Procurement Law Trends

Legal experts take a look at the trends and issues affecting procurement law.

Court cases, the role of technology, recent developments in contract law, the development of the negotiated RFP: there's no shortage of legal issues that procurement professionals must deal with. For the first issue of 2017, PurchasingB2B has consulted industry professionals and legal experts to weigh in on some of the issues affecting today's legal landscape. What follows is a look at some of the issues that procurement must now deal with, recent trends, as well as tips and tools to deal effectively with challenges.

Institutions are under increasing pressure to adopt flexible tendering formats to negotiate the acquisition of technology solutions, says Paul Emanuelli, general counsel of the Procurement Law Office, who has 20 years of experience dealing with government technology projects. According to Emanuelli, use of the negotiated RFP has hit an irreversible tipping point across the Canadian public sector. At the moment, he says that he sees an increased use of more complex versions of such formats.

"Initially my projects were mainly one-stage ‘rank and run’ RFPs, but in recent years I’ve seen an accelerating use of two-staged or even multi-staged dialogue RFPs," Emanuelli notes. “That’s an inevitable trend given the pressures to adapt to quickly changing technology and the need for more sophisticated evaluations.”

And while adoption of the negotiated RFP is gaining ground in Canada, public procurement should not be too quick to celebrate the benefits of the more flexible option, Emanuelli says. There is much unfinished business left at the negotiating table as the country is literally decades behind Europe, the US and dozens of other jurisdictions in optimizing the use of flexible formats for more complex projects. Given the current trade treaty climate, Emanuelli encourages public procurement professionals to redouble efforts with regard to innovation and negotiation. “We need to ensure that institutions invest in the right advice and staff training to properly manage these complex procurements,” he says.

Emanuelli advises that public institutions should be using these formats as a counter-balance against increasing complexity in the technology space. But, he

"Unsolicited proposals send us down a slippery slope to ungoverned sole sourcing and non-transparent decision-making. From a public accountability perspective, that’s a failure.”

—Paul Emanuelli
stresses, the flexible format is not easy. Employing them requires precision, balance and a strategic execution based on an understanding of market conditions. However, he says, the alternative can be project failure. Emanuelli offered the example of former US CIO Tony Scott’s description of government deciding the solution to a complex technology problem by drafting detailed RFP specifications as ‘a silly notion’. “I agree,” Emanuelli says. “Government is usually at least one step behind, typically trying to solve tomorrow’s problems with yesterday’s solutions. With any RFP that’s suboptimal. With technology RFPs that’s deadly.”

Emanuelli warns that when procurement processes fail, operational areas go ‘off the grid’ and start improvising with non-compliant procedures. “As an alternative to inflexible RFPs, Scott called for more unsolicited proposals so vendors can unilaterally approach government with their solutions,” Emanuelli says. “I disagree with that approach. Unsolicited proposals send us down a slippery slope to ungoverned sole sourcing and non-transparent decision-making. From a public accountability perspective, that’s a failure.”

Negotiated RFPs strike the right balance with creative competition, Emanuelli says. Flexible formats bridge the gap between no innovation and no competition while allowing suppliers to propose solutions to government, rather than government going to market with pre-determined solutions. However, he warns, rather than being a free for all, flexible formats seek solutions based on pre-identified government objectives, criteria and process rules. They also lead to a discussion that can help refine the competing solutions against transparent criteria and negotiating a contract award. With technology projects, Emanuelli says, procurement needs to encourage this type of competitive innovation.

While public procurement in Canada is progressing regarding the use of flexible formats for complex procurements across the public sector, Emanuelli, who is a former Crown Counsel, says there’s an ongoing lack of leadership within some Canadian senior level government. His concern is that instead of investing in flexible formats, some senior level governments remain mired in indecision, still debating whether to adopt them while major projects end up in failure. However, other senior level governments are recognizing the need to adapt. For them, he notes, it’s no longer a question of when, but “how fast?” “My advice is quite simple,” Emanuelli says. “Adapt to flexible formats or get left in the dust. Thankfully, many Canadian institutions figured this out for themselves years ago.”

As with any area of law, recent legal decisions continue to affect the procurement field. For example, the recent decision of the Canadian International Trade Tribunal (CITT) in TPG Technology Consulting Ltd v R (2016) confirmed that the CITT has concurrent jurisdiction and a claimant is able to choose either venue, subject to the 10-working-day timeline and res judicata (meaning the matter has been decided and the parties involved can’t pursue it any further). However, as TPG was over 10 years too late, Ragan says, the CITT dismissed the complaint.

This means that the Federal Court and the CITT have now clarified the appropriate forum for a federal procurement challenge, Ragan says. However, this serves to increase the pressure on suppliers who are making a decision on the viability of a challenge to a federal procurement decision. Indeed, Ragan says, the CITT often poses difficulties in this regard as it does not provide suppliers with much time to compile the information they need to support a complaint within the 10-day time limit. “As is evident from the TPG case, there is no significant risk to any further court action if the CITT process is not fully pursued at this early stage,” Ragan says.

Regarding international developments affecting Canadian procurement, Ragan points to the recent political change in the US, specifically the election of Donald Trump as President. Uncertainty looms over the status of various international trade agreements, including NAFTA. The impact of any NAFTA discussions on procurement remains to be seen, Ragan stresses, but if
terms of the agreement are renegotiated there could be significant changes to this chapter as well.

**Contract risk**

Legal risks are inherent in contracts, and at the outset, Ragan recommends that purchasers should ensure that they have selected the appropriate procurement vehicle based on the requirements of the contract and the relevant market, whether it’s an RFP, RFQ, RFI and so on, Ragan says. After choosing this, purchasers should allow enough time to plan and draft their tender documents, which, he says, can be a complex and multidisciplinary process. In comparison to other forms of contracting, the phases of a procurement are time consuming and the legal risks increase without the required time allotted. As well, he says, “purchasers should establish a fair and transparent procedure that is clearly outlined in the relevant tender documents. Education and training of any persons or employees involved in the procurement process is also crucial so that no missteps are made along the way. Obtaining legal advice early in the process assists in mitigating any legal risks and avoiding issues before they arise.”

Moving on to technology, Ragan lauds e-bidding as an excellent tool that is increasingly used in Canada to streamline and reduce the costs associated with procurement processes. Bidders can submit their bids online, make bid revisions prior to close, directly upload their e-bid bond, receive confirmation of a submitted bid, and learn the bid results online. Although e-bidding has numerous advantages, Ragan cautions both purchasers and suppliers to be mindful of the risk of electronic communication. For example, he notes, e-bidding can make it more difficult for purchasers and suppliers to control and moderate the communication between one another. “Organizations involved in an e-procurement process need to ensure that all electronic communication occurs with the appropriate level of formality and in accordance with the terms of the tender documents,” Ragan says.

Those using e-procurement should be aware of the security risks associated with communicating and uploading information to an electronic site, he adds.

Steps should be taken to ensure that any confidential or sensitive information is transmitted and stored with the appropriate electronic security measures.

**Contract management**

Maureen Sullivan, president of National Education Consulting, Inc., says that the biggest shift she saw during 2016 was an increased focus on managing the contract once it is in place. Most organizations are now pretty good at the RFx process, she says, but the contractors tend to be left to their own devices once work has begun. Based on her own observations, Sullivan attributes this to three factors: inadequate resources and attention allocated to contract management; concern about liability for defamation; and lack of specific measurable performance expectations in the contract. These factors are interrelated, Sullivan says. Without the proper resources dedicated to contract management, it is difficult to convince people of the value of embedding specific performance measures in the contract. “Those on the ground actually working with the contracts can easily recognize how tricky it is to hold contractors accountable unless performance expectations are made clear,” she says. “And without a means to enforce that accountability, it is difficult to effectively manage the relationship or to demonstrate that the best value has been realized.”

Sullivan says she has witnessed organizations avoid the issue of evaluating contract performance through fear that they could be held liable if that evaluation harms the contractor economically. While this is an important consideration, she says these fears are misguided—the main legal principle to remember when the issue of defamation arises is that truth is a complete defence. Provided that the information is true—as well as accurately recorded and directly linked to the measurable performance expectations set out in the contract—the organization is immune from claims of defamation.

“My advice is to be reasonable, document deficiencies in an objective manner and give the contractor adequate opportunities to correct issues,” Sullivan says. “In addition to enhancing relationships with your contractors and demonstrating effective use of corporate funds, clear contract performance measures can help justify the exercise—or not—of contract extension or renewal provisions.”

This was the subject of a recent decision by the Supreme Court of Canada, called Bhasin v. Hysen, Sullivan says. If the ability to get a contract extension or renewal is linked to measurable performance during the initial term, there is another incentive for the contractor to devote its best resources to ensuring success, she says. While it takes work with regards to planning and during contract delivery, she says, this approach ensures the owner organization can show effective stewardship of corporate funds.

On the other hand, for organizations unable or unwilling to devote adequate resources to setting up performance measures during planning, then managing that performance, Sullivan’s advice is not to build remedies into the contract. “You have no way of using those remedy provisions defensively, and you will almost certainly pay a risk premium built into the contractor’s pricing,” she says. “Instead, go into the relationship knowing that you have no way to enforce

—Marvin J. Huberman

“Litigants involved in disputes concerning contractual interpretation and how evidence of post-contractual conduct of the parties will be admitted and weighed by the courts should give this landmark decision their full attention.”
Contract dispute with a supplier?

We’re here to help!

Problème de contrat avec un fournisseur?

Nous sommes là pour vous aider!

ombudsman@opo-boa.gc.ca
1-866-734-5169

Follow us on:
Suivez-nous sur:

OPO-BOA.GC.CA
accountability or to reward the best performers, and that this will likely result in only marginal performance from all your contractors in the future.”

**Interpreting contracts**

Challenges can also arise when interpreting contracts, says Marvin J. Huberman, a Toronto-based lawyer. He cited a decision released on December 2, 2016 from the Ontario Court of Appeal, called *Shevezuk v. Blackmont Capital Inc.*, that provides guidance on the principles of contractual interpretation. In that case, the appellant was dissatisfied with a compensation plan for certain transactions, says Huberman. The appellant began negotiations for a new contract, with the new agreement essentially amending the compensation plan. But a dispute arose regarding which transactions the agreement applied to. At trial, each party argued that, properly interpreted, the agreement was clearly in its favour, says Huberman. The judge found that the agreement was ambiguous and that the ambiguity could only be resolved by looking at the surrounding circumstances, including the parties’ conduct after an agreement was formed.

The case was appealed, with the Court of Appeal agreeing with the trial judge that there was ambiguity. The Court of Appeal pointed to the Supreme Court of Canada’s 2014 decision in *Sattva Capital Corp. v. Creation Moly Corp.*, which held that evidence of the contract’s “surrounding circumstances” can be used to interpret the contract. The court identified the issue as: whether evidence of the contracting parties’ conduct after carrying out their agreement is part of the “factual matrix” and is admissible at the beginning. The court held that the subsequent conduct is separate from this matrix. “Litigants involved in disputes concerning contractual interpretation and how evidence of post-contractual conduct of the parties will be admitted and weighed by the courts should give this landmark decision their full attention,” Huberman says.

Courts continue to emphasize key rules in bidding processes to be followed by owners, says Bill Woodhead, an associate in the Calgary office of Borden Ladner Gervais LLP and Doug Sanders, a partner in Borden Ladner Gervais’s Vancouver office. All bids must be evaluated fairly and consistently with the stated criteria. If the owner does not follow these rules it can’t rely on language in the bidding documents providing for discretion or exclusion of damages. Woodhead and Sanders cite a called *Elan Construction Limited v. South Fish Creek Recreational Association*, 2016 ABCA 215, in which Elan Construction Limited took issue with how South Fish Creek Recreational Association awarded a contract to build an additional space at a recreational complex.

South Fish Creek invited four prequalified bidders, saying they would be evaluated based on criteria including the proposed completion date, bid price, previous experience and references, say Woodhead and Sanders. Each criteria was assigned a point value for evaluating proponent bids. Elan, who was unsuccessful in the bid, took issue with how South Fish Creek had assigned point values for the stated criteria, as it looked like factors taken into account were undisclosed and potentially unfair.

In both the trial and appeal decision South Fish Creek tried to rely on the exclusion clause in the invitation to bid, says Woodhead and Sanders, which stated that each bidder waived their right to legal proceedings against the owner for how it awarded points under the criteria. The invitation to bid included a clause that South Fish Creek could award the contract to the bidder they selected—but both the trial and appeal courts found that South Fish Creek could not rely on these provisions to treat bidders unfairly.

Although the Alberta Court of Queen’s Bench found in favour of Elan it only awarded nominal damages of $1,000 based on evidence presented by the successful bidder that it had suffered losses on the project. But the trial court’s decision was upheld by the Alberta Court of Appeal, with the amount of damages awarded to Elan increased to $572,868.

As is clear from *Elan Construction Limited v. South Fish Creek Recreational Association*, procurement professionals should continue to be focused on ensuring that all bidders are treated fairly during their procurement processes, say Woodhead and Sanders. “Procurement documents that are overly complex and have unclear or undislosed factors used in evaluating bids leave rooms for errors or unfairness when procurement professionals are selecting a successful bidder,” they say. “The actions of the procurement team in assessing the bids can also lead to risks of unfairness.”

Woodhead and Sanders caution that

> “Those on the ground actually working with the contracts can easily recognize how tricky it is to hold contractors accountable unless performance expectations are made clear.”
> —Maureen Sullivan