DO RFP's TRIGGER A DUTY OF FAIRNESS?

By: Bill Preston

Does the law impose an obligation of fair dealing upon an owner who uses a Request for Proposals (RFP)? Now, there is no simple straight-forward answer. The law is still a work in progress, but it appears to be progressing toward imposing a duty of fairness. To give you a bit of insight, below I have chronicled the recent path of judicial pronouncements which admonish me to caution owners to err on the side of fairness when making decisions concerning the language of their RFP's and the process used for evaluating the proposals received.

In 1989 the British Columbia Court of Appeal in *Chinook Aggregates* imposed a duty of fair dealing upon a municipal government which had issued a formal tender call. Quickly, following judges imposed like duties on private owners. Then, in 1998 the Manitoba Court of Appeal in *Hughes Land* reminded us that putting the label of RFP on an invitation, did not guarantee the owner that it had avoided a duty of fair dealing. And, in 1999 the British Columbia Courts in *Powder Mountain Resorts* carefully reviewed an RFP of the provincial government seeking proposals for the development of a ski resort, to determine whether the language of the RFP triggered an obligation of fair dealing. The British Columbia Courts concluded that the language chosen by the provincial government did not intend a Contract A (*Ron Engineering*'s label for bid contract) and the consequent obligations of fairness. But, in 2002 the Manitoba Court of Appeal in *Mellco Developments* equivocated on the BC Court's conclusion that there could be no duty of fairness where the parties had not intended a Contract A. The Manitoba Court of Appeal was heard to say, "Even if the absence of Contract A is not an obstacle to the City of Portage la Prairie having a duty of fair dealing, we are not satisfied that the City acted in bad faith." So, where is the law? A 2003 decision of the Ontario Court of Justice in *Buttcon Limited* v. *Toronto Hydro* is as near as I can come to an answer.

In 1992, Toronto Hydro recognized that its service centre operations had about outgrown the capacity of its single building. But, it was faced with a complicated question: What is more cost effective – expansion at the existing site, or development of a second site? Thus, to meet its public obligations of transparency and accountability, Hydro chose a two-step process. First, it issued a Request for Expressions of Interest (RFEI) to identify who had land for a second site, and who had the competency to design, build, and finance both alternatives. Twenty-one responses of interest were received and this was short-listed to five who were each given a detailed RFP. Of the five short-listed, only four timely submitted proposals, two of which came in at approximately $27,000,000 and two of which were greater than $41,000,000. Internorth Construction (base price $27,000,000) was chosen as the preferred proposal, and it eventually built the project. Buttcon, one of the $41,000,000 proposals, sued, alleging that Hydro's choice had been unfair. The basis of this claim was really two-fold: (1) Internorth's HVAC decision was substantially non-compliant with the detailed requirements of the RFP in that it was gas rather than electric; and (2) the business development manager of Internorth was the father of the consultant who was leading Hydro's evaluation team. So, how did Judge MacFarland deal with this dispute?

First, she concluded that the clear terms of each of the RFEI and the RFP proscribed a conclusion that either Hydro or the proposers could have intended that Contract A was created; and, secondly, in any event, there was no convincing evidence that Hydro's process had been unfair. So, what clear language and process persuaded her to these conclusions?

- Hydro pre-announced its commercial reasons for not using a standard tender call.
- Hydro, in the RFEI, announced a process schedule which clearly indicated that there would be three months between Hydro's receipt of proposals to the RFP and negotiation of a construction contract.
- Hydro's detailed requirements in the RFP were performance based.
- Hydro announced that it was seeking not only a competent design/build team, but also a proposer who had the right land and financial capacity to lease the building to Hydro over the life of the building.
- The RFP clearly announced Hydro's intention to seek to negotiate a construction contract with the preferred proposer and, if this failed, to either negotiate with the others or reject all proposals.
- The HVAC details did not proscribe gas-fired equipment.
- Before the four proposals were evaluated, the consultant's son disclosed his "conflict" and abstained from further participation, while there is no evidence that he did anything wrong or even knew that Hydro had a budget limit.
- And, if Hydro had not contracted with Internorth, the Court was satisfied that it would have rejected all other proposals because they were clearly beyond Hydro's budgeted capacity.

So, in conclusion, Judge MacFarland ruled that she was not deciding whether a Contract A was a prerequisite to an obligation of fair dealing being imposed upon owners who use RFP's. Rather, she went through the effort of determining that Hydro's process was not unfair. Further, she determined that Hydro could not be responsible for Buttcon's lost profits by not getting the job, because it was clear from the evidence that Hydro would not have gone forward with the project using Buttcon's best negotiated price because it was beyond Hydro's budget. At the most, Buttcon could only expect its marginal costs to have prepared its proposal, and these costs could not include the design consultant's costs because they could not expect to be paid unless Buttcon succeeded in negotiating a construction contract!