

School bus tender: insights for procurement by NZ central/local Government, SOEs, etc

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The Auditor-General's recent report on the tender for over 2,000 school bus routes provides valuable insights on handling public procurement by all public sector agencies, including SOEs and Crown entities. Despite a procurement approach by the Ministry of Education that is much better than many other agencies, the Auditor-General pointed to a number of lapses. While the lapses were said not to be major causes for concern, there are recommendations which are valuable for all agencies.

We highlight the generally excellent pre-RFP steps by the Ministry, contrary to the under-baked pre-RFP action by some other agencies. We also question whether a conclusion by the Auditor-General (which permitted preference for the incumbent providers ahead of others) is the optimal approach. The pro-incumbent provision highlights one of the most challenging areas in procurement: encouraging competitive proposals from non-incumbent providers.

Introduction

Here we overview some key points in the Auditor-General's (A-G's) report.¹ Those closely involved in public sector procurement would find reading the full report valuable. That includes not only central government, but also nearly all other public sector agencies including local government, SOEs, Crown entities, etc, plus their subsidiaries and other controlled entities.² Most findings in the report apply beyond central Government, although adjustment to fit circumstances may be necessary. For example, this was a high dollar, high profile procurement calling for a particularly robust approach.

¹ The report is *How the Ministry of Education managed the 2008 national school bus transport tender process* <http://www.oag.govt.nz/2009/bus-tender/> (October 2009).

² That is because the A-G expects those agencies to have processes that compare favourably with the A-G's procurement good practice guidelines (<http://www.oag.govt.nz/2008/procurement-guide/>). Each procurement is fact-specific however and may vary from the School Bus Tender approach. The Ministry of Education must, additionally, apply the Mandatory Rules (<http://www.med.govt.nz/upload/35084/rules.pdf>), along with other central Government departments. However, often, this does not create additional obligations in the circumstances addressed in the A-G's report on the school bus tender.

What happened?

The Ministry went out to tender for 6 year contracts (with renewal rights) for all national school bus routes. Many of these routes had long standing local providers, smaller than the bigger bus companies that could cover multiple routes with better cost efficiencies. The Ministry rightly focused on value for money. As well as strong weightings for non-price factors such as safety, the Ministry took an approach which encouraged cost-efficient multi-route tenders. However, to foster competition, a bus operator could not win more than 75% of the routes in a particular area.

In addition to making the position more challenging for incumbent (and often smaller) operators, this added complexity to the tender.³ The tender was undertaken in two steps: qualification assessment based on non-price terms followed by evaluation which included price.

There was significant change from the approach in earlier tenders, and pressure on incumbents as a result. This made for a

³ The tender accommodated fleet bids, bids for "route groupings" (that is, geographically close routes) and "clusters" of "route groupings".

controversial tender (the more so in view of the prospect that well established smaller bus operators in close-knit rural communities would go). The Ministry knew this could result in changes to the pool of bus operators. In the end, 227 existing operators were reduced to 95 operators. This highlighted the need to carefully manage political and strategic risks, one of the insights from this report.

What the Ministry did better than many others

Before the RFP was issued, the Ministry extensively consulted stakeholders (bus operators, school communities, etc). It even provided a draft RFP for comments (and made many changes to the RFP to reflect stakeholder feedback).

Such careful planning, careful design, and getting vendor input, is lacking in many public sector procurements. The result can be poorly designed tenders. This leads to poor outcomes for both vendors and for purchasing agencies. While the A-G's report understandably focuses on failings, the Ministry did far better than many other agencies on this and other aspects.

Weighting in favour of incumbents

In response to stakeholder submissions, the Ministry changed the evaluation criteria so that up to 5% of the total available points could be awarded to reflect the fact that the tenderer was an incumbent.⁴ This was said to reflect feedback from schools as to the perceived benefits of using local bus operators, particularly those already providing services. While small, 5% may be enough to tip the balance between success and failure in some instances.

The A-G accepted that the Ministry could choose to do this.

Is that optimal or even correct? Maybe not, at least as to central Government departments like the Ministry. The Mandatory Rules,⁵ applicable to those departments, contain non-

⁴ The way this 5% fits with price and non-price factors, respectively, was a further aspect, including exclusion of the incumbency factor when larger proposals (clusters of route groupings) were considered. Incumbency scores were not included until the pricing phase.

⁵ <http://www.med.govt.nz/upload/35084/rules.pdf>

discrimination provisions (e.g. "Each Department must accord all potential vendors equal opportunity and equitable treatment..."). Giving incumbents a head start may not comply with the Mandatory Rules. However, there may be some special factors with this tender, not apparent from the report, which justified the approach here. Other agencies should be cautious before taking a similar approach.

In principle too, where competition and level playing fields are important policy drivers, one group of vendors should not get a head-start unless there is good reason to do so. Favouring incumbents (or even smaller operators who are not incumbents) may not be valid reason to move away from that policy. Put another way, using incumbent operators may not improve value for money.

Encouraging competition when there are incumbents

One of the big problem areas in procurement is achieving great outcomes where there is an incumbent. Often this is not optimally handled by purchasers so that they do not get the best outcomes for them and their stakeholders (the public). For example:

- Often, the process is inadequately designed to enable potential new providers to put in a viable proposal. For example, potential proposers don't get enough information to put in a sensible proposal. The incumbent, on the other hand, generally knows what is needed, and can put in the best proposal. The process effectively entrenches the incumbent. All the new provider knows is largely what is in an RFP (which is often inadequate) plus what it can glean in other ways.
- This is a problem frequently cited by vendors. However, they don't usually complain for fear that they will be tarnished for future purchases. A major ultimate loser is the agency and the recipients of its services (the public).
- These problems can be reduced by a strategic approach with careful design and planning (of which the school bus tender is an example of great work). Good practice calls for this approach.

The A-G's Good Practice guidelines and the Mandatory Rules are explicit about this. However, it is relatively infrequently done (for example; comprehensive publicly available procurement plans, as required by the Mandatory Rules, are rare). Additionally, failure to do this may mean non-compliance with non-discrimination requirements (there is discrimination when non-incumbent vendors do not have adequate information, for example, relative to the incumbent).

- Given these problems, many vendors choose not to lodge proposals. Often they have a concern that, regardless of the theoretical requirements (such as evaluation weightings) agencies will somehow appoint the incumbent. Rightly or wrongly, they sometimes suspect the agency will find a way to achieve this. These concerns aren't often aired in public, as vendors fear they will be informally blacklisted as troublemakers. As noted above, the losers ultimately are not just these vendors but also agencies and their stakeholders.

This is a challenging area to handle optimally. After all, an incumbent already has the knowledge, experience, and, often, demonstrated reliability. Additionally, there can be incremental cost in the transition from incumbent to new provider. However, for many agencies, improving this area will considerably optimise their outcomes.

Some of the key insights from the School Bus Tender report

As we note above, there are many insights in the report. Here we outline only some of those insights:

- Ensure the RFP guidance is clear (such as for the evaluation criteria) to ensure the requirements are clear and that the full range of circumstances are provided for. This is a common problem in procurement and comes back to the need, noted above, to take a strategic approach, to plan, get market input, and so on.

- Ensure there is clear responsibility for the strategic oversight of tender processes, so that early warnings of strategic and political risks can be managed appropriately and in a timely way.
- Expressly reflect policy objectives in the procurement plan objectives and the evaluation criteria, to clearly align objectives at each level of decision making.
- Include procurement plan objectives in RFPs so that proposers can more easily understand policy priorities underpinning the tender process.
- Have adequate QA. As a result of feedback from proposers, the Ministry ended up fixing errors in weightings allocated to proposers. The A-G noted that the external feedback drove this, not internal QA, highlighting the need for adequate QA.
- Changes to the RFP (and material parts of the process) need to be notified through the channels stated in the RFP. One key change (a change in the approach to evaluation) was not notified at all.
- Maintain adequate records. In some instances, the Ministry did not have a paper trail showing the approach it took.
- Where external contractors are used to help with the process, give them adequate guidance on how they provide their services (and QA this).
- There are observations on detail such as the need to date stamp proposals, ensure price proposals are not opened before non-price proposals (where there is a two step process), strictly follow the rules about late submissions, have a centralised repository for correspondence, etc.

Conclusion, and the legal position

The report was restrained in its criticism of the Ministry. The A-G noted that, with any in-depth

inquiry, she expects to find inconsistencies as no process is perfect.

The A-G does not and cannot unravel the awarded contracts. That's not her role. There are other channels for that, although those channels are generally limited. In particular, assuming the documents include usual provisions protecting the Ministry, judicial review by the Courts is generally a relatively limited remedy. This is highlighted in a 2007 Court decision on tendering school bus routes, outlined in our article, *School Buses clarify Public Sector Procurement and Judicial Review*.⁶ That article in turn refers another of

⁶ http://www.wigleylaw.com/assets/_Attachments/school-buses-clarify-public-sector-procurement-and.pdf

our articles on the leading decision, *Transit v Pratt*, and various potential remedies.

Now in the mix are the Mandatory Rules. Will this new kid on the block (well, new since the last major judgments) make a difference to the Courts' approach in relation to central Government procurement?

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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