Template Recall
The Hazards of Hidden Defects

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Law Office. He has been ranked by *Who’s Who Legal* as one of the ten leading public procurement lawyers in the world and his firm was selected by *Global Law Experts* and *Corporate INTL* as Canada’s top public procurement law firm. Paul’s portfolio focuses on major procurement projects, developing innovative procurement formats, negotiating commercial transactions and advising institutions on the strategic legal aspects of their purchasing operations. Paul also has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement, The Laws of Precision Drafting*, *Accelerating the Tendering Cycle* and the *National Tendering Law Update*. Paul hosts the *Procurement Law Update* webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across Canada and internationally.
Template Recall
The Hazards of Hidden Defects

While tendering templates are an essential part of every procurement toolkit, many organizations are unaware of the common defects that lie buried in outdated tendering terms. This webinar will explain how these hidden hazards create significant procurement pitfalls that can be mitigated with a targeted template overhaul.
Purchasing institutions should overhaul their procurement playbooks with a professionally designed set of tendering templates that meet the broad challenges of an increasingly complex, diverse and dynamic marketplace. In this regard, no two institutions are the same. There is no substitute for direct knowledge of an organization’s inner workings and an understanding of market conditions.
Template Overhaul
Integrated Into the Canadian Tendering System

While tendering templates should be tuned up to **prevailing due diligence standards**, they should also be tailored to meet the organization’s unique operational requirements. They need to be calibrated to address the challenges that are distinct to the particular industries that the purchasing institution is buying into. Those formats should be properly adapted for use within the Canadian legal context.
Does your organization use a broad range of tendering formats based on domestic and international best practices?
Internal Governance Roadmap

1. Project Planning
   - Business Units
     - Business Plan
       - Requirements and Specifications
       - Pricing Structure
       - Evaluation Plan
       - Stream Selection
       - Format Selection
   - Business Units
     - Pre-Qualification Framework Corporate Agreements
     - Invitational Competition
     - Open Competition
     - Pricing Structure
     - Evaluation Plan
   - Procurement
     - RFX Document
     - Contract Legal Terms
   - Evaluation Plan
   - Issuing of Competitive Bid Document
   - Posting of Q&As and Addenda
   - Bid Receipt
   - Business Unit
     - Direct Award
   - Business Unit
     - Bid Evaluations
   - Business Unit
     - Contract Finalization
   - Legal and Procurement
     - Bid Protest Process
2. Procurement Streaming
   - Business Units
     - Procurement
3. Document Assembly
   - Business Units
     - Procurement
   - RFX Document
   - Contract Legal Terms
   - Evaluation Plan
   - Issuing of Competitive Bid Document
   - Posting of Q&As and Addenda
   - Bid Receipt
   - Business Unit
     - Direct Award
   - Business Unit
     - Bid Evaluations
   - Business Unit
     - Contract Finalization
   - Legal and Procurement
     - Bid Protest Process
4. Competition
   - Business Units
     - Procurement
     - Supplier Selection Letter
     - Notice of Award
     - Performance Tracking and Payment
     - Issue Management
   - Legal and Procurement
     - Bidder Barring Process
5. Contract Formalization
   - Business Units
     - Procurement
     - Notice of Award
     - Performance Tracking and Payment
     - Issue Management
   - Legal and Procurement
     - Bidder Barring Process
6. Post-Award
   - Business Units
     - Procurement
     - Notice of Award
     - Performance Tracking and Payment
     - Issue Management
   - Legal and Procurement
     - Bidder Barring Process
7. Contract Management
   - Business Units
Template Overhaul
Menu of Options

- Invitation to Tender
- No-Negotiation RFP
- Consecutive Negotiation/Rank-and-Run RFP
- Concurrent Negotiation/BAFO RFP
- Invitational Request for Quotation
- Open Request for Quotation
- Request for Information
- Request for Supplier Qualifications – Prequalification Version
- Request for Supplier Qualifications – Master Framework Version
Forms and Formats

Do your organization’s standard template terms comply with the expanding body of red-tape regulations flowing out of treaties, statutes, directives, good governance guidelines and case law developments?
The Architecture and Anatomy of Template Design
By Paul Emanuelli, Procurement Law Office

When it comes to maintaining tendering templates, many institutions try to fend for themselves by filling in gaps in their outdated documents with spare parts collected over the years from templates used by other institutions. This is a high risk practice that should be avoided. The increasingly complex legal landscape that governs tendering in Canada calls for the deployment of professionally designed and drafted templates that will assist in creating and maintaining proper version control over procurement documents.

This article by Paul Emanuelli was previously published in the July/August 2013 edition of Purchasing b2b magazine and is extracted from the Accelerating the Tendering Cycle handbook.
The following discussion addresses the dual aspects of proper template design: template architecture and template anatomy. One of the critical features that distinguishes state-of-the-art tendering templates from antiquated purchasing documents is the incorporation of proper design features based on the principles of modularization.
Architectural Concepts
Four Pillar Modularization

Every solicitation document can be modularized into four core content categories: (i) a description of requirements that sets out what the institution wants to buy; (ii) performance terms that will govern payment and performance under the awarded contract; (iii) evaluation criteria that will determine which supplier will be selected for contract award; and (iv) tendering process rules that set out the process protocols from the time the opportunity is issued through to the contract award and debriefing stages.
Architectural Concepts
Four Pillar Modularization

Many templates lack this clean four-pillar architecture, leading to incalculable inefficiencies in the drafting process and significant downstream interpretive risks. Professionally designed templates incorporate this four-pillar strategy so that the different components interoperate while allowing project teams to draft different components concurrently prior to final assembly. This helps maximize the use of limited drafting time.
Core Anatomy

Tendering Terms

No matter which type of tendering document you are using, there are certain core requirements that are universal to all solicitation documents and should be included as base provisions. These core provisions include clauses covering the following:

• placeholders for users to insert a brief description of the requirements and the terms and conditions that will govern the performance of the contract;

• placeholders for the purchasing institution’s disclosure of material information and for the insertion of key dates, along with tender submission protocols;
Core Anatomy
Tendering Terms

- provisions providing consents for the use of bidder information, as well as process protocols dealing with pre-bid communications, confidentiality, conflict of interest, inappropriate conduct, disqualification, tender cancellation, debriefings and bid disputes;

- standard evaluation provisions for the screening of threshold requirements and the assessment of ranking criteria, as well as protocols governing contract award to the top-ranked supplier; and
Core Anatomy
Tendering Terms

• legal disclaimers regarding work estimates, exclusivity and work volumes, as well as disclaimers stating that suppliers bear their own bidding costs.

In addition to the core terms, tendering templates also call for specialized provisions based on the specific type of procurement format, which would include bid irrevocability and bid bond protocols along with the appropriate reserved rights and privileges for Invitation to Tender formats, and “no claims” covenants, rectification processes and negotiation protocols for Negotiated RFP formats.
While this list is by no means exhaustive, it provides a benchmark against which you can measure the content of your existing tendering templates in order to determine whether you can get by with some minor spot repairs or whether it’s time for a template overhaul. As purchasing professionals know, it’s hard to keep things simple when it comes to tendering templates. It takes experience and precision to balance the complexity of the tendering process with the need to maintain simplicity and ease of use for end-client departments. Purchasing institutions should therefore select the right design team when assigning someone to tool up their procurement playbook.
Forms and Formats

Awareness of Format Use

Does your organization have a clear understanding of the legal liabilities created by certain tendering formats and is it properly avoiding the risks of bid repair, unfair process and bid shopping claims?
To properly manage legal exposures, purchasing institutions should ensure that there is a proper awareness across their organization of the legal duties created by different tendering formats. Contract A formats create a significant layer of additional legal risks and restrictions. Institutions should carefully control when and how those formats are used since the implied Contract A fairness duties impact bid validity, restrict any post-bid corrections or changes and create significant exposures for purchasing institutions.
The Supreme Court of Canada renders its seminal decision, recognizing that the tendering process creates a preliminary “Contract A” that gives rise to pre-award duties between the parties. The decision foreshadows common law developments in Canada and across the Commonwealth.
The Formation of Contract A and Contract B

Purchaser Issues Tender Call

Purchaser’s Offer to Enter Into Contract A
Purchaser’s Invitation to Treat on Contract B

Bidder Submits Compliant Tender

Bidder’s Acceptance of Contract A Offer
*Contract A Formed*

Bidder’s Binding Offer to Enter Contract B

Purchaser Accepts Bidder’s Contract B Offer

Bidder Must Honour its Tender to Comply With Contract A
Legal Risks and Remedies
Remedy Against Breaching Bidders

As recognized by the Supreme Court of Canada in 1981 in *Ron Engineering*, the duty to honour a tender is a key bidder responsibility and one of the cornerstones of a formal legally binding bidding process. Where a bidder responds to a binding Contract A bidding process, submits a compliant tender, is selected for contract award and then fails to honour its tender, it can be liable for forfeiture of bid security or damages amounting to the difference between its tender and the next-best bid.
Legal Risks and Remedies

Remedy Comes With Risk

However, this imposes the burden of bid security on all bidders or requires the purchasing institution to initiate legal proceedings against the breaching bidder to recover damages. Furthermore, this remedy exposes the purchasing institution to the legal *quid pro quo* of lost profit claims by unsuccessful bidders.
Legal Risks and Remedies

Lost Profit Claims

Where a bidder loses a Contract A bidding process, it has the right to bring a legal claim and may be entitled to its lost profits if it can show that it lost the contract award due to a breach of the tendering rules. The larger the tendered contract, the greater the amount of potential lost profit damages. This remedy creates considerable legal exposures:

Contract Value x Profit Margin = Lost Profit Damages
(e.g. $25 million x 10% profit = $2.5 million in damages)
Win or lose, the direct and indirect costs of defending against these tendering claims can have a significant adverse impact on the purchasing institution.
Simplified Bidding Under Traditional Contract Law

- Purchaser Issues Tender Call
- Purchaser’s Invitation to Bid on Contract
- Bidder Submits Quote or Proposal
- Compliance Rectification Permitted
- Pricing Remains Basis of Evaluation and Ranking
- Process Permits Fine Tuning of Contract Terms
- Process Permits Negotiating Improved Pricing Terms and Enhanced Performance Commitments
- Purchaser Selects Best Response
Top Ten Template Defects

1. Frankenstein Formats

Notwithstanding all the tendering-related litigation over the last four decades, many organizations continue to improvise with “one-size-fits-all” tendering formats that assemble random irreconcilable provisions into a single template. These “chop and paste” mash-ups attempt to merge Contract A concepts and traditional contract law principles in runaway formats with legal consequences that are impossible to properly manage, predict or control.
Top Ten Template Defects


Contract A is based on the unequivocal irrevocability of a bid for a prescribed period of time. However, many tender calls fall short of creating Contract A certainty by vaguely asking bidders to “hold” their pricing or require that pricing be “valid” for a prescribed period of time. These vague pricing provisions send purchasing institutions into a legal grey zone between Contract A and traditional contract law.
Top Ten Template Defects


Contract A replaces negotiation with fixed-bid “one-shot” tenders. Properly designed Negotiated RFPs are based on traditional contract law, with negotiations serving as the embedded operating system for contract award. These two systems are mutually exclusive. Yet, many purchasing institutions continue to ask for irrevocable bids while reserving the right to negotiate over those bids even though the courts defined this practice as bid shopping years ago.
4. Sole and Absolute Discretion Clauses

Whether they are running a Contract A bidding process or engaging in a properly structured Negotiated RFP process under traditional contract law, public institutions are subject to strict fairness duties and can expose themselves to significant legal risks if they fail to follow strict due process protocols in their bidding processes. Sole and absolute discretion clauses purport to give purchasing institutions legal immunity from arbitrary decision-making but a long legacy of litigation shows that the courts take a different view of the latitude afforded by these false comfort clauses.
Top Ten Template Defects

5. Cancellation Clauses

There is no such thing as a risk-free public procurement or the risk-free cancellation of a public tendering process. While tender call terms may contain reserved cancellation rights, bidders in a government procurement process have the right to sue to challenge the fairness of a cancellation decision. The courts serve as the ultimate arbiters of the liability that may flow out of cancellation decisions, which means that pushing the cancel button may take a purchasing institution on a one-way trip into legal entanglement.
Top Ten Template Defects


Once a Contract A bidding process crystallizes with the submission of compliant bids, there is no safe reboot out of an over-budget bid situation (except finding more money). Whether the organization tries to negotiate its way out of the situation or decides to cancel and retender, its next step remains subject to legal challenge and lost profit claims. The failure of the courts to chart a clear course out of over-budget bid situations under Contract A fixed-bid tendering represents one of the most significant defects in the Canadian tendering system.
A non-compliant tender is legally incapable of acceptance. Full stop. Procurement provisions that purport to give a purchasing institution the right to “waive” bid irregularities are a lawsuit waiting to happen. Rather than becoming the next case study on the “substantial compliance” test, purchasing organizations would be well served to manage their mandatories and reduce the recurring trip hazards that habitually cause their bidders to become non-compliant in the first place.
Top Ten Template Defects

8. Limitation of Liability Clauses in Contract A

The only way to effectively limit the Contract A liability of lost profit claims is to avoid creating Contract A. Once Contract A is created, the ultimate effectiveness of liability disclaimers is highly suspect. In fact, these provisions are completely useless in preventing a determined bidder from initiating a lawsuit and potentially dragging a purchasing institution through protracted legal proceedings. As case law has proven, properly drafted Negotiated RFPs are a far more effective method of enabling the rapid dismissal of lost profit claims and thereby serving as a deterrent against the initiation of lost profit lawsuits.
Top Ten Template Defects

9. “Best Value” Clauses

Your project team needs to decide early whether it plans to award based on the low bid or based on transparent high score factors. Hedging your bets with the reserved right to award based on undisclosed “best value” considerations leaves the organization open to a bid dispute if a bidder decides to challenge the decision-making process behind the post-bid “best-value” determinations.
Top Ten Template Defects


Reserving the right to conduct a site visit, demonstration, product testing process, interview, or any other improvised post-bid procedure is no substitute for a properly planned, transparently described, and properly followed evaluation process. Bid evaluations should not be an improvised “choose your own adventure” created in an ad-hoc fashion after bid submission. Improvised evaluation procedures are a trial tested entry point into the realm of bid dispute challenges, lost profit awards and court-based contract award cancellations.
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- September 23, 2015, 1 pm EDT, Bid Protest Powder Keg: The New Wild West?
- October 29, 2015, 1:00 pm EDT, Navigating NRFPs: Balancing Transparency and Confidentiality
- November 17, 2015, 1:00 pm EST, Template Recall: The Hazards of Hidden Defects
- December 16, 2015, 1:00 pm EST, Top Ten News Stories of 2015

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