

Developments in the law of competitive tendering, and innovations and best practices in procurement and contract management

A MESSAGE FROM THE PRESIDENT AND PUBLISHER

Announcing BIG CHANGES for *The Legal Edge*!

The saying that “nothing is constant except change” is particularly apt for the current world of publications, newsletters and print subscriptions. In light of rapidly changing procurement practices, new and emerging case law and trade obligations, and increasing emphasis on sustainability – as well as the constant pressure all businesses feel to reduce costs – we felt that the time was right to review how we can best continue delivering *The Legal Edge* to our loyal readers.

As the following testimonial emphasizes, we are proud to have been providing a long-term resource that enables our clients to stay current with new developments, on both the legal and practical sides of procurement and contract management in Canada:

“As a member of a team of Procurement Specialists, I am always looking for new or tried-and-true

means of staying current with what is happening in the procurement world. *The Legal Edge* is rather unique, in that it provides a combination of theoretical guidance, as well as practical, real-life experience. Each issue provides a blend of articles presented from various perspectives, considering lawyers, executives and procurement staff of all levels.” – Derek Cockburn, cga, Manager of Contracts, Policy and Review for the B.C. Ministry of Community, Sport and Cultural Development & Ministry of Jobs, Tourism and Innovation, from our January - March 2014 issue.

Good News for a Better Way Forward

We will continue to publish the same quality content, guest authors, and updates on current and pending legal developments, including regular features you have come to look forward to, such as “You Be the Judge” and

“What’s Working for You?” *The Legal Edge* content will come to you through our email newsletter, and as of January 2016, it will be completely FREE! Yes, you read that correctly: there will no longer be a subscription charge.

There will also no longer be a printed version of *The Legal Edge*, which will allow us to conserve natural resources, reduce costs, and increase our agility in being able to publish timely, relevant, need-to-know information to help procurement and contract management professionals stay up to date and continue to hone their practices.

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although we are confident that you will continue to look forward to our content, as you always have. Please also spread the word to your colleagues, who may not have been able to take advantage of a paid subscription to *The Legal Edge* in the past.

Finally ...

We simply cannot conclude this long-standing delivery format without a huge THANK YOU to our current *Legal Edge* subscribers who have followed the developments at NECI over the last 21 years. Your loyalty, feedback,

and article suggestions have helped us provide you with the most relevant information and timely best-practice suggestions that we could.

We look forward to continuing to engage with you, hear from you, and incorporate your ideas into the new format for *The Legal Edge*. If you have an article idea, or a topic you would like to see covered, or if you simply have comments or thoughts about our new delivery format, I would welcome your email to maureen@neci-legalledge.com.

Thank you! ♦

Good Planets are Round: The Circular Economy and Supply Chains

by Larry Berglund, SCMP, MBA

A sea change is occurring in Europe, and the ripples are crossing the Atlantic. The circular economy is affecting environmental, social and governance values. Why? It makes good business sense to adapt to a world of resource scarcity.

Contributing to profitability while exercising more responsible use of natural resources is tough to argue against. Creating employment to ensure an extended life for resources builds social capital. The 200-year old tactics of cheap, cheaper or cheapest materials and labour is running dry.

The circular economy provides a viable business model alternative and is restorative in nature. With iconic international organizations such as Apple, Coca-Cola, H&M, Philips, Renault, and Unilever getting on board, the circular economy strategy, albeit in its early days, is gaining traction.

Where It Begins

For supply managers, if you could

not buy raw materials, how could you sustain your operations? The answer cannot be found entirely within the procurement mandate; it starts at the design stage. Rather than design for disposal, we adopt a design-for-the-environment model. Any product being brought to market is designed to be deconstructed, repurposed or harvested for its critical materials to contribute to future production.

Why Recycling is Not Enough

“Waste is not acceptable” is a part of the circular economy mantra. Landfill sites are not to be used as a repository for poor designs and low-cost disposable goods. Every industry and market sector has a role to play, as do their customers and consumers. The fast-moving consumer goods (FMCG) sector generates mega-tonnes of packaging that are largely treated as an external cost. It’s estimated that we can only recycle about 20 percent of the volume we are generating, and we are generating more each year.

Recycling has been around for a

long time, but it has failed to meet our needs. Recycling actually encouraged customers to buy more disposable products, under the guise that they could be recycled after use, but we simply exceeded the capacity to recycle the mass production of goods. The unit costs of the mass-produced goods were reduced, making cheaper goods available to a wider range of consumer incomes. The end result is an economy that requires a certain segment to continue to buy and support this disposable cycle. The circular economy will be challenged to transition to more sustainable economic models focused on conservation rather than consumption.

Managing Waste By Design, Not Default

Converting a company’s waste or by-products into useful materials is also not new. Wood waste from sawmills goes into pulp and paper or fuel pellets. Fertilizers are made from oil refining. Old cardboard is made into new cardboard. Scrap metal is a

source for many types of alloys and can be reformed into new products. Glass can be converted to other glass products. The sheer volume of these types of common waste led to finding more useful and commercial purposes. What is new is that the circular economy proposes to manage waste by *design*, not by *default*.

Risks and Demand

Critical materials, once more accessible, are now subject to two forms of risk: supply insecurity because of geopolitical conditions, and environmental stress where water and soil degradation may exceed the benefits of extraction. Many precious metals are found in politically sensitive areas such as China, Russia, and the Democratic Republic of the Congo.

By 2030, there will be an estimated 3 billion more consumers coming into the market, mainly from emerging economies. In managing waste by design, the circular economy will help industry and business prepare for market growth, by contributing to the advancement of economic decoupling, managing for sustainable growth, and embracing innovations like biomimicry.

Economic Decoupling

Economic decoupling is the ability to grow markets without a corresponding increase in energy and resource usage or environmental stress.

The circular economy views waste as a target to be eliminated, so it will require a much more efficient infrastructure to collect and segregate industrial waste. It will also require changes in consumer behaviours and commitments to collection. For industry, reverse logistics will play a much more strategic role in supply chain management. The circular economy is more than recycling. Reverse logistics ensures responsible management of all related materials

to support the ability to redirect these for further valuable uses, as opposed to discarding them as scrap. The collection link in the supply chain will in turn create employment for thousands of low-skilled workers.

The circular economy requires the majority of the players in a sector to adopt more progressive design strategies as the norm, not the exception. 3D manufacturing, for example, will contribute when it achieves scalable solutions for large industrial applications. The circular economy has automobile manufacturers designing vehicles to be deconstructed after their useful life, with parts and materials going into new production. Lighting companies are starting to lease their products to customers, and then taking the products back after use. Tire companies won't sell you tires: they will let you use them, and you will pay for the wear and tear when you return them.

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Steelcase™, a long-time market leader in office furnishings, sees zero landfill waste as a critical component when designing its products. Reclaiming materials is a component in its holistic vision for sustainable and ergonomic products, and reducing waste contributes to profitability.

Designing products to be repurposed is not new: Xerox® was successful with this strategy in the late 1990s with its copier fleets. Older models were taken apart, and many usable mechanical parts were

recovered and installed in next-generation copiers by design.

Sustainable Growth

Sustainable growth takes into consideration impacts on air, water, soil fertility, and biodiversity.

We can reduce energy needs and natural-resource depletion through increased labour in a sustainable manner. Sweden estimates that an improvement of 3 percent in its gross domestic product (GDP) will be achievable via the circular economy through using renewable energy, energy efficiency, and material efficiencies, along with increased employment.

I:CO (I Collect) participates in a closed-loop process collecting and sorting clothing, furs, socks, belts and other garments in more than 90 countries. Collecting used clothing to produce new products instead of manufacturing them new can reduce the amount of fresh water needed by between 90 and 95 percent.

Unilever's Sustainable Living Plan provides supply chain leaders with a good framework to adopt. At the core of Unilever's initiative is the recognition that, while consumption of products is inevitable, innovative designs and resource conservation are fundamental in enabling sustainable business models.

Biomimicry

Technology and science offer innovation through biomimicry – emulating nature to sustain business.

Examples of biomimicry are legion. They include the hook-and-loop fastener first produced by Velcro® in the 1950s, inspired by burdock burrs that attached themselves to the coats of animals to disperse their seeds. Observing how the kingfisher dives into water with almost no splash led to Japan's bullet train design, with a 50-foot beak to reduce sound waves, increase speed and use less energy.

Studies of shark skins led to developing a film to repel bacteria in hospital surface materials. Innovators watching the desert-dwelling Namibian beetle collect water on its back from fog copied that natural process and designed dew-bank bottles to convey moisture into a drinking container. Microscopic tardigrades (also known as “water bears” or “moss piglets”) can dry out for more than 10 years and be returned to life by water, which encouraged research that led to the development of vaccines that don’t require refrigeration and can be reanimated with water after six months – extremely useful in tropical climates. LED illumination has been increased by 55 percent after LED products were

redesigned to mimic the workings of the firefly.

Change Is Coming

The Ellen MacArthur Foundation in the UK was established in 2010 to accelerate social and economic development, with the goal of transitioning to the circular economy. Since then, the idea has quietly grown and permeated the boardrooms of global players. All supply chains will be affected, directly or indirectly, as innovations in design come to fruition. While there will still be a need for the conventional competitive bids and negotiations for goods and services, supply chain managers may need to start thinking more about critical

supplies rather than tactical processes.

In the Western world, our estimated consumption per year per person includes 20 kilograms (kgs) (or 44 pounds [lbs]) of apparel and shoes, and 800 kgs (1,763 lbs) of food and beverages requiring 120 kgs (264 lbs) of packaging. Something has to give. The circular economy is giving ideas that work.

Larry Berglund (lberglund@prezplus.com) is an educator and consultant on supply chain management. He leads executive-level eSeminars for NECI and is the author of Good Planets are Hard to Buy: A Management Handbook for Creating Conscious Capitalism, Sustainability Principles and Supply Chain Excellence. ♦

NEGOTIATED RFPs CAN ADD VALUE, BUT AT WHAT COST?

NRFPs – A Practitioner’s Perspective

by Cris Munro, CPM, CPSM, SCMP

Negotiated Requests for Proposal (NRFPs) may seem like a silver bullet for all things procurement these days. However, as a consultant and practitioner, I believe that a few words of caution are in order. Based on my experience, here are five things to consider when you are contemplating the use of NRFPs.

1. Not Every Tool is a Hammer

NRFPs – solicitation documents specifically designed to be non-binding – are another great tool to achieve procurement objectives, but it is crucial to exercise discretion to make sure that you select the right tool for the procurement at hand.

I am a firm believer that NRFPs should not be used for every procurement just because they are the latest thing (in fact, organizations

have always had the option of stepping outside of Contract A). Our marketplace reputation as procurement professionals is reflected in the procurement documents we issue, so it is important to ensure that you choose the most appropriate tool. I am old enough to remember when RFPs became the latest/greatest thing and many organizations began using them for everything. It wasn’t unusual to see an RFP with 20 pages of terms and conditions out front, only to arrive at the last page and find that the procurement was for 50 desks ... FOB destination. End of discussion!

You also need to consider the level of sophistication in your organization, because your personnel will need to fully understand the risks (and benefits) of each tool to achieve a successful procurement.

2. Public- v. Private-Sector Use

The private sector has been using NRFPs successfully for years as the primary way of doing business, and simply calling them RFPs. The public sector uses RFPs primarily as a binding procurement process, intended to attract Contract A obligations for both sides of the process. In my experience, there is a lot of confusion in the marketplace about these two different tools. The critical distinction is whether or not the tool is intended to be binding, and you need to ensure that you are very clear in your documents about this.

I find it very interesting that, in the past couple of years, there seem to be more private-sector firms interested in using binding competitive bidding for their procurements, while in the public sector, there appears to be a trend away from binding procurements.

3. Considerations About Resources

Conducting an NRFP process consumes more resources than other methods of solicitation do, and therefore costs much more, for both sides. Most organizations are already stretched on budgets and timelines, so should consider this very carefully.

We don't often fully consider the internal costs of doing business, but we need to recognize that the time involved in developing and running extensive resource-consuming processes can represent lost opportunity costs when those resources are not available for something else of value. As procurement professionals, we have been taught to look at the total cost of ownership. We can apply this to procurement processes by also including what it costs the marketplace to respond, since you can be sure that proponents are factoring the extensive process costs into their pricing.

I have done a non-scientific comparison of the costs of using a tender, an RFP and an NRFP on a capital (building) project, taking into account both internal and external costs of the procurement process and the project itself, with all base factors the same (e.g., \$50/hour for consultant and staff time, five respondents in each process, and 12 trades involved). The tender process was the least expensive, at \$75,150 (\$41,900 for the owner and \$33,250 for the marketplace, divided equally among five bidders). The RFP was \$109,000 (\$49,850 for the owner, and \$59,000 for the marketplace among five submissions, plus the costs of an additional interview), and the NRFP came to \$134,800 (\$66,800 for the owner, and \$59,000 for the marketplace among five respondents, plus costs of negotiations and meetings).

While we can argue with the numbers, there is a definite correlation between the complexity of the process and the costs related to it. NRFPs clearly rise to the top as the most costly and time-consuming.

4. NRFPs Can Add Tremendous Value

Despite the increased costs, complexities, and time involved, however, the value of NRFPs has been proven for appropriate procurements. I have often found that the negotiation process leads to innovative ideas that we had not thought of at the beginning.

Costs are adjusted by the parties for various options, which can allow your organization to find the most innovative solution within its budget. And using this process, the organization can legitimately claim that it explored and understood many options and wound up with the best solution at the most reasonable price.

The private sector has been using NRFPs successfully for years ... and simply calling them RFPs.

5. Concerns About Transparency

Concerns about fairness and transparency should always be at the top of any procurement professional's mind. We must ensure that our documents are very clear, and that our processes are outlined with enough detail that the marketplace will have the trust and confidence to respond. We also must be prepared to defend our processes in the face of potential challenge.

I find that there is still a lot of suspicion in the marketplace about the evaluation process for both prequalification and standard RFPs. This tells me that we are not yet doing enough work in building confidence in our documents and processes, and perhaps the increasing use of loosely structured NRFPs is contributing to the confusion and suspicion.

Recently, the B.C. Deputy Ministers

& Industry Infrastructure Committee has developed guidelines on prequalification and indemnification (www.fin.gov.bc.ca/tbs/camf.htm) and is now looking at recommending a single document for capital-project procurement for use by broader public-sector organizations. This may reduce our procurement professionals' ability to select the most appropriate tool for the project, and may restrict or even eliminate the option of using a non-binding procurement process. This should be of concern to us all.

Such initiatives are largely a result of industry's perception of unfair processes and confusing documents used by organizations, and the addition of loosely structured NRFPs has perhaps contributed to the confusion. We owe it to ourselves and to our stakeholders to ensure that we structure and conduct our processes with the utmost transparency, and issue well-crafted, appropriate and balanced documents to the marketplace.

Final Word

Using the most appropriate tool for the procurement – taking into consideration the complexity and cost of the various processes, as well as the level of sophistication of our organization – will further enhance our reputation and help build trust in the marketplace. ♦

Cris Munro is principal and CEO of CM2 Ventures Inc. (www.cm2ventures.com), and a frequent presenter in construction procurement. CM2 works in a broad range of supply chain areas and specializes in professional and construction services. A primary focus is building working relationships among external organizations to create stronger and more positive affiliations with the public sector. Cris can be reached at (778) 808-4638 or info@cm2ventures.com.

True Non-Compliance in B.C.

In the recent case of *True Construction Ltd. v. Kamloops (City)*, 2015 BCSC 1059, the City of Kamloops in B.C. ran a tender for construction of the Aberdeen Fire Hall. True Construction Ltd. submitted the lowest bid of \$3,434,526. The True bid was rejected by the City as substantially non-compliant, and the City awarded the contract to Tri-City Contracting (B.C.) Ltd.

True challenged the award to Tri-City, alleging that its bid was capable of acceptance because any omissions were simply minor irregularities, and the RFX gave the City the express right to waive minor irregularities. In turn, the City argued that, even if the True bid was substantially compliant, the City had acted properly within its discretion to reject the bid and award to Tri-City.

The Trial

Since the parties agreed on the facts, the matter proceeded to a summary trial in B.C. Supreme Court in early 2015. The decision was released in August 2015.

The evidence showed that both True and Tri-City had submitted last-minute price revisions by fax, and True had also submitted two pages of Appendix A and a full Appendix B by fax, both of which had been missing from the sealed submission delivered earlier by True. All faxes were received before the specified closing time, but the City became concerned about possible non-compliance of the True bid.

After contact with counsel for Tri-City, City staff became concerned about the possibility of litigation, and made the recommendation to City Council that the contract be awarded to Tri-City as the lowest compliant bidder. City Council accepted that

recommendation, and the contract was awarded to Tri-City.

At trial, the City's position was that the True bid was not substantially compliant, as the appendices were part of the bid and had not been submitted in the sealed envelope containing the Bid Form. In turn, True argued that the Instructions to Bidders were ambiguous as to whether or not the appendices needed to be completed and in the sealed envelope, or whether they could be submitted later, as long as it was before closing.

Whether True intended this result or not, it did provide True with a competitive advantage over other bidders, and therefore undermined the integrity of the competitive process.

True argued that this ambiguity ought to be construed *contra proferentum* against the City, as the drafter of the instructions. (This doctrine holds that, if a contract is ambiguous/inconsistent, it should be interpreted against the party who drafted it.) In addition, under the terms of the competitive process, the City had significant discretion to waive irregularities, and True argued that the City should have exercised that discretion in favour of retaining the True bid.

The Legal Analysis

The Court reviewed the long line of cases relating to non-compliance,

and referred to the statement of the same Court in *Cambridge Plumbing Systems Ltd. v. Owner, Strata Plan VR 1632, 2009 BCSC 605*, that a bid will be non-compliant if the omission "undermines the fairness of the competition or the process of tendering, impacts the cost of the bid or performance of Contract B, or creates a risk of action by other (compliant) bidders."

The Court found that the manner in which True submitted its bid – by failing to complete Appendix A and omitting Appendix B in its initial sealed submission – permitted True to continue negotiations with its subcontractors and suppliers. Whether True intended this result or not, it did provide True with a competitive advantage over other bidders, and therefore undermined the integrity of the competitive process. The Court held that the True bid was materially non-compliant, and therefore incapable of acceptance. It dismissed True's action with costs to the City.

Lessons Learned

This case serves as yet another reminder to make sure that Instructions to Bidders are crystal clear about what bidders are required to submit, as well as the required method of submission – particularly when bidders are asked to complete multiple appendices.

A more subtle lesson from this case is that broad discretion clauses can act as a double-edged sword. Yes, they can leave the owner in the driver's seat, so to speak, but discretion can swing both ways: in this case, True challenged on the basis that the City failed to exercise the discretion in True's favour. ♦

Five Strategies for IT Procurements

by Debby Shapero Propp, BA, LL.B

Information technology (IT) procurement can be highly complex and expensive, and it covers a broad range of acquisitions. Whether you are contracting for a licence, or to acquire custom software or hardware or related services, IT procurement creates unique challenges and is often associated with a relatively high failure rate. Because of this high failure rate, this is the one area of procurement in which various studies of such failure are generated and published on a regular basis.

Some of the sources of IT failure to be aware of (beyond the purely technical issues) include: lack of planning, lack of IT management and support, incomplete or changing requirements and specifications, failure to account for scalability (i.e., how your procurement will be able to handle a growing amount of work, or its expansion potential to accommodate growth in your organization), lack of user input, unrealistic expectations, supplier representatives who over-promise, uncontrolled integration costs, lack of acceptance testing, and lack of internal skills – to name a few.

In venturing into the area of IT procurement, it is important to consider the challenges and use of that information to avoid common pitfalls. Just a few of those challenges include: the rapid pace of change in IT, the fact that procurement professionals require a higher degree of specialization to assist in the process, traditional procurement methodologies are often not well suited to the task, and there are usually multiple impediments to getting to contract. Here are five of the many existing strategies to consider in IT procurement.

1. At the Planning Stage

Utilize the planning stage to your advantage, since it is critical in IT procurement, and often overlooked. Proper planning can save both time and money and help your organization mitigate the risks. How? Here are three ways:

Use an IT needs analysis. This is a fact-finding and review process to ferret out the information required to make technology investment and implementation decisions. It can be undertaken internally or by consultants. And while one size doesn't fit all, it usually has at least the following components: identifying existing deficiencies through interviews and a documentation review, a fact-finding/survey of available technology, solutions research, and recommendations and conclusions.

Build the team. An IT procurement team can make or break a competitive procurement (RFx) process; with careful consideration, a good team can advance the likelihood of success on your project. The key questions to ask are: what IT skills and efforts are required, and which IT member will be assigned to the team? At the same time, you need to keep in mind the more common legalities and process considerations, such as including team members with the appropriate experience who are free of conflict of interest, and who have executed the required internal procurement documentation.

Perform due diligence. When an organization performs due diligence, it voluntarily investigates, researches and completes an analysis to prepare for a business transaction. Due diligence is a critical part of the risk management exercise. And while there are multiple

types of due diligence, many of the benefits are similar. Done properly, it helps facilitate decision making, helps identify and mitigate risk, assists in avoiding costly mistakes and expediting the project, facilitates compatibility with other processes and platforms, and promotes compliance with internal and external requirements.

2. Choosing the Procurement Process

Before issuing your RFx, consider the procurement process to be used. If your organization has been using the same procurement methodology for as long as you can remember, consider using this IT procurement as an opportunity to expand your procurement toolkit and arsenal.

Choosing the appropriate procurement process appears to be one of the most popular topics in procurement lately. And while both a traditional Contract A/B methodology and a negotiated RFP (NRFP) each have a place in IT procurement, it is procurement dependent. This is a decision to be made by the organization – with expert guidance.

Without a doubt, there are benefits to each process. But a number of pronounced benefits can heavily tip the scale toward an NRFP for many IT procurements. An NRFP can: provide an opportunity to rectify any deficiencies in the mandatory requirements, minimize the risk for complex IT procurements, increase the flexibility and scope for negotiations, promote innovation, and facilitate getting to contract. That said, however, you do need to be aware of how the courts have distinguished between a Contract A/B methodology and an

NRFP, and how an NRFP can affect your organization's procurement process. If you have never used an NRFP, it is best to seek professional assistance.

3. Using a Statement of Work

You should consider whether or not a Statement of Work (SOW) might be useful in your IT procurement. Using an SOW can help facilitate the procurement at many stages. A SOW document typically specifies work to be done in developing or producing the goods or services to be delivered or performed, and it can be especially helpful in IT procurement. A SOW can be used at the RfX stage and/or as part of the contract, and brings many benefits, such as clearly defining expectations and requirements, consolidating key parts of a procurement or project, helping suppliers determine if they can meet expectations, and preventing misunderstandings and disputes.

However, there also many consequences of an inadequate SOW at both the RfX and the contract stage. At the RfX stage, an inadequate SOW may (at minimum) increase the number of questions, cause delays, and discourage suppliers from responding. At the contract stage, it can create operational, legal and financial risks (e.g., project delays and failure, disputes

and litigation, and cost increases and extra expenses). For the first few times, it is best to seek professional help in constructing a SOW.

4. Communication and Information Methodologies

In IT procurements, there is often an overwhelming amount of information

A Statement of Work document typically specifies work to be done in developing or producing the goods or services to be delivered or performed, and it can be especially helpful in IT procurement.

to collect, hold, disseminate, respond to or clarify in a timely and efficient manner, so you will need to familiarize yourself with methodologies to help you handle that for your organization. Communication considerations for IT procurements include the information itself, the time framework, what is being acquired, and a cost-benefit analysis of pursuing some of the methodologies. Some ways to approach communication

and information include holding technical briefings/conferences, hosting a data room, arranging commercially confidential meetings, undertaking a proof-of-concept validation, and inviting suppliers to give a presentation and demonstration.

5. Requirements: Certifications and Standards

IT acquisitions and licences often have a number of unique certifications and standards that you should investigate before proceeding with your RfX ... and these certifications and standards seem to be ever-evolving, such as standards for cloud privacy or resource credentials. Talk with your internal sources or outside consultants and become familiar with this information *before* issuing the RfX. ◆

Debby Shapero Propp is a commercial lawyer focusing on procurement, technology, and health law. She was in-house counsel to the Ontario Ministry of Health and Long-Term Care and shared services organizations. Debby is a founding member of the Health Lawyer Network (www.healthlawyernetwork.ca). She can be reached in Toronto at (416) 576-1154 or debby@shaperopropp.ca. This article is based on a two-day training course that Debby has developed.

Managing Sweet and Sour: Handling Passive-Aggressive Behaviour

by Pam Paquet, MEd, BA (PSYCH)

In our workplaces and practices, we work with and may need to manage a wide variety of behaviours among our colleagues, reports, suppliers and superiors. Particularly difficult to read and deal with can be passive-aggressive behaviour.

We've all met this kind of person before: he or she appears to act or comply appropriately and even positively, but in fact, behaves negatively, or resists in a passive way. According to the Mayo Clinic, someone with passive-aggressive

tendencies will exhibit a pattern of indirectly expressing negative feelings instead of openly addressing them, and there is a disconnect between what a passive-aggressive person says and what he or she does.

The Reality of Passive-Aggression

People who exhibit passive-aggressive behaviour tend to fear and avoid conflict. They get others to act out their hidden anger, so that they can portray themselves as the victim. They also tend to feel powerless and helpless, because their needs are never acknowledged or addressed.

In reality, passive-aggression is deliberate, and it is masked (Long, Long & Whitson, 2009). People with passive-aggressive tendencies act in a way that is intended to get back at people without them recognizing it or the anger behind it, creating a hidden and unspoken power struggle.

The Passive-Aggressive Indicators

In your procurement work, you may know people who exhibit some or all of the following indicators, as summarized by the Mood Disorder Association of Manitoba Inc. They may:

- complain of being misunderstood and unappreciated,
- unreasonably criticize and scorn authority,
- express envy and resentment toward those who are apparently more fortunate, and/or
- voice exaggerated and persistent complaints of personal misfortune.

Signs and Symptoms

We all have bad days. We've all complained from time to time about the boss or a colleague's habits. But those with passive-aggressive behaviour exhibit a pattern over time that will often include some or all of the "usual" signs and symptoms. These people can be:

- stubborn
- resentful
- cynical
- sullen
- hostile
- sulky
- forgetful

- chronically impatient

They may also procrastinate, make multiple mistakes, blame others and be easily offended, making working with them like tiptoeing through a minefield. A common tendency with passive-aggressive people when they are confronted is denial ("I did not agree," "I did not say that," "I did not ...").

[P]assive-aggression is deliberate,
and it is masked ... "

The Receiver Reaction

If you are on the receiving end of passive-aggressive behaviour, you are probably often confused and frustrated, sometimes doubt your own sanity, often have the urge to give them a good shake (at least), and are uncertain about how to work with them – all while the person exhibiting the passive-aggressive behaviour seems rather oblivious and unaffected.

The bad news is that we can't change these people. Medications don't fix the behaviour, and there are no known ways to prevent it.

The good news is that a psychological evaluation can assess someone for passive-aggression, counselling can help him or her identify the problem, and we can hope that he or she will acknowledge the need for change.

But the best defence we have is for us to manage our own self-preservation. We can't change anyone else, but we can manage our own words, actions and behaviours to best preserve our own mental health and the climate in which we work.

Sweet and Sour

People with passive-aggressive behaviour will often say the right

things (sweet) and then behave in incongruous ways (sour). To begin managing our response, we need to start by recognizing strategies for both.

For sweet (the words), recognize what it is, do not buy it, realize that it's not personal, and learn to predict it.

For sour (the actions), resist engaging, describe the problem (the elephant in the room), admit that you are confused, link cause and effect, keep your distance, and avoid tit-for-tat.

Examples and Strategies

Example 1: He makes promises about things on which he does not intend to ever follow through. He blames things that were "out of his control," precluding him from being able to fulfill his promise.

Strategy: Don't be lenient. Set consequence or limits: "The next time we work together, I will need your task list and deadlines in writing before we start the project."

How to Manage and Respond:

- Document tasks, steps and deadlines.
- Brainstorm and discuss different options.
- Discuss and clarify the tools or information needed, ahead of time.
- Offer ideas and solutions as alternatives and options.
- Do a mid-point checkup.

Example 2: She withholds important information from others in order to make herself appear more important and more valuable. This is an attempt to make others around her fail.

Strategy:

 Link cause and effect.

Talk in specifics: "The award went to the other team because our team missed deadlines. Your portion was received after the agreed-upon date."

How to Manage and Respond:

- Ask direct, open-ended questions.
- Encourage opportunities to speak at meetings using a roundtable format.
- Document tasks, steps and deadlines.

- Use a “working draft” document to ensure information sharing and allow monitoring.

Example 3: He uses sarcasm or humour to make fun of someone else so he can hide behind an “I was just kidding” attitude, when in reality, he meant every word.

Strategy: Don’t allow this to happen. Stop it immediately and tell him not to “kid” at your expense. Advise him that this behavior is not funny and will not be tolerated.

How to Manage and Respond:

- State your confusion (“Help me

understand ...”).

- Refer to bullying and harassment policies.
- Identify what he has done.
- Use wording like “passive-aggressive” (if you are comfortable with it) and provide research and resources.

Remember: we cannot change anyone else’s behaviour. But recognizing passive-aggression for what it is and following some simple strategies to manage and respond to it can help you improve your working environment and your own mental health. ◆

Pam Paquet is the owner of Pam Paquet & Associates Performance Management. A master-level facilitator registered as a Canadian Speaking Professional, she helps people and companies stop doing what does not work. Her Build Better Bosses program focuses on improving how supervisors manage and lead. She can be reached in Winnipeg, M.B. at (204) 415-5858, (604) 349-8660 or pam@thepossibilities.ca. This article is based on a presentation that Pam gave in June 2015 at the Supply Chain Management Association national conference in Halifax, N.S.

FREQUENTLY ASKED QUESTIONS

When to Inform Non-Compliant Bidders

Through our Signature Seminars, eSeminars, Public Sector Procurement Program (PSP) and other courses, our NECI instructors regularly answer questions about procurement-related issues. Here is a recent question.

In our competitive procurements, we do not usually advise any vendor of anything until we have posted an award notice on our electronic procurement platform. On a current IT procurement, we have 14 vendors. Seven are shortlisted, and seven are non-compliant. We have not commented on the status of the RFP to any bidder yet. We are just entering into the testing portion of the RFP, and our users have confirmed that, if the vendor with whom we are testing the equipment does not work out, we will cancel the RFP process. In terms of implied fairness in competitive contracting, should we be informing the non-compliant vendors before we award?

You are likely not in Contract A or any other contract with non-compliant proponents, unless your RFX language specifically allows for

this, which is certainly not the norm.

So, if you are not in contract with the non-compliant proponents, legal challenge is probably not a risk. However, certainly in the public or quasi-public sector, there are potential political or Judicial Review challenges. And as you know, we are huge advocates of maintaining good vendor relationships wherever possible.

In our experience, it is the mainstream practice to let non-compliant respondents know that they are non-compliant and are off the hook, once the decision on compliance is made. Regardless of what happens with your compliant responses (e.g., no deal struck, need to cancel the process, etc.), you will NOT be able to circle back to the non-compliant proponents. So why not tell them, in the interest of maintaining your vendor relationships, at the earliest point in time, so that they can pursue other opportunities? We can’t see any benefit to keeping the non-compliant respondents on deck while the process continues to unfold.

Follow up: *As a matter of administrative process, we decided against notification prior to contract award. In my experience, a non-compliant bidder usually wants to discuss the matter immediately upon notification, and we don’t want to tie up resources at that point or risk that the matter will be escalated to senior management during the competitive bid process. Public procurement professionals stand on a precarious cliff in terms of balancing our transparency obligations with efficient business processes.* ◆

Do you have procurement-related questions that might be of broad interest (or additions to/rebuttals of our answers)? We invite you to send them to our Legal Editor and Publisher, Maureen Sullivan (maureen@neci-ledge.com). We will publish questions of a general nature that we think are relevant and timely. We cannot address specific legal questions, provide legal advice, or guarantee that your question will be published.

ANSWER TO YOU BE THE JUDGE

It is important to keep in mind that *Jono Developments Ltd. v. North End Community Health Association, 2014 NSCA 92* was an appeal from a Judicial Review application, not a breach of Contract A claim. A Judicial Review examines whether the decision was reasonable, given the circumstances.

Did the HRM breach its duty of fairness to the community groups by failing to follow the policy, even though it had followed the RFP evaluation process? The Court of Appeal reviewed the standard to be applied and agreed with the trial judge that the HRM owed a duty of procedural fairness to the community groups. It then turned to the degree of procedural fairness that should apply, referring to *Kelly v. Nova Scotia Police Commission, 2006 NSCA 27*: “Fairness is often in the eye of the beholder and the tribunal’s perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for review.”

After reviewing all the facts, including the terms of the RFP, the Court of Appeal

in *Jono* concluded that the duty owed to the community groups amounted to an opportunity to advance a proposal and to have the proposal considered by the HRM on criteria other than simply the price offered for the property.

In concluding that the RFP process followed was sufficient to discharge the duty of procedural fairness owed to the community groups, the Court noted that the process was consistent and predictable, the community groups were notified of the process, the RFP granted the community groups participatory rights in a substantial way, and their proposals were considered on more than just a financial basis. This ground of appeal was therefore allowed, and the lower court’s decision was overturned on this point.

Did the reviewing judge err in law by determining that the HRM’s interpretation of “market value” was unreasonable? The Court of Appeal agreed with the trial judge that the appropriate standard of review was the reasonableness of the HRM decision, but the Court of Appeal found that the trial judge incorrectly applied that standard in concluding that HRM had breached the Charter by selling the property for less than market value.

The Court of Appeal accepted what it considered to be “the very logical conclusions” put forward in the staff report recommending the sale to Jono at \$3 million, including a detailed analysis of the then net present value (NPV) of each of the financial proposals. Jono was offering the equivalent of approximately \$3.1 million NPV for the property “as is,” which the HRM’s independent appraisal had identified at a value of \$1 million. There were no financial proposals higher than Jono’s, and the Court accepted that this in and of itself served as the best evidence of market value of the property.

The Court of Appeal concluded that the trial judge was in error in finding this analysis unreasonable, and it overturned that finding.

Was the Court correct to order Jono to pay a portion of the costs in this circumstance?

This issue was a moot point in light of the Court of Appeal’s decision to allow the appeal and set aside the lower court decision. As a result, the Court of Appeal ordered that any costs paid by Jono and the HRM to the community groups be returned. The Court of Appeal awarded Jono costs in the amount of \$15,000 for the lower court proceedings, and \$6,000 plus disbursements for the appeal. ♦

The Small Print

For the first time in construction law in Canada, a general contractor, an engineering firm (soil lab) and an architect have been absolved of all liability to an owner for a serious defect in a building, based on a finding of sole liability on the part of a structural engineering firm, in *SNC-Lavalin inc. v. Société québécoise des infrastructures (Société immobilière du Québec), 2015 QCCA 1153*. By this decision, the Quebec Court of Appeal has said that it is possible for a party to exonerate itself from the obligation

of the five-year legal warranty under the *Civil Code of Québec*. At issue was a new annex added to a hospital in Trois-Rivières, which started to sag significantly soon after it was completed and occupied. The estimate for remedial work was \$6 million, so the owner, Corporation d’hébergement du Québec, sued the general contractor, the architect, the soil lab and the structural engineer. The general contractor and the architect successfully defended themselves against liability, arguing that the issue was struc-

tural and lay with the bearing capacity of the land under the new annex. The soil lab was also able to defend against liability by proving that the structural engineer had not followed its recommendations. The **structural engineer was found solely liable** in this case. The case has also been noted as unique because it is the first time since the *Civil Code* came into force in 1994 that a subsequent fault by one professional has been held to absolve another professional of all legal liability in a construction matter. ♦

YOU BE THE JUDGE

Municipality Unfair in Sale of Property?

Test your understanding of fairness in this recent case from Nova Scotia.

In 2012, the Halifax Regional Municipality (HRM) issued an RFP for the purchase and redevelopment of a surplus elementary school property. Jono Developments Ltd. and several community groups submitted proposals. There is evidence that the HRM closely followed the terms of the evaluation process laid out in the RFP, which allocated 20 percent of the weighting to the financial offer. Following evaluations, the HRM approved sale of the property to Jono.

Around the time the sale to Jono was approved, the community groups discovered that the HRM had passed a "Policy and Procedure for Disposal of Surplus Schools" in 2000. Among other steps, the HRM was required under the policy to first assess and evaluate any proposals from community groups or grant applications and, if none were received or none were supported by the Community Grants and Partnering Program under the HRM, then the HRM was to take steps to seek Council approval to put the property on the market.

Compelling evidence was presented that the HRM had not tested the policy since its inception, and in fact was not aware that it even existed until challenged by the community groups following the approval of the sale to Jono. When the HRM became aware of the policy, which clearly had not been followed in this instance (or in any of the previous disposals of 18 other surplus school properties), the HRM rescinded its decision to sell to Jono, made a motion to rescind the policy and, then, passed a third motion to sell the property to Jono.

The HRM was also enabled under its Municipal Charter to "sell property at market value when the property is no longer required." The appraised value of the property was listed in the RFP as \$4.3 million, based on a valuation report that provided three scenarios:

- Market value of property as is: \$1 million
- Prospective market value – maintain old school/redevelop remainder: \$3 million
- Prospective market value – demolish all buildings and redevelop: \$4.3 million

[T]he HRM rescinded its decision to sell to Jono, made a motion to rescind the policy and, then, passed a third motion to sell the property to Jono.

Jono had submitted an unconditional financial offer of \$3 million for the property "as is," to be increased by increments of \$75,000 over the highest bid to a maximum of \$4 million. In other words, Jono offered to pay \$3 million if there were no competing bids, and up to \$4 million if there were. Jono also provided a slightly higher option that was conditional on certain development approvals.

Several community groups also submitted proposals, each offering a purchase price of less than \$3 million. The HRM approved the \$3 million offer from Jono. As shown by the HRM's evaluation process, Jono had received the highest score in the RFP process, in part because of its financial proposal.

In the HRM's view, "market value" is the price the market will offer,

so it therefore believed that it was complying with the Charter.

Pursuant to a Judicial Review application by the community groups, in 2012, the N.S. Supreme Court set aside the sale to Jono on the basis that the HRM had breached its duty of fairness to the community groups by not following its own policy, and further, that the HRM's interpretation of "market value" was unreasonable, so the HRM had breached the Charter by selling the property below market value. The Court also ordered Jono to pay a portion of the costs awarded. Jono appealed the decision, and the matter was heard by the N.S. Court of Appeal in May 2014.

What would you decide in this case? Turn to page 11 for the answers. ♦

STAYING IN TOUCH

Want to know what's happening with NECI and *The Legal Edge* between issues? We are on the web at www.neci-legalgedge.com and on Twitter, follow NECI @necilegaledge, or Maureen @maureenNECI. To join our mailing list, visit our website and click on "Learn More."

THE LEGAL EDGE

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