Coffee Talk
Health Industry Seminar Series

Build, Renovate, Expand
Risk Management in Construction & Procurement

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Case Example

- You intend to engage in construction to expand facilities
- Project is being funded by MOHLTC
- You retain a consultant to prepare and issue the tender documents to secure a contractor
- You engage in a competitive procurement process
- Tender documents are issued with CCDC contract form and Supplementary Conditions
- You engage legal to prepare the contract for signature
- Legal advises that the terms issued with the tender contain provisions contrary to your interest and fail to address key funding agreement requirements
- no contract amendments can be made without agreement of contractor

CAN THIS BE PREVENTED?
Agenda

1. Procurement Rules and Process
2. Roles of Key Stakeholders
3. Preparing and Administering Key Procurement Documents
4. Funding Implications
The Procurement Rules

• Under AIT competitive procurement where construction > $250,000
• Under BPS competitive procurement where construction > $100,000
• Funding agreements and corporate policies may have more stringent competitive procurement requirements
IS A COMPETITIVE PROCUREMENT PROCESS REQUIRED?

If Yes

Are you a BPS organization receiving $10 million or more in funding from the Government or a Shared Services Organization owned by such an organization?

BPS Guidelines apply

Procuring goods, services or construction valued over $100,000?

Yes

Qualify for exemption

Yes

Competitive process not required

No

No

Competitive process not required

If No

AIT may apply

Does the procurement fall under the Non-Application Section (L) of Annex 502.4? e.g., contracts with non-profit services provided by licensed health professionals, etc.

If Yes

AIT/Annex does not apply

No

Procuring construction valued over $250,000 or goods/services valued over $100,000

Yes

Qualify for an exemption under Appendix C or D of Annex 502.4?

No

Yes

Competitive process not required

No

Competitive process not required
The Procurement Process

• At its most basic form, a procurement process is a process by which one party (usually an Owner) obtains competitive proposals/bids for particular mandate (i.e. a project or service) in order to select the best vendor.

• However, the procurement process requires a lot of planning and thought in order to manage internal and external risk.
Overview of Procurement Process

1. Procurement Process Planning
2. Preparation of Procurement Documents
3. Issuance of Procurement Documents/Management of Process
4. Evaluation of Submissions/Award
5. Negotiation/Execution of Contract
6. Contract Management
BPS Procurement Directive

• How does BPSA work?
  • Defines those covered (i.e. Hospitals)
  • Provides for issuance of “Directives”

• BPS Procurement Directive
  • Governs the procurement of goods and services
  • Applies to all types of procurements:
    • Tenders, bids, proposals, quotes
    • RFPs, RFTs, RFQs, RFSQs
BPS Procurement Directive

• 2 Major components:
  • Adopt “Supply Chain Code of Ethics”
  • Follow 25 Mandatory Requirements
    ➢ Competitive procurement process requirements
    ➢ Competitive procurement document requirements
    ➢ Contract requirements

MUST ENSURE COMPLIANCE
ROLES OF KEY STAKEHOLDERS

- MOH/LHIN
- HEALTH SERVICE PROVIDER
- LEGAL
- USER GROUPS
- OTHER GOVERNMENT AUTHORITIES
- CONSULTANTS
- LANDLORD (if applicable)
Stakeholders

• Health Service Provider
  • Governance – Board risk management/financial oversight and approval
  • Management – development/procurement office implements the project and seeks Board approval at governance decision points
Stakeholders

• MOH/LHIN
  • MOH capital planning approvals for own fund and ministry-funded projects
  • Capital funding agreements
  • Failure to comply with competitive procurement requirements constitute breach of funding agreements with sanctions
Stakeholders

• User Groups
  • Needs assessment
  • Fair, transparent, efficient procurement
Stakeholders

• Consultants
  • Consultants are technical experts
  • Prepare specifications and drawings and address technical/design risks
  • Limits of liability for consultant work
  • “Crossing the line”
Stakeholders

• Legal
  • Advisors on legal compliance with procurement requirements and laws
  • Draft and negotiate legally enforceable binding contracts
  • Support due diligence and enterprise risk assessments of procurement process issues and contract terms
Stakeholders

• Other Government Authorities
  • Examples
    • Municipal zoning and subdivision
    • Environmental record of site condition
Stakeholders

• Landlord (if applicable)
  • Lease terms/consents required for land use and development
Procurement Planning

- Budget/Funding Arrangement
- Approvals
- Scope of Work (consulting vs. non-consulting)
- Type of Procurement (i.e. RFQ, RFQu, RFP, RFT, EOI)
- Pricing Structure
- Form of Contract (i.e. CCDC, OAA)

Risk assessment in all stages of procurement planning
Procurement Planning - Process

- RFP
  - Flexible
  - Unenforceable
  - Issuer/seller can walk

- BID
  - Structured
  - Enforceable
  - Issuer/seller obligations
Procurement Planning - Process

- Make a conscious decision between an RFP and a BID
- If intention is a non-binding process then avoid language suggesting irrevocability and use of the words “bid”, “tender”, “bidder”
- Either way state your intentions and be clear
Procurement Planning - Documents

• Procurement documents combination of:
  • technical documents (e.g. specifications and drawings); and
  • legal documents (e.g. instructions to bidders, bid form, contract)
Preparing and Administering Key Procurement Documents

• Key procurement documents include:
  • Instructions to Bidders
  • Bid Form/Price Form
  • Form of Contract
Instructions to Bidders

• Content is determined by type of procurement elected

• was there a pre-qualification process? if not, do you include technical and financial submission requirements.

• Importance of assessing technical capabilities of bidders – low price is not always best
Bid Form/Price Form

• Price Form/Financial Submission should be consistent with pricing language in the form of contract
• Consider cash allowances/contingencies for unknowns
• Cost certainty – funding agreement may not permit or account for cost overruns
Form of Contract

• Industry standard forms such as CCDC documents
• Designed to be contractor friendly, and don’t address all project-specific matters
• Requires modification via development of supplementary conditions
• Different forms of supplementary conditions available, developed by contractor industry associations
• Supplementary conditions can include any additional or amended terms desired by owner
Form of Contract

• BPS Directive Requirements:
  • Mandatory Requirement #15: Executing the Contract
  • Mandatory Requirement #16: Establishing the Contract
  • Mandatory Requirement #17: Termination Clauses
  • Mandatory Requirement #22: Contract Management
Form of Contract

• The contract must be finalized using the form of agreement that was released with the procurement documents

• Very little room to make unilateral changes to contract terms after successful bidder identified
Funding Implications

• Funding agreement imposes obligations that need to be flowed through to the construction contract in order to comply

• Failure to do so could result in breach of the funding agreement resulting in potential for significant financial/legal liability
Funding Implications

• Examples:
  • MOH audit rights
  • MOH consent/approval requirements
  • MOH right to terminate
  • Insurance requirements
Summary

• Procurement project planning is key to effective risk management/mitigation
• Consider at the outset the roles and appropriate involvement of stakeholders in the procurement process
• Ensure legal compliance of your process and secure legal advice on contract terms early and before issuing procurement documents
• Be proactive and deliberate in how you run your procurement process; pitfalls can be avoided
Questions?

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