

S U C C E S S S



Facing the Tender Process with Confidence

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IPWEAQ Central and North Queensland Branches
Conference – Winton

7 & 8 April 2005



McCULLOUGH ROBERTSON

l a w y e r s



‘Any exercise of power which potentially has the benefit to confer considerable financial rewards upon those favoured by such an exercise of power, and to deny such financial rewards to competitors, is self evidently a power susceptible to bribery and corruption’



Improprieties

- When to call tenders and expressions of interest;
- Order-splitting;
- The specialist contract;
- A supplier's stranglehold;
- Unfair advantage;
- In-house bids;
- Local supplier preference;
- Specifications and non-conforming tenders;
- Conflicts of interest; and
- Related or linked tenderers.



Matters which may give rise to legal liability:

- any failure to adhere to stated assessment criteria by the introduction of undisclosed policies;
- the acceptance of a non-conforming tender where such possibility is not averted to in the published assessment criteria; and
- failure to adhere to standard procedures, assessment criteria and time frames.



How to avoid legal liability:

- a) clear statements to the tenderers of the proposed procedures to be adopted;
- b) confirmation of the evaluation procedures;
- c) clear outline of the assessment criteria; and, above all,
- d) a dedicated and unwavering application of the stated criteria and procedures.



Example

Chinook Aggregates Limited v District of Abbotsford

'the lowest or any tender will not necessarily be accepted'



Representations by Council

1. Council does not make any representations (express, implied or inferred), or provide any undertakings to Tenderers other than to invite them to submit a Tender.
2. Council is not obliged to negotiate or sign a Contract with any Tenderer.



Representations by Council cont...

3. Council may, by notice in writing to the Tenderers, terminate this tendering process at any time at no cost or loss (contingent or otherwise) to Council and the Tenderer shall have no right or entitlement for time or financial compensation whatsoever (including, without limitation, to a claim for economic loss or loss of opportunity) from such termination.
4. Without limiting the terms of Clause 3 hereof, Council is not responsible for, or liable to pay for, costs, expenses, losses or damages which may be incurred by any Tenderer in the preparation or submission of its Tender.



Tender requirements

In their Tenders, Tenderers must provide all information required by the Tender Documents, including:

- (a) a completed Letter of Tender;
- (b) details of how the Tender meets the requirements of the Tender Documents;
- (c) details of any special conditions pertaining to the Tender;
- (d) a Statement of Departures;
- (e) the information as set out in the Tender Schedules; and
- (f) any other information required by the Tender Documents.



Managing the Evaluation Process

4 x risk minimisation strategies:

- adequate scoping;
- meaningful evaluation criteria;
- plan the evaluation process;
- appropriate reporting.



Strategy 1 – Scope of the work

Inadequate scoping – leads to:

- unresponsive submissions;
- amendments to documentation;
- evaluation difficulties;
- loss of commercial advantage;
- lack of responses.



Strategy 2 – Evaluation criteria

Evaluation criteria – the tools to ‘test’ the tendered solution:

- helps to clarify scope;
- enables meaningful comparison.



Strategy 3 – The evaluation process itself

Evaluate and report:

- focuses the mind;
- detects flaws;
- provides signposts;
- creates an audit trail,
- which leads to a fair and transparent process.



Strategy 4 – What is a tender evaluation plan and when should it be prepared?

- Background;
- Purpose;
- Objectives and principles;
- Indicative timeline;
- Evaluation methodology;
 - identify evaluation criteria;
 - weighted/mandatory;
 - set weightings;
 - agree a rating scale;
 - scoring and comparison;
- Identify evaluation panel and decision maker.



The tender evaluation report

Reporting:

- State reasons for procurement;
- Summarise evaluation process;
- Analyse tenders by reference to evaluation criteria;
- Scoring sheet;
- Make recommendation;
- Justify recommendation.



Conclusion

- the procedure should reassure tenderers that, even if the terms are tough, the procedures will be reasonably applied;
- sufficient time should be allowed for proper due diligence;
- set terms which reduce, as far as possible, the pricing for risk;
- identify the evaluation method with sufficient flexibility to ensure that the inviter retains control of the process;



Conclusion cont...

- the tender process should be reviewed and signed off by the inviter at senior levels internally before issued to ensure that the integrity of the process is retained;
- once inviters have selected a tender process, they should stick to it; and
- an appropriate allocation of risk and a fair and reasonable application of the procedures, during tendering and post-award, will significantly reduce the risk of subsequent dispute.