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A Request for Proposal versus a Tender

A recent Court decision demonstrates that the line between a tender process and a request for proposal can be a very fine one. The legal consequences of holding a process to be one or the other can have dire consequences for an owner or a contractor.

Tercon was one of the respondents in a proposal call process run by British Columbia's Ministry of Transportation and Highways ("MOTH"). The chosen delivery model was a "design-build" model. A Request for Expressions of Interest ("RFEI") process was run to screen candidates down to a short-list of three. Tercon ranked first.

The MOTH then decided to proceed using a different model: an "alliance" model where the MOTH would carry out the design and then share some of the risk with the successful respondent.

The Request for Proposal ("RFP") was issued to the six respondents involved in the RFEI. No one else would be considered.

The RFP also allowed the MOTH to consider a contractor's financial circumstances and personnel in awarding the project. Brentwood was one of the original proponents. It lacked the expertise and bonding to do the job. To overcome these challenges, Brentwood created a joint venture with EAC. Brentwood wrote to the MOTH advising it of what it had done. The MOTC did not respond.

The total proposal price from Brentwood was $23,935,166.00. Tercon's price was $26,083,623.00. Through the evaluation process, both Brentwood and Tercon scored significantly better than any of the other proponents. To avoid violating the rule restricting who could be awarded the contract, the MOTH was careful to enter into the contract to Brentwood alone, and let Brentwood and EAC then work out a separate agreement between them.

Tercon took the position that the MOTH should not have awarded the contract to Brentwood because, in reality, the actual proponent was a joint venture between Brentwood and EAC. Such an entity, which is legally different than Brentwood alone, should not have been considered because of the rule in the RFP against non-prequalified participants. Tercon sued for almost $3.3 million.

The MOTH argued that no Contract A had arisen between Tercon and the MOTH, so no liability could flow. Even though the document was described as an RFP and the respondents as "proponents", the Court concluded that the process really was a tender and Contract A had arisen. The Court came to this conclusion based on the fact that the "RFP" consisted of a formal process with explicit, prescribed documentation. The bids were irrevocable for 60 days and a security deposit was required. Although negotiation was contemplated, which is often a distinguishing feature of an RFP, the Court found that the extent of the negotiation in this case was very limited and did not, therefore, mean that the process was an RFP process but rather was a tender.

The Court also concluded that the Brentwood proposal was materially non-compliant. The Court held that the proposal, properly construed, had been submitted by a joint venture, which was an ineligible proponent. Brentwood's proposal was not capable of acceptance by the MOTH.

The Court went on to find that the sanctioning of this arrangement by the MOTH constituted a breach of the duty of fairness owed to Tercon particularly because it gave Brentwood/EAC an unfair advantage. The Court went on to assess Tercon's damages.

The Court carefully reviewed the evidence of Tercon's anticipated costs and compared it to the adjusted revenues and partly upon certain costs overruns actually experienced when the project was performed by Brentwood/EAC. The difference between the two figures was $3,293,998.00. This was the amount of damages Tercon was entitled to. The MOTH also had to pay Brentwood/EAC for the work itself.

This is what can happen when a party confuses a tender process and a request for proposal.