

IN MY OPINION

What you don't know can hurt you

by Michael Asner

Public sector procurement is based on fair and open competition. Most public sector purchasing policies contain the same elements: BC's policy talks of awarding contracts in a "visibly fair, ethical and prudent manner," Nova Scotia describes procurement being "carried out in an open, fair, consistent, efficient and competitive manner" and NAFTA speaks of "fair, open and impartial competition."

But, in spite of the best efforts of many dedicated procurement people, sometimes they miss the mark. There are complaints. In every competition, there are more losers than winners. And some of the losers examine every aspect of the process looking for issues and weaknesses on which to base a complaint. Sometimes these issues are obvious – like a patronage award. Others are subtler – involving the specific language of the RFP.

In 1999, complaints and protests made the news several times. When this occurs, buying is transformed from a relatively obscure function to something dramatic – a 30-second news clip beamed around the world, or a 3-column page-2 story in the daily press. Money, the power of government, the rights of business – all converge when the purchasing decision of a government agency is challenged. Public scrutiny can be painful. Consider the following scenes.

Scene 1 ... on the steps of a legislature the premier is being challenged by a reporter. "But didn't you award the contract to your friends? And doesn't your government have purchasing policies requiring competition. In fact, doesn't your policy state that purchasing is to be done in a 'visibly fair, ethical and prudent manner?'" The reply first involved denial of the existence of a firm procedure, then proclaiming his right to exercise discretionary ministerial power and, finally, characterization of the contract award as an act "in the best interests of the people of this province."

Scene 2 ... the Hearing Room for the Canadian International Trade Tribunal where the Chair is presenting its ruling in the case of Corel vs. Revenue Canada. The tribunal found that Revenue Canada had discriminated against Corel in favour of Microsoft, the incumbent and the RFP gave Microsoft an unfair advantage. This ruling was, for several days, a national media event.

Scene 3 ... the federal Auditor General makes the news. This year, he found that there were an excessive number of contracts awarded without any competition. Most vendors, especially those

accessing the online bidding system, MERX, on a regular basis, were not surprised at this finding.

These scenes provide disturbing images of public procurement in Canada.

While these stories have been in the news, they are relatively rare. We don't hear about procurement abuses every day, or every week. I'm not surprised that there are so few news stories, few complaints and fewer challenges in court. To challenge any government's procurement decision, you have to have money and corporate energy – which is not the case for most Canadian corporations. Most simply do nothing. Although a company may believe that the procurement was improperly executed, few will complain; even fewer will go to court. Most suppliers find the process too costly and too visible for their comfort.

Also, many Canadian companies are not aware of their legal rights. In fact, my experience over the last six months, as I've given my workshop on proposal writing to about 700 firms across Canada, is that most small companies, and many of the largest ones, aren't aware of the remedies under the law. Most of these firms were unaware of the rules imposed by the courts on public procurement. Typically, in a group of 50 participants, only two or three would know about case law and the duties of public agencies. Almost no one knew any of the details concerning the duties and obligations of the buying organization.

The courts have identified duties and responsibilities for any competitive procurement, including the following:

- disclose all evaluation criteria;
- treat all bidders fairly and equally;
- disclose all requirements; and
- avoid misrepresentation.

Most procurement people have taken courses on purchasing law sponsored by their professional associations. No comparable education program is readily available in the supplier community.

In my opinion, public procurement is widely misunderstood in the supplier community. The policies are not well known; the principles are hidden; and the role of the courts is hardly known at all. A concerted effort to educate Canadian suppliers would be a great start – a millennium project. There are courses on purchasing and contract law, books about supplier complaints and protests and advisors specializing in this area. All that is needed is an awareness of the information and resources. Few supplier organizations have identified this issue as important for their members. Educated, informed suppliers will, however, ensure politicians and bureaucrats fully implement the principles of fair and open competition.

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