RFPs – A binding process or not?

A major IT project such as a new system implementation, or an outsourcing or managed services arrangement, will often commence with the issue of a Request for Proposal (RFP) or tender document. Conducting an RFP process can assist the organisation in assessing the various solutions available in the market and/or suppliers' capabilities to deliver a customised solution, while also creating a competitive environment that encourages suppliers to submit their “best price”.

While there are certainly a number of benefits that can be realised in going to market with an RFP, there are also some potential legal pitfalls or risks that need to be managed and mitigated. One of these is the possible formation of a “process contract” between the organisation issuing the RFP document (Issuer) and a supplier who submits a response (Respondent).

What is a process contract and why is it an important issue?

Generally-speaking, a process contract is a contract that governs the manner in which an RFP process will be conducted. This might include specific rules as to how:

- the Issuer will conduct that process (eg timetables and the "shortlisting" of Respondents);
- the Respondent will participate in that process (eg requirements to give presentations, respond to clarification questions and to negotiate with the Issuer); and/or
- the Issuer will assess the RFP responses and select the successful Respondent, including criteria against, which the Issuer will assess proposals.

For an Issuer, the key objective of the RFP is to identify, and ultimately procure, the best possible solution, taking into account technical capabilities, reliability/security (both in terms of the supplier and its solution), and “value for money”. A process contract with rigid rules could unduly restrict the Issuer's flexibility in assessing and selecting Respondents' proposals.

For a Respondent, preparing an RFP response may involve a considerable investment in terms of time and resources. Where the size of the project or arrangement is significant, the financial stakes may also be high, with the successful Respondent having the opportunity to secure significant revenue and significant market presence. If the RFP relates to an existing arrangement (eg outsourced services), the incumbent supplier faces a
significant loss of business if unsuccessful. These factors can drive an unsuccessful Respondent to consider legal proceedings against the Issuer. Generally, challenges to the decision to award a contract to a particular Respondent will be on the basis that the Issuer did not follow a process in accordance with the express terms of the RFP document, or terms that were implied from the RFP document or the circumstances in which it was issued. Specific examples of claims against the Issuer range from breach of a requirement to accept the lowest conforming tender,[2] to breach of an implied term that tenderers would be assessed on an even handed and fair basis.[3]

**When is a process contract formed?**
The mere fact that an RFP document has been issued does not automatically mean that process contracts will be formed with the Respondents. For a process contract to exist, the ordinary requirements for contract formation must have been met - these are:

- a concluded agreement between the parties (often analysed in terms of an offer and acceptance) on terms that are sufficiently certain;
- an exchange of consideration between the parties (which may take the form of an agreement to pay a price or perform an obligation); and
- an intention of the parties to create legal relations.

When assessing whether these requirements have been met, the courts will typically refer to the RFP document as a starting point. If the RFP document explicitly excludes or disclaims the formation of any process contract, it is unlikely (in the absence of compelling factors to the contrary) that an intention to create legal relations and therefore a process contract could be found.

If the RFP document provides no such direction, the courts may look to various other features, including the degree of formality and prescription in the procedures for submitting and evaluating proposals and the existence or absence of:

- a requirement for registration of RFP responses;
- detailed specifications for the RFP response that must be complied with;
- stated criteria for evaluating RFP responses;
- an express or implied commitment to accept the response that best meets the criteria.[4]

Ultimately the existence or not of a process contract will depend on the facts of the particular situation.

**Considerations for organisations preparing an RFP document**

**Level of detail as to process**

On the one hand, it can be helpful to include in the RFP document clear, detailed "rules" for the RFP process. This can:

- Give suppliers comfort that the process will be conducted in a transparent manner with a high degree of probity, and that their proposals will be considered objectively. This is important as otherwise suppliers may be reluctant to spend the time and resources required to submit a proposal, which would undermine the key objectives of issuing the RFP document in the first place.
- Limit complaints from Respondents in relation to the process. If the Issuer has merely followed the clear process outlined in the RFP document, the unsuccessful Respondents shouldn't really have grounds to feel aggrieved.
- Assist the Issuer in managing the process efficiently, including by ensuring that Respondents submit proposals that comply with the Issuer's requirements and comply with the Issuer's timetable. More often than not Respondents will adhere to these requirements (whether they have a legal obligation to do so or not) so as not to jeopardise their chances of "winning" the contract.

On the other hand, the inclusion of detailed rules may increase the likelihood of a process contract being formed, especially where some of the rules seem inherently contractual in nature (eg requirements that a Respondent keep the proposal contained in its response open for a period of time, limitations or exclusions of liability). As noted above, a process contract can potentially restrict the Issuer's flexibility in assessing and selecting proposals and/or form the basis of a legal challenge by an unsuccessful Respondent.

One way to address these competing factors is to include detailed rules in the RFP document, but in doing so also build into the document mechanisms to ensure that the Issuer retains sufficient flexibility in conducting the RFP process, such as rights to:

- accept non-compliant or "late" responses;
- discontinue the RFP process and not award a contract;
- change the RFP process as outlined in the RFP document, including any relevant timetables and how proposals may be assessed.
Alternatively, the Issuer could include only a limited set of rules in the RFP document, and place greater reliance on a separate evaluation procedures document. An evaluation procedures document is usually prepared for the evaluation of proposals submitted in response to an RFP and will usually set out the evaluation criteria to be applied and weightings to be given to each area of evaluation, so that the Issuer's evaluation team is able to adopt a consistent and uniform approach. The evaluation procedures document would not form part of the RFP document and therefore should not be binding as between the Issuer and a Respondent.

Express exclusion of process contract
Another issue is whether the RFP document should expressly rule out the formation of any process contract. This may seem like the "safe" approach to take, but if an Issuer is not contractually bound by any rules set out in the RFP document, the Issuer cannot then expect to enforce those rules against the Respondents.

Before issuing the RFP document the Issuer should consider the extent to which it requires specific contractual protection in relation to the RFP process. For instance, if the Issuer wishes to avoid a process contract but is concerned about the protection of sensitive confidential information being made available to Respondents, one solution might be to expressly exclude the formation of any process contract in the RFP document, and enter into separate binding confidentiality agreements with the Respondents.

Conclusion
When preparing an RFP document it is important to establish a process that is clear and provides certainty and uniformity in approach on the one hand, but which does not unduly restrict innovation in solutions and responses or flexibility in evaluating solutions and responses on the other hand.

With the careful balancing of these requirements, the chances of a decision to award the contract being successfully attacked on the basis of breach of a process contract can be significantly reduced.

[1] For the public sector, the Mandatory Rules for Procurement by Departments even dictate that government departments must (except in limited circumstances) conduct an open tendering process for contracts for goods or services with a value of $100,000 or more.


[3] Onyx Group Ltd v Auckland City Council (2003) 11 TCLR 40 (although in this case Onyx was not able to prove the existence of a process contract).


Key contacts:
Karen Ngan
Matt Smith

Other articles in this issue:
Technology by design
Copyright users given more of a fair deal
RightSignature[2] both announced in April that they had paired up with Google to bring their services to Google...

Read the full article.

providing advice to multinational firms and their professional advisers on all aspects of...

Read the full article.

firm's transactional banking and finance group in Wellington. Peter acts...

Read more about Peter

and hope to publish some of these soon. Please check back here for any...

Read the full article.

on the responsibilities of businesses opting to use electronic systems,...

Read the full article.

Read the full article.