# Tender or RFP?

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CANADA'S LAW OF tender derives from three decisions of the Supreme Court of Canada: *Ron Engineering v. The Queen*; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*; and *Martel Building Ltd. v. Canada*. Under it, an implied contract (known as a tender contract or contract "A") will arise where a competitive contract award process is employed that obliges the bidder to take up a contract, if offered, and that requires the customer to:

- comply with the terms and conditions of the tender or other competition (tender);
- limit the contract competition to "compliant" bids and suppliers (as determined by the rules of the tender), no matter how attractive other bids may appear;
- treat all bidders fairly; and
- award or reject bids based only on the criteria expressed or implied in the terms and conditions of the tender.

Although the foregoing apply most clearly in the case of a contract awarded under a tender, they can also apply in the case of contract competitions conducted under a request for proposal (RFP).

The hallmark of a true tender is that the contract is usually awarded purely by reference to price. Thus the normal rule is that the lowest compliant bid wins. In contrast, an RFP tends to take into account a much wider range of criteria than price alone, many of which are capable of only a subjective evaluation.

The exact terms of any contractual obligations will be determined by the customer, since those rights arise by way of implication when the terms of the contract competition are fixed. Purchasers are permitted by law to specify any terms and conditions that they consider advisable. Purchasers may reserve to themselves the right to award contracts to bids other than the lowest, or not to award contracts at all, to enter into negotiations with one or more bidders, or to take into account a range of non-price conditions in selecting a supplier. The terms may allow the customer to prefer or exclude individual suppliers or an entire class. Purchasers may also elect whether they open the competition to all potential suppliers, or to only pre-qualified suppliers. They may also impose any number of criteria on bidders such as prior similar work experience, the absence of claims or prior litigation, a requirement for a local base of operation, scheduling criteria, composition of construction teams, and so on. This overall freedom is subject to only three apparent limitations:

- Courts have exhibited a strong preference for protecting the integrity of the tender system, and will give effect to terms that undermine the competitive nature of a tender only when that intent is clearly manifest.
- General language, such as a right to reject "any tender" is rarely effective; in contrast, specific, clear language is usually accepted by the courts;
- Any reserved right will be narrowly construed against the purchaser setting the terms of the competition.

One other possible rule also applies:

- Reserved rights may be ignored by a court where they are hidden in an obscure part of a lengthy document and unlikely to come to the notice of even a careful reader.

Following the *M.J.B. Enterprises Ltd.* decision, purchasers often inadvertently entered the realm of tender law. Over time, many government purchasing agencies became adept at working around the law and avoiding liability. In principle, there is nothing wrong with customers adopting such language. Governments, like all customers, need the right to take into consideration a wide range of conditions beyond the bid price, when deciding what or whether to buy, including: the full lifetime cost implications with respect to each bid – life-expectancy, training costs, length and scope of warranty coverage, maintenance requirements, the compatibility of a bidder's products with existing equipment, computer software and hardware, the capability to generate reports suitable to the government's existing reporting requirements, the need to secure timely and reliable sources of supply, to discontinue reliance on obsolete technology, and the risks implicit in unproven technology.

Many customers have learned to their cost that it is unwise to base a decision only on the bid price, and to ignore any extraordinary or unjustified disparity between the lowest bid and the other bids received; the benefit in employing suppliers who have a proven track record of successful delivery and good reputation within the business community for integrity and competence; and the prior record of a bidder as a supplier.

Unfortunately, much of the case law expounding the law of tender fails to reflect the importance and legitimacy of these concerns. It is for this reason that government purchasers have become very careful in the wording of their contracts.

Suppliers considering bidding should always review the instructions in the tender or RFP carefully before submitting a bid. Suppliers concerned about the commercial risk associated with submitting a bid in the absence of the rights afforded under tender law or where a customer reserves numerous specific privileges to itself allowing it almost complete discretion in the award of the contract should always obtain legal advice. In addition, such advice should be obtained where the instructions to bidders contain a statement that:

- No contractual rights will arise by virtue of the submission of a bid in response to the invitation for tenders.
- Allows bidders to withdraw bids, or that does not oblige them to take up a contract if it is awarded to them.
- All bids that are submitted will be accepted for consideration only on the condition that bidders will have no cause of action in respect of the manner in which bids are evaluated or the contract is awarded.
- The award of the contract does not guarantee any specific order volume, or any exclusive right of supply.
- The customer reserves a right to cancel any contract awarded on short notice with no compensation.

Government customers often find it necessary to include such provisions to protect their rights, and such flexibility is both necessary and desirable. However, suppliers also need to understand the basis on which their bids are submitted.

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