Wigley & Company
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PUBLIC SECTOR PURCHASING AND THE OMBUDSMAN: A NEW DECISION

Presentation to Public Sector Lawyers
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Public sector procurement raises many legal and probity issues. An August 2005 Ombudsman's report adds an important area for agencies to consider: the need in some instances to follow up with suppliers and the need for use of appropriate expertise.

This paper overviews an important development in the public sector procurement area.

We summarise public sector procurement issues in our paper at http://www.wigleylaw.com/mainsite/TendersRFSCompetitivePurchasing.html .

As well as legal issues, there's a focus on probity and Auditor-General overview, MED and SSC guidelines, etc.

The prospect of the Ombudsman taking a close issue hasn't been centre stage. That's so until the local agents of a Korean company (Hyundai (aka HHI)) had a tangle with a procurement division of Defence. This arose in respect of the acquisition of $500M of naval vessels. The Ombudsman issued a report, in August, criticising the procurement process.

This also hit the courts in respect of another vendor, as we note in our paper referred to above.

This report should change the approach of many involved in public sector procurement.

The Defence acquisition of around NZ$500M of naval vessels commenced with the equivalent of a Registration of Interest (ROI) or Requestion for Information (RFI). The aim of the exercise was to get information about potential vendors and then reduce the number of vendors going to the RFP to a manageable volume. From a procurement perspective, that's an excellent approach.

Importantly, the principles in the Ombudsman's decision are just as relevant to later steps in the procurement cycle, including RFPs.

We will only overview the complicated facts.

HHI's NZ rep complained to the Ombudsman that HHI were cut out from going forward to RFP. The HHI response to the ROI did not pass the required hurdle in relation to:

- the financial strength of HHI; and
- its ability to continue to support and maintain the vessels after delivery.

HHI is massive in the shipbuilding world. It is the largest operation of its kind. This raised something of a presumption, said the Ombudsman, that it might be capable of having the financial strength to justify its selection to go forward to RFP.

Also, HHI had also indicated in the ROI that it was capable of undertaking post-delivery support etc.

However:

- there were some question marks over HHI's accounts; and
- it was claimed by Defence that not enough information on post-delivery support was provided by HHI.

Most significantly, Defence made no follow up enquiries. They eliminated HHI on the strength of the response to the ROI alone. There were also issues around the clarity of the ROI and whether it was clear that Defence would cull 21 vendors down to 6.

The Ombudsman said that the process was not flexible enough. In particular, given the strength and size of HHI, and its indication that it could do post-delivery support, Defence should have followed up to get more detail, rather than just deciding the issue based on the ROI. In other words, HHI should have been given the opportunity to provide more information.

The Ombudsman quickly concluded that he had jurisdiction as to these decisions and processes under sections 13 and 22 of the Ombudsmen Act 1975. Under s22 the Ombudsman could reach the view that the process/decision was contrary to law, unreasonable, unjust, wrong, and so on.

A vendor in circumstances such as this is entitled to a fair approach and uncertainties should have been clarified by follow-up questions.

Defence and their lawyers claimed that they would have been breaking the law (and probity obligations) by following up. We agree with the Ombudsman that this view is flawed. There will be times when that will be difficult (for example, when one vendor has a confidential proposal which, otherwise, ideally should be put to others). Sometimes the sums involved will make this unwieldy (for example what happens when there are say 25 vendors pitching for $100K of business: do you eliminate a vendor on the basis of inadequate information in its proposal?).

The decision reinforces that we need to be alert to giving vendors opportunity to respond on significant issues rather than just make assumptions. We are aware of many examples where vendors have been culled because their proposals weren't "compliant". Some were very large acquisitions. Agencies should consider whether they need to go back to the vendor to clarify.

An important point: the main thing the customer wants is a great outcome. That should be reason in itself to go back and ask for more detail rather than rejecting a proposal on what is often a technicality.

Another issue is that the Ombudsman thought that Defence should have brought in off-shore experts to assist in the decision-making given the size and complexity of the procurement. The same issue can be "downsized". For example a smaller acquisition may call for the agency to get external local expert input (or help from a specialist elsewhere in the organisation). All this needs to be kept in context, including as to project size, value and so on.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on "both sides of the fence", and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).