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Changing the Rules during the Game

Towards the end of last year Auckland Local Authorities agreed collectively through their Auckland Regional Contracts Group (ARCG) to amend NZS3910 to enable them to award contracts using tender evaluation criteria not contained in the Request for Tender (RFT) or tender documents.

The ARCG made this decision after six months of discussion with the contracting industry and ignored the industry's advice that this move could compromise the integrity of the tender process and lead to contractors losing confidence in it. It could also open up opportunities for corruption or accusations of corruption.

Accordingly Roothing New Zealand does not support this change.

Criteria for evaluating tenders have been used by Principals for many years to signal in tender documents what's important to them for a particular contract. Contractors then use these criteria to pitch their tenders in a way that maximizes their chances of winning. To change these criteria after tenders close without giving contractors the opportunity to re-submit bids to the new criteria cuts right across this principle. It could put contractors in the impossible position of not being able to win contracts because the rules change after tenders close and they have no opportunity to respond.

Under this amendment you could get a local authority awarding a contract to a non conforming tender by changing the criteria after tenders have closed. This lack of transparency could lead to negative public perceptions and make people wonder why the contract was awarded to that particular contractor.

Given these unhelpful possible scenarios you might be wondering why on earth did the ARCG make such a decision. The answer to that question came up during our discussions with them. Put simply ARCG's legal counsels advised that:

- Councils needed an out clause to cover situations that they could not foresee.
- North Shore City already had this clause included in their contracts, had used it a number of times and it had not caused any problems.
- This principle of changing criteria was already accepted by NZTA because during the tender evaluation process Principals were able to change the quality premium amount they were prepared to pay.

Needless to say we didn't agree with those reasons because

- Councils already have an out clause by being able to decline all tenders and start again.
- There had not been any complaints to North Shore City because it was an isolated situation. In addition, it appeared to have been used to overcome poor contract documentation which we do not believe is a good reason to justify its use.

- Changing the amount of the quality premium is a minor change compared to changing the evaluation criteria.

In response to these discussions ARCG amended the clause to say that it should not be used “unreasonably”. While this is a small improvement on the original wording we remain unconvinced of the need to amend NZS3910 because the amendment would be contrary to international best practice.

The New Zealand Construction Industry Council’s document *“Principles of Best Practice in Procurement in Construction in New Zealand”* is based on research of international best practice. It states as one of the key procurement principles that *“the process for selection of suppliers is clearly defined and transparent”*. Clearly this is not the case in this situation.

Over the past 20 years there has been a huge improvement in Local Government contract administration and management. Practices that used to undermine the tender process have largely disappeared. This has contributed to New Zealand being recognized as one of the least corrupt countries in the World.

It’s disappointing to see these practices reappearing.

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