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IF YOU BID IT, THEY WILL COME

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In the 1989 movie *Field of Dreams*, the character played by Kevin Costner turned a field of corn into a baseball diamond because a voice in his head told him that "if you build it, they will come".

In construction, the comparable words would be, "if you **bid** it, they will come." But, what is a bid, and who, exactly, will come?

A property owner, such as a hospital, long-term care home, clinic or other health facility, which is considering entering into a construction project - whether new construction or renovation work - has a number of important things to consider and issues to resolve, including financing, acquisition and design. Once these (and other) issues are resolved and settled, the design process is complete and you are ready to start the actual construction work, there is one more very important thing which must be decided; who will do the work?

The process of selecting a contractor is one of the most important decisions in the construction process. To do so, health facilities and in particular, public sector organizations are often obliged, either through legislation or policy, to use a bid or tender process.

A bid (also called a tender) process is a means whereby an owner can obtain competitive bids for a particular project with a view to securing the lowest or best possible price. This bid process often results in a contract - a contract separate and apart from the contract which the owner will sign with the successful bidder for the construction work.

In 1981 the Supreme Court of Canada decided a bidding case called *R. v. Ron Engineering & Construction (Eastern) Ltd.* and, in doing so, completely changed the rules for competitive bidding in Canada. Prior to *Ron Engineering* the bid process was made up of an offer (the bid) made by a contractor to do the work required by the owner. When the owner accepted a bid, a contract for the construction work was created.

In *Ron Engineering*, the Supreme Court of Canada took an entirely different view of the bid process. The Court held that the process leading up to the construction contract was made up of two separate contracts, which the Court called "Contract A" and "Contract B". The Court explained that an owner's invitation to bid (a bid call) represents, in law, an **offer** by the owner to consider the bids it receives and to enter into a contract to complete the project where a bid is accepted. So, when a bidder responds to the bid call by submitting a compliant bid, this represents **acceptance** of the owner's offer, at which point a **contract** is formed - the Court called it "Contract A". This contract is now commonly referred to as a "bid contract" and is separate and distinct from the construction contract to be awarded to the successful bidder (which the Court called "Contract B").

Both parties to a "bid contract" have contractual obligations to each other. These obligations are specified in the bid documents, and also include additional obligations which have been read into the "bid contract" by the Courts. For example, one such obligation is an owner's obligation to conduct the evaluation of the bids and to award the project only in accordance with the terms of the "bid contract". Another implied obligation is an owner's duty to treat all bids fairly and equally.

Because the "bid contract" is a real contract, if either party breaches it they can be liable to the other for breach of contract damages, which can be substantial. In the case of an owner, if it breaches the "bid contract" and awards the project to the wrong bidder, it could be liable to pay the "entitled" bidder the profit that bidder would have earned had it been awarded the project.

Bidders also have obligations, including an obligation to sign the contract for the project if it is awarded.

The law on bidding has continued to evolve. For a health industry client considering a construction project it is therefore critical to ensure that the bid process is well understood and, most importantly, is properly and correctly reflected in the bid and contract documents. To avoid problems and potential litigation - before the project even begins - consider having a lawyer review or revise the bid documents. In fact, since the bid documents could result in a "bid contract", consider treating them like any other contract and having them drafted or reviewed by a lawyer.

If you bid it, they - the bidders - will come. However, whether the result is a "field of dreams" or a bad dream could depend on the bid documents used to select the contractor.

This is Part 1 of a two Part series on bidding processes. Our Health Industry Practice Group would be pleased to assist you with the structuring or review of your bidding processes.

ABOUT THE AUTHOR

Dražen Bulat is a partner in our Construction Industry Group. Dražen's practice focuses on the development of "front end" procurement and construction documents, including tender documents, RFPs and different forms of design and construction contracts applicable to most areas of the construction industry, including health care facilities.

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