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Procurement Pitfalls and Troublesome Contractors

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Difficult Contractors

- Everyone will have encountered problematic contractors
 - Late Completion and Delays
 - Performance/Safety Issues
 - Change Orders/Payment Disputes/Claims
 - General Conflict/Personality Issues

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Why Is This An Issue?

- Generally, those are companies you would simply seek not to retain again in the future
- But not always so simple:
 - Trade Agreements
 - Law of Tender and Contract

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Trade Agreement Overview

- *New West Partnership Trade Agreement*
- *Canadian Free Trade Agreement (replaces AIT-Agreement on Internal Trade)*
 - Came into force July 1, 2017
 - Now have to comply with both; meaning more stringent of two standards will apply

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NWPTA and CFTA

- Applies to Alberta municipalities
- Requires open and nondiscriminatory procurement practices
 - CFTA now has explicit prohibition on local preferences
- Sets out specific rules for procurement that exceeds certain minimum threshold values

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NWPTA and CFTA

- Procurement values triggering obligations under NWPTA:
 - \$75,000 or greater - procurement of goods or services
 - \$200,000 or greater - construction
- CFTA is slightly higher - set to increase with inflation, but have to comply with NWPTA anyway

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NWPTA and CFTA

- For purchases and contracts which exceed those thresholds, the municipality must use a public procurement process, posted through an electronic tendering system:
 - Alberta Purchasing Connection
 - COOLNet Alberta (Alberta Construction Association website)
 - Etc. (no specified website or process dictated)

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NWPTA and CFTA

- Exceptions:
 - Must consult agreements for specific exceptions
 - But remember you must comply with both; so an exception found in only one agreement is no longer helpful

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NWPTA and CFTA

- Exceptions generally:
 - Sole source exception (where it can be demonstrated that only one supplier is able to meet the requirements of the procurement)
 - Emergencies
 - Procurements from non-profits, certain public bodies

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NWPTA and CFTA

- Exceptions (continued):
 - Confidential/Privileged Processes
 - Buying Groups (where other party complying for you)
 - Specific Exceptions (i.e. lawyers and notaries)

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CFTA

- CFTA adds provisions to specifically narrow the application of exceptions and potential work-arounds

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Prohibited Practices (Art. 503.5)

- (a) according a preference for local goods, services, or suppliers;
- (b) scheduling events in the tendering process in order to prevent suppliers from submitting tenders;

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Prohibited Practices Con't

- (c) specifying quantities of, or delivery schedules for, the goods or services to be supplied in order to prevent suppliers from meeting the requirements of the procurement;
- (d) using price discounts or preferential margins in order to favor particular suppliers;

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Prohibited Practices Con't

- (e) limiting participation in a procurement only to suppliers that have previously been awarded one or more contracts by a procuring entity;
- (f) requiring prior experience if not essential to meet the requirements of the procurement;

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Prohibited Practices Con't

- (g) providing information to one supplier in order to give that supplier an advantage; and
- (h) adopting a registration system with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of any other Party.

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Other Prohibited Practices (Art. 507.2)

- Prohibited to impose a requirement:
 - (a) that the bidder has previously contracted with the entity;
 - (b) for prior experience unless essential; and
 - (c) for prior experience in the territory.

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Prequalification/ Evaluation Criteria

- Article 508 prohibits prequalification or standing arrangements in excess of 3 years
- Article 509(7) imposes a requirement that tender documentation include all pertinent details of the evaluation criterion (including weighting)

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NWPTA and CFTA

- CFTA is newly coming into force, without much guidance on interpretation
- But clear it will impose additional restrictions and reduce flexibility for municipalities when it comes to procurement

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Tendering “Contract A/Contract B” Analysis

- Contract A:
 - Tender is Acceptance of Offer
- Contract B:
 - Construction or Services Contract

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Why is This Important?

- Because it is important to remember that tender law is contract law; therefore, each tender governed by unique terms of offer to tender. Not necessarily governed by “custom” or industry standards.
- Duty of Fairness in Considering Bids

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Potential Lawsuits

- Not accepting low tender
- Accepting non-compliant tender
 - Alternative price structure
 - Late submission
 - Incomplete or missing information
- Wrongly rejecting or disqualifying a tender
- Sometimes, through no fault of the municipality, becomes a case of “pick your lawsuit”.

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Damages

- If a bidder sues successfully, they are entitled to their loss of profits (even though they did not do the work.)
- When an unsuccessful bidder sues, they must be in a position to show a court that they should have been successful with their bid.
- Breach of Contract (A), with the owner failing to comply with its duty of fairness.

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Difficult Contractors

- The risk of rejecting a bid in a tender process shows that it is not a simple process to refuse work from problematic contractors or consultants
- Requires careful planning PRIOR to putting out an invitation to tender or a request for proposals

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Difficult Contractors

- Two approaches to dealing with this issue:
 - Addressing in the Procurement Documents themselves (including the use of privilege clauses)
- Addressing in a Procurement Policy (including expressly providing for a right to disqualify or bids from contractors in certain situations)

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What Can Be Done to Reduce the Risk?

- Firstly, in the procurement documents (instructions to tender, RFP, etc.), can mitigate risk through contractual terms.
- Privilege clauses and caps on liability
- Reduce liability risk generally before turning specifically to problematic contractors

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Privilege Clauses

- The lowest or any tender will not necessarily be accepted
 - Can be combined with clearly articulated scoring criteria including components other than price
 - Can specify that municipality will award to bidder that it deems most advantageous, regardless of price, and include other general criteria (without scoring.)

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Privilege Clauses

- Right to waive irregularities, correct calculation errors, or accept non-compliant tenders.
 - But be careful with this last point - courts often conclude accepting non-compliant tender is fundamentally unfair
 - Use of that clause should not lead you to accept non-compliant bid (certainly not without seeking approval and legal advice)

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Privilege Clauses

- Right to negotiate with one or more bidders after receiving their proposals (particularly applicable to RFPs as we will discuss later)

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Liability Cap

- As a second layer of protection, include a cap on liability for the municipality.
 - Damages shall be limited to thrown away costs of preparing the bid, to a maximum of \$X.
 - Waiver of any claim to lost profits or other additional compensation as a condition of submitting the bid

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Other Kinds of Procurement Documents

- Tender
- RFP (Request for Proposals)
- RFPQ (Request for Pre-qualification)

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Difference Between a Tender and an RFP

- A tender is a two step process involving Contract A and Contract B. The expectation is that a contract will be awarded as a result of the process.

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Difference Between a Tender and an RFP

- An RFP, does not contain the same expectation. Proposals are requested, and will be considered, but strictly speaking, there is no requirement to award a contract, or an expectation (objectively) that a contract will automatically follow.
- Technically, what is expected to follow is some discussion and/or negotiation which eventually may lead to a contract.

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Difference Between a Tender and an RFP

- However, in determining whether a document is a tender or request for proposal, courts will look at substance, not form.
- Simply calling something an RFP, does not make it an RFP.
- Many RFPs we review would fail the test. Most are really tenders under a different name, and courts would apply the duty of fairness, as well as other tendering rules.

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Difference Between a Tender and an RFP

- Furthermore, courts have found a duty of good faith applies to RFPs as well (*Bhasin v. Hrynew*)
- *Elan Construction Limited v. South Fish Creek Recreational Association*
- So for RFPs or other procurement documents, the same kind of privilege clauses and restrictions on liability should be included

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Scoring Systems

- Use caution in preparing a scoring system
- Courts will hold you to account for applying the scoring criteria you set out:
 - Cannot consider criteria not established
 - Must have objective basis for scoring
- Sometimes, less is more in point systems.

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Scoring Systems

- Can range from the simplest:

"Award shall be made on the basis of quality, service and price."

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Scoring Systems

- To the very detailed:

Price	30%
Project Team Qualifications	30%
Past Experience	20%
• Similar Projects	(10%) +
• Local Experience	(10%)
References	10%
Interview	10%

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Scoring Systems

- But remember CFTA Article 509:

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Tender documentation shall include all pertinent details concerning:

- (a) the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighting and evaluation, unless price is the sole criterion;

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Scoring Systems

- A balance is often most effective:

- Award shall be made on Proposals that will give the greatest value based upon quality, service, and price.
- For greater clarity, in awarding any contract, the City may consider any or all of the following factors in evaluating and selecting the successful Proponent(s):

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Scoring Systems

- a) Corporate Experience and Quality Control
 - Previous related knowledge and experience
 - Demonstrated successful project completion record for similar projects
 - Demonstrated good engineering processes and quality control systems
- b) Project Team
 - Demonstration of relevant qualifications and experience of assigned project staff and their role in the project.
 - Availability and commitment of assigned personnel

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Scoring Systems

- c) Project Understanding and Proposed Work Plan
 - Appropriate assumptions to demonstrate the understanding of the scope
 - Work schedule meeting critical milestones
 - Effective project controls – communications and consultation planning approach, risk management planning approach, quality management approach
- c) Proposal Compensation
 - Proposed total cost
 - Appropriate allocation of resources and fees for services proposed

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Scoring Systems

- Then carefully consider weighting
 - Sufficient to ensure you have a basis for rejecting bad contractors based on past performance, references, etc.
 - But be cautious in underweighting price - don't want to be stuck with high bid from well-qualified contractor

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Scoring Systems

- Key tool to ensuring you avoid the worst contractors, who not surprisingly often lowball their bid submissions (and make up for it by cutting corners and submitting claims once they get the project)
- But not always a full solution...

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Scoring Systems

- Firstly, remember other CFTA Restrictions (Article 503(5) Prohibitions):
 - Cannot limit to suppliers that have previously worked for municipality
 - Requiring prior experience only if essential to meet requirements of procurement

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Scoring Systems

- But fairly easy to support the need to consider past experience
- And CFTA Article 507(4) expressly allows municipality to exclude on grounds including:
 - "significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts."

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Scoring Systems

- Also remember the risk of failing to score properly (*Elan case*)
- And be aware that for projects tied to Provincial Grant Funding, the Province will sometimes direct that the work be awarded to the low bidder, so must work within the parameters of that grant funding

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Procurement Policy

- Beyond a scoring system that will include an evaluation of past performance, municipalities can adopt a policy expressly prohibiting certain contractors or suppliers from submitting a bid in certain situations

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Procurement Policy

- Can arise for contractors who:
 - Are engaged in, or have recently engaged in, litigation with the municipality
 - Have failed to complete previous work, or have a documented history of poor performance
 - Have a poor safety record

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Procurement Policy Examples

Interpaving Limited v. City of Greater Sudbury, 2018 ONSC 3005

- City Bylaw allowed a bidder or supplier to be excluded from eligibility to submit a bid or quote (or to reject any bid or quote received) from a party in several circumstances

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Interpaving Case

1. Bidder involved in litigation with the municipality;
2. Documented evidence of poor performance, non-performance or default by the Bidder; or
3. Bidder or its personnel have demonstrated abusive or threatening behaviour or conduct towards the municipality's staff or representatives

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Interpaving Case

- The Bylaw required the relevant staff, in consultation with the City Solicitor, to consider whether the circumstances at issue are likely to affect the Bidder's ability to work with the City, and whether experience indicates City is likely to incur increased staff time and legal costs in dealing with the Supplier

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Interpaving Case

- Court upheld application of bylaw
- But warning about procedural fairness:
 - Need to provide for and follow a clear and transparent process
 - Should notify bidders of potential disqualification, and allow opportunity to respond

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City of Burnaby Example

J. Cote & Son Excavating Ltd. v. City of Burnaby, 2018 BCSC 1491

- In Dispute Resolution process, referee sided with contractor; City refused to accept
- Contractor forced to sue municipality
- In response, municipality added new clause to Invitation Tender disqualifying those with litigation against municipality in last 2 years

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City of Burnaby Example

- Even in these circumstances, court upheld policy as having a legitimate business purpose
 - Discouraging lawsuits helps protect the public purse
 - But be careful of bad faith arguments (“targeting” particular contractor/supplier)

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Procurement Policy

- Need to ensure the policy provides flexibility
- There are many times you would not want to disqualify contractors automatically
 - For example, exclusion for litigation
 - Contractor may be dragged into third party claim, or simply needs to preserve limitation period while dealing in good faith

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Procurement Policy

- Also need to ensure Procurement Policy is incorporated and adopted in procurement documents
- Remember Contract A/Contract B issue- the terms of the contract need to reflect the policy
 - Eg- This tender is subject to the Town's procurement policy number xxx, etc.

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Procurement Policy

- Tracking Problems
 - In order to gather reasonable basis for any disqualifications, need to ensure there is a record of past problems
 - Important to document on each project and have a system to track those issues
 - Some municipalities adopt a "report card" type process at the conclusion of each project

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Conclusion

- Public procurement inevitably creates a risk of litigation, but cannot be avoided in many cases as a result of the *NWPTA* and *CFTA*.
- Useful to create one or more policies to address these issues, and provide another tool to deal with the more extreme cases

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Conclusion

- An area where legal advice will be important; particularly in circumstances where a municipality is forced to consider disqualifying or rejecting a bid - or wanting to select something other than the low bidder.

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Thank You For Your Attention Questions Are Welcome

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