ELECTRONIC TENDERING – WELCOME TO THE 21ST CENTURY

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Electronic tendering in its true sense denotes the electronic submission of bids to the accepting party. In Canada at present true electronic tendering in the construction industry is rare. While the Nova Scotia provincial government has just recently started to employ it for small-scale construction projects, no construction project of any significance has been the subject of electronic tendering.

Elsewhere in the world however electronic tendering has been gathering momentum over the last few years and is now being frequently used in the United Kingdom, Australia, New South Wales, Tasmania, India, Hong Kong and recently in the United States.

Here in Canada electronic tendering is being used with increasing frequency already for tenders for goods and services. We already have in place the legislation which would be required in order to operate a full scale electronic tendering system. The Ontario *Electronic Commerce Act* and the Canada *Personal Information Protection and Electronic Documents Act* provide efficacy to electronic contracts by providing that they are of the same binding effect as traditional contracts. This legislation also provides validity to the concepts of electronic signatures and "originals" in the electronic world. Further, the Canadian Construction Association has been working for some time on "Guidelines for Electronic Bidding and Tendering" which are in the final stages of being finalized.

With the foundation in place, and the world moving in that direction, we need to be prepared for what lies ahead.

How Electronic Tendering Works

1. Tender is prepared and posted: the owner or other entity wishing to call for tenders registers with a third party service provider and supplies the third party with the tender summary, tender package and bid documents which are then posted by the third party on its server. The third party server is typically equipped with the ability to generate an automatic encryption certificate to keep information transmitted electronically secure as well as extensive firewalls to prevent against hackers.

2. Registration by prospective bidder: those interested in obtaining the tender documents register on the site, often for a fee. The registration makes it easy to distribute to prospective bidders notices of modifications and clarifications to the tender. Further, the process of registration requires the assignment to the user of a digital signature (from a further third party certifying authority) which must be attached to the bid as electronic proof of origin.

3. The prospective bidder obtains the RFT electronically from the third party website: this is usually done as a download from the website and is currently the system in use for the dissemination of tender packages across much of Canada. The cost of this distribution is reportedly a fraction of the traditional paper copy.

4. Prequalification: as in the traditional system, there are often steps to take for prequalification in order to be permitted to submit a bid. At this time the complete terms of the tender are disclosed.

5. Training and briefing of the technology: those who are prequalified are then trained on the software package in use to submit the bid. This is to minimize user related problems with the tender submission and is usually provided by the third party who provides the tender accepting service.

6. Tender preparation and submission: tender documents are then prepared on the computer by completing the forms obtained from the third party and inputting all attachments. Submission of the tender is then usually done similar to the submission of an email. It is also frequently the case that forms are completed and stored, even when in draft form, on the third party's server, thereby eliminating the sending of the information and requiring instead that it be "submitted". Once received, the bids are time and date logged and usually a receipt is sent to the bidder. The bids, are then stored in an electronic lock box which can not be opened until the close of bids.

7. Insertion of bond information into bid: though not yet established here in Canada, in the U.S. there has been created an electronic bond registry. When bidders obtain their bond they are also issued an electronic bond ID from the bonding company. Bidders then fill out the bid file electronically including the bid bond information using the electronic bond ID. The electronic bond ID is then validated online through the bond registry.

8. Opening of bids: this is done as in the traditional model, only following the close of the tender. Until that time the bids remain under electronic key in a "lock box". The lock box also operates to lock out incoming bids upon the close of the tender.

The Pros and the Cons

There are many advantages to the electronic tendering system, including:

- Faster turnaround time
- Reduction of administrative overhead
- Available fraud protection mechanisms
- Access to information 24 hours a day
- Ease and speed to notify of changes or clarifications to the tender documents
- Ability of bidders to modify or withdraw their bids at any time prior to the close of the tender
- Virtual elimination of arithmetic errors
- Incomplete bids are automatically rejected, thereby giving bidders the opportunity to correct them

- Arguably expands the market by allowing smaller companies greater access, regardless of location, to respond in a cost-effective way without the traditional concerns of how to get the bid in on time; and,

- Arguably expands the market to a greater number of bidders and to bidders to a greater number of projects.

There are of course disadvantages also:

- The time to download tender packages can be lengthy

- Computer malfunction is always possible which may make it impossible to submit a timely bid

- There is a need for computer literacy and/or training of the bidders

- The time required to submit a bid is uncertain and can vary widely;

- Technical mistakes may result in a bid not being recognized as proper and lead to rejection; and,

- New innovation brings uncertainty, ambiguity and doubt as to how matters may be interpreted by the court.

Electronic Tendering Gone Wrong

There have already been two reported cases from the U.S. concerning electronic tendering, both from the State of Pennsylvania.

The first involved a State bridge construction project in which the bidder had submitted a complete bid but because the bidder had clicked on the "add contractor" icon on the bid screen but not added a contractor, it was recorded as a "bid with errors". As a result the bid was kept locked by the bid system software and it was never reviewed.

The error was discovered prior to the tender being awarded. The State then declined to award the contract but instead rebid it. The contractor alleged a breach of contract and further that the State was acting in bad faith and sued for damages.

The Court held that the State had an obligation to review the bid even though it was logged as a "bid with errors" and that they had failed in fulfilling that obligation. However, the Court went on to conclude that the rebidding of the project was an appropriate remedy and declined to award damages.

The State continues to use the same third party provider; however, it has now posted a special notice about the "add contractor" button and how to delete the information once it is selected.

The second case involved a road construction project. The bidder had filed all documents with the tender accepting authority (i.e. the documents were stored on the third party's server), but the bidder forgot to click the "submit" button. The tender closed and the bidder's tender was not examined as it was not "submitted" by the required time.

The Court held that the clicking of "submit" was not a technicality but was necessary in order for the tender to be valid. Therefore the contractor's action was dismissed.

The Canadian Construction Association

The Canadian Construction Association has been developing Guidelines for Electronic Bidding and Tendering which are still in draft form but are presently scheduled for release sometime during March 2006.

The CCA draft indicates that the CCA believes that the process of electronic tendering provides "a fair and equal opportunity to all bidders, reduces confusion, promotes competition and reduces construction costs".

The guiding principal upon which the recommendations are founded is that the electronic system should mirror the traditional system as closely as possible. The highlights of the draft guidelines recommend that electronic tendering:

- conform with provincial and federal statutes
- ensure tender information is readily accessible
- software/method used is reliable, including the availability of 24 hour technical support and the ability to submit a hard copy in the event of system failure
- incorporate encryption, electronic signatures, lock-box and bond verification protocols
- utilize the display of an accessible time clock to allow for time synchronization
- feature automatic lockout of bids after close
- provide for the issuance of bid receipts
- enable bidders to access, modify or withdraw bids up to the time of closing
- make bid results electronically accessible as soon as possible after closing.

Electronic tendering will be the standard in the construction industry within the next few years. It will be necessary to keep up in order to stay competitive and in touch. Consider this the gun shot in the air signalling you to get out of the starting blocks.

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