

A cautionary tale

by Denis Chamberland

Are unsolicited proposals worth the effort?

LAST FEBRUARY, ONTARIO released *Building a Better Tomorrow*, billed as “A Discussion Paper on Infrastructure Financing and Procurement.” It makes clear that the Ontario government needs help from the private sector in tackling its many infrastructure challenges and welcomes the feedback, creativity and capital that the private sector can contribute. The paper parallels a mounting interest across Canada in public-private partnerships.

There is a growing *rapprochement* between the public and private sectors, making now a good time to revisit the position of private sector proposals to provide goods and services, submitted to the public sector on an unsolicited basis. This article looks at why the Canadian public sector appears to remain aloof to an idea, which, on its face, offers the possibility of forging new relationships, as well as the potential for achieving a more efficient and cost-effective means of delivering services. It also examines some internal public sector dynamics that private sector companies should consider when planning to make a proposal to a public sector entity that is subject to trade agreements.

A familiar comment from those who oppose unsolicited proposals is that Canada’s major trade agreements – the *North American Free Trade Agreement (NAFTA)*, the World Trade Organization (WTO) *Agreement on Procurement*, and the *Agreement on Internal Trade (AIT)* – allow for competitive bidding only. It’s not that the trade agreements explicitly forbid unsolicited proposals, rather, it’s that unsolicited proposals do not fit neatly into the language that lays down competitive bidding as the preferred method of procuring goods and services. For example, Article 501 of the AIT provides that the purpose of the procurement chapter of the Agreement is to “establish a framework that will ensure equal access to procurement for all Cana-

dian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in the context of transparency and efficiency.”

Detractors argue that receiving and evaluating an unsolicited proposal is in breach of the principle set out in Article 501 on the basis that “if it isn’t expressly authorized, it’s illegal” – a weak argument, in light of the fact that the AIT includes explicit exceptions to the principle of competitive bidding. It could be argued, under the right circumstances, that an unsolicited proposal amounts to one of the stipulated exceptions.

However, those who support the acceptance of unsolicited proposals have made little effort to explain how the trade agreements allow the practice. Some justification is called for, at least from those who have put in place the infrastructure to facilitate unsolicited proposals.

Quite apart from the legal status, a view offered in defence of unsolicited proposals is that they promote a thoughtful, non-traditional, value-added approach to the management of government operations and service delivery. According to this view, unsolicited proposals are designed to en-

ideas that can only be shared through an unsolicited proposal. This view may well be overly cynical, to the point where it loses credibility. It assumes that only the public sector is capable of creativity (a reversal

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courage proponents to submit ideas that are “unique, innovative, and valuable.” This view assumes that the private sector is capable of energy and creativity, which should be tapped in the interest of the broader public good. Not everyone shares this view.

Others hold that the private sector is rarely, if ever, able to submit truly unique

of the old cliché idealizing the boundless genius of the free enterprise system).

These commentators say that unsolicited proposals are unlikely to provide any substantive advantage in the quality of the proposals over those submitted through the more conventional, competitive bidding framework. And, to the extent that an idea is truly innovative, they add, it should

be channeled through the competitive bidding process. Some also claim that the quality of innovation may, in fact, be inferior, because proponents may be tempted to use unsolicited proposals as an easy opportunity to market their offerings, without offering value or innovation.

Aside from the legalities and the merits of unsolicited proposals, it is impossible to overstate the importance of having a robust infrastructure for processing them – a guideline or other similar procedure or directive. Not having this infrastructure makes it difficult, if not impossible, for any public sector entity receiving an unsolicited proposal to ensure that the proposal and the ensuing evaluation process are credible, defensible, and perceived to be so by the public – leading to a clear disincentive to accept unsolicited proposals. It is not surprising then that the public sector often greets such proposals with fear, sometimes even scorn.

Closely related is the risk that the public sector entity may end up at the centre of a controversy. As one experienced critic put it, the acceptance for consideration of unsolicited proposals in the public sector has a tendency to lead to abuse, and even collusion between the proponent and the public sector participants who are responsible to shepherd the proposal through the maze of government. Whether this is true most of the time or in a small number of cases only is anyone's guess. Still, everyone's anxiety level would drop several notches if a well-defined procedure were in place.

Where a policy decision is made to accept unsolicited proposals, there should be a well-articulated rationale. What is the public sector trying to achieve? What broader public policy purpose is being served? Such a rationale should be supported by a solid, well-documented procedure that provides guidance to would-be proponents, and assists in defending any challenge launched against a contract award. Such a procedure would also help ensure that the public sector entity could demonstrate that the decision to go ahead with an unsolicited proposal served the best interests of the public.

Notwithstanding the debate around unsolicited proposals, the public sector is

beginning to recognize the value of working closely with the private sector. For example, more and more public sector entities are putting in place strategies that move them from traditional purchasing – where suppliers are treated as providers of commodities and only price matters – to strategic partnering, where common business goals and objectives are developed and risks and rewards are shared. Increasingly the procurement process is put within a holistic context that includes the entire lifecycle of the goods and services being procured, which then helps generate the needed cost savings and solutions that address the challenges facing modern government.

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While the private sector typically welcomes the more collegial approach, to do well, it often lacks the required nuanced understanding of the public sector environment. This is also true where they take the lead and seek a closer and more synergistic relationship with the public sector. Having generally assumed that, if a proposal has merit, the target department or ministry will accept it and the wheels will almost immediately be put in motion to implement the project, they often find themselves puzzled by the lukewarm response their ideas receive. The absence of an infrastructure for handling unsolicited proposals pretty much guarantees that the wheels – if they ever began to turn – would grind to a halt.

Another major factor is simply the workings of government itself. Public sector priorities and capital plans are typically set years ahead of their intended implementation. If the subject matter of a proposal is not already recognized in the target department's agenda, it is improbable that the proposal will be received with any level of interest. Civil servants have enough challenges on their individual and collec-

tive plates and too few resources to go around. Taking on another project that has yet to receive the *imprimatur* of the appropriate internal authority would not be attractive – not to mention that doing so could be seen to be infringing the tendering laws.

Obviously what works for the private sector does not necessarily work for the public sector. Rather than spending time and effort pushing a proposal no one asked for, it is better to take a strategic view of what can be achieved, recognizing that this also tends to be the longer view. It is best to work to 'seed' the good idea over time and have it put on the target department's agenda. Once the public sector enti-

ty has 'bought in,' the road ahead will be much smoother.

However, where a good idea makes it on someone's agenda, there is always the possibility that the target department will decide to compete the idea or proposal received – a risk the private sector proponent has to be prepared for. There is also the risk that proprietary information may be shared. A private sector proponent will try to protect the propriety information through a non-disclosure agreement, but it isn't always possible to get public sector entities to agree to bind themselves that way, and there can be very good reasons for that.

In principle, the potential value of unsolicited proposals is significant. But unless the related procedural issues are addressed, there isn't likely to be much appetite for unsolicited proposals in the public sector. Procedure is integral to the success of the concept. *mm*

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