



# Tendering and Effective Contract Management

Probity, Procurement and Tendering Article Series

## Probity, Procurement, and Tendering Article Series

Over the next five weeks, we will be discussing various aspects of the procurement process, including:

- the procurement process – implications for effective contract management;
- tendering and process contracts;
- tender process risks and strategies to mitigate;
- probity plans; and
- contract negotiations.

### The Procurement Process – implications for effective contract management

Tendering for contracts, whether as procurer or supplier, is difficult. The procurer will ask:

- Am I asking for the right service, product or works?
- Will the successful tenderer deliver?
- Will I have real competition and get the best value I can?
- Will I be able to sign the contract on my preferred terms?
- Is my delivery strategy appropriate?
- What happens if I don't like any bids?
- What if I like a tenderer's proposal but don't want to award the contract because they have a poor delivery record?
- Do I have to comply strictly with the procurement process terms and internal procurement guidelines?

The tenderer on the other hand will ask:

- The process is expensive – is it worth bidding?
- Will I win?
- What do I need to do to submit a compliant bid?
- Will my bid be considered fairly?
- Can my ideas be used by the procurer even if I don't win?

- Can I negotiate the contract terms if I am the preferred bidder?
- How do I do the job if I do win?
- When do I "win"?

While all of these questions are relevant, many of them are particularly concerned with the tender process and the legal implications that arise from the process.

### The Tender Process

A typical tendering process involves most, if not all, of the following steps:

Step 1: expressions of interest;  
Step 2: the development and issue of a Request for (or Invitation to) Tender (RFT);  
Step 3: the preparation and submission of the tenders by tenderers in response to the RFT;  
Step 4: the evaluation of tenders by the procurer;  
Step 5: clarification and negotiation between the procurer and one or more tenderers; and  
Step 6: the award of the contract.

### Analysis of the Process

When procurement processes are simple, prescriptive, and largely input based, such as a tender for construction of a fully designed building, tenders can be assessed on a relatively objective basis of compliance.

However, contrast this with the procurement of a building to be fully designed by the successful tenderer—here, the criteria are based on a complex matrix of performance (output based) criteria, making the assessment much more difficult.

Additionally, government agencies (and many private sector procurers) are required to meet strict probity guidelines and principles in conducting procurements.

These processes can create additional complications which may lead to legal liability arising before a contract is awarded.

A further issue is the need to manage the procurement process well. A procurement process can take much longer than expected and involve extensive negotiations. This has the potential to lead to legal and probity consequences, as well as commercial difficulties – for example, the deal being changed or market conditions forcing a rethink.

## Pre-award legal issues

In certain circumstances, contractual obligations, and therefore liability, will arise during the pre-award period predominantly for the procurer, but also for the tenderer. During this stage, any departure from the process terms outlined in the RFT may give rise to legal liability. Additionally, legal obligations and liability may arise during the pre-award period as a result of:

- statute (e.g. misleading conduct in relation to the conduct of the party inviting tenders);
- negligence (e.g. where the procurer owes a duty of care to a tenderer); and
- estoppel (e.g. where the conduct and/or representations made by the procurer subsequently prevent the procurer from departing from the terms and conditions in the RFT).

## 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 a procurement 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 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 within the terms of the RFT.

Keep an eye out for the second article in this Series, “Tendering and process contracts” where this topic will be explored further with reference to decided cases concerning government procurements. In the meantime, if you would like to discuss this article or require assistance with your next procurement or tender process, or for a review of your procurement, tendering or probity documentation please contact Paul Muscat or Sian Phelps.

## 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 advisers and auditors 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.



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