

# Evaluating evaluations of RFPs



Kevin McGuinness



Stephen Bauld

USUALLY TENDERED CONTRACTS are awarded to the lowest qualifying bid. For this reason, true tenders are useful in only a limited range of cases: where the products offered from different suppliers are essentially interchangeable, and where the organization knows exactly what it wishes to buy. When the products or services offered by each supplier are unique, or when the organization seeks to compare the features and range of products and services being offered before deciding to buy, it is better to proceed by issuing a request for proposal (RFP).

Although many organizations believe that they are free of legal risk if they use an RFP rather than a tender, the truth is nowhere near that simple. There are numerous cases in which public authorities have been successfully sued for not treating the proponents in a manner that is fair, according to the rules governing the RFP.

An RFP constitutes an invitation to proponents describing the intent and concerns of the organization issuing the RFP and prescribing how proponents are to respond. The project description will usually set out a general description of the organizations' requirements including location constraints; information on space requirements; performance requirements and other technical specifications; warranty and maintenance requirements; and other factors that the organization intends to take into account in the award of the contract. The performance and service requirements set out in the project description will usually constitute the minimum requirements. Proponents will be invited to bring forward base-level proposals that address these minimum requirements. In addition, proponents will also be encouraged to investigate and recommend enhanced value options, including optional features or higher grade products which will result in improved performance, a more cost-effective solution or that otherwise better meet the stated requirements.

When awarding the contract, a properly structured RFP process allows the issuing organization to consider the full range of options, amenities and enhancement features offered by a proponent. The organization will reserve the right to award the contract based solely upon the evaluation criteria set out in the RFP, even if the effect of so doing is to cause the contract to be awarded to a contractor other than the one that submitted the lowest bid. Thus bid evaluation is a critical aspect of the award of the contract.

The theoretical goals of the bid evaluation process itself can be summarized simply enough in the following two statements:

- The process should be transparent; it should be possible for an objective third party to see how decisions were made.
- The process should be fair. The bids should be evaluated on the criteria that were established when bids were solicited (subject to such modifications as may have been properly brought to the notice of the bidders). Unless such fairness

prevails, the organization has no certainty that the bids it is evaluating will offer the best possible combination of price and functionality.

That at least is the theory. Unfortunately, it is often only during the process of bid evaluation that the fundamental flaws, if any, of the specifications become evident. When it is discovered that the specifications are poorly conceived, it is usually in one or all of the following areas:

- important requirements were left out of the specifications;
- specifications included in the process prove to be irrelevant to functionality; and
- specifications are redundant.

To rectify the problem, people will often try to adjust the evaluation process so that problems with the specifications are negated. This presents both legal and corporate governance concerns. Accordingly, *in our opinion* it is impossible to over-stress the need to take great care with the specifications for the project.

However, there are also problems peculiar to the evaluation process itself, most frequently:

- The weighting of evaluation criteria is unrealistic.
- There are too many criteria of assessment.
- The criteria of assessment are so subjective, that it is difficult to reconcile or justify the approach that evaluators have taken towards scoring.
- The evaluators are not properly qualified to carry out an assessment (at least with respect to particular aspects of the assessment criteria). This is essentially no more than a problem in assembling the evaluation team and in the manner of assigning work to that team, which can usually be circumvented by including language in the contract documents along the following lines: "The evaluation team may include such members of the [organization's] staff and outside consultants as the [organization] considers necessary or advisable to provide proper technical (including legal and financial) evaluation and analysis of the proposals received. Evaluators may not individually score every component, depending upon the background and expertise required. The evaluation team will meet as required to create a team score for each proponent proposal."

Unfortunately, the solution of the first three of these problems is not as easily accomplished. Stay tuned to this space for a series of future articles that will suggest ways to deal with these problems. *mm*

---

Steve Bauld is purchasing manager at the City of Hamilton, and Kevin McGuinness is a lawyer with Ontario's Attorney General.