



Australian Government Procurement Webinar Series 2022

# Legal Issues and Risks in Procurement and How to Avoid Them

Presented by **Scott Alden** (Partner) and **Brian Ambler** (Partner)

17 August 2022

# The 2022 Procurement Seminar Series

- Part 1 – Probity in Procurement (19 July 2022)
- Part 2 – Current Issues and Updates in Procurement – (2 August 2022)
- **Part 3 – Legal Issues and Risks in Procurement (17 August 2022)**
- Part 4 – Open Q&A (30 August 2022)
- Part 5 – Tender Assessment with a focus on Sustainable Procurement (13 September 2022)
- Part 6 – Managing Procurement (28 September 2022)
- Part 7 – Prickly Issues in Procurement (11 October 2022)
- Part 8 – Open Q&A (25 October 2022)

If you have any questions about our Australian Government Procurement Series please contact Katarina Szivek, Business Development Specialist on [kszivek@hwle.com.au](mailto:kszivek@hwle.com.au)

# Agenda

- What is the process contract?
- What else is there?
- A word about panels
- A journey of discovery
- The new regime
- War stories

# The Process Contract

## Legal Risks

- The Process Contract



## One Contract (before Hughes Aircraft)

- 📁 Invitation to Tender (Invitation to Treat)
- 📁 Tender (Offer) – Validity Period
- ⚙️ Letter of Acceptance (Acceptance)

## The Process Contract

Two Contracts (after *Hughes Aircraft*)

- a. *The Queen in Right of Ontario et al v Ron Engineering & Construction Eastern Ltd* [1981] 1 S.C.R 111 (Canada)
- b. *Hughes Aircraft Systems International and Airservices Australia* (1997) 146 ALR 1
- c. *IPEX ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480

# The Process Contract

What are its terms?

## Implied

---

- Receive and assess an on time compliant tender
- Good Faith

## Express (Conditions of Tender)

---

- Closing Date
- Late Tender
- Assessment Criteria
- Value for Money?
- Mandatory Criteria
- Confidentiality
- Collusion
- Carry out committed Offer if Accepted

# Legal Formation

	Process Contract	Substantive Contract
<b>Request for X</b>	Offer	Invitation to Treat
<b>Tender Submitted</b>	Acceptance	Offer
<b>Letter of Acceptance</b>		Acceptance

## The Process Contract

**How is it formed – the required element of Certainty and Intention?**

[A Process Contract will exist where]

*...a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests that an obligation (promissory in nature) to follow such timeline and process had been incurred.*

*IPEX decision*



## Procurement – Legal Risk – Non-Contract

- Equitable Estoppel
  - *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (unreported 10 April 2003)
- Misleading and Deceptive Conduct
  - Section 18, Schedule 2 *Competition and Consumer Act 2010* (Cth)
    - *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337
    - *Hughes Aircraft*
  - Section 42, *Fair Trading Act 1987* (NSW) and other state equivalents
    - *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2010] NSWSC 726
  - *Government Procurement (Judicial Review) Act 2018* (Cth)

## The Process Contract

- Damages for a breach of the Process Contract
  - Loss of Profit
  - Loss of Chance
- *J&A Developments v Edina Manufacturer Ltd, Amoura Ltd Ors* [2006] NIQB 208
- Compensation / Reliance
  - Statutory (s 236 of the Australian Consumer Law)
  - Other heads

## Excluding the Process Contract / Liability

- *There is no **intention** to create legal relations by this RFP. The request may result in negotiations for the award of a contract, but of itself is not an **offer** that applicants / Proposers **accept** by submitting a proposal. To avoid doubt, **no process contract** will arise by the issue of this RFP.*
- By responding to this RFP you acknowledge **acceptance** of the principles specified within this documents...
- Proposers must acknowledge in their proposals that they **accept** all the **terms and conditions** and information requirements contained in this document.

## Excluding the Process Contract / Liability

- Each Proponent agrees and acknowledges that notwithstanding anything contained in this Call (except in relation to the irrevocable offer described in Clause 3.1.17), **no contractual relationship** exists between the Principal, and Operator... and any Proponent... in relation to the evaluation... or otherwise in dealing with a Proponent in relation to the ITS. (at clause 3.1.1)
- Each Proposal submitted in response to this Call will comprise an **irrevocable offer**... The irrevocable offer shall be given **in consideration** for the Principal agreeing to consider the Proposal in accordance with this Call... (at clause 3.1.17)

*Cubic decision*

## Excluding the Process Contract / Liability

- The tenderer acknowledges and agrees that no legal rights or obligations will be deemed to have arisen between the vendor and the tenderer until a tender is, if at all, accepted

*State Transit Authority v AJC [2003] NSWSC 726*

- Nothing contained in this ITT or any other communication ...between the Customer or its representatives and any party shall constitute an agreement, contract or representation made between the Customer and any other party (except for a formal award of contract made in writing by the Customer). Receipt by a potential supplier of this ITT does not imply the existence of a contract or commitment by or with the Customer for any purpose and suppliers should note that this ITT may not result in the award of any contract.
- The Customer reserves the right to change any aspect of, or cease, the tender process at any time

*Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049*

## Excluding the Process Contract / Liability

- Except as expressly and specifically permitted in these Instructions to Proponents, **no Proponent shall have any claim for compensation of any kind whatsoever**, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

*Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69

- The Ministry shall **not be liable** for any **costs, expenses, loss or damage** incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the **acceptance or the non-acceptance** by the Ministry of any Tender, or by reason of any delay in acceptance of a Tender, except as provided in the tender documents.

*Rankin Construction Inc v Ontario* 2014, CarswellOnt 12595

# The Process Contract

## Excluding the Process Contract / Liability

- Can you exclude
  - *Cubic cf State Transit Authority v AJC*
  - *Tercon Contractors Ltd cf Rankin*
- Should you exclude
  - *Ron Engineering & Construction Eastern Ltd* [1981] 1 SCR 111 Canada
  - *City Polytechnic of Hong Kong v Blue Cross (Asia Pacific) Insurance* [1994] HK CFI 355
  - *Woollahra Municipal Council v Secure Parking Pty Ltd* [2015] NSWSC 257
  - *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWCA

# A Word About Panels

## De-Registering Suppliers

- Do you have Panel Conditions?
- Do you have a Panel Deed?
- Have you retained discretions?
- *Eden Contractors v State of NSW (No 2)* [2007] FCA 689
  - Contractor Performance Reports – ‘critical’
  - Breached duty of care – tort of unlawful interference with Eden’s business
  - Misuse of market power under s46(1) of Trade Practices Act
  - Negligent misrepresentation
- *Austar Plumbing P/L v Sydney Water* [2018] NSWSC 864
  - Sub-standard work (47 CARs between 2013 and 2017)
  - Warning from Sydney Water
  - Sydney Water had not breached Good Faith obligation and decision was not unreasonable or procedurally unfair



## The Process Contract – Preliminary Discovery

### ***Griffin Energy Pty Ltd v Western Power Corporation [2006] FCA 1242***

- Coal fired power station in Western Australia
- Mandatory requirements
- Environmental standards
- Power output
- Tender awarded to Wambo – Griffin Energy doubted mandatory requirements complied with
- Made application for preliminary discovery

## The Process Contract

### ***Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No.3) [2007] FCA 1567***

- \$600m broadband grant
- 5 tenderers
- Included Optus and Telstra
- Optus and government negotiating for \$900m
- Telstra considered unfair
- Applied for preliminary discovery
- Tenderer clarification questions

# A New Regime

## ***Government Procurement (Judicial Review) Act 2018***

- Application (Who and What)
- Non Discrimination
- Basis to Exclude
- Limited Tenders Justification
- Complaints
- Investigation
- Injunction
- Compensation
- Public Interest Certificate
- Cannot Affect Current Contracts
- Other Rights Not Affected

## Some War Stories

- Late Tender
- Chair of TEC – Conflict of Interest
- E-Tender – ‘Preferred Didn’t Upload’
- Didn’t Empty Tender Box
- Result Too Risky
- Good Idea... Shame You Lost
- Brown Bags

| Any Questions?

## Contacts



**SCOTT ALDEN**

PARTNER

T +61 2 9334 8418  
E [salden@hwle.com.au](mailto:salden@hwle.com.au)



**BRIAN AMBLER**

PARTNER

T +61 2 9334 8984  
E [bambler@hwle.com.au](mailto:bambler@hwle.com.au)

This seminar and accompanying documentation is not intended to be legal advice and should not be relied upon as such.

The copyright of this material is and will remain the property of  
HWL Ebsworth Lawyers.



HW  
LEBSWORTH  
LAWYERS

Adelaide | Brisbane | Canberra | Darwin | Hobart | Melbourne | Norwest | Perth | Sydney