



by Glenn Ackerley

# Standardized procurement

“The rationale for the tendering process... is to replace negotiation with competition.”

Mr. Justice Iacobucci  
*M.J.B. Enterprises Ltd. v. Defence Construction*

AS THE SUPREME COURT of Canada reminded us in the famous case of *M.J.B. Enterprises Ltd. v. Defence Construction* in 1999, the tender process is a competition. Like any other competition there have to be rules that competitors must play by. Knowing and understanding what the rules are is a big part of playing the game.

Imagine playing hockey in different towns across the country, where the size of the rink, the number of periods played, and types of penalties called differed as you travelled from town to town. If you were not familiar with the local rules, you would clearly be at a distinct disadvantage. To have any chance of winning, you would have to invest a lot of time researching and learning each new set of rules you come across.

Hardly sounds like the conditions to ensure a level-playing field, or fair and open competition, does it? And yet, in the competitive sphere of public procurement, the situation is very much the same. Municipalities, public hospitals, and other public sector buyers regularly impose their own specific terms and conditions on both the procurement processes they run and the contracts they procure. Consistency among public owners, even in relation to the same kinds of routine procurements, seems to be the exception, not the rule.

On the procurement side, bidders often face onerous but unique submission requirements with each different owner, making it easier for bidders to miss something called for in the instructions. When that happens – as it often does – the bidders face disqualification for being “non-compliant.” Worthy competitors are having to be tossed out of the game on what could be considered minor technicalities.

As for the contract covering the goods or services being procured, the variation is virtually endless. Some owners use standard industry documents such as the CCDC family of construction documents, in relatively unaltered form. Others will add fifty pages of additional terms and conditions to the standard forms. Still others use their own unique forms, often containing idiosyncratic provisions, the rationale for which has long been forgotten. The daunting task of studying these provisions during the bid is so time-consuming, bidders often ignore them and choose to take their chances.

When faced with proposed contract terms and conditions which are unacceptable, the options open to bidders are limited. Aside from refusing to bid, bidders may submit a “qualified” bid, where a price proposal is made subject to the owner agreeing to make certain changes to the offensive provisions. This approach, while sending a message to the owner, legally amounts to a “counter-offer” and may put all parties into a non-contract A situation. Negotiation of a contract usually follows, undermining the formal tender process, and turning the principle enunciated by Mr. Justice Iacobucci on its head.

Can this undesirable situation be improved? Is there a better way?

Some people think so. Groups of public buyers and industry suppliers are beginning to realize the value of developing standardized

procurement processes, and terms and conditions for different sectors. Their goal is to put processes and documentation in place that are well understood and have the buy-in of all participants. The rules by which the game will be played are agreed upon in advance. The actual procurement can revert to being a simple competition, as originally intended.

One such initiative spearheaded by the Ontario General Contractors Association has been the development of a standard set of instructions to bidders and supplementary contract terms and conditions for public hospital projects in Ontario. A task force committee comprised of design consultants, general contractors, lawyers, and representatives from the Ministry of Health and Long-Term Care has been working on template documents intended to be included in the capital planning manual for use by all hospitals involved in traditional construction projects. After two years of work, the draft documents are out in circulation for comment and consideration by the respective industry organizations.

A similar initiative is currently being undertaken by certain municipalities in the GTA region to standardize the terms and conditions for IT procurement. Those involved share the same goal of simplifying the process by having – to the greatest extent possible – uniform provisions for common and routine IT technology procurements. Discussions are currently taking place with major vendors and their association towards that end.

Although these initiatives continue to be works-in-progress, the experience of the participants has been positive. By sitting at the same table, both purchasers and suppliers of goods and services come to appreciate the pressures and challenges faced by the other side. That dialogue can lead to reasonable compromises and agreement on ways to simplify and streamline the procurement process and arrive at model terms and conditions. Although everyone recognizes that varying from any model may be necessary in specific cases, the benefits of standardization are worth the effort. Let the games begin! ♫

*Glenn Ackerley is a lawyer with WeirFoulds, LLP, practicing construction law. He has developed and taught the Construction Law course at Ryerson University for many years and is experienced at mediation and arbitration. Glenn can be reached at [ackerley@weirfoulds.com](mailto:ackerley@weirfoulds.com).*