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Contract A, eh?!

Not necessarily

YOU'VE ATTENDED THE seminars. You've done your training. You've read the articles. It's been drummed into you over and over again: if you engage in competitive contracting, the Supreme Court says you are bound by a bidding contract (so-called "Contract A") with every compliant bidder. If you breach the terms of that bidding contract, you can get sued, right? Well, think again. Turns out, it's not quite that simple.

In fact, it is a common misconception that if you engage in a competitive contracting process, you will wind up in a bidding contract situation. Not so, say the courts. Like all contracts, Contract A comes into being only through the consent of the parties to the contract. No consent, no contract. So, if owners wish to carry out competitive contracting processes with no Contract A obligations, they can do it. After all, it's their process; they set the rules.

This goes against your orthodoxy, you say? Not what you learned at the conference? Well, three recent court cases confirm this in no uncertain terms, *Maple Ridge Towing Ltd. v. District of Maple Ridge* [2001] B.C.J. No. 1923 (B.C. Supreme Court); *Mellco Developments Ltd. v. City of Portage la Prairie and Lions Park Housing Inc.* [2002] M.J. 381 (Manitoba Court of Appeal); and *Buttcon Ltd. v. Toronto Electric Commissioners* [2003] O.J. No 2796 (Ontario Superior Court).

In these cases, the courts confirm that they will examine the solicitation documents carefully before concluding that Contract A was formed. In other words, the court will only impose Contract A obligations if the solicitation documents indicate that it was the intention of the parties that Contract A obligations would bind them. This means that as a matter of common law, if you want to carry out an RFP process without Contract A obligations, you can. All you have to do is make sure that your solicitation docu-

ments clearly set out in an appropriate clause that no Contract A is being formed.

Of course, particularly in the case of federal contracting, there are still a variety of limitations on the flexibility and freedom of purchasing entities that no single clause can eliminate. For example, getting out of Contract A obligations does not get you off the hook in terms of compliance with the trade agreements and the supervision of the Canadian International Trade Tribunal. It is not possible to "contract out" of trade agreement procurement commitments. The CITT's supervisory role implements international commitments of the Government of Canada and is established by statute, which trumps any contractual arrangement.

Moreover, just because you can do something doesn't necessarily mean it's a good idea. There are both advantages and disadvantages to doing an RFP without Contract A obligations. The advantages include maximum flexibility in the selection process, reduced risk of legal challenges based on problems in the process, no obligation to disqualify bidders for minor failings in their proposals and increased flexibility to negotiate with vendors.

On the flip side, running an RFP without Contract A obligations falls outside the mainstream (most RFPs incorporate Contract A obligations) and has disadvantages. For example, if the language in the solicitation documents is not sufficiently clear or if it is contradictory, the courts might still impose Contract A obligations. This might happen, if there is a "no Contract A" clause, but at the same time the bids are said to be irrevocable, (thereby incorporating a critical element of Contract A). Again, getting out of Contract A obligations might be of limited use if your RFP falls under the jurisdiction of the Canadian International Trade Tribunal. As well, without the rules of Contract A to frame your discretion, suppliers, the media, your superiors and internal auditors may take issue with the process and it may be more difficult to demonstrate that you are obtaining value for money. Finally, some good vendors may choose not to participate in a process that seems to have no rules.

Deciding to opt out of Contract A obligations is a decision that should be carefully thought through, preferably in collaboration with experienced counsel. In making this decision, you will need to balance business imperatives, legal constraints and accountability concerns, among others. In a particular situation it may be the best option for your organization, but it is important to weigh the disadvantages of opting out of Contract A in each case where this is contemplated. Once the decision is made, then the trick is to make sure that the solicitation documents are carefully drafted to ensure Contract A obligations will not apply to any part of the process. *mm*

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