

Miller Thomson LLP Education Group
Morning Recess Webinar Series

**Thoughts on Governance and
Broader Public Sector Procurement**

Dražen Bulat

dbulat@millerthomson.com

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INTRODUCTION

- **Outline**
 - **What are the Governance obligations of a Board?**
 - **How does BPSAA impact Board procurement?**
 - **What is Trustees' role in approving contract awards?**
 - **How should Trustees respond to lobbying?**
 - **Q & A**

WHAT ARE THE GOVERNANCE OBLIGATIONS OF A BOARD?

- **“Board” commonly refers to**
 - Corporation
 - Trustees
 - Staff
- **Board (corp.) is a creature of statute – *Education Act***

WHAT ARE THE GOVERNANCE OBLIGATIONS OF A BOARD?

- **Trustees:**
 - As a body – authority to act
 - As individuals – no authority to act
 - Trustee duties include
 - due diligence
 - fiduciary obligations
- **Staff:**
 - Day-to-day management
 - Implement policies / directions

WHAT ARE THE GOVERNANCE OBLIGATIONS OF THE BOARD? (cont'd)

- **Focus today is on**
 - Procurement of construction / services
 - Management v governance
- **Sn 169.1(1) of EA requires Board to**
 - promote student achievement / well-being (a)
 - ensure stewardship of resources (b)
 - develop and maintain policies (d)
 - monitor and evaluate policy results (e)

WHAT ARE THE GOVERNANCE OBLIGATIONS OF THE BOARD? (cont'd)

- **Effective stewardship requires:**
 - **Managing the resources in a manner that upholds public confidence (Sn. 169.1(5) of EA)**
- **Sn 218.1 of the EA lists duties of Trustees**
 - **assist Board to meet obligations (a)**
 - **entrust management to staff (f)**
 - **comply with Board's code of conduct (h)**

HOW DOES BPSAA IMPACT BOARD PROCUREMENT

- **What is BPSAA?**
- **Why was BPSAA passed?**
 - eHealth
 - Bellamy Report (City of Toronto computer leasing)
- **What is the goal of BPSAA?**
 - create accountability
 - establish transparency
 - create process consistency
 - obtain value for money
 - create standard processes

HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont'd)

- **How does BPSAA work?**
 - statute
 - defines those covered (Boards are in)
 - provides for issuance of “Directives”
- **BPS Procurement Directive**
 - governs procurement of goods and services

HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont'd)

- **How does BPS Procurement Directive work?**
 - **Major components**
 - adopt “Code of Ethics”
 - follow 25 Mandatory Requirements
 - **Code of Ethics**
 - “Personal Integrity and Professionalism”
 - “Accountability and Transparency”
 - “Compliance and Continuous Improvement”

HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont'd)

- **Some key Mandatory Requirements**
 - **Must use if value of procurement > \$100K**
 - **Post on country-wide electronic database, eg. Biddingo, Merx**
 - **Must disclose evaluation criteria and weight**
 - **Highest scoring respondent wins**
 - **Debrief**
 - **Dispute resolution**

HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont'd)

- **Are there exceptions?**
 - **Section 5 BPS Procurement Directive**
 - **Refers to Agreement on Internal Trade**
 - **Incorporates exceptions / exclusions in the AIT**
 - **Annex 502.4 of AIT**
 - **Sn. I – exceptions (emergency / no other source)**
 - **Sn. L – non-application (architects / lawyers)**
- **Use of Sn. 5 to be documented**

HOW DOES BPSAA IMPACT BOARD PROCUREMENT (cont'd)

- **What is Board's (Trustees') accountability under BPS Procurement Directive?**
 - **Pass and require implementation**
 - **Perform due diligence (Governance obligation)**
 - NOT every procurement
 - regular staff due diligence reports
 - policy decision: how far into day-to-day management?

WHAT IS TRUSTEES' ROLE IN APPROVING AWARDS?

- **Two main guide posts**
 - *Education Act*
 - **Governance / policy decisions**
- ***Education Act***
 - **Broad thrust: few details**
- **Board Governance principles (generally)**
 - **Establish policy parameters**
 - **Approve articulation of policy**

WHAT IS TRUSTEES' ROLE IN APPROVING AWARDS? (cont'd)

- **What are Governance principles?**
 - Policy is Board's main role
 - Set reporting parameters from staff
- **Capital budget as example**
 - Annual capital / operating budget
 - Identifies a variety of procurements / budgets
 - Maintenance \$
 - New / reno \$
 - Procurement / award process delegated to staff provided
 - policy followed
 - award within budget

WHAT IS TRUSTEES' ROLE IN APPROVING AWARDS? (cont'd)

- **If within parameters:**
 - **Should approve award**
- **What Trustees should NOT do:**
 - **Get involved in the prequalification process**
 - **Get involved in the evaluation of proposals / bids**
 - **Task of the Evaluation Team**
 - **Substitute own assessment of bidder / proposal**

HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING?

- **What is procurement lobbying?**
 - Attempt to change outcome of process
 - Investigate a bid / proposal
 - Attempt to gain advantage
- **What are Governance implications?**
 - None, if Trustees decline to act
 - Many, if direct staff to take action

HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont'd)

- **Consequences of lobbying**
 - Needs “two to tango”
 - Staff should disqualify vendor
 - Otherwise:
 - Possibly breach internal policy
 - Contrary to intent of BPS Procurement Directive
 - Create difficult environment for staff
 - Potential for complaints / claims

HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont'd)

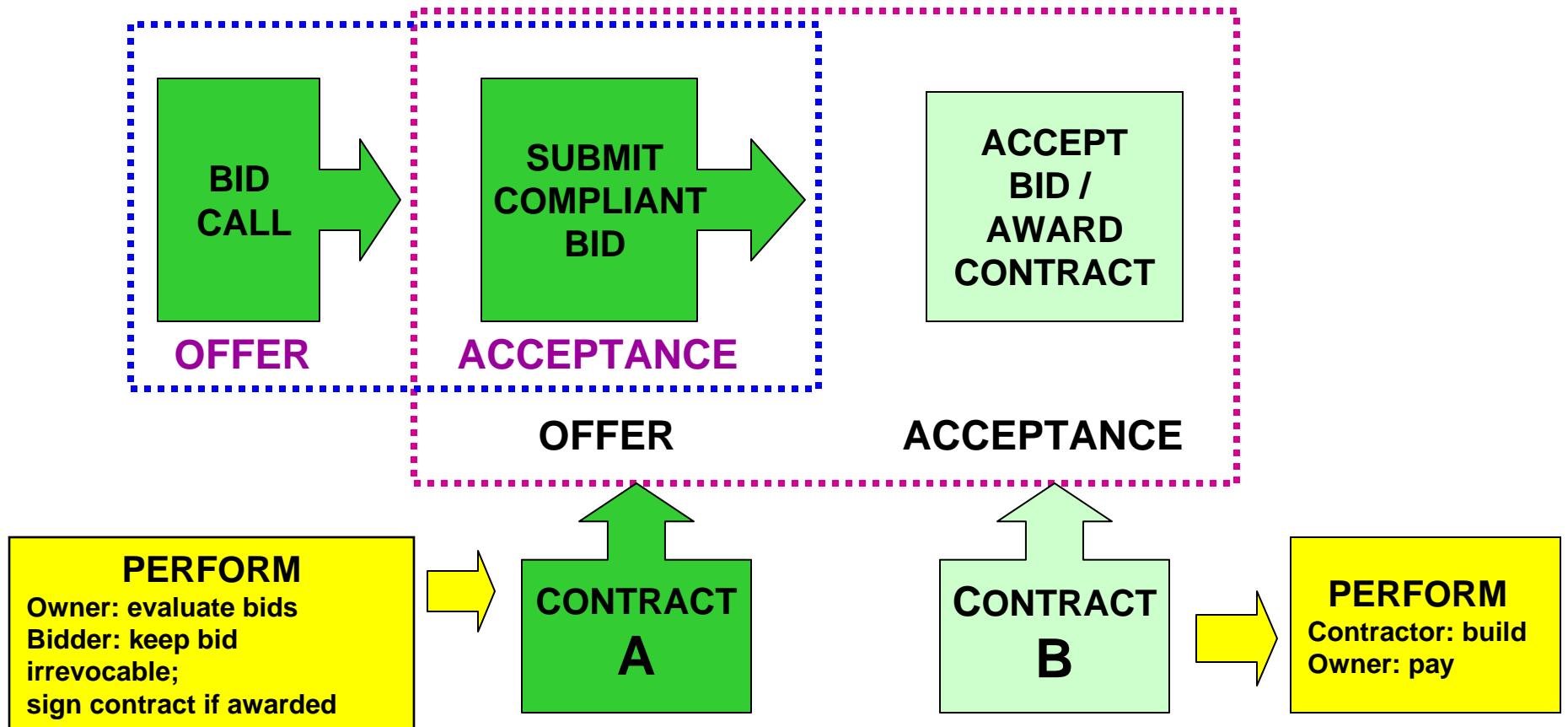
- **BPS Procurement Directive says**
 - **Lobbying?**
 - nothing specific
 - avoid conflicts of interest
 - **BUT, high scorer “must” win**
- **Bid documents / RFP**
 - **Restrict contact to designated person**
 - Prohibit other contacts
 - Breach = disqualify

HOW SHOULD TRUSTEES RESPOND TO PROCUREMENT LOBBYING? (cont'd)

- **Legal implications of Trustee lobbying**
 - **Breach of fiduciary duty?**
 - **Breach of BPS Procurement Directive**
 - **Breach of internal policy**
 - **Reputational issues**
 - **Ministry issues**

BOARD COULD BE SUED! WHY?

1981 – RON ENGINEERING: WHY OWNERS GET SUED



- **Questions?**

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