WELCOME

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EDUCATION LAW
Miller Thomson LLP Education Group
Morning Recess Webinar Series

The Broader Public Sector Procurement Directive: Myths and Fairytales (and a few Truths)

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Agenda

1. Introduction
2. Contract A
3. Myths / Truths
4. Questions
Introduction

• **BPSAA**
  • What is it?
  • Who does it apply to?
  • What does it do?

• **Procurement Directive**
  • What is it?
  • When does it apply?
  • What does it do?
Introduction

• **Procurement Directive High Points**
  • Posting on country-wide electronic database, eg. Biddingo, Merx
  • Evaluation criteria set out in docs
  • Debrief / complaint process
  • 25 mandatory requirements

• **Goals**
  • Clean up public procurement
  • Create process consistency
  • Create accountability
  • Create credibility with vendors
Introduction

• **Tools**
  • Procurement Directive
  • Implementation Guidebook
  • Ministry of Finance website

• **Consequences of non-compliance**
  • Breach of funding agreement

• **Effects**
  • Inconsistent application
  • Some process consistency
  • Accountability
  • Confusion / Myths
Glossary

- The term RFP includes:
  - Tenders
  - Bids
  - RFQ
  - RFP
  - RFT

ALL USED IN “COMPETITIVE PROCUREMENT”
Bidding Until 1981

- Bid Call
- Submit Bid
- Accept Bid
- Offer
- Acceptance
- Contract
- Build
- Litigation
- Claims
Contract A: Alive and Well

**BID CALL**

**OFFER**

**SUBMIT COMPLIANT BID**

**ACCEPTANCE**

**ACCEPT BID / AWARD CONTRACT**

**PERFORM**
- Owner: evaluate bids
- Bidder: keep bid irrevocable; sign contract if awarded

**CONTRACT A**

**PERFORM**
- Contractor: build
- Owner: pay
You Must Always Use the “Bid Contract”

- Preferred under PD
- Opt out permitted
  - MR16 and MR21
  - Guidebook, Sn. 11.2.6
- Why would you not want “Bid Contract”?
  - Looking for differing solutions
  - Output specs key

PD APPLIES: BID CONTRACT OR NOT!
You Never Have To RFP Professionals

- PD incorporates AIT (s. 5):
  - If an exemption, exception, or non-application exists in AIT, can apply to PD

- AIT Annex 502.4 (Sn. L)
  - Non-application
  - Accountants / architects / lawyers etc.

- Truth, provided
  - Professional not “consultant”

WHAT’S A CONSULTANT?
You Always Have to RFP Professionals

- **MR3**: O must procure consulting services irrespective of value
- **What’s a consultant / consulting services?**
  - Very broad definition
- **Defined in the PD Implementation Guidebook:**
What’s A Consultant?

- “Consultant” means a person or entity that under an agreement, other than an employment agreement, provides expert or strategic advice and related services for consideration and decision-making.

- “Consulting Services” means the provision of expertise or strategic advice that is presented for consideration and decision-making.
The PD Prohibits Prequalification!

- PD provides for
  - Open prequalification (Biddingo, Merx, etc.)
  - Creation of select list of qualified vendors
  - Comply with / evaluate per PD
  - Then, bid documents to select list only
  - Second process still follows PD rules
Owners Can Never Negotiate!

- PD, no prohibition
- Addressed by implication (MR16)
- OK if:
  - Prices over budget (not concurrent)
  - RFP specifies/requires
  - Contract not issued with RFP
Low Compliant Bid Always Wins!

- PD says (MR9):
  - “maximum justifiable weighting must be allocated to the price / cost component of the evaluation criteria”

- Somewhat rigid sounding
  - Value for money goal

- Can produce unwanted results
  - Sometimes lowest price ≠ best
  - Concern with poor technical winner
Low Compliant Bid Always Wins!

- Low compliant bid may lose
  - If points reward other things
  - No prequalification

- Approach:
  - Don’t accept myth
  - Model evaluation matrix
If Process Has Problems, You Must Cancel

- Assume “bid contract”
  - O must follow process
  - Most RFPs include cancellation clause
- Nothing in PD
  - Requiring cancellation
  - Preventing adjustment/re-negotiation
- “Bid contract” is a contract
  - Contracts can be amended
  - Consider option to negotiate/change

SAVING PROCESS = TIME AND MONEY
Wrap Up

• PD is still fairly new
• Owners still learning
• Everyone will be better off
  • Process consistency
  • Accountability
  • Evaluation criteria are public
  • Debrief available
• Questions?
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