

# AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

## PART 5: LEGAL ISSUES AND RISKS IN PROCUREMENT

PRESENTED BY  
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## **Acknowledgement of Country**

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

# THE 2023 PROCUREMENT SEMINAR SERIES

Part 1: Planning for a Perfect Procurement... Setting Up For Success – Wednesday, 09 August 2023

Part 2: Probity in Procurement – Wednesday, 23 August 2023

Part 3: Current Issues and Updates in procurement – NACC, Unsolicited Proposals and ECI Processes– Wednesday 6 September 2023

Part 4: Key Learnings from the ANAO Reports – Tuesday 19 September 2023

Part 5: Legal Issues and Updates in Procurement – GPJR and the Process Contract – Wednesday 4 October 2023

Part 6: The Art of Tender Assessment and Achieving VFM – 17 October 2023

Part 7: Managing your Procurement – 1 November 2023

Part 8: Prickly Issues in Procurement – 15 November 2023

Part 9: The Cth Contracting Suite and Cth Procurement Policies – 29 November 2023

To find out more about the additional seminars in our Procurement Seminar Series, and to register to attend, please contact Katarina Szivek on [kszivek@hwle.com.au](mailto:kszivek@hwle.com.au)

# OVERVIEW

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

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- 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 Boulderstone 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*
    - *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
- *Chaplin v Hicks* [\[1911\] 2 KB 786](#)
- 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

Confirms that a “tender process contract” will only be implied where there is an “*objectively demonstrated intention to undertake the contractual obligations relied on*” – and not where it is expressly ousted

*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 and decision not unreasonable or procedurally unfair

# THE PROCESS CONTRACT – FINDING OUT WHAT HAPPENED

Debrief

Austender/ Publication

Freedom of Information

Word of Mouth

Legal Discovery

# 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

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