

GOVERNMENT PROCUREMENT WEBINAR SERIES 2021

Legal Issues and Risks in Procurement

Presented by Scott Alden, Partner and Victoria Gordon, Senior Associate

Tuesday, 28 September 2021

The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- Probity in Procurement – 17 August 2021
- Current Issues and Updates in Procurement - 7 September 2021
- **Legal Issues and Risks in Procurement – 28 September 2021**
- Tender Assessment – 19 October 2021
- Innovations in procurement – 9 November 2021
- Managing the Procurement – 30 November 2021
- Top Ten Issues for 2021/2022 – 21 December 2021

If you have any questions in relation to our Government Procurement Webinar Series, or to register to attend a session, please email Katarina Szivek, BD Specialist on kszivek@hwle.com.au.

To view the recordings of sessions already delivered, please visit <https://hwlebsworth.com.au/recordings-government-procurement-webinar-series-2021/>

Agenda

- What is the process contract?
- What else is there?
- A journey of Discovery
- Statutory tender challenge rights
- War stories

The Process Contract

Legal Risks

- The Process Contract

One Contract (before Hughes Aircraft)

- 📁 Invitation to Tender (Invitation to Treat)
- 📁 Tender (Offer) – Validity Period
- ⚙️ Letter of Acceptance (Acceptance)



The Process Contract

Two Contracts (after *Hughes Aircraft*)

- a. *The Queen in Right of Ontario et al v Ron Engineering & Construction Eastern Ltd* [1981] 1 S.C.R 111 (Canada)
- b. *Hughes Aircraft Systems International and Airservices Australia* (1997) 146 ALR 1
- c. *IPEX ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480

The Process Contract

What are its terms?

Implied

- Receive and assess an on time compliant tender
- Good Faith

Express (Conditions of Tender)

- Closing Date
- Late Tender
- Assessment Criteria
- Value for Money?
- Mandatory Criteria
- Confidentiality
- Collusion
- Carry out committed Offer if Accepted

The Process Contract

How is it formed?

[A Process Contract will exist where]

...a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests that an obligation (promissory in nature) to follow such timeline and process had been incurred.

IPEX decision

Procurement – Legal Risk – Non-Contract

- Equitable Estoppel
 - *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (unreported 10 April 2003)
- Misleading and Deceptive Conduct
 - Section 18, Schedule 2 *Competition and Consumer Act 2010* (Cth)
 - *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337
 - *Hughes Aircraft*
 - Section 42, *Fair Trading Act 1987* (NSW) and other state equivalents
 - *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2010] NSWSC 726
 - *Government Procurement (Judicial Review) Act 2018* (Cth)

The Process Contract

- Damages for a breach of the Process Contract
 - Loss of Profit
 - Loss of Chance
- *J&A Developments v Edina Manufacturer Ltd, Amoura Ltd Ors* [2006] NIQB 208
- Compensation / Reliance
 - Statutory (s 236 of the Australian Consumer Law)
 - Other heads

Excluding the Process Contract/ Liability

- *There is no intention to create legal relations by this RFP. The request may result in negotiations for the award of a contract, but of itself is not an offer that applicants / Proposers accept by submitting a proposal. To avoid doubt, no process contract will arise by the issue of this RFP.*
- By responding to this RFP you acknowledge acceptance of the principles specified within this documents...
- Proposers must acknowledge in their proposals that they accept all the terms and conditions and information requirements contained in this document.

Excluding the Process Contract/ Liability

- Each Proponent agrees and acknowledges that notwithstanding anything contained in this Call (except in relation to the irrevocable offer described in Clause 3.1.17), **no contractual relationship** exists between the Principal, and Operator... and any Proponent... in relation to the evaluation... or otherwise in dealing with a Proponent in relation to the ITS. (at clause 3.1.1)
- Each Proposal submitted in response to this Call will comprise an **irrevocable offer**... The irrevocable offer shall be given **in consideration** for the Principal agreeing to consider the Proposal in accordance with this Call... (at clause 3.1.17)

Cubic decision

Excluding the Process Contract/ Liability

- Except as expressly and specifically permitted in these Instructions to Proponents, **no Proponent shall have any claim for compensation of any kind whatsoever**, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

Tercon Contractors Ltd. v British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 SCR 69

- The Ministry shall **not be liable** for any **costs, expenses, loss or damage** incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the **acceptance or the non-acceptance** by the Ministry of any Tender, or by reason of any delay in acceptance of a Tender, except as provided in the tender documents.

Rankin Construction Inc v Ontario 2014, CarswellOnt 12595

The Process Contract

Excluding the Process Contract / Liability

- Can you exclude
 - *Cubic*
 - *Tercon Contractors Ltd*
 - *Rankin*
- Should you exclude
 - *Ron Engineering & Construction Eastern Ltd* [1981] 1 SCR 111 Canada
 - *City Polytechnic of Hong Kong v Blue Cross (Asia Pacific) Insurance* [1994] HK CFI 355
 - *Woollahra Municipal Council v Secure Parking Pty Ltd* [2015] NSWSC 257
 - *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWCA

Procurement – Legal Risk – Non-Contract

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- Government Procurement (Judicial Review) Bill 2017 (Cth)
- Enforceable Procurement Provisions – EPPs

The Process Contract – Preliminary Discovery

Griffin Energy Pty Ltd v Western Power Corporation [2006] FCA 1242

- Coal fired power station in Western Australia
- Mandatory requirements
- Environmental standards
- Power output
- Tender awarded to Wambo – Griffin Energy doubted mandatory requirements complied with
- Made application for preliminary discovery

The Process Contract

Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No.3) [2007] FCA 1567

- \$600m broadband grant
- 5 tenderers
- Included Optus and Telstra
- Optus and government negotiating for \$900m
- Telstra considered unfair
- Applied for preliminary discovery
- Tenderer clarification questions

Statutory tender challenge rights

- NSW Enforceable Procurement Provisions and amended *Public Works and Procurement Act* (NSW)
- *Government Procurement (Judicial Review) Act* (Cth)

Some War Stories

- Late Tender
- Chair of TEC – Conflict of Interest
- E-Tender – ‘Preferred Didn’t Upload’
- Didn’t Empty Tender Box
- Result Too Risky
- Good Idea... Shame You Lost
- Brown Bags

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