Thoughts on Governance and Broader Public Sector Procurement

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June 26, 2014
INTRODUCTION

• Outline
  – What are the Governance obligations of a Board?
  – How does BPSAA impact Board procurement?
  – What is Trustees’ role in approving contract awards?
  – How should Trustees respond to lobbying?
  – Q & A
WHAT ARE THE GOVERNANCE OBLIGATIONS OF A BOARD?

• “Board” commonly refers to
  – Corporation
  – Trustees
  – Staff

• Board (corp.) is a creature of statute – *Education Act*
WHAT ARE THE GOVERNANCE OBLIGATIONS OF A BOARD?

• **Trustees:**
  – As a body – authority to act
  – As individuals – no authority to act
  – Trustee duties include
    • due diligence
    • fiduciary obligations

• **Staff:**
  – Day-to-day management
  – Implement policies / directions
WHAT ARE THE GOVERNANCE OBLIGATIONS OF THE BOARD? (cont’d)

• Focus today is on
  – Procurement of construction / services
  – Management v governance

• Sn 169.1(1) of EA requires Board to
  – promote student achievement / well-being (a)
  – ensure stewardship of resources (b)
  – develop and maintain policies (d)
  – monitor and evaluate policy results (e)
WHAT ARE THE GOVERNANCE OBLIGATIONS OF THE BOARD? (cont’d)

• Effective stewardship requires:
  – Managing the resources in a manner that upholds public confidence (Sn. 169.1(5) of EA)

• Sn 218.1 of the EA lists duties of Trustees
  – assist Board to meet obligations (a)
  – entrust management to staff (f)
  – comply with Board’s code of conduct (h)
HOW DOES BPSAA IMPACT BOARD PROCUREMENT

• What is BPSAA?

• Why was BPSAA passed?
  – eHealth
  – Bellamy Report (City of Toronto computer leasing)

• What is the goal of BPSAA?
  – create accountability
  – establish transparency
  – create process consistency
  – obtain value for money
  – create standard processes
HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont’d)

• How does BPSAA work?
  – statute
  – defines those covered (Boards are in)
  – provides for issuance of “Directives”

• BPS Procurement Directive
  – governs procurement of goods and services
HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont’d)

• How does BPS Procurement Directive work?
  – Major components
    • adopt “Code of Ethics”
    • follow 25 Mandatory Requirements
  – Code of Ethics
    • “Personal Integrity and Professionalism”
    • “Accountability and Transparency”
    • “Compliance and Continuous Improvement”
HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont’d)

• Some key Mandatory Requirements
  – Must use if value of procurement > $100K
  – Post on country-wide electronic database, eg. Biddingo, Merx
  – Must disclose evaluation criteria and weight
  – Highest scoring respondent wins
  – Debrief
  – Dispute resolution
HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont’d)

• Are there exceptions?
  – Section 5 BPS Procurement Directive
  – Refers to Agreement on Internal Trade
    • Incorporates exceptions / exclusions in the AIT
  – Annex 502.4 of AIT
    • Sn. I – exceptions (emergency / no other source)
    • Sn. L – non-application (architects / lawyers)

• Use of Sn. 5 to be documented
HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont’d)

- What is Board’s (Trustees’) accountability under BPS Procurement Directive?
  - Pass and require implementation
  - Perform due diligence (Governance obligation)
    - NOT every procurement
    - regular staff due diligence reports
    - policy decision: how far into day-to-day management?
WHAT IS TRUSTEES’ ROLE IN APPROVING AWARDS?

• Two main guide posts
  – *Education Act*
  – Governance / policy decisions

• *Education Act*
  – Broad thrust: few details

• Board Governance principles (generally)
  – Establish policy parameters
  – Approve articulation of policy
WHAT IS TRUSTEES’ ROLE IN APPROVING AWARDS? (cont’d)

• What are Governance principles?
  – Policy is Board’s main role
  – Set reporting parameters from staff

• Capital budget as example
  – Annual capital / operating budget
  – Identifies a variety of procurements / budgets
    • Maintenance $
    • New / reno $
  – Procurement / award process delegated to staff provided
    • policy followed
    • award within budget
WHAT IS TRUSTEES’ ROLE IN APPROVING AWARDS? (cont’d)

• If within parameters:
  – Should approve award

• What Trustees should NOT do:
  – Get involved in the prequalification process
  – Get involved in the evaluation of proposals / bids
    • Task of the Evaluation Team
  – Substitute own assessment of bidder / proposal
HOW SHOULD TRUSTEES Respond to Procurement Lobbying?

• What is procurement lobbying?
  – Attempt to change outcome of process
  – Investigate a bid / proposal
  – Attempt to gain advantage

• What are Governance implications?
  – None, if Trustees decline to act
  – Many, if direct staff to take action
HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont’d)

• Consequences of lobbying
  – Needs “two to tango”
  – Staff should disqualify vendor
  – Otherwise:
    • Possibly breach internal policy
    • Contrary to intent of BPS Procurement Directive
    • Create difficult environment for staff
    • Potential for complaints / claims
HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont’d)

• BPS Procurement Directive says
  – Lobbying?
    • nothing specific
    • avoid conflicts of interest
  – BUT, high scorer “must” win

• Bid documents / RFP
  – Restrict contact to designated person
    • Prohibit other contacts
    • Breach = disqualify
HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont’d)

• Legal implications of Trustee lobbying
  – Breach of fiduciary duty?
  – Breach of BPS Procurement Directive
  – Breach of internal policy
  – Reputational issues
  – Ministry issues

BOARD COULD BE SUED! WHY?
1981 – *RON ENGINEERING*: WHY OWNERS GET SUED

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

**Submit Compliant Bid**

**Accept Bid / Award Contract**

**Perform**
- Contractor: build
- Owner: pay

**Offer**

**Acceptance**
• Questions?