

Process contracts and tender invitations

By Elisabeth Stevenson

An often-overlooked consequence of tender invitations is exposure to claims for breaches of process contracts. This can be expensive even if a claim does not succeed.

What is a process contract?

Process contracts are based on tender documents making representations on the process that will be followed in assessing tenders submitted.

Hughes Aircraft Systems International v Airservices Australia [1997] 146 ALR 1 was the landmark case on process contracts in Australia.

In *Hughes* a tenderer that failed in a bid to provide the Civil Aviation Authority with a new air traffic control system, succeeded in a claim in the Federal Court based on the formation of a process contract. The Court found that a process contract had been formed between the Authority and the tenderer through the tender invitation and the tenderers submission in response. It went on to find that the Authority breached the process contract by not evaluating the tenders received in accordance with the process set out in the tender invitation.

Since *Hughes* there have been numerous cases across Australia where tender invitations have been found to give rise to contractual obligations.

The general principles that appear to arise from these cases is that –

(a) whether or not a process contract is formed is to be determined under ordinary principles of contract law (ie offer, acceptance, consideration, capacity to contract, certainty of terms and intention to create legal relations);

(b) a process contract will not arise unless the submission of a tender can be characterised as an acceptance of the offer formed by the invitation to tender. Accordingly, a non-conforming tender is more likely to be characterised as a counter offer, than an acceptance of the offer represented by the invitation to tender. This might be more complicated if the invitation to tender expressly invites non-conforming tenders; and

(c) provisions of legislation binding a local government to a tender process will not generally be considered to be incorporated into any agreement that might be formed, although it might be possible to, inadvertently or otherwise, incorporate such provisions into a process contract.

Can process contracts be avoided?

Part 4 of the Local Governments (Functions and General) Regulations 1996 makes it very difficult for local governments to avoid entering into process contracts with tenderers.

The requirements presenting the most difficulty are those that require local governments to pre-determine the criteria for selecting tenders prior to inviting them and to make that criteria available to prospective tenderers. These requirements make it almost inevitable that a local government tender invitation will, at the very least, resemble a process contract 'offer'.

Most local governments compound the problem by using standard tender invitation documents that go beyond what is required under the regulations.

All that is required with respect to selection criteria is that-

- (a) the criteria for deciding which tender to accept be determined in writing prior to tenders being invited;
- (b) the criteria be made available to prospective tenderers seeking information on the tender invitation; and
- (c) tenders be evaluated against the criteria when making a decision on which tender to accept.

The standard request for tenders used by most local governments include more than the criteria for assessment. Documents made available to prospective tenderers generally also include a description of the process that will be followed in evaluating tenders against the criteria and the weighting that will be given to each criterion. Doing this greatly increases the chance of a disgruntled tenderer being able to convince a court of the formation of a process contract with a term binding the local government to following a particular evaluation process. Irrespective of whether or not the tenderer would then be able to produce evidence that would convince the court that the term had been breached, being able to establish that a process contract had been formed is enough to give the tenderer a cause of action.

Accordingly, one way of reducing the risk of process contract claims would be to pare back tender invitation documents to only what is strictly necessary to both comply with statutory requirements, and to ensure tenderers are fully informed of what will be required from a successful tenderer.

Disclaimers

There is also no apparent reason why local governments could not protect themselves through the judicious use of

disclaimers.

Disclaimers have been successful in other jurisdictions. In the *Canadian case Budget Rent-A-Car of B.C. Ltd v Vancouver International Airport Authority* 2009 BCCA 22 a well drafted and very clear disclaimer clause was found to prevent the formation of a process contract.

One Australian case suggests that courts here might accept a disclaimer in tender documents can prevent the formation of a process contract.

In *Karimbla Properties (No. 50) Pty Ltd v New South Wales* [2015] NSWSC 778, the New South Wales Supreme Court considered whether a process contract was formed through an expressions of interest process which preceded a tender invitation. Clearly the less complex documentation used for inviting expressions of interest is far less likely to give rise to a process contract than a full tender invitation.

However, in concluding that a process contract was not formed Justice Beech-Jones stated 'most critically, in none of the cases to which the court was referred was there a disclaimer in the documentary material similar to the one in this case, namely one which stated that: "[no] legal or other obligations will arise... unless and until formal documentation has been signed"...'. This part of the EOI publication appears to be inconsistent with any attempt to erect a contract relating to the EOI process.'

It is possible that a disclaimer, at least in the terms stated, might not be considered to have such a definitive effect in a full tender invitation case but that was not tested.

Nevertheless, *Karimbla* indicates that Australian courts might well be prepared to follow the approach taken by the British Columbian Court of Appeal in the *Vancouver Airport* case.

Limiting damages

There is a school of thought that, for probity reasons, public authorities should be prepared to stand by any selection process set out in tender invitations.

If that approach should be taken, it is important to ensure decision makers do not merely 'rubber stamp' tender invitation documents. If the decision on awarding the tender is to be made by Council, elected members need to be fully aware of the selection process in the documents and that by approving that process they are committing themselves to following it. Added protection might also be afforded by including a provision in tender documents to the effect that should a process contract be found to have been formed, a term of that contract is that the maximum damages payable to a tenderer for breach is the cost of the tender submission.

Manage the risk

Local governments need to be aware of the risks associated with process contracts when inviting tenders. It is difficult but not impossible to put risk management strategies in place with the aim of avoiding the formation of a process contract, or at the very least, containing the risk that such a contract might present.

Reviewing standard tender invitation documents with the principles of process contract formation in mind is a good place to start.

For further information please contact Elisabeth Stevenson on 9383 3133 or by email on estevenson@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.