

Legal Services Procurement 101

The Two-Step Process

By Kenneth E. Bunge

There can be no doubt that the economic crisis we are experiencing is forcing corporate general counsel to scrutinize legal spending in ways they have never experienced before. The troubling financial mess also means legal department budgets will be very tight and cause legal departments to look at the real value of what they are buying in new ways. The purpose of this article is to discuss a relatively straightforward strategy to obtain the maximum value at the best possible price for a wide range of legal services.

The Two-Step Procurement Methodology

Two-step procurement is one of the basic forms of competitive contracting by many governmental agencies. Its origins date back to the 1950s. Fundamentally, it combines elements of sealed bidding and negotiation. This approach typically begins with a request for proposals (RFP), which describes the procuring agency's requirements. After proposals are received and evaluated, those found acceptable will be asked in the second phase to submit their price proposals based on their initial terms. Then the government agency will conduct negotiations with the parties, leading to the award of a contract to the lowest responsive offeror. The good news for in-house counsel is that in using this model for acquiring legal services, one is not bound by the rigid regulatory requirements attendant to the government process. Therefore, in establishing the "rules" for a solicitation, you will have wide discretion to tailor your approach. Some suggestions are offered below. While this model may not be the best approach for obtaining "bet the farm" legal advice and counsel, it can be very effective for most other legal services.

Initial Planning and Request for Proposals – Step One

The first thing to do is to establish specific requirements. The initial request for proposals

should describe your requirements (what you are buying) in sufficient detail so that the bidders will be able to respond definitively as to how they will meet those requirements and at what price. You may be able to define your requirements so that price proposals are all you need during this phase. If you are buying commodities or tangible property generally available in the marketplace, a very useful approach might be to conduct an online reverse auction where all parties are able to propose the lowest bid through the use of an online bidding system. This may be an approach already employed by your supply management or purchasing department. Reverse auctions may also be useful for legal services such as immigration services or trademark applications, where you solicit "prices" for specific categories of work. Generally, an online bidding event can be accomplished in one day. Alternatively, if you solicit offers via a formal RFP, written responses should be submitted by a specific time and date.

At this stage, it is very important to bring appropriate company representatives (your internal clients) into the action. For example, if you are acquiring immigration or employment related services, the human resources department should be involved. Similarly, if you are purchasing M&A support services, your strategic planning group should be included. Typically, a designated team will be assembled to evaluate the written proposals and determine those that are sufficiently responsive to be invited for face-to-face discussions. Proposals will be evaluated based on such factors as responsiveness, experience, capability and, of course, price.

Once you have received all bids or proposals for your procurement, the final task of step one is to determine which offers are in the competitive range. Simply, this is the process of determining how many of the offerors are determined capable of possible award of a

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“...a relatively straightforward strategy to obtain the maximum value at the best possible price for legal services.”

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contract dependant on the face-to-face discussions contemplated during the second step.

Face to Face Discussions — Step Two

The primary objective during this phase is to obtain sufficient information from each offeror to reach an internal consensus as to the one offer that will give you the best value for the price. The price you achieve may not be necessarily the lowest overall. For example, if you are soliciting proposals for “bundled” legal services at a fixed fee or price, you will want to hear from the firms as to how and why they believe they are able to commit to such a deal. Here you would be evaluating, among other things, the realistic probability that they will be able to perform as offered. You will save considerable time by eliminating unrealistic proposals before proceeding. It is highly recommended, however, that you err on the side of inclusion (for reasons that will be discussed below).

In setting up the logistics for the second phase, the first order of business is to reconvene the company team who will participate. It is desirable for the team leader to be from the legal department and the other participants to be strictly limited to key individuals able to contribute to the decision making process. It is advisable that the team meet for at least one planning session before discussions commence to review the offers and discuss strategy. Face-to-face meetings with the selected offerors should then be held as soon as possible after step one is complete. In this regard, these meetings should be scheduled as close to each other as practical with time in between for the team to make immediate comparisons of the offers while information is fresh in the minds of the evaluation team.

The environment should be com-

fortable but the atmosphere must remain businesslike at all times (i.e., put personal acquaintanceships aside). The competing representative teams should be advised beforehand they will be given a specific amount of time to make a presentation and be given reasonable latitude as to their approach (e.g., some may elect to do a formal presentation, others may have a product demonstration, etc). Your team members should be advised and encouraged to ask questions about the products, services, pricing and other relevant areas of the proposal. It is also advisable to prepare a set of key questions that will be asked of all offerors. The team can delve into unique aspects of the individual proposals as well. After discussions are completed with all of the offerors, the team should meet to rank the proposals. It is important to reach a consensus during this time if possible. The team leader should document the results and present the findings to the decision-maker for selection of the winning offer. Finally, as soon as possible after the award of the contract is announced, losing bidders should be apprised of the decision and given constructive advice as to how they might improve their proposals in the future.

Conclusion

As stated at the beginning of this article, the ultimate objective of the two-step process is to achieve the best value that meets the operating needs of your legal department for the lowest price possible. There are some other important benefits in using this approach. A systematic and documented approach will be a valuable addition to any quality process improvement initiatives at your company. Over time, your department will accumulate a database to use to validate your legal service acquisitions to senior management, your purchasing department or other interested functions.

If the two-step approach is foreign to your legal department, I recommend that you try it on an upcoming project. The potential advantages are great and it may be the start of a very effective acquisition strategy for many of your outside legal services needs. ♦

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