Court actions avoidable by getting procurement processes right: process contracts

In two separate 2012 NZ cases, a public sector and a private sector buyer running procurements faced court action by unsuccessful bidders. Under the microscope were process contracts by which buyers have legal duties during procurement, something buyers want to avoid. The District Council lost and the construction contractor won. Both might have avoided claims by different wording of their documents, and if they had done things a different way.

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Takeaways

- Procurement people should know about process contracts as they can add unexpected exposure;
- Generally, have terms in RFPs and RFTs excluding process contracts;
- Take particular care when departing from the requirements of an RFP/RFT.

What we cover

We'll outline the private sector case then the one in the public sector, summarising on the way an explanation as to what process contracts are, the risks, and the ways of minimising those risks. The relevant rules apply to both RFTs and RFPs.

Leighton Works came close to liability

Leighton Works (LW) was contracted to do enabling works for the Manukau Rail Link running parallel to a new motorway. They had to subcontract piling work for this, so they sent an RFT out to several piling contractors.

Of the responses to the RFT, GHP Piling had the bid that would have been accepted.[1] But, after reviewing those bids, Leighton Works decided to get a bid from another contractor, Brian Perry Civil. This was outside the original requirements of the RFT. In the end, LW decided to go with Brian Perry instead of GHP.

GHP sued LW on the basis that LW went outside the process in the original RFT, by seeking and accepting the late bid by Brian Perry. To win its claim, GHP had to show there was a process contract and that it had been breached. No process contract and LW would have no liability to GHP. Process contracts are well-recognised risks to be managed on an RFT or RFP.

Process/Preliminary Contract

The GHP claim was based on the claimed existence of a preliminary or process contract, separate from the main contract with the successful tenderer to do the works. The Canadians usefully call the process contract, Contract A, and the subsequent main contract, Contract B. We'll do that here.

Whether there is a Contract A is based around offer and acceptance concepts: the RFT/RFP is said to be the offer and the bid is said to be the acceptance, creating a contract requiring the buyer to take certain steps, such as treating bidders fairly and equally and in accordance with the RFT/RFP. One way that there may not be a process contract is if the RFT is really an invitation to treat and not an offer.[2]

Whether there is a Contract A scenario is a fact-intensive question, based on some indicators developed over the years and usefully summarised in the decision on GPL Piling's claim.[3] For example, the more formality, the more likely there is a Contract A.

The court in GHP Piling case ultimately decided there was no Contract A because:

- balancing the indicators for and against the RFT being an offer, there was no offer; and

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- there was a disconnect between the RFT and the "acceptance" (the bid). The RFT required the bid to be open for 90 days but GHP's bid said it was open for only 30 days. The court said a Contract A only arose where the bid conformed with the RFT. That's a "meeting of the minds" idea, reflecting the need for the acceptance to be clear acceptance of the offer, not something different.

Get-out-of-jail-free

It looks like – for whatever reason – LW's RFT did not include statements, or sufficiently strong statements such as:

- No contract comes into existence until Contract B is signed;
- The RFT process creates no legal liability.

Carefully drafted statements like that are generally included in RFTs/RFTs, to cut out much Contract A risk.[4] But buyers should still take care when departing from the terms of RFPs and RFTs (or take care as to how they do that). Plus there is the issue, not a legal one, of keeping the supplier community reassured that a buyer will perform fairly in later RFTs and RFPs.

However, in the real commercial world – public and private sector – buyers should ultimately be able to take the course that produces the best outcomes. Often, so long as that is done correctly, legal risk can be avoided. For example, in this case, if there was a Contract A, and there was commercial sense in going back to the market – as LW did – the RFT process could have been altered in this way. Additionally, the RFT could have been worded to permit the late bid.

Reasons to have a process contract

Having no process contract can play out against buyers. An example is the commitment to keep a bid open for X days. If there is no process contract, that is unlikely to be legally binding.

Contract is – generally – about the parties' choice. So, for example, it is possible to have a process contract limited to that one commitment by the bidders. It is possible to limit liability under the contract, and so on.

But we've never seen an RFP/RFT that does this.

An unexpected foot fault for South Waikato District Council

The District Council went to tender for solid waste disposal operations. The RFT required the Council to follow a 2 step approach:

- Non-price assessment based on 6 non-price attributes; then
- Price assessment.

Two of the three bidders survived through the first step to the price assessment.

Both surviving bids were around $1M. RAL's was $40K lower than MPL's. But MPL's higher bid won.

Unsuccessful lowest bidder, RAL, sued the Council and won damages for lost profit in court.[5]

The RFT said that "*The second stage shall consist of determining which of the remaining (non-excluded) Tenderers has the lowest price*".[6] It went on to state that "*the lowest or any tender will not necessarily be accepted*" and that the bidders understood that the Council was "*not bound to accept the lowest or any tender*".

On a quick read of those words – and even on a more careful read – many would say they allowed the Council to select the higher bid instead of the lower.

Not so.

There were two reasons why the Council had a problem, and both crop up in practice quite a bit.

Wrong evaluation criteria used

The Court said that the focus in the second stage had to be on the lowest overall price. For one thing, that's what the RFT says: "*The second stage shall consist of determining which of the remaining (non-excluded) Tenderers has the lowest price*". And that is where RAL focussed.

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However, unknown to RAL, and after the bids were received, the Council instead gave overriding significance to one facet in the price calculation: reducing liability under the Waste Minimisation Act 2008, and making savings in the cost of landfill space. As the judge said, those criteria *"were foreign to the Council's chosen method of assessment, as the Council had elected to define it"*.

So, having decided there was a Contract A – under which there was an implied term to treat all tenderers fairly and equally – the Court said the Council was in breach and liable to RAL for the lost Contract B that went to MPL instead. In evaluating the tender on an undeclared basis, it did so inconsistently with the basis it had declared. If RAL had been aware, it would have pitched its bid differently.

RFT wording doesn't permit higher tender to be accepted

Depending on context, often used words such as this RFT's words – *"the lowest or any tender will not necessarily be accepted"* – do not permit acceptance of a tender higher than the lowest. They only allow acceptance of the lowest, or acceptance of none. That follows an often cited case that dealt with similar words.[7] Here, two bidders got through the first non-price phase and another clause states that the bidder with the lowest price must be determined. The only way to mesh that obligation with the wording earlier in this paragraph is that either the lowest bid is accepted or none are accepted. As the judge pointed out, the ability to select a higher bid had to be provided for explicitly, and could have been done.

Best to say that there will be no Contract B

We come back again to what probably would have avoided the problem. The Council, it appears, did not have words in the RFT confirming that no Contract A could come into existence, and that there could be no liability. But the words need to be right.

Public law issues for public sector agencies

Those agencies face different obligations under public law, and they might be judicially reviewable. That is a separate topic.

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1. There were changes in bids before the final bids.

2. The analysis is not just limited to offer, acceptance and consideration: the issue ultimately is whether, viewed as a whole and objectively, there is a concluded Contract A. *GHP Piling v Leighton and Downer EDI* [2012] NZHC 1695. The law does not incline toward finding a Contract A, even in a public sector context. *Transit v Pratt* [2002] NZLR 313.

3. *GHP Piling v Leighton Contractors and Downer EDI* [2012] NZHC 1695.

4. *Onyx v Auckland City Council* (2003) 11 TCLR 40.

5. *Roading & Ashphalt v South Waikato District Council* [2012] NZHC 1284.

6. Taking into account the schedule of tenderer's resources.

7. *Pratt v Palmerston North City Council* [1995] 1 NZLR 469.

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