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You are a procurement professional: You make purchases on behalf of a public- or private-sector organization, or ‘owner’. A new procurement file hits your desk, and you ask yourself: Should I issue an Invitation to Tender (ITT) to make this purchase, or a Request for Proposals (RFP)? Your organization may offer some internal guidelines to help you make your decision. Or you may follow past practice: If an ITT was issued the last time this kind of purchase was made, then an ITT will be issued again this time around. Or you may simply say to yourself: “All we care about is price.” ITT it is.

My main point in this Briefing Note is this: When tempted to issue solicitations as ITTs, a buyer’s first impulse should be to pause and rethink. I argue we should freeze, or be slower to seize, our ITTs.

Terminology Untangled

First, it may be helpful to clarify terminology. ITTs can go by many names: Invitation to Tender, Invitation to Quote, Request for Quotations, Call for Tenders, and other long-winded labels, or simply ‘Tender’ or ‘ITT’ for short. For the purposes of this Briefing Note, ITTs fit this description: *Apart from mandatories, the only evaluation criterion is price, and the lowest compliant bid wins.*

In contrast, an RFP includes desirable evaluation criteria going beyond price. An RFP might also evaluate the quality of goods and services; experience of firms; resumes of personnel; proposed delivery dates; and much more. Points are assigned to various criteria, including price, and the compliant proponent with *the highest total points wins*. ‘Value-for-money’ is the basic principle underlying an RFP.

These labels can get confusing, because judges in Canadian courts have sometimes drawn a different distinction between a tender, on the one hand, and an RFP on the other. Roughly speaking, judges have sometimes ruled that a true tender creates Contract A, and a true RFP does not.¹ In my view, this categorical distinction is becoming less common in court. These days, judges hearing procurement disputes typically review the entire solicitation document to figure out whether Contract A is created; they look past the title of the document, and need not categorize it as a ‘true tender’ before finding that Contract A has arisen. At bottom, ITTs that focus on price can create Contract A (or not); RFPs that weigh desirable criteria along with price can create Contract A (or not). Labels aside, courts apply a multi-factored analysis aimed at discerning the parties’ underlying intent regarding Contract A.²

To further muddle matters, different organizations might use different variations of the ITT model. Many ITTs demand only one thing in bids: A total dollar figure in a sealed envelope. Other ITTs demand a detailed pricing breakdown: A fill-in-the-blank form is constructed by the owner and completed by the bidders, perhaps with price-related assumptions or explanations added by the bidders, which can raise evaluation complications. Other ITTs look primarily at price, but leave some room for gathering additional information: Bidders are asked to include delivery dates and personnel resumes, for example. Under these ITTs, disqualification may hinge on meeting some minimum “mandatory” (e.g. delivery by X date; at least Y years of experience), then price and only price is evaluated to pick a winner. In short, ITT documents come in many different flavours, as do RFPs. The title of the document gives a clue to the underlying approach, but the devil lies in the detailed clauses and forms.

¹ For an example of an analysis that leans on categories, see: *Mellco* (2002, MBCA). Still, the question of intent was said to be fundamental (at paragraph 69).

² For an example a multi-factored analysis going to intent, see: *Tercon* (2006, BCSC), approved by the SCC in *Tercon* (2010, at paragraph 19).

To be clear, I'll be discussing the kind of ITT that cares (or pretends to care) *only about the price* of compliant bids. I will assume that Contract A is created by the solicitation document, for the purposes of this analysis.³

Documents Deconstructed

ITTs date back to the earliest solicitation situations, born out of the belief that owners should prescribe every detail of a purchase, in advance, so that price and only price is left to be quoted by bidders. On this model, the owner might receive a one-page response from each bidder, with contact information from the bidder, maybe bid security, certainly a dollar figure, and that's about it. The owner opens the bid envelopes, perhaps publicly, checks for non-compliance issues, and ultimately declares a winner based solely on 'lowest price'. Countless construction contracts have been awarded this way. The owner scopes-out everything about the work down to the quality of the crushed stone, and bidders quote pricing.

Two strengths of this approach are fairly clear: Perceived fairness and seductive simplicity. Owners and vendors might perceive this model as the fairest, because it leaves relatively little room for judgement. And moving a solicitation from an ITT template to an RFP model means more complexity, because it means more work setting evaluation criteria in the drafting room, and more work scoring submissions against those criteria in the evaluation room. At the end of the day, an RFP model might mean that a proponent offering a relatively high price wins, based in part on non-price information. That process and outcome may strike some procurement professionals as unnecessarily complicated and unfair.

In my view, it is fair to say that a typical ITT is simpler than a typical RFP. Again, an RFP will typically mean setting out more extensive evaluation criteria, attaching points to each, and then assessing proposals against each criterion in the evaluation room. But it is unfair to say that ITTs are inherently fairer than RFPs. Either model can be drafted with clear evaluation criteria and fair selection methodologies, later followed by the owner to the letter. At the other end of the spectrum, either model can be made a mess. And make no mistake: ITTs loaded with mandatory criteria can certainly involve serious complexities, subjective judgement, dubious decisions, and allegations of unfairness, as we'll soon see.

Turning from perceived strengths, consider an ITT's proven pitfalls:

-A bidder gives you what you pay for. The lowest price can also correspond with the lowest (perhaps barely acceptable) quality. Often, paying a little more money for a much better offering makes a lot more sense. An owner may learn to regret ignoring the relative quality of offerings among bidders, pre-award.

-A bidder low-balls in order to win. Once the ink is dry and the work well-underway, the winner cuts corners, drags feet, and cries poor. Change orders pile up. Pressure mounts to amend the contract to increase the price to get the work moving. But increasing the contract price means spending more than anticipated, and seems to dishonour the original competitive process. Apart from a price increase, you may face other uncomfortable choices. If the project is half-completed, do you really want to start over (or go through an awkward transition) with another vendor, and/or haul the existing contractor into court? An owner may learn to regret turning a blind eye to comparing bidders' past performance, pre-award.

-A bidder simply proves to be financially unstable. The bidder becomes the contractor, and the contractor becomes insolvent. Or perhaps financial instability leads to slipshod performance. Bid security and

³ For more discussion on why an owner might wish to create or avoid Contract A in a particular solicitation scenario, feel free to review my Briefing Note entitled "Contract A: Yay or Nay?"

performance security can help protect an owner against financial instability, but among those bidders able to provide security, there can still be big differences in financial strength. And some owners are reluctant to enforce these forms of security, even when they are in a position to do so. An owner may learn to regret ignoring the relative financial strength among bidders, pre-award.

In short, post-award, an owner may regret running an ITT that contemplated only a price comparison. I'd urge you to give careful consideration to commentary quoted (with approval) by the Supreme Court of Canada, in 1999: "the prudent owner will consider not only the amount of the bid, but also the experience and capability of the contractor, and whether the bid is realistic in the circumstances",⁴ for example.

In my view, a big problem with the ITT format is that owners may sincerely believe that price is the only concern at the outset, only to be unpleasantly surprised by other concerns during evaluations. Post-close, an owner may learn that the lowest-priced bidder is inexperienced, incompetent, litigious, criminal, corrupt, unstable, or simply difficult to work with. Or, on another front, the lowest-priced bidder might have proposed an exception – perhaps a cap on its liability - in relation to Contract B, raising compliance issues, and tainting the bid in a way that the owner finds difficult or impossible to accept. Suddenly, additional criteria (apart from price) leap or creep into the picture, with no mechanism under the ITT to help the owner weigh that information, all of it relevant; no mechanism to give one bid a little more credit than another, on a sliding scale. An RFP's point-scoring process offers this kind of mechanism.

These kinds of ITT situations can set the stage for 'breach of Contract A' claims. The owner may find itself weighing factors not specified in the ITT, in breach of an implied duty under Contract A to assess bids only on the basis of disclosed criteria.⁵ Or, for business reasons, the owner may find itself accepting an arguably non-compliant bid, or rejecting an arguably compliant one, despite the legal risks.

When an ITT leads to agonizing disqualification decisions or embarrassing unfairness allegations, what next? Once burned, will an owner 'go RFP' when a similar purchasing file presents itself?

Hazardous Half-Measures

After discovering the pitfalls of the ITT model through painful experience, an owner might settle for stop-gap measures next time around. For example, an owner might try to shoe-horn additional criteria into an ITT model, on a pass/fail basis. An owner might add a new set of mandatory criteria to its ITT template, in an attempt to weed out bidders that the owner finds unacceptable based on the quality of the offering, the reputation of the bidder, or the stability of its business, for example. These counter-measures might be seen as a step in the right direction, or a step toward a new set of slip-ups. Pretending to care only about price, while caring about more than price, can turn warm feelings into cold sweats.

Take a simple example. An owner issues an ITT for a construction project. The lowest-priced bidder wins the contract, but it turns out that the company's equipment is ancient and prone to breakdowns. The work is completed late. Lesson learned: Let's be sure to look at the age of equipment next time.

Months later, the owner needs equipment and operators to move garbage at a landfill. The owner remembers the last time a project went sideways thanks to ancient equipment. So the owner adds a new mandatory criterion to its ITT: A bidder's equipment must be 1980 or newer, or the bid will be rejected.⁶

⁴ *MJB Enterprises* (1999, SCC, at paragraph 45).

⁵ For a recent lawsuit against an owner for evaluating bids based on undisclosed criteria, see: *Topsail Shipping* (2014, NLCA).

⁶ This fact pattern is loosely based on the case of *Double N Earthmovers* (2007, SCC).

What could go wrong? Murphy's Law could kick in. What if an all-star bidder with a price significantly below its nearest competitor proposes one piece of equipment (among several) that was manufactured in 1977? What if that bidder is willing to rent a newer piece of equipment, if the owner demands it, and says so in the bid? What if the lowest-priced bidder says that all of its equipment is 1980 or newer, but you learn that the equipment is poorly maintained, and prone to breakdowns? Should that bidder be on the same footing as a bidder with a similar price, similar-aged equipment, but a superior maintenance record?

Qualitative criteria offer no natural boundary between a bid that is clearly acceptable, and one that should be rejected. To cope, the owner tries to draw a reasonable (but debatable) line in the sand between pass-fail. Bidders will respond with an array of information, some expected, some unexpected, presenting the owner with shades of grey. My point: This kind of qualitative criterion is best scored on a sliding scale, under an RFP model. Cramming a qualitative criterion into an ITT template, framed as a mandatory criterion, can lead to nasty lawsuits. Disqualify a low bidder for non-compliance when the bidder was arguably compliant (and arguably should have been accepted), and risk a lawsuit from that low bidder.⁷ Accept a low bidder as compliant when the bidder was arguably non-compliant (and arguably should have been disqualified), and risk a lawsuit from the second-lowest bidder.⁸

Mandatory Criteria Critiqued

What are some indicators that you are shoe-horning a purchase into an ITT model, when an RFP model would be a better fit? One tip-off: If you are expecting responses from bidders that run multiple-pages, responses that include non-price information, you are probably interested in more than price. If you find yourself drawing debatable lines in the sand in relation to mandatory criteria under an ITT, criteria that you would typically see framed as desirable under an RFP, all in an attempt to weed out bids based on non-price information, you are probably interested in more than price.

A helpful mandatory criterion works like a light switch. It is easy to judge as pass-fail on an objective basis, with little room for debate. A good example: A deadline for bid submissions; the bid is either on time or it is late. Another good example: A signature on the bid; the bid is either signed, or it is not. Other good examples: professional certifications; security clearances; bid security. These mandates are fairly easy to evaluate based on objective evidence submitted with the bid, as pass/fail, qualified or disqualified. Even in these examples, uncertainty and disputes can creep into the picture. But by and large, mandatory criteria like these are used routinely in ITTs and RFPs, on a relatively low-risk basis.

A hazardous mandatory criterion works like a dimmer switch. It is difficult to judge as pass-fail on an objective basis, leaving plenty of room for dispute. "Equipment that is 1980 or newer" works that way, as discussed above. "At least five years of experience on similar projects" works that way. What counts as a similar project? Is it enough to have some experience five years ago but nothing more recent, or is experience required in each and every year? Should a bidder with scant experience sprinkled over five years be placed on equal footing with a bidder with strong experience in four of the last five? This kind of factor is better framed as a desirable criterion under an RFP, then scored on a sliding scale.

In my experience, spurned bidders find it easier to accept a low mark under an RFP in relation to a criterion like "experience" (even though the low mark may put the bidder out of the running), compared to a difficult-to-justify disqualification decision under an ITT. Using an RFP, and awarding points to bids on a sliding scale, is generally wiser than forcing a bright-line, pass-fail test onto qualitative criteria.

⁷ A recent example: *Rankin Construction v. Ontario* (2014, ONCA).

⁸ A classic and authoritative example: *MJB Enterprises* (1999, SCC).

If you find yourself driven to frame factors as mandatory criteria under an ITT, when you might ordinarily see those same factors framed as desirable criteria under an RFP, freeze and take a cold, hard look at your choice of template. Consider embracing an RFP model instead.

More RFPs Please

Again, ITTs can be seductive, because they are perceived as relatively simple, compared to an RFP. For this reason, ITTs run the risk of over-use. Buyers (and their clients) may say to themselves (and each other): “All we really care about here is price” -- until it dawns on them that the lowest-priced bidder has proven itself to be a bad performer, or a combative contractor, or name-your-poison. Suddenly, lawyers or procurement professionals are asked to find a basis for disqualification so that the lowest-priced bidder can be eliminated in favour of a higher-priced bidder offering superior goods/services.

“Lowest-price wins, period” used to be a common way to engage a construction contractor. These days, I believe that more owners are drawn to an RFP model (or should be) in all sorts of solicitation situations, including construction. Owners have learned the hard way that experience, quality, stability, reputation, and other factors matter an awful lot to a successful construction project, *and ought to be carefully weighed and measured as part of a competitive solicitation process*, at least to some degree. Maybe price should be weighted heavily in a particular procurement situation, but comparing qualitative factors among bidders should not be ignored. An RFP model can work here, and can work well.

With all that said, it is important to point out that some government entities may be subject to a legislative obligation to issue an ITT, under specified circumstances. Provinces may be subject to statutory obligations to ‘go ITT’; municipalities may be subject to bylaw obligations; any government entity may face specific obligations under legal or quasi-legal instruments. For example, under BC’s *Transportation Act*,⁹ the Province is obliged to “invite tenders” in relation to the construction or repair of provincial public highways (subject to certain exceptions or approvals to do otherwise). “Tender” is undefined under the Act; however, whenever the Province is obliged to invite tenders, it must generally award the project to the lowest tenderer (again, subject to certain exceptions or approvals). Thus, in the context of this particular (and peculiar) statutory obligation, it seems clear that “tender” means the kind of ITT that cares *only about price*. I would not advise any government official to ignore such statutory obligations. But I would suggest that government officials take full advantage of statutory exceptions or approvals (and the *Transportation Act* in BC includes some generous ones), in order to favour RFPs over ITTs.

Putting aside these potential legislative obligations, I see room for voluntarily issuing ITTs when all three of the following ingredients are present:

1. Owner is purchasing goods (not technology, not construction, and no services of significance);
2. Product specifications are precise, clear and complete;
(e.g. the market offers steel of a certain quality, and suppliers distinguish themselves only on price)
3. Lowest price is *genuinely* viewed as the only relevant criterion.

These three ingredients are closely linked. It is relatively easy to nail down specifications for goods because service requirements and deliverables tend to be more slippery; it is relatively easy to focus strictly on pricing for goods because owners should generally solicit resumes from service providers. To be clear, there are an awful lot of situations where goods cannot be scoped-out clearly or completely, or where considerations other than price are crucial to the purchase of particular goods. In those cases, or in cases where an owner is purchasing services or technology or construction, promote your RFP model.

⁹ S.B.C. 2004, c. 44, s. 4.

Consider a case study. Post-closing, I was asked to review an ITT that seemed to offer all three ingredients: Goods only (with simple installation services); detailed specifications prescribed by the owner (and straight-forward specifications at that), and an apparent wish to look only at price. But appearances can be deceiving. Under a bid form included in the ITT, bidders were required to give detailed technical data regarding their goods, demonstrating the owner's interest in supplementing its specs with bidders' technical information (undermining ingredients 2 & 3, above). The bid form also invited information from bidders on customer references, delivery dates, and changes to Contract B terms and conditions (undermining ingredient 3, above). These elements introduced evaluation criteria going well beyond price. If I had seen this solicitation document before it was released to vendors, I would have recommended moving over to an RFP template.

Crucially, the ITT format offered no methodology for weighing non-price information during evaluations. After bid closing, comments provided by bidders in their completed bid forms (particularly regarding changes to Contract B) raised compliance concerns, and agonizing pass/fail decisions. ITTs like this one, laced with demands for non-price information, can certainly involve subjective judgement, dubious decisions, and allegations of unfairness. In contrast, the RFP format would have included a mechanism for weighing information in addition to price, assigning a score to the information received, and selecting the proponent with the best overall score, all in a relatively fair and transparent way.

A simplified example: Let's imagine that the ITT demanded pricing and a delivery date, period. If Bid 1 offered the lowest price by a slim margin but a woeful delivery date, and Bid 2 the second-lowest price but a speedy delivery date, how would an owner weigh one offer against the other under an ITT? The choice would seem to be between ignoring the delivery dates and accepting Bid 1 as the low bid, or making an agonizing and risky decision to disqualify Bid 1 based on the woeful delivery date, in favour of the slightly higher-priced Bid 2. However, it would be difficult to justify rejecting a bid based solely on the delivery date - unless a range of acceptable delivery dates had been specified in the ITT.

So let's assume that the ITT *did* specify a range of acceptable delivery dates. Under that scenario: What if Bid 1 priced the goods *well-below* all other bidders, but offered a delivery date falling *just after* the latest acceptable delivery date specified in the ITT? Easy enough, right? Disqualify Bid 1 for non-compliance. But is that a good outcome? At some point, shouldn't a massive price advantage make it worth waiting an extra day or two for delivery? Under an RFP model, price could have been assigned a maximum of 70 points, delivery date a maximum of 30 points, for example. Now, a proponent with a slightly higher price could more than make up for it with a speedy delivery date, or a proponent with an unappealing delivery date could more than make up for it with a low enough price.

Unless a legislative obligation dictates otherwise, an ITT should generally be avoided for purchasing services, technology, or construction, in my view. Even for goods: Unless we're talking pencils or steel or the like - simple, standardized goods that can be thoroughly scoped-out - an RFP model is generally preferable to an ITT. Even if price is the *primary* factor, an owner can use an RFP template, simplify the evaluation criteria down to price and one or two other relevant factors, and allocate plenty of points to price relative to the other criteria. If technology, construction, services or non-standardized goods are involved, then going with the cheapest bidder, without considering differences in quality, experience, stability, and so forth, is asking for trouble when it comes time for evaluations, and performance. Again, you tend to get what you pay for.

An added RFP advantage: Your RFP template might include more protective language regarding privileges and liability than your ITT template. A distinct disadvantage: Your vendor community may not welcome your move away from ITTs and over to RFPs, especially for purchases where the ITT model may be entrenched, like local construction projects. Some vendors may prefer the perceived objectivity of ITTs, however dubious that perception may be. To me, it will be the bottom-feeding vendors who will

(and should) object most strenuously to an RFP model. Higher-quality vendors should welcome the move, because at last, the owner would be scoring the quality of competing offerings along with price.

In any event, I'm betting that when buyers turn their minds to the common evaluation criteria set out in RFP templates (e.g. experience of the proponent; resumes of key personnel; financial stability, etc.) , at least one or two of these criteria, in addition to price, will strike buyers as worth evaluating in the context of a particular purchase. I'm also betting that if an owner moves away from ITTs and over to RFPs, even for construction projects, even over vendor objections, the vendor community will adapt, and submit proposals. Vendors will still want the work. Still, before making your final decision, consider consulting with potential proponents to take their pulse. Use this Briefing Note as part of that process, if you like.

Conclusion

If your organization uses policies or procedures to help buyers decide between choosing an ITT or an RFP for a particular solicitation, scrutinize those guidelines closely. Consider reworking those guidelines to acknowledge the pitfalls associated with ITT over-use.

At a minimum, consider adding detailed instructions to the cover page of your template ITT, to help ensure that the ITT is used only with well-reasoned justifications and/or high-level approvals. Consider freezing your ITT, to a greater degree.

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.