

Contract and Tendering Templates



May 2012

1. Introduction and Context
2. Treaty and Regulatory Framework
3. Common Law: Contract A and B
4. Using the RFP Template
5. Using the Agreement Template

Introduction and Context



- A strong governing principle for all public sector organizations, including healthcare organizations, is to ensure public funds are used as effectively as possible through fair, open and transparent processes
- Public sector organizations are increasingly under public scrutiny and the scrutiny of the Auditor General

- In Ontario, *the Broader Public Sector Accountability Act, 2010* introduced new rules and accountability standards for the broader public sector (BPS), including a Procurement Directive
- The intent of the BPS Procurement Directive is to
 - provide BPS organizations with consistent procurement practices
 - ensure publicly funded goods and services are acquired in a fair, open and transparent manner
 - ensure accountability throughout the process
 - maximize the value for money derived from the use of public funds
- Ontario healthcare organizations are required to have in place
 - Supply Chain Code of Ethics
 - Procurement Policies and Procedures, which must comply with the 25 mandatory requirements set out in the Directive

Tools and Templates

- The Ontario BPS Supply Chain Secretariat has provided tools and templates to support both the Supply Chain Guideline and the BPS Procurement Directive over the past number of years
- Healthcare RFP and Agreement templates were initially developed by them in response to a request from the province's hospitals for such a tool
- Stakeholder feedback was taken into account in the development of the final documents, and they have been developed to benefit both the provider and supplier communities by helping standardize tendering documents, processes and rules
- HSCN has assumed ownership of the healthcare templates and has released them into the public domain
 - HSCN engaged Fasken Martineau to provide a legal perspective on behalf of HSCN's supplier and provider constituents
 - HSCN will maintain the templates, ensuring they reflect changes in procurement law or leading practices

Tools and Templates

- There are 6 templates in total (as of today)
 - RFP Goods
 - RFP Services
 - RFP Major Equipment
 - Agreement Goods
 - Agreement Services
 - Agreement Major Equipment
- The templates are available for download, in Word format, from the HSCN website: www.hscn.org
- Use of these templates is not mandatory, and they may be adopted for use in whole or in part
 - HSCN strongly recommends seeking legal advice when making changes to the documents
- Although these templates were developed for Ontario, they are founded in leading procurement practices and may be used and adapted by other provinces
- Future templates may be developed based on demand

Training on the Templates



- HSCN and Fasken Martineau collaborated to develop a training program for stakeholders in Ontario and are co-facilitating the training sessions
- We have delivered four full day training sessions for hospitals and healthcare organizations to date. These include:
 - Toronto
 - Ottawa
 - Burlington
 - Chatham
- Two additional sessions are being offered as follows:
 - Supplier session in Burlington: May 22
 - Provider session in Toronto: May 23
- The provider sessions have been well attended and feedback has been positive
- Further sessions are being planned, including a second supplier session for June (date and location TBD)

The agenda for the training program includes:

- Background and context
- Treaty and Regulatory Framework
- Legal Concept: Contract A and B
- Procurement Workflow
 - Breakout session
- Using the RFP Templates
- Using the Agreement Templates
 - 2 Breakout sessions
- Managing Risk and Conflict of Interest

Treaty and Regulatory Framework



Sources of procurement obligations:

- Treaties
- Legislation
- Government Directives
- Case Law

Treaties

- **Agreement on Internal Trade**
- Governs trade within Canada – including how publicly funded health entities procure goods, services and construction within Canada
- Purpose is to reduce / eliminate, where possible, barriers to free movement of persons, goods, services and investment *within* Canada
- Per Annex 502.4, publicly funded health entities must conduct an **open competitive procurement** where the procurement value is
 - \$100,000 or greater, in the case of goods or services; or
 - \$250,000 or greater, in the case of construction

Treaties

Ontario and Quebec Trade and Cooperation Agreement

- Governs trade between Ontario and Quebec
- Imposes a framework and rules for public procurement
- Threshold amounts differ slightly from the AIT, and in the case of the health care sector, this agreement applies where the procurement value equals or exceeds \$100,000 or more for goods, services or construction

Legislation

Freedom of Information and Protection of Privacy Act

- Ontario law that applies to protect personal information and to give the public access to public sector information
- Applies to all records that came into a hospitals custody or control on / after January 1, 2007
- Can result in unsuccessful proponents and other persons requesting access to procurement documentation (including evaluation materials, proposals and contracts with successful proponents).

Legislation

Broader Public Sector Accountability Act

- Hospital Presidents/CEO's and the Board of Directors are required to prepare attestations with respect to compliance with the requirements of the Act, including:
 - The completion and accuracy of reports on the use of consultants
 - Compliance with procurement directives issued by the government

Government Directives

Broader Public Sector Procurement Directive

- Extension of government procurement policies to BPS
- Seeks consistent management of procurement throughout BPS, per 5 principles:
 - ***Accountability***
 - ***Transparency***
Value for Money
 - ***Quality Service Delivery***
 - ***Process Standardization***
- Organizations are required to have in place
 - **Supply Chain Code of Ethics**
 - **Procurement Policies and Procedures**, which must comply with the 25 mandatory requirements set out in the Directive

Treaty and Regulatory Framework – Key Principles

...from the AIT and OQTCA

- Ensure **public notice** of procurements
- Ensure that **qualified suppliers are able to participate** (regardless of province/territory)
- Ensure appropriate levels of **regulation** are maintained with regard to **environmental protection**.

Treaty and Regulatory Framework – Key Principles

...from the BPS Procurement Directive

- Formally adopt a **Code of Ethics**
- Ensure **personal integrity and professionalism** amongst the individuals participating in the procurement – e.g., honesty, care, due diligence, respect, preserve confidentiality, no conflicts of interest
- Ensure **open and accountable** supply chain activities – e.g., contracting and purchasing activities must be fair, transparent, seek best value for public money, responsible, efficient use of public sector resources

- Ensure that **policies/procedures** set out how procurements are to be conducted and ensure a standardized process
- Ensure that responsibility for different parts of the procurement process are **separated** within the organization so that no one person controls the entire process
- Ensure that limits are imposed on **individuals' ability to approve procurements** commensurate with individuals' authority levels
- Protect against **conflicts of interest**
- Ensure that organizations are internally reviewing procurement policies and practices in order to **continually improve** them

Common Law: Contract A and B



Supreme Court of Canada: Ron Engineering Case

“I will pay you a dollar if you will cut my lawn.”

This analogy to the procurement process was used by the Supreme Court in Ron Engineering. No obligation to cut the lawn exists, but the obligation to pay the dollar arises if someone cuts the lawn.

Issuing procurement documents can amount to an offer about how a procurement will unfold. By submitting a compliant bid, a bidder is treated as accepting that offer. This gives rise to a contractual relationship (Contract A) that is separate from the eventual contract that is awarded to the successful bidder (Contract B).

Contract A:

= procurement document with irrevocability clause,
other indicia

a “process contract”:

- governs the procurement process
- requires that the bidder enter into a formal agreement (Contract B) on the basis of its bid if that bid is irrevocable
- *exception*: “patently obvious” mistakes
- double-edged obligations:
 - proponents with compliant bids must stand behind them
 - purchasing organization must reject non-compliant bids
 - purchasing organization must comply with process

Contract B

- = final agreement signed with a successful proponent
- it governs the procurement of equipment/goods/services from the successful bidder

Terms of Contract A

- **Express Terms:**
 - RFP terms (process, requirements, eval. criteria)
- **Implied Terms:**
 - Statute, treaty
 - Directives, policies, practices
 - Common law, including fairness and related duties
 - Industry customs
- **Non-compliant bids do not create Contract A**
 - purchasers do not typically owe non-compliant bidders any procurement law duties
 - purchasers cannot compel non-compliant bidders to honour their bids

Contract A – Implied Terms

- Duty of fairness (reasonableness, good faith)
 1. The duty to **disclose material information**
 2. The duty to **reject non-compliant bids**
 3. The duty to **conduct a fair competition**
 4. The duty to **award the winning bidder(s)**
 5. The duty to **award the contract as put forward in the procurement documents**

Contract A – Breach & Consequences

- A breach of the express or implied duties of Contract A by the purchasing organization can lead to
 - legal challenges from unsuccessful proponents
 - damages (inc. lost profits)
 - injunctions (interrupt purchasing, operations)
 - Auditor General
 - public inquiries

Contract A – Reserved Rights

- For example, reserve the right to:
 - waive formalities and accept proposals that substantially comply with the requirements of the RFP, in the purchasing organization's sole discretion
 - select a proponent whose proposal does not reflect the lowest cost
 - cancel the RFP process at any stage and issue a new RFP for the same or similar requirements
- Most of the reserved rights are at section 2.27 and 2.28 of the RFP template

Contract A – Reserved Rights and Risk

- Reserved rights may override the implied terms of Contract A and allow for flexibility – *but are not risk free*
- Courts will not enforce reserved rights in all circumstances
- Must be stated clearly in the procurement documentation
- Use of reserved rights should be a last resort

Using the RFP Template



1. Introduction
2. RFP Terms and Procedures
 - Part A Procedure
 - Part B Additional Terms
3. General Requirements
 - Part A Corporate Overview
 - Part B Service/Support/Training/Warranty
 - Part C Specifications
 - Part D Pricing
4. Evaluation Process

Schedules

- Unfair Advantage and Conflict of Interest Statement Schedule
- Form of Agreement Schedule
- Requirements Schedule
- Pricing Schedule
- Corporate Overview Schedule
- Services and Support Schedule
- Site Planning and Turnkey Requirements Schedule
- Purchasers' Information Practices Schedule
- Specifications Schedule
- Variance Schedule
- Mandatory Requirements Checklist Schedule
- Declaration and Certification Schedule
- References Schedule

- **Reserved Rights**

- Section 2.27 and 2.28 provides for a number of ‘reserved rights’
- Generally comprehensive; however, consider whether any other specific rights are needed in your particular circumstances
- All reserved rights relating to the procurement process must be clearly stated in the procurement documents
- If a purchasing organization takes any action that is not based on a right set out in the procurement documents, this may give rise to a lawsuit or challenge by any proponent who feels prejudiced
- However, even if a purchasing organization exercises a reserved right, this does not mean that it is immune from complaints or legal claims – implied duty of fairness (good faith, reasonableness)

- **Stage I – Mandatory Requirements**
 - RFP template sets out various mandatory requirements
 - delete those that are unnecessary or inapplicable
 - add any other mandatory requirements that are specific to your procurement
 - When deciding on the mandatory requirements, bear in mind that if a proponent misses even one mandatory requirement, that proponent's proposal must be disqualified
 - Consider if a requirement should be made mandatory, and if there might be other ways to present the requirement
 - *Mandatory requirements are a source of risk*

- **Stage II – General Requirements**

- Rated criteria take into account the quality of the proponent's response
- Customary to use a point system
- **Weighting** ensures that those requirements that have greater importance are given more weight in the final scoring
- **Minimum scores** (optional) ensure that the preferred proponent demonstrates sufficient strength across all of the stages of the evaluation process. Any proponent that fails to achieve the designated minimum score must be disqualified.

- **Stage III – Oral Presentation / Site Visit**
- **Stage IV – In-House Trial / Evaluation**
 - Oral presentation, site visit and in-house trial/evaluation are each intended to give the proponent an opportunity to address major elements in its proposal (if required).
 - RFP template sets out sample language and framework
 - Consider and develop your own framework
 - If not applicable, delete from the RFP

- **Stage V – Risk Mitigation**

- Proponents must identify risks and risk-mitigating initiatives in their proposal, which are then evaluated
- If not applicable, delete from the RFP

- **Stage VI – Pricing**

- Pricing envelopes only opened at the end of the evaluation process
- Pricing evaluation conducted by Evaluation Team Leader (alone)
- In the template, the pricing evaluation is by relative pricing formula (lowest price receives the total available points, with higher prices receiving fewer points per the formula)

- **Stage VIII – References**

- Proponents to identify references
- Consider qualifying the request for references in some way to achieve more balanced feedback from references (rather than the most advantageous ones selected by the proponent). Example: the last 5 installations of equipment.

- **Tie Break Process**

- Only used if 2 or more proposals achieve a tie score
- Tie broken by a pre-determined method (such as, selecting proponent with lowest price).

Mandatory vs. General Requirements

Careful Drafting!

- Distinguish between mandatory and optional elements (i.e. “must”, “shall” vs. “should”, “may”, “can”)
- Failure to meet mandatory requirements will generally result in the disqualification of the proponent
- Failure to fulfill optional elements may result in a proponent not achieving the maximum available points
- Careless use of language when drafting an RFP could result in
 - mandatory requirements being framed as optional, likely jeopardizing the evaluation process if proponents do not comply; or
 - immaterial elements being framed as mandatory, potentially requiring the disqualification of viable proponents that fail to meet the requirement
 - vague language could result in complaints or legal claims

- Evaluation criteria and weightings must:
 - Be developed and approved before a competitive procurement process begins
 - Be included in the competitive documents
 - Differentiate between mandatory and rated requirements
 - Not change once the RFP is issued, unless an addendum is issued in the same manner as the original document
- The RFP must include:
 - Weights for rated requirements
 - Descriptions of any short-listing processes
 - The role and weighting of reference checks, oral interviews and demonstrations
 - Descriptions of the price/cost evaluation methodology
 - The method to resolve a tie score

Evaluating Responses

- Only material submitted as part of the RFP submission and/or material obtained by formal clarification can be evaluated
- Evaluators must review all information provided in the proposal and clearly document all comments/findings on an evaluation matrix
 - These comments may be used as part of a subsequent debriefing
- Evaluators should conduct assessments individually and independently from other team members
 - Under no circumstances should a consensus scoring methodology be used as an alternative to individual scores

Evaluating Responses

- Records of evaluation scores must be auditable and everything said or documented must be fair, factual, fully defensible and may be subject to public scrutiny (e.g., FIPPA)
- Once the individual evaluations are completed, evaluators may meet to discuss their responses and review the final score
 - If, during the evaluation review meeting, it is established that an evaluator has misunderstood elements of a submission, the organization's published process for addressing this issue must be followed and documented for any revisions
- The Bid Administrator will then prepare the evaluation summary for each proposal evaluated by the team by coordinating all comments and feedback from the team

Using the Agreement Template



- **Contract / Agreement**
 - A legally binding oral or written agreement
- **Letter of Agreement**
 - Shorter form of written document, used in less complex scenarios
- **Purchase Order**
 - Legally binding contract
 - Includes organization's primary terms and conditions

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- **Letter of Intent**
 - *Non-binding* expression of intent or expectations

 Not a contract!

- Including the form of the final agreement as part of the procurement allows:
 - for a fair comparison of submissions based on common contract terms
 - suppliers to consider the contract terms when pricing the submission
 - for minimized negotiations with the selected supplier since the expectation is the supplier will accept most of the terms
- Terms that are essential or mandatory to the agreement should not be subject to negotiation
- Organizations should keep the negotiable terms at a minimum level to ensure fairness, transparency and accountability

- What to do if one or more proponents will not agree with your form of agreement?
 - Ensure that the degree to which a proponent will accept the form of agreement is part of the evaluation criteria and disclosed in the procurement documents
 - Proceed to negotiations if desirable (or if you do not wish to and no proponents will agree with your form, discontinue the procurement and restart)
- What is open to be negotiated?
 - Must not deviate in material way from terms provided to other bidders
 - You should seek legal advice in connection with negotiations

Principal rights/responsibilities of Purchaser:

- Inspect equipment prior to delivery and on delivery
- Once delivered, Purchaser is responsible for loss or damage to equipment (insurance)
- Acceptance testing (*optional*)
- Others responsibilities can be added (i.e. prepare site prior to delivery, provide back up power, etc)

Principal obligations of Supplier:

- Shipping at no cost
- Remove equipment if rejected by Purchaser
- Installation and all installation costs (including where Supplier causes damage or destruction)
- Deliver manuals and other documentation
- Ensure no liens attach to equipment
- Training
- Maintenance and Support
- Product Warranty

Questions?