Best Practices to Manage Risk

by Roger Gillott & Paul Ivanoff

Procurement has been much in the news in recent years as a series of scandals at all levels of government – municipal, provincial, and federal – has tarnished reputations and increased scrutiny of the public sector and its vendors.

All buyers, however, whether public or private, must grapple with the more mundane but more common risks of today's procurement process – risks that stem from perennial issues of fairness, human error and complexity.

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Defending the award decision against allegations of non-compliance

In today's context of intensified scrutiny, running a clean procurement process has never been more important. A critical element is the selection of a winning bidder, as losing bidders are apt to seize on any chance to prove that the winner is not in fact compliant with the criteria set out in the tender.

Traditional protections for buyers – like "exclusion of liability" clauses meant to prevent litigation over lost bids – may not protect against liability in all circumstances. In 2010 the Supreme Court held in *Tercon Contractors v. B.C.* that although exclusion of liability clauses are often enforceable, British Columbia could not seek liability protection through its particular limitation clause after the province awarded a highway-building contract to a joint venture that was ineligible to bid. The Supreme Court's elimination of the doctrine of "fundamental" breach of contract in this same decision means that limitation and exclusion clauses will both be treated more seriously and analyzed more rigorously to determine their actual scope of applicability.

A more recent case, 2013's *Rankin Construction v. Ontario*, involved the disqualification of the low bidder after a government investigation showed that the company had failed to comply with a requirement to declare the value of imported steel in its proposal – an omission which reduced its pricing and rendered the bid non-compliant. In this case, interestingly, the Court held that the government's exclusion clause would have successfully fended off the challenge from the disqualified bidder in any event.

To guard against non-compliance allegations, buyers need to develop procurement processes with carefully considered selection criteria. Even more importantly, they need to adhere to their processes and ensure that those processes are clear.

Selected Best Practices

1. **Avoid unnecessary criteria**
   The more criteria a selection process uses, the less likely that winning bidders will be 100% compliant with them – and the more likely that that selection will be challenged.

2. **Use "substantial" compliance language to create flexibility**
   Using language requiring "substantial" compliance gives the buyer the flexibility to select a winning bidder whose bid contains minor technical flaws.

Upholding the duty of fairness

Treating all bidders fairly is one thing when none of them have worked with the purchaser's company before; it's quite another when one of the bidders is an incumbent, and therefore already knows the ins and outs of the purchaser and the practical details of the service being performed.

In fact, this information asymmetry is often so pronounced that some buyers find themselves relying on the incumbent vendor to define (and even write) the selection criteria in the RFP.

When the purchaser's relationship with the incumbent or approach to the RFP breaches the duty of fairness to the other bidders, it exposes a purchaser to significant liability. After two failed bids (in 2002 and 2004) for lucrative multi-year contracts involving the relocation of personnel, Envoy Relocation Services sued the federal government for awarding the contracts to the incumbent vendor who had tailored its bid based on its inside knowledge of actual service volumes. In 2013 the Ontario Superior Court agreed that government employees had knowingly favoured the incumbent, and awarded Envoy $29 million in compensation for lost profits.

Purchasers wishing to ensure that they do not breach their duty of fairness to bidders – and that they receive the benefit of being able to choose the best vendor – should consider how to redesign their processes and train their staff so that the incumbent's advantage of holding information that no one else has is minimized.

Selected Best Practices

1. **Enforce clear guidelines**
   Develop consistent, best-practice-based guidelines for procurement. Involve your lawyers in this process, and then train your procurement team.

2. **Invest in training**
   Ensure that all relevant staff attend internal training programs on the implications of mistakes in the procurement process and how to avoid pitfalls.

Avoid complexity, minimize error

Errors in bids and the procurement process are an ongoing source of litigation risk. When discovered after the process is completed and the winner has been selected, some errors can be used by successful bidders to get out of contracts they are no longer comfortable with – or by unsuccessful bidders to argue that their bids should be reconsidered in light of the corrected information. They are also used, as shown by the case of *Rankin Construction v. Ontario* (above), by purchasers to disqualify bidders if an investigation indicates that the details presented in the bid are not in fact true.

Ironically, a favoured method of making procurement processes fairer has made this particular problem worse. Purchasers tried to reduce litigation risk by making criteria more detailed and more complex – and less subjective – but as a result the complexity and level of detail required in a given bid went up in equal measure. As with any system, increasing its complexity means increasing the potential for errors: the more fields to fill in, the more fields to possibly get wrong – particularly so if a bidder depends on subcontractors or other suppliers for much of its information.

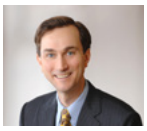
Selected Best Practices

1. **Push towards simplicity**
   To avoid mistakes in the first place, use simple tender forms that do not require excessively detailed information (like unit prices) that might be nice to have but is not truly necessary.

2. **Obtain security**
   Use bid bonds to recover value from bidders who refuse to contract by alleging mistakes. Use a simple bid bond clause so that the bid bond itself does not become a ground for non-compliance.

3. **Clarify your rights**
   Explicitly include a clause explaining the procurer's approach to and rights regarding mistakes (e.g. to correct or disqualify in its sole discretion).

To discuss the issues and risk management strategies discussed above, please contact:



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