

Avoiding RFP Dramas: An Owner's Perspective

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I. Introduction

Requests for Proposals ("RFP") are becoming more popular with owners because this procurement model provides owners with more flexibility than the tendering process. The construction tendering process is governed by a series of very strict and very specific rules. By contrast, in the RFP process, proponents ("bidders" when a tender is used), do not base their proposal on a specific set of plans and specifications. Rather, proponents are free to conceptualize an owner's general project and design requirements in any way they see fit. Similarly, an owner is entitled to negotiate the contract for the work, including the price for that work, with the proponent whose proposal best responds to the owner's general requirements. With an RFP, an owner is not required to accept the lowest priced proposal.

However, before the RFP process becomes the procurement panacea for owners, careful consideration should be given to the express wording contained in the RFP document. Often, terms that are synonymous with the tendering paradigm are mistakenly incorporated into the RFP document. This can be problematic for an owner in that tendering law obligations are very different than those in the RFP paradigm. Simply labeling the procurement documents as an RFP will not be enough. In other words, an owner can become subject to tendering law obligations and potentially be exposed for significant damages if the RFP is poorly worded. In fact, Courts look beyond the title of the procurement document to the substance of the procurement request in order to determine whether the procurement is a true tender or an RFP. As was the case in ***Tercon Contractors***¹, an owner can unwittingly become liable for significant damages if its RFP mistakenly contains tender-like concepts and terminology.

Accordingly, this paper seeks to cover various aspects of the RFP procurement model including the differences between an RFP and a tender, the importance of pre-qualifying potential proponents through the use of a Request for Expression of Interest/Request for Qualifications ("RFEOI/RFQ"), the obligations that arise during the evaluation of proposals, the benefits of conducting an interview following the receipt of responses to the RFEOI/RFQ, the short listing of proponents for the RFP, and finally, the consideration of suggested wording in the RFP document. Armed with this information, it is hoped that owners will be able to avoid unnecessary drama and unintended risks in the RFP process.

¹ ***Tercon Contractors Ltd. v. British Columbia***, [2006] B.C.J. No. 657 (B.C.S.C.) [***Tercon Contractors***]; reversed on appeal (2008), 289 DLR (4th) 647 (BCCA); application for leave to appeal to the Supreme Court filed on February 1, 2008..

II. Is This an RFP I See Before Me?

In the ***Tercon Contractors*** case, the British Columbia Ministry of Transportation (“the Owner”) sought expressions of interest for the construction of a highway in a remote part of the province. The RFEI contained specific conditions which firms had to comply with in order to be considered eligible to submit an expression of interest. One such condition prohibited a submission from a joint venture composed of an ineligible and eligible firm. Six firms responded and were deemed eligible to submit a proposal in response to the Owner’s RFP.

Tercon Contractors Ltd. (“Tercon Contractors”) and Brentwood Enterprises Ltd. (“Brentwood”) were two of the six eligible firms. Each submitted a proposal. Brentwood’s proposal was, in effect, a joint venture with another firm that had not been deemed eligible. Brentwood made the Owner aware of this fact. The Owner sought to cover up this fact in the evaluation of the Brentwood proposal. The Owner eventually awarded the contract for the work to Brentwood. When Tercon Contractors learned that the Brentwood proposal was a joint venture with an ineligible firm, Tercon Contractors objected to the award. Tercon Contractors commenced an action claiming damages on the basis that the Owner failed to reject the proposal of Brentwood on the grounds that the Brentwood proposal did not comply with the terms of the RFP.

A number of issues arose during the trial; however, for the purpose of this paper, the one key issue was whether this procurement request was an RFP or a tender.

After examining the specific language in the RFP, the trial judge concluded that the procurement request was really a tender, rather than an RFP. The following elements in the RFP were the basis for the trial judge’s conclusion: the wording of the Owner’s procurement document made it clear that the Owner intended to create contractual relations upon the submission of a proposal by the proponent; the Owner required the completion of the highway by a specific date; the highway was to be constructed according to the Owner’s specific design—from which no deviation was permitted; the nature of the work and the materials to be used were not left up to the proponent’s discretion, nor were they the subject matter of negotiation; a proposal would have been rejected if it did not adhere to the Owner’s specifications; the Owner did not have a general right to reject a proposal; the RFP did not specifically state that it was “not a tender”; the successful proponent was required to execute a non-negotiable “project construction alliance” agreement which contained non-negotiable essential terms including the price for the work; the RFP contained an evaluation criteria that imposed an express duty of fairness on the Owner. The trial judge held that many of these elements are commonly found in a tender document rather than an RFP.

Accordingly, the trial judge held that the Owner was subject to the obligations imposed by tendering law. The trial judge held that the Owner breached the duty of fairness in both the evaluation of the proposals received, and in the award of the contract for the work. Specifically, the trial judge held that the Owner breached the duty of fairness by attempting to cover up the fact that the Brentwood proposal was a joint venture with an

ineligible firm, thus rendering the proposal non-compliant and incapable of acceptance. Accordingly, the Owner was liable to Tercon Contractors for damages for loss of profits in the amount of approximately \$3.3 million. Not even an exclusion clause contained in the RFP document prevented the trial judge from finding the Owner liable.

On appeal, the British Columbia Court of Appeal accepted the fact that the procurement request was actually a tender rather than an RFP even though the procurement documents were clearly labeled as an RFP. In fact, the Court of Appeal used the terms "tender process" and "bids" rather than "RFP" when referring to the Owner's procurement documents and process. However, the Court of Appeal reversed the trial judge's decision on the grounds that the exclusion clause should be enforced as per its terms. In other words, the exclusion clause had the effect of preventing Tercon Contractors from being able to claim damages against the Owner.

The two cases of *Mellco*² and *Buttcon*³ provide some additional indication of how Courts will treat RFP's.

In *Mellco*, The City of Portage la Prairie owned a piece of property that it was anxious to develop. Rather than sell the property outright, and thereafter possibly wait until the new owner decided to develop the site, the City chose to issue an RFP for the development of the property. The City determined that this approach would result in the timely development of the property. The RFP contained extensive information about the site, terms and conditions of the RFP, and two appendices containing a form of the offer to purchase for the property. The RFP indicated that the successful proponent was to initiate a plan of development to permit a single family or multiple family dwelling.

The RFP called upon the proponent to design a concept plan for this new residential area and stated that a re-zoning of the subject lands was required. The RFP contained the following statements:

- The invitation for proposals was not a tender call.
- The City would negotiate with the proponent that presented the most attractive proposal. In the event that the sale of the property to the "most attractive proposal" did not close, the City would negotiate with the next most attractive proponent.
- The proposal had to remain open for a minimum of 90 days to allow for acceptance. The sale of the lands had to be concluded within 90 days following acceptance.
- After the completion of the sale, the City and the successful proponent would negotiate a development agreement for the site.

A number of proposals were submitted. Mellco's proposal and that of another proponent were short-listed for final consideration by the City. After the evaluation process, the City determined that the proposal from Mellco's competitor was the "most

² *Mellco Developments Ltd. v. Portage la Prairie*, [2003] 1 WWR 216 (Man. CA).

³ *Buttcon Limited et al. v. Toronto Electric Commissioners* (2003), 65 OR (3d) 601 (Ont. SCJ).

attractive". The competing proposal offered a higher price for the lands, and contained a more innovative residential concept than the proposal submitted by Mellco.

Mellco objected to the City's decision and sought to prevent the sale of the lands to the other proponent. In a concerted effort to prevent the sale of the lands, Mellco employed a number of strategies. Firstly, Mellco opposed the rezoning of the lands. It also alleged that the competing proposal contained material misrepresentations. After the lands were sold to its competitor, Mellco filed a caveat against the lands claiming an interest in the lands. It also started an action claiming a constructive trust in the lands.

Mellco argued that the City should have accepted its proposal because it constituted a binding tender. Further, Mellco asserted the following grounds as the basis for rejecting the competing proposal:

- the competing proposal did not comply with the requirements of the RFP;
- the competing proposal contained a number of misrepresentations;
- the City applied an undisclosed criterion when it evaluated all the proposals submitted.

Mellco also argued that the competitor had breached certain fiduciary duties owed to Mellco, and as such, the lands were held in a constructive trust for Mellco. All of the arguments raised by Mellco were rejected at trial. As a result, Mellco launched an appeal; however, Mellco's various arguments were also rejected by the Manitoba Court of Appeal.

Firstly, in its consideration of Mellco's arguments, the Court of Appeal found that the language contained in the RFP clearly indicated an intention on the part of the City to avoid the creation of a binding contractual relationship as typically found in a tender scenario. Accordingly, the principles enunciated in the **Ron Engineering**⁴ and **MJB**⁵ cases did not apply. Using the **Ron Engineering** analysis, a contract "A" was not created. The RFP clearly indicated that the City would enter into negotiations with the successful proponent rather than award a specific contract to the successful proponent. In fact, the RFP failed to contain any information about the actual contract for the development of the lands. Using the **Ron Engineering** analysis, it was impossible to determine a contract "B" based on the wording of the RFP.

Secondly, the Court rejected Mellco's argument that the competing proposal was non-compliant. In coming to this conclusion, the Court also refused to find that there was an implied term in the RFP that required the City to reject non-compliant proposals. Given that the RFP was not a tender, the concept of "compliance" did not apply.

Thirdly, though the Court held that the City was required to conduct itself fairly and in good faith, there was no evidence to suggest that the City had breached this obligation. On the issue of conducting contractual negotiations in good faith generally, the Court

⁴ *R. v. Ron Engineering & Construction (Eastern) Ltd.* [1981] 1 SCR 111.

⁵ *MJB Enterprises Ltd. v. Defence Construction (1951) Limited*, [1999] 1 SCR 619.

followed the decision in ***Martel***⁶ wherein the Supreme Court of Canada rejected the notion that a duty to bargain in good faith was recognized by Canadian law.

The Court also summarily rejected any argument based on constructive trust. As a result of the improper registration of the caveat, and the certificate of *lis pendens* by Mellco, the Court of Appeal upheld the trial judge's decision to award general damages against Mellco in the amount of \$35,000 and exemplary damages in the amount of \$10,000.

In ***Buttcon***, Toronto Hydro needed to build new facilities. Toronto Hydro decided that a RFP would be issued rather than a tender. Part of the justification for adopting the RFP approach was that final decisions about the new facilities had not been made. In particular, Toronto Hydro had not yet determined whether it required one or two new facilities. Furthermore, there were many unanswered questions about how to proceed with the work.

As part of the procurement process, Toronto Hydro authorized a two step approach that was comprised of a Request for Expressions of Interest ("RFEOI") followed by an RFP. Toronto Hydro hoped that the RFEOI would solicit responses from the construction industry. The RFEOI indicated that there would be a short listing of 4 or 5 of the respondents who would then be asked to submit a proposal in response to the RFP.

In the RFEOI, Toronto Hydro provided basic information about the work. The RFEOI clearly stated that there would be a negotiation, over the course of 3 months, with the short listed companies. The RFEOI also contained the very broad specifications for the work as well as and the criteria to be used to evaluate each proposal. The RFEOI also stated that Toronto Hydro required a proposal submission deposit of \$100,000 and that the bond, required to be supplied by the successful proponent during the final negotiation stage, would be \$250,000. Furthermore, upon the successful completion of the negotiation phase, the successful proponent would be required to provide a full line of credit for the entire construction value. The RFEOI also contained a privilege clause that, amongst other things, allowed Toronto Hydro to reject any and all proposals, and reserved to Toronto Hydro the right to accept the proposal which was most advantageous to Toronto Hydro.

Toronto Hydro received 21 responses to the RFEOI and 5 firms were short listed. The five short-listed firms were notified of their selection. Buttcon was one of the short listed firms. When Buttcon was not awarded the contract, it sued.

In rendering its decision, the Ontario Superior Court of Justice paid very close attention to the language used in the RFEOI and the RFP. The Court concluded that the language in both the RFEOI and the RFP made it clear that:

⁶ *Her Majesty the Queen v. The Martel Building Ltd.*, [2000] 2 SCR 860.

- at the time of the RFP, Toronto Hydro had not made any decision about the number of facilities that it would require, or whether the facilities would be centralized or decentralized
- Toronto Hydro had not made a number of decisions about the work due to certain commercial considerations
- there would be three month period of time to negotiate with each of the short listed firms
- the evaluation criteria for the proposals was very open ended
- the evaluation criteria was not solely a price comparison
- Toronto Hydro could request subsequent information in order to evaluate the submission by each of the firms
- each proponent had complete freedom to create it own specifications for the project
- Toronto Hydro stated very clearly, on all the documents, that this process was not a tender call.

Perhaps the most telling evidence in this case was the fact that the artistic renderings for the various proposals were very different. The Court found the renderings to be as different as they could possibly be. The Court reasoned that if the process chosen by Toronto Hydro was a true tender call, in the traditional sense, then there would be no explanation as to how the artistic renderings for the various proposals could look so different. The Court concluded that the process was not a tender call. As a result, the Contract A/Contract B analysis from ***Ron Engineering***, and the duty of fairness from ***MJB Construction*** and ***Martel*** did not apply.

Therefore, in order to determine whether a procurement request constitutes a tender, or an RFP, some questions to ask include, but are not limited to the following:

- Do the procurement documents evidence an intention to create a binding contract upon a submission, or do the documents indicate that a non-binding negotiation will ensue?
- Is the submission irrevocable?
- Are the terms of the contract for the work contained in the procurement documents?
- Are these contractual terms negotiable?
- Are the specifications for the work negotiable, as per the terms of the procurements documents?
- Is the price for the work negotiable, as per the terms of the procurements documents?
- Is an evaluation criteria specified?
- Does the owner have a right to reject the submission without liability to the proponent?
- Do the procurement documents contain any “tender terminology”?
- Do the procurement documents state that “this is not a tender call”?

This list is not closed. Other questions/considerations may be added based on different fact circumstances.

III. Designing The Set

The caselaw discussed above makes it clear that in order to ensure a successful conclusion to the RFP process, an owner must give consideration to the specific steps in the process. The first step in the RFP process involves screening of potential proponents. This initial screening (or selection) process is usually referred to as the RFEOI/RFQ—or request for expression of interest/request for qualification—process.

The terms of the RFEOI/RFQ are significant because they create the backdrop for the entire RFP process. If the terms are too narrow, then an owner may not receive a sufficient number of responses from the industry. As a consequence, the owner may not be able to attract qualified respondents, or the owner may not be able to build the project for a competitive price. By contrast, if the terms are too broad, then an owner may not receive the quality of responses desired.

Achieving the proper balance owes more to art than science. In order to achieve this balance, an owner should consider the following categories when drafting the terms of the RFEOI/RFQ:

- Background Information
 - Provide general information about the nature of the project
 - identify the stakeholders who will either be involved in the design development and/or construction process or be the end users of the completed project
 - provide the estimated budget for the project
 - enumerate any general project goals e.g. “community and family oriented spaces”, “flexible uses”, “open concept”, “innovative designs”; or any specific project goals e.g. “LEED standards”
- Services Requested
 - list the specific type of services being requested by the owner e.g. design–build services for a community centre
 - include the estimated start and completion dates for the services requested
- Selection Process
 - describe the selection process to be followed e.g. a short listing of interested and qualified firms
 - set out the evaluation criteria to be employed in the evaluation of the responses and the selection process
 - identify key dates in the selection process including the deadline for the submission of responses

- indicate that the owner has the sole and unfettered discretion to conduct an interview with some, all or none of the respondents
 - indicate when the RFP will be released
 - identify when the negotiation phase will begin: i.e. after the evaluations of the RFEOI responses, follow-up interviews are conducted, and the RFP proposals are evaluated
- Specifics Requested from each Respondent
 - Request detailed background about the respondent firm
 - experience generally
 - experience with a project of similar nature, size, budget, scope etc...
 - ability to deal with innovative projects, if applicable
 - access to a stable of subcontractors and consultants, if applicable
 - key personnel on respondent's team
 - financial capability
 - insurance and bonding facility
 - references
- Specific Requirements for a Submission
 - Outline the mandatory requirements for the format of the submission e.g. electronic and hard copy versions, number of copies etc...
 - Deadline for the submission
 - Location of the submission
- Contact Information
 - provide the name of the owner's representative
 - designate website where questions and answers raised by other interested respondents can be shared
 - identify the owner's project team members
- Key Statements about the RFEOI/RFQ
 - this is not a tender, or even an RFP process—just a solicitation of expressions of interest to be used for a short listing of qualified/interested firms for the project
 - no contractual relations are created
 - owner has sole and unfettered discretion in the acceptance, review, evaluation and selection of any and all responses received
 - owner can terminate the process at any stage--without reason given or compensation paid
 - respondents can withdraw at any stage also
 - no representations or warranties of any kind
- Miscellaneous
 - FOIP requirements applicable to the owner

This list is not closed. Other considerations may be added based on different fact circumstances.

IV. Building the Cast

After the deadline for the receipt of responses has passed, the owner will conduct an evaluation of the responses received. Often during the review and evaluation process, an owner may have follow up questions about any of the responses received or require a clarification from one or more of the respondents. In order to address this scenario, a good practice would be to schedule a follow up interview of all or some of the respondents—provided this follow up interview is contemplated by the terms of the RFEOI/RFQ. The benefits of this interview are numerous. Some of these benefits include, but are not limited to the following. Firstly, the owner can address any specific questions that arise as a result of the submission received from any one of the respondents. Secondly, the respondents can be allowed to emphasize certain aspects of the submission that might be more relevant for and applicable to the intended project. Thirdly, meeting with the respondent's prospective project team can give rise to a comfort level that could help the owner in making the decision about which firms to short-list.

The evaluation and interview process should include the following:

- General considerations
 - Establish a team to conduct the evaluation of responses received
 - Ensure that all members of the team are familiar with the RFEOI/RFQ documentation
 - Identify the mandatory(material) requirements of the RFEOI/RFQ document
 - Identify the non-mandatory(non-material) requirements
 - Prepare written score sheets for each response received
 - Undertake the evaluations fairly and objectively
 - If any assumptions have to be applied, apply them equally to all responses
 - Be prepared to defend the decisions made during the evaluation process
 - Keep notes of the evaluation process
 - Once evaluations are conducted, discuss results as a group
 - Develop a consensus
- Specific considerations
 - When reviewing the responses, identify the specific services that each firm is prepared to provide
 - Make a comparative list of all services offered so that an “owner’s wish list” of services is created
 - Evaluate all responses received against the “owner’s wish list”
 - Develop the general and specific questions (for the interview phase) which arise from the evaluation process

- Steps to follow after preliminary evaluations(for the interview phase)
 - Make a list of specific written questions
 - Address the same questions to each of the parties
 - Hand the questions out before the interview
 - Conduct an interview process with each firm to address any questions that the owner has
 - Provided the RFEI/RFQ permits it, ask each respondent to make a presentation of their response
 - Conduct an evaluation of the responses received during the interview process
 - Don't share information received from other respondents
- Steps to follow after preliminary interview
 - De-brief after the interview process
 - Finalize the evaluation after the interview process
 - Finalize the short listed firms
 - Complete the RFP for release to the short listed firms
 - Consider adding the "owner's wish list" to the RFP document
 - distribute the RFP to the short listed firm(s)
 - Send letters to the short listed firms as well as letters to the firms that have been eliminated.

When conducting the evaluation and interview process, an owner should ensure that all respondents are treated "fairly and equally". The obligation of "fair and equal" treatment is an obligation typically imposed on an owner in the tendering process. However, caselaw suggests that some Courts have imported tendering principles into the RFP paradigm⁷. The law is not settled in this regard. Though the extent of the obligation of "fair and equal" treatment may be difficult to define, adopting the above noted practices and incorporating them into the evaluation and interview process, should assist an owner in meeting this obligation.

V. The Starring Role(s)

After the owner determines which firms have been short listed, the owner can release the RFP document to these firms. The prospective proponents to the RFP process should be given a period of time to respond to the RFP by a designated closing date.

This phase of the procurement process is designed to bring out the best proposal from each of the prospective proponents. From the owner's perspective, all of these proponents are qualified to do the work as these proponents have survived the screening/short listing process. The owner knows that each of the prospective proponents likely feels that it is closer to being awarded the contract for the work. Accordingly, the owner can confidently believe that each proponent will want to express maximum creativity, as well as good value to the owner, in the proposal. Furthermore,

⁷ *Wind Power Inc. v. Saskatchewan Power Corp.*, [1999] S.J. No. 219 (Sask. Q.B.); see also *Mellco*, supra..

the owner will also want to ensure that it retains the ultimate discretion in deciding which of the proposals it will accept.

From the perspective of the proponents, each one of them will be vying to ensure that their proposal is the most responsive to the owner's requirements. At the same time, each proponent will strive to make its proposal unique and therefore more attractive, to the owner. Each proponent will also want to know, relatively early on in the process, whether its proposal is acceptable, or not, to the owner--as creating a proposal, and working through the RFP process, can be very time consuming and expensive.

After the proposals are received, the owner may want to conduct an evaluation and interview process as was followed after the submission in response to the RFEI/RFQ—provided the RFP expressly permits such an evaluation and interview process. Accordingly, the express wording of the RFP is critical in order to ensure that the owner's objectives can be realized.

VI. Scripted Essentials

Examples of the wording that could be used in an RFP are noted below. ***Please note that the wording noted below is only a suggestion and that specific legal advice should be obtained prior to relying on the wording.***

- No Tender and no Contractual Relationship

This selection process is not a tendering process. It is part of an overall selection process intended to enable Owner to identify a potential Successful Proponent. The submission of a Proposal does not constitute a legally binding agreement between Owner and any Proponent. For greater certainty, by submission of its Proposal, the Proponent acknowledges and agrees that there will be no initiation of contractual obligations or the creation of contractual obligations as between Owner and the Proponent arising from this RFP or the submission of a Proposal.

Further, the Proponent acknowledges and agrees that this procurement model is not a tender but a Request for Proposal. A Proposal may be rescinded by a Proponent at any time prior to the execution of the Contract.

- Selection Process Overall

The Successful Proponent will be selected through the following process:

Stage One – Request for Proposal;

Stage Two –Interview;

Stage Three - Invitation to Negotiate;

Stage Four – Award of Contract.

1.1 Stage One

1.1.1 An RFP will be issued by the Owner to potential Proponents as determined by the Owner in its sole and unfettered discretion.

1.1.2 Any questions raised by potential Proponents during this stage shall be submitted in writing and must be received by Owner no later than 15 days prior to the Closing Date. Owner shall respond to all written requests no later than 10

days prior to the Closing Date. Without disclosing the name of the Proponent, a hard copy of all questions received and answers provided by Owner shall be provided to all potential Proponents no later than 5 days prior to the Closing Date;

- 1.1.3 Following the Closing Date, the Owner's Evaluation Committee will review the Proposals which have not been rejected and will determine the overall scores and ratings of the Proponents;
- 1.1.4 After this initial review, Proponents may be formally asked by the Evaluation Committee for clarifications. A written response will be required, and the time frame for response will be minimal. After responses for clarification are received, the Evaluation Committee will ensure all Mandatory Criteria are formally reviewed for completeness and understanding.

1.2 Stage Two

- 1.2.1 Following the initial review, and clarifications, if any, the Owner may, in its sole and unfettered discretion interview any one, or more of the Proponents that have submitted a proposal in response to this RFP.
- 1.2.2 By submitting a Proposal, each Proponent acknowledges and agrees that the holding of an interview shall not constitute an express or implied representation, warranty or undertaking on the part of the Owner as it relates to the content of the Proposal submitted by the Proponent, and the Owner expressly rejects any express or implied representation, warranty or undertaking which may arise as a result of the Proponent submitting a Proposal in response to this RFP.

1.3 Stage Three

- 1.3.1 After Stage One and Two have concluded, the Evaluation Committee may select one or more Qualified Proponents to participate in the Invitation to Negotiate ("ITN").
- 1.3.2 During the ITN stage, Owner will engage in bilateral negotiations with each Proponent selected to participate in the ITN using the Draft Contract as the basis for negotiations. At the conclusion of these negotiations, Owner, in its sole and unfettered discretion, may select the Successful Proponent based on the terms agreed to as a result of their negotiations.
- 1.3.3 The Proposals received shall remain irrevocable for a period of 90 days following the Closing Date in order to allow for Owner to undertake the evaluation of the Proposals received, to conduct the interviews noted above, and to enter into the ITN.
- 1.3.4 However, as stated previously, until the Contract is actually executed, Owner reserves the right to terminate negotiations, cancel the Project, and proceed with the Project on different terms, all without compensation to the Proponents.
- 1.3.5 Owner reserves the right to draft the Contract based on the Draft Contract and any related documentation and further reserves the right to determine the location, date and times of all meetings related to the negotiation of the Contract.

1.4 Stage Four

- 1.4.1 The award of contract by Owner for the Work occurs once the Successful Proponent receives a Notice of Award of Contract letter duly executed by the Owner.

- Specific - Project Information

Through this RFP process, Owner is requesting the following information:

1.0 Proponent's Team and Organization Chart

- 1.1 Provide management organization charts including the names of the specified personnel forming the Proponent's team who will be assigned to the Project for the pre-construction phase and construction phases of the Project. Include the names of the Proponent's management and supervisory personnel. Identify proposed team members as full time or part time and indicate the time commitment of their involvement in the Project.

2.0 Proponent's Team Experience

- 2.1 Owner values local regional presence of key members of the Proponent team.

2.1.1 The Proponent shall provide a resume and summary of experience for each of the Project personnel assigned to the Project team. Provide information regarding previous projects completed by the assigned Project personnel, including their actual role, participation, and duration of involvement in the Project.

2.1.2 Provide the number of projects that this team has worked together on in the last five (5) years. Provide reference information.

2.1.3 The Owner will rely significantly on this information in the evaluation of the Proposals. Owner reserves the right to verify all information provided.

2.1.4 Removal and/or substitution of assigned Project team members shall require the prior approval of Owner.

3.0 Leadership

- 3.1 Information shall be included that demonstrates the Proponent's ability to lead and direct in a manner that produces positive outcomes in a timely and efficient manner.

3.2 Statements shall be included about the Proponent's abilities to be flexible and creative in performing the services and related to the communication, interpersonal, and conflict resolution skills of its members.

4.0 Project Communication

- 4.1 The Proponent shall describe its communication plan for the Project team members.

4.2 Describe the electronic capabilities for communication management. Include system and software requirements if the Proponent anticipates an integrated system between the Proponent, and Owner.

5.0 Project Team Development

- 5.1 Owner views the development of an integrated design/construction team as the key element to the success of this Project.

5.1.1 Describe how the Proponent has participated as an integrated team member on projects of this scale;

5.1.2 Provide reference names and contact information for these projects the Proponent has completed in the last five years;

- 5.1.3 For this Project indicate how the Proponent will create a partnering exercise or workshop to develop roles, responsibilities, expectations/objectives and describe the intended outcomes;
 - 5.1.4 Provide a list of people/positions from the entire team, who should attend these meetings;
 - 5.1.5 Provide examples of meeting agenda and minutes from sessions already completed by or attended by the Proponent.
- 5.2 Anticipating that the contract award will occur by **(Owner to insert date)**, provide a date that Proponent would be able to commence with the Project team development and partnering sessions.
- 6.0 Design-Build Services
 - 6.1 The Proponent shall provide a fee proposal at this time. It is the intent to obtain a fixed price for the Design-Build Services.
- 7.0 References
 - 7.1 To effectively evaluate the technical expertise and level of service that the Proponent can provide, Owner shall contact references provided by each Proponent.
 - 7.2 The Proponent shall provide reference projects complete with the contract information for the project owner, prime consultant and the prime foundation, mechanical and electrical companies used on the projects.
 - 7.3 Provide three projects of similar scope/complexity or value completed in the past 5 years.
- 8.0 Contact Information
 - 8.1 Each Proponent shall provide one key contact person and 1 alternate contact person for all communications during this RFP stage with Owner.
 - 8.2 For Owner, **(insert name)** shall be the primary contact person.
- 9.0 Other Pertinent Information
 - 9.1 Provide other pertinent information as deemed necessary.

- Site Conditions

The Proponent is responsible for inspecting the site of the Project and for making whatever inquiries or arrangements necessary for it to become fully informed of the nature of the site of the Project, including the soil structure and topography of the site, and of the Project to be performed and all matters which may in any way affect the Project. Without limiting the foregoing, by the submission of its Proposal, the Proponent acknowledges that it has investigated and satisfied itself as to:

- a. the nature of the Project;
- b. the location and all conditions relating to the Site of the Project including, but not limited to, accessibility, general character, surface and sub-surface conditions, soil structure, utilities, road, uncertainties of seasonal weather and all other physical, topographical, geological and geographic conditions;
- c. the general character, conditions, laws and restrictions applicable to the Project that might affect the performance of the Project;

- d. all environmental risks, conditions, laws and restrictions applicable to the Project that might affect the Project; and
- e. the magnitude of the construction required to execute and complete the Project.

The Proponent is fully responsible for obtaining all information required for the preparation of its Proposal and for the execution of the Work. Owner is not responsible for undertaking any investigations to assist the Proponent. Any information, plans, drawings, shop drawings or existing equipment or facilities, photos of the original construction, reports or other documents which are not included or referred to in a Proposal (the "Non-Proposal Information"), form no part of such Proposal. Owner and Owner's consultants assume no responsibility of any kind whatsoever arising from or relating to its failure to include or refer to such Non-Proposal Information.

The Proponent's obligation to become familiar with the information described herein is not lessened or discharged by reason of any technical reports, including soils reports or data, test hole drilling reports or other soils information, made available or supplied in conjunction with the proposal process. Any technical reports so provided are for information only and neither Owner nor Owner's consultants accept or assume any responsibility for the contents or accuracy of such technical reports, and the Proponent agrees that Owner, Owner's consultants and their representatives shall not be liable in any way to the Proponent in respect of such technical reports.

The Proponent further agrees that it shall not rely upon any oral information provided to it by Owner, Owner's consultants or any of their respective representatives.

- **Mandatory RFP Submission Requirements**

1.0 Proponents shall submit six copies of their Proposal in a sealed envelope or package marked "Proposal for Design-Build Services".

1.1 Format

1.1.1 Owner requires that Proponents submit Proposals as follows:

- a) each set (original Proposal and copies) shall be in bound volumes not exceeding 6 inches in height (for example two 3-inch binders or three 2-inch spiral bound documents);
- b) all copies are to be spiral, 3-hole punch, "Acco" or "GBC" bound;
- c) pages are to be numbered in sequential order;
- d) pages shall be 8.5 x 11 inch white paper;
- e) pages shall be single-sided and text shall single-spaced in a standard font that is the minimum of 10 point to a maximum of 12 points in height;
- f) information provided shall be easily reproducible by normal black and white photocopy machines;
- g) Proposals shall be divided into sections with each section separated by tab dividers.

1.1.2 The sections shall be tabbed as follows:

- a) Introduction;
- b) Proponents Team and Organization Chart;
- c) Proponents Team Experience;

- d) Leadership;
- e) Project Communications;
- f) Project Team Development;
- g) Pre-construction Services;
- h) Value Engineering;
- i) Architectural and Design Services;
- j) References;
- k) Contact Information;
- l) Other Pertinent Information.

1.1.3 All Proposals shall be submitted in the English language.

1.1.4 Where requested, provide samples, drawings, or references that will be used for clarification and confirmation of the services being offered.

1.1.5 Proposals must include all relevant pricing on all items that are the responsibility of the Successful Proponent;

1.1.6 The cover of each Proposal must clearly identify the following:

- a) The Project title;
- b) The Proponent's name and Proposal Title;
- c) The date;

1.1.7 Proposal documentation shall be in metric measure. The standard method for measuring floor area in Office Buildings, ANSI Z65.1-1996 as adopted by BOMA shall be used for interpretation of all area measurements;

1.1.8 Numbering within a set (for example, if each copy comprises of three volumes, identified the volumes as "1 of 3", "2 of 3" and "3 of 3").

1.1.9 No faxed or other electronically transmitted Proposals will be accepted by Owner;

1.1.10 Proposals will be opened following the Closing Time. No Proposal submitted after the Closing Time will be accepted;

1.1.11 Proposals shall remain open for a period of time [Owner to insert details] in order to allow the Owner to evaluate the proposals received and to undertake the negotiations contemplated herein.

1.1.12 Only one Proposal may be submitted by each Proponent; and

1.1.13 Proposals must include all required information.

- Copyright for ideas, etc.

All documents submitted by a Proponent shall become the property of Owner upon being presented, submitted, or forwarded to Owner. Should any documents be submitted electronically, notwithstanding the prohibition on same contained elsewhere in this RFP, then their content and the media they are contained in shall also become the property of Owner upon their being presented, submitted or forwarded to Owner. Owner has the right to utilize any designs, ideas or information contained in any of the Proposals in any manner, in its sole and unfettered discretion.

Notwithstanding anything contained in this RFP as to the purpose for the submission of Proposals, Owner may use the concepts, ideas, suggestions, and directions contained within the documents, drawings, plans, written descriptions and other materials contained in Proposals and in any communication surrounding the Proposals provided by the Proponents or their agents, for any purpose whatsoever including, but not limited to, use of portions of the Proposals or of ideas, information, enhancements to the Evaluation Criteria and designs contained therein in other Owner projects.

The Proponent must, in correspondence under which the Proposal is being submitted to Owner, state as follows:

"By submitting the Proposal or otherwise communicating to Owner matters relating to the RFP, and for good and valuable consideration, receipt of which is acknowledged, this Proponent transfers and assigns unto Owner any and all Copyrights related in any way to its Proposal. This Proponent represents and warrants to Owner that it has become the owner of Copyrights as they have arisen from time to time and accordingly it has become qualified to make this copyright assignment(s) in favour of Owner. This Proponent has also ensured that the first owners of Copyrights have waived their copyright moral rights in written documents. Copies of assignments of Copyrights from first authors and waivers shall be provided to Owner at no cost and the originals shall be available for inspection by Owner and its agents on reasonable terms. The Proponent agrees to assist in understanding, documenting, and in applying for registration for Copyrights for any works; including executing such documentation as is reasonable and proper and within a reasonable time therefore."

The Proponent must, in correspondence under which the Proposal is being submitted to Owner, state as follows:

"This Proponent hereby indemnifies Owner and its related parties including, but not limited to, its elected officials, officers, employees, agents and advisors and hereby agrees to hold them harmless against all claims, suits, proceedings, demands and actions arising out of or in any way connected with copyright, patent or other intellectual property infringement rights asserted by others against Owner, including for all damages, judgments, costs, fees and expenses (including legal fees on a solicitor and his own client full indemnity basis) as a result of Owner owning, using or benefiting from the use of the Proposal or from designing, building, operating and maintaining the Project that is contained in the Proposal."

- Evaluation criteria

As a general framework, all Proposals presented by Proponents will be evaluated in the context of the overall value they bring to Owner. The criteria to be considered by Owner will include a combination of fee, expertise, qualifications and such other criteria as determined by Owner at its sole and unfettered

discretion (the "Evaluation Criteria"). The selection of the Successful Proponent shall be based upon Evaluation Criteria that will be determined and rated prior to the issuance of this RFP. The Evaluation Criteria shall include, but not be limited to, compliance with the Mandatory Requirements as set out herein. Further, the criteria shall be applied to Proposal (including Addenda) and Interview.

Owner will use the following criteria as the basis for its evaluation of the submitted proposals.

Note to reader: Owner to insert specific criteria along with points assigned to each criteria.

- Proponent Selections

The Owner may select one or more Qualified Proponents whose Proposals in the Owner's view and sole and unfettered discretion, best meet the Evaluation Criteria. The Qualified Proponent(s) may, at Owner's sole and unfettered discretion, be extended an Invitation to Negotiate with Owner.

- Discretion Clause

1.0 Notwithstanding any other provision of this RFP to the contrary, the provisions in this paragraph prevail, govern and override all other parts of this RFP. Owner is not bound to accept any Proposal. At any time prior to execution of the Contract, Owner may, in its sole and unfettered discretion, or for its own convenience, terminate this selection process, cancel the Project and proceed with the Project on different terms. All of this may be done with no compensation to the Proponent.

2.0 Owner reserves the right to accept or reject any and all Proposals, all without giving reasons, not necessarily accept the lowest priced Proposal, and not accept any Proposal. Owner reserves the right to determine, in its sole and unfettered discretion, whether any Proposal meets the Mandatory Requirements. Selection of the Successful Proponent, if any, is at the sole and unfettered discretion of Owner.

3.0 Owner is not bound to negotiate with any Proponent.

4.0 Owner is not bound to grant an interview to any Proponent.

5.0 Owner reserves the right, at its sole and unfettered discretion, to:

- a. utilize any designs, ideas or information contained in any of the Proposals for its sole use and benefit without making payment or otherwise providing consideration or compensation to any Proponent or any other party;
- b. negotiate the specific contractual terms and conditions, including but not limited to the Design-Build Contract;
- c. waive any formality, informality or technicality in any Proposal, whether of a minor and inconsequential nature, or whether of a substantial or material nature;
- d. negotiate with any or all Proponents; and
- e. receive, consider, negotiate and/or accept any Proposal, regardless of whether it complies (either in a material or non-material manner) with the Mandatory Requirements or not.

- 6.0 Owner also reserves the right to accept conditions to be offered by and/or negotiated with the Successful Proponent which are not specifically contained in this RFP. Such options and/or alternatives shall be included in the Proposal review process as part of the evaluation.
- 7.0 At all times, Owner reserves the right to seek written clarifications of a Proponent. Such clarification shall be deemed an amendment to such Proponent's Proposal and be binding upon the Proponent.

- Waiver of Claims and Liability

By submitting a Proposal, the Proponent acknowledges and agrees that:

Owner has, and is hereby entitled to exercise, the sole and unfettered discretion to award the points for the evaluation of the Evaluation Criteria; and it waives any right to contest in any legal proceedings or otherwise the decision of Owner to award points in respect of the Evaluation.

By submitting a Proposal, a Proponent agrees:

to be responsible for conducting its own due diligence on data and information upon which its Proposal is based;

that it has fully satisfied itself as to its rights and the nature extended to the risks it will be assuming; and

that it has gathered all information necessary to perform all of its obligations under its Proposal and the Contract;

that is solely responsible for ensuring that it has all information necessary to prepare its Proposal and for independently verifying and informing itself with respect to any terms or conditions that may affect its Proposal;

to hold harmless Owner, its elected officials, officers, employees, insurers, agents or advisors and all of their respective successors and assigns, from all claims, liability and costs related to all aspects of the RFP process;

that it shall not be entitled to claim against Owner, its elected officials, officers, employees, insurers, agents or advisors on grounds that any information, whether obtained from Owner or otherwise (including information made available by its elected officials, officers, employees, agents or advisors, regardless of the manner or form in which the information is provided) is incorrect or insufficient;

that Owner will not be responsible for any costs, expenses, losses, damages or liability incurred by the Proponent as a result of or arising out of submitting a Proposal or due to Owner's acceptance or non-acceptance of its Proposal; and

to waive any right to contest in any proceeding, case, action or application, the right of Owner to negotiate with any Proponent for the Contract whomever Owner deems, in its sole and unfettered discretion, to have submitted the Proposal most beneficial to Owner.

- Representations and Warranties

- 1.0 Owner makes no representations or warranties other than those expressly contained herein as to the accuracy and/or completeness of the information provided in this RFP.
- 2.0 Proponents are hereby required to satisfy themselves as the accuracy and/or completeness of the information provided in this RFP.
- 3.0 No implied obligation of any kind by or on behalf of Owner shall arise from anything contained in this RFP, and the express representations and warranties contained in this RFP, and made by Owner, are and shall be the only representations and warranties that apply.
- 4.0 Information referenced in this RFP, or otherwise made available by Owner or any of its elected officials, officers, employees, agents or advisors as part of the selection process, is provided for the convenience of the Proponent only and none of Owner, its elected officials, employees, agents and advisors warrants the accuracy or completeness of this information. The Proponent is required to immediately bring forth to Owner any conflict or error that it may find in the RFP. All other data is provided for informational purposes only.
- 5.0 Further, Owner makes no representation or warranty about the conditions of any of the land upon which the Project is to be constructed or any of the adjacent lands including, without representation, buildings, utilities, soils, land use entitlements or other service, sub-service or legal conditions. Proponents shall make their own conclusions concerning such conditions.

- Appendices

Attach a copy of the draft contract that will be used as the basis of the negotiation between the owner and the successful proponent.

This list is not closed. Other sections may be added based on different fact circumstances. Before any use is made of these sections, specific legal advice should be obtained.

VII. Conclusion

Ensuring success and avoiding any unnecessary risk in the RFP procurement process is not as easy task. Drafting of the RFP procurement documents and the conduct of the RFP process is critical. Owners need to be mindful of these considerations as poorly drafted documents can give rise to significant risk. By incorporating the practices and concepts set out in this paper, it is hoped that unnecessary risks can be avoided.