

The devil is in the details

E-tendering poses potential legal risks

by Robert C. Worthington

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When professional contract managers choose electronic communications, the potential legal risks rise as one gets more interactive. At the light end of the scale, those who simply post information on the Internet on “pure information” sites have some risk, but it is largely manageable by attention to detail. Ensure that what goes up on the owner’s site is true, accurate and not misleading or defamatory; and employ a “non-reliance” exclusion clause with a statement like “do not rely upon this information as it may be inaccurate.” These actions will go a long way to reducing an owner’s legal risk.

In the middle of the scale are those websites that purport to have information that owners want a bidder to rely on and, perhaps, to download. In this scenario, an owner must spend more time ensuring that what is on their site is complete, accurate and true. Equally, in this scenario, a “non-reliance” exclusion clause is a necessity but is of somewhat uncertain value. The courts could find such an exclusion clause unenforceable as unreasonable in all the circumstances. Additionally, due to the purported reliability of the information on an owner’s website, the website owner must ensure the content can in fact be successfully downloaded in its entirety. This is important when considering an Invitation to Tender or Request for Proposal (RFP) package, which bidders are to download and reply to with hardcopy bids. You should know the limitations and faults of the various browsers people might be using. Additionally, unlike

a pure information-only site, the owner of a “reliable information” site must do more to protect the site and its contents from hackers, attackers, and gremlins. One can never be certain of security in the electronic world, despite the claims of secure site builders. Money must be allocated to security issues both at the outset and on a continuing basis, simply to stay even with the never-ending mutations of these risks.

At the heavy end of the scale are fully interactive websites, where bidders both receive Invitations or RFPs and reply with bids electronically. These site owners face the full spectrum of legal risks. Where there is no option of obtaining a paper copy of the Invitation, RFP, or the bid itself (except by printing out the electronic version) security of the information and integrity of the system takes on paramount importance. Legally binding and enforceable contracts are being formed electronically, and there is little room for error in receiving, sending, or storing the information once received.

This is not much of a concern for competitive bidding in the US, where many of the e-tendering system builders are located, as America does not have legally binding competitive bidding. But for Canadians, it could be an area of significance, especially since our laws do not allow for correction of bids after the bidding is closed. Thus, fully interactive website owners must take a great deal more care initially and continuously.

It will not simply be a matter of the owner excluding all liability for what could happen. Having set up the entire process,

the owner will likely have to assume some of the risk, especially for those processes where electronic reply is the only option for the bidders.

It is equally unlikely that the courts will turn a blind eye to preventable problems. If the owner has taken reasonable steps to ensure accuracy, integrity and certainty in sending, receiving and storing information, then the courts will likely allow some leeway. But where the owner could have spent more time, care, or money to secure the information but didn’t, it is unlikely the courts will have much sympathy.

It may be that for fully interactive e-tendering to work lawfully and seamlessly in Canada, owners will be forced to change some of the time-honoured practices of the competitive bid process – such as the rule that bids are unchangeable for any reason after closing, or the rule that a bid must be fully compliant before it will be considered. Not many e-tender owners appear to have done this yet, but it may be time to create two sets of rules – one for paper bids and another for e-bids.

Until then, it behooves owners who are striving for successful e-tendering to remember that “the devil is in the details.”

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