



February 2022

Loopholes in the Tender Process

Written by **John Hodgkinson**

INTRODUCTION

Landowners, developers, government agencies and other principals commonly invite competitive tenders in an effort to get the lowest price for material or work. Government agencies also use the process to assure stakeholders that the choice of contractor has been open, fair and transparent.

This paper explains how contractors can find holes in the process.

TENDERS ARE OFFERS

A request for tenders is just that. It's an invitation addressed to anyone who may be interested to submit offers. The company or agency is free to accept - or reject - any offers as it thinks fit. But an offer is only half of what is needed to make a bargain.

If it goes unaccepted, no agreement is reached. It is only upon acceptance that the offer matures into a legally binding contract.

PROCESS CONTRACTS

But that's not always the case. In certain circumstances, the company or agency may be legally obliged to follow the process it has promised.

For example, in one case, a local Council invited tenders for the operation of commercial flights from its aerodrome. It promised that it would "admit for consideration" all tenders received by a particular deadline. The Blackpool and Fylde Aero Club lodged its offer on time. It was the highest bid. The council clerk put the wrong date-stamp on it, so it was excluded from consideration. The Aero club won compensation for its lost profits.

Most companies and agencies are aware of that kind of responsibility. They often expressly exclude any such obligation and instead reserve the right:

- to issue addenda changing the process for receipt and consideration of tenders;
- not to accept the best or any tender;
- to consider late or non-conforming tenders and
- to negotiate with tenderers and others.

MISLEADING OR DECEPTIVE

But reservation of these rights isn't a complete defence.

Competition law prohibits anyone engaged in trade of commerce from acting in a misleading or deceptive way. That law applies to tender processes that are nothing more than a sham. It applies to trading companies and agencies that never intended to consider tenders in the way promised. Or, the company or agency may have departed from the process at a late stage in the process.

In one case, the Civil Aviation Authority sought tenders from just two suppliers for replacement of air traffic control systems. Both tenderers received a detailed briefing about the criteria and evaluation methodology the CAA would adopt. The CAA subsequently departed from those criteria and methodology. The tenderers ought in fairness have been informed of the departures, but were not. The disappointed tenderer successfully sued the CAA.

DEPARTURES

Principals in construction projects usually reserve a right to negotiate contract departures with the preferred tenderer. Early works have often commenced before the contract is awarded so the parties are usually anxious to sign.

But construction contracts are complicated and lengthy. The entire document must be reviewed to ensure departures do not introduce gaps or inconsistencies, especially in the usual case where the general conditions have been written by lawyers and the annexures by a mix of architects, engineers and other consultants.

The potential for introduction of contradictions or gaps is obvious. Where inconsistent terminology is used, the reader is entitled to assume that different meanings or consequences were intended. Gaps can be exploited as the basis for variations.

GUIDANCE OR REQUIREMENT?

Requests for tenders often include background material. It's often unclear what is intended to be contractual and what is simply informative. The documents comprising the contract ought be clearly identified in (and given an order of precedence) in the formal instrument of agreement.

Particular care should be taken with preliminary programmes, proposed method statements and preferred supplier lists. The language of the tender process - "preferred tenderer", "bid price" and so forth - should be avoided in contractual documents.

CONTACT US

Please contact us on (02) 8239 6500 or at excellence@kreisson.com.au if you have any queries or need any assistance.

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.