
Procurement Dilemmas: Damned if you do, damned if you don't...

Robert Jordan

A public service manager finds herself under increasing pressure to move a project forward. Time is limited, resources are scarce and deadlines are looming. On top of this, she is already putting in a 50+ hour week, leaving her with no time to complete the work herself.

Sound familiar?

Ideally, our manager would have a capable staff member available to whom she could delegate some of the responsibilities and workload.

Wishful thinking, right?

Several positions in her organization are currently vacant, the few existing staff she has are already deployed on other pressing work, and the work to be done requires a high level of subject matter expertise and analytical ability. Not an easy requirement to fill.

So, what then is our beleaguered and overworked manager to do?

Faced with no other option, she meets with her boss and together they opt to establish a service contract with a consultant. A practical and expedient decision, under the circumstances.

With what seems to be increasing frequency, understaffed government program managers often find themselves relying on outside consultants to execute large portions of projects, particularly at the early stages when the detailed planning, scoping and feasibility assessment work typically occurs.

And therein lies our manager's dilemma: Despite the fact that using a consultant is her only practical and expedient option to complete the required work on schedule, by having done so at this early stage of the project she may have inadvertently introduced a serious procurement risk that has the potential to rear its ugly head at a later stage in the project.

It is the risk associated with the knowledge and experience acquired by the consultant she just retained, which may ulti-

mately contribute to a finding of "bias" against her government agency on the much larger downstream procurement process that will occur later in the project.

As it has played out countless times, this risk normally occurs when the consultant originally retained to work on the early planning and scoping stage of the project ultimately becomes a bidder on a later stage Request for Proposal (RFP) related to the project (i.e. for Phase 2 or 3 implementation). As a bidder, should this consultant win the RFP process, it is very likely that his unsuccessful competitors will cry foul and allege that he had an unfair competitive advantage stemming from his prior knowledge and involvement.

Should the Canadian International Trade Tribunal (CITT) or a court agree with them, it could mean disaster for the government agency's project time line, not to mention the potential financial costs associated with paying damages to one or more of the unsuccessful bidders, the resulting media coverage and the negative audit findings that are sure to follow.

By having been actively involved in the preliminary and formative stages of the project, the consultant would have acquired an intimate knowledge of the government agency's needs, and he may have even developed a good portion of the requirements definition text which ultimately made its way into the later stage RFP document. To make matters worse, the consultant may have also been the only outside contractor involved at this early stage, and was probably retained to provide his services via one or more non-competitive (i.e. sole-source) contracts.

From several recent Auditor General reports which have been highly critical of government contracting practices, to the Gomery inquiry, the Toronto computer leasing scandal and today's proposed *Federal Accountability Act*, government contracting practices are being increasingly scruti-



Robert Jordan

Robert Jordan is a Senior Research Analyst with RFP SOLUTIONS - Procurement Strategies for Government, an Ottawa-based firm of procurement, legal, accounting and engineering professionals. RFP SOLUTIONS works exclusively for government agencies to help managers reduce the risks, delays and complexities associated with the RFP process. Robert can be reached at (613) 728-1335 x223, or by e-mail at bobby@rfpsolutions.ca

nized by Parliament and Provincial Legislatures, the media, the general public and the supplier community.

At the centre of this increasing scrutiny is the issue of fairness, a fundamental principle within public sector procurement often upheld by courts and tribunals, touted by governments and demanded by suppliers, particularly when a perceived lack of fairness in the procurement process is to blame for separating an unsuccessful supplier from a large government contract.

An absence of fairness within a public sector procurement process, often referred to legally as a finding of bias, can manifest itself in many ways, some of which are more obvious than others.

Less obvious examples include the "wiring" of specifications or evaluation criteria in an RFP to favour an incumbent or desired supplier, while more blatant examples involve outright violations which occur during the evaluation of proposals intended to give preferential treatment to a particular bidder, usually at the expense of his competitors.

Another less obvious manifestation of bias results when an incumbent contractor is allowed to contribute to an RFP on which they will be a bidder, or to gain access to privileged knowledge of the contents of an upcoming RFP prior to its public posting or distribution. This is the classic example referred to earlier, wherein an incumbent consultant completes a scoping phase early on in a project, during which he has gained insights and knowledge not

readily available to his competitors, and possibly even written entire sections of the RFP document.

Irrespective as to how this risk ultimately manifests itself within a procurement process, the possibility of a bias finding is a serious risk to the integrity of the process, to the public sector officials involved and to their organizations.

In the face of these and other risks, what should our manager have done to mitigate a potential finding of bias at the RFP stage of her project?

The first and most basic step to mitigate the risk of bias almost goes without saying, but cannot be overstated; never involve a potential bidder in the planning or development of an RFP. Doing so provides this bidder with privileged knowledge of the contents of the RFP prior to the date on which all other potential bidders will have access to the same information, potentially providing him with an unfair competitive advantage vis-à-vis his competitors, and a justifiable claim by unsuccessful bidders that the government agency was in some way biased.

When an outside consultant is needed for the explicit purpose of developing an RFP document, it is always best to use an independent specialist who has no business relationships with potential bidders. At the very least, have the selected consultant sign a non-participation waiver as part of their contract exempting themselves as a bidder on the RFP, as well as a detailed non-disclosure agreement.

A second potential risk mitigation measure involves retaining an independent procurement consultant or Fairness Monitor to assist with the process. Public Works and Government Services Canada (PWGSC) started recommending the use of Fairness Monitors for high risk and/or high dollar value procurements where the circumstances warranted an additional level of transparency and prudence by the government entity. A Fairness Monitor acts as an independent and impartial third-party observer of the procurement process, and ideally provides oversight and input into the development of both the RFP Statement of Work and Evaluation Criteria, as well as overseeing the evaluation of proposals to ensure that the entire procurement process adheres to fairness principles.

A third potential strategy involves utiliz-

ing multiple contractors to complete the scoping and planning work, so that there is no perception of a perceived bias towards any particular incumbent contractor within a future RFP. This strategy would allow our manager to mitigate (although not totally eliminate) the risk of bias, while ensuring that all contractors are eligible to bid on remaining portions of work.

Although complex and time consuming to implement initially, a fourth potential strategy involves including the scoping and planning phase of the project within a larger contract, which includes options for the government agency to continue with the same contractor for future phases of the project. This approach utilizes a mechanism called a "Task Authorization Contract", which would guarantee the phase 1 scoping and planning work to the successful bidder with, upon an additional task authorization from the government agency, the contractor continuing on with additional phases of the project, as defined within the contract. The additional benefit of this mechanism are the "off-ramps" built-in to the contract allowing the government to commit only to giving pre-defined portions of the project work to the contractor at a time, while preserving its flexibility to effectively terminate the contract by not authorizing the contractor to continue to the next pre-defined phase of the project.

Notwithstanding the above strategies, what would happen if our manager were to have only identified this risk after an initial scoping and planning contract had been awarded and possibly even completed? This particular situation, despite its frequency, requires some fancy footwork to resolve, and our manager's last opportunity to do so would be prior to the issuance of the RFP for the subsequent phases of the project.

When assessing an allegation of bias, generally speaking the courts/tribunal will examine the extent to which the issuing government agency did everything possible, within reason, to ensure that the RFP process was clear, consistent, equitable and fair. At this stage in the process (i.e. the scoping and planning contract has already been awarded and completed) a strategy of "aggressive disclosure" is often a very effective defence against potential allegations of bias.

Aggressive disclosure essentially means that our manager should be forthcoming

with any relevant information to all potential bidders, so as to limit any perceived unfair advantage that the incumbent contractor may have.

It is not so much about how she goes about implementing a strategy of aggressive disclosure, but that she made every reasonable effort to share information with all potential bidders. Some of the more common techniques that have been used in the past include the issuance of a Request-for-Information (RFI) prior to the development of the RFP for future phases of the project, and/or the posting of a draft RFP for comments prior to the official release. Both the RFI and draft RFP should request comments from the industry, so that all potential bidders are afforded an equal opportunity to make input to the requirements of the forthcoming RFP - not just the incumbent contractor. Allowing all potential bidders to contribute to the requirements has been found to mitigate the likelihood of a bias finding.

Others have used the open forum of a Bidder's Conference, or even established websites and newsletters to share information with potential bidders, including industry best practices, the identity of groups/firms who were involved prior to the RFP and the nature of their involvement, findings of the scoping and planning phases, project plans and project charters.

However, the mere fact of being contracted to do some related work in advance of an RFP (what the CITT calls "incumbency") is not necessarily grounds for either exclusion or bias within the subsequent RFP process. There are several CITT precedents on this point. In other words, incumbency in and of itself is not sufficient grounds to support a finding of bias (at least so says the CITT).

Despite the existence of an incumbent contractor, there are many things which can be done to mitigate the potential procurement risks on the subsequent RFP.

The use of service contracts with consultants can be an effective and expedient way to acquire needed expertise on a short-term basis, but it is not without its risks. An awareness of these risks and the ways in which they can be mitigated, are key to ensuring the success of a project and preserving the integrity of the procurement process. ■