



Tendering and Process Contracts

Probity, Procurement and Tendering Article Series

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In the first article in this Series, "The Procurement Process – implications for effective contract management", we discussed the questions that procurers and tenderers do, and should, ask themselves when approaching the market or submitting a tender, as well as a legal analysis of the tender process and pre-award legal issues. We also introduced the concept of "process contracts" and the legal issues and risks associated with them. In this article, we explore this topic further with reference to court cases concerning government procurements.

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

- tender process risks and strategies to mitigate;
- probity plans; and
- contract negotiations.

Tendering and Process contracts

Requests for Tender (RFTs) have traditionally been viewed as an invitation to treat, meaning that it invites the submission of a tender, but does not create legal or contractual obligations until the party inviting the tender accepts a tender.

A process contract arises when a statement or term of an RFT constitutes an offer which, when accepted or complied with (generally by the tenderer submitting its tender), brings about a separate binding and legally enforceable contract.

The case law concerning process contracts predominantly applies to government contracts due

to the need to ensure the integrity of their tender process. The way this has been done is to have a set of tender conditions which prescribe how tenders will be assessed.

Case Studies

By way of a simple illustration, in one local government case a council provided in the tender documents that the council "does not bind themselves to accept all or any part of any tender. No tender which is received after the last date and time specified shall be admitted for consideration."

An unsuccessful tenderer complied with the requirement to submit its tender before tenders closed. However, due to an administrative error by the council, the tender box was not cleared until after the deadline, and the tender was deemed late and not considered at all. The Court held that there was an implied obligation on the council to consider the tender and the failure to consider the tender was a breach.

In another case, a council did not disclose its policy of accepting a local tenderer's tender if it fell within 10% of the lowest tender outside of the local government area. An unsuccessful tenderer complained (who in fact submitted the lowest tender) and was successful in convincing the Court that the council was in breach of an implied term of fairness. The council could not rely on a selection criterion that was not known to the tenderer as it was inequitable to do so.

In another case, the Court found the existence of a process contract in circumstances where the tender documents stated that tenderers would be assessed on the basis that the successful tender would be the "lowest price conforming tender". The council accepted a non-conforming alternative tender which identified cost savings.

The Court found that there was an implied contract to accept the lowest conforming bid and to do otherwise was unfair. The unsuccessful tenderer was awarded damages based on its tender preparation costs and loss of profit on the contract.

The Australian position has since been determined by the High Court in *Hughes Aircraft Systems International v Air Services Australia*.^[1]

Hughes was the unsuccessful tenderer in a two-party bid for the award of a contract by the Civil Aviation Authority (CAA). The CAA had invited both Hughes and the successful tenderer (Thomson) to tender for the project. During negotiations the CAA sent a letter to Hughes and Thomson setting out the selection criteria together with the tender process. The letter also said that an independent probity adviser would be appointed to verify that the evaluation procedure was followed and applied fairly. A subsequent RFT was issued in the same terms as the letter. The RFT said that “neither the lowest tender, nor any tender, will necessarily be accepted by the CAA”.

A Tender Evaluation Committee (Committee) was established. Following the evaluation process, the Committee recommended Hughes for the Contract. However, the majority of the CAA Board rejected the recommendation and awarded the Contract to Thomson.

Hughes commenced proceedings against the CAA alleging that the CAA was in breach of its contractual obligation to conduct the tender process fairly, requiring the court to consider whether:

- contractual obligations had arisen in the form of a “process contract”; and
- (if such an obligation existed) a term was to be implied to the effect that the CAA was under an obligation to conduct the tender process fairly.

The Court said there were two expressions of a process contract, being the letter from the CAA to the tenderers and the subsequent RFT issued to the tenderers to submit a “best and final offer”.

[1] (1997) 76 FCR 151

The Court found that each of the letter and the subsequent RFT constituted a binding agreement between Hughes and the CAA which details the matter in which the tender process was to be conducted (that is, a process contract).

It was also held that a necessary incident of a process contract with a public body is that “it will deal fairly with the tenderers in the performance of its tender process contracts with them”. This decision is significant in that it provides for “fairness” to be implied by law into all public sector tender processes regardless of what may have been the intention of the parties.

The Court held that the CAA breached the RFT by:

- failing to evaluate the tenders in accordance with the priorities and methodology specified in the RFT;
- failing to ensure that measures designed to maintain strict confidentiality of tenderers’ information were maintained;
- accepting a late change to the successful tenderer’s tender; and
- that the CAA had, by certain actions described above, and during its tender debriefing to Hughes, also contravened the Trade Practices Act 1974 (now the Competition and Consumer Act 2001) by engaging in misleading and deceptive conduct.

Accordingly, the Hughes Aircraft decision is authority for the proposition that pre-award tenders with public bodies contain an implied term of fair dealing as a matter of law. The decision highlights the need for government bodies to arrange and conduct their tender process with diligence, including the need for probity.

Summary

The authorities show a willingness by courts to, in the case of public sector procurement:

- impose obligations on those requesting tenders to act in a way that they say they will in the RFT; and
- impose an obligation on the procurer to act “fairly”, particularly where there are policies or codes which require this.

As the implications of process contracts are far reaching, the party inviting tenders will need to pay close attention to the tender process and draft the RFT to reduce the legal risk and:

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

Keep an eye out for the third article in this Series, "Tender Process Risks and Strategies to Mitigate" where we discuss strategies that can be adopted by procurers and tenderers to minimise the risks associated with the tender process. We will also discuss the frustration experienced with an inability or unwillingness to finalise outstanding clarifications/negotiations with the consequent delay to the "award" of the contract and the risks that arise.

In the meantime, if you would like to discuss this article or require assistance with your next procurement or tender process, or would like to engage us to review 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 developments 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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