



Legal Issues in Structuring RFPs



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Robert T. Bauer

Davies Ward Phillips & Vineberg LLP

1. Introduction

Davies Ward Phillips & Vineberg

- Toronto, Montreal, New York
- Over 225 lawyers
- National and international practice
- Focus on Corporate, Commercial law
 - M&A
 - Project Finance
 - Infrastructure
 - Commercial Real Estate
 - Tax
 - Litigation

2. Our P3/Infrastructure Practice Group

Counsel to public sector bodies

- Provincial – OLGC (Crown Corporation) re Casino initiatives
- Municipal – City of Toronto
 - National Trade Centre
 - Union Station Restoration
 - Waterfront Revitalization
- Universities – University of Waterloo Tech Park
- Housing Authorities – Toronto Community Housing Corporation – Don Mount Court
- Charitable Organizations – Toronto Children’s Aid Society
new Head Office

Our P3/Infrastructure Practice Group (Cont'd)

Counsel to private sector consortiums

- Abbotsford Hospital, Abbotsford, B.C.
- Anthony Henday Ring Road, Edmonton, Alberta
- Confederation Bridge, NB/PEI
- Detroit-Windsor Rail Tunnel, ON
- Durham Consolidated Court House, Durham Region, ON
- Kicking Horse Canyon Highway, Golden, B.C.
- Vancouver General Hospital, Vancouver, B.C.

3. Evolving law applicable to the RFP Process

- Focus on common law development
- Are other specific Statutory or Policy Requirements
 - Interprovincial Trade Agreements
 - Ontario's new Public Infrastructure Renewal policies
 - Quebec's new Bill 61 re Partenariats Quebec
 - British Columbia's Partnerships BC

4. Basic Legal Framework

Traditional approach (pre Ron Engineering)

- RFP an “invitation to submit tenders”
 - not an offer
- The responding bid submitted is the offer
- Selection of the “winning bid” is acceptance of that offer
- No contract with the other bidders

Basic Legal Framework (Cont'd)

The saga of Ron Engineering

- Revolutionized the law of tenders
- Involved a formal tender procurement process:
 - Bid contained a detailed process
 - Included the terms of the construction contract to be entered into
 - Owner knew bidders would incur significant expense in bidding
- Supreme Court of Canada held that the invitation to tender documents constituted a unilateral offer
- Bids submitted constituted acceptance of that offer
- Creates a contract with each bidder (“Contract A”)

5. The terms of Contract A

The terms of Contract A

- Is a contract to proceed toward selection of the successful bidder and to enter into a formal contract (“Contract B”)
- Comprised of the terms set out in the tender call document and the terms of the responding bid
- Implied terms:
 - to treat all bidders fairly and evenly
 - that all parties to act in good faith
 - not to base evaluation or decision on extraneous criteria
 - other terms that arise from the intention of the parties

6. Breach of Contract A

- Successful bidder in Ron Engineering made a calculation error in determining the bid amount
- Sought to withdraw and get back bid deposit
- It wasn't an obvious error on the face of the bid
- Upon submission, Contract A was formed
- To depart from those terms would constitute a breach of Contract A
- Bidder lost its deposit

7. The Privilege Clause

- With Contract A being formed, the “Privilege Clause” becomes critical
- Typical Privilege Clause wording: “The lowest or any other tender will not necessarily be accepted”
- Essentially makes the Contract conditional
- If want to select a bidder other than the lowest, or unwind the process, have to work within the Privilege Clause(s)
- Because the clause is “exculpatory” and is being “imposed” on bidders, it will be construed narrowly against the Owner
- Wording must be clear and unambiguous

The Privilege Clause (Cont'd)

- Must be interpreted in the context of the overall tender package
- Must still be proceeding in good faith
- Can't have a hidden agenda
- Can't use the clause to bid shop, i.e., give a bidder a second chance to change its bid
- Must treat all bidders fairly
- Can't use the clause to introduce new or undisclosed criteria

8. Acceptance of Non-Compliant Bid

- In “MJB Enterprises”, winning, lowest price bidder’s bid was non-compliant – had qualified its price
- Owner sought to rely on the Privilege Clause
- S.C.C. found an implied term against accepting a non-compliant bid:
“difficult to accept that...any of the other contractors would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted...”
- But, recent decision of B.C. Court of Appeal (Kinetic Construction) contained a privilege clause saying non-conforming tenders may be rejected but Owner may, in its sole discretion retain tenders which do not conform
- Held Owner could accept a non-compliant bid
- Are conflicting cases – open issue for S.C.C.

9. Departure for RFPs from Contract A/Contract B

- Ron Engineering was a straight procurement process
- More recent SCC decisions (e.g., MJB Enterprises, Mellco Developments) refrain from applying the Contract A/Contract B approach in all instances
- Will look to the intention of the parties
- RFP Process might be:
 - more discretionary than a tender process
 - less clearly defined
 - terms of Contract B might not be clear or even identified
 - key terms still require negotiation

Departure for RFPs from Contract A/Contract B (Cont'd)

- S.C.C. in MJB Enterprises stated that:
 - “whether or not Contract A arises depends on whether the parties intended to initiate contractual relations by submission of the bid”.
- For example (Mellco Developments):
 - losing bidder challenged City award, stated winning bid was non-compliant
 - RFP expressly stated not a tender call
 - City stated it would negotiate with the bidder “submitting the most attractive proposal” to develop 21 acres of City owned property
 - terms of “Contract B” not included
 - held not to constitute a tender call and no contract formed by bid submission
 - therefore, since no breach of contract, could proceed with non-compliant proposal

Departure for RFPs from Contract A/Contract B (Cont'd)

- Result:
 - no contractual obligation of Owners to bidders
 - don't need to rely on Privilege Clause
 - but courts are still finding a duty to:
 - treat all bidders fairly
 - proceed in good faith to ensure the integrity and openness of process
 - give effect to the reasonable expectations of the parties
 - in Quebec it's written right into the Civil Code:
Article 6: "Every person is bound to exercise his civil rights in good faith".

10. Damages for Breach of Contract A

- Put plaintiff in same position as if contract had been properly performed
- For Contractor's breach:
 - if lowest bidder, difference between his bid and next lowest tender
 - if not lowest bidder, allocation of costs
- For Owner's breach:
 - Contractor has to show he would have been awarded Contract B
 - put Contractor in as good a position as if he had won it
 - duty to mitigate
 - if not clear who would have won, may still be damages for "loss of chance"

11. Damages for Breach if no Contract A

- If owner breaches its duty
 - bidders entitled to assume there would be a process conducted in good faith
 - reimburse for bid costs
- Possible exemplary or punitive damages
 - remote
 - would have to have acted in very “high handed” fashion