Top 5 Tendering Pitfalls

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Introduction

GOAL: Practical Overview

• Issues during bid process
• Do’s and don’ts of dealing with them
• Where can things go wrong?
Introduction

- Traditional procurement is no stranger to risk
- Risk Mitigation/Management
- Result if risk not managed: unhappy bidders and unhappy owners
Introduction

3 main phases to the bid process:

1. drafting and planning;
2. the open period; and
3. evaluation/award.
Introduction

Focus will be on:

1. intention
2. communication
3. pricing
4. timing and
5. bid errors.
Intention

• Bid process: how? what governs it?
• Bid documents and your intentions :
  – What are you buying?
  – Who are you buying it from?
  – Cost?
  – Time?
Intention

• What are you buying?
  – Poorly drafted scope: lost time and resources
  – Fully drafted scope:
    • realistic pricing
    • reduction in change orders
    • happy vendor/happy owner
Intention

• Who are you buying from?
  – Who is your bidder?
  – Pre-qualified?
  – Why is this important?
Intention

• How much are you expecting it to cost?
  – Approval process
  – Cost estimates
  – What do you do if you just don’t know?
Intention

• What is your process?
  – Brief overview of complications
  – Overview of obligations: owners? Bidders?
Tercon Contractors Ltd. v. B.C. (SCC, 2010)

- “RFP” for highway construction
- Proponents must be pre-qualified
- Successful proponent = joint venture
  - One member pre-qualified; other not
- Tercon claims breach of Contract A
Tercon Contractors Ltd. v. B.C.  
(SCC, 2010)

• Tercon wins at trial
  – “RFP” = actually a bid (Contract A created)
  – Contract A breached
  – Award = $3.2 million

1. Appeal court reverses
  – But agrees Contract A breached

• SCC splits 5/4
  – All 9 judges agree: Contract A breached
  – BC pays
Don’t Be Fooled By “Privilege Clause”

“the lowest or any tender not necessarily accepted…”

- Don’t be fooled by the “privilege clause”
- Legal limits on use
- It is a term of Contract A
- Not owner wild card
MJB v. Defence Construction
(SCC, 1999)

- DC calls bids for trenching
- Three different fills: one unit price
- MJB second; S low – two unit prices
- DC awards to S: thinks bid compliant
- In any event: privilege clause
- MJB recovers damages in SCC
- SCC clarifies privilege clause:
  - Obligation to accept only compliant bid
  - No obligation to accept low compliant bid
Communication Risks

• Appoint a single contact person
• Stipulate consequences
• Risks:
  – Bias: real or perceived
  – Breach of duty of fairness
  – Breach of duty of good faith
• Post close communication
Maritime Fence Ltd. v. Parks Canada Agency (CITT, 2009)

- Tender for guardrail removal and sign post installation
- Lowest bidder price discrepancy
- Result:
  - CITT awarded lost profits
  - Lowest bid non-compliant
Maritime Fence Ltd. v. Parks Canada Agency (CITT, 2009)

- CITT:
  - Bidder submitted contradictory pricing info; means non-compliant and incapable of acceptance; and
  - Government’s attempt to “clarify” pricing = bid repair

- Tread carefully – seek legal advice if unsure
Pricing

- Words and numbers
- Breakdown of bid price
- HST

*Maystar v. Tn of Newmarket (2009 Ont. CA)*

- Maystar bid: $35,524,000 incl GST ($33,200,000 + GST)
- Bondfield bid: $33,000,528
- GST: $2,346,960 (actually = 7% of $33,528,000)
- Total: $35,874,960 (actually = $33,528,000 + 7%GST)
- Bondfield: base price = correct
- Bondfield’s corrected price: ($33,000,528 + GST) = $35,310,565
Timing

• What does “submit by” mean?
  – 3:00 (means up to 3:00:59)
  – 3:00:00 (means on the dot)
  – Say “submit before” (means up to 2:59:59)

• Whose clock?
  – Owner’s?
  – Greenwich? \[ Specify \]

• If late
  – Offer for Contract A expired
  – Return unopened: always
Yukon v. P.S. Sidhu Trucking (YKCA, 2015)

- Tender for bridge replacement
- I/B: Tenders must be rec’d “before the specified time” (16:00pm, August 15, 2013)
- Newspaper / online: Tenders will be rec’d “up to and including” 4:00pm
- Envelope submitted 3:59pm
- PSS: Is there time to correct and re-submit?
- YG: Yes; have until 4:01pm
- PSS re-submits; envelope time-stamped 4:00pm
- Ct application: Was PSS’s bid on time?
Summary

- **INTENTION**: know the what and how
- **COMMUNICATION RISKS**: lost time, resources, and reputation
- **PRICING**: know budget and be realistic
- **TIMING**: A late proposal is a late proposal. Enough said.
- **BID ERRORS**: mathematical errors are tricky – be very careful
Questions
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