

## **Tender evaluation methodologies, contractor selection and award**

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The decision process is based on probity, fairness and value for money.

### **Probity**

Probity connotes integrity and honesty in the procurement process.

Probity can be defined as:

"a defensible process which is able to withstand internal and external scrutiny - ... which achieves both accountability and transparency and provides tenderers with fair and equitable treatment".<sup>1</sup>

Requirements for promoting probity in the procurement process include:

- fairness and impartiality;
- use of a competitive process;
- consistency and transparency of process;
- security and confidentiality;
- conflicts of interest management;
- development of a probity plan; and
- compliance with legislation and government policies.<sup>2</sup>

By ensuring probity in the procurement process a principal can:

- ensure conformity to processes;
- improve accountability;
- encourage commercial competition;
- preserve public and tenderer confidence; and
- defend against potential administrative and legal challenges.<sup>3</sup>

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<sup>1</sup> Australian Government Solicitor, *Commercial Notes* No. 15, 14 March 2005

<sup>2</sup> Victorian Government Purchasing Board, *Victorian Public Construction Probity Plan Template*, 2006, [3.3]

<sup>3</sup> Department of Treasury and Finance, Government of Tasmania, *Tasmanian Government Tender Evaluation and Probity Plan*, undated, [3.1].

## Fairness

This is best achieved through use of objective criteria and an open and transparent tender process. Where the tender is conducted by a public body there is an implied term of the "process" contract that the tender process will be conducted fairly and in good faith.<sup>4</sup>

These terms then involve assessment as to whether an equal opportunity has been afforded to all tenderers and the process by which tenders were evaluated generally.

## Value for money

Value for money is assessed on a combined analysis of qualitative criteria and price. This should include assessment of the quality of the proposed service, costs over the life of the project and risks relating to time and budget.<sup>5</sup> This requires a cost-benefit analysis over the life of the project. The Commonwealth Procurement Guidelines indicate the following factors which should be considered:

- fitness for purpose;
- the performance history of each prospective supplier;
- the relative risk of each proposal;
- the flexibility to adapt to possible change over the lifecycle of the property or service;
- financial considerations including all relevant direct and indirect benefits and costs over the whole procurement cycle; and
- the evaluation of contract options.<sup>6</sup>

It is important to look at factors other than price. Choosing a tenderer based solely on price may mean you get a contractor who performs poorly and does not have the financial capacity to carry the risks. This will lead to an adversarial relationship with increased contract variations or other disputes. Consequently there will be delays, increased costs and increased risk of project failure.<sup>7</sup>

## Dealing with returned tenders

The Tasmanian department of treasury and finance gives the following indicative steps in evaluating tenders:

1. evaluate compliance with mandatory criteria;
2. clarify offers (eg. allowing correction of unintentional errors);
3. evaluate qualitative / non-cost criteria;

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<<http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=D5A2323D22585431CA25704D000980DD>>

<sup>4</sup> Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1

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<sup>6</sup> Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, December 2008

<sup>7</sup> Office of Building and Development, Department of Infrastructure for the Government of Victoria, *Tendering for Public Construction and Related Consultancy Services*, 1997, p39

4. shortlist offers;
5. request tenderers to make a formal presentation (if appropriate and the tenderers have been forewarned in the RFT) - presumably this step would incorporate site visits and tenderer interviews;
6. calculate value for money and compare offers (this step could involve use of a number of alternative evaluation methods);
7. seek clarification from referees;
8. select the preferred offer;
9. apply due diligence;
10. write the evaluation report;
11. provide the evaluation report to your agency's review committee for endorsement;
12. provide the evaluation report and review committee endorsement to the appropriate authority for approval;
13. negotiations; and
14. final approval process.<sup>8</sup>

These steps are flexible and some may apply in a different order or simultaneously.

#### **1. Evaluate compliance with mandatory criteria**

Offers must:

- be complete;
- comply with the conditions of the RFT;
- be lodged on time; and
- meet mandatory specifications.<sup>9</sup>

There is an implied promise that a principal will give consideration to all complying tenders. If an invitation to tender imposes conditions on the tenderer, then a complying bid may result in a pre-award contract such that the tenderer is entitled to have their bid considered along with other complying tenders. Under that preliminary, collateral contract the principal's obligation is to open that tender and consider it along with any other tenders which he or she also considered.<sup>10</sup>

#### **How should you deal with non-conforming tenders and alternative proposals?**

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<sup>8</sup> Department of Treasury and Finance, Government of Tasmania, *Evaluating Tenders* (2001) <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=234403A038E05B4BCA256C91001E5869> at April 2010.

<sup>9</sup> Ibid.

<sup>10</sup> *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25

A non-conforming tender is a tender which is not priced by reference to the conditions of the invitation to tender.<sup>11</sup>

An alternative tender is one which is presented alongside a conforming tender but still complies with the conditions of the invitation to tender. [this is my interpretation]

- Tenders may be conforming or non-conforming.
- A conforming tender must be considered.<sup>12</sup>
- If there is an express term allowing for non-conforming tenders to be considered then this will be upheld since the doctrine of freedom of contract entitles a principal to reserve his discretion as to whether he will take into account, let alone consider, a non-conforming, or informal, tender. The courts will not imply a contract obliging the principal to consider only conforming, or formal, tenders.<sup>13</sup>
- A principal is not obliged to consider a non-conforming tender<sup>14</sup> and an obligation to do so will not be implied.<sup>15</sup>
- The proprietor may accept a non-conforming tender unless he or she is bound only to consider conforming tenders.<sup>16</sup> This may occur where :
  - » There is an express term prohibiting consideration of non-complying tenders in the conditions of the invitation to tender; or
  - » Other tenderers have submitted compliant tenders such that there is a process contract.

Using a bilateral analysis of the pre-award contract, submission of a non-complying bid would constitute a counter offer capable of acceptance by the principal. On the ordinary offer/counter offer/acceptance analysis there would be nothing to stop the government body from considering and even accepting a non-complying tender. However Sneddon argues that the “the nature of the tender process is such that the government body is obliged not to consider or accept non-complying tenders (unless it had said in the request for tender that it reserved the right to accept non-complying tenders).”<sup>17</sup> If a non-complying tender is submitted then there is no process contract formed with that particular tenderer and hence no obligation to consider the non-complying tender.

If the principal has accepted complying tenders from other tenderers then it may be obliged under a process contract with those tenderers not to accept a non-complying

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<sup>11</sup> LexisNexis, *Halsbury's Laws of Australia*, (at April 2010) 65 Building and Construction, 'II Building Contracts [65-455].

<sup>12</sup> *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25

<sup>13</sup> Thomson Reuters, *Legal Online*, (at April 2010) Building and Construction Contracts in Australia, 'Tenders' [2.10].

<sup>14</sup> *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 LGRA 168

<sup>15</sup> LexisNexis, *Halsbury's Laws of Australia*, (at April 2010) 65 Building and Construction, 'II Building Contracts [65-455].

<sup>16</sup> *Ibid.*

<sup>17</sup> Nicholas Seddon, *Government Contracts – Federal, State and Local*, 4<sup>th</sup> ed, 2009, 344

tender. The principal would have a process contract with the compliant tenderers which stated the terms under which the tender process was to be conducted. If a non-compliant bid were then accepted, the complying tenderers could arguably base an action against the principal on the breach of an express or implied promise not to consider non-complying tenders.<sup>18</sup>

In the absence of a statement that the principal can or cannot consider non-complying tenders it is prudent not to. This is because while the non-complying tender could be accepted on ordinary contractual principles, it would leave the principal exposed to claims from complying tenderers under the process contract.

Eg. See Pratt Contractors below.

In the event that a process contract is excluded and there is no statement as to whether or not non-complying tenders can be considered then presumably they could be.

In government contracts there is an implied term not to consider or accept a non-compliant bid unless the request for tender document explicitly reserves the right for the government party to consider non-compliant bids.

- The Victorian Building Commission says alternatives should be encouraged but may only be considered if submitted as part of a conforming tender.<sup>19</sup>  
If it is intended that alternative bids should be considered this should be explicitly stated in the conditions of the invitation to tender.

Eg. In *Pratt Contractors Ltd v Palmerston North City Council*, the council attempted to accept an 'alternative tender' submitted in a letter alongside the complying tender. The Competitive Pricing Procedures manual (a government procurement manual) clearly contemplated alternative tenders. However, this was not incorporated in the tender document schedule but rather was referred to in the addendum to the conditions of tendering. The court held that the manual as a whole was not incorporated into the tendering procedure. Thus the court would have concluded that it was not open to the council to consider the alternative tender if it had been necessary to do so. (Instead it decided that the alternative was not sufficiently precise as to allow acceptance.)<sup>20</sup>

Gallen J noted that "if tendering is to be on a basis other than that disclosed by the documents themselves, there is a risk of unfairness and I think that if a manual in its entirety is to be part of the tendering process, then it should be specifically incorporated."<sup>21</sup>

Further, Gallen J stated that this could have been "relatively easily overcome by a specific inclusion of the right to lodge alternative tenders either specifically or by an inclusion of the manual."<sup>22</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Department of Infrastructure for the Victorian Government, *Code of Practice for the Building and Construction Industry*, 1999, [5.6.3]

<sup>20</sup> *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 484

<sup>21</sup> Ibid 485.

<sup>22</sup> Ibid.

How do you define non-compliant? The Canadian cases suggest a sensible, flexible approach that allows consideration of bids which are *substantially* compliant. A bid that has minor errors or failures to comply will be a legitimate bid and need not be automatically rejected.<sup>23</sup>

To avoid having to ask this question it is prudent to state the degree of compliance required in the request for tender documentation.

The Victorian Building Commission, Code of Practice for the Building and Construction Industry states that:

- Tender documents should clearly specify what constitutes a complying tender;
- Alternatives are encouraged but may only be considered if submitted as part of a complying tender;
- Where a tenderer offers an alternative, a comparable price for the alternative must not be obtained from other tenderers, nor may the alternative be used as the basis for the re-calling of tenders;
- Tenders which do not comply in a material way with the tender documents must be rejected.<sup>24</sup>

The Office of Building and Development have stated that good practice in evaluating tenders includes:

- adequate time must be allowed for a full evaluation of all conforming tenders;
- evaluation must be based on conformity with the tender documentation and the specified criteria;
- any discrepancies must be clarified and their resolution recorded before a final decision is made;
- all conforming tenders must be considered;
- non-conforming tenders should be rejected;
- large projects may require a tender evaluation panel;
- any conflict of interest which has been identified should be resolved before evaluating tenders.<sup>25</sup>

### **CASE STUDY – BGC CONSTRUCTION PTY LTD v MINISTER FOR WORKS (WA) 2009<sup>26</sup>**

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<sup>23</sup> *British Columbia v SCI Engineers and Constructors Inc* (1993) 22 BCAC 89 endorsed and cited in *Health Care Developers Inc v Newfoundland* (1996) 135 DLR (4<sup>th</sup>) 609 at 629

<sup>24</sup> Department of Infrastructure for the Victorian Government, *Code of Practice for the Building and Construction Industry*, 1999, [5.6.3]

<sup>25</sup> Office of Building and Development, Department of Infrastructure for the Government of Victoria, *Tendering for Public Construction and Related Consultancy Services*, 1997, p37

<sup>26</sup> *BGC Construction Pty Ltd v Minister for Works*, 2009, BC200911755, (Unreported, Kenneth Martin J, 4 December 2009

**Nb. this was a hearing for interlocutory relief and hence the factual issues were not determined. Rather it simply had to be shown that there was a serious question to be tried.**

**Facts:** The plaintiff was one of 7 short listed tenderers who had meetings with the defendant.

The plaintiff claimed that in its meeting with the principal, a representative of the principal allegedly stated that “You can submit more than one sub-contractor per trade but they must each be submitted on their own schedule.”

The defendant alleged that a representative of the plaintiff asked whether they could submit more than one subcontractor for each trade. The principal allegedly responded with words to the effect that ‘we’ll take that on board and we’ll review the questions and then determine if we will change the intent.’ The intent referred to being that only one sub-contractor per trade be nominated.

The plaintiff submitted a tender on the basis of more than one subcontractor but listed them on separate schedules.

In written addenda issued to the tenderers before close of tenders the principal stated that:

- “Tenderers must nominate only one subcontractor on each Tender Schedule.”
- “Tenderers must still nominate one (1) sub-contractor for each schedule”
- “Tender documentation may follow post tender but should the sub-contractor not meet the selection criteria this may deem the tender submission as non-conforming.”

Since there were no express terms stating that there cannot be more than one sub-contractor per area of work subject to each one being the subject of a separate schedule, this was not enough to overcome what was allegedly said at the prior meeting.

The plaintiff was successful in showing that there was an arguable case of estoppel based on representation, reliance and a manifest detriment. This was a serious question to be tried and the balance of convenience justified the granting of interlocutory relief.

Kenneth Martin J stated that “the plaintiff stands to sustain immeasurable loss and damage of an unquantifiable kind, if its tenders remain summarily ejected as non-conforming, on a basis of what appears to be an unfortunate misunderstanding in communication.

The court ordered:

- That the defendant be restrained from awarding the contract until it had considered the plaintiff’s tenders as conforming tenders with one nominated sub-contractor per trade.

**The Lesson:**

- Representations in interviews should not be made or if made should be expressly qualified later.
- Seeking relief early may mean your tender can still be considered.
- As the court noted it was persuaded by the fact that if it was later established that the plaintiff was entitled to final relief based on the alleged representations then it would be too late to effectively “unscramble the egg.” The plaintiff would be left with a claim for equitable compensation or statutory compensation under the Fair Trading Act. It would be very difficult to determine the value of the lost opportunity. On the other hand there was no great prejudice in making the defendant consider the plaintiff’s tender provided that the contested changes were made.

## CASE STUDY – KINGSCAPE HOLDINGS PTY LTD V SHIRE OF CAPEL (WA) 2003<sup>27</sup>

**Facts:** Kingscape trading as South West Waste (SWW) submitted a tender and an alternative tender for the joint waste collection services for 3 councils. Cleanaway also submitted a tender and alternative tender. Cl 6 stipulated that “tenders shall comply with the conditions of tender.” Cl 17.1 stated that the contractor shall supply and deliver a new waste container to all tenements from which the contractor is required to collect waste. It provides further that the contractor is the owner of all such waste containers.

SWW’s alternative proposed the use of the current used bins rather than new bins as provided in cl. 17.1 of the conditions of tender. SWW’s alternative was excluded on the basis that it did not conform to the tender conditions. Cleanaway’s alternative proposed that Cleanaway buy the bins and lease them to the councils with a right to assign the financing of the bins to a third party. It was awarded the contract on the basis that it met the ‘intent of the specification.’ The contract entered into provided that the contractor or a nominated third party shall lease the bins to the Shires for the term of the contract at a nominated rental. Ultimately Cleanaway chose to own the bins itself and lease them to the councils.

SWW argued that:

- Cleanaway’s alternative tender did not comply with the tender conditions and could not be accepted. The applicant argued that it was not open to Cleanaway to submit what amounted to a conditional counter offer as a tender. They said the tender as evaluated by the respondent was something different from what had been submitted in accordance with the tender since certain qualifications were changed after the close of the tender process. The respondent argued that even if did not comply originally, the alternative complied with the tender conditions by the time it was evaluated and any changes made were permissible under the Local Government (Functions and General) Regulations. The court declined to express a view on the competing submissions of the parties.
- SWW’s alternative tender was improperly excluded from consideration. It was deemed non-conforming because it proposed used bins whereas the tender conditions called for new bins. SWW argued that its alternative was within the scope of the conditions of tender because cl 25.2 provided that “Contractor must ensure that all the contractor’s plant is new at the commencement date unless specified otherwise in the contractor’s tender for this contract.” The applicant was seeking to have the tender grant quashed and hence had to show it had an arguable case on this point. The court stated that it met the threshold test of being arguable even though the prospects of success on this point were “doubtful.”

**Held:** The writ of certiorari was not granted due to delay on the part of the applicant. Cleanaway’s tender was accepted on 13 February. The applicant had decided to commence proceedings by 13 March but this was not done until 12 June. The existing waste disposal contract was due to end on June 30. The court held that there was no satisfactory explanation for this delay. Cleanaway had incurred substantial set up costs for the commencement of its contract after June 30 and it would have suffered very substantial loss if the contract were now set aside.

### The Lesson:

- Because of SWW’s delay, Cleanaway were forced to incur substantial costs in anticipation of the commencement of the contract. Thus it was too late to “unscramble the egg.”

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<sup>27</sup> *Kingscape Holdings Pty Ltd v Shire of Capel*, 2003, BC200306275, (Unreported, Roberts-Smith J, 24 October 2003)

## 2. Clarify offers

Ambiguity can be clarified or minor errors amended but this is not an opportunity for suppliers to revise their original offer. If one tenderer is allowed to correct unintentional errors, this opportunity must be provided to all tenderers.<sup>28</sup>

## 3. Evaluate qualitative / non-cost criteria

The use of selection criteria helps to ensure objectivity in assessing suppliers. Further, they act as a risk management tool by identifying any weaknesses that a certain contractor or proposal may have.

Qualitative criteria can be scored on a weighted evaluation matrix.

The tender evaluation process applies weighted scores for skills, quality, experience and previous performance. The most common criteria are:

- relevant experience (preferably recent, in comparable fields, comparable in scale and in the role applied for);
- appreciation of the task;
- past performance;
- management and technical skills;
- resources to be employed;
- management systems (eg. project management tools, program software, environmental management systems and OHS&R systems); and
- methodology (includes program of works, KPIs, the division of works into subcontracts and reporting and recording systems).

Criteria must be relevant to the projects, capable of being meaningfully evaluated and must be able to be used to allocate a score to the tender submissions. Evaluation criteria should be identified and set in the early stages of planning.

There is a balancing act between transparency and probity on one hand and disclaiming legal liability on the other. More objective and ordered selection criteria will attract quality competitive bids but may expose the principal to claims under a "process" contract if these criteria are not complied with. On the other hand, the principal may reserve discretion, exclude a pre-award contract or state that selection criteria are not ordered or comprehensive. This will reduce the risk of legal liability if selection criteria are not adhered to but undermines the objectives of probity and fairness.

Other criteria include:

- financial capacity (company turnover, credit agency information, net worth and company capital, assessment of current financial statements, review of financial history);

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<sup>28</sup> Department of Treasury and Finance, Government of Tasmania, *Evaluating Tenders* (2001) <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=234403A038E05B4BCA256C91001E5869> at April 2010.

- organisation capacity (identification, financial capacity, insurance, quality assurance and compliance with the Code of Practice);
- performance capability (criteria are time, cost and quality - this is generally collected from referees. In assessing cost, claims performance is important to see whether the supplier often underbids. Costing should be over the life cycle of the project. A purchaser should look at work completed by potential suppliers and to assess through referee interviews, the quality that is likely to be provided.);
- resources availability (HR management, equipment & IT systems, innovation); and
- health and safety management.<sup>29</sup>

Typical criteria include:

- technical, managerial, physical and financial resources;
- previous performance on similar or equivalent work;
- evidence of satisfactory service delivery;
- quality assurance system;
- OHS system and management record;
- current commitments;
- record of performance regarding time, quality of work and payment of subcontractors;
- record regarding bankruptcy, liquidation and default;
- contract claims record; and
- use of local materials, local content.<sup>30</sup>

The announced criteria in the RFT documents must be followed or the principal may leave itself opened to claims based on:

- Misleading and deceptive conduct;
- Estoppel; or
- Process contracts.

#### 4. Shortlist offers

Some offers can be eliminated if they are clearly not competitive based on evaluation of the qualitative criteria.<sup>31</sup>

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<sup>29</sup> Department of Infrastructure for the Victorian Government, *Code of Practice for the Building and Construction Industry*, 1999, [5.2]

<sup>30</sup> Office of Building and Development, Department of Infrastructure for the Government of Victoria, *Tendering for Public Construction and Related Consultancy Services*, 1997, p38

<sup>31</sup> Department of Treasury and Finance, Government of Tasmania, *Evaluating Tenders* (2001) <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=234403A038E05B4BCA256C91001E5869> at April 2010.

## 5. Post-tender interviews and site visits

Any information communicated to a tenderer that is not public knowledge must be communicated to all tenderers. This should be done in writing.

### *Interviews with short listed tenderers*

Interviews with tenderers should be of the same duration and comprise the same core questions and discussion points. Timing of interviews should be scheduled to minimise waiting for tenderers and meetings between competing tenderers. All tenderers should be given the same amount of notice of the interview time. A record should be kept at the interview.<sup>32</sup>

If the procurement process is raised during social occasions or unrelated business activities, the principal's employee should indicate that it is not appropriate to discuss such matters. The incident should be reported to the Chair of the Tender Evaluation Committee.<sup>33</sup>

During the interview, the same information should be provided to all tenderers except matters specific to a tenderer.

### *Site Visits*

- Prepare agenda before the visit;
- The Chair of the Tender Evaluation Committee should lead the visit;
- A record of the visit should be made; and
- Fairness should be maintained.

The Victorian Building Commission states that sufficient time must be allowed between issuing tender documents and the close of tenders to enable tenderers to make site visits and undertake any other work necessary to tender. Clients must make the site reasonably available for inspection by tenderers.<sup>34</sup>

### **CASE STUDY – DOCKPRIDE PTY LTD V SUBIACO REDEVELOPMENT AUTHORITY (WA)<sup>35</sup>**

**Facts:** The first and second plaintiffs were related companies who were unsuccessful tenderers in a joint tender bid for the award of a contract to purchase and develop land in the Subiaco Redevelopment Area. They argued that there were breaches of a process contract and also misleading and deceptive conduct. During the expressions of interest stage, the authority's agent provided to the first plaintiff (at their request) an 'information package' which contained 'design guidelines' including the 'Rokeby Walk Guideline' (**Rokeby**) and Anchor Tenancy Entrance Guideline (**ATE**). The plaintiff complied with all relevant guidelines but the contract was awarded to another tenderer who had deviated from the Rokeby and ATE Guidelines.

### **Written representations:**

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<sup>32</sup> Victorian Government Purchasing Board, *Victorian Public Construction Probity Plan Template*, 2006, p22

<sup>33</sup> Ibid.

<sup>34</sup> Department of Infrastructure for the Victorian Government, *Code of Practice for the Building and Construction Industry*, 1999, [5.6.3]

<sup>35</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority*, 2005 WASC 211, (Le Miere J)

The plaintiffs argued that by delivering the information package and tender documents to Westpoint (the first plaintiff), the authority impliedly or expressly represented that:

- It would consider only tenders containing a design for the redevelopment which complied with the Rokeby guideline and the ATE requirement;
- It would not accept a tender containing a design for the redevelopment which did not comply with the Rokeby guideline and the ATE requirement; and
- Alternatively, it would not accept a tender containing a design for the redevelopment which did not comply with the Rokeby guideline and the ATE requirement, without first offering all tenderers an opportunity to submit a tender containing a design which departed from the design guidelines.<sup>36</sup>

**Held:** A reasonable person in the position of the plaintiff would have considered that the design guidelines are a guide to what the authority considered to be appropriate development within Station Square and against which the authority would assess tenders. Such a reasonable person would understand from the information package and the tender document that the tender must respond to the design guidelines and a design that was clearly unresponsive to the design guidelines would not be accepted. They would also understand from the special condition of the design guidelines relating to the ATE guideline that the design must in the opinion of the authority substantially comply with the ATE guideline.<sup>37</sup>

The defendant's conduct in accepting the Blackburne tender did not make the continuing representations constituted by the information package or tender document misleading. The winning tender sufficiently responded to and complied with the guidelines.<sup>38</sup>

#### **Character representations:**

They also argued that a statement in certain advertisements in the information package and tender document represented that tenders were invited for a redevelopment which was primarily retail and commercial in character and in which residential parts were relatively minor. This was reinforced by a letter from the authority's agent that the limit on the retail component was increased from 7000m<sup>2</sup> to 10,000m<sup>2</sup>.<sup>39</sup>

**Held:** A reasonable person in the position of the plaintiff would not have understood from the information package and the tender document that the authority was representing that it was inviting tenders for designs which incorporated a relatively minor residential component.<sup>40</sup>

The authority did not engage in misleading conduct by considering or accepting the Blackburne tender that incorporated a significant residential component.<sup>41</sup>

#### **Oral representations:**

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<sup>36</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority*, 2005 WASC 211, (Le Miere J), p28 at para 214.

<sup>37</sup> *Ibid* para 218.

<sup>38</sup> *Ibid* para 219.

<sup>39</sup> *Ibid* para 190.

<sup>40</sup> *Ibid* para 222.

<sup>41</sup> *Ibid* para 224.

They also argued that the authority, by an employee – Dr Cox, represented orally to Westpoint (first plaintiff) that:

- the Westpoint sketch plan and development proposal contained in its expression of interest complied with the design guidelines;
- many would be tenderers had not been invited to tender because their expressions of interest did not comply with the design guidelines; and
- the authority wished to maximise the financial returns to itself from the tender process and also wished to achieve a good outcome for the community and if the design for the redevelopment complied with the design guidelines, that would achieve such a good outcome for the community.<sup>42</sup>

The plaintiffs pleaded that by necessary implication those express representations gave rise to the further representation that the authority would only consider tenders which complied with, and would not accept tenders which did not comply with the design guidelines in the respects referred to.<sup>43</sup>

**Held:**

Le Miere J did not accept that Dr Cox said or that it would have been understood by a reasonable person in Mr Aitken's position, that if a tenderer's design located Rokeby Walk more than a couple of metres out of alignment with Rokeby rd then the tender would not be considered or accepted. He said a reasonable person in the position of Mr Aitken (the plaintiff's employee) would have understood that Dr Cox was expressing the authority's preference as expressed in the design guideline.<sup>44</sup>

The discussions at the meeting with Dr Cox had to be considered in the context of the tender documents, particularly clause 6 which made it clear that the authority might accept a design that did not strictly comply with the design guidelines.<sup>45</sup>

A reasonable person in the position of the plaintiff would have understood that the design guidelines were a guide to what the authority considered to be appropriate development of the precinct and against which the authority would assess tenders. However the guidelines did not contain a series of prescriptive or mandatory requirements where compliance was a pre-condition to the tender being accepted or considered by the authority. A reasonable person would have understood the authority was left with a significant margin of discretion to determine what in its opinion constituted acceptable variances.

What was said by Dr Cox at the meeting would not have altered the understanding a reasonable person would have had from a consideration of all those documents and communications with the authority. What was said at the meeting, taken together with the tender documents and other communications did not constitute a representation by the authority that it would only consider tenders which complied with and would not accept tenders which did not comply with the Rokeby guideline and the ATE Guideline. The authority did not engage in misleading conduct by

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<sup>42</sup> Ibid para 225.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid para 231

<sup>45</sup> Ibid para 232.

considering or accepting the Blackburne tender containing a design which varied from the guidelines in some respects.<sup>46</sup>

**Implied Representations:**

They also pleaded that by reason of the tender procedure adopted by the authority and the written, character and oral representations there were further implied representations as follows:

1. That the authority would accept the tender which offered the highest price provided that tender contained plans for the redevelopment which complied with the Rokeby and ATE guidelines.<sup>47</sup>

However, clause 6 stated that the authority was not obliged to accept the highest or any tender and was not precluded from accepting a tender which was not in strict conformity with the tender document. Nothing said by or on behalf of the authority changed this and thus the authority's conduct did not give rise to such a representation.<sup>48</sup>

2. That the authority would act fairly at all times in its dealings with each of the persons invited to tender prior to selecting a tender for acceptance.<sup>49</sup>

The court found that Dr Cox had represented to the plaintiff that the tender process would be fair. However the authority did not act unfairly by selecting a tender containing a design which varied from the Rokeby guideline and the ATE guideline in the manner and to the extent that the design in the Blackburne tender did. Fairness did not require that the authority inform the plaintiff that it might consider or accept a tender containing a design that did not comply with those guidelines.<sup>50</sup>

It was not unfair for the authority not to inform the plaintiff of its communications with the Blackburne consortium concerning the Rokeby and ATE Guidelines<sup>51</sup>. (At this meeting with the eventual winning tenderer, Dr Cox was asked if a tenderer could put in a non compliant bid, essentially Blackburne was given the impression that if he could justify a departure from the location of Rokeby Walk he might get his tender accepted but there was still a risk.)<sup>52</sup>

3. That the authority would not communicate to any of the invitees material information as to any matters which a tender should or could address or omit unless it communicated that information to all other invitees.

The court found that the authority represented that it would act fairly and even-handedly to the invitees, that general information relevant to all invitees would be provided to all invitees but that the answers to specific matters raised by individual

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<sup>46</sup> Ibid para 234.

<sup>47</sup> Ibid para 236.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid para 237.

<sup>50</sup> Ibid para 240.

<sup>51</sup> Ibid para 242.

<sup>52</sup> Ibid para 246.

invitees would remain confidential to the invitee. This representation was not breached.<sup>53</sup>

4. That the authority would deal with each of the invitees fairly and in good faith.

The court held that the authority represented that it would act fairly in its dealings with each of the invitees and would act even-handedly in its dealings with each of them. It did not act contrary to this representation.<sup>54</sup>

5. That the authority would not accept a tender which did not comply with a mandatory and/or material requirement of the design guidelines including, amongst others, the Rokeby and ATE guidelines.<sup>55</sup>

The court held that such a representation was not made.

6. That the authority would not fail to accept a tender which offered the highest price if that tender contained plans for the redevelopment which complied with the Rokeby and ATE guidelines.<sup>56</sup>

The court held that such a representation was not made.

7. That the authority would assess competing tenders by reference to the criteria contained in the design guidelines in each of the respects referred to in the Rokeby and ATE guidelines.<sup>57</sup>

The court held that the authority did represent to the would be tenderers that in assessing tenders it would have regard to the tenderer's response to the design guidelines. However, it did not represent that it would regard the Rokeby and anchor tenancy guidelines as mandatory requirements and would not consider or accept a tender containing a design which had any significant variation from those requirements. Thus there was no misleading or deceptive conduct.<sup>58</sup>

8. That the authority would not fail to accept a tender which offered the highest price and which complied with the Rokeby and anchor tenancy guidelines merely on the basis of a subjective preference for another design.<sup>59</sup>

The court held that such a representation was not made.

9. That the authority represented that it would act fairly in considering competing tenders and if it decided amongst other things that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby or ATE guidelines then

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<sup>53</sup> Ibid para 249.

<sup>54</sup> Ibid para 250.

<sup>55</sup> Ibid para 251.

<sup>56</sup> Ibid para 252.

<sup>57</sup> Ibid para 253.

<sup>58</sup> Ibid para 254.

<sup>59</sup> Ibid para 255.

it would inform each tenderer of that fact and give them the opportunity to modify its design and plans.<sup>60</sup>

The court held that such a representation was not made.

The court held that where there were representations made by the authority, these were not breached.

In relation to the process contract, the court held that there was no contract with the first plaintiff (Westpoint) but there was a process contract between the authority and the second plaintiff (Dockpride). However, no breach of the process contract was established.

## **6. Calculate value for money and compare offers**

The major factors to be considered are:

- Quality;
- Cost over the life of the project; and
- Risk (that the project will not be delivered on time or on budget).

A number of comparative evaluation processes can be used including:

- Comparative price method - a basic comparison of prices;
- Matrix method - a comparison of weighted scores based on weighted qualitative and price criteria;
- Adjusted comparative price method - weighted scores are calculated and a portion of the price is factored up according to performance on non-price criteria (used for complex contracts where price is an importance consideration); and
- Ratio method - a weighted score is calculated. multiplied by the ratio of lowest tendered price to the price of the bid under consideration.<sup>61</sup>

The matrix method is to be used where the output of the contract cannot be precisely defined in the specification and other factors are important (eg. timeliness, reliability and past performance). A weighting is given to each criterion based on its importance. A score out of 5 is given and then adjusted according to the weighting of the criterion. The tenderer with the highest weighted point score is the preferred tenderer.<sup>62</sup>

In the adjusted comparative price method non-price factors are assessed and a portion of the tendered price is adjusted according to the non-price score. For example, 10% of the price will be factored up based on performance in the non-price criteria.<sup>63</sup>

The ratio method aims to achieve the best output for every dollar spent rather than considering the lowest purchase price. It is not used for works contracts. In this method, an initial assessment

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<sup>60</sup> Ibid para 256

<sup>61</sup> Department for Transport, Energy and Infrastructure for the Government of South Australia, *DTEI Tender Evaluation Guidelines*, 2010, pp.3-7.

<sup>62</sup> Ibid 4.

<sup>63</sup> Ibid 5.

determines weighted scores for non-price criteria. A value added ratio is then calculated (lowest price / this tenderer's price). The weighted score is multiplied by the value added ratio to give a final score. The tenderer with the highest final score is the preferred tenderer.<sup>64</sup>

Other issues to consider are environmental impacts and the impacts and benefits to local industry.

### **Is there a legal obligation to accept the lowest cost price?**

- Generally there is an express privilege/disclaimer clause that the principal is not bound to accept the lowest or any tender. This is usually effective to prevent challenge from the lowest bidder. However, if a breach of another term of the pre-award contract can be identified (eg. use of undisclosed criteria, resort to irrelevant or extraneous considerations or where the tender is a sham) then a bid challenge by the lowest price bidder may be successful despite a privilege clause.<sup>65</sup>

The following Canadian cases provide an illustration:

*Chinook Aggregates Ltd v Abbotsford (Municipal District)* - The principal inserted a clause in the request for tender which stated that "the lowest or any tender will not necessarily be accepted". The unsuccessful tenderer complained that the principal had not disclosed his general policy of accepting a local tenderer's tender if it was within 10 per cent of the lowest tenderer outside the locality. The Court of Appeal of British Columbia found for the tenderer on the grounds that equitable principles prevented the principal from relying upon the disclaimer of any obligation to accept the lowest tender.<sup>66</sup>

*WIB Co-Construction Ltd v Central Okanagan School District* - the lowest bid was rejected on the advice of the government party's architect. The plaintiff sued the school board. The tender documents had made it clear that it was important to the school who would be the superintendent of the construction project and the bidders were required to state this. The architect thought the plaintiff's nominated superintendent was not competent. It was held that the Board had properly applied the announced criteria for selection and therefore the plaintiff's bid, though the lowest was not the lowest qualifying bid.<sup>67</sup>

*MJB Enterprises Ltd v Defence Construction (1951) Ltd* - In the invitation to tender, the principal had made the common reservation or "privilege" about not necessarily having to accept the lowest or any tender but it did not expressly entitle the principal to accept a non-conforming tender (which it subsequently did). Accordingly, under the collateral contract the next but unsuccessful tenderer succeeded in obtaining expectation damages in the amount of the profits it would have earned.<sup>68</sup>

- It seems there is no implied term that the principal is bound to accept the lowest price tender.<sup>69</sup> (Compare with Canada where in the absence of an express term to the contrary

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<sup>64</sup> Ibid 7.

<sup>65</sup> Nicholas Seddon, *Government Contracts – Federal, State and Local*, 4<sup>th</sup> ed, 2009, [7.25]

<sup>66</sup> *Chinook Aggregates Ltd v Abbotsford (Municipal District)* (1989) 40 BCLR (2d) 345;35 CLR 241.

<sup>67</sup> *WIB Co Construction Ltd v Central Okanagan School District No 23* (1997) 6 ACWS (3d) 627.

<sup>68</sup> *MJB Enterprises Ltd v Defence Construction*<sup>68</sup> (1951) Ltd (1999) 15 Const LJ 455 (Laner CJ, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ):

<sup>69</sup> Thomson Reuters, *Legal Online*, (at April 2010) Building and Construction Contracts in Australia, 'Tenders' [2.170].

courts have been prepared to find an implied term from custom or trade usage to the effect that the lowest bidder will be awarded the contract.)<sup>70</sup>

- If there is an express term that the principal will accept the lowest price tender then they are likely to be bound by this if a process contract is established. Eg. *Pratt Contractors*

Both AS 2125 and the Commonwealth conditions now simply confirm that the principal is not bound to accept the lowest or any tender, although the better view is, it is submitted, that there is no implied term that the principal is so bound.<sup>71</sup>

Where the invitation states that the lowest tender will be accepted or where that is the custom of the trade, the invitation may amount to an offer.<sup>72</sup> However, a principal can expressly state that it is not obliged to award the contract to the lowest bidder or at all. This is the most common form of disclaimer clause. However, there is still an obligation to consider complying tenders in accordance with the announced rules.

### **CASE STUDY – PRATT CONTRACTORS V PALMERSTON NORTH CITY COUNCIL (NZ)<sup>73</sup>**

**Facts:** The defendant opened tenders for a flyover in Palmerston North. When the detailed tender was lodged each tenderer was required to succeed in a pass/fail method of evaluation based on six non-price attributes. Those who passed all six were then assessed on price with the contract to be awarded to the tenderer with the lowest price.

Four tenders were considered. Pratt was the lowest tenderer and accordingly expected to be awarded the contract. Another tenderer had, with his tender made in accordance with the tender documents (the conforming tender), forwarded a letter amounting to an alternative tender on the basis of which he claimed that the work could be done for \$250,000 less than otherwise under the conforming tender. That “alternative tender” was accepted and the defendant entered into a formal contract with that tenderer.

Pratt claimed that:

- In all the circumstances, its tender gave rise to a contract between the defendant and it was an express or implied term that only tenders submitted in accordance with the requirements of the tender documents would be considered and that the defendant had breached those express or implied terms.
- The “alternative tender” letter could not be regarded as an offer which was sufficiently precise to allow acceptance and could not therefore be regarded as an alternative tender.

### **Held:**

- Pratt had established that a contract had arisen between the defendant and itself when it submitted the tender which had admittedly been in conformity with the requirements of the defendant, particularly as it was not a situation which had admittedly been a mere calling for tenders and nothing more but a requirement to register an interest; and because the tender documents were extensive, detailed and substantial.

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<sup>70</sup> Nicholas Seddon, *Government Contracts – Federal, State and Local*, 4<sup>th</sup> ed, 2009, [7.25]

<sup>71</sup> Thomson Reuters, *Legal Online*, (at April 2010) Building and Construction Contracts in Australia, ‘Tenders’ [2.170].

<sup>72</sup> LexisNexis, *Halsbury's Laws of Australia*, (at April 2010) 65 Building and Construction, ‘II Building Contracts [65-450].

<sup>73</sup> *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469

- In selecting a particular tenderer the Council was bound by the terms it had itself imposed, as well as by the requirements of fairness and equity which might well have an application.
- The letter with the “alternative tender” could not be regarded as an offer sufficiently precise as to allow acceptance and could not therefore be regarded as an alternative tender. It was not a tender for the purposes of the process initiated by the defendant. To accept as an alternative tender (and thus deprive the lowest conforming tenderer of such opportunity as that qualification gave it) a document which was indefinite in terms of price and which required elucidation and confirmation was unfair. In acting as it had, the defendant was in breach of its contract with Pratt which was entitled to be restored to the position it would have been in if the defendant had complied with the obligations imposed upon it.
- Pratt was entitled to recover the nugatory costs of its tendering exercise amounting to \$17,822.
- If the alternative tender had not been before the defendant, Pratt would have been awarded the contract. Damages in the sum of \$200,000 were deemed appropriate (Pratt had claimed \$710,512).
- Pratt’s claim for loss on the basis of being deprived of the opportunity of obtaining future contracts was too speculative and remote such that it was not entitled to recover under that head.

#### **CASE STUDY - DALCON CONSTRUCTIONS PTY LTD v STATE HOUSING COMMISSION<sup>74</sup>**

**Facts:** Dalcon tendered for various projects from Homeswest aka the State Housing Commission. It was an express term of the standard tender conditions that the Commission was not obliged to accept the lowest or any tender. On each occasion Dalcon was unsuccessful despite having the lowest tendered price (or having become the lowest tenderer after withdrawal of other tenders) on each occasion.

Dalcon argued that:

- The Commission owed it a contractual duty to act honestly, impartially and in good faith in selecting the successful tenderer.
- This was breached by failing to award contracts to Dalcon because it was associated through a director with companies that had failed to pay a sub-contractor and were insolvent or experiencing financial difficulties.

**Held:**

- The parties did not intend that there should arise from the tendering process itself a contract having as a term that the Commission would act honestly, impartially and in good faith in selecting the successful tenderer. The court was in particular influenced by the fact that the Commission had a policy of partiality towards regional contractors and this was not consistent with such an implied term.
- Even if there was a contract between the Commission and Dalcon which required the Commission to act honestly, impartially and in good faith in awarding contracts, there had been no breach of that contract.

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<sup>74</sup> *Dalcon Constructions Pty Ltd v State Housing Commission*, 1998, BC9800062, (Unreported, Templeman J, 22 January 1998).

## **7. Seek clarification from referees**

The information the referee provides is used for clarification purposes only, not as the basis for a new judgment. All discussions with referees should be documented in full.<sup>75</sup>

## **8. Select the preferred offer**

This is the offer that represents best value for money.

## **9. Apply due diligence**

Due diligence may include corporation information such as ownership, litigation, director's profiles, financial security and past history. This should include referee checks, ASIC records, commercial records and annual returns.<sup>76</sup>

Referee checking procedures should be substantially the same for all tenderers checked and confidentiality should be assured.<sup>77</sup>

A due diligence investigation should be undertaken of the preferred supplier for high risk / high value or complex projects to ensure that the supplier has the capacity and stability to fulfil all of the requirements of the contract. The due diligence process should, at a minimum, confirm the financial ability, technical ability and capacity of the service provider to deliver the required services. These activities often require professional legal and financial input and advice.<sup>78</sup>

## **10. Write the evaluation report;**

## **11. Provide the evaluation report to your agency's review committee for endorsement;**

## **12. Provide the evaluation report and review committee endorsement to the appropriate authority for approval;**

## **13. Negotiations**

## **14. Final approval process**

## **LETTERS OF INTENT, AWARD AND SIDE AGREEMENTS**

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<sup>75</sup> Department of Treasury and Finance, Government of Tasmania, *Evaluating Tenders* (2001) <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=234403A038E05B4BCA256C91001E5869> at April 2010.

<sup>76</sup> Victorian Government Purchasing Board, *Victorian Public Construction Probity Plan Template*, 2006, p54

<sup>77</sup> Ibid.

<sup>78</sup> Department of Treasury and Finance, Government of Tasmania, *Evaluating Tenders* (2001) <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=234403A038E05B4BCA256C91001E5869> at April 2010.