

Contract Splitting

Jonathan Mak

You have been asked by your superior to get some contractors into the office post haste. They need a project manager yesterday and two teams of analysts next week, and while you're at it, could you possibly give them the kitchen sink as well?

Given the requirement, you know that the project manager would only cost about \$22,000 over the course of the project. But the analysts; well, that requirement ruins everything. You're sure that even the cheapest firm could not produce the team of analysts that your superior needs for anything less than \$55,000. You have no choice, you can't sole source anything. Not only that, you're over the NAFTA threshold (\$76,600 for services) which means you have to go out to an RFP for the analysts and project manager together, for a public posting of at least 40 days. Your superior is going to be unimpressed, to say the least, that the timeline they would like is not possible, but there's nothing to be done. If only you could somehow separate those two requirements. "Split" them, one might say...

Mention "contract splitting" while walking through Public Works in Gatineau, and you'll probably get more than one alarmed look from passers by. Everyone is told that contract splitting is a horrible faux pas, to be avoided at every turn.

However, ask five people from five different Federal Government contracting groups (or even in the same group) just what 'contract splitting' means, and you'll probably get five very different answers. Probe further and ask 'so, what can I do to make sure I don't split my contract requirements?' and you might

find some struggle to give a full answer.

Like the dreaded term 'plagiarism' in the academic world, 'contract splitting' in federal government procurement is definitely a concern. But there does not appear to be a universal agreement, nor consistent interpretation of what does and does not constitute contract splitting. Nevertheless, the risk of contract splitting is increasingly being mentioned as something to be avoided.

According to the Treasury Board Contracting Policy, contract splitting is "the practice of unnecessarily dividing an aggregate requirement into a number of smaller contracts, thereby avoiding controls on the duration of assignments or contract approval authorities."¹ The House of Commons Standing Committee on Public Accounts added the interpretation that contract splitting "has the effect of reducing controls and avoiding the need for competitive tender."²

Though it is not said in so many words, the "controls on the duration of assignments" and "the need for competitive tender" mentioned above are referring to the requirements of the Government Contracts Regulations (GCRs) and trade agreements that affect Government procurement. Those are, the Agreement on Internal Trade (AIT), NAFTA, the WTO Agreement on Government Procurement (WTO-AGP), the Canada-Chile Free Trade Agreement (CCFTA), and the Canada-Peru Free Trade Agreement (CPFTA).

Each of the trade agreements have various dollar-value thresholds where, if a requirement is covered and the total value of the requirement is above these thresholds, the Government must go to competitive tender for a prescribed

number of days. The NAFTA threshold of \$76,600 is one that tends to irk procurement officers and program managers frequently, since exceeding this amount will necessitate you post your requirement for 40 calendar days³ on the Government Electronic Tendering Service (GETS, commonly known as MERXTM).

Another common threshold that causes vexation at times is the \$25,000 value, which comes from the Government Contracts Regulations,⁴ and is the maximum amount for which one can sole source. Throw in internal authorities for different departments and agencies, at different managerial levels (certain managers, procurement and program officers able to authorize procurements up to a certain dollar value), rules about what mechanisms must be used when and for how much when whichever trade agreement applies, and then the pressure to get it all done yesterday, as our friend above is experiencing, and the desire to cut corners by chopping up your requirement to get it done faster may soon result.

Now add to that the beginning of the Treasury Board Contracting Policy, which says, among other things, "Government contracting shall be conducted in a manner that will: ... ensure the pre-eminence of operational requirements"⁵. The words chosen here are quite strong on Treasury Board's part. Operational requirements come first.

So what does that say of our friend here at the beginning of all this? Does he have a legitimate operational requirement of 'time', justifying splitting his contracts any which way, so long as it gets done?

Spectrum of Splitting

I would argue there are about four (4) categories along a spectrum in to which types of accused contract splitting falls. The first is where there is a genuine operational requirement to separate the work, and by doing so, you go below authorities. Such a requirement is usually planned for.

For example, I need to contract for a large number different types of IT personnel, at different levels (such as program managers, business analysts, systems analysts, and web designers). I could certainly put out a giant RFP for a supplier to provide all types and levels of personnel I'd need over the next five (5) years, because I know there are one or two firms that can do this. However, if this is divided in to logical sets of three (3) (for example program managers, business and functional analysts, and programmers/developers) then I can encourage competition, innovation in methodologies and service delivery, and possible cost savings.

Or, perhaps though I really could use a single supplier for all my IT services, the IT services I need are just not sold that way, so I have no choice but to set out the three (3) separate RFPs.

This might be termed "contract unbundling," as the requirement could possibly be placed together, but it does not necessarily make operational or financial sense to do so, or capacity does not exist in the market to meet the requirement when bundled together.

The second category is a symptom of poor procurement planning. I know I need some programmers to get a project done, so I figure my total dollar value is about \$50,000 and go out and contract for them according to the AIT⁶. While that's going on, I discover that I actually need some business analysts and a program manager as well, who will all have to work with the programmers on the same project under the same project authority; thus, probably a part of a single contiguous requirement. That puts me over NAFTA for all three (3) groups of people, had I known about it to begin with.

The third category is a symptom of no procurement planning at all. Think of a procurement group in any large depart-

ment with mounds of paper work and requisitions for all kinds of services and goods, which just gets bigger as time goes by, despite working extra hours almost every day. To help mitigate this, program managers can get valuable support from their contracting group if they engage them as early as possible in their process.

If anyone had time to plan ahead, they could figure out which requirements logically and practically go together. But just to get it done they process it as it comes. By and large, contracts are probably not split, but because there's no time and probably not enough people to deal with the work load, the odd requirement might accidentally get split.

The fourth category, on the other end of the spectrum, is the one we hear about in the newspapers and that result in inquiries. That's the unscrupulous fellow cutting requirements here and there to give the contracts to buddies, while getting a couple of bucks in unmarked envelopes at the back of coffee shops and pubs in the seedy part of town. When such deals are uncovered, though rare, they tend to leave an impact on everyone's authorities, at the very least.

As far as this spectrum goes, we can see that good procurement planning is a key (perhaps *the* key) weapon in fighting against contract splitting, either accidental or intentional.⁷

Bundling Along

When planning your procurement, there are many options available to you. One option in particular leads to much confusion within the concept of contract splitting: bundling.

Bundling is a process whereby one puts multi-faceted requirements into one or more work packages based on an analysis of the dollar values, contract durations, supplier capabilities, risk management considerations and contract administration elements associated with the components of work. You might choose to bundle your requirements if it makes greater operational or financial sense, and/or to achieve better value. It might also have the effect of saving you time as well, depending on what it is and how you are able to go about the solicitation.

However, the key in the idea of bundling is taking what might otherwise be multiple, separate requirements, and putting them together. For example, I may wish to put my requirement for business analysts and programmers in a single standing offer agreement, because I know there are plenty of firms out there that can offer both types of resources. This would make it easier for my IT branch to get who they need, quickly. However, given that the business analyst resources and the programmer resources would work on separate projects at separate times under separate project authorities, they probably would not necessarily form a single, contiguous requirement.

Alternatively, one might decide that better value, greater supplier capability, reduced risk and more effective contract administration might be attained by separating complex and/or multi-faceted requirements into multiple work packages with separate contracting mechanisms. In terms of our 'contract splitting spectrum' earlier, this would be the first example of 'contract unbundling.'

The problem occurs if, for whatever reason, prior to the RFP being published you decide that a bundled requirement is no longer optimal. This could happen if capacity in the market changes (or you become aware of capacity you previously did not know about), your operational requirements change, or a host of other factors. Is taking it apart in to two (2) or more tenders now contract splitting? Can it be said that by bundling a set of requirements in to one (1) tender, you have created a new, single contiguous requirement?

There is one more interesting, if sinister side to the concept and results of contract splitting. It's that heavy hand that's just above Policy: Law.

The Legality of it All

The obvious start for such a discussion is with the trade agreements; NAFTA section 1002 (4), WTO-AGP Article II (3), and the AIT section 505(3) all state, in one way or another, that you must not split contracts to avoid the application of these agreements.

The inclusion of these clauses in these agreements has the effect of making

contract splitting an issue that can be heard in front of the Canadian International Trade Tribunal (CITT). If a matter is brought before the CITT and the Tribunal decides that the contract was indeed split to avoid the application of one or another trade agreement, the supplier in the case can then be awarded lost profit damages.⁸

There are a number of important laws that effect government contracting in Canada, beyond the trade agreements. The most notable of these is the *Financial Administration Act (FAA)*. This is what sets out, among other things, the basis for managers to have signing authorities.

Where it gets interesting in terms of the concept of contract splitting is in section 80(1). It lists a number of conditions which, if an “officer or person acting in any office or employment connected with the collection, management or disbursement of public money” meets such a condition, is guilty of an indictable offence.

Of course, your first reaction if you decide to read the section will be “but that’s dealing with fraud.” However, let’s take a look at part d), which says

*an officer who “wilfully makes or signs any false entry in any book, or wilfully makes or signs any false certificate or return in any case in which it is the duty of that officer or person to make an entry, certificate or return,” is guilty of an indictable offence.*⁹

Though I am not a lawyer, one might read this as possibly referring to the signing authorities designated to procurement officers. So if you know that you have authorities for contracts up to \$10,000, your total requirement is for \$12,000, but you split it up to two (2) contracts for \$6,000 a piece just to get it done without seeking a higher authority, could you be in breach of section 80(1) of the *FAA*?

Add to that section e) which states that if one has “knowledge or information of the contravention of this Act or the regulations or any revenue law of Canada by any person... under this Act or the regulations or any revenue law of Canada, fails to report, in writing, that knowledge or information to a superior officer,” is also guilty of an indictable offence.

Could this go so far as if your neighbour in the cube next to you splits a requirement as above, and you hear about it, you would *both* be in breach of section 80(1)?

That said, if we take a look at our friend at the beginning, we can again ask if he has a legitimate operational requirement to divide his requirement. Does it exist? How so? Does it not? Why not?

Contract splitting is a topic that brings to the table many questions, and plenty of information, but not too many answers. The CITT and the Courts continually make decisions that impact how this is seen. The Auditor General continues to seek out split contracts (happily, such findings are not very common). And Policy, Regulations and Guidelines are regularly reviewed and revised to ensure that the laws are understood and followed.

There really is only one piece of advice I could offer a program or procurement officer that wonders if a contract is being split or not. That is: when in doubt, ask a few people, and perhaps make sure at least one is a lawyer! ♡

References

1. Contracting Policy, Appendix A. 1 Sep. 2008. Treasury Board Secretariat. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494§ion=text>.

2. House of Commons Standing Committee on Public Accounts, PACC (37-2). “Observations and Recommendations.” House of Commons. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032191&Language=E&Mode=1&Parl=37&Ses=2>

3. The WTO-AGP also has a 40 calendar day posting period (see Article XI 2(a)), however the value here for services is \$221,300. The thresholds for each of the trade agreements mentioned here can be found at http://www.tbs-sct.gc.ca/pubs_pol/dcg-pubs/ContPolNotices/2009/12-31-eng.asp.

4. “Government Contracts Regulations.” *Financial Administration Act*. Section 6.b.i. <http://laws.justice.gc.ca/en/SOR-87-402/Full-Text.html>. The Contracting Policy, Appendix C, schedule 3 (<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494§ion=text#secC.1>) actually indicates that most departments have a non-competitive entry authority of \$100,000. However, to exercise this larger authority, the requirement must meet one of the exceptions in section 6 of the GCRs and be outside of the trade agreements. In addition, in practice, the \$100,000 delegation is often kept at a higher level.

5. Contracting Policy, Section 2. 1 Sep. 2008. Treasury Board Secretariat. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494§ion=text>.

6. AIT Article 506(5) says “Each Party shall provide suppliers with a reasonable period of time to submit a bid...” In practice, this has equated to 15 days.

7. See Andrea Deme. “An Ounce of Prevention – Preparing for the Pandemic.” *FMI Journal*. Spring/summer 2007. 18:3, 33-34, on Procurement Planning.

8. Worthington, Robert. *The Public Purchasing Law Handbook*. Toronto: LexisNexis Canada Inc. 2004, p 169.

9. Government of Canada. *Financial Administration Act*, section 80.d.

About the Author

Jonathan Mak is a Research Analyst with RFP SOLUTIONS (www.rfpsolutions.ca), an Ottawa-based firm that works exclusively for government agencies to assist in the development of complex and/or urgent Requests-for-Proposals (RFPs). Jon supports the development of procurement strategies, and the writing of RFP documents - including SOW’s and Evaluation Criteria. Jonathan can be reached at 613-271-6476 x223 or be e-mailed at jon.mak@rfpsolutions.ca



fmi * igf welcomes its newest member!

fmi* igf would like to extend congratulations to part-time staff member, Ananda Kelly, and her family on the arrival of their new baby boy, January 4, 2010.