The procurement "squeeze play"

Are small IT service providers being unintentionally squeezed out of federal procurement opportunities?

by David Swift

The "law of unintended consequence" holds that certain actions taken (especially those actions taken by governments) will inevitability result in consequences that were never intended or anticipated. As is often the case, such unintended consequences can have distinctly negative impacts. In some cases, they have even been known to produce the opposite result of what was originally intended.

A well-known example involves the controversial policy of Prohibition in the US, a policy originally intended to suppress the sale and distribution of alcohol. One of the most harmful (albeit unintended) consequences of this policy was that it ultimately led to the consolidation of the illegal alcohol trade by organized crime groups. This was obviously not the intent of the policy, nor was it foreseen at the time.

Canada has also witnessed its share of unintended consequences resulting from government policy decisions. The much-maligned National Energy Program, originally intended to develop greater self-sufficiency in oil production, was ultimately blamed for inhibiting foreign and domestic investment in Canada's oil patch. Regional economic development programs have been cited for inhibiting prosperity in have-not regions of the country. Various grants and subsidies to industry have been singled-out as barriers to innovation and enhanced productivity, and the list goes on.

The law of unintended consequence is often cited as one of the greatest challenges to developing effective policy and regulatory frameworks. How does one strike the correct balance between achieving the intended results of a well-intentioned policy, while at the same time mitigating the potentially harmful effects caused by the unintended and unforeseeable consequences resulting from its implementation? No easy task.

One of the latest examples of unintended consequence comes to us from the labyrinthine world of federal procurement policy. In particular, the impending fate of many small-to-mid-sized IT professional services firms supplying specialized IT resources under contract to federal departments and agencies.

In recent months, a number of the smaller IT professional service firms have begun to find themselves on the outside of the procurement winner's circle looking in, as their larger, multi-national competitors have begun to win long-term, winner-take-all contracts, effectively shutting the smaller firms out of key client organizations for years to come.

What makes this development particularly ironic is that it is the unintended consequences of a procurement policy decision originally intended to bring greater fairness to government suppliers.

By way of background, on November 26, 1998, Polaris Inflatable Boats Canada Ltd. filed a complaint with the Canadian International Trade Tribunal (C.I.T.T.) regarding a National Master Standing Offer (NMSO) established by Public Works and Government Services Canada (PWGSC) for the supply of rigid hull inflatable boats.

Among other things, the complaint alleged that the resulting award of contracts (i.e., call-ups) under the NMSO was not properly managed or disclosed by the Crown. The Tribunal agreed, and awarded costs to Polaris. Needless to say, the ruling was well received by many within the industry, as are many C.I.T.T. rulings that go against the government.

So what then does an isolated dispute regarding the supply of boats have to do with the market for IT professional services within government, and the related opportunities for small IT service providers? The simple answer is, everything! Notwithstanding the specifics of the ruling (which are limited to the case at hand), the real issue involves the establishment of a perceived precedent.

Since the Polaris ruling, PWGSC and many other departments have naturally responded by taking steps to prevent similar rulings from occurring in the future. To accomplish this, they have implemented a series of changes to the manner in which SOAs are competed, awarded and utilized. In their defence, departments have undertaken these steps in accordance with what they have had little choice but to regard as a precedent setting ruling from the Tribunal.

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The result of these changes has been a tightening-up of the IT manager's flexibility to select what he/she feels is the right firm from the SOA list for any given project assignment.

Prior to these developments, the SOA had long been one of the more preferred contracting mechanisms for government IT managers, based on its flexibility and degree of choice with respect to potential service providers. For years, the goal of suppliers in the $500M federal government marketplace for IT professional services was "to get on the list". Being on the list (i.e., the SOA) was the key to doing business for IT service providers, both large and small.

While many of the smaller firms lacked the capacity to take on some of the larger projects, they were quite capable of supplying what many government IT managers wanted and needed – a steady stream of the right people with the right skills sets, available at the right price and at the right time.

Today, however, all of this is changing. In direct response to the Polaris ruling, many departments have begun to implement pre-defined call-up allocation mechanisms within SOAs. Such restrictions go by many names: right of first refusal, proportional allocation, etc. The common thread is that managers have lost the flexibility within SOAs to decide which listed firm gets the work on any given assignment.

If managers do not feel that they can operate effectively within the boundaries of such restrictions, they of course have other contracting options at their disposal. Unfortunately, the decision regarding which of these other options to choose inevitably comes down to which one the manager ultimately dislikes the least (i.e., Supply Arrangement, RFP on MERX, etc).

The difficulty with these other options from the government IT manager's perspective is that they can take too long to process through all of the necessary approvals, and/or they impose too much administrative burden on the manager. In some cases, the alternative mechanisms do not contain sufficient contract entry authority to meet the needs of a typical IT professional service engagement. At least one of them (the sole source contract) is increasingly considered to be at odds with the Treasury Board Contracting Policy, while others are subject to a C.I.T.T. challenge under the trade agreements.

In the interests of acquiring needed IT resources in the most efficient, timely and compliant manner, managers in some federal organizations are beginning to adopt a contracting mechanism known as the Task Authorization, Winner-Take-All contract.

As alluded to previously, this mechanism is a competitively awarded contract to a single firm (usually with a back-up firm). It is established on a multi-year basis for the provision of as-required IT professional services (via a number of successive task authorizations), encompassing a broad range of resource categories and specialized skills.

As this mechanism is openly competed, yet awarded to only one contractor, the competitive requirements of the procurement policy framework are addressed up front. And since there is only one contractor on the list, government IT managers can utilize this mechanism to acquire as much service for as long as they need, with little or no regard for imposed bidding thresholds or restricted contract entry amounts.

The primary outcome of adopting this mechanism is that it tends to favour the larger firms – those with the organizational capacity and the managerial processes needed to address the aggregated requirements of an entire client department. Consequently, this mechanism has a tendency to drive customers into the willing arms of the larger firms, to the detriment of the smaller and often more cost-effective providers.

Does such a development represent good public policy? Further, are such contracting mechanisms a good fit with actual business requirements? Well, from the government IT manager's perspective, consider the trade-offs. On a Task Authorization contract (Winner Take All), there are no competitions to be held each time a resource is selected. The elapsed time from inception of need to deployment of qualified resource takes days/weeks, not months, and the administrative burden on the manager is reduced by an order of magnitude.

Although this approach places all of a department's eggs in one basket (so to speak) and comes with certain risks, by comparison, none of the other contracting alternatives are much better. Acknowledging that such an approach is less than ideal (relative to the "good old days" of wide-open SOAs), for many government IT managers it represents a deliberate trade-off decision and a set of implicit priorities.

Procurement needs to work for managers, not against them. The process to select one or two contractor resources for an IT project should not take months to complete, and/or weeks of effort by a manger to process through the system. If the procurement process becomes so restrictive and risk averse, to the point where conducting routine transactions in a timely and efficient manner is no longer possible, managers will be left with little choice but to make the types of trade-offs implicit in mechanisms such as the Task Authorization, Winner-Take-All contract.

To put it bluntly, if this is the only workable option on the table, they'll take it, and they'll find a way to live with it and manage the risks. If in so doing, a few unintended consequences are realized as a result, so be it.

Canada Revenue Agency (CRA) has recently implemented such a mechanism, to the tune of approximately $50M per year. The RCMP and a number of other federal organizations are currently studying CRA's initiative. At the same time, other major departments/agencies are waiting for current SOAs to expire before considering such a mechanism.

Will the unintended consequence of striving for greater fairness to suppliers in the procurement process, ultimately end up hurting some of the smaller IT service providers? The jury is still out, but the early indicators are not looking good.

The law of unintended consequence is a powerful force, often defying our ability to predict its effects. As with Prohibition, who could have foreseen that an isolated C.I.T.T. ruling regarding boats could lead to such serious, yet unintended consequences for an entire sector of the IT industry?

Perhaps this is one unintended consequence that can be foreseen by policy makers, and efforts can be taken to mitigate its negative impacts.

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