EDUCATION GROUP WEBINAR SERIES
PRINCIPAL’S 201: PROCUREMENT AND CONSTRUCTION

September 28, 2017

Rosa L. Mauro
rmauro@millerthomson.com
416.597.4389
@RMauroMT
Agenda

1. Tendering Law: An Overview
2. Reducing Risk
3. Lessons Learned
4. Procurement Governance – CFTA and CETA
5. Q and A
Part 1: Tendering Law: An Overview

• Refresher on contract law

• Old fashioned bidding (where it all started)

• Ron Engineering: the “Big Bang”
Refresher on Contract Law

1. Road to a contract requires an offer
   • Example:
     • “I’ll sell you this car for $5,000” – offer?
     • Example:
     • “Give me your best price for this car” – offer?

2. There must be acceptance of the offer
   • Example:
     • “I’ll give you $20 to shovel my driveway” – offer?
     • How can accept?
Refresher on Contract Law (Cont’d)

Example:

• “I’ll sell you this car for $5,000” – offer?
• “I’ll give you $4,000” – acceptance?

Counter offer

• Effect = to reject original offer
• No obligation to sell for $5,000
Refresher on Contract Law (Cont’d)

Example

- “I’ll sell you my 1990 Vette for $5,000” – offer?
- What if meant my 1990 “Chevette”?
- Can we have a contract?
Bidding Until 1981

1. **BID CALL**
2. **SUBMIT BID**
3. **ACCEPT BID**
4. **OFFER**
5. **ACCEPTANCE**
6. **CONTRACT**
7. **PERFORM**
McMaster v. Wilchar (Ont CA 1973)

- Irrevocable bid for work at McMaster
- Escalator page missing from W’s bid
- MAC notices mistake and accepts W’s bid
- W refuses to sign
- Court: W not bound; does not have to sign
  - MAC opportunistic
  - Obvious mistake “trumps” irrevocability
Belle River v. Kaufman (Ont CA 1978)

- K low by $15,000; bid looks OK
- Irrevocable; bid bond
- Next day, K finds mistake and tells Owner
- Owner later accepts bid
- K refuses; Owner awards to another & sues
- Court: K not liable to owner
- Mistake disclosed before Owner’s acceptance
- “Invisible” mistake trumps irrevocability
So Where Are (Were) We?

• Irrevocable bid with bid security
• But, cannot accept an obvious mistake
• Same result for “invisible” mistake
• What use is:
  • Bid security?
  • Irrevocability?
Her Majesty v. Ron Engineering (SCC 1981)

- Ron bids $2.75 M; next bid $3.3 M
- Ron price close to HM estimate
- Ron discovers $750,000 mistake and tells HM
- HM says sign; Ron says no – made mistake
- HM: What mistake? Mistake invisible
- HM grabs $150,000 bid security
- Ron sues and …
Her Majesty v. Ron Engineering (SCC 1981)

• Ron sues and wins
• ... BUT loses at S.C.C.

HOW CAN THIS BE?
Bidding Until 1981

1. BID CALL
2. SUBMIT BID
3. ACCEPT BID
4. OFFER
5. ACCEPTANCE
6. CONTRACT
The Ron Engineering Revolution

BID CALL

SUBMIT COMPLIANT BID

ACCEPT BID / AWARD CONTRACT

OFFER

ACCEPTANCE

OFFER

ACCEPTANCE

PERFORM
Owner: evaluate bids
Bidder: keep bid irrevocable;
sign contract if awarded

CONTRACT A

CONTRACT B

PERFORM
Vendor: perform
Owner: pay
The Fallout from *Ron Engineering*

- Bidders bound to “invisible” mistake
- Compliant bid: 2 functions
  - Accepts an offer (for Contract A)
  - Makes an offer (for Contract B)
- Compliant bid creates Contract A
- Contract A is misleading
  - Irreversibility: Yes!
  - But, Owner has obligations too
Subsequent Cases Established

- Privilege clause will not excuse breach of Contract A
  - *Chinook Aggregates v. Abbotsford*

- Owner has implied obligation to accept only compliant bid;
  but, no obligation to accept low compliant bid
  - *MJB Enterprises v. Defence Construction*
Subsequent Cases Established

- Fairness = implied term of Contract A; Owner must treat bidders fairly and equally
  - *Martel Building v. Canada*

- Owner can be liable for breach of Contract A.
  
  Damages = bidder’s loss of profits

  - *MJB Enterprises v. Defence Construction*

**PROCUREMENT IS RISKY EVEN BEFORE CONTRACT AWARD!**
A Detour: Fairness
What is Fair?

• In procurement, fair is:
  • Not your common notion
  • Can be “nasty” or “nice”

FAIR IS FOLLOWING PROCESS: WHETHER “NASTY” OR “NICE”
What is Fair?

- Procurement documents may
  - Deny transparency
  - Reduce accountability
  - Promise arbitrariness / unfairness
  - Abuse bidders

IRONY: IF THAT’S WHAT’S DELIVERED, IT’S FAIR!
Where Are We Now?

- *Ron* addressed invisible mistake
- Contract A has moved on
- Contracts bind both ways
- Lost message in *Ron*: Owner has obligations
- Owner’s obligations “controlled” by the bid docs
- Fairness potent implied term
- Invisible mistake: minor issue
Part 2: Reducing Risk

1. Risks? What risks?
2. Effective Drafting
Overview of Procurement Process

- Procurement Process Planning
- Preparation of Procurement Documents
- Issuance of Procurement Documents/Management of Process
- Evaluation of Submissions/Award
- Negotiation/Execution of Contract
- Contract Management
Risks? What Risks?

- Risk of awarding to the “wrong” bidder
- At risk = $$: bidder’s lost profit
- Acting in good faith ≠ defence
Risks? What Risks?

- *Tectonic v Middlesex (Twp) (Ont., 2004)*
  - Twp awards contract based on Consultant’s recommendation
  - Tectonic sues Twp for breach of Contract A
  - Twp claims over vs. Consultant
  - Ct: contract awarded to non-compliant bidder
  - Ct: Consultant recommended award
  - Ct: Consultant pays
Risks? What Risks?

- *Stanco v B.C. (Ministry) (BCCA, 2006)*
  - S = low bidder
  - Consultant begins post-closing “negotiations”
  - C recommends award to other than S as result of negotiations
  - S sues BC; BC claims over vs. C
  - Ct: “negotiations” = bid shopping
  - Ct: Consultant’s conduct caused BC to breach Contract A with S
  - Ct: Consultant liable to BC
Effective Drafting

• Drafting contract to govern award of Contract B

• Offer = issuance of bid package

• Acceptance = submission of compliant bid

• Treat Contract A as a contract

• State intentions: be clear

• Plan for the unexpected
Public Sector Procurement

- What is BPSAA?
- Why was BPSAA passed?
  - eHealth
  - Bellamy Report (City of Toronto computer leasing)
- How does BPSAA work?
  - Defines those covered; incl. Hospitals, Universities, School Boards, etc.
- Section 13 of the BPSAA states the “The Management Board of Cabinet may make guidelines with respect to the procurement of goods and services by publicly funded organizations.”
Public Sector Procurement (cont’d)

• BPS Procurement Directive
  • Governs procurement of goods and services
• Applies to all types of procurements:
  • Tenders, bids, proposals, quotes
  • RFPs, RFTs, RFQs, RFSQs
Public Sector Procurement (cont’d)

• How does BPS Procurement Directive work?

• 2 Major components:
  • Adopt “Code of Ethics”
  • Follow 25 Mandatory Requirements

• Exemptions? A few

• Consequences of non-compliance?
Public Sector Procurement (cont’d)

• Some Mandatory Requirements
  • Must use if value of procurement > $100K
  • Post on country-wide electronic database, eg. Biddingo, Merx
  • Must disclose evaluation criteria and weight
  • Highest scoring (compliant) respondent wins
  • Debrief
  • Dispute resolution

• Formerly subject to the Agreement on Internal Trade (AIT) which, effective July 1, 2017, has been replaced by the Canadian Free Trade Agreement (CFTA)
Effective Drafting

1. Intention
2. Time
3. Listing Trades
4. Evaluation Criteria
5. Privilege clause
1. Intention

- Instructions to Bidders
  - Procurement Planning/Procurement Governance
  - Key to Contract A
  - Describe process
  - State intent
  - All clauses important
  - Judicious use of “shall” / “may”
  - Describe consequences of non-compliance
2. Time

- 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?

- If late
  - Offer for Contract A expired
  - Return unopened: **always**
3. Listing Trades

- Why important?
  - Trades are 95% of job
  - Who does work matters
  - Stops bid shopping

- How many should ask for?
  - Request only essential

- Common Problems:
  - Proposed sub is: Panes R Us / Glass & Stuff / C—Clear
  - Proposed sub is: N/A
  - Proposed sub is: _________
4. Evaluation Criteria

- Evaluation criteria makes or breaks your procurement
- Should reflect what you are truly asking for
- Avoid:
  - Unclear evaluation criteria
  - Irrelevant criteria
    - If you don’t need it don’t ask for it
  - Criteria that isn’t comparing “apples to apples”
  - Subjective criteria
5. Privilege / Discretion Clause

• Around since mid-19th century:
  • “the lowest or any bid not necessarily accepted…”

• Beware: What it says ≠ what it means!

• Usual clause means:
  • Can only award to compliant bidder

• But, do not have to award to low compliant bidder **
5. Privilege / Discretion Clause (Cont’d)

- Privilege clause will not:
  - Excuse unfairness
  - Permit a secret agenda
  - Permit breach of Contract A
- Can use if have valid business reason
Part 3: Lessons Learned

• Examples of things gone wrong

• Learning from others’ mistakes:
  • E-tendering
  • Advising bidders
  • Clarifying bids
Electronic Tendering

- Bids submitted electronically
- Biddingo; Merx
- Process ≠ change law
- *Coco Paving (1990) v. Ontario (Transportation)* (2009 Ont. CA)
- MTO tender for wk on Hwy 402 ~ $60 M
- Tender docs:
  - Must complete on-line Bid Form
  - Must submit electronically
  - Must be received by MTO’s servers before 3:00:00pm
Electronic Tendering – Coco Paving (cont)

- Coco’s bid rec’d 3:28:05pm
- Coco: computer glitch
- Ct: MTO should consider C’s bid
- Appeal by Bot Construction
- Bot: no glitch; C’s bid stuck in internet traffic jam
- CA: C took “calculated risk” in waiting to access MTO’s electronic bidding system
- Receipt of bid was critical
- Merely “sending” bid ≠ receipt by MTO

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

- Ct: Bid was late
- YG: Awards to 2nd low bidder
- PSS: Appeals; sues YG, employees
Clarifying Bids

- Words and numbers
- Breakdown of bid price / HST
- What if don’t match / add up?

**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
Summary of Procurement Issues

- Treat Contract A as a contract
- Contracts bind both ways: Owner has obligations – AND liabilities
- Owner’s obligations (and liabilities) governed by the bid docs
- Reduce risk by ensuring that
  - Use appropriate procurement process
  - Docs reflect intentions / process
PART 4: Procurement Governance

- Canadian Free Trade Agreement (CFTA) replaced AIT effective July 1, 2017
- Comprehensive Economic and Trade Agreement (CETA) Effective September 21, 2017
- Moving forward, BPS Procurement Directive must consider both CFTA and CETA
- BPS Procurement Directive not yet amended and those aspects of the BPS Procurement Directive not addressed in either the CFTA and CETA remain in effect
- BPS cannot be looser than CFTA or CETA
Procurement Governance - CFTA

Notable provisions in Chapter 5 of the CFTA include the following:

1. Legitimate Objectives – Article 501
2. General Principles/Duty to Compete – Article 502
3. General Procurement Rules – Article 503
   - Value
   - Extensions
   - Local Preference
   - Canadian Content
4. Thresholds – Article 504.3 to 504.4
5. Buying Groups – Article 504.5 to 504.9
Procurement Governance - CFTA

6. Public-Private Partnerships – Article 504.10
7. Non-Application – Article 504.11
8. Tender Specifications and Tender Documentation – Article 509
9. Time Periods – Article 511
10. Limited Tendering – Article 513

Full copy of CFTA available online at https://www.cfta-alec.ca/
Procurement Governance - CETA

Notable aspects of CETA include the following:

1. Chapter 19 addresses procurement.
2. CETA protocols contemplate a 5 year grace period for establishing an electronic single point of access for posting bid opportunities. Article 506.3 of CFTA acknowledges this as an international obligation.
3. Largely consistent with the CFTA.

Full copy of CETA available online at
QUESTIONS