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Public Procurement: Gagging bidder's litigation and adverse commercial activity

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One of Government's largest procurement processes stops suppliers from threatening litigation and from engaging in adverse commercial activity. Is that OK?

A major request for proposal, understandably, contains a provision stopping personal inducements, etc. But the provision goes further, to stop bidders from threatening:

- legal action; or
- any commercial or other action which would be detrimental to the public sector agencies,

against the relevant public sector agencies, including Ministers.[1]

Is that acceptable?

We don't think so. This should be corrected and excluded from future public sector RFPs. If there is to be a clause to deal with conduct driven by ulterior motives, it would need to be carefully drafted.

[1] The provision reads:

No influencing or undisclosed benefits

Respondents must not directly or indirectly seek to influence any Decision Maker [including the Ministry, the Ministers, and the Crown entity] by:

(a) offering any form of personal inducement or reward to that Decision Maker;

(b) threatening any legal action against any Decision Maker or the organisation which they represent; or

(c) threatening any commercial or other action which would be detrimental to the interests of the Decision Maker or the organisation which they represent.

Legal action against the public sector

The grounds on which bidders can sue public sector agencies in relation to procurement are relatively limited. But they do exist. Where a bidder has a legitimate complaint, and a right to sue (e.g. if the process is botched in some way), that bidder should be able to sue. In fact, remedial action such as litigation is an important safeguard in relation to public sector action. A clause that stops such action is not appropriate as a use of public sector power.

The restriction only applies to threatening legal action. There's nothing to stop the bidder issuing proceedings without giving advance notice. That's not practical. Surely it is better if the bidder can write saying something like: "We believe you are in breach of ABC. Unless this is remedied or explained, we have no alternative but to issue proceedings." Pragmatic resolution is more likely, for starters.

No doubt the public sector agency did not intend to restrict this type of approach, but that is the effect. If there is to be a clause dealing with this, it needs careful focus on threats with an ulterior motive. Even then, that is hard to draft without dampening rights.

One fact makes this issue self-policing in most situations anyway. Lawyers will usually be involved when litigation is in prospect. Ethically, lawyers cannot be party to empty threats. To be able to write, "Our client will sue unless you do XYZ", the lawyer must know that the client will in fact sue if XYZ does not occur.

Threats of commercial activity detrimental to the public sector agencies

As it happens, this particular procurement process includes a number of providers that could take commercial action which could be detrimental to the public sector objectives. So much so, that the public sector objectives could even be torpedoed. The providers have legitimate business interests to protect. Their action is likely to be legitimate. Further, the interplay between bidders and the public sector can produce better outcomes overall for the ultimate stakeholders: New Zealanders.

Most other procurements face this issue to a greater or lesser degree: it just so happens that this one is particularly acute.

The prospect of detrimental commercial activity (from the perspective of the public sector agency) is likely whatever happens with this project (although that depends on whether the objective is just the immediate objective stated in the RFP document or wider objectives). Much of that is the action of the marketplace: to dampen that is to dampen competition. Ultimately, this clause could be unacceptably anti-competitive.

Raising the prospect of detrimental commercial activity should be a legitimate part of this process. It is one which will get to the optimal end result more quickly and effectively when parties can say: "If you do X then we will do Y".

Not only is the restriction inappropriate, it also stands in the way of optimal outcomes. If the parties can't talk openly, sub-optimal results flow through.

Solution?

Drawing the line between "legitimate" threats and inappropriate threats may be so hard that this should not happen. Having no provision does not necessarily rule out the use of poor conduct in evaluation of proposals.

Draft RFP for review

In our article on school bus tenders,[2] we commented positively on the Ministry of Education's approach of sending out the draft RFP for review and comment by stakeholders. For high value proposals, we think this is very good practice.

[2] http://www.wigleylaw.com/Articles/LatestArticles/school-bus-tender-insights-for-procurement-by-nz-c/.

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