



by Paul Emanuelli

Preventative law

Good medicine for public purchasers

Note: This article is excerpted from the forthcoming 2nd edition of Paul Emanuelli's *Government Procurement* textbook.

THE CONCEPT OF PREVENTATIVE medicine is firmly entrenched in health circles because medical resources are scarce and illness is harder to treat than to prevent. Yet, this proactive approach is sadly lacking in public procurement when it comes to using legal knowledge to prevent liability. This has to change. In public purchasing, an ounce of prudence can prevent a ton of litigation. To better serve the public interest, government institutions need to apply a strict regimen of preventative law to their procurement practices. This requires evolving from the “lawyer as litigator” or “lawyer as solicitor” model towards a new paradigm that utilizes the lawyer in the role of process builder and trainer.

In the lawyer as litigator model, lawyers are typically used to either launch lawsuits on behalf of private sector bidders or defend lawsuits on behalf of public institutions – a highly inefficient use of legal resources. An inordinate amount of energy is devoted to dealing with and resolving isolated disputes, draining critical resources away from the core business of the procurement operation: buying the goods and services needed to properly run our institutions. In the litigation model, there may be successful plaintiffs or successful defendants but, in the broader sense there are rarely any winners.

In the lawyer as solicitor model, greater efficiencies are created since the lawyer helps facilitate the institution's purchasing activities while helping to avoid or limit associated legal risks. The same

amount of time typically taken in defending a single legal action can be translated into assisting an institution in successfully concluding dozens of transactions. The lawyer as solicitor model works in a semi-proactive fashion by helping the institution succeed on a transaction-by-transaction basis but with little broader benefit. Typically, advice is repeated again and again with no resulting systemic improvements to the institution's procurement practices. Using the medical analogy, the lawyer only treats one person (or transaction) at a time.

To better serve the procurement system within each institution and across the public sector, scarce legal resources need to be deployed in the most efficient fashion possible. Rather than focusing on the boardroom and the courthouse, legal services should be redirected to the drawing room and the workshop. They should be directed to designing more legally sound processes and formats and to training procurement professionals, enhancing the knowledge and skills needed to employ legally defensible purchasing procedures. Three specific examples are provided below.

At the institutional governance level, the Gomery Commission issued highly detailed recommendations that went well beyond the specifics of the federal sponsorship scandal and focused on practical steps that can be taken to improve the procurement practices of public institutions. With the assistance of their lawyers, public institutions should review and implement these recommendations.

At the procurement format level, the United Nations developed a model law for government procurement that recognizes a broad range of procurement formats, many of which are far more flexible and lower risk than the traditional invitation to tender and request for proposal formats. Public institutions should direct legal resources to develop and implement these internationally recognized formats in a strategic and coherent fashion.

Finally, at the legal developments level, reviewing hundreds of reported decisions from across Canada dealing with disputes in public procurement can help identify litigation hotspots and help inform better procurement practices. Public institutions should implement training programs that focus on these case law developments with a view to enhancing the knowledge and skills necessary to promote prudent and defensible purchasing practices.

There is a vast amount of untapped legal knowledge that can be leveraged to help develop preventative processes, design safer, faster and more flexible procurement tools and train purchasing professionals in the latest legal developments. How many institutions can say they direct even a fraction of their total legal procurement resources towards such preventative measures? To better serve the public interest, government institutions should choose the right prescription for their procurement operations and start focusing on a preventative approach to procurement law. *mm*

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