategy and Legal Implications – Part 2

In Part 1 of this article series, we looked at strategies for adequately planning a procurement process, process contracts and managing risk in the planning stage. In part 2 of this article series, we consider the legal and probity implications for procurers and tenderers after the release of tender documents, strategies for procurers and tenderers, how to deal with conforming and non-conforming bids and closing the deal.

Probity and legal implications

The dictionary definition of “probity” refers to honesty, proper and ethical conduct, uprightness and propriety in dealings with others. Good probity practices means ensuring that tenderers will be treated fairly, impartially and equitably, adopting and applying a consistent methodology in the assessment of tenders and ensuring a consistently applied and transparent process.

Probity is an important concept for both procurers and tenderers. For procurers, good probity practices:

- encourage engagement from the market due to the higher degree of trust between the market and the procurer;
- assist the procurer to obtain value for money from the market due to the higher level of engagement and market trust; and
- establish a good reputation in the market, and if the procurer is a government procurer, establishes a good reputation in the public as a result of the proper use of public resources.

For tenderers, good probity practices ensure that tenders submitted are assessed fairly, impartially and equitably against other tenderers, which makes participation worthwhile.

The tender documents, in particular the Procurement Plan, the Evaluation and Probity Plans and the invitation documents map out the procurement process to be followed. It is important that they be followed to ensure integrity of the process. Departing from these documents can raise significant probity and legal issues in addition to undermining the confidence of the market in the integrity of the process.

The probity process can sometimes result in the procurement being procedurally driven, resulting in increased time and cost. While this may seem unnecessary at times, it is essential given the Court’s approach in holding procurers liable for breach.

Conforming and non-conforming bids

A tender which does not comply with the RFT is not a conforming tender. The procurer may accept a non-conforming tender unless they are bound by the RFT to only consider conforming tenders. The procurer is generally not obliged to accept non-conforming tenders, but the RFT needs to expressly deal with this to avoid uncertainty.

For a tenderer, a conforming tender is important as it will often secure (depending on the RFT) the possibility of having alternative proposals considered, unless the RFT excludes such tenders. For the procurer, it is equally as important to ensure that conforming tenders can be evaluated on an “apples for apples” basis.

It is important for the RFT to address this how conforming and non-conforming tenders will be assessed otherwise the procurer could be exposed to actions with respect to procedural fairness and estoppel, and injunctive relief. Problems can arise when a tender is accepted, but the tender does not conform with the RFT.

Unsuccessful tenderers who submitted conforming tenders may have a remedy. Disqualifying tenderers when their tender is non-conforming depends upon the wording of the RFT.

For procurers, careful drafting of tender requirements is essential to ensure flexibility if procurers would like the option of being able to consider non-conforming tenders. For tenderers, careful analysis of what constitutes a “conforming tender” is essential to ensure maximum prospects of success.

Strategies for procurers

Probity

Key probity practices that should be adopted by procurers include:

- not treating tenderers in a way that could be viewed, objectively, as unfair or unreasonable;
- no favouritism or bias afforded in treatment of any one, or group, of tenderers ahead of others;
- ensuring that all tenders are assessed against the same evaluation criteria;
- adopting and applying a consistent methodology;
- ensuring that evaluation panel members do not have conflicts of interest;
- ensuring all tenderers are provided with the same information and material;
- ensuring that all questions asked by tenderers and answers to those questions are distributed to all tenderers (de-identifying the tenderer that asked the question);
- giving all tenderers the same amount of time to submit their tender;
- when making a decision, taking into account all relevant considerations; and
- when making a decision, ignoring any irrelevant considerations.

If these principles are adopted and implemented, then there should be a high degree of confidence in the fairness of the outcome. However, if they are not observed, then you face the prospect of adverse publicity, loss of confidence in your tendering processes with a consequent frustration or increased cost of implementing policies and programs, disciplinary action, court proceedings and criminal proceedings.

Process Contracts – RFTs

As discussed in part 1 of this article series, procurers can enter into express process contracts to govern the pre-award period and to provide certainty regarding the legal relationship by stating express terms in the RFT and limiting liability. Procurers must remain conscious of the terms in their process contracts, or if no process contract, the terms in the RFT, during the procurement and ensure that these terms are complied with.

Documentation

The tender documents and Plans referred to above should have been endorsed by the various internal stakeholders. Any departure from the plan rationale and processes will tend to invalidate that endorsement. Verification and sign-off procedures should also be implemented to minimise the risk associated with misleading statements or negligent misstatements being made, as the invitation documents will make certain representations on how the process is to be conducted. It is therefore essential that you are familiar with them and do not depart from what has been stated in them.

Training

Staff involved in conducting tenders should undertake specific training to identify the legal risks with the tender process.

Strategies for tenderers

Deadlines

Tenderers should note when the tender closes so that it can prepare an adequate submission, and submit it before the closing date and time. Procurers will not typically accept a late tender. Tenderers should also note the deadline for submitting requests for clarification.

Documents to be provided

Tenderers should note what documents are to be provided with the tender.

Tender requests for clarifications

If a tenderer has any questions regarding the RFT, they should be asked in accordance with the requirements in the RFT.

These requests for clarification may be appropriate to understand the scope, presumptions and the bases for the tender and highlight any concerns to the procurer so tender documents may be amended. This may also reduce negotiation time.

Conforming and non-conforming tenders

Tenderers should carefully analyse what constitutes a conforming tender and submit a conforming tender as it may secure the right to submit a non-conforming tender (if the RFT requires a conforming tender as a pre-requisite to submitting a non-conforming tender).

If non-conforming tenders are not requested, it may be prudent for a tenderer to submit one (along with a conforming tender) if the tenderer considers that an alternative procurement method would result in cost savings, innovation or other value.

Format

The tenderer should check submission requirements well in advance of the deadline. Examples of submission requirements include how the tender is to be submitted, whether an acknowledgement of addendums is required and what documents are required to accompany the submission.

Closing the deal

Two issues to consider when closing the deal. Firstly, the longer the procurement process without contract award the greater likelihood the procurement aims will not be met. Secondly, ensuring an "award" involves entering into a binding contract.

If not managed well, there is a greater risk that the tender process is not being complied with. Commercially, a situation could arise where the successful tenderer does not enter into a binding contract, and the tenderer may reopen negotiations. It may also be a breach of the tender process.

If it is the intention of the procurer that a binding contract will only be formed on the execution of a formal contract, it should be made clear that formation of the contract will be conditional upon the execution of a formal contract, and that acceptance of the tender will not constitute formation.

Finally, if you want to incorporate tender documents into the contract you should expressly do so and include an order of precedence clause.

We also recommend not attaching a tender as a contract document as it will likely contain qualifications, terms and conditions inconsistent with the contract and specification.

Conclusion

As noted in part 1 and part 2 of this article series, there are various important matters that procurers and tenderers should consider to ensure a successful and defensible procurement process and a successful project.

We will be discussing all of these matters in more detail in our upcoming seminar series on 11 December 2024.

In the meantime, if you have any questions in relation to the planning, strategy and legal implications of the procurement process, please do not hesitate to contact us.



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