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OPINION

The tender art of outsourcing

by DOUG JONES

SUCCESSFUL "outsourcing" of part of a business, such as the construction or maintenance of its facilities, depends on many things: information, people, industry capabilities, internal management and, ultimately, good long-term relationships between owners and their contractors.

At the threshold, any decision to "outsource" needs to:

- Identify the contract "packages" correctly (e.g. on the basis of geography or a similarity of underlying services)
- Identify the most appropriate contracting strategies and tailor them for each package
- Assess industry capabilities to ensure there are organisations in the marketplace which can genuinely deliver the services required
- Ensure probity and transparency during tender processes and evaluations, particularly if there are bids by in-house service providers
- Ensure tenderers will have sufficient information, so the prices submitted will reflect a full understanding of the scope and risks
- Establish evaluation criteria which reflect the objectives of the outsourcing process
- Ensure the transition period will be well managed, and
- Facilitate internal acceptance of the change and awareness of the new procedures.

The terms of the contractual structure are obviously crucial to the long-term owner-contractor relationship - and so, as a result, are the pre-requisite tendering processes.

Inviting tenders for outsourcing is much more than a mere documentation exercise. Yet many owners still reach for standard - and often quite unsuitable - conditions of tender and contract as part of their procurement and contracting strategies.

When long-term success is at stake, it's wise to return to first principles.

For owners, the overriding practical considerations need to be to:

- Provide tenderers with sufficient information on the scope of services and the contract strategy, so the tenderers can submit fully-informed, competitive prices, and
- Adequately inform tenderers of the evaluation criteria and the information required by the owner, so the best tender is chosen.

The major "scope" information issues which need to be addressed by owners are:

- The quality of information on existing services and the real needs of their users
- The contract strategy (e.g. performance-based or prescriptive specifications)
- The remuneration basis to be offered (e.g. lump sum, schedule of rates), and
- Any budgetary or other constraints.

Provided an owner can minimise its potential liability for errors in information, its interests are usually best served by informing tenderers on these issues.

The critical nature of the *quality* of information on the scope cannot be over-emphasised. If information quality is low or information is lacking, the owner may need to make real compromises in its procurement and contracting strategies, or the outsourcing process may fail.

The outsourcing of performance-based maintenance on facilities of unknown condition provides an all-too-common example. The tenderer may be in the invidious position of being asked to submit a lump sum when the scope of work will hinge on the facilities' unknown condition. And there is no point in an owner requiring tenderers to take the risk of the facilities' condition without giving them a real opportunity to price this risk.

One way of addressing this is to provide a "due diligence" period during the later stages of the tendering process. Another is to require each tenderer to prepare a condition assessment of a portion of the facilities, perhaps for a fixed fee, with the results being distributed by the owner to all tenderers.

If the issue is not dealt with at the tendering stage, the contract might initially need to be let on a schedule of rates basis, moving to lump sums once the successful contractor understands the condition of the facilities.

Implied contract

Particularly when innovative contract strategies are being established, it is important to ensure tenderers appreciate the contractual mechanisms which will dictate the way their services will be delivered and remunerated.

For example, there is little point in having "alliance" or similar contracting strategies, with inherent tensions and incentives to maximise contract performance, if the tenderers are not fully unaware of the details.

Owners always need to remember their tender documents will crystallise what the tenderers will submit. Asking the wrong questions helps no-one.

The tender conditions and schedules therefore need to clearly stipulate the evaluation criteria and processes and the information to be submitted.

The evaluation criteria and processes need to truly reflect the owner's requirements. If they do not, they may still bind the owner and compel it to choose a tenderer other than its preferred tenderer.

Invitations to tender may be accompanied by an implied "collateral" contract that the owner will conduct the tender processes and evaluations in accordance with the tender conditions. Recent court cases have demonstrated that the need for fairness and probity in tender processes, which has always been important, is now acute.

The provision of information to tenderers is a vexed question. Tenderers obviously need to be given detailed information about the work and the scope of services, so they can bid for the work. The difficulty for an owner, particularly with any large-scale project, is that it may not be able to guarantee this information is complete or accurate.

Even though the information may have been prepared by consultants, and even though tenderers are told they should not rely on the information, the information will inevitably be used by tenderers in preparing their bids.

So if the information is incomplete or inaccurate and causes a contractor to suffer loss - for example, by submitting a lower price than it would otherwise have done - the owner may be liable:

- In negligence, and/or
- Under the Trade Practices Act and/or the State and Territory Fair Trading Acts.

One of the best examples of an owner's liability for negligence in the preparation or distribution of tender information is the 1972 High Court case *Morrison-Knudsen International Co Inc v Commonwealth of Australia*, arising from the construction of Tullamarine airport in Melbourne.

The contractor alleged that in preparing its tender it had relied on a negligently prepared geotechnical report provided by the owner.

Even though this report did not form part of the contract and was the subject of an extensive exclusion clause, the High Court ruled that the owner could be liable to the contractor in negligence, quite outside the contract.

The potential exposure of owners under section 52 of the Trade Practices Act, replicated in the various State and Territory Fair Trading Acts, may be even greater. This section forbids conduct by corporations that is misleading or deceptive, or is likely to mislead or deceive.

In preparing their tender documents owners need to remember that:

- This liability does not depend on any wrongdoing (e.g. negligence), and there does not need to be any *intention* to mislead or deceive.
- It is possible for mere opinions or predictions, and not just representations about existing facts, to be misleading or deceptive.
- Owners can be liable for information their consultants pass on to tenderers.
- Silence about the existence of a particular matter can be misleading and deceptive if the tenderer is entitlement to expect, or infer from the circumstances, that the matter would be disclosed to it.

The lesson for owners is to focus on ensuring the information given to tenderers is accurate and complete, any deficiencies are made abundantly clear and the need to obtain further information is emphasised in detail. ■

Doug Jones AM is a construction partner in the national law firm Clayton Utz.

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