



no laughing matter

by Howard Grant

While legal review is necessary, the time devoted to it in even the simpler RFPs is becoming excessive.

Public sector procurement is a complex process and clearly legal involvement is imperative. But, in today's public sector procurement arena, legal involvement has gone beyond a joke and has seriously impacted the end user clients' ability (and us as citizens) to achieve a timely business outcome and the associated benefits.

Previously, lawyers were engaged to ensure a contract met the needs of the client; currently legal involvement seems more focused on reduction of the likelihood of protest by a losing proponent. Consequently we see lawyers involved in the development of the traditionally non-legal aspects of RFPs such as the evaluation and selection processes and technical

requirements for which they have little or no training.

Looking at the volume of a typical public sector RFP – which is often directly proportional to the cost of responding – legal matters consume over 60 percent of RFPs that are less than 100 pages. The legal matters have little to do with the prime purpose of the RFP, which is to explain clearly and succinctly the needs of the client. Many of these same RFPs have less than five percent of their volume dedicated to the explanation of the needs of the client in the form of a statement of work.

This extensive legal involvement in the pre-issuance stage of the RFP has a spin-off effect. The potential bidder's lawyers spend even more time (for time read "cost") than their public sector counterparts in analyzing the voluminous legal overlays in the RFP.

The net effect is:

- longer periods to get the RFP "on the street;"
- longer periods required for the RFP to be "on the street" in the Q & A phase;
- longer periods to evaluate the responses;
- higher proposal pricing to offset the additional response time due to excessive legal input;
- higher costs to offset perceived risks as a result of over-exhaustive legal review; and,
- a significant number of would-be responses from vendors that never get

beyond their own internal corporate legal review, once they realize how much resource time would be required to respond. Some of these proposals might have contained exactly the response that meets the business need of the client, but they are never exposed to the client.

In the climate of “procurement reform,” the pendulum has swung, and is now stuck at a point that brings no benefit to anyone – except perhaps to government and vendor lawyers. Look at the time frames associated with the federal government Temporary Help Services RFP process, designed to be a vanguard for procurement reform, which were, in their introductions, harbingers of reductions in process time, complexity and cost.

The federal Temporary Help Services RFP was issued and withdrawn once, then reissued over a year later. The reissued, streamlined process produced an RFP in more than 30 parts, each of which was reissued (amended in PWGSC parlance) at least once – many several times over. The confusion of parts, articles, appendices and attachments (which always seemed to produce additional translation and legal review challenges) resulted in nearly 400 questions and many extensions with the end

result of a (should have been) simple RFP being on the streets for more than seven months! Bear in mind that the purpose of this RFP was to allow the government to get temporary clerical help quickly.

Will these new processes result in lower costs to the clients? If the private sector factors in the cost of working on RFPs over several months, costs will likely be higher. There is no such thing as a free lunch, so the delays and obfuscation will result in a net “real” cost increase.

Is there a solution to this tedious and protracted RFP process? In the same way that “financial” responses are separated from “technical” responses in most RFPs, perhaps legal issues should also be isolated and placed into a different time and response continuum. Maybe the legal responses and materials should be looked at after the selection of preferred bidders. This may not initially reduce the timeframes, but it will certainly focus attention on the slowest and most expensive processes. Perhaps only then will we be motivated to change this absurd situation.

In my opinion, while I do not advocate removing lawyers from the procurement process, perhaps removing them from the “client requirement” main-stream would allow public sector procurement to again focus upon best value solutions which meet the needs of the client. 

Howard Grant is a founding partner and President of PPI Consulting Limited. PPI is a management consultancy offering a full range of integrated, multi-discipline services for public sector partnering and procurement.