



## Side-stepping procurement traps

Since the 1981 decision of the Supreme Court of Canada in *R. (Ont.) v. Ron Engineering*, the law of tendering has developed into a complicated legal matrix. The public sector is subject to layers of laws, regulations, trade agreements, bylaws, and policies affecting procurement, such as the Agreement on Internal Trade and Ontario's Broader Public Sector Procurement Directive. In this quiz, imagine that a municipality has decided to build a new community centre. The municipality's bid selection committee will administer the tendering process and recommend that council award the construction contract to the strongest bid. How would you decide the following questions if you were tasked to be a member of the selection committee?

**1** The committee runs a competitive procurement and asks interested contractors to provide a firm price, schedule, and bid security. Once responses are received, the committee intends to sit down with the best three responses and negotiate with each to arrive at the best deal. Can they take this approach?

- a) Not a problem
- b) Could be a problem
- c) Definitely a problem

**2** BuildBig Contracting, one of the bidders, overlooked a portion of the scope of work and, as a result, its price is mistakenly lower than it would have otherwise been. The bid committee cannot tell from the face of the tender that there is an error. What can BuildBig do?

- a) Can't do anything. BuildBig is stuck with its mistaken price.
- b) Write to the municipality describing the error and withdraw its bid before the municipality accepts it.
- c) When presented with the contract for signature, BuildBig can refuse to sign it.
- d) Try to find a flaw in its bid submission and point it out to the committee so that the municipality has no choice but to disqualify its bid.

**3** In an effort to prevent BuildBig and other bidders from getting off the hook through flaws or potential problems with their respective bids, and in an effort to allow the committee to accept any bid submitted, the committee adds a "discretion clause" to the bid documents that allows it to waive any and all errors and omissions in any bid it receives. Can the bid committee use this clause to accept a non-compliant bid?

- a) Yes
- b) No

**4** The municipality asks bidders to provide bid prices in both words and numbers. One bidder submits a bid but the bid price in words does not match the bid price written in numbers. Both prices are lower than any of the other bid prices received. What should the bid committee do?

- a) Pick the lower of the two prices and award the contract.
- b) Pick the higher of the two prices and award the contract.
- c) Reject the bid.
- d) Write to the bidder and ask it to clarify which is the intended price.

**5** To protect the municipality from lawsuits arising from tenders, the bid committee adds an "exclusion of liability" clause to the instructions to bidders. It states that the municipality is free of any liability associated with the tender process. The municipality gets sued by Second2None Contracting, the second-lowest bidder, for having chosen another contractor's non-compliant bid. Can the municipality successfully defend the claim?

- a) No, the courts will not enforce exclusion clauses.
- b) Yes, the courts always enforce exclusion clauses.
- c) Who knows?



**1 (B)** The municipality's obligations are determined, in large part, by the proper characterization of its procurement. Since the *R. (Ont.) v. Ron Engineering* case, the law of tender in Canada has been subject to the "Contract A/ Contract B" framework where "Contract A" refers to the mutual obligations owed between owners and bidders during the tender process and "Contract B" is the contract between the owner and the successful bidder. "Contract A" arises when the parties to the procurement intend to create legal obligations between them, and courts will look at various indicators to determine what the intent was. The municipality's process would probably be considered a true tender, and, as a result, duties such as fair treatment would be owed to the bidders. Typically, little or no negotiation is to be carried out in a tender process, and the situation could be made worse if the bid selection committee goes "bid shopping" — a process by which an owner uses one bidder's price to extract a better price from another bidder. The law of tender considers such behaviour to be a violation of the implied duty of fairness and of the goal of preserving the integrity of the bidding system. To avoid any problem, the municipality should run a Request for Proposal process, which allows for more significant negotiation.

**2 (D)** If a bidder makes a price error, Ron Engineering says the bidder can't revoke the bid unless the mistake itself is obvious on the face of the bid documents. The committee could accept BuildBig's mistakenly low bid price and force it to enter into the contract. If BuildBig refused, the committee could sue for damages based on the difference in cost between BuildBig's bid and the bid price of the next lowest bidder. However, if BuildBig found a problem making its bid non-compliant, then no "Contract A" could arise and BuildBig would be free to walk away from its bid without obligation or penalty.

**3 (B)** The "discretion clause" is one of the terms and conditions of "Contract A" between the municipality and all compliant bidders. Since BuildBig's bid submission was non-compliant (and no "Contract A" arose), such a discretion clause would be ineffective in allowing the municipality to waive non-compliance. However, if BuildBig was prepared to go ahead with the contract at its quoted price and the municipality accepted its bid, such a clause may be a successful defence against the claim of a compliant bidder who complains about the municipality choosing a non-compliant bidder.

**4 (C)** A fundamental principle of tendering law is that the bid price must be certain. If the price is ambiguous or vague (like this bidder's price), then the bid should be rejected as non-compliant. For this reason, owners often include language in the instructions to bidders that permits owners to resolve ambiguities in accordance with a predetermined rule, such as amounts written in words will take precedence over amounts in figures. That way, a bid like this one does not need to be disqualified.

**5 (C)** The Supreme Court of Canada examined the wording of an exclusion of liability clause in the decision of *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* and, in a close 5-4 decision, the majority found the wording was not clear and broad enough to protect the owner from liability for having chosen an ineligible bidder as the successful bidder. While the court appeared to accept that a perfectly drafted exclusion clause would be enforceable in the absence of unconscionable circumstances, it remains open whether subsequent courts would still find that such clauses offend public policy and knock them down.

### YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*

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