

e-procurement e-performance

by George S. Takach

IN GOVERNMENT IT ENABLEMENT of the purchasing function has brought tangible benefits to jurisdictions that implemented sophisticated, online tendering and bidding systems.

Consider www.bcbid.gov.bc.ca, the British Columbia government's e-procurement website, offering prospective bidders on government projects a range of information related to the relevant tender. In this sense, bc.bid fulfills the first objective of government going online – namely, “iGovernment” (the process by which governments save costs and increase ease of use by uploading paper-based forms onto a website, so the public can download them).

Some government online procurement sites only have this capability, but on bc.bid a supplier can register for the site's bid-watching service. The supplier creates a profile of the sorts of government contracts that interest them, and every time one becomes available, the site automatically sends them an email. The service is easy to implement; produces more bidders per project; and suppliers do not miss a bidding opportunity.

Moreover, companies can post their bids and proposals online at bc.bid making the site more than just information; it is interactive. The result is easier and cheaper bidding, so the government gets more participants in each bid. And while each bidder's bid-to-win ratio may drop at bc.bid due to greater competition from the larger number of bidders, ultimately, as other Canadian governments adopt similar e-procurement systems, the total number and ease of bidding opportunities for the bidders will expand, eventually making online bidding positive for bidders as well.

While the benefits from online bidding are clear, some governments (who have not adopted e-procurement) and potential bidders still have concerns about the legality of online tendering, asking: Is online bidding as legally effective as the traditional paper-based bidding? The answer is “yes.”

Process, technology and the law position government bidding websites to bring real benefits

Over the past 10 years, several legal developments related to effecting commerce over the Internet have coalesced to produce as safe and sound a legal environment for doing business electronically as has long existed for doing business with paper-based tools such as written contracts.

Every jurisdiction in Canada (except the Northwest Territories, but including Nunavut and Yukon) today has an e-commerce statute like Ontario's *Electronic Commerce Act* or BC's *Electronic Transactions Act*, which establishes several important principles.

One is that information will not be legally ineffective merely because it is in electronic form. However, not all information in

electronic form is legally effective. Information, whether electronic or paper-based, can be ineffective, such as when it results from fraud, mistake or lack of capacity, as with a minor. Thus, it is imperative that online bidding systems are designed to enable the creation of binding contracts.

Canada's e-commerce statutes also provide that any legislative rule requiring that certain information be in “writing” may be satisfied in an electronic environment. Equally, they confirm that an “electronic signature” is any electronic information that a person creates or adopts (including a PIN or password) in order to sign a document, so long as it is in, attached to, or associated with the document. There are a few exceptions. Manitoba has not yet implemented the e-signature part of its e-commerce statute; PEI requires a “digital signature” under its e-commerce statute (a more secure version of an e-signature); and the NWT, as noted above, has no such statute. In these three jurisdictions, reliance can be had on the common law, which has recognized in Canada the effectiveness of e-signatures through judge made law.

The e-signature provisions of the e-commerce statutes in the other jurisdictions confirm statutorily the ability of websites to implement various technologies and processes to authenticate users. For example, bc.bid issues a password (e-bidding key) that a bidder uses when submitting binding bids. Each password designates only one particular entity. Thus, bc.bid is comfortable knowing who submitted which specific bid. This type of process is blessed by BC's *Electronic Transactions Act*.

The federal and various provincial evidence laws have been amended to facilitate e-commerce. But, is a copy of the electronic bidding information as admissible as evidence in court as the traditional paper-based bidding material? Again, the answer is “yes,” provided you can show that your computer system was working properly at all the relevant times.

Therefore, it is a “best practice” to keep a log of the operational history of your computers to show how rarely they did not operate properly and, that when there was a computer glitch, it didn't result in a corruption or loss of data. For example, bc.bid keeps an audit trail of the operational history of their online system.

Canada now has an official standard, called *Electronic Records as Documenting Evidence*, that sets out how to establish the integrity and authenticity of electronic records through the creation of an electronic records management program. Your program would be reflected in a manual that would address security, quality assurance, indexing and various other matters. If you follow this program, it is unlikely that a copy of your electronic records would not be admitted as evidence in court should it ever be required.

Judges, through several helpful decisions dealing with various novel questions emanating from online commercial arrangements,

Disclaimer: This column is intended to convey brief, timely but only general information and does not constitute legal advice; readers are encouraged to speak with legal counsel to understand how the general issues noted above apply to their particular circumstances.



are also helping to create a legal environment hospitable to e-procurement.

In one Canadian case, the court concluded that clicking the “I agree” button at the end of a set of terms and conditions presented on a computer screen is functionally the equivalent of signing a paper-based contract. When one party in the litigation argued that he hadn’t read all the terms because they weren’t all displayed on the single initial screen, the judge (sensibly) responded that neither does a signatory to a multi-page paper contract see all the terms on one page – they have to turn the pages.

In another case, a judge was asked to approve a novel online shareholder voting system where shareholders were sent a password by email. They could then register on an Internet site where they would vote. The question to the judge was: Is

such a system as good as the traditional paper-based means of voting where ballots/proxies are sent to shareholders by regular mail, shareholders mark the ballots and return them by regular mail?

The judge concluded that the online method is to be preferred; it is safer, more secure and more efficient. Neither system is perfect; both are capable of being subject to fraud, but the key point is that the paper-based process itself was not immune from forged signatures so, the electronic system should not seek perfection either. Rather, both should aim at a reasonable degree of security and authenticity.

That the Canadian legal environment today facilitates e-commerce and e-procurement is only half the battle. The other half is to carefully design your e-procurement website in a manner that ensures that binding bids and contracts are indeed made on it. Bidders should register on the site, and, as part of the registration process, agree to some sensible and even-handed terms and conditions. Often, operators of the site make such terms far too one-sided by including provisions that are extremely onerous on users. In the consumer context, such overreaching terms are sometimes found to be unenforceable by courts. Even in the commercial world, it is a good idea to use sensible, even-handed terms.

For example, some e-procurement site operators say, in their terms, that they can discontinue the online service without notice to users of the site. Imagine the scenario where a bidder has come to rely exclusively on the site (and quite reasonably so; the government wants to wean bidders off expensive paper-based processes). The bidder submits an online bid only to be told it was never effectively received because the online procurement site (without notice) had been terminated. One wonders whether the bidder would have any recourse against the government, notwithstanding the site’s terms and conditions to the contrary.

In short, draft the legal terms that bind the bidders (and the entity hosting the site) carefully and sensibly and then parties using the site can be confident that their e-procurement activities are as effective as traditional paper-based measures. *MM*

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