SUMMIT
THE BUSINESS OF PUBLIC SECTOR PROCUREMENT

LEGAL NOTES PUBLIC PROCUREMENT AND THE LAW

Comply or else, says court

by Robert C. Worthington

In a previous column, I referred briefly to the problems a public sector supply management professional faces in choosing a competitive bid procurement model. In this column, and the next several, I will explore those legal obligations in more detail.

The most recent pronouncement in this area by the Supreme Court of Canada (April 22, 1999) is the case of *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd. (1999) 195 W.A.C. 3609 (SCC)*. This decision appears to be causing some problems for some public and private procurement professionals.

The facts in this case are relatively simple. Defence Construction was seeking a contractor to perform construction work via their standard Invitation to Tender. The invitation required bidders to provide a single price for all types of fill. The lowest bidder, Sorocan, did not do that but Defence Construction awarded them the contract anyway, on grounds that this non-compliance was merely a clarification. MJB Enterprises, the next lowest bidder, who was compliant, sued, arguing that Defence Construction had no right to accept a non-compliant bid.

The Supreme Court agreed, holding that it was an implied term of this particular invitation that the Owner (in this case, Defence Construction) would only accept a fully compliant bid. That disqualified Sorochan. The court then decided that MJB, as the lowest compliant bidder, would have received the award because the Owner had a policy of awarding to the lowest bidder. Damages equal to their lost profit were awarded to compensate MJB for the lost opportunity. What the court did in this case has been the law of contract (offer and acceptance) in Canada for over 100 years.

Queen v. Ron Engineering (1981, SCC) established that an Invitation to Tender (or a Request for Proposals or a Request for Quotation) is a legal offer to all potential bidders to participate in a legally binding process of competition. If a bidder wants to participate, they must match the terms of the offer (i.e. follow the Instructions to Bidders – exactly) when they bid. If the bid does not match the invitation's mandatory requirements it is not compliant and must be disqualified. The bid (acceptance) must match the invitation (offer). There is no other choice.

http://www.summitconnects.com
Originally appeared in *Summit* magazine, December 2000 issue.

And there is nothing an Owner can do about any non-compliance after the fact. If an Owner says "this is mandatory," then the bidders bid on that basis. Those who follow the rules as set out by the Owner in the invitation may compete; those who don't, can't. That is fair and that is the law, at least for competitive bidding in Canada. Compliant in Canada means 100 percent compliant to the words in the Invitation to Bid, both for the bidder and for the Owner in the evaluation process.

However, Owners can word the Invitation to Bid in such a way as to give themselves the power to waive non-compliance. The Owner must do this up front, in the Invitation document and then use it fairly with legitimate reasons.

Public sector Owners have started to do this, in a variety of ways, from "we can waive minor non-compliance" to "we can waive any non-compliance." It is perfectly lawful for an Owner to do so, providing the waiver has been disclosed in the invitation and is applied fairly. In my next column, I will look at two cases where the Owner did exactly that and one where the Owner did not and paid the price.

Meanwhile, public sector procurement officers may want to review their policies and substitute some concept of "award to best value bidder" rather than "award to lowest bidder."

Robert C. Worthington is president of Worthington & Associates Ltd, a Vancouver-based company specializing in business education and training in purchasing law. He has lectured on law for public and private corporation in-house seminars, as well as at the University of British Columbia. He is the author of the *Purchasing Law Handbook* and several legal texts for various public and private clients.

Originally appeared in *Summit* magazine, December 2000 issue.