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Procurement & Competitive Purchasing:

Tips, Trends & Legal Update for Municipalities

Manitoba Municipalities Administrators' Association
Presented by Lisa J. Stiver

Member
LexMundi
World Ready



Session 1 – Governance & Procurement Practices

- I. Trade Treaties
- II. Overview of the Law
- III. Governance
- IV. Procurement Strategies



Session 2 – Evaluation: Criteria and Considerations

- I. Price & Non-Price Factors
- II. Issues: Past Experience, Local Preference,
Debarment, Social Benefit
- III. Evaluation Considerations

Trade Treaties

- ◆ Tendering & Competitive Bid Law:
 - ◆ Contract Law
 - ◆ Offer and Acceptance
- ◆ Two methods to purchase goods & services:
 - ◆ tendering/competitive bid process
 - ◆ sole source/direct purchase

Trade Treaties

Public Procurement:

- government departments
 - Crown Corporations
 - MASH entities
 - P3s
-
- All subject to the Trade Treaties

Trade Treaties

- North American Free Trade Agreement (NAFTA)
- New West Partnership Trade Agreement (NWPTA)
- Canadian European Trade Agreement (CETA)
- Canadian Free Trade Agreement (CFTA)
 - (replaced Agreement on Internal Trade – AIT)

Trade Treaties

- Excluded Good/Services
 - Professional services
 - Health and social services
- Sole Supplier exemptions
 - Monopoly
 - Compatibility
 - Warranty
 - “exceptionally advantageous circumstances”
- Exceptional Circumstances
 - Unforeseeable urgency
 - Specific construction materials

Canadian Free Trade Agreement (CFTA)

- Crown Corporations:
 - \$500,000 for Goods/Services
 - \$5,000,000 for Construction
- Government:
 - \$25,000 for Goods
 - \$100,000 for Services and Construction
- MASH sectors:
 - \$100,000 for Goods/Services
 - \$250,000 for Construction

New West Trade Partnership Agreement (NWPTA)

- **Crown Corporations:**
 - \$25,000 for Goods
 - \$100,000 for Services and Construction
- **Government:**
 - \$10,000 for Goods
 - \$75,000 for services
 - \$100,000 for Construction
- **MASH sectors:**
 - \$75,000 for Goods/Services
 - \$200,000 for Construction



Trade Treaty Obligations:

- Valuation of Extension/renewal Options
- Disclosure of Criteria and Weightings
- Include Right of De-brief
- Limitation on Framework agreements
- Prohibitions on local preference, required experience
- Permits Negotiated RFPs
- Posting of Contract “value” of award

II. Overview of the Law

- Many types of RF“X”s:
 - RFQ – Request for Quotation/Qualification
 - RFI – Request for Information
 - RFEOI - Request for Expression of Interest
 - RFP – Request for Proposals
 - NRFP – Negotiated Request for Proposals

- “Tender”, “Bid Document” – one of the above

Overview of the Law

- **Contract A:**
 - Offer – issuance of bid document (RFP, tender) by Owner
 - Acceptance – submission of proposal by Bidder
 - Contract A formed between Owner and each Bidder
- **Contract B:**
 - Agreement for purchase of goods/services

Contract A: *Ron Engineering* (1981)

- tender was awarded to lowest bidder, bid contained an error in pricing
- bidder withdrew its bid
- “Contract A” was created
 - automatic
 - Irrevocable

- Contract law = remedy available

Compliant Bids: *MJB Enterprises* (1999)

- Tender awarded to low bidder
- Low bid was “non-compliant”
- unsuccessful bidder sued the government
- government relied on its privilege clause:

“the owner may reject or accept all or any part of a Proposal or any of the Proposals submitted in response to this RFP. The owner is under no obligation whatsoever to accept the Proposal with the lowest price, or any of the Proposals submitted”.

- Court: may only accept compliant bids, creates Contract A

Privilege Clause: *Tercon Contractors Ltd. v. British Columbia (2010)*

- 30 years after Ron Engineering
- most significant case since Ron Engineering
- Unsuccessful bidder challenged owner's ability to accept a bid as "non-compliant" because ineligible bidder
- BC relied on privilege clause:

"no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that is has no claim."

Tercon (2010)

- Court: ineligible bidder, disclaimer does not apply
- Trial - \$3.5 million awarded in court
- New “test” for Contract A to be established
 - Was a Contract A created?
 - Breach? If so, does disclaimer apply? (Tercon Test)
 - Damages?
 - Contract B

Contract A – post Tercon

- Most significant change: Avoid Contract A
- “Negotiated RFPs”
- intent of the parties – evidenced through terms
- Examples:
 - irrevocable bids
 - bid security
 - price guarantee
 - mandatory terms
- Remedy – administrative, no damages

Contract A – Implied Duties

- *Wind Power v. Sask Power Corp.:*

“***the duty to treat all bidders fairly and equally*** is designed to ensure that the owner does not extend an unfair advantage to any particular tenderer in the bidding process. It is said that this policy promotes economic efficiency and discourages corrupt tendering practices.” (emphasis added)

Duty of Fairness - Implied Duties

- Duty to Reject Non-Compliant Bids
 - tender compliance v. contract performance
- Duty to Disclose
 - material information
 - award criteria
- Duty to Award to the Winning Bidder
- Duty to Award the Contract as Tendered

Duty to Reject Non-Compliant Bids

- Mandatory Requirements or Criteria
 - “shall”, “must”
- Preferred, or Evaluated Criteria
 - “should”, “may”
- Compliance: strict vs. substantial
 - Is it material?
- Goal:
 - As few as possible
 - Simple, clear language
- Law: No duty to investigate
- *Coady* case: unit price contract, failure to enter a unit price = non-compliant

Duty to Reject Non-Compliant Bids

- Tender compliance v. Contract Performance
 - distinguish between Contract A and Contract B requirements
- Examples: Bid Security v. Performance Security
 - bonds required for compliance with tender
 - bonds required for compliance under contract
- **Note:** Ensure you understand which are the bid criteria

Duty to Disclose

Material Information

- specifications, requirements, expert reports, quantities, potential problems

Incumbent Advantage:

- must disclose information that assists other bidders, to level the playing field with the incumbent
- does not include any 'natural business advantage'
- *RCMP, Envoy* cases

Duty to Disclose Material Information – Award Criteria

Evaluation Criteria

- Trade Treaties - Disclosure of Weightings
- Law - Cannot evaluate on undisclosed criteria
- **Note:** If you are relying on anything other than price, it must be disclosed
- Construction - Low-Bid Rule
 - *Brunet & Associates (2002)*
 - bypass of low bidder for incumbent contractor

Duty to Disclose Award Criteria

Improper Use of Privilege Clause:

- “the lowest or any bid may not necessarily be accepted...reserves the right to make an award on an overall basis”.
- “any bid may be accepted”
- “may accept other than the low bid”
- Law: cannot be exercised arbitrarily and any criteria must be disclosed to bidders
 - bidders are entitled to rely on these terms in composing their proposals.
 - “discretion must be exercised fairly and objectively (*Sound Contracting*)

Duty to Award to the Winning Bidder

- Evaluation material is required to support scoring and defend the process
- Consensus scoring must be documented
 - *Almon Equipment v. Public Works*
 - no evaluation notes retained
 - insufficient detail to justify how scoring completed

Duty to Award the Contract as Tendered

- Procurement Cycle:
 - tender documents (RFP, RFQ)
 - response from bidders (Proposals)
 - contract award/negotiation/execution
- Issues Post-award:
 - bid repair
 - bid shopping
- Outside Procurement Cycle:
 - Contract performance

Duty to Award the Contract as Tendered

Bid Repair

- generally, Purchasers cannot “correct” or “change” bids
- Correcting bid = Non-compliance and bid repair

Bid Shopping:

- Cancelling and doing a direct award, or second tender process
- Correcting bid = Non-compliance and bid repair

- All problems in Contract A - avoid damages in Negotiated RFPs

III. Governance

- Two areas of compliance:
 - Law – Trade Treaties, Common law
 - Administrative – Bylaws, Policies

The Municipal Act - Public tendering and procurement policy

251.1 The council of a municipality must establish a public tendering and procurement policy in respect of the municipality's acquisition of goods or services by purchase, hire-purchase, lease, rental or other agreement, which may

- (a) establish criteria for soliciting procurements by public tenders or other forms of competitive bids;
- (b) establish forms of contract and determine when they are to be used; and
- (c) govern the process for awarding contracts of procurement.

Governance - Policies

Policies create defensible processes:

- Purchasing thresholds
- Sole sourcing
- Steering Committees
- Delegated Authority
- Employee/Council Member Code of Conduct
- Conflict of Interest
- Public openings*
- Restriction on formats*

**caution use of these*

Governance - Policies

- Trade Treaties vs Policies

- Policies MUST align with Trade Treaty requirements
- Cannot contain exceptions to Trade Treaty obligations
- Reliance on policy is not a defence to a challenge under Trade Treaty or common law

- Compliance with Policies

- Avoid contract-splitting
- Ensure justification for sole source done in good faith
- Transparency – include reference in the tender documents if certain policies apply

- Role of Council in Evaluation

- Requires transparency

IV. Procurement Strategies

Onboarding & Extension of Scope:

- Rules: open competition once you hit the Trade Treaty thresholds
- Onboarding – where the competitive bid process used by one entity is extended to another entity
- Extension of Scope – once a competitive bid process has awarded a Contract, the scope of the Contract is either extended or renewed to contemplate additional goods/services, that would otherwise have to be competitively bid

Procurement Strategies – Sole Source

- Sole Source
 - Must be in compliance with Trade Treaties AND Policies
 - Cost cannot be used as justification
 - Compatibility exception is grey area
- Key: document analysis
- Competition = value

Procurement Strategies – Sole Source

- What is an “emergency” ?
- Cannot be self-created through failure to plan
 1. Is it a real emergency?
 - ie. public health and safety concerns
 2. What is your rationale?
 - document it in real-time
 3. What is the scope of the sole source?
 - termination rights, length of term

Procurement Strategies – Framework Agreements

Framework Agreements:

- Used for repetitive expected purchasing
- RFSO – Request for Standing Offer, VOR - Vendor of Record, SOR – Supplier of Record
- Prequalified suppliers/vendors
- Regular re-refresh required by the Trade Treaties (annually if longer than 3 years)
- Law requires a process and written policies for how program administered, 2-stage process
- (ie How is the List established, How is work purchased from within the List?)

Procurement Strategies – Cancelling?

- Can you cancel a tendering process?
 - Requires a legitimate reason
 - Document the reason(s)
- Options:
 - Cancel and Re-Tender
 - Re-scope, review budget
 - Cancel and Negotiate with Lowest Bidder/Highest Scoring Bidder



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Session 2 – Evaluation: Criteria and Considerations

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Evaluation: Price

- Traditional RFP – fixed price (Contract A)
- Negotiated RFP – non-fixed price
- Default Formula:
 - the lowest bidder will receive 100% of the points allocated for pricing and the others receive a prorated percentage
 - need to include method if not using default proportionality scoring
- How important is price? Consider before allocating weighting
 - Note: above 40% is determinative
- Price and Technical points – inverse scores



Evaluation – Non-Price Factors

- Past Experience
 - Sustainability Criteria
 - Debarment
 - Local Preference
-
- Law - all must be disclosed in order to comply with Duty to Disclose Evaluation Criteria

Evaluation – Past Experience

- Past Experience:
 - Unrealistic Costs
 - Unrealistic Schedule
 - Performance Issues
 - Past projects, experience with like organizations
- No duty to investigate – but a right to investigate
- Owner may rely on information acquired through experience
- Must provide evidence of a reasonable basis

Evaluation – Past Experience

- How evaluated?
 - Additional costs related to scope creep, change orders
 - Additional costs due to resources required based on past projects
 - Court: likely the best indicator of how a relationship may go, but discretion must be valid, objective reasons for concluding that better value may be obtained by a higher bid.
 - *Sound Contracting Ltd. v. City of Nanaimo (BCCA 2000)*

Evaluation - Debarment

Litigation Exclusion

- “relevant and reasonably connected”
- Typically related to ongoing, or recent litigation
- If too broad, will not be enforceable
- *Court:* “nothing wrong with a public body refusing to deal with a contractor who is engaged in litigate with the public body.” (*Advanced Ergonomics* case)
- Trade Treaties: bankruptcy or insolvency, false statements, poor past performance, serious crimes, professional misconduct and the failure to pay taxes

Evaluation - Debarment

Interpaving Ltd. v. City of Greater Sudbury (2018)

- City “debarred” Interpaving from bidding on City contracts for four (4) years, based on by-law:
 - “A Bidder or Supplier may be excluded from eligibility to submit Bids or quotes or a submitted Bid or quote may be summarily rejected and returned to a Bidder...the following circumstances:
 - (a) the Bidder or Supplier is or has been involved in litigation with the City, its elected offices, officers or employees;
 - (c) there is documented evidence of poor performance, non-performance or default by the Bidder or Supplier in respect of any contract;
 -
 - (g) the Bidder, Supplier, or its personnel have demonstrated abusive behavior or threatening conduct towards City employees, their agents or representatives.”

Evaluation - Debarment

- Interpaving alleged that the By-Law violated AIT/CFTA
 - Court: no evidence of this
- Interpaving alleged breach of procedural fairness
 - Court: yes, should have received notice of the intention to debar and the proposed penalty
 - BUT this breach was cured by City's subsequent reconsideration of the issues and redetermination of debarment decision
- Court determined that based on the safety complaints, conduct of staff of contractor to City officials, and abuse of change order process, debarment was reasonable
- **Note:** dissent provides a warning to owners re: fairness of process

Evaluation - Debarment

J. Cote & Son Excavating Ltd. v. Burnaby (City) – 2019

- Company received approximately 25% of its work from City, and 70% from surrounding municipalities
- Policy read:

“Tenders will not be accepted by the City of Burnaby (the “Owner”) from any person, corporation or other legal entity (the “Party”) if the Party, or any officer or director of the corporate Party, is, or has been within a period of two years prior to the tender closing date, engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner in relation to any contract with, or works or services provided to the Owner, and any such Party is not eligible to submit a tender.”

Evaluation - Debarment

- ◆ Court:

- referred to Quebec case where such clause was found to be unconstitutional, was a permanent ban on bidding
- Ruling: clause is permissible, not unconstitutional
- Plus, policy is contract law, not constitutional law

Evaluation - Debarment

Debarment – must have a protocol for your organization:

- Policies and procedures
 - Failure to honor bid
 - Litigation
 - COI
 - Collusion, bid rigging
 - Performance issues
- Time period for debarment
- Reasons for debarment
- Records to substantiate decisions

Evaluation – Local preference

Local Preference:

- Prohibited in the trade treaties (very few exceptions)
- ***Miller Group Inc. v. The Village of Salisbury (2018)***
 - Contractor submitted low bid for snow plowing/salt spreading services
 - was not awarded the contract, bypassed for incumbent
 - \$824 difference
 - Village: “factors other than the cost of the bid would be considered before choosing a contractor”
 - Legislation: permitted “preferential treatment” if within 10% of the lowest bid
 - *Court*: Village acted within the letter of the law, value was below Trade Treaty threshold

Evaluation – Local preference

Local Preference – how can you include criteria?

- Policies – as per Miller, adopt policies that provide for some flexibility in the evaluation
- Cost-Benefit Analysis – balance the pros/cons, weigh cost savings and benefit to community, reciprocal treatment to be considered
- Documentation – all considerations in evaluation should be documented to ensure decisions being made at appropriate level
- Clear, objective application – free from political interference

Example: Price window, “advantage to community”

Evaluation – Social Benefit

- Sustainability Procurement – Social Benefit
 - Ethical purchasing
 - Local development for job training
 - Sustainability practices
 - GHG reduction strategies
 - Waste reduction plans
- Must comply with procurement fairness standards so are defensible manner.

III. Evaluation Considerations

- Criteria:
 - Mandatory Criteria – goes to compliance
 - Evaluated/Rated Criteria – goes to scoring
 - All Quantitative factors must to be reflected
 - All requested information must be scored, will influence the evaluation
 - Key: If you are not evaluating it, do not ask for it.

Evaluation Considerations

- Trade Treaties (CFTA):
- Article 509.7 – Disclosure of Requirements and Criteria
- Tender documents must contain the information required for suppliers:
 - detailed evaluation criteria, weightings
 - technical requirements
 - warranties
 - transition costs – otherwise bias toward incumbent
 - reasonable delivery times

Evaluation Considerations - Thresholds

- Thresholds - used for creating spread or baseline qualifications
- What do I want to achieve?
 - Need to review on project-by-project basis
- Consider options:
 - Threshold in each category
 - Threshold overall in technical scoring

Evaluation Considerations – Who is Evaluating?

- Evaluation Committee
 - Best practice is to list members of Committee (by role)
 - Include stakeholders, if at all possible:
 - SME, Administration, Finance, other stakeholders
- Report to Council
 - Summary of evaluation, including overall points
- Council cannot over-rule or veto decision of Evaluation Committee under the law
 - Contract A claim in waiting

Evaluation Considerations – Conflict of Interest

- Conflict of interest rules must:

(a) set out the types of conduct that are prohibited, which must include prohibiting an employee from

(i) using information that is obtained as a result of his or her employment and that is not available to the public to further, or seek to further, his or her private interests or those of his or her dependants, or to seek to improperly further another person's private interests, or

(ii) using his or her position to seek to influence a decision of another person so as to further the employee's private interests or those of his or her dependants or to improperly further another person's private interests; and

(b) specify the procedure an employee is to follow if the employee suspects that he or she may be in a conflict of interest and the procedure for resolving a conflict.

Evaluation Considerations – Conflict of Interest

- How to uncover?
 - Declaration as part of process
- Must mitigate COI:
 - Employee recuses themselves
 - Alternate evaluator chosen – sometimes difficult
- *The Municipal Act*:
 - Employee code of conduct must include conflict of interest rules

Evaluation Considerations - Bias

- Bias vs Conflict of Interest
- Law: procedural fairness principles apply
- Incumbent is most affected
- How to mitigate:
 - Ensure scoring criteria focus on project in question
 - Past experience – cannot be weighted too heavily
 - Disclosure of all material information to all bidders
 - Document scoring

Evaluation Considerations – Good Faith

- “Good Faith” – just, fair, reasonable, and honest conduct
- When:
 - During negotiations
 - During performance of a contract, enforcing rights in a contract
- Court: duty of good faith now a concept in the law
 - “: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.”
- Implied duty, cannot contract out of it
- Procurement:
 - Processing and evaluation of bids
 - Arbitrarily exercising a discretionary power

Thank you!

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