Contract A: Yay or Nay? *March, 2016*

by Michael Large, LLM, LLB, B.COMM

In both public and private sector procurement, a key question from an owner's point of view is this: Should we create Contract A or not? This briefing note aims to answer that question, drawing on many years of relevant research and experience.

Background on Contract A, including Implied Duties

Beginning with the case of *Ron Engineering* (1981), and continuing in cases like *M.J.B. Enterprises* (1999) and *Tercon Contractors* (2010), the Supreme Court of Canada has held that when a project owner issues a solicitation document for the purchase of goods or services (RFX), the owner may be issuing an offer to vendors to evaluate their bids in accordance with the terms in the RFX. By submitting a compliant bid, a bidder may be judged to accept the owner's offer, creating a preliminary contract called Contract A (also called the Bid Contract). In this way, Contract A can arise between an owner and each compliant bidder. Roughly speaking, the basic obligations under Contract A tend to be that the owner agrees to evaluate a bid in accordance with the evaluation process set out in the RFX, and the bidder agrees to carry out the work in accordance with applicable terms if selected as the winner.

In *Martel* (2000), the Supreme Court of Canada found that an implied "duty of fairness" can arise as part of Contract A, a duty which is informed, in part, by the express terms of the RFX. Over decades, several specific duties have been implied by Canadian courts (e.g.'s: owner's duty to avoid secret criteria; owner's duty to reject non-compliant bids), in the context of breach of Contract A cases. Importantly, the Supreme Court of Canada has made it crystal clear that Contract A is not *necessarily* created in a competitive procurement situation. Contract A is created (or not) like any other contract. The actual intentions of the parties to create a contract, along with an offer from one party and acceptance from the other, are a few of the key ingredients needed to create Contract A. The courts look primarily to the language in the RFX and the conduct of the parties to determine their intentions and whether an offer and an acceptance have changed hands.

In situations where Contract A arises between an owner and a bidder, an owner risks a lawsuit for breach of Contract A if the owner strays from its express or implied duties under the RFX. An aggrieved bidder may claim lost profits, or at least the cost of preparing its bid. On the upside, if a court finds that no Contract A is created by a particular RFX, then a claim for breach of Contract A (including implied duties) must fail. *Guysborough* (2011, NSSC) and *Everything Kosher* (2013, ONSC) are recent cases demonstrating how an owner can avoid the creation of Contract A, with clear and consistent language. Simply put, no Contract A means no possible breach of Contract A, and no related damages.

Tentative Templates Tempt Fate

Remarkably, most of the RFX templates I have reviewed during my career send mixed messages about the creation of Contract A. Clauses speaking to the intent to form or avoid Contract A are often unclear and inconsistent. In fact, I seldom see an RFX template that specifically refers to the creation or avoidance of Contract A, by name. This ambiguous approach leaves the door open for courts to find that Contract A was created by the parties, when the owner didn't really want or expect that outcome – or worse, when the owner didn't even turn any attention to the question. Few organizations approach the creation of Contract B (also called the Performance Contract) so casually, so why do they continue to leave the creation of Contract A to chance?

To Contract A, or Not?

The decision to create Contract A or not is best driven by context, including the preferences and priorities of the decision maker. As a lawyer interested primarily in reducing liability risk for owners issuing RFXs, I tend to recommend minimizing the role of Contract A in procurement situations, or excluding its creation entirely. I see room for Contract A, in some contexts.

Why Avoid Contract A Entirely?

• ***Avoid liability:*** Again, if no Contract A is created by a particular RFX, a claim by an aggrieved bidder for breach of Contract A (including its implied duties) cannot be successful. In my view, this is the most compelling reason to avoid Contract A: to minimize the risk of evaluation-related liability to an aggrieved bidder for lost profits, or the cost of preparing its bid. In *Tercon,* for example, the Supreme Court of Canada upheld damages for lost profits totaling more than $3 million. The stakes for owners can run high.

At the same time, it is important to make clear that avoiding Contract A is no guarantee that legal troubles of all sorts will be avoided. Federal government ministries and certain federal entities are subject to Canadian International Trade Tribunal scrutiny, and those legal challenges are based on breach of trade agreement obligations, whether or not Contract A is created. Creative claims for damages are also possible, like misrepresentation or negligence, although in the procurement context, these lines of attack have not been particularly popular or profitable.

In addition, public-sector entities can still be subject to judicial review (JR) for reasonableness, despite a general reluctance by courts to review commercial decisions in this way. *Rapiscan* (2014, FC) is a recent example. In that case, the owner, a federal Crown corporation, had decided to explicitly avoid Contract A in an RFX. An aggrieved bidder applied for JR. The Federal Court decided that intervention through JR was justified, in part because the bidder had no Contract A remedy. The Court also decided that the owner's award decision was unreasonable and unlawful, in light of specific statutory duties, internal deception, no evaluation criteria, no performance requirements, no Contract A, and other factors. When this court decision was appealed by the owner, the result in favour of the bidder was upheld,[1] and a 'declaratory remedy' granted. The Federal Court of Appeal declared that CATSA failed to follow its own contracting procedures. In effect, the declaration amounts to an authoritative form of public reprimand.

Crucially, damages are typically unavailable through JR. However, an owner can face a court declaration branding the owner a wrong-doer, or a court order obliging the owner to run a future procurement more reasonably, for example. In other words, a JR decision may say "shape up"; in contrast, a breach of Contract A decision may say "pay up." Public sector entities may wish to avoid Contract A to reduce the risk of the latter dramatically, even if that means raising the risk of the former to some degree.

• ***Cope with urgency:*** RFX documents are often drafted rough-and-ready because of intense time pressures. Evaluation criteria and Statements of Work are sometimes cobbled together in a hurry. This is not advisable, but it is sometimes unavoidable, at least from the point of view of procurement professional working under-the-gun. Post-close, if events unfold that no one anticipated during drafting, an imperfect RFX might leave important questions unanswered. If Contract A is avoided entirely, then gaps and gaffes might be patched up post-close, with little or no legal recourse for bidders. So, speed can trump rigour

---

[1] In the Federal Court of Appeal decision, *Rapiscan* (2015, FCA), the FCA upheld the lower court result for reasons unrelated to the owner's avoidance of Contract A. The FCA had little new to say about the owner's avoidance of Contract A, apart from summarizing the lower court's findings on that front. Owners can take some comfort from the FCA's choice to side-step explicitly supporting the lower court's 'no Contract A' reasoning, and some discomfort in the FCA's choice to side-step critiquing that reasoning. To further muddle matters: the lower court had stated that internal deception was enough, on its own, to support the lower court's decision, even if Contract A had been created. Just the same, the lower court's discussion of the 'no Contract A' model indicates that the model was a relevant factor (even if not the most compelling one) that worked against the owner.

during drafting, when necessary, on a lower-risk basis. On the downside, no Contract A may lead to even sloppier RFX documents; more time in the negotiating room with a winning bidder, and more successful applications for JR by aggrieved bidders (as discussed above).

• ***Increase flexibility:*** Similarly, if an owner is not contractually bound to follow its evaluation process, then the owner arguably enjoys a greater degree of flexibility in the evaluation room. Unpleasant surprises can appear in bids post-close, and creative solutions become less risky when the evaluation process is non-binding. An owner should still aim to follow its own process, but the owner is not contractually *obliged* to do so. Failing to follow a *non*-binding process can be embarrassing; failing to follow a *binding* process can be embarrassing and expensive.

• ***Bidder's primary promise empty and/or unnecessary:*** As mentioned above, under Contract A, a bidder typically promises to carry out the work *in accordance with applicable terms*, if selected as the winner. In other words, the bidder is saying that the owner's one-sided, bone-crushing standard terms are acceptable. However, some procurement situations are too complex or uncertain for the owner to set out all performance specifications and legal terms in the RFX. The owner may believe that bids are unlikely to fill the gaps in an owner-friendly way, so may see negotiations as likely or inevitable. In these situations, the bidder's promise to perform to the *owner's* specs and terms may be empty, or at least significantly undermined. Worst case: the bidder's promise to accept the owner's incomplete or ambiguous terms is really an empty one. The promise depends on successful negotiations; it is merely an agreement to agree, which is no agreement at all. The upshot is that a court may find that no Contract A has been created in that instance, relieving the owner of evaluation-related duties.

Consider the example of an owner going RFX for a custom software solution, maybe something out of a science fiction movie. The owner may be unable to draft precise software specs for the RFX, or precise licensing or support terms. The owner might be unsure if it is possible to affordably design and code the software. Thus, the owner may be unable to attach a form of Contract B to the RFX, or the terms of Contract B may be uncertain or incomplete, or unrealistic or unacceptable to bidders, forcing negotiations. Negotiations are the antithesis of contractual certainty. A bidder's promise to perform to the owner's specs and terms is of little value if those specs and terms are still up in the air and subject to (re)negotiation. More to the point, even if the bidder's primary promise under Contract A has value, it need not take the form of a Contract A commitment. It can – and often does - take the form of an offer to enter into Contract B.

Why Create Contract A?

• ***Land irrevocable offers:*** Here, it is necessary to grapple with the mechanics of offer and acceptance, in relation to contract formation. As explained above, an RFX issued by an owner may form an offer to potential bidders to enter into Contract A, and a compliant bid submitted by a bidder may be acceptance of the owner's offer, forming Contract A. But the bid can serve a dual purpose. If it is properly put together, the bid can also serve as an *offer* by a bidder to enter into *Contract B*. How does this work?

Many RFXs include a cover page for bidders to sign and submit with their bids. That page may include offer language drafted by the owner, in relation to the creation of Contract B. Sample language: "The bidder hereby *offers* to complete the work in accordance with the RFX and the bid." If a bidder signs and submits that form, an offer to the owner has been made. If the owner chooses a bid and accepts it - typically with a public announcement or signed award letter - then Contract B is born (assuming all other ingredients needed to form a contract are in place).

If the offer is framed as irrevocable (typically on the prescribed bid cover page itself, and/or through a clause appearing elsewhere in the RFX), then the bidder is not permitted to withdraw its bid during the

irrevocability period defined in the RFX. If the lowest compliant bidder withdraws unjustifiably, then the owner might carefully analyze the situation, and decide to sue that bidder for the difference between its bid price, and the price of the next-highest compliant bid (which the owner would presumably accept instead).

Here's the rub: Courts have taken the existence of an irrevocable offer in relation to Contract B *as an indicator of the parties' intent to form Contract A*. This has led some procurement experts to conclude that, if they wish to extract irrevocable offers from bidders in relation to Contract B, they can expect to create Contract A as a side-effect. It is sometimes said that Contract A is needed in order to *bind* the bidders to their bids, in order to create a "binding process." Why aim to bind bidders? Bidders sometimes make mistakes in their bids, win more attractive work elsewhere, or just get cold feet about a project post-close. Typically, an owner does not want an attractive bidder to be free to walk away, once its bid has been submitted.

This seems to be an owner's primary motivation for tolerating Contract A: owners want to hold bidders to their bids throughout the evaluation period (which should be equal to or less than the period of irrevocability stated in the RFX). There are two layers to consider here: first, owners tolerate Contract A because they want the bidder's Contract A promise to complete the work, if selected. Second, owners want to extract an irrevocable offer in relation to Contract B. *But arguably, an owner does not need both.* The Supreme Court of Canada has been clear: although an irrevocable offer in relation to Contract B may be a factor in determining the existence of Contract A, *many other factors are relevant*. In a disputed RFX, a blunt statement that Contract A is not intended to be created is difficult for a court to ignore.

In my view, there is nothing inherently inconsistent between an owner's intention to receive irrevocable offers in relation to Contract B, and an owner's intention to avoid Contract A. In *MJB*, the Supremes said: "it is always possible Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call." In other words, the irrevocability of an offer in relation to Contract B, and the creation of Contract A, are *not* inextricably linked. With careful drafting, owners can have one without the other.

Moreover, owners can do without a bidder's Contract A promise to perform the work, if selected, and be satisfied with an irrevocable offer to perform the work under Contract B. Compare:

- Contract A ***promise***: To perform the work as set out in the RFX, *if selected*. This *conditional* promise is typically binding on each (compliant) bidder, when its bid is submitted.

  Versus

- Contract B ***offer***: To perform the work as set out in the RFX, *period*. This *unconditional* (and perhaps *irrevocable*) offer is typically binding on just one bidder, when the owner communicates acceptance to that bidder. At that moment, a binding Contract B is born (again, assuming all other ingredients needed to form a contract are in place).

Arguably, an owner can forego a bidder's primary promise under Contract A to perform if selected; it is redundant. We get essentially the same thing, if we get an irrevocable offer in relation to Contract B. Once the owner receives an irrevocable offer to enter Contract B, the owner has that bidder over a barrel, even if Contract A is not created. There is some risk here: requesting or demanding an irrevocable offer in relation to Contract B may lead a court to conclude that the parties intended to create Contract A. But courts will read your RFX as a whole. And if your intentions are made clear throughout the document in

relation to the avoidance of Contract A and creation of Contract B, expect the courts to respect your words.

Again, Contract A is typically created with *every* compliant bidder (not just the winning bidder), and it is created *pre-award*. The question becomes: does an owner wish to create contracts with *every* bidder (perhaps even non-compliant ones) and create those contracts pre-award, in order to extract *secondary promises* from bidders?

• ***Secure secondary promises***: Promises made under Contract A can be just as diverse as under any other contract. I have reviewed RFX documents in which each bidder agrees up front to keep certain information confidential, agrees to limit liability linked to the evaluation process, and even agrees to pay a modest fee to help the owner cover the costs of evaluation-related investigations. If an owner wishes to hold all bidders to their pre-award promises, then those promises should form part of a pre-award contract. Contract A can get this job done.

Other approaches are also possible. For example, at the outset of a competitive process, an owner can create pre-award confidentiality obligations and other secondary promises using a non-disclosure agreement signed by both the owner and each potential bidder. On its own terms, the NDA should be clear that obligations are binding whether or not potential bidders actually submit bids, and whether or not those who submit bids are ultimately compliant.

To dump Contract A - without replacing it with something else - means dumping not only the owner's primary promise to follow its own process; it also means sacrificing the bidders' pre-award promises. It is a basic principle of contract law that one party cannot agree to something unless the other party agrees to something in return. Promises, or 'consideration', must be exchanged. Confusingly, some RFX templates aim to hold bidders to their pre-award promises, while stating that the owner owes bidders no obligation in return. Owners may find it difficult to justify clauses that purport to bind bidders to certain terms pre-award, while simultaneously arguing that the owner carries no evaluation-related obligations at all.

To clarify, I'm talking about sacrificing Contract A *promises* – pre-award commitments that are both offered *and* accepted. The owner can't expect bidders to be bound by pre-award confidentiality obligations, for example, without the owner agreeing to a single thing in return. I'm not talking about sacrificing *offers* in relation to Contract B. Open offers and binding promises are not the same thing. An offer is just an offer; it is not a binding promise until the offer is accepted. An owner can ask for an open offer from bidders in relation to Contract B without promising anything in return, and without creating any preliminary contracts. In effect, the owner is receiving something of value from bidders when it receives an offer, but neither party is contractually bound to do anything. At least not yet. Of course, if the owner accepts a bidder's Contract B offer, then at that moment, the bidder is bound by promises to perform, and the owner by a promise to pay. Both are promises under Contract B.

Again, we can avoid Contract A while still receiving offers in relation to Contract B. Countless contracts are initiated under our legal system through the presentation of an open offer from one party to another, without creating any preliminary contract at the same time, and without creating any kind of contract until the offer is accepted. If it is properly drafted, an RFX can do likewise. But we must understand that losing Contract A, without replacing it with something else (like an NDA), can mean losing all pre-award promises by both owners and bidders.

• ***Avoid negotiations:*** Ideally, an owner will set out all material terms of Contract B in the RFX, and receive offers from bidders to complete the work on those terms. In this way, the owner can be in a position to simply "snap up" the winning bid and get down to work. The owner formally accepts the winning bidder's offer, and Contract B is born. Again, a signed acceptance letter delivered by the owner

to the winning bidder should do the job. No time is wasted in the negotiating room, and no concessions are made to the owner's standard terms.

Now, if the winning bidder wants to back out of the project or talk about renegotiating the owner's standard terms, arguing that it never signed Contract B, the owner has a powerful counter-argument: the winning bidder's signed bid amounted to a signature on Contract B, and the owner's signature on the acceptance letter amounted to a counter-signature. Contract B was born, with no need for additional signatures or painful negotiations. This quick and clean outcome represents one of the chief benefits of the RFX process. The owner can snap-up the winning offer and put a bidder to work, without getting pulled into contract talks.

Here is an old-school argument in favour of Contract A: we want open offers in relation to Contract B, in order to avoid negotiations, snap up the winning offer and get down to work, and we should assume that Contract A has been formed in the process. But few owners bother to speak squarely to the issue of Contract A creation in their RFX templates. Careful and consistent RFX drafting can allow owners to avoid Contract A and also avoid negotiations.

As explained above, an offer of some sort can be obtained from bidders in relation to Contract B, without creating Contract A. So a new logic can emerge: let's get open offers, snap one up and get down to work, while avoiding Contract A *and* avoiding painful negotiations. Or, if the RFX allows it, enter negotiations if that turns out to be necessary, all the while holding an open offer over the head of the front-running bidder. Either way, the owner keeps the upper hand.

• ***Meet bidder expectations:*** To me, this is the most compelling reason to tolerate Contract A: bidders may expect it, even demand it. High-quality bidders may decide not to bid when they see that an owner does not wish to be bound by its own evaluation process. Even big companies don't enjoy unlimited resources; they set bidding priorities. They make daily decisions regarding which RFX opportunities to pursue, and which to pass by. Vendors may never tell an owner about a decision not to bid, so this loss may lie deceptively out of sight. Vendors may simply bid on other projects for other organizations – ones that continue to accept a Contract A paradigm. Fewer bids mean less competition, and in turn, can mean poorer work and higher prices.

Or, perhaps worse, good bidders may let an owner know about a no-bid decision, and loudly. An owner may receive complaint letters, or letters may go to political masters. This scenario can get hot if it involves a high-priced, high-priority project, and the procurement professional responsible for the RFX is suddenly faced with loud internal and external demands to redraft an RFX to create Contract A, on an urgent basis.

A perfect storm: you anticipate one bidder or just a few; one or more threaten not to bid because the process is non-binding; you *believe* those bidders (they're not bluffing), and you need them more than they need you. In this scenario and others, you may feel compelled to create Contract A, despite the legal risks. This is why I typically recommend that owners develop a template toolkit with *at least* two models in it: a no-Contract A model, and a Contract A model, each to be used when appropriate, based on context.

At bottom, I think it would be fair to frame the Contract A decision as primarily a trade-off between legal risk and business risk. By successfully avoiding Contract A, an owner eliminates its risk of legal liability for breaches of Contract A, but may increase its risk of vendor resistance or revolt, ultimately translating into higher prices.

Certain factors serve to mitigate business risk. In my experience, lawyers for vendors may fuss over the creation of Contract A, but business leaders (especially salespeople) care less. Many vendors just want the work, and the revenue. And authority tends to be divided in businesses, large and small: a business leader is free to hear their lawyer's discouraging advice, but not follow it. I believe that many vendors tend to hold their noses, and bid anyway, in spite of one-sided terms relating to Contract A and Contract B. They may take comfort in the fact that government entities pay for work done well; payment risk is low, so other risks become more palatable from the vendors' point of view. They may also take comfort in the fact that they can write to the minister or a councillor or the newspapers, to attack unreasonable owner behaviour. Not every remedy available to a vendor is found within the four walls of a courtroom, or the four corners of a contract.

Further, Contract A is a creation of judge-made law in Canada. It may be mainstream here, but it is out of step with the rest of the planet. In virtually every other jurisdiction, bidders know that they are competing for *a chance* to enter into a contract to do work, nothing more. Avoiding Contract A should come as no disappointment to bidders based in most other countries. They may not know what Contract A means, and they may not care to know.

I've heard it said that public entities should create Contract A, in light of duties arising under applicable trade agreements, and related internal policies. However, I have yet to see a trade agreement or policy that translates directly into an owner obligation to create Contract A. International trade agreements are, by definition, with other countries. If government entities in other countries are not creating Contract A because the concept is foreign to procurement and legal professionals in those jurisdictions, then why should we voluntarily create Contract As in Canada? That doesn't sound like free trade to me. It sounds costly to Canadians.

• ***Promote integrity of the bidding process:*** Vendors like to believe that an owner will either follow its own process, or pay damages. Courts often talk about promoting the integrity of the bidding process, as well. Public sector owners are rightly concerned about integrity and transparency. Contract A may be seen as consistent with these values. But arguably, the integrity and transparency of the bidding process is preserved by an owner doing what it said it would do. If the owner is clear that it wishes to avoid the creation of Contract A, and a vendor bids anyway, a court may find it difficult to find fault with the owner for that vendor decision.

As a matter of internal discipline, giving up Contract A may come at a cost. Clear *and binding* evaluation-related rules may help keep internal discretions and biases in check. If giving up Contract A means playing fast and loose with evaluations, then that news could negatively impact your organization's reputation for integrity and transparency. An overly aggressive owner may repel good bidders, make dubious decisions and attract negative headlines. On the other hand, your RFX can still set out a detailed, fair and transparent evaluation process. To stay out of trouble, your people will still feel obliged to follow it, at least to a degree. They simply won't be *contractually* obliged to follow it, if Contract A is successfully avoided.

How to Avoid Contract A

Basically, to avoid Contract A, clear language in the RFX would state that the RFX is not an offer in relation to Contract A, compliant bids are not an acceptance, and no Contract A or preliminary contract of any sort is intended to be formed. Implied terms would be expressly and specifically excluded. Evaluation criteria would be framed as non-binding guidelines. An acknowledgement would exclude liability for deviations by the owner from its evaluation guidelines. Broad privilege and negotiation provisions would confirm that the owner has considerable flexibility in the evaluation room and in the negotiating room. Clauses in the RFX that say that bidders are *agreeing* to X or *accepting* Y, pre-award,

would be deleted or reworded – although clauses saying that bidders are *offering* Z could be retained. An offer in relation to Contract B is not the same as a promise under Contract A. The RFX drafter should lead the RFX reader by the hand through the creation (or avoidance) of each contract layer.

An offer in relation to Contact B could still be framed as irrevocable, as discussed above, but again, this decision may be viewed by a court as an indicator of intent to form Contract A. An unwanted liability risk may arise: an owner may aim to avoid Contract A and fail. A court may perform mental gymnastics to find that Contract A was created, despite the owner's considerable but imperfect efforts to avoid that outcome. A court may hang its hat on a clause that indicates an intention to create Contract A (e.g.: a demand for an irrevocable offer), and apply a doctrine called *contra proferentem* to find against the owner. In basic terms, this doctrine holds that, if a contract is ambiguous or inconsistent, it should be interpreted against the party who drafted it. And of course, if the owner believed it was safe from Contract A claims, and as a result, ran rough over its express and implied duties under the RFX (e.g.: by accepting a materially non-compliant bid), then the owner may feel sucker-punched by Contract A liabilities. If aiming to avoid Contract A, an owner should aim to be clear and consistent throughout its RFX document.

To further reduce risk, an offer in relation to Contract B could be requested by the owner (not demanded as a mandatory), and could be framed as revocable. This is a sacrifice: bidders could choose to omit any offer, or could withdraw from the competition post-close (assuming they withdraw before the owner accepts their offer). If an irrevocable offer is an indicator of intent to form Contract A, then a revocable offer should be seen as less hazardous. And who wants to work with a contractor who doesn't want the work, anyway? If a reluctant bidder wants to withdraw its offer post-close and pre-award, I say give that bidder a hug and a wave. Otherwise, brace yourself for a contractor who cuts corners, cries poor, or otherwise proves difficult.

Other variations are possible. An owner could leave it to bidders to frame their bids as revocable or irrevocable using a multiple-choice bid cover page, and the (ir)revocability of the bid could be a rated criterion (e.g.: irrevocable bids earn 10 points; revocable bids earn 5; no signature means 0 points on that criterion). Don't be afraid to be a bit innovative. This is *your* process, after all.

"Contract A-Lite" – Accepting, Yet Minimizing, the Role of Contract A

Lawyers tend to see Contract A as an all-or-nothing proposition. I believe there is another way, lying somewhere in-between. With the help of legal counsel, an owner could review its RFX, clause by clause, and sort those clauses into three baskets:

1. Clauses the owner wants itself and the winning bidder to be contractually bound to follow, **post-award**.

These are our Contract B promises, and they should be batched together under that heading. This is the easy part.

2. Clauses that the owner wants itself and every bidder to be contractually bound to follow, **pre-award**.

These are our Contract A promises, and they should be batched together under that heading. For example, the parties' pre-award confidentiality obligations could go here. A few of the owner's evaluation obligations could also go here: the promise to reject late bids, or bids without our prescribed form of bid cover page, for example. The owner could limit its liability in relation to this chunk of the RFX, not exclude liability entirely. After all, we intend to be held accountable for our Contract A, to a degree. Again, the owner would draft language to exclude unwanted implied terms, and to exclude pre-award

obligations other than those set out in the Contract A section. Consider subtle but important variations on this theme: sorting obligations that every *compliant* bidder should follow (e.g. submitting responses to owner's requests for clarification), from those that every bidder should follow *regardless of compliance* (e.g. safeguarding owner's confidential information). Organize and identify those obligations accordingly.

3. Clauses that the owner does ***not*** want itself or any bidder to be contractually bound to follow, **pre-award**.

These would be framed as non-binding guidelines, akin to a cover letter to an unsigned contract, intended to inform but not intended to bind. Most of the owner's evaluation process could go here, for example. The owner could also exclude liability in relation to this section. After all, the owner does *not* wish to be held accountable for this chunk, to any degree. The owner could include other language in this section of the RFX to minimize risk and maximize flexibility.

I'm calling this approach "Contract A-lite." It aims to keep the best of Contract A and avoid the worst. *Only declare as binding those parts of the evaluation process that we know we can always follow*. Aim to *limit* liability in relation to those parts of the process that bind. Aim to *avoid* liability entirely in relation to the parts of the evaluation process we declare to be non-binding.

Under this approach, the owner would be able to say to bidders, with a straight face, that it is creating Contract A; the owner is taking seriously vendor concerns about the integrity of the bidding process (at least compared to owners who exclude Contract A entirely). The owner can also keep alive secondary promises from bidders, and ask for an irrevocable offer in relation to Contract B, without fear of unintentionally creating Contract A (we *know* we're creating it).

On the downside, this would be a more extensive drafting exercise than simply avoiding Contract A altogether, because it involves a careful look at each clause in the RFX, an extensive reorganization of the document, and additional drafting to ensure that the owner creates Contract A in only one specific part of the document, while avoiding it in all other parts.

Conclusion

Ultimately, a traditional Contract A model, a model that avoids Contract A entirely, and the model I'm calling Contract A-lite, are all justifiable. Each choice involves significant trade-offs. Each choice depends significantly on context, including project complexities and uncertainties, owner priorities and preferences, and bidder expectations and demands.

As a risk-sensitive lawyer, I largely tend to recommend either avoiding Contract A entirely, or implementing Contract A-lite. But this need not be an overarching 'either/or' decision. I continue to encourage the development of robust RFX toolkits made up of diverse template models, each model suited for a particular procurement context.

This Briefing Note is a general consideration of procurement issues; it is not legal advice. When faced with an issue in relation to a particular procurement situation, buyers & bidders should seek legal advice that is context-specific.