

## Effective Procurement Methods

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In recent years, procurement of goods and services has become somewhat more confusing and technical. This is likely due to the fact that more organizations are now subject to formal procurement rules and unsuccessful bidders are suddenly, and vigorously, challenging the results.

In 2009, the Ontario Government imposed the *Management Board of Cabinet Procurement Directive* on all Ministries and “entities” that received a significant portion of their funding from the Government. However, the Directive simply mandated the acceptable *method* to procure. It did not suddenly create the process of procurement as this had been occurring well before the arrival of the Directive. Organizations who are not publicly funded also regularly procure goods and services. However, the absence of a directive does not mean that an acceptable, and legal, method of procuring does not exist for these organizations.

We provide below some tips and pointers on how to implement the procurement process for your organization. We must stress that procurement is not a “one size fits all” process. The size of your organization, the quantum of the procurement project and other numerous factors will have to be taken into account when developing a proper, and effective, procurement process. The procurement document is a legal document and should be treated as such.

- Determine which procurement document or process is required for each stage.
  - If you require assistance in determining what you need, you may wish to issue a Request for Information (RFI). This will allow you to solicit input from the “players” in the industry and determine

what issues you should be addressing and what questions you should be asking.

- If you wish to gather information on the qualifications of a certain supplier, you may wish to issue a Request for Expressions of Interest (RFEI).
- Once you receive the responses to the RFI, or RFEI you can then frame your Request for Proposal (RFP). Be mindful that the RFP must respect the original foundational document (e.g. the RFI or the RFEI). There cannot be any conflict between the two.
- If you wish to procure a project and want to base your decision on the lowest price **only**, you may wish to issue an Invitation to Tender (ITT). This is generally used when two or more sources are considered capable of carrying out the project and there is no intention to negotiate but to accept the lowest priced bid.
- Although it is tempting to utilize one procurement document for all procurement projects, be aware that this could cause more problems than it solves. “Boiler plate” clauses can sometimes cause confusion in that they simply do not apply to the project at hand. If your organization tends to use one master document, take the time to review each clause and ensure that it actually applies to the project. Consider whether other clauses should be included. If the document contains conflicting information, it will be of no use and will only delay the process (and likely add additional costs).
- Be mindful of categorizing requirements as mandatory. Determine if they are truly mandatory (e.g. is it mandatory that the bidder submit 10 copies? If a bidder does not, and if this is phrased as a mandatory requirement, that bidder is automatically rejected).
- Carefully review all of the terms in the document. Are they precise? Are they unambiguous?
- When you are drafting the document, be sure to ask for the information that you require. Be sure to ask it in

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# Grey Areas

a way that allows for objective evaluation. In certain situations, the completed RFP will become a Schedule "A" to the final contract.

- Consider including a discretion clause such as the following "The Owner has the right to waive minor errors, omissions or irregularities in the bid..." This will allow you some flexibility in that "minor" errors can be overlooked. But be aware that with greater flexibility comes greater risk. What is considered "minor"? Will one bidder attempt to challenge your decision to overlook the minor error of another?
- Consider including a limitation of liability clause. This precludes the bidders from suing you as a result of participating in the procurement process. If the clause is clear the courts will be more willing to accept it. However, be aware that although such a clause can dissuade an unsuccessful bidder from suing or challenging the decision, it will not act as an absolute shield against such actions.
- When you are prepared to issue an RFP or an ITT, consider including a draft contract. This will bring more certainty to the bidder's proposal. However, it may handcuff your ability to negotiate at a later date so these are often included in ITTs more than RFPs.

## Scenario

An organization requires a new website but is uncertain as to what factors it should be addressing in its procurement document. It decides to invite three website developers (Vendor 1, Vendor 2 and Vendor 3) to respond to its procurement document. The organization procured new office furniture three years ago so it tweaks that document and sends it on its way. The mandatory provisions include the following, "Five copies of the response must be received by one o'clock p.m. on Monday, August 8, 2010."

The document includes a discretion clause.

The organization delivers the procurement document to the three website developers.

Certain problems arise:

- Unfortunately, August 8 is a Sunday – not a Monday. Vendors 1 and 2 arrive on Sunday, August 8 and are able to deliver the documents as a member of the organization is luckily at the office. Vendor 3 delivers the document on Monday, August 9. Vendors 1 and 2 allege that Vendor 3 should be disqualified.
- Further, Vendor 1 delivered immediately before the clock struck one o'clock. Vendor 1 was therefore flummoxed when the Vendor 2 delivered his documents two minutes later. Vendor 1 claimed that as Vendor 2 delivered after one o'clock, he should be disqualified. The organization did not time stamp the packages as they arrived so they are not certain as to how to proceed.
- The organization attempts to trigger the discretion clause in order to allow the organization to accept all of the documents but Vendor 1 claims that the errors committed by Vendor 2 and Vendor 3 are not minor and that they therefore do not fall within the ambit of the discretion clause and that Vendor 1 be awarded the contract.
- The organization disregards the complaint of Vendor 1 and decides to award the contract to Vendor 3.
- Vendor 1 brings an application for a declaration that it was the only vendor that complied with the terms and that it therefore should be awarded the contract.

Although this is a somewhat dire conclusion to a simple error, it is unfortunately possible.

We remind all organizations that the procurement process should be fair, transparent and clear. Although these "tips" are not fool-proof, they will hopefully assist your organization in streamlining the procurement drafting process and dissuading any unsuccessful vendors from challenging your decision.

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