

ANNABEL SHEPPARD, PARTNER

(May 2003, Updated 2010)

What are your rights if you wish to buy or sell something by tender? Annabel Sheppard, a partner of the Christchurch Lawlink firm of Wynn Williams & Co, points out that the tendering process can be very useful as long as it is handled correctly. An example may be found in the decision of the Court of Appeal in *Transit New Zealand Limited v Pratt Contractors Limited*, which related to the Vinegar Hill project on State Highway 1 where the court made its views very clear.

INTRODUCTION

If handled correctly the tender process is an effective way for buyers to maximise the chances of getting exactly what they want at the best price. There are, however, numerous ways in which the tender process can go wrong. To avoid the pitfalls you must plan carefully and get advice before starting the tender process.

If you do not plan, document and implement the process properly, then you do so at your own risk. Increasingly, aggrieved tenderers are approaching the courts to either interfere in the process or grant compensation for wasted costs and potential loss of profits if their tender is not successful.

POTENTIAL PROBLEMS

Traditionally when a request for tender (RFT) was issued it was considered that the person was merely asking for invitations from suppliers to make an offer to supply something ie they were simply advertising what they wanted. The RFT was not in itself considered an offer and any tenders were not an acceptance. Therefore there was no contract established with any unsuccessful tenderer. If the buyer did not follow the tender process as set out in the RFT (eg accepted a tender which did not comply with the requirements), unsuccessful tenderers were left with no rights. This is unfair to people who have spent considerable time and money complying with the process when a non-conforming tender wins the contract. This approach has now changed. The courts have recognised this unfairness and are increasingly prepared to find that the RFT is a type of contract known as a process contract.

This means that the RFT governs the process that is to be followed and the buyer may have to act in a certain way. The court may order the buyer to comply with the RFT or award damages to an unsuccessful tenderer for the losses he or she suffers if the RFT is breached. In other words, the court may say that there is a breach of the process contract and thereby find that the tenderer does have remedies.

A failure to follow the tender process may also result in liability under the Fair Trading Act 1986. This Act says that no person in trade can do anything that either is, or is likely to be misleading or deceptive. If you adopt a different approach to the tendering process from that disclosed in the RFT, then it is possible that this could be held to be misleading or deceptive. Therefore potentially you could face liability under the Fair Trading Act.

For example, it is common for RFTs to require tenderers to supply information in separate envelopes. Envelope A contains information about the tenderer, its business experience and other relevant information. Envelope B contains the price. It is then usual for the RFT to state that envelope B (ie the price) will not be considered unless the buyer believes that the information in envelope A meets its criteria.

If a tenderer mistakenly supplies all its information (including the price) in one envelope then it has not complied with the RFT. If the person or entity calling for the tenders then accepts this tender, unsuccessful tenders may argue that this is unfair and that the person or entity has breached its own rules.

GETTING IT RIGHT

It is important to spend time and resources planning the tender process. Before embarking upon it you must have clear in your mind what you wish to achieve and what particular goods or services you are seeking. Failure to plan properly at the beginning may mean that you then need to amend, or even worse cancel the RFT and start again. This adds extra expense and potential suppliers may lose interest in the tender.

Another key factor in the tender process is to ensure that the process is documented clearly and then implemented in accordance with the procedure set out in the tender documents. Business entities that are regularly calling for tenders should take legal advice on setting up the process. It is then a good idea to prepare a tender manual and appoint one person to be the tender manager for the process. That person must be given a reasonable degree of independence and must be protected from interference by others in the workforce.

The request for tender should set out clearly what goods and services are being requested, how a tender should be submitted, how the tender is to be assessed, the contract terms and a timetable for the tender process. If time

is spent drafting the tender request properly it will help reduce the exposure to liability and help ensure that proper procedures are followed.

Failure to get the basics right may result in the whole process costing more and taking a lot longer than is necessary. You may be left wondering whether the process was worthwhile.

The tender process must be designed and tailored carefully for the project in mind. It is vital that the process is documented properly and implemented accordingly. You should seek legal advice at the very beginning to help avoid the pitfalls and ensure the process is a beneficial one.