

# PUBLIC PROCUREMENT AND AVOIDING LAWSUITS

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# Understand the law

- Most of the law of procurement is made up of case law = decisions made by the courts.
- Law of procurement is the law of contract.
- Leading case is *The Queen v. Ron Engineering(1981)(SCC)*.
- Terms of the contract are set out in the procurement documents.
- Trade Agreements also apply.

# Remember your duties

- ▣ Duty to conduct a fair competition.
- ▣ Duty to reject non-compliant bids.
- ▣ Duty to award to the compliant bidder.
- ▣ Duty to award the contract as tendered.

# Have a good policy

- ▣ Set out clear lines of authority.
- ▣ Be consistent with trade agreement and other legislative requirements.
- ▣ Set out decision making ladder (more expensive procurements require higher authority).
- ▣ Should include good templates.

# Be clear on the type of procurement required

- ▣ Know the difference between invitations to tender, requests for proposals and other procurements.
- ▣ Invitations to Tender (ITT).
- ▣ Requests for Proposals (RFP).
- ▣ Terminology.
- ▣ Other types of procurement.

# Use good templates

- ▣ Have your templates vetted, if not prepared by legal counsel.
- ▣ Essential elements.
  - Introduction and Definitions.
  - Instructions to bidders.
  - Scope of the project.
  - Evaluation criteria and award process.
  - Privileges.
  - Draft contract.
- ▣ The power of the privilege clause.
- ▣ Consider new technology.

# Establish evaluation excellence

- ▣ Establish separation between evaluation process and municipal council.
- ▣ Evaluation should be consistent with process detailed in ITT or RFP.
- ▣ Don't make evaluation criteria too complicated.
- ▣ Evaluators should be qualified.
- ▣ Maintain good records.

# Be careful with contracting

- ▣ Public vs. private awards.
- ▣ Negotiations are risky.
- ▣ Avoid Bid Shopping.
- ▣ Contracting basics.
  - Contract terms should be included in ITT or RFP.
  - Contract should be prepared/vetted by legal counsel
  - Should be clear, unambiguous and comprehensive.
  - Should be internally consistent.
- ▣ General duty of honesty in contractual performance.



# Summary of Best Practices

- ▣ Understand the law.
- ▣ Know your duties.
- ▣ Have a good policy.
- ▣ Be clear on what you need.
- ▣ Use good templates.
- ▣ Establish Evaluation Excellence.
- ▣ Be careful with contracting.
- ▣ Questions?