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memorandum

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To	**Bid Evaluation Steering Committee**	**Your ref**	Stage 2 Light Rail Transit Project

Trillium DBFM RFP - Technical Evaluation
Minimum Scoring & Discretion to Allow Proposal to Continue

We have been asked to opine on the potential impact should the OLRT Bid Evaluation Steering Committee (**BESC**) recommend to the OLRT Executive Steering Committee not to allow a Proposal to continue in the Evaluations Process, following a failure to achieve an applicable minimum score in its Technical Submission.

This memorandum supplements a memorandum dated October 23, 2018 explaining the legal basis, under the RFP, common law and applicable trade treaties, allowing the City to exercise its discretion to have a proposal continue notwithstanding failure to meet minimum scores.

Summary & Conclusions

The City, either through the Bid Evaluation Steering Committee or otherwise, should be very careful if it has doubts that the Technical Evaluation Committee evaluates a proposal based on scoring criteria that is not clearly established in the RFP. In such a case, the City may incur significant liability if the ESC, upon the recommendation of the BESC, decides not to exercise its options either: (i) to have the bid re-evaluated by the evaluation team; or (ii) to allow the bid to continue notwithstanding the score.

Relevant to both of these options, there is a well-established line of case law which holds that sponsors may not rely on criteria or preferences in their evaluations which are not clearly disclosed in the RFP or tender documents. In this respect, we have flagged a number of potential issues arising from the Evaluation Framework and our prior professional experience which may be relevant here.

If a proponent could show that the evaluation and score which led to its proposal not continuing in the evaluations process was flawed, then there is a strong likelihood that a court would at the very least award

significant damages. This would be either on the basis of its lost profits based on a failure to award the Project Agreement (contract B), or for its costs of preparing and submitting its bid. There is also a possibility that such a proponent could obtain an injunction to force the reintegration and re-evaluation of its bid based on uncertainties arising from its not continuing.

Background

We have reviewed the Evaluation Framework against the RFP and applicable legal principles and have identified the following potential issues.

Scoring Grid

There is a lack of clarity to the grading and scoring chart contained in the Trillium Evaluation Framework.[1] The suggested scoring grades do not correlate to the actual score ranges proposed for each evaluation category and sub-category. Nor are they expressed in terms of percentages. It is similarly unclear whether the scores should be applied to "categories" (i.e. the General Technical Submission, the Design Submission, the Construction Submission and the Maintenance & Rehabilitation Submission) or to "subcategories" (the various sections of those submissions, each of which has its own applicable maximum score range which vary from 5 to 40). A literal reading of the Evaluation Framework would suggest that evaluators should look at the whole category first (e.g. the Design Submission), assign an overall grade, and then reverse-engineer the scores for the subcategory based on the overall score which is applied following the grading system. An alternative reading would be that each sub-category should first receive a grade and then a score, which should be totalled up to provide the score for the category.

Presumptive Scoring

The General Instructions to the Technical Evaluation team include, at page 53 of the Evaluation Framework, the following paragraph:

> Evaluators should note that a finding by the Technical Conformance Team that a Proponent's design is conformant, which will be vetted by the OLRT Bid Evaluation Steering Committee, a Proponent has attained a presumptive design score of 70%. The Technical Evaluation Team may nonetheless assess a score of more or less than 70%, at its discretion.

The interaction between the scoring grid itself and these presumptive scoring provisions is somewhat unclear. If a court were to scrutinize the process followed in these evaluations, including e.g. where a Proponent was marked down by a Technical Evaluator despite being marked conformant by the Conformance Team, it is unclear whether it would consider the evaluation process fair.

Subjective Commentary in Evaluations

We understand that there may be concerns around evaluators providing subjective commentary that is not based on the RFP and/or PSOS. For example, an evaluator might comment that a part of a Proposal is poorly written or failed to include a requirement for X items. Where there is no identifiable requirement for a Proponent to provide a specified number of items, the Proposal should not be evaluated and scored negatively as a result. The risk in such cases is that the evaluator has used a standard or applied a criterion which is not made clear in the RFP documents and has not been clearly disclosed to Proponents.

[1] Ottawa LRT Stage-2 Evaluation Framework – RFP, Trillium Line Extension Project, August 10, 2018, Version Final, p.53

Liability

We are asked to comment specifically on the risk of exposure to the City, should it decide not to exercise its discretion to allow a Proposal to continue in the evaluations process following a failure to reach an applicable minimum score, given the issues identified above.

In general, a purchaser is not permitted to rely on undisclosed evaluation criteria when making a contract award in a formal bidding process due to the general duty of fairness that requires all bidders to be treated equally. As a result, the failure to provide proper disclosure of evaluation criteria can constitute a breach of the purchaser's common law duties or applicable trade treaty obligations. Issues also arise where the failure to disclose is in regards to the evaluation methods a purchaser employs, or where there is vagueness or ambiguity in the tender call.

The integrity of the tendering process depends on the authority giving no competitive advantage to any one bidder over the others, and as a result, there is an implied duty of fairness requiring the bidding process to respect the parties' reasonable expectations. As part of this duty of fairness, there exists a general rule that the fate of the bidders may not be determined by undisclosed standards, unless those standards are of a kind that any prudent customer would necessarily take into account in deciding whether to award a contract.[2] This rule typically applies regardless of whether a purchaser has included a privilege clause allowing it to decline any or all tenders received.[3]

A failure to provide proper disclosure can constitute a breach of the purchaser's common law duties and/or applicable trade treaty obligations. Thus, best practices dictate that a purchaser should strive for transparency and clarity in its evaluation criteria, formulas, and procedural rules in order to enhance the defensibility of its evaluation process.[4]

Issues also arise where a purchaser fails to disclose the relative weighting of its various evaluation categories. While the most detailed version of the evaluation procedure will not always be necessary, more than general guidance is required to ensure that all parties can participate meaningfully in the procurement process.[5] However, even where the particulars of calculation methods are not indicated, undisclosed criteria may be justified if they are consistent with the more general evaluation method set out in the tender call, or if the methods used are common and predictable in the circumstances.[6]

A purchaser's decision may also be challenged for relying on undisclosed criteria where the tender documents are vague or ambiguous. In *Re XIA Information Architects Corp,*[7] the Canadian International Trade Tribunal (the "CITT") found that the government improperly relied on a vaguely stated mandatory requirement when it rejected the complainant's tender.[8] While the tender documents in question did note that a project would be using certain software and all examples cited by the government included said software, the detailed experience requirements did not explicitly mention that experience with the software was necessary.

A case which brings together much of the considerations outlined above, and which is particularly relevant for present purposes, it *Elan Construction Ltd. v. South Fish Creek Recreational Association.*[9] In *Elan*, the court found that the way in which a scoring matrix was applied and the weightings given to particular forms of experience had not been fully disclosed in the tender documents. This changing methodology resulted in an

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[2] Kevin McGuinness and Stephen Bauld, "Municipal Procurement" 2nd ed (Markham: Lexis Nexis, 2009) at 250.
[3] Paul Emanuelli, "Government Procurement" 4th ed (Markham: LexisNexis, 2017) at 279.
[4] Paul Emanuelli, "Government Procurement" 4th ed (Markham: LexisNexis, 2017) at 279.
[5] *Re Deloitte & Touche LLP,* [2006] CITT No 45.
[6] *Re Herve Pomerleau Inc*, [1997] CITT No 96.
[7] See generally: *Re XIA Information Architexts Corp*, [2002] CITT No 52; *Re MTS Allstream Inc*, [2009] CITT No 9.
[8] Although CITT decisions are not binding on common law courts, they are likely to be viewed as persuasive authority given the Tribunal's specialist knowledge in procurement cases.
[9] 2015 ABQB 330

"arbitrary standard that could not have been in the contemplation of the bidders."[10] Accordingly, the Court found that such behaviour breached the tender documents.

Such criticisms might be held to apply to all of the three issues we have identified above. In the case of subjective comments or marking down of proposals based on something other than a clear RFP or PSOS requirement, there is a clear risk of a court finding that this amounted to evaluating the Proposal based on undisclosed criteria. Evaluation and scoring should be based only on the requirements in the RFP (and – to the extent they are directly incorporated, in the PSOS). If an evaluator has either provided a comment that is overly vague and subjective, or has commented that there is a failure to provide something not *required* in the RFP and/or PSOS, then there is a risk that that evaluation would be held by a court to be based on undisclosed criteria and therefore invalid.

In the case of the scoring grid and presumptive scoring, the issue is likely to be vagueness or ambiguity making the final process used unclear.

In either case, the issue will be what effect this had on the Proponent's place in the evaluation. In the context of the decision whether to allow a Proposal to continue based on a failure to achieve a minimum score, this is particularly acute, since all the Proponent will need to show in the first instance is that the Proposal would have continued in the evaluations had its score been properly calculated, or had the City properly exercised its discretion. Remedy is discussed in greater detail below, but where the remedy begin sought is an injunction – particularly on an interim basis – the threshold the Proponent would have to meet is likely to be lower than would be the case had it continued to the end of evaluations. In the latter case, the Proponent would have to show not merely that it would have continued, but that its final ranking would have been substantially different as a result. Courts and tribunals tend to be more lenient where the purchaser's reliance on undisclosed criteria is found not to have an impact on the final proponent rankings, or where the same result would have been achieved had the criteria been disclosed.[11]

Potential Remedy

Injunction

Tendering injunctions are rare, chiefly on the basis that a failure to properly award a contract can usually be compensated by damages. In order to obtain an injunction, the losing bidder must show, among other things, that it would suffer irreparable harm (i.e. harm of a type which cannot be compensated monetarily). For this reason injunctions are difficult to obtain in the tendering context, as the court will usually be able to compensate the plaintiff bidder through an award of damages, either for lost profits (i.e. the contract price less the cost of execution), or the cost of preparing and submitting the bid. Injunctions have been awarded where the court decision would put the plaintiff out of business,[12] or where it will be impossible for it to collect a damages award,[13] or in cases of a failure to consult first nations whose territory is the subject of the tender.[14]

Nonetheless, in some cases where there have been actions by the sponsor which adversely affect the integrity of the bidding process, the courts have granted injunctions. In *Ben Bruinsma & Sons Ltd. v. Chatham (City)*[15] the court granted an interlocutory injunction prohibiting the execution of the contract awarded due to an unfair post-bidding change to the tender specifications by the city.

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[10] *ibid.* at [90]
[11] See generally: *Femme Cachee Productions Inc v Canada (Department of Public Works and Government Services)*, [2009] CITT No 95; *Professional Computer Consultants Group v Canada (Environement)*, [2012] CITT No 159.
[12] See, e.g. *Medical Laboratory Consultants Corp. v. Calgary Regional Health Authority* [2003] A.J. No. 1500
[13] See discussion in *Horizon Builders Ltd. v. Brandon (City)* [2009] M.J. No. 203 at paras. 16-20
[14] See, e.g. *Ta'an Kwach'an Band v. Yukon (Premier)* [2008] Y.J. No. 52; *Kwanlin Dün First Nation v. Yuokon* [2008] Y.J. No. 107
[15] 1982 CarswellOnt 1334

In our view, should the City decide not to exercise its discretion such that a Proposal with a failing score does not continue in the evaluations process, there is a more than negligible risk that a court would grant at least an interlocutory injunction. At this stage in the process, it is difficult to second-guess what the outcome of the evaluations and final ranking would be. However it is clear that by not being permitted to continue, a Proponent would be denied the opportunity to be ranked. If the score on which that decision were based was flawed, the Proponent would potentially be able to show a strong *prima facie* case of breach of the RFP (the Contract A). Furthermore, and most importantly, that Proponent would potentially have an argument that it had suffered irreparable harm on the basis that it could not establish and/or quantify its damages due to the fact that it was cut out of the evaluations process. In other words, the City would by its own action have prevented the Proponent from establishing its right to damages. That is potentially a form of irreparable harm upon which a court would be willing to grant an injunction requiring the City to conduct a re-evaluation of Proposals.

Although injunctions are rare, the City cannot discount the possibility of at least an interim injunction being granted either preventing evaluations from continuing pending resolution of a dispute with a Proponent who did not continue, or requiring the City to reinstate and/or re-evaluate the Proposal in question. There is some small risk of exposure that such an application on an urgent basis would be successful if there were serious grounds to doubt the integrity of the evaluation and failing score.

Damages

Aside from the question of an injunction, a proponent who can successfully prove a breach of contract A has a right to damages. There are two different measures which may apply depending upon the circumstances. If the proponent can prove that it would have been the winning bidder, had the evaluation been conduction properly, it will usually entitled to its lost profits. This is measured as the contract price less the cost of preparing the bid and executing the contract.[16]

Alternatively, if the proponent cannot show that it would have been awarded the contract B, courts will sometimes award the cost of preparing the bid submission.[17] In our view, this is also a possibility in this case since uncertainty arising from a proponent's bid not continuing may make it difficult to prove that that proponent would otherwise have been the winning bidder. However assuming the court were still to hold that the scoring methodology was flawed and the proponent improperly removed from evaluations, they would still have established a breach of contract A.

Assuming that a proponent proved that the scoring methodology was flawed, and that they would have been the highest ranked proponent, there is a strong likelihood a court would award significant damages.

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[16] *Naylor Group v. Ellis-Don Construction Ltd.* [2001] SCJ No. 56
[17] *Colautti Brothers Marble Tile and Carpet (1985) Inc. v. Windsor (City),* [1996] 21 O.T.C. 68 (Gen. Div.)