

# The tender trap

NOT LONG AGO, A veteran CAO told me he had discovered the magic of the request for proposals (RFP) over the tender document. He had bought many fire trucks during his long career, always on the basis of a tender. But once he had what he thought was the lowest price available, he'd spend another 15-20 percent over the base cost of the vehicle to retrofit it, adding 2-3 months to the purchasing cycle, not to mention the management time involved in contracting for the add-ons. The CAO questioned whether he was getting best value from his purchases. He was ready for something new – the RFP.

## *Tenders are not always the right tool to get what you really want; RFPs might be your answer*

In the RFP, the CAO described the functions he wanted in his new fire truck and let the bidders propose the solution. The resulting fire truck RFP was a blazing success. The municipality got **all** it wanted and at the price it would have paid had it issued a tender and focused on price alone. Also, the CAO was pleased with the transparency associated with the RFP – a fundamental issue highlighted again in the recent decision of the New Brunswick Court of Queen's Bench, Trial Division.

In *Cherubini Metal Works Ltd. v. New Brunswick Power Corporation (Cherubini)*, the purchaser required co-ordination of a number of contracts and contractors in work associated with an operational generating plant. The work site was relatively small and confined, and the overall project worth in the range of \$18 million. Cherubini's bid was the lowest, with the second lowest some \$300,000 higher.

The tender contained the standard privilege clause where the purchaser, NB Power, reserved the right to "reject any, or all, tenders for any reason, or to accept any tender which NB Power in its sole unfettered discretion deems most advantageous to itself." The tender also included a provision entitled "Evaluation Criteria," where NB Power reserved the right to consider (a) schedule, (b) past experience of similar work by the contractor and its proposed subcontractors, (c) quality, and (d) safety. The relative weight allocated to each criterion was not shown in the tender.

NB Power was familiar with the work of the second lowest bidder and its proposed subcontractor, as they were New Brunswick-based companies with whom NB Power had a past relationship. NB Power was not familiar with Cherubini, a Nova Scotia company, and its proposed subcontractor. As a result, to help it arrive at a decision, NB Power launched a full investigation of Cherubini and its subcontractor, requesting information from Cherubini about individuals, past projects, and visiting Cherubini in Nova Scotia. In

the end, NB Power concluded that Cherubini's lesser experience with the type of project contemplated could affect the project schedule, so NB Power selected the second lowest bidder to perform the project work.

Among other things, Cherubini argued that NB Power (i) decided the case on the basis of an undisclosed preference, (ii) was under a duty to disclose the relative weight of each criterion, and (iii) breached its duty to treat all bidders fairly by launching an investigation of Cherubini and not the second-lowest bidder.

The Court appeared to recognize that NB Power had given consideration to its past relationship with the second-lowest bidder, an undisclosed criterion, but that in the end NB Power had relied on the result of the investigation to prefer the second-lowest bidder. The Court also decided, on the basis of prior court decisions, that NB Power was under no legal requirement to disclose the weight to be attached to each criterion, and that a buyer can investigate any bidder it wishes, if it decides it knows the other compliant bidders. As the Court said, "NB Power knew [the second-lowest bidder] and its subcontractor. It knew their capabilities."

There is much in the reasoning of the New Brunswick Court of Queen's Bench, Trial Division that gives rise to concern.<sup>1</sup> But from a practical perspective, perhaps the bigger concern is the use (or misuse) of the tender when the procurement format of choice should clearly be an RFP. This is a significant issue in Canadian procurement, one that ignores the need for transparency in procurement.

It is the reality of modern procurement that most buyers want to take into account much more than just price, regardless of the goods and services being procured. Large numbers of tenders explicitly include a variety of evaluation criteria – sometimes clustered in a single provision, sometimes sprinkled throughout the document – but fail to explain how such criteria will be assessed against the myth of the lowest-tender-wins. Because these criteria typically become relevant only when a buyer has a concern with the lowest bidder, they are often not well considered during the tender drafting phase, either in substance or from a process perspective. The result is that such tenders often invite disputes, as it did in *Cherubini*.

Whether in the end the reviewing court confirms or overrules the lower court's decision, the procurement process failed simply because it did not provide NB Power with the tools it needed to defend its decision to an unsuccessful bidder. It's time to look at the value that RFPs can truly provide. *W*

<sup>1</sup> As of the time of writing, a notice of appeal was filed to review the Court's decision.



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