Face off

Reducing the adversarial approach


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THE PARTIES TO A transaction must consider a range of costs beyond those associated with financing, production and delivery of the product being sold, such as the cost of documenting the transaction, identifying competent suppliers, monitoring performance and enforcement costs where there is a default. Since first identified in the late 19th century, these costs have mounted steadily as controlling factors in business decision making.

Now, in Canada, tender-related disputes are imposing an enormous cost on public contracting. Since the decision of the Supreme Court in the Ron Engineering case in 1981, there have been several hundred reported judicial decisions dealing with disputes over the tender award process. Thousands of other claims have been subject to extensive negotiation. Although other jurisdictions recognize implied contractual rights arising through the use of the tender process, no other Commonwealth country has seen so much litigation of this type. For instance, in the United Kingdom over the same period, there were only two claims of this type that reached a final court verdict. In Australia, there were fewer than 20. Obviously this disproportionate volume of litigation has an impact upon the cost of running government.

The result of this litigation is fairly predictable. Since 1981, public contracting has become more confrontational and adversarial. With each attempt to impose tighter contractual restrictions upon the industry, the problems have escalated. Tight bonding conditions have worsened the impact of these changes.

Tender litigation has an adverse effect upon supplier competitiveness. Many major construction companies now avoid bidding for government work, often due to the arbitrary nature of the rules being adopted. While lawyers have a role to play, to achieve the optimum results *for government,* the contract that is drafted must be a fair contract to both sides. Good suppliers won't bid if their chances of winning are slim, or if they cannot get a fair reward for their work. Customers do not benefit from contract terms that allow unreasonable, arbitrary behavior, if good suppliers do not bid. And, no one benefits from a system in which almost every tender or RFP results in a complex dispute costing thousands in legal costs to resolve.

In the hope of reducing some of the confrontation that has characterized recent years, some governments are now employing a number of less adversarial techniques such as:

- Enhanced project management by the government, with a view towards improved identification of project requirements.
- Moving away from strict price competition, which tends to encourage low ball bids and hidden long term cost, toward a more flexible "best value" approach that affords proper consideration to a fuller range of economic, efficiency and effectiveness factors when deciding the winning bid.
- Inserting "partnering" provisions into supply contracts. Partnering provides the formal framework of a joint project team that works together to deliver the project on a best value basis. The joint team includes balanced representation of consultant, contractor, subcontractor and customer interests. It creates an integrated forum for the management of the project from design onward. It permits the identification and correction of emerging problems. The team is a forum for exchanging information and allows the project to be subject to continuing review. This, in turn, increases efficiency and reduces the potential for dispute. All the parties may use the process to settle targets and to create and monitor cost control mechanisms and key performance indicators. Increased understanding and team *esprit d'corps* leads to reduced misunderstanding and dispute avoidance. Unfortunately, the cost of this approach is a factor. Partnering arrangements have proven most effective on large, complex, high-value projects (especially those that involve several major players or a series of projects). On low value projects, the process usually cannot be cost-justified.

In addition to these measures at the individual contract level, there is movement to improve the supplier-customer relationship at the "macro" level. For instance, the Ontario General Contractors Association, along with the Ontario Architects Association, Council of Ontario Construction Associations and others have been working with public sector entities, such as Public Works and Government Services Canada and the Ontario Realty Corporation, to address a range of public sector contracting issues. They hope to improve methods and policies to ensure that the owner gets the best service for the right price. A major focus is developing alternative dispute resolution techniques to resolve issues quickly and effectively, ideally right at the site level. Positive efforts have also been made in working out an acceptable approach to performance evaluation, and with respect to pre-qualification.

More of this macro-type cooperative work needs to be undertaken. Governments and their suppliers must re-establish the ability to work and communicate together. Pro-active, fair and flexible representation by trade associations in dealing with their suppliers serves this end.

Perhaps it would be worthwhile to look to the past for guidance as to how best to mitigate the problems of public sector contracting. In the early 1980s, the Attorney General of Ontario appointed a balanced committee of industry, finance, union and government representatives to consider the revision of Ontario's then nearly inexplicable mechanics' lien laws. Perhaps a similar committee should be created today, to deal with the problems of public contracting. In the construction field in particular, such an effort would seem to be timely, given recent commitments from several governments to rebuild infrastructure.

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