



ROBINS APPLEBY
BARRISTERS + SOLICITORS

Procurement: What we Really Want to Say

John Fox
Robins Appleby LLP

November 4, 2017

Robins Appleby LLP | 2600-120 Adelaide St. W., Toronto, ON M5H 1T1 | T. 416.868.1080 | F. 416.868.0306

www.robapp.com

 @robinsappleby

Agenda

- I. Procurement 101 (John)**
- II. The Procuring Agency's view (Sue and Brett)**
- III. The Proponent's View (Heather)**
- IV. Questions/Discussion**



Daily Bread
Food Bank



Toronto
Community
Housing



ROBINS APPLEBY
BARRISTERS + SOLICITORS



John Fox



DALHOUSIE
UNIVERSITY

SCHULICH SCHOOL OF LAW

Procurement 101

- A process for awarding contracts for the supply of goods and services based on an established set of criteria.
- Can be a “tender” or a “Request for Proposal”
- Scope: Public (incl. government agencies), For-Profit, Non-Profit.
 - Each entity will have different steps in the process
i.e. Some might qualify bidders first.

Procurement 101: A Possible Procedure

- Procuring Agency Sets its Strategy (*Note: This is actually the hardest part*)
 - Identify Needs to be addressed by the Procurement
 - Determine the Methodology of Procurement
 - Determine evaluation criteria (is the lowest price the law?)
- Draft/Issue Tender Call or RFP
- Submission of Responses
- Evaluation of Responses
- Selection of Winners Execution of Agreement
- Performance of Contract

Procurement 101: Hard Question #1

- Competitive Procurement replaces negotiation of contracts with a competition.
- Policy Underpinning:
 - The Holy Trinity of Public Procurement: Accountability, Transparency, Value-for-Money.
- Is Competitive Procurement always the best way?
 - What if the market is limited?
 - What if different bidders value the subject of the procurement differently?

Procurement 101: Sources of Law

- I. Ron Engi-who?
 - i. The basic rule of procurement is based in the common law doctrine of fairness. The law stems from a Supreme Court Decision: **Ron Engineering**.
- Dual Contracts:
 - **Contract A:** Formed between a bidder and the purchaser when the bidder submits a qualifying bid.
 - **Contract B:** Formal contract created with the winning bid.
- II. Municipal and Provincial Policies
 - Broader Public Service Procurement Directive
- III. Trade Contracts

Procurement 101: Contract A: Duty of Fairness

- Overarching obligation imposed on the purchaser of goods/services as part of Contract A
- Many subsidiary obligations:
 - Duty to disclose all information material to performance of the final contract;
 - No undisclosed criteria
 - Duty to only accept compliant tenders
 - i.e. the winning bid must meet criteria set out in rules
 - Tender calls should set out the standard for evaluating submissions (i.e. strict or substantial – default is substantial)
 - Duty to conduct fair competition
 - Avoid preferential or unfavourable treatment of competing bidders (i.e. conflicts of interest)
 - Conduct evaluation process in the same manner as set out in the instructions.
 - Ensure proper records are kept
 - Must review bid as against the evaluation criteria
 - Duty to diligently review a submitted bid.
 - Duty to award to the winning bidder (subject to a privilege clause)

Procurement 101: Contract B: Final Service Contract

- The terms of the final service contract must be the same as those contained in a submitted bid.

Procurement 101: More Hard Questions

- Can you negotiate in the context of an RFP? A Tender?
- In a land sale, should the seller keep environmental risk? What is the danger of using the usual buyer beware method?
- Should you include Contract B in the bid documents? If so, how do you deal with amendments if the bid documents can't be changed?
- Do you tell proponents the weighting of different criteria? How do you weight price?
- As a proponent what do you do if you think you have a better way to achieve the procurement goals?
- What happens if you don't like any of the bids? Or you don't like the one that has scored the highest?




ROBINS APPLEBY
BARRISTERS + SOLICITORS

John Fox

Partner

T: 416.360.3795

E: jfox@robapp.com

 [@johnfox67](https://twitter.com/johnfox67)

The Procuring Agency's View

Sue Ritchie
Brett Barnes

2017 ONPHA Conference

Session # 406

Procurement: What we really want to say

Presenters:

Sue Ritchie, Manager, Human Services
Brett Barnes, Advisor, Human Services

PROCUREMENT AND THE MUNICIPAL SERVICE MANAGER

- Provincial Long Term Affordable Housing Strategy and Service Manager 10 year Housing & Homelessness Plans (2014 to 2024)
- Key priority: Maintaining and Creating Affordable Housing Stock
- Some key challenges:
 - ❖ Development – Land; Project state of readiness
 - ❖ Funding
 - Availability to meet capital project needs
 - Getting money allocated within required timelines for provincial/federal programs
 - ❖ Approvals
 - Council approvals
 - Ministerial approvals/consent

WHAT IS THE REGION OF PEEL LOOKING FOR IN RFP RESPONSES?

Requirements:

- Seeking proposals from both non-profit and for profit – to create new affordable housing in the Region
- The average rent of all Funded Units must be 80 percent of Average Market Rent or lower
- Up to 40 percent of all Funded Units rented at 60 percent of Average Market Rent or below (tenants chosen by the Region from its waiting list)
- Proponent must rent the remaining Funded Units to tenants meeting the income criteria as per RFP
- All submissions to RFP will be evaluated by a Regional Evaluation Committee set up by the Region

WHAT IS THE RFP PROCESS?

1. RFP released
2. Respondent briefing
3. Issuances of Addenda to questions raised by respondents
4. RFP proposal completeness and compliance check
5. RFP proposal evaluation of mandatory eligibility requirements
6. RFP proposal scoring of evaluated criteria

WHAT IS THE RFP PROCESS?

7. Ranking of proposals and notification of selected respondents
8. Resubmission of the selected respondents proposal (final amended proposal)
9. Evaluation and ranking of the final amended proposal
10. Council approval
11. Execution of the conditional memorandum of understanding
12. Execution of the contribution agreement

WHAT IS THE EVALUATION PROCESS?

- ☐ Completeness and compliance
- ☐ Mandatory eligibility requirements
- ☐ Environmental site condition
- ☐ Scoring of evaluated criteria
- ☐ Ranking of proposals and notification of selected respondents
- ☐ Negotiation
- ☐ Resubmission
- ☐ Evaluation of final amended proposals

- Please read the RFP documents carefully and attend the information session provided
- Answer the question posed
- Be specific – if the question asks for 3 examples please provide
- If you are considering an affordable development project seek advice from your Service Manager
 - ☐ Ask about support opportunities
 - ☐ Share your vision to ensure aligned with local plans and priorities
 - ☐ Review local Housing & Homelessness Plans along with Strategic Plans

THANK YOU AND QUESTIONS

Sue Ritchie

Manager, Design and Development, Housing Services

Human Services Department, Region of Peel

sue.ritchie@peelregion.ca

905-791-7800, extension 8605

Brett Barnes

Advisor, Design and Development, Housing Services

Human Services Department, Region of Peel

brett.barnes@peelregion.ca

905-791-7800, extension 8486

The Proponent's View

Heather Tremain

Heather Tremain, CEO Options for Homes



Heather Tremain is the CEO of Options for Homes, an organization that uses an innovative financial model to help low and moderate income families become home owners. Under Heather's leadership, Options, Canada's largest developer of affordable ownership housing, has grown to have over \$650 million in its development pipeline. As an advocate for affordable ownership housing, she has been central in the formation of a national network of providers, who have come together for the first time to make a shared submission to the federal government for the much-anticipated National Housing Strategy.



It is possible.

4 ANNOYING ISSUES WITH RFPs

1. TOO MUCH TOO SOON
2. “FISHING” EXPEDITIONS
3. LACK OF CLARITY AROUND PRIORITIES
4. TIMING

Questions/Discussion