



Tender Process Risks and Strategies to Mitigate.

Probity, Procurement and Tendering Article Series

Tender Process Risks and Strategies to Minimise those Risks

Over the course of our previous articles on the procurement and tender process we have discussed various risks associated with it, including process contracts, conforming and non-conforming bids, and probity obligations. In this article, we will discuss strategies that can be adopted to minimise the risks associated with the tender process.

Over the next two weeks, we will be discussing further aspects of the procurement process, including:

- probity plans; and
- contract negotiations.

Strategies

Procurers

Procurers can adopt the following strategies to minimise the risks associated with the tender process.

Process contracts – the party inviting tenders may willingly enter into an express contract (process contract) with each tenderer to govern the pre-award period. This is to provide a level of certainty about the legal relationship between the parties and limit any potential liability by expressly stating the terms and conditions governing their relationship. For example, a procurer might include express terms in the Request for Tender (RFT) to avoid implied terms and limit liability.

Non-binding – if a party does not want to enter into an express process contract, that party must clearly and unambiguously express that intention in the RFT in order to address any potential finding of a binding contractual relationship.

RFT – various waivers and conditions of the tender should be included in the RFT. These conditions include:

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

Documentation – it is important that verification and signoff procedures are implemented into RFTs in order to minimise the risk of misleading or negligent misstatements in the RFT.

Disclaimer – a disclaimer should be considered in the RFT requiring tenderers to fully inform themselves of all matters relating to the tendered project. Tenderers should also be required to acknowledge that they will not rely on any information provided by the party inviting the tender.

Training – staff who are commonly involved in conducting tenders should undertake specific training to identify the legal risks associated with the tender process. This training should include the need to take care in dealing with tenderers to minimise the risk of liability arising through representations made to tenderers and documentation, which includes the RFT and any other documentation provided during the pre-award period.

Probity adviser – for higher risk or high value procurements, the engagement of an external probity adviser should be considered to oversee the process in order to mitigate and manage any probity risks. The probity adviser will review the market approach material to ensure compliance with probity principles, prepare a probity plan and probity protocols for the project, oversee the process, provide probity briefings as required, attend site visits and other attendances with respondents, review requests for clarification and answers, attend evaluation committee meetings and prepare a probity report at the conclusion of the process. The probity adviser will also provide advice throughout the process to ensure any probity issues are managed properly to avoid the process being compromised and to ensure the integrity of the process. In our next article we will delve further into probity plans and the role of the probity adviser.

Tenderers

Tenderers can adopt the following strategies to minimise the risks associated with the tender process.

- Tenders must clearly analyse what constitutes a conforming tender in the RFT and submit a conforming tender. This may secure the right to have alternative proposals considered.
- If the RFT requires a conforming tender as a pre-requisite to the submission of a non-conforming tender, ensure the conforming tender is submitted.
- If non-conforming tenders are not requested, it may still be prudent to submit one (but only after the above steps), especially if cost savings arise (for example, from an alternative procurement method).
- Tender qualifications are also sensible as these set out the scope, underlying presumptions and bases for the tender, and may, prior to the award of the tender, highlight key areas of concern to the party inviting the tender so that the tender documents are amended.
- Check how the tender is to be submitted (for example, a mark-up or schedule of departures), by when, and to where/whom.

Closing the deal

“Closing the deal” involves two very important issues:

- the longer the tender process continues without a contract being awarded, the greater likelihood of the tender process aims not being met; and
- “awarding” the contract must actually involve entering into a binding contract.

One source of frustration that is experienced in the tender process is an inability or unwillingness to finalise the outstanding clarifications/negotiations, leading to a delay in the “award” of the contract.

If this process is not managed well, then it increases the likelihood that the tender process is not being complied with.

One source of frustration that is experienced in the tender process is an inability or unwillingness to finalise the outstanding clarifications/negotiations, leading to a delay in the “award” of the contract.

If this process is not managed well, then it increases the likelihood that the tender process is not being complied with.

From a commercial point of view, it can lead to the situation where the successful tenderer is chosen and, for a variety of reasons, not signed up. In this scenario, there is no contract, and it is open to the tenderer to reopen negotiations because there is at that point no serious competition. This can undo a great deal of effort that has been expended in the tender process. Further, it could also constitute a breach or non-compliance with the tender process.

Accordingly, it is very important to ensure that the contract documents are finalised at the same time as assessment of tenders is undertaken, and that when final terms are agreed upon in that process (to the extent there is negotiation), the contract is properly executed.

This leads to the second point – when does the contract actually come into being?

Whether a binding and enforceable contract will come into existence on acceptance of the tender or on the execution of the formal contract will depend on the intention of the parties as disclosed by the tender documents.

If it is the intention of the party inviting the tender that a binding contract will come into existence on the execution of the formal contract, then the party inviting the tender will need to make it clear that formation of the contract will be conditional upon the execution of a formal contract. As a result, acceptance of the tender will not constitute formation.

If the parties to a contract wish to incorporate the tender documents into the final contract, the parties should expressly do so and provide for an order of precedence in order to avoid uncertainty and ambiguity.

The parties should:

- include an order of precedence clause, setting out what happens if there is any inconsistency between the various contract documents; and
- avoid attaching the contractor's tender as a contract document as it is likely to contain qualifications inconsistent with the conditions of contract and technical specification.

The consequences of getting this wrong are dramatic as it may be determined that there is no contract between the parties governing the works or services being provided. If this is the case, the tender process would be a complete waste of time ... for the procurer!

Keep an eye out for the fourth article in this Series, "Probity Plans", where we discuss what should be included in a Probity Plan to mitigate procurement risk at each of the relevant stages: planning; preparing the RFT; the RFT; the evaluation of tenders; and recommendation.

If you require procurement and/or probity or contract training for your staff or assistance with the review of your procurement, tender and contract documentation, please contact Paul to discuss your requirements.

Muscat Tanzer's Procurement and Probity Services

Paul Muscat and Craig Tanzer are long-term probity and procurement practitioners having been regularly engaged by the Commonwealth, State and many local governments as probity and procurement adviser and auditor on numerous infrastructure asset development and other major projects. If you require a probity adviser for such a project or would like us to provide probity training to your officers, please contact Paul or Craig to discuss.



Paul Muscat
Director

paul.muscat@muscattanzer.com.au



Sian Phelps
Associate & BD Manager

sian.phelps@muscattanzer.com.au



Paul Muscat

Director

+61 408 234 289

paul.muscat@muscattanzer.com.au



Joel Taylor

Consultant

+61 407 641 338

joel.taylor@muscattanzer.com.au



Joseph Sammut

Senior Associate

+61 428 834 096

joseph.sammut@muscattanzer.com.au



Sian Phelps

Associate & BD Manager

+61 409 688 169

sian.phelps@muscattanzer.com.au



Kayla Webb

Lawyer

+61 473 586 473

kayla.webb@muscattanzer.com.au



Isabel Rusovan

Office Manager

+61 473 749 259

isabel.rusovan@muscattanzer.com.au



Jackie White

Accounts & Compliance Manager

+61 409 972 735

jackie.white@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



India Bennett

Associate

+61 459 684 170

india.bennett@muscattanzer.com.au



Hugo Sherlock

Lawyer

+61 466 662 121

hugo.sherlock@muscattanzer.com.au



Layla Montefiore

Law Clerk

layla.montefiore@muscattanzer.com.au



Gillian Want

Legal Assistant

+61 411 469 480

gillian.want@muscattanzer.com.au