Requests for Proposal

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By Glenn Ackerley

With the release of her decision in *Buttcon et al. v. Toronto Electric Commissioners*, Madam Justice MacFarland of the Ontario Superior Court of Justice provided some much needed guidance to understanding the legal rules applicable to the Request for Proposal process.

The Request for Proposal ("RFP") process is increasingly finding favour with owners as a way of choosing a design and in selecting a constructor for a project. Where owners have an idea of what they want in terms of program and function, but are less certain about how to achieve their goals, the RFP process offers owners the opportunity to obtain innovative and creative solutions to meet their needs.

Unlike the traditional tender approach, where the project is designed and then bids are solicited through a tender call, the RFP process involves the owner developing a set of requirements which are then described in a proposal call document. Interested parties are invited to submit proposals in response to the call, and the owner then evaluates the submissions. Depending on the nature of the project, the evaluation process may be exhaustive, covering a wide range of evaluation criteria and usually involving at least some degree of subjectivity. Price is usually just one factor in determining the winning proposal.

Once the best proposal is chosen, the parties enter into a period of negotiation to settle on the details of the project, from design elements to contract terms. If the negotiations fail to lead to a contract, the owner may turn to one of the other proponents and attempt to negotiate a contract. Alternatively, the owner may decide to scrap the process and take a different route altogether.

The law governing the tender process has been developing since the *Ron Engineering* case in 1981 and by now is well-established and the rules are clear. In recent years, the Supreme Court of Canada, in its decisions in *MJB Enterprises*, *Martel Buildings* and *Naylor*, has dealt extensively with the Contract A/Contract B analysis applicable to tenders.

Those cases have held that the tender process includes an implied contractual obligation on the owner to treat bidders fairly, and to reject bidders whose bids are "noncompliant" or fail to properly respond to the tender call.

What about the RFP process?

Does the same Contract A/Contract B analysis apply, or is an RFP simply a form of "beauty contest" without legal effect? These were the questions faced by MacFarland J. in the Buttcon case.

The action arose out of a request for proposal process run by the Toronto Electric Commissioners ("Toronto Hydro") in 1993. Toronto Hydro needed to expand its service centre facilities by either renovating its existing facilities and adding a second new site or consolidating all of its operations into a new location. Toronto Hydro decided to explore both the decentralized and centralized approaches and went into the market in early 1993 through a request for expressions of interest process to seek proposals from the

construction/development community. The object of the RFEI stage was to elicit proposals for design and construction teams and possible sites. From those who responded, a short list of five proponents was drawn up.

The RFP stage came next. The shortlisted proponents were provided with a detailed package setting out Toronto Hydro's technical and functional requirements. The documentation described the criteria that Toronto Hydro would use to evaluate the proposals submitted including the quality of the design and both the capital and long-term operating costs of the proposal.

Four proponents submitted detailed design-build proposals for both the centralized and decentralized scenarios. The four proposals varied greatly in both design and price. Two of the proposals had a capital cost of just over $27 million, while the other two (including "Buttcon") were over $40 million.

After carrying out the detailed evaluation of all proposals, Toronto Hydro ended up selecting the second lowest-priced proposal to build a centralized facility. Internorth Construction Company Limited was awarded the contract and proceeded to build the new service centre.

In the meantime, Buttcon and other members of its design team complained that the process had been fatally flawed and the result unfair. In particular, based on an M.J.B. Enterprises-type analysis, Buttcon believed Toronto Hydro had selected a non-compliant bidder and therefore breached its obligations to the other bidders. Although Buttcon had been about $13 million more expensive than the Internorth proposal, it had scored second in the overall rankings. Buttcon argued that Had Internorth been properly disqualified, Buttcon would have been awarded the contract. Buttcon sued for damages, claiming that Toronto Hydro's conduct had caused Buttcon to lose the opportunity to earn the anticipated profits.

The five-week trial of the action was held before MacFarland J. in late 2002. In her reasons released, in July 2003, MacFarland J. dismissed the action.

The first issue the court had to consider was the nature of the request for proposal process. Was it like a tender, giving rise to Contract A? Recognizing the principle in *M.J.B. Enterprises* that whether Contract A arises or not depends on the intentions of the parties, the court concluded that the RFP in this case was "exactly that a request for proposals and nothing more." The RFP was therefore a mere invitation to treat.

The court carefully examined the RFP language to reach this conclusion. Of all the factors considered by the court, one of the most important was that the timetable for the process clearly contemplated a significant period of negotiation after the selection of the "preferred proponent" to finalize the scope of the project and the contract terms. The court considered that the prize for the successful proponent at the end of the exercise was the opportunity to negotiate for a contract to build the services centre. The court thought that this suggested something quite different from the Contract A/Contract B issues of *Ron Engineering*.

In the result, Buttcon's complaint that there had been a breach of Contract A by Toronto Hydro failed, since Contract A had not arisen on the facts.

However, the court went on to consider whether a further legal duty fell on Toronto Hydro to be fair, outside of any implied contractual obligation arising under Contract A. The British Columbia Court of Appeal in *Mid-West Management* and *Powder Mountain* had recently held that no free-standing duty of fairness exists in law where no Contract A has arisen. By contrast, the Manitoba Court of Appeal in *Mellco Developments* concluded that even absent Contract A, the proponents in an RFP were at least entitled to have their proposal considered fairly.

MacFarland J. opted to adopt the *Mellco Developments* approach, and held that the owner does owe a duty to consider proposals fairly without favouring or giving an unfair advantage to one over another, even without Contract A. On the facts, the court concluded

that Toronto Hydro had treated the four proposals it received in an equitable and fair manner, reviewing each proposal using the same criteria.

In arriving at this conclusion, the court had to consider and then dismiss Buttcon's argument that the winning proposal had not complied with the stated requirements in the RFP in various ways, including the choice of proposed mechanical systems.

Implicit in the court's analysis is thisnovel concept: even where a Contract A does not arise, the owner's selection of a noncompliant proposal—one which clearly falls outside of what was being asked for—might be considered "unfair treatment" of the other proponents. In this case, however, no such unfairness was demonstrated.

In assessing damages, the court refused to accept Buttcon's argument that its team lost the opportunity to have been awarded the project. The court concluded that it was more likely that Toronto Hydro would have cancelled the process and run the proposal call again rather than accept Buttcon's much higher-priced proposal. If damages were to have been given, they would have been confined to the costs of preparing the proposal, and even further restricted to Buttcon's costs alone and not those of the other design team members, who were held to be in the position of subcontractors without a direct cause of action against Toronto Hydro.

This case is of interest to both owners and proponents involved in RFPs, as it is the first case in Ontario to impose on an owner a duty to consider proposals fairly even where Contract A does not arise. The case represents an interesting step in the evolution of "fairness" principles in law. Although in this case the owner was held to have been fair in fact, the next step in the evolution will occur where an owner is found to have actually been unfair to one or more proponents. In such a case in the future, the court will have to articulate more fully the true nature of this "fairness" obligation and what are the consequences of breaching it.

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