

Too much information

Capping the number of assessment criteria

As explained in previous articles, the specifications and evaluation criteria in any RFP or tender should relate directly and significantly to the functional needs that a given supply is intended to address. However, even when all the assessment criteria are pertinent to the evaluation, too many may become a problem. A major capital project will often have so many different purposes and requirements that the list of specifications and minimum qualifications can run into the hundreds of pages. If there are 200 or more things that one is looking for in a bid, giving each of them equal weighting means that each will have a value of 0.5 percent or less in the final decision. Clearly, *in our opinion*, the number of criteria needs to be managed.

The mere fact that a particular specification is mandatory does not mean that it requires a numerical weighting. On the contrary, mandatory criteria generally require no weighting; if they are not satisfied, then the bid is non-compliant. For instance, if one were to buy a car, the need for wheels is clearly a mandatory specification, and if one were to compare two cars, one would be unlikely to give much weight to the fact that both of them have wheels. Only when a particular item is deemed so important that no purchase will occur if it is not present, should it be given a weighting. It should be set as a minimum threshold – almost like a light switch; if the light is on, the project proceeds, but not otherwise.

Another method of reducing the number of assessment criteria is to group related criteria together, giving them a collective score based on the overall extent to which they address the requirement. Some care is needed in doing this, however, in order to make sure that the process of evaluation conforms to the *Ron Engineering* case law,¹ requiring that public tenders and RFPs be conducted in a manner that is fair. Either the criteria upon which they are being assessed must be clear to the proponents, or it must be made very clear to bidders that the procuring organization is reserving a great deal of discretion as to the manner in which it carries out the evaluation.

The possibility of reserving discretion brings us to the third problem with respect to assessment criteria: they are often so subjective that it is difficult to reconcile or justify the approach that evaluators have taken towards scoring.

Since the decision of the Supreme Court of Canada in *MJB Enterprises v. Defense Construction (1951) Ltd.*,² it has been clear that a purchasing authority may contract entirely around the duty of fairness, by employing a properly worded contract. The basic



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rule is that reserved privileges and discretions must be clearly set out. Provided that they are stated in unambiguous terms, the court will give effect to them. Thus, in principle, it is possible to reserve virtually complete discretion over evaluation. Nevertheless, although legally possible, there are a number of reasons why it may be ill advised from a practical perspective:

- the reservation of too much discretion may prompt qualified bidders not to submit a proposal;
- allowing evaluators broad discretion may not give them sufficient guidance as to the priorities of the procurement, with the result that the purchase decision may not reflect a true need; and
- overly broad discretion can create a corporate governance risk.

Given these concerns, it is clear that a considerable measure of corporate control needs to be built into the procurement process, whenever the procuring organization wishes to retain overall discretion – in other words, the final purchase decision should require high level approval. With limitations on the extent to which high level decision makers can become involved in daily procurement decisions, the last remaining (and most practical) option is to keep the number of assessment criteria to a bare minimum. ❧

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¹R. v. *Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267 (S.C.C.).

²[2000] S.C.C.D.J. Lexis 53 (S.C.C.).