

FALSE AND MISLEADING TENDERS ?

Recently, the Federal Court ordered that an organisation who was involved in a procurement process to secure a successful bidder, should disclose its documents to the unsuccessful bidder, so that the unsuccessful bidder could inspect how the procurement process was managed.

Case Law

In the case of *Griffin Energy Pty Ltd -v- Western Power Corporation [2006] FCA 1241* decided on 15 September 2006, the Court determined that there was a “substantial issue to be tried” as to whether or not Western Power Corporation (**Western Power**) engaged in misleading or deceptive conduct in accordance with section 52 of the Trade Practices Act 1974 (Cth).

Despite the fact that the Western Power documents were of a commercially sensitive and confidential nature, the Court was of the view that these documents should be released to Griffin Energy (**Griffin**) in any event, so that an assessment could be made as to whether the tender process was conducted lawfully.

Griffin was an unsuccessful bidder in regards to bidding statement documents issued to suppliers by Western Power. Wambo Power Ventures Pty Ltd (**Wambo**) was ultimately the successful bidder, however Griffin claims that its bid strictly complied with the tender documents that were issued by Western Power, whereas Wambo’s did not.

Further, Western Power’s tender documents contained certain disclaimers and waivers

which were allegedly agreed to by Griffin as part of its participation in the tender. These disclaimers and waivers may preclude Griffin from pursuing any claim it might have against Western Power, as the Court noted that they could be an “obstacle”.

Tender Management

From a practical point of view, businesses should ensure that, if a decision is made to award a tender to a supplier who has submitted a response which is non-complaint or submits a response which is not the best response as compared to other suppliers, documentation should be retained outlining the reasons for choosing a particular supplier.

In addition, questions submitted by suppliers and the answers given, should be recorded.

As always, disclaimers and waivers in any request for proposal or other tender documents issued, should be carefully drafted to ensure a business is able to maximise its ability to rely on the disclaimers and waivers and potentially protect itself in the event of a claim by an unsuccessful supplier.

As with all procurement processes, transparency in the selection process is of primary importance, as is the independence and expertise of the persons involved in the decision making process, when selecting the successful tenderer.

If you would like any further information on this topic, please contact Ilona Teremi, Partner on 9230 6503 or Ilona.teremi@kreissonlegal.com.au.