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TENDERS, RFPs AND COMPETITIVE PURCHASING: TRAPS FOR UNWARY BUYERS AND SELLERS: 2005 UPDATE

PAPER PRESENTED FOR PUBLIC SECTOR LAWYERS AND FOR NEW ZEALAND COMPUTER SOCIETY/TECHNOLOGY LAW SOCIETY "THE LAW OF IT" SEMINARS

The New Zealand Computer Society Inc.

Technology Law Society of New Zealand Incorporated

Wellington
April 2005

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Tenders, RFPs and competitive purchasing are a very important part of the IT sector, particularly in dealings with public sector agencies.

There are a raft of issues and risks to take into account including Fair Trading Act risk and issues arising out of the legislation, cases, statutory framework, and public sector requirements such as MED, OAG and SSC guidelines.

This note is our 4th annual update of developments. Our observations about the additional obligations in the public sector are also relevant to suppliers to that sector. We'll deal with a new case on judicial review of public sector procurement. First we'll deal with two private law issues which apply to all competitive purchasing processes, public or private.

We look at some of the lessons that can be learned from RACV v. Unisys (an Australian case).

We'll also cover a very important development: the Privy Council decision late in 2003: *Pratt v Transit New Zealand*.

Suppliers can get caught in unexpected ways when pitching for business in response to Requests for Tenders (RFTs), for Proposals (RFPs) and for estimates or quotes. A supplier can get a false sense of comfort from the beautifully worded limitation of liability provision in its supply contract.

Purchasers using competitive purchasing processes such as tenders can get caught with pre-supply contract commitments they don't expect and don't want.

The cases highlight these two risks for suppliers and purchasers respectively. Each can get caught unawares. This note outlines the risks and suggests solutions.

Issues noted below for vendors are relevant to purchasers and vice versa. There's a flipside to each story. We suggest it's useful for vendors to read the commentary focused on purchasers, and vice versa

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1 Introduction

1.1 Procurement processes, ranging from the informal such as *"estimates"* through to the more formal such as *"RFPs"* and *"Requests for Tenders"*, raise a bunch of risks and issues, most of which can be minimised or eliminated with careful steps.

1.2 For vendors, there is a risk of being sued for over-claiming the performance of the product. There can be statutory liability under our Fair Trading Act (in relation to misleading and deceptive statements), which almost always cannot be limited by the Limitation of Liability provision in contracts. The simplest solution here is to have accurate statements not only in proposals, but also in what is said orally in sales pitches, etc. Having a disclaimer in the small print in a proposal generally won't do the trick either.

1.3 One of the issues in larger projects is whether to include the proposal in the contract. We address the pluses and minuses below (it's not always the best thing to do).

1.4 Generally, purchasers should be careful to ensure that they incur no potential liability (including contract and negligence liability) during the procurement process (that is, prior to signing up the agreement). There have been quite a few cases of this which illustrate the risk.

1.5 In the public sector, there are additional risks, including in relation to potential judicial review of procurement processes by the Courts. This risk is relatively low but nonetheless is present. The public sector will also have additional probity and audit concerns.

1.6 It is common in both the public and private sectors for procurement processes to be either over-engineered or under-engineered. Public sector processes do permit a large measure of flexibility to reflect practicalities and specific needs. That this is so is highlighted by a Privy Council decision. That includes a decision that it is appropriate for a tender evaluation panel to include someone who already has knowledge (even adverse history) of particular parties (indeed that is seen as an advantage, rather than simply having people on the evaluation panel who come to the project from a totally neutral and uninformed perspective).

1.7 In relation to the public sector, we address the various government purchasing guidelines, together with a recent case which illustrates some of the issues in this sector.

2 Fair Trading Act: Supplier Risk

2.1 In *RACV v. Unisys* (an Australian case) RACV – an insurer – wanted to install an on-line document imaging/retrieval system to enable its staff to have ready access to documents. It put out an RFP. The supplier responded with a proposal which ultimately was accepted. The supplier and RACV entered into an agreement that – as usual – limited the supplier's liability for breach, including in relation to loss of profit etc.

2.2 Like the next case we'll deal with, our summary of this case will focus only on key issues.

2.3 RACV claimed:

- The supplier had stated in sales material that documents would be retrieved to PCs within a specified number of seconds (and this was backed up by a test site demo). Some documents were to be retrieved within 2-4 seconds and others in around 20 seconds.

- The response time was much slower than those speeds.

2.4 Although the factual issues were hotly and understandably disputed, the court accepted RACV's position. In the end, the contract was terminated. RACV successfully sued for several million dollars.

2.5 RACV relied on the Australian equivalent of our Fair Trading Act. This is an important Act for marketers and suppliers. Under that Act, marketing statements (written, verbal etc) must not be misleading or deceptive. In short, they must be accurate. If they are not, the supplier can be required to compensate the purchaser for loss incurred.

2.6 Importantly, a limitation of liability in a contract that is later signed up generally doesn't cap this liability.[1] This is because Fair Trading Act liability is statutory and cannot be overridden by contract. If the Act is breached, not only can the marketer be prosecuted in some instances but it can also be required to compensate an affected party for its losses. This statutory compensation overlaps with contract liabilities for damages.

2.7 Because of the statutory obligation, the supplier in the *RACV* case couldn't rely upon:

- its limitation of liability provision (it wouldn't work to stop statutory liability);
- "small print" in the proposal, which qualified the performance statement. To work, such a qualification has to be upfront and generally located near to the performance statement. In *RACV*, it was lurking in another part of the proposal.

2.8 The case is complex, the factual conclusions are heavily disputed and it went to appeal.

2.9 On 14 May 2004, the vendor lost its appeal. It was lost on the factual issues, so the same legal point remains about unlimited liability under the Fair Trading Act, when statements made in the sales process are unsustainable.

3 Fair Trading Act: Solutions for Suppliers

3.1 Tenders, proposals, quotes and estimates can range from the very formal to the relatively informal. Even when they are formal (eg: in response to an RFT) they are sales pitches. There is an understandable commercial desire to highlight the strong points of the products and gloss over the weaknesses. It's particularly hard when there's a belief that competitors are over-pitching their services. But the supplier can be stuck with the

[1] Limitations of liability and entire agreement clauses don't always work anyway to cap liability, so this is another risk area. An example in relation to collateral contracts and entire agreement clauses is *Assn of Community Laboratories v. Ministry of Health* (CP287/01 (Wgtn Registry), 6/11/02, Master Gendall). There are some circumstances in which contract terms will eliminate Fair Trading Act risk, such as terms that show *very* clearly that the customer isn't relying on the statement made (eg: the service taken is clearly intended to be different to the service as represented). But things are not usually that clean cut. For a good summary of cases in this area see *Gault on Commercial Law* paras 9.36-9.37.

statements if the weaknesses are not outlined, even though a fancy contract is signed up later which tries to minimise risk.

3.2 Solutions include:

- In tenders, proposals, estimates, etc, be accurate and make sustainable statements (just as suppliers must do in other marketing material). Don't over-egg the custard. Try to talk about delivering certain products, rather than business outcomes. Proposals and other sales pitches often talk about business outcomes. If vendors do this, do it only when taking a calculated and considered risk. Try persuading your average account manager on this though! It's hard work, particularly when less prudent competing suppliers promise the world.

- Where a claim about products and performance should be qualified, do so upfront (ideally, close to where the claim is made). It's often easier to do this than many think, in a way that doesn't erode the marketing message. Often it just needs a little thought. To put the qualification in the small print won't always work.

- If a supplier gets stuck with something said in a proposal, ideally deal with the point in the contract. Perhaps have a term in the contract expressly replacing the proposal or particular parts of the proposal. Note, however, that this will only reduce the risk. It may not completely remove it. This has to be handled very carefully and ideally in a very upfront manner. Anything short of expressly and overtly backing away from what was said is unlikely to work (and even that won't always work; it's safer to get it right from the start).

- A related risk is that a proposal may become part of the contract itself unless care is taken: This opens up another avenue of attack on suppliers (yet ironically, because the proposal is incorporated in the agreement, it may be easier to argue that the Fair Trading Act liability is capped by the contract's liability limitation clause). There are purchasers (some government agencies are good examples) that require the proposal to be incorporated in the agreement. Extra care is needed in these cases.

4 Fair Trading Act: Solutions for Buyers

4.1 One option is to make the proposal part of the contract. There's a trend in this direction, although it's not without difficulty. First there's often a mis-match between proposal and the final agreed work. Second, this could make it easier for the vendor to argue that the limitation of liability applies to cap the liability. It could be best to keep the proposal and the contract separate.

5 Fair Trading Act: Purchaser Risk

5.1 A purchaser can have Fair Trading Act problems in the tender process as well. For example, someone from the purchaser company can make a verbal statement in discussions with a tenderer which, under the Fair Trading Act, overrides the written statements in the tender. This can end up imposing greater obligations than the RFT. So, for example, care needs to be taken in relation to follow-up enquiries in the tender process.

6 Process Contracts: Purchaser Risk

6.1 **Introduction:** In December 2003, the Privy Council come out with an important judgment: *Pratt v Transit*[2]. It is particularly material to public sector purchasers, but is also relevant to private sector buyers. The case raises quite a few issues which commonly come up in RFPs and RFTs, including in relation to technology purchasing. So we have gone into detail about various issues that have been raised. While there are warnings for purchasing agencies, the case also gives a high level of comfort and flexibility.

6.2 RFPs, Requests for Tender (RFTs), and other competitive procurement processes (we'll call these tenders in this note) can create what are called *process contracts*. These are contracts between the purchaser and the tenderers before the sale contract is ultimately awarded. A typical *process contract* obligation is a duty of good faith owed by the purchasing agency to the tenderers, during the tender process. Most purchasing agencies will try and avoid *process contract* obligations, including a duty of good faith. They can do this by carefully wording the tender documents.

6.3 The Privy Council has left open the important issue of whether or not such a *process contract* implicitly creates a duty of good faith on the purchaser (assuming there is no statement to the contrary). In the *Pratt* case, however, it was accepted there was a *process contract* and a duty of good faith. The big issue was the extent of the duty of good faith. It's regarded as hard to figure out what the duty means.

6.4 The important conclusions are that, where the *process contract* and the duty of good faith exist, then, generally:

6.4.1 The purchaser doesn't have to act judicially, in the sense of giving the tenderers a hearing about the rights and wrongs of certain situations. They don't have to make sure that those evaluating the tender are free from any bias, so long as those people treat tenderers equally and honestly. At least one member of the tender evaluation panel in the *Pratt* case had strong adverse views about *Pratt*, from prior experience about

[2] For additional commentary, see the May 2004 article by P. Devonshire, *The Modern Law of Public Tendering: The Principles Defined* Vol 10. NZBLQ 114.

Pratt (the unsuccessful tenderer that sued Transit). The Court said that, not only is it permissible to take that adverse history into account, but it is desirable to use people who have experience and knowledge from the past including about the characteristics (good and bad) of the tenderers. This is an important conclusion because it means that the purchasing agency (public or private sector) can take a practical and relatively commercial approach, taking into account past history and practical realities, past and present.

6.4.2 Generally a purchasing agency's internal documentation (such as purchase manuals) is not incorporated in the tender process (unless the RFP, RFT, etc says so).

6.5 It is easy to fall into the trap of inadvertently creating a *process contract*, a duty of good faith and/or incorporation of internal guidelines where that's not wanted. Purchasing agencies have to be vigilant here. It is easy to trip up.

6.6 While public sector agencies, just like the private sector, can exclude and minimise process contract obligations and duties of good faith, there are other reasons why the public sector may wish to approach RFPs, RFTs etc on the basis of exercising good faith. The *Pratt* case, and the observations below, give some good hints as to how to minimise risk and how far it is appropriate to go.

6.7 Vendors should know about purchaser's procurement obligations and rights, including as set out in this paper. Success is more likely if vendors know the ground rules, particularly for public sector purchasers.

6.8 **What happened in the *Pratt v Transit* case?** Pratt, a roading contractor, tendered for the Vinegar Hill roading works. Rightly or wrongly, they had a reputation for "*low balling*" (that is, tendering at a low price to obtain the contract, in the expectation of making a profit by aggressive claims later for additional payments). That's a complaint made about some vendors of course.

6.9 Pratt had already been to Court (and won) in an unrelated case involving Palmerston North City Council. That case contains important lessons as we note later in this paper. Pratt also had had a spat with the Ruapehu District Council over another roading contract (the Pipiriki job).

6.10 There ended up being two tender rounds for the Vinegar Hill job but we will not focus on both as that history is not particularly relevant to the issues in this paper.

6.11 On the Vinegar Hill job, one of the tender evaluation panel had strong views that "*Pratt's business methods and lack of competence made it unwise for Transit to engage it as a contractor*". Part of the history was

the Piripiki job (in which that panel member was also involved) and the Palmerston North case.

6.12 Transit had internal procurement guidelines which were not expressly incorporated in the RFT, except for one reference to those guidelines on a particular issue.

6.13 Transit used a "*weighted attribute method*" by which marks are given for qualitative attributes as well as pricing. One of those attributes was "*resources*". Transit's internal guidelines said this could not include financial resources. However, Transit, under the "*resources*" attribute, took into account financial attributes. As the Privy Council confirmed, they could take into account such a "*sub-attribute*" (ie: financial resources as a sub-attribute of the attribute, *resources*). Generally a purchasing agency can choose what *sub-attributes* it will use provided they are legitimately within the head *attribute*. The problem however was that Transit's internal guidelines said they could not include financial resources as a *sub-attribute* under the heading, *resources*. The question was whether they could do so for the Vinegar Hill job when the purchasing guidelines said they couldn't.

6.14 In *Transit*, there was in fact a process contract, which included a duty of good faith on the part of Transit. The Privy Council left open whether such a duty would generally be implied in process contracts. Where there is a duty, for whatever reason, the next question is: What is the extent of that duty (ie: what does a duty of good faith mean?). This has been a controversial issue in relation to contracts generally. This case helps resolve what it means.

6.15 Before dealing with the conclusions we'll cover how this case relates to public and private sector purchasing.

7 How is *Pratt v Transit* Relevant to Public Sector Purchasing Agencies?

7.1 *Pratt* directly involves public sector processes and confirms the degree of flexibility (and obligation) available to public sector agencies. It's now the leading case in this area.

8 Why is *Pratt v Transit* relevant to Private Sector Purchasers?

8.1 The same contract, tort (and maybe fiduciary) duties apply also to private sector purchasing agencies, just as they do to public sector agencies. However, the public sector faces an overlay of greater risk of judicial review, attack via the Audit Office, Official Information Act risk etc. So the principles in *Pratt v Transit* (which focus on contractual issues) are also relevant to the private sector. Private sector organisations going out to competitive processing will find it easier to exclude potential liabilities at the process contract/duty of good faith level. The key point is to expressly exclude these responsibilities in the

original RFP/RFT process. The wording should be chosen carefully, as the *Palmerston North City Council* case noted below confirms.

9 What did the Privy Council Decide in *Pratt vTransit*?

9.1 First, it said that internal manuals do not legally apply to the relationship between the purchasing agency and the tenderers, unless they're specifically introduced into the RFP or RFT. In the *Pratt* case, one specific part of that documentation was introduced. The Privy Council confirmed that this did not mean that the rest was automatically included. Therefore, it was right to have a sub-attribute (financial resources) within the *resource* attribute in the tender document even though the purchasing manual said otherwise.

9.2 This highlights that purchasing agencies should be careful in how they structure their documentation, to avoid reference to internal manuals (unless that's desired). Note there is a risk of this happening inadvertently, such as by way of a statement made by a person from a purchasing agency, which could have Fair Trading Act implications.

9.3 Note that, generally, it is prudent that public sector agencies should follow the agency's purchasing guidelines anyway, although the guidelines should be flexible enough to accommodate particular needs.

9.4 In *Transit*, it was accepted of course that there was a *process contract* and that there was a *duty of good faith.* This can (and generally should) be excluded by prudent purchasing agencies. Where it is not, the Privy Council noted the points that follow in this paper.

9.5 The duty of good faith, where it applies, does not "*judicialise*" the agency's decision-making. Putting that another way, the duty of good faith does not mean that the agency needs to conduct itself in a way that avoids making its decision amenable to judicial review.

9.6 Flowing from this, one of the standard judicial review grounds (*apparent bias*) is generally not available in these situations. As we noted above, at least one of the tender evaluation panel, based on past dealings with Pratt, had a strong view that Pratt's business methods and lack of competence made it unwise for Transit to engage it as a contractor. Pratt alleged that the tender could be attacked as there was *apparent bias.* On this, the Privy Council said, in passages which make a number of important points:

"*But that was no reason for him to disqualify himself from the [Tender Evaluation Team]. Transit had paid for his expert opinion and were entitled to pay attention to it.*"

And earlier in the judgment:

"*Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable or adverse. It would have been impossible to have a [Tender Evaluation Team] competent to perform its functions unless it consisted of people with enough experience to have already formed views about the merits and demerits of roading contactors.*"

And earlier from the judgment:

"*The duty of good faith and fair dealing as applied to [the tender evaluation panel] in making its assessment required that the evaluation ought to express the views honestly held by the members of the [tender evaluation panel]. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different. … The obligation of good faith and fair dealing also did not mean that the [tender evaluation panel] had to act judicially. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no doubt have been bad faith for a member of the [tender evaluation panel] to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all.*"

9.7 The Privy Council confirmed that there was no finding of bad faith on the part of any member of the tender evaluation panel, nor that there was anything to show that the marks on which the panel agreed did not reflect a true consensus of their honestly held opinions. Pratt lost its case as a result.

10 *Pratt v Transit*: Conclusion

10.1 This decision gives purchasing agencies a great deal of flexibility as to how they approach procurement. They can take into account a wide array of information including adverse prior history etc. Public sector agencies will also need to take into account MED Guidelines, and any purchasing manuals (including any developed under the Auditor-General Guidelines). If there are no such guidelines, then the Auditor General's Guidelines themselves are a very useful benchmark. It's also well worth vendors being familiar with the Auditor-General's Guidelines, the MED procurement guidelines and the State Services Commission IT guidelines where appropriate.

10.2 The good news is that, provided agencies are acting fairly and treating tenderers equally, there is significant latitude in the approach that can be taken and the information that can be taken into account. However real care is still needed and it is particularly important to have carefully drafted RFP or RFT documentation so that the purchasing agency does not get tripped up inadvertently.

10.3 The *Pratt* case can be read at: http:/www.privy-council.org.uk/files/other/pratt.rff.

11 Avoiding process contracts: a flipside problem for purchasers

11.1 Generally, purchasers should avoid process contracts in the RFP process. But what if the purchaser wants a contractual obligation on the vendor during the RFP process? To obligate vendors or their representatives in their proposals shouldn't be a problem. Usually they're caught by the Fair Trading Act anyway.

11.2 But what if, for example, the purchaser wants to impose a confidentiality obligation on the vendors? Or it wants the vendor's price to be binding for 90 days? In confirming that the RFP creates no process contract (in the interests of the purchaser) a side effect is to stymie the vendors' contract obligations too.

11.3 Many purchasing agencies will often decide to take the risk. For others it will be desirable to get a binding commitment from the vendors (eg: as to confidentiality). This could be achieved in two ways:

11.3.1 setting up a specific contract for confidentiality (care is needed to have consideration flowing both ways); or

11.3.2 having a deed, which does not require consideration. Confidentiality deeds are relatively common so this is a suitable and practical solution.

12 Procurement and the duty of good faith: duty to negotiate a contract

12.1 The significant issue of duties of good faith has also been developed in a Court of Appeal case, *WCC v Body Corporate 51702*.[3] There, the City Council (as lessor) agreed with a lessee that it would "*negotiate, in good faith, sale of the Council's property to the lessee at not less than the current market value*".

12.2 As the Court said: "*If a contract specifies the way in which the negotiations are to be conducted with sufficient precision for the Court to be able to determine what the parties are obliged to do, it will be enforceable.*"

12.3 If this was to be a contractual commitment, it would amount to a *process contract*, similar to a process contract that can be created in a competitive tendering scenario. The Court said that, usually, agreements purporting to bind parties to negotiate, (whether expressed in terms of good faith, best endeavours or otherwise), were really agreements to try to agree. Such agreement to agree would not be enforceable. However,

[3] *WCC v Body Corporate* 51702 [2002] 3 NZLR 486 (CA).

they could become enforceable, depending on their terms and particularly the specificity of those terms.

12.4 Applying this to competitive tendering and process contracts, generally an obligation in a tendering context to negotiate in good faith, or to use best endeavours etc, will not be binding. But a purchaser can run a risk here if there are other terms which elevate and clarify the responsibilities.

12.5 A good example might be the use of an arbitration type of clause in an RFP scenario, which the Courts could use to force the equivalent of a negotiated deal on the parties, on the basis that an objective approach (namely an arbitrator) has been established. This is consistent with the authorities; lessors and lessees for example have been caught out in this way. Parties, either deliberately or unwittingly, could end up being stuck with a process contract on this basis.

12.6 There's a little doubt about whether all the Court of Appeal decisions about good faith duties will survive unscathed. That's because the Privy Council (in the *Dymocks* case[4]) has – in a different area (franchises) – left open for later resolution the question of whether there will be implicit good faith duties in franchise situations. That's where the contract says nothing about this.

12.7 This whole area of good faith duties has been a controversial area in contract law for many years. We may not have heard the last.

13 Solutions

13.1 A solution to avoid this type of risk and uncertainty is to state expressly (such as in an RFT or RFP) what is to happen (for example, to state there's no duty for good faith). In *Pratt* there were a number of obligations, against the background of the relevant legislation, the RFT and implied obligations. However, the duty of good faith was not excluded.

13.2 Sometimes a purchaser wants to be committed to a transparent and enforceable tender process. It wants tenderers to have faith in the system. After all, tenderers often spend a lot of time and money in preparing the tenders. The purchaser wants to encourage tenderers to pitch for business in the future so it uses a transparent and reliable process. Additionally, public purchasing bodies often will want to act fairly, to comply with internal purchasing rules and other legal obligations, and to minimise risk such as review by the Ombudsman.

13.3 Even in those situations, the RFT can be crafted optimally to minimise risk yet achieve those outcomes. Variations on the ideas that follow in 13.4 can be used.

[4] *Dymocks Francise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 (PC).

13.4 In other cases, where purchasers want to totally exclude risk, solutions include:

- In the RFT (or, as appropriate, in the RFI or other relevant competitive purchasing situation) say that no contract is created until the purchase contract itself is signed. Perhaps confirm that the purchaser is not liable for any loss in any way arising in relation to the process. It's wise also to exclude liability for the overlapping area of negligence. This can be complex and so it's best to have legal advice to get this right.

- It's important to make sure the request fits together as a whole. Courts can work hard to find a way to make liability stick; one clause may not be enough in itself to answer the problems. Another case involving Pratt Contractors (*Pratt Contractors v Palmerston North City Council*) illustrates this well. Pratt pitched for bridge building work for the City Council. The Council put in a provision which is common in RFTs:

  "*We understand that the [Purchaser] is not bound to accept the lowest or any tender he may receive.*"

- Pratt had the lowest price but wasn't successful. Despite this clause, however, it won a case against the Council for damages, ironically because it had the lowest prices. Another clause in the RFT effectively overrode that clause. It said:

  "*The [Purchaser] shall only enter into a contract with the non excluded tender with the lowest price.*"

13.5 The Court said that the net effect of these two seemingly conflicting provisions was that, if a tender was in fact accepted, it had to be the lowest one. The lesson is to make sure the various components of the Request fit together. With technology RFPs, this can be awkward.

14 Public Sector Issues

14.1 We have dealt above with the private law position applicable to public and private bodies alike. Public sector bodies have added layers of obligations.

14.2 Clearly the public sector needs to be aware of these obligations. In practice, either non-compliance or uneconomic over-compliance is very common. The latter is costing industry and the public sector many millions of unnecessary dollars.

14.3 Suppliers should also be aware of the public sector requirements. That would help improve prospects of successful tendering (and the ability to complain or attack if there are problems).

14.4 It's particularly important to address public law obligations in the context of the public entity's own statutory framework, manuals, and the type of purchase underway. A "cookie cutter" approach is not enough. Each public sector entity needs to work out what it should do, depending on its statutory obligations and functions, the particular transactions in question etc.

14.5 Public sector entities at risk here range from the most commercial (State Owned Enterprises and LATEs) to Ministries, local bodies, Departments and Crown Entities.

15 Statutory Framework

15.1 This is the first consideration. The first step is that, often, purchasing decisions are made within a particular statutory framework. Regard must be had to the relevant statutes.

16 Judicial Review

16.1 The purchasing process might be reviewable by the Courts in view of legislative obligations and other obligations. In particular the Courts may require the purchasing public body to act fairly (this is a shorthand way of describing the purchaser's obligations; judicial review invokes a range of variations on that theme). The degree to which a Court will intervene depends on the circumstances. But, generally, intervention is more limited than in relation to many other public sector decisions and there can be intervention, even though the *Pratt* case indicates it will be limited. For example, SOEs have relatively wide freedom to make commercial decisions on procurement. As the Privy Council has confirmed in the *Mercury Energy* case, the Courts generally will intervene only in relation to commercial purchasing decisions by SOEs, so far as public law duties are concerned, where there is *bad faith, fraud or corruption*.

16.2 However, danger lurks. Subsequent High Court decisions point to a low threshold for the establishment of "bad faith". For example, if a purchaser fails to follow the process outlined in its RFP, arguably that's "bad faith" in this context. If later decisions apply that reasoning (they may not), even SOE commercial decisions are reviewable. See below the discussion about *Schelde Marinebouw* for an illustration of a case where alleged failure to follow proper process was overcome by good RFP wording.

16.3 If the most commercial of Government entities (SOEs) have reviewable obligations then clearly all other public sector entities do as well.

16.4 The degree to which public sector purchasing decisions are reviewable can, broadly, be assessed on a scale. At one end are the least reviewable decisions. These tend to be largely "back office", often of a minor

nature, and are not directly involved in the agency's outputs. An example is purchase of stationery. While there is a risk of a judicial review, it is relatively limited.

16.5 At the other end of the spectrum (tending more towards public decision-making which is more quasi-judicial in nature, but not of that degree) are acquisitions involving large sums, in particular where the goods and services are at the core of the entity's outputs, and/or which tend to face more toward the public.

16.6 The classic example here is Pharmac and the numerous judicial review attacks it has faced at the behest of pharmaceutical suppliers and others, in relation to choice of drugs. Much money is involved. While it is the pharmaceutical companies that tend to drive the litigation, the provision of the drugs is the core function of Pharmac. Of course their availability or otherwise has substantial public implications. Pharmac's role is like a purchaser using competitive tendering processes. The courts have closely reviewed their processes in numerous cases (unsuccessfully so far).

16.7 Public agencies need to be particularly careful where acquisition of goods and services is at or near this end of the spectrum. But the SOE example shows that all public sector purchasing is potentially reviewable, although *Pratt v. Transit* shows judicial overview is quite limited.

17 A recent development: *Marinebouw BV v Attorney-General*

17.1 The recent case of *Schelde Marinebouw BV v Attorney-General*[5] confirms that the courts will not be quick to review public sector purchasing decisions conducted under process contracts.

17.2 Schelde, unhappy at missing out on a Ministry of Defence contract for the supply of new naval vessels, brought an action in the High Court seeking judicial review of the tender process. The Attorney-General successfully applied to strike out Schelde's claims. Schelde complained that certain information, regarding pricing and specification, was given to the successful tenderer but not to them, and also, that while its own design complied with the RFP the successful design did not.

17.3 Schelde brought the action as an application for judicial review, claiming also negligence and a breach of the Fair Trading Act. This article will focus on the main issue of the case – whether judicial review is available when a process contract is in place.

17.4 The short answer to that question is generally no. From this case it appears that where a process contract exists between the parties then the

[5] *Schelde Marinebouw BV v Attorney-General (24 November 2004) HC WN CIV-2004-485-1603, Gendall J.*

appropriate remedies generally lie in private law contractual remedies, not in the public law remedy of judicial review. Justice Gendall qualified this by stating that review might yet be available if there existed exception circumstances such as conspiracy, fraud, bribery, or misfeasance in a public office. That would be rare.

17.5 Because there was a process contract in place, Schelde was limited to claiming remedies under that contract. The problem for Schelde was that the process contract, ie the terms of the RFP, specifically allowed the Ministry to do what it did and it excluded liability for exactly what Schelde was claiming for – the cost of preparing the tender and lost profits from not being the successful tenderer.

17.6 Schelde tried to argue that the Ministry's decision had public consequences and therefore ought to be reviewable as well as subject to the common law. Justice Gendall disagreed, saying that while certain aspects were public this was really a private process having only private consequences as between the Ministry and the tenderers.

17.7 The judge said that Schelde entered into a contract with the Ministry, and its rights and remedies were set out in the contract. This same contract specifically allowed the Ministry to do what it did. "The plaintiff cannot seek to achieve by way of judicial review that which it cannot obtain by contract, where what it contends for is specifically excluded. Judicial review, whilst theoretically available, namely, where gross abuse of power exists, is untenable on the pleaded allegations."

17.8 This case will be of comfort to public sector purchasers as it upholds the terms of their RFPs. Purchasers should include a clause in their RFP that provides for a wide measure of discretion in how they run their tendering process. Additionally, they should ensure that they include a clause which states that the agency will not be liable in contract for any costs, expenses, or losses incurred by the tenderers in connection with the RFP. It was these two clauses that immunised the Ministry in this case.

17.9 While the supplier won't appeal, public sector agencies would be wise not to rely on the case too much, as the decision may not be the last word. Also even if legal risk if limited, audit/probity risk remains.

17.10 For suppliers, this case – if ultimately accepted as stating the law correctly - is a warning that they may have to put up with perceived "unfair" behaviour on the part of purchasing agencies. This will be cold comfort for those suppliers who, like Schelde, expend huge sums in the preparation of proposals. Where there's a lot at stake, suppliers who are concerned about the purchaser giving out different information could try to seek written assurances from the purchasing agency that they will not do so. Purchasers may be receptive to this suggestion, particularly at the beginning of the process before they've begun to pick their favourites.

17.11 We think that it is firmly arguable that this case, however, is not correct in that judicial review has a greater role to play in public sector procurement (including for IT) than the case indicates. For example, Pharmac has been sued many times by pharmaceutical companies in comparable circumstances, and no one has questioned the ability for there to be relatively expensive judicial review. This is a variation of the procurement theme. Additionally, there are authorities to the contrary.

17.12 Anyway, even if the law won't stop activity by which public sector agencies give pricing details to one tenderer but not others, and then can substantially change the nature of the project without telling all tenderers, chances are the Auditor-General's office might look closely at what's happening. For these reasons it would be wise for agencies not to take any comfort from the decision and to notify all tenderers of significant information and changes.

17.13 Note that generally this will not apply to private sector purchasers, who can, by contract, do whatever they please generally.

18 Government Purchasing Guidelines

18.1 Overlapping with the statutory framework and judicial review, internal Governmental guidelines can be important, as can the public sector agency's own purchasing manual. While *Pratt v Transit* confirms that such manuals are not binding unless they are made part of the tendering process, they do set some sort of benchmark. It is prudent for purchasing agencies to follow them, but to use discretion and move away from the manual where appropriate (the manual should be careful in defining the level of delegated authority before there can be departure from the manual as this should be carefully controlled).

18.2 However, in our experience, often these manuals are honoured as much in the breach as in their fulfillment. In addition, they are often not as flexible as is practically desirable, nor as flexible as the Courts would allow. Considerable cost and time saving is possible by optimal application of requirements which for many (if not most) public sector agencies could save 6- or 7- figure sums annually. The vendors would save comparable sums, to the ultimate benefit of the purchasing agencies.

18.3 The Audit Office has produced excellent guidelines for the preparation of such manuals (see *Procurement: A Statement of Good Practice*, June 2001, Office of Controller and Auditor-General (http://www.oag.govt.nz/HomePageFolders/Publications/Procurement_Guide/Procurement_guide.htm)).

18.4 Each manual of course needs to reflect individual requirements. A cookie-cutter approach won't work. While promoting the drivers of competitive tendering, the Audit Office also promotes and provides flexibility in appropriate cases. Take the following example: A

Department uses Microsoft platforms and is looking to extend into another platform where it makes sense to continue with Microsoft for integration and co-ordination purposes. It can readily justify going out to the market based only on that Microsoft platform, without looking at other alternatives. Yet it is surprising how often it is perceived that other alternatives need to be sought. The guidelines are good in that they are flexible and reasonably meet commercial needs.

18.5 Regard should also be had of course to the MED guidelines such as *Government Procurement in New Zealand: Policy Guide for Purchasers*, July 2002, produced by the Ministry of Economic Development (see www.med.govt.nz/irdev/gov_pur/purchasers/index.html) and the other guidelines on that site. Among other things, they confirm (a) the compliance required with the NZ/Australia and NZ/Singapore Government procurement requirements (again, commitments often honoured more in the breach than fulfillment), and (b) the obligation on some Government entities (and encouragement for others) to notify tenders to the Industry Capability Network (ICN) and its GETS site (http://www.gets.govt.nz).

18.6 For IT projects, useful guidance is in the post-Incis SSC Guidelines which are useful even though they are only mandatorily applicable to larger or higher risk projects. See *Guidelines for Managing and Monitoring Major IT Projects*, August 2001, State Services Commission (http://www.ssc.govt.nz/display/document.asp?docid=2495). Note that, in our experience, the Guidelines apply mandatorily in more projects than is generally understood.

18.7 Competitive tendering done properly is not dissimilar to fulfillment of the duties of fairness and consultation, which are the hallmarks of judicial review. So a properly done competitive tendering process can minimise judicial review risk.

18.8 Suppliers can look at attacking the process. Both they and the purchaser should be aware of the ability to obtain underlying documentation (such as under the Official Information Act or on discovery in litigation). Some documents may not be able to be obtained under the Official Information Act in view of the commercial sensitivity exception in that Act. But Government agencies should not count on that. In any event, process-related materials such as evaluation criteria are generally disclosable under the Act. So, while there is a significant degree of flexibility for Government agencies, they should take care to "walk the talk", to have a squeaky-clean process, to have proper paperwork supporting this, and so on.

18.9 While the position is more relaxed than in respect of other administrative or quasi-judicial decision-making, some care is needed.

18.10 But we can't emphasise enough that, often, it's not necessary to do the expensive "belt-and-braces" tendering that's frequently seen. The

Courts and the government guidelines don't always require that. The benefits of competitive purchasing can often be met in more cost efficient ways.

18.11 However, in the aligned but different area of funding of NGOs, we particularly recommend that procurement staff read closely the recent Auditor-General's report on Donna Awatere Huata (see http://www.oag.govt.nz/HomePageFolders/Publications/Huata/Huata_Report.htm). This contains a treasure trove of information which, while focused on NGOs, is also relevant to procurement processes generally. This is a hot topic in government at present.

19 Conclusion

19.1 There are other risk areas in the tender process, and ways in which that risk can be reduced for both parties. We have focused on the Fair Trading Act, process contracts and public sector risk. To completely avoid legal risk may mean the parties won't do the business. Often there must be a balance between commercial reality and the reduction of legal risk.

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.

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