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Keeping it legal

Experts look at trends in procurement law



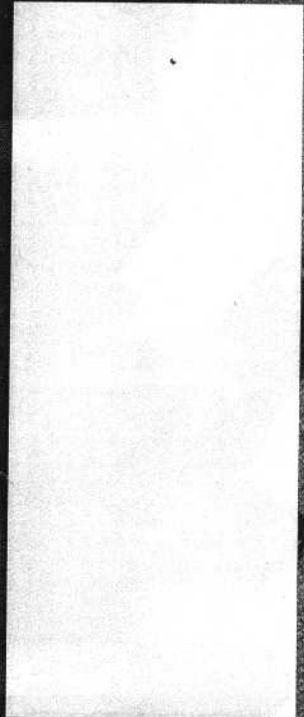
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Keeping it legal

Legal tips and viewpoints from our expert panel of purchasers and lawyers.

*Standing L-R: Joel Ramsey,
Lori Benson, Marvin Huberman;
Sitting L-R: Stan Gal, Shawn Casemore.*



From navigating legal language and controlling risk to managing disputes, today's procurement department has its hands full with legal issues. In February, *Purchasingb2b* brought together industry professionals with legal experts to discuss what purchasers need to know to navigate the legal landscape. At the table were Toronto litigation lawyer and ADR Chambers mediator and arbitrator Marvin Huberman; strategic sourcing director for Ernst & Young Canada, Lori Benson; Shawn Casemore, president of Casemore & Company; Stan Gal, director of supplies and services, finance department, Regional Municipality of York; and Joel Ramsey, partner at Osler, Hoskin & Harcourt.

Clearing the language

The panel discussed RFPs and how to formulate the right legal language when doing so. York Region's Stan Gal noted an RFP's function is to reflect the scope of the work being asked for and lay out the buyer's needs. Procurement must evaluate proposals against the RFP and its evaluation criteria, not against other bids. As well, he noted, procurement professionals should stick with the tasks they're best at, such as putting together RFPs. "The role of the purchasing professional should be monitoring the methodology, to be responsible for the process, not the evaluation," he said. "I'm not an expert in engineering, I'm not a legal expert, but one thing I do know is how to develop documents."

Shawn Casemore of Casemore & Company recommended purchasing professionals meet with their legal departments from the start when developing an RFP or other process. That helps ensure all parties are on the same page in terms of legal content and document wording, he said. "With that relationship at the outset, we can sit down and proactively look at something ahead of time," Casemore said. "And we're now talking the same language and can have a discussion and come up with either an interpretation or, if we're drafting a document, come up with language that we both agree on. If I don't understand something you can explain it to me and vice versa. I've never had any problems if I'm proactive versus if I don't involve legal, where I think I should and later on I've got a problem."

A back-and-forth process between procurement and legal when drafting an RFP is common, said Gal, and it pays to go through the document and customize the language. During that process, he stressed, ensure not to set rules that will be difficult to comply with. "If you set out evaluation criteria and response criteria that you're not quite sure about, you might find yourself in trouble," he said.

Managing risk—including legal risk—is increasingly important for organizations, Gal said. Public agencies have tried to pass on more of that risk to contractors. But as a consequence, those organizations wind up paying more for some goods or services. "There's also third-party risk management for losses, where there are injuries on construction sites and—especially in the municipal field—we're dealing with roads under construction," Gal said. "At the same time, you've got the public using those roads. So we're subject to a lot of risk on that."

Another common challenge stems from whether to use the contractual language of the supplier or the buyer, said Ramsey. If both sides have an RFP template, then the discussion revolves around which template will apply. "In the public sector you're typically saying, 'Hey, hands down, it's mine—period,'" he said. "Private sector, not so much." It's therefore a good idea to state in the RFP or RFI whose terms and conditions will apply. Suppliers that can't abide by those terms should be asked not to submit a proposal.

The speed at which documents are expected to go to market, combined with a lack of communication between client and lawyer—as well as internally—can lead to misinterpretations and mistakes, said Marvin Huberman, litigation lawyer and ADR Chambers mediator and arbitrator. That can lead to a lack of clarity in the wording of those documents. "When you get fuzziness in contractual language, problems often arise and that's when the disputes begin," he said. "The two tips I would suggest would be to slow it down and to make sure the message that's being communicated is more clear."

Lori Benson of Ernst & Young agreed complex language can make it tough to understand documents and many such documents can con-

tain language that would benefit from rephrasing into plain language. Another useful step that can help clarify the process, Benson noted, was drawing up a confidentiality agreement before releasing an RFP.

"I find it's helpful [to ensure] that as we go into [the process] we're going to hold the response in confidence and that we expect the same of the bidders."



Joel Ramsey, partner at Osler, Hoskin & Harcourt

"Tercon made people a bit more aware of the legal ramifications if you don't follow your own process. It's a very blunt instrument in teaching people a lesson."

The rise of red tape

Last year, the Ontario government released a directive formalizing recommendations from the province's auditor general designed to promote greater openness in public procurement. The document, the Broad-er Public Service Directive, includes five governing principles and 25 mandatory requirements for public purchasers. Since the document was released, public procurement practitioners have become more concerned about liability and risk, said Ramsey. The result of the directive's prescriptive nature has been wariness among purchasers when drafting documents. "They're so driven by risk aversion and fear of non-compliance that they do things in their RFPs that don't really make sense."

The document's five governing principles—

Stan Gal,
director of supplies
and services, finance
department, Regional
Municipality of York



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accountability, transparency, value for money, quality of service delivery and process standardization—can be difficult to express in a contract, he noted. “I’ve seen an RFP from a purchaser that asks the vendor to represent and warrant that they are providing value for money,” Ramsey said. “How can I agree to that? I don’t know what that means, legally. So

Marvin Huberman,
Toronto litigation lawyer
and ADR Chambers
mediator and arbitrator



“When you get fuzziness in contractual language, problems often arise and that’s when the disputes begin.”

there’s some clumsiness in the way the BPS Directives are being applied that’s going to have to be worked out. We need to find reasonable ways to interpret how to contract around these.”

For Gal, the directive offers little new guidance, since procurement professionals have always been able to make sound judgments, he said. These days, new entrants to the field are well educated and equipped to deal ethically with the profession’s rising complexity. “They’re more apt to deal with their legal departments to ask for advice and work with other professions to develop documents that are easily interpreted by the vendor community,” he said. “In a lot of agencies, the documents aren’t released until they comply with the standard terms and conditions developed by the agency and legal has approved it.”

Benson said the directive served mainly as a “behavioural document” that, although tough to put into a contract word-for-word, still offers guidance to procurement professionals. While there’s little within the directive she didn’t already know, “at least it’s going to take you through some stages if you’re not familiar with how to get there.”

Casemore said the proliferation of regulations such as the BPS and its directive had led to some low morale among procurement professionals he deals with. As more and more guidelines and regulations are developed on the municipal, provincial and federal levels, practitioners become frustrated as they’re told “when you cross the t, not just how you cross the t”.

“We continue, from a public standpoint, to add layers upon layers to try and drive compliance and create clarity,” he said. “In actuality, the individuals I speak with—often leaders in the public sector—find it reduces their ability to navigate effectively. They constantly require interpretation to ensure what they’re interpreting is, in fact, true.

But Benson took a different view. For her, procurement is looked upon more frequently as a source of expert opinion and as a resource that can provide valuable feedback into the buying process. “When it’s time to engage the legal community, we’re able to do that,” Benson said. “It’s become a more heightened value statement for the practitioner to say, ‘OK, the procurement individual, the supply chain individual, can actually help this process because people within the organizations maybe don’t have that expertise.’”

A solution for every dispute

As with any field, disputes in procurement are bound to arise and, our panelists noted such disagreements often spring from how contract language is interpreted. But many disputes also touch on product quality, said Huberman. As well, the number of disputes can depend on economic conditions and an ailing economy often leads to organizations looking for ways to escape from contracts. “In a challenging economy, there are a lot of fights that might not otherwise occur,” he said. “But there are always disputes in these kinds of areas, for better or worse.”

There are a growing number of mechanisms available for dealing with disagreements, Huberman said. For instance, disputing parties can choose to negotiate or have their dispute mediated (which involves facilitated negotiation with a third party that has no decision-making powers). Another available option is arbitration, which involves a private judge or panel. A recent trend, Huberman noted, sees a hybrid mechanism for resolving disputes, like mediation then arbitration, known as med-arb. “Or, you hire an expert—called early neutral evaluation or ENE—where somebody from the industry who is respected by both sides gives a non-binding opinion and says, ‘Here’s how you should

do it.' There are different ways that are being explored. More and more people are coming up with creative ways (to resolve disputes) because it's usually a waste of time and a lot of money to go full-frontal war."

Often, if a contract includes a dispute resolution clause, the approach to disagreements is layered, Huberman noted. For example, the clause may state that parties must first negotiate, then mediate, then arbitrate to find a solution. But arbitration isn't always a better option than going to court. "The basic reason is, you're paying for the arbitrator," Huberman said. "If you have a three-member panel, the parties are paying for the judges, who may not be [quick] in getting it over with. There's a whole other layer of costs and there may not be a strong arbitrator who's going to control the process." Having a tailor-made mechanism prepared can help keep the process—and costs—under control, he noted. "If you're going to do a dispute resolution clause, think about it up front. Get some good advice on how to structure it. Then engage in a process where the people, the process and the problem are the right ones."

Tercon then and now

In the case of *Tercon Contractors Ltd vs. BC Ministry of Transportation and Highways*, the BC ministry included a limitation of liability clause in its RFP, claiming the clause protected it from any legal action arising from the tendering process. Tercon, the losing bidder, sued and won \$3.3 million from the BC government. The decision was reversed on appeal, after which the Supreme Court of Canada ruled 5-4 the BC ministry had breached the provisions of its tender contract by accepting and awarding a contract to a bidder that was ineligible.

While fallout from Tercon grabbed some headlines, the outcome of the case hasn't affected the public procurement process much, said Gal. Measures have long existed to help purchasers deal with irregularities in bid documents. "Through (York Region's) purchasing by-law and council's directive we've established a bid review committee, which is composed of our legal department, our client department and the supplies and services branch that have the authority to deal with issues of this nature," he said. "We keep a history of decisions over the years to determine how we handle these situations in dealing with fairness, integrity and all those things our bidders expect of us. Quite frankly, I believe that most municipalities deal in the same way." An ineligible bid, similar to the one the BC government accepted in the Tercon case, would have been rejected immediately by York Region, he noted.

The Tercon case has affected how organizations draft contracts and RFP language, said Ramsey. It also speaks to the importance of proper procurement behaviour. "It doesn't change the fact that good procurement practices were the same a few years ago as today," he noted. "Tercon made people a bit more aware of the legal ramifications if you don't follow your own process. It's a very blunt instrument in teaching people a lesson, the minority who don't follow their own process. I think the majority do." Organizations still include limitation of liability clauses in RFPs, he said, since there's no downside to including them. "Whether it's enforced or not becomes the question."

Tercon reiterated points procurement professionals have always been aware of but added clarity to the RFP process, said Huberman. Organizations must ensure they're engaging in best practices surrounding risk management, corporate governance and legal language. "If you don't, you might be in litigation with uncertain results and lots of costs thrown in," he said. "It's an alarm for everybody to say, 'Pay attention and engage in best practices.'"



Lori Benson, strategic sourcing director for Ernst & Young Canada

"At least (the BPS Directive) is going to take you through some stages if you're not familiar with how to get there."

The roundtable's themes included clarity in language, dealing effectively with the increased number of guidelines and regulations along with options for handling disputes once they arise. The rising profile and skill level of procurement professionals help ensure Canada's purchasing community is well-equipped to deal with whatever legal challenges arise. **b2b**



Shawn Casemore, president of Casemore & Company

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