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Developments in the law of competitive tendering, and innovations and best practices in procurement and contract management

HOW PREPARED IS YOUR ORGANIZATION FOR THE NEW AMENDMENTS AND ENFORCEMENT PRIORITIES?

Canadian Competition Law: Your Top 10 Compliance Questions in 2010

by the Competition/Antitrust Group, Osler, Hoskin & Harcourt LLP

This has been a busy year for competition law enforcement in Canada. Canada's recently appointed Commissioner of Competition, Melanie Aitken, officially took the helm of Canada's Competition Bureau in August 2009, only a few months after Canada's Parliament passed the most significant amendments to Canada's *Competition Act* in decades. The amendments, which were described in detail in the March 12, 2009 "Osler Update," carry a "get tough" theme: they increase the penalties for *Competition Act* violations such as cartels, misleading advertising, deceptive marketing and abuse of dominance, and give the Commissioner better enforcement tools for reviewing mergers.

Commissioner Aitken has also articulated an ambitious set of enforcement priorities for the Bureau, focussing on cartels; bid-rigging; mass marketing fraud and internet scams; mergers; and abuse of dominance. In addition, the new Commissioner has promised that the Competition Bureau will enforce the law, and will not be deterred by fear of losing a "responsible" case. Consistent with this promise, in April 2010, the Commissioner filed abuse of dominance proceedings in the Competition Tribunal against the Canadian Real Estate Association (CREA), alleging that CREA has used its control of the Multiple Listing Service (MLS) system to lessen competition substantially in the market for residential real estate services.

One of the more controversial amendments passed in 2009 transforms Canada's conspiracy law from one that punishes agreements between competitors only where the agreement seriously impacts competition, to one that punishes agreements to fix prices, allocate markets or restrict supply regardless of any market impact. Penalties for these agreements have also been increased to a maximum fine of $25 million and 14 years imprisonment. Ominously, removal of the "competitive effects" test from the criminal provision simplifies the task for civil (including class) plaintiffs who have become increasingly active in bringing conspiracy-based damages claims.

The amendments also add a new "non-criminal" administrative track. A competitor agreement falling outside the scope of the criminal prohibition

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may nonetheless be prohibited, where the Competition Tribunal finds that the agreement substantially lessens or prevents competition.

Given the fundamental nature of the conspiracy law amendments, which affect businesses in virtually all of their dealings involving competitors, Parliament recognized that firms required time to make adjustments, and thus suspended the coming into force of the amendments to the conspiracy provision for one year. These amendments came into effect on March 12, 2010.

The amendments have important and far-reaching implications for businesses of all sizes. To prepare for and adjust to these significant changes and a more rigorous enforcement environment, companies should consider the following questions to minimize and manage risk through compliance training and controls and maximize readiness for Competition Bureau enforcement action.

1. ***Cartel conditions:*** *Is your industry facing falling prices, shrinking demand and overcapacity?*
Since the economic downturn in 2008, many industries have been experiencing falling prices and demand. These are prime conditions for cartel activity, as employees seek to limit the damage to their businesses (and performance-based compensation). Firms need to be extra vigilant about avoiding risk, by ensuring employees are sufficiently trained and monitored to avoid this type of activity.

2. ***Risk profile:*** *Is my company or industry on the Competition Bureau's "radar screen"?*
Certain industry conditions/structures are more likely to attract scrutiny. Experienced competition counsel can help you identify and mitigate the risk.

Trade association activities involving competitors attract special scrutiny. The recent CREA case is a prime example. All companies should have in place controls to: (1) monitor which employees participate in trade associations, and (2) ensure that the associations operate in compliance with competition law rules and that participating employees are trained on these rules.

> [F]alling prices and demand ... are prime conditions for cartel activity ... Firms need to be extra vigilant about avoiding risk ...

3. ***Competitor dealings:*** *Does my company have any dealings with a competitor or a potential competitor? Do these dealings involve the kinds of activities that are prohibited in the new conspiracy provision of the* Competition Act*?*
The new conspiracy law does not require an impact on competition for an agreement or arrangement to be unlawful.

The list of prohibited activities is long: any agreement between competitors or potential competitors that (a) fixes, maintains, increases or controls price; (b) allocates sales, territories, customers or markets; or (c) fixes, maintains, controls, prevents, lessens or eliminates the production or supply of a product, may be caught by the new conspiracy provisions.

Many companies have co-operative arrangements with their competitors which may be lawful (e.g., supply arrangements in certain locations to achieve freight savings). While most arrangements will be compliant with the new law, some may now be suspect (e.g., an "understanding" with a small competitor not to compete in certain markets).

4. ***Due diligence in deal-making:*** *Do employees and management know how to handle the transfer and sharing of sensitive information in the context of a proposed acquisition or joint venture?*
How should a data room be set up to minimize the risks of inappropriate information transfer?

How should the parties deal with pre-merger planning to avoid inappropriate "gun jumping" risks?

5. ***Closing conditions:*** *What do I need to have from the Competition Bureau now in order to close my deal?*
For most deals, the clearance process has not changed, but for some difficult deals, there are important timing issues.

6. ***Marketing and advertising:*** *Does my company carefully screen all marketing and advertising materials to ensure they are not deceptive?*
Criminal and civil penalties have been increased substantially.

Failure to manage this risk can result in substantial damage awards and costly litigation, not just disruption to marketing plans.

7. ***Protocols for dominant firms:*** *Is my company a dominant supplier of any products? If so, does it have protocols in place to minimize risk under the abuse of dominance provision?*
This risk involves real financial consequences with the introduction of multi-million–dollar penalties.

8. ***Repeal of old criminal pricing provisions:*** *Has my company considered new opportunities resulting from the repeal of the price discrimination and promotional allowances provisions of the* Competition Act*, and the de-criminalization of the price*

maintenance provisions?
New flexibility enables suppliers to charge different prices to competing purchasers and gives them greater flexibility in controlling resale prices without potential criminal liability.

9. ***Search and seizure checklist:*** *Does my company have a checklist of procedures to follow in case the Competition Bureau searches our premises or databases?*
The Competition Bureau and police can show up at your premises without any advance warning.

Are your employees aware of the "dos and don'ts" of document creation?

Ensure key employees know what to do to make certain the search is properly conducted and rights are protected.

10. ***Compliance program:*** *Does my company have a compliance program that covers competition law issues, and does it adequately address such issues in light of the amendments?*
Companies with compliance programs are better placed to identify problems earlier and claim immunity from prosecution, if necessary, reduce exposure for their senior management, minimize potential civil lawsuits, and assert the compliance program as a mitigating factor if they are investigated.

Be especially careful of trade association activities with competitors.

The Competition Bureau recently published a "Bulletin" on Corporate Compliance Programs (http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html) which includes a template for a program and a due diligence checklist. ◆

WHAT THE RULING MEANS FOR EMPLOYERS AND CONTACTORS

Defining the "Dependent Contractor"

by the Labour & Employment Group, McCarthy Tétrault LLP

In the case of ***McKee v. Reid Heritage Homes, 2009 ON C.A. 906***, the Ontario Court of Appeal has now confirmed the intermediate category of the *dependent contractor*. As a result, employers must now provide reasonable notice upon termination for both employees and dependent contractors. Employers, in order to be aware of the defining features between an employee, an independent contractor, and the new intermediary category of the dependent contractor, need to take a closer look at the essence of the relationships with workers.

McKee v. Reid Heritage Homes

In 1987, Reid Heritage Homes, a new-home builder, entered into a handwritten contract with Elizabeth McKee, agreeing that McKee would sell 69 homes for Reid, exclusively and in exchange for commission. The agreement included a termination provision providing that, with 30 days' notice, either party could end the agreement.

In the years following, and after the initial 69 homes were sold, McKee continued to sell homes for Reid, being paid commission through her incorporated business. McKee hired and trained her own contingent of sales staff to assist with her work. McKee paid these staff through the commission she obtained from Reid.

Beginning in 2000, under new management, the company underwent restructuring that affected the way McKee was to operate within the company. Consequently, the relationship between McKee and management deteriorated. Ultimately, McKee sued for wrongful dismissal.

The trial judge found that McKee was clearly an employee of Reid Heritage Homes. After considering her age, years of service, position, qualifications and likelihood of finding comparable employment, the court awarded her 18 months' severance pay in lieu of notice.

The Court of Appeal upheld the trial court's finding that McKee was an employee of the company as determined by the trial judge. The court also confirmed the intermediary "dependent contractor" status, outlining what it entails.

Defining the Worker as an Employee, Independent or Dependent Contractor

Employers should be aware that the dependent contractor falls under the contractor category. Courts will first determine whether a worker is an employee or a contractor in the normal way, answering questions such as:

- Who supplies the equipment?
- What degree of control does the employer impose over the work?
- How is the worker paid?
- Does the worker hire and direct workers?

If the worker is found to be a

contractor, the next stage begins to determine whether that contractor is independent or dependent. The sole factor in this determination is *exclusivity* – whether the employer is the only source of income for the contractor. Exclusivity inherently implies that the contractor is economically dependent on the employer, and is entitled to reasonable notice upon termination, just like an employee.

At the first stage, when the courts are determining whether someone is a contractor or an employee, exclusivity is but one factor that is considered. However, once it has been determined that the worker is a contractor, exclusivity becomes the sole and defining factor. Employers, resting on the laurels that they are in a contractor relationship, may be surprised to find that they are responsible for providing reasonable notice to contractors found to be in this intermediary position – not quite a contractor, not quite an employee.

Tips for Employers

Employers are advised to consider the essence of their relationship with their workers, particularly contractors, given that dependent contractors are now entitled to reasonable notice of termination, just like employees.

> [O]nce it has been determined that the worker is a contractor, exclusivity becomes the sole and defining factor.

To manage this obligation, employers can take steps to ensure that they are engaging in best practices by reviewing current relationships with workers and taking steps when entering into new relationships. Employers should be aware of the following:

- Are your contractors working exclusively for you? Where your contractor is economically vulnerable by virtue of their exclusivity, employers will be responsible for providing reasonable notice.
- Are contractors performing an essential function of your business? If so, they are more likely to be seen as employees.
- Are workers operating under a valid contract? Employers should ensure that they are working under valid contracts with clearly defined provisions.
- What termination provisions, if any, are contracted? Contracts should have termination provisions that at least match, if not exceed, the legislated standards. ◆

New West Partnership: TILMA Expands East

by Roy A. Nieuwenburg, Clark Wilson LLP

The New West Partnership Trade Agreement (NWPTA), among the governments of British Columbia, Alberta and Saskatchewan, was signed on April 30, 2010. In general terms, this might be thought of as an expansion of TILMA [the Trade, Investment and Labour Mobility Agreement] to Saskatchewan. (See the news release issued by the Province of British Columbia, at www2.news.gov.bc.ca/news_releases_2009-2013/2010PREM0093-000508.htm.)

Will the NWPTA change the procurement practices for British Columbia entities? Answer: no – so long as the entity is not trying to confer a procurement preference to British Columbia suppliers over suppliers in Alberta and Saskatchewan.

A key feature of TILMA and the NWPTA is that these provinces have agreed not to give preferential treatment to suppliers within their home province. In my experience, procurement bodies rarely do so. It happens, but rarely. Instead – they just want to make the best procurement choice, regardless of where the supplier comes from.

In those instances where a local preference is stipulated, greater scrutiny will be paid to compliance with the requirements of TILMA and the NWPTA. In addition (as procurement professionals will readily appreciate), the liability at common law that flows from the *Chinook Aggregates* case, and similar cases, will also have to be considered and addressed.

In order to try to ensure that the objective (no local preference) of TILMA and the NWPTA is observed, the principle of "fair and open (transparent) procurement" is adopted. How strident do you have to be in the measures you adopt for "fair and open (transparent) procurement"? In my experience, this is addressed on a case-by-case basis.

If, in fact, no local preference is being applied by the procurement body, then, since the spirit of the regime is being observed, that will diminish the degree to which you might feel the need to adopt "fair and open (transparent) procurement" measures. For example, if you have a public opening, do you have to read out the prices at the public opening? You might choose, for various reasons, to announce prices. But if you prefer not to, and the award goes to the lowest qualified bidder, then it would be hard for another bidder to complain too loudly (especially, of course, if the lowest qualified bidder happens to be from out of province)!

Note – as described in the news release issued by the Province of British Columbia:

- Under the New West Partnership Procurement Agreement, the provinces will work together to jointly purchase goods and services in order to achieve efficiencies and cost-savings.
- This could include joint purchasing of health supplies or common government supplies (e.g., paper or office supplies) and the standardization of procurement templates and contracts.

For more on this, see the *Journal of Commerce* articles from May 10, 2010 (www.joconl.com/article/id38780) and May 12, 2010 (www.joconl.com/article/id38826). ◆

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Sale of Land by Tender: Do Contract A Fairness Obiligations Apply?

Here is a case with a bit of a twist – it involves the sale of land by tender. Do you think that Contract A obligations of fairness would apply to this type of a process? Do the courts have inherent jurisdiction in such cases to interfere with a bidding process and write their own rules? Read on.

The Facts

Bill McCulloch and Associates Inc. was the court-appointed receiver for the bankrupt River Rentals Group Ltd. The assets to be disposed of included a property known as the Birch Hills Lands. The bankruptcy process required that the receiver make efforts to sell the property by tender, and then apply to court for final approval of the sale.

The 'call for offers' on the Birch Hills Lands was issued on April 17, 2009, by a posting on the receiver's website, and also through wide advertising in local and national newspapers. The advertised closing date for offers was May 7, 2009. In all, the receiver sent out 160 tender packages, and received 15 offers. An appraisal showed the most probable sale price to be approximately $1,560,000. The highest offer received was from the Hutterite Church of Codesa, for $2,205,000 – an excellent offer, indeed.

After closing, as the receiver was preparing for the court application to obtain approval to sell the land to the Hutterite Church, he was approached by another bidder, Don Warkentin. Mr. Warkentin had bid only $2,100,000 for the land, under the impression that he would not be able to receive possession of it until the fall. On further discussions with the receiver, however, Mr. Warkentin realized that, in fact, the buyer would have possession of the land much earlier, so he asked to revise his bid to reflect an earlier possession date. The receiver declined his request, and proceeded with the court application for approval of the sale to the Hutterite Church.

Mr. Warkentin joined in the application, ultimately convincing the court that he had misunderstood the date on which he would obtain possession of the property, and therefore had submitted a lower bid than he would have otherwise done.

The Trial

The evidence at trial showed that the tender document had outlined the process for sale of the Birch Hill Lands, including the need for court approval before the sale could be finalized. Mr. Warkentin drew his own conclusions about possible possession dates.

The Alberta Court of Queen's Bench was sympathetic to Mr. Warkentin's plight, and approved a re-tendering based on the misunderstanding. Mr. Warkentin rebid a price of $2,300,000. The Hutterite Church stood firm on its bid price of $2,205,000. As a result, Mr. Warkentin was the highest bidder on the re-tender, and the court subsequently approved the sale of the Birch Hill Lands to him. The Hutterite Church appealed both the order

allowing re-tendering, and the order approving the sale to Mr. Warkentin.

The Appeal

The key issue before the Court of Appeal was whether or not the trial judge was correct to intervene with the receiver's recommendation to award to the Hutterite Church based on the bid prices for the original process.

Most procurement folks know that such a decision would be unthinkable in the context of a normal competitive procurement process. Unlike a normal commercial process, however, a sale of assets by a receiver is specifically subject to judicial approval.

The Alberta Court of Appeal referred to the test for when the court should intervene in a receiver's recommendation for sale, as set out in ***Royal Bank of Canada v. Soundair Corp., (1991) 4 OR (3d) 1 (C.A.)***:

> "(a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
> (b) the interest of all parties;
> (c) the efficacy and integrity of the process by which offers are obtained; and
> (d) whether there has been unfairness in the working out of the process.

"When considering if the Receiver has acted improvidently or failed to get the best price, the following factors are to be considered:

> (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
> (b) whether the circumstances indicate that insufficient time was allowed for the making of bids
> (c) whether inadequate notice of sale by bid was given; or
> (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or owner.

Salima Investments Ltd. v. Bank of Montreal, (1985) 65 A.R. 372 (C.A.)"

> "The defendant was performing due diligence, an exercise that decision makers are entitled to perform . . . "

The Court of Appeal noted that the trial judge had made no assessment whatever of the conduct of the receiver. In fact, no evidence had been presented at all about the sale to the Hutterite Church being 'improvident' or 'unrealistic'. The receiver had made substantial efforts to widely distribute the call for offers and had received offers that were higher than the suggested appraisal price.

The Court of Appeal emphasized that, in exercising its discretion to approve a receiver's recommendation, the Court "has consistently favoured an approach that preserves the integrity of the process." The Court quoted from the case of ***Cameron v. Bank of Nova Scotia, (1981) 45 N.S.R. (2d) 303 (C.A.)***, that a decision of the receiver:

> "should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard – this would be an intolerable situation … "

In addition, there was no cogent evidence before the trial judge of any unfairness to Mr. Warkentin. On the contrary, the impugned order to re-tender conferred an advantage upon Mr. Warkentin, who then knew the price that had previously been offered by the Hutterite Church, when re-tendering his offer.

The Decision

The Alberta Court of Appeal concluded that the trial judge erred in principle and on insufficient evidence. The orders for re-tendering and for approval of the second Warkentin bid were set aside, and the sale to the Hutterite Church was approved. ◆

Five Factors in Successful Vendor Prequalification

by Chris Duggan

Under the right circumstances, vendor prequalification can be a valuable procurement tool. It can improve the quality of your vendor selection over time and strengthen your vendor relationships. It's not for every procurement, or for every organization, but when the right opportunity presents itself, and with a little work up front, the payoff down the road can be significant.

Some buying organizations use prequalification for specific procurements, or to create qualified vendor lists for ongoing opportunities. Both usually involve a Request for Qualifications (RFQ).

Following are the main benefits of vendor prequalification, along with five important factors to consider

in designing your prequalification processes.

Benefits of Prequalifying Vendors

The RFQ process is attractive, particularly for ongoing opportunities, because it can help you:

- determine the availability of the right quantity and quality of vendors in advance of the need for firm commitments and cost proposals, which can help defer Contract A obligations,
- ensure that only qualified vendors are invited to participate in any subsequent procurements, relieving your organization of the duty to evaluate obviously unqualified proposals,
- standardize your vendor qualification submission and update process to a yearly or multi-year schedule, rather than as part of every new Request for Proposals (RFP),
- drive operational efficiencies by aggregating demand and streamlining vendor selection, which can lead to market leverage,
- lower your exposure to risk by establishing and enforcing procedures for monitoring and controlling requirements such as vendor technical certifications, insurance, and workers' compensation coverage, and
- create a heightened awareness within your organization and the vendor community about procurement and related best practices.

Unfortunately, the RFQ process is not often used, or it is used incorrectly and with unfavourable results. Here are five things you should know about the RFQ process that can help improve the end result.

Five Important Factors

1. If you let the process determine the outcomes, you probably won't like the results.

As with any procurement, planning is key. Before selecting an RFQ as part of your procurement plan, assess whether or not vendor prequalification really makes sense. For example, if your anticipated future needs don't really warrant establishing a list of prequalified vendors, then that might not be the most effective tool to use.

Firm closing dates and duly authorized signatures make sense, but beyond that, mandatories in an RFQ should be minimal.

Determine your desired outcomes, then adopt, adapt or develop an appropriate process – in that order. If you believe that an RFQ is appropriate, remember that it is not a one-size-fits-all solution. Each RFQ can be built from a standard base, but you will need to customize it, based on your specific industry, the nature of the work, and any particular needs of your organization.

2. Remember the differences: when you use it like an RFP, it is one.

First, reduce or eliminate mandatory requirements in the RFQ. Firm closing dates and duly authorized signatures make sense, but beyond that, mandatories in an RFQ should be minimal. If it reads like an RFP and requires an RFP-like response, then it's an RFP, not an RFQ.

Second, do not award contracts based on responses to an RFQ! To do this, whether expressly stated as a possibility in the RFQ document, or through a mid-stream change of process, is a recipe for disaster, including possible litigation. The purpose of the RFQ is to determine the capability and capacity of your supply base, not to award contracts.

3. Remember the similarities: the RFQ process requires fairness and transparency, too.

RFPs must be fair, open and transparent. The same applies to RFQs.

If you design, implement and use your RFQ process fairly, then it will be fair. To be clear and unambiguous, you need to lay out a visible path for vendors who want to get on the list. You also need to provide clear procedures about how a vendor is selected for a given contract. You can treat vendors fairly by:

- being accurate in how you describe the types of procurements for which you will draw on the list of qualified vendors,
- thinking and articulating clearly about how you will establish and use the list, to ensure a good fit for individual procurements, and
- clearly communicating with the vendor community about how they can participate in your process.

For public-sector organizations, once you aggregate the value of your procurements in a particular area of your organization, it is likely that trade agreements such as the Agreement on Internal Trade (AIT), the B.C./Alberta Trade, Investment and Labour Mobility Agreement (TILMA), and/or the New West Partnership Trade Agreement (NWPTA) will apply. It is best to err on the side of caution and provide open and transparent processes that keep you in compliance with the applicable trade agreements, regardless of regulated requirements.

4. Say what you are going to do and do what you said you would do.

This is obvious stuff, but it bears repeating, because – as court cases demonstrate – so many purchasing organizations continue to get it wrong.

In any procurement process, the real key to fairness is to say what you are going to do, and then do what you

said you would do. The vast majority of procurement-related disputes arise from one party or the other doing something different than promised. Even if the owner is in fact doing what it is supposed to do, perceptions of wrongdoing can cause disputes that disrupt schedules, cost money, strain relations and tarnish reputations on both sides.

So spell out your evaluation criteria and weightings, how you plan to request bids and award contracts, and any other important ground rules. *Then follow them.*

5. Refresh your RFQ toolkit.
A strategic approach to vendor prequalification includes an RFQ toolkit that offers your organization clear and unambiguous practical guidance on sound processes, as well as easy-to-use documents and templates from which you can build each RFQ. The toolkit should also include a base evaluation methodology, and guidelines on how to fairly score vendor submissions within a defensible evaluation model.

> [T]he real key to fairness is to say what you are going to do, and then do what you said you would do.

The toolkit is also a good reference point for documenting related procurement fairness factors and best practices. It should include sample documents and process checklists. And be sure to update and improve it on an ongoing basis, in light of lessons learned through actual use.

And Finally

Big changes require big buy in from everyone. If you decide to use prequalification, look at the process implementation like a project, with some basic project structure. At a minimum, ensure that you have sponsorship at an appropriate senior-management level, create a project charter, and establish other project management requirements to suit the level of complexity. ◆

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WHAT'S WORKING FOR YOU?

Simon Fraser University's RFP Checklist

Helen Doucette is Director, Procurement Services, Simon Fraser University in Burnaby, B.C. She oversees all of the university's purchasing policies and procedures. She developed the Request for Proposals File Checklist (see page 9) to organize and control all of the information – paper-based and electronic – associated with each procurement.

The RFP Checklist allows us to access competitive bidding information quickly and track its progress, beginning with our User Matrix – a separate document, in which users sign off on conflict of interest and confidentiality, while determining the appropriate importance and weighting values – to the final approval of award document that is signed off by the stakeholders.

We use this checklist for every competitive bid. We print and staple it to the paper file folder, and as we complete each step of the checklist, we file everything in order. We do the same with the electronic documentation, on a central server. This helps us maintain the integrity of the process, up to and including the award and vendor debriefing.

Every component listed on the checklist is equally important and rarely omitted. Each step has the appropriate standard document setup, which we access electronically from our central network drive. Although we use the same standard documentation for each step of the RFP process, we customize them for each RFP. (Remember "The Huge Risks of Cut-and-Paste Tendering" from *The Legal Edge* Issue 50 in September 2003?) This also supports the integrity and continuity of our process.

We update the checklist regularly, as we develop new processes. ◆

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What's working for you? If you have put a good idea into practice or embraced an innovation that's made a difference, we invite you to share it with our readers. Please send us a brief email to: editor@neci-legaledge.com.

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RFP FILE CHECKLIST **RFP#_____**

WORD DESCRIPTION OF RFP:			**ESTIMATED $ VALUE ANNUAL:$**	**TOTAL$**
1. Date user requisition or documentation received to generate RFP process: including Budget or account code				
2. Register RFP/RFQ (electronic entry into S drive-set up files)				
3. How many suppliers suggested by:	USER		PURCHASING	COMMODITY CODE(S)
4. File order beginning from the bottom up except #1. 1. RFP File Checklist (stapled to the left hand side of the folder) 2. Draft Documents 3. User's Requisition or email and Evaluation Matrix (Scan) 4. Email Communications and Vendor Performance Documents 5. Vendor List (if applicable) 6. Approved RFP 7. BC Bid Posting 8. RFP Addendum 9. RFP Opening 10. RFP Evaluation Documents 11. Reference Checks (if applicable) 12. Approval of Award (Scan) 13. Vendor(s) Letter of Award (Scan) 14. Awarded or successful Vendor(s) RFP Submission (Scan) 15. Signed Contract or Purchase Order (Scan) 16. Unsuccessful Vendor(s) Letter (Scan) 17. RFP Vendor Debriefing Document (internal only) (Scan) 18. Proposed RFP Board Information Document Buyers make up new file folders as needed. After award, all ongoing correspondence is to be placed on the top of File#1. If received electronically, enter into the S drive.			BUYER'S NOTES	
5. Electronic copy of RFP posted on S drive. Date				
6. RFP/RFQ reviewed by Director: (prior to issuance) Initial/Date				
7. RFP/RFQ reviewed by User Department (if requested) Name/Date				
8. Complete Proposed Competitive Bid Information document for Martin/Pat Date				
9. Date RFP issued	RFP Register	BC Bid		
10. Date Paper file put in RFP cabinet 'open status'.				
11. Number of Proposals Sent (only if paper copies sent)				
12. Date Proposal/Tender Closed				
13. Number of responses received			Compliant	Non-compliant -Name
14. Date evaluation completed				
15. Was order issued & followed up by Buyer within time frame of the Suppliers firm pricing structure? (within the quoted # of days) YES OR NO If not, include explanation or refer to file summary.				
16. Was Low Bid taken? Yes/No if no, Check for: Letter of Justification from user and/or committee justification for the decision (Approval of Award doc). Indicate date rec'd.				
17. If P.O. is over Buyer's signing amount of $100k or over, check for appropriate approvals and signatures: Sr.Buyer - $10k-$250k Major Contracts Officer $250k-$500k Director, Procurement $500k-$1 Million Assoc. VP Finance $1million +			❑ Original signatures should be obtained prior to purchase order issuance to the vendor. ❑ Appropriate signatures received	
18. Date P.O. or contract awarded: Vendor acknowledgment clause to be inserted after the approval signature(s) on the P.O. or contract award letter. (Larger dollar value contracts) Vendor acknowledgement signature received. Date/Fax/Original				
19. Purchase Order number and/ or Contract Number (if multiple award) A. Vendor's Name_____C._____ B. Vendor's Name_____D._____			P.O.# or Contract #	
20. File completed and data entered (initial and date required)	a. RFP REGISTER	b. PS	c. EDCO or?	d. CONTRACT REG. / e. ADMIN NOTICE
21. Date Vendor Award Letter(s) Issued				
22. Number of file folders for this proposal (eg….1 of 6)				
23. Date this file completed				
24. File complete: Director, Procurement Date and Signature				

What is "Criminal Breach of Trust"?

BC Rail, Ron Danderfer, Airbus, Rahim Jaffer, the Gomery enquiry, the Toronto Leasing enquiry… what do these all have in common? Those of us in the procurement world know that, unfortunately, there is no shortage of examples in the press about elected officials and other public servants getting into trouble for procurement-related scandals. Some, such as the allegations against Dave Basi and Bob Virk in the BC Rail case, and against Danderfer and Jonathan Burns in the B.C. eHealth case, involve serious criminal allegations under the heading of "breach of trust."

What does that mean? Where is the line between simple inadvertence or ignorance, and criminality? And what lessons can we draw from these examples, to help well-intentioned public servants stay on the right side of the law (and the media)?

Some of these questions were answered during a recent presentation in Victoria, B.C. by Sgt. Andrew Cowan and Sgt. John Taylor, members of the RCMP's E Division on Commercial Crime.

Both of these officers have many years of experience investigating and assisting with prosecutions on these difficult files. Sgt. Taylor, for example, took participants back to the days of former B.C. Premier Glen Clark and the "Deck Affair," reminding the group that, while Clark was ultimately exonerated, the alleged briber, Dimitrios Pilarinos, was actually sentenced to jail for two years. This was a stark reminder that these *Criminal Code* provisions swing both ways: the person allegedly receiving the improper benefit, as well as the one providing it, are subject to prosecution under the same terms.

The most recent example to hit the press involves former B.C. Assistant Deputy Minister of Health, Ron Danderfer, and his alleged accomplice, Dr. Jonathan Burns. In early March 2010, both were charged with criminal breach of trust and fraud for activities related to awarding contracts for the electronic health records for B.C. It is alleged the Mr. Danderfer received "benefits" from Dr. Burns in exchange for favourable treatment on contract awards, extensions, and consulting fee rate increases.

The alleged benefits so far include allegations that Mr. Danderfer's wife and daughter were hired as consultants to work with Dr. Burns, and that Danderfer was given use of Dr. Burns' Kelowna condo for significant periods of time, plus post-retirement income for Danderfer himself. Dr. Burns allegedly received major consulting fee rate increases arbitrarily, with no questions asked or documentation maintained. As with many of the other examples, this matter is currently before the courts, and 'not guilty' pleas have been entered.

Key sections of the *Criminal Code of Canada* that apply to prosecutions and investigations of many of these procurement scandals include section 121 ("Frauds on government"), 122 ("Breach of trust by public officer") and 123 ("Municipal corruption"). The principles of sections 121 to 123 can be summarized as follows: no government officials should use their position for personal benefit, other than the salaries and benefits paid to them by government. Seems pretty straightforward. But how do we apply the principles in our day-to-day work environment?

Sgt. Taylor has an interesting 'litmus test' that might be of use to public servants, as well as to other procurement professionals who are in a position to award contracts. His comment was that any time a contract is awarded in a non-standard way, to someone you know, warning bells should be going off in your head. This would of course include direct awards for large-dollar contracts that are normally competed, as well as less-obvious examples, such as issuing a Notice of Intent, instead of a following a normal competitive procurement route.

When someone is charged under the *Criminal Code*, it of course becomes public record, making the information accessible to anyone who asks. As we all know, once these types of allegations are aired in the media, the damage to the public-sector organization is done, whether or not actual convictions follow.

By being vigilant, obtaining appropriate and documented approvals for any deviation from standard procurement policies, and by keeping your business and personal relationships entirely separate, you can reduce the risk of being caught up in one of these damaging investigations. It is not enough to act fairly and ethically, you must also be *seen* to be acting fairly and ethically, so as to avoid any possible perception of impropriety. Taking the high road is definitely a best practice in personal risk management, and you will also contribute to setting the right tone for your staff and the rest of your organization. This, in turn, will reduce the risk in this area for your entire organization and help build your reputation as an individual and an organization with whom the very best contractors and suppliers are eager to work.

That is, after all, the bottom line when it comes to achieving best value from your procurement processes. ◆

Editor's Note: For other examples of breach of trust, see "It's Not Just the Rules: It's the Law," *The Legal Edge* Special Issue 67, June - July 2006.

ANSWER TO YOU BE THE JUDGE

In ***Tulsa Heaters Inc. v. Syncrude Canada Ltd., 2008 ABQB 774 (Court of Queen's Bench of Alberta)***, the Judge found that Syncrude had followed what he referred to as a "dual track." On the first track, when a source for seamless pipe was not known, Syncrude insisted that Tulsa continue to meet the ultimate timetable for the supply of the heater. Tulsa could only do this – with Syncrude's full knowledge – using welded pipe, while Syncrude, at the same time, insisted that the contract required seamless pipe.

On the second track, Syncrude searched for a possible supplier of seamless pipe. Syncrude ultimately found one that did not regularly produce such a pipe, but could do so at an additional cost and delay. The delay was initially unacceptable to Syncrude (thus favouring the first track), but when the other parts of the project were delayed such that time was no longer an impediment, Syncrude then insisted that it was a contractual requirement and that Tulsa manufacture the heater with seamless pipe. Tulsa ultimately did this, under specific protest for the additional cost of the seamless pipe.

The Judge found ample evidence to show that Syncrude was prepared to accept the welded pipe, so long as Tulsa was maintaining the contractual delivery date of September 13, 2002 for the heater. When the delivery schedule was relaxed, Syncrude decided to revert to the seamless pipe requirement and, by requesting that Tulsa order seamless pipe from Kaiser, it was implicit that Syncrude would pay the reasonable additional expense associated with that request.

Syncrude was held liable to Tulsa in the amount of US$587,170, plus interest and court costs. Syncrude appealed the decision. In 2009, the Court of Appeal affirmed the trial Judge's decision. ◆

Frequently Asked Questions

Through our Signature Seminars and other courses, our NECI instructors regularly field a lot of questions about procurement-related topics and issues. We are including some of these, along with our answers, as a regular feature in *The Legal Edge*.

If you have procurement-related questions that might be of broad interest, we invite you to send them to our Legal Editor and Publisher, Maureen Sullivan (maureen@neci-legaledge.com). We will publish questions of a general nature that we think are relevant and timely. We can publish them with your name, or anonymously, as you wish. We unfortunately cannot address specific legal questions, provide legal advice, or guarantee that your question will be published.

Here are two questions recently received from readers.

What is bias, exactly?

We are all familiar with the 'smell test' and have a pretty good sense of when our own personal feelings and experiences are beginning to creep into and affect our contract management activities. But how do the courts view bias, and what is the legal test for it?

There have been a number of judicial pronouncements on this topic, but a 2009 small claims case out of Ontario – ***1488573 Ontario v. Kitchener (City)*** – has one of the more useful definitions: "Bias is a preconceived opinion that is arrived at through partial, arbitrary or unobjective criteria … A negative opinion is not biased if arrived at as a result of impartial consideration of relevant factors such as admitted conduct or objective evidence."

Not surprisingly, the words "impartial" and "objective" come through loud and clear in this definition. When in doubt as to whether you may be or may appear to be biased, always seek advice from someone more senior within your organization. If your objectivity is indeed impaired, then you are, by definition, not in a good position to make that determination yourself.

What are 'consecutive' and 'simultaneous' negotiations?

Several readers have asked for clarification of this issue, which was raised in our article on negotiated Requests for Proposals (RFPs) in the last issue of *The Legal Edge*. Although I am sure that most of you are aware of the processes, if not the terminology, I will review them briefly.

"Consecutive negotiations in an RFP" refers to the process whereby the owner selects the front-runner based on disclosed criteria and weighting, then enters into negotiations with the front-runner for the purposes of fine-tuning the contract before award. If the owner cannot strike a deal with the front-runner within a prescribed timeframe, the owner can then move to the second front-runner to negotiate. This keeps the

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YOU BE THE JUDGE

Who Pays the Piper for Changing Specifications? – You be the Judge

On May 15, 2001, Syncrude issued a Request for Quotations (RFQ) for the design and installation of a fired heater for its Upgrader Expansion (UE) Project. Delivery of the heater was required by September 2002 in order to meet the schedules for the broader project. The RFQ exceeded 200 pages and included terms, conditions and specifications. One RFQ requirement was that all radiant tubes for the heater had to be made of seamless pipe. A footnote specified that the pipes for the heater were to be made of "Incoloy 825," a specialty alloy. The RFQ further stated that materials "should" be obtained from a list of approved pipe suppliers. That list was included in the RFQ documentation.

Tulsa Heaters Inc. was the successful respondent to the RFQ, and was awarded the contract in November 2001. When Tulsa began to search for the seamless Incoloy 825 pipe of the required dimension, it learned that no supplier worldwide, including those on Syncrude's approved list, could supply such a product. In January 2002, Tulsa ordered welded (not seamless) pipe for the heater fabrication. At the end of January, Tulsa advised Syncrude that the pipe and fittings had been ordered, but did not mention the fact that it was welded rather than seamless pipe.

In early March, Tulsa submitted plans to Syncrude that clearly showed the change from seamless to welded pipe. On April 22, Syncrude directed in writing that "work may proceed" in accordance with the drawing, and continued to remind Tulsa that the rest of the UE project hinged on the September delivery of the heater. Syncrude expressly stated that it would accept welded pipe if certain testing criteria were met. The criteria were subsequently met, and Tulsa proceeded with fabrication of the heater.

In early August 2002, the entire UE project timeline relaxed, due to external factors, allowing Syncrude more time to find a supplier of seamless Incoloy 825. This was not disclosed to Tulsa until August 7, when Tulsa was notified that Syncrude had located a supplier (Kaiser) that could custom manufacture seamless pipe of the type required. Syncrude requested that Tulsa order seamless pipe from Kaiser to use in place of the welded pipe, and Tulsa submitted a purchase order to Kaiser on September 5.

In mid-2003, Tulsa delivered the heater to Syncrude. It included the Incoloy 825 seamless pipe, as per the contract, that Tulsa had purchased from Kaiser. Tulsa was, however, stuck with the welded pipe, which was of no use to it. It therefore sued Syncrude for the cost of the seamless of pipe ordered from Kaiser (US$587,170).

Syncrude argued that any variation of the contract specification requiring the supply of seamless pipe could only be done in strict accordance with the provisions for change set out in the contract. That strict process was not followed, and therefore, Syncrude should not be responsible for the cost of the seamless pipe.

Who do you think should bear the considerable cost of the welded pipe? See page 11 for the answer. ◆

Continued from page 11

competitive tension in play for all respondents, as they all continue to be bound by the process until Contract B (the Performance Contract) has been signed, or the irrevocability period expires, whichever first occurs.

"Simultaneous negotiations," on the other hand, involve concurrent negotiations with the two top-ranked proponents. In this scenario, it really is 'the first past the gate' who is awarded the contract, so the negotiations tend to move much more quickly. Because the optics of this latter process are not as transparent, however, public-sector bodies tend to confine their RFP discussions to the consecutive-negotiations process.

Whichever way you decide to go, make sure that you fully disclose the process in the solicitation document, and, if at all possible, identify which items are open to negotiation. ◆

STAYING IN TOUCH

Want to know what's happening with NECI and with *The Legal Edge* between issues? Check our website or our Facebook page, or you can follow Maureen on Twitter @maureenNECI.

THE LEGAL EDGE

Developments in the law of competitive tendering, and innovations and best practices in procurement and contract management

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