



PROCUREMENT DAY

2014 FINAL REPORT

SEEKING COMMON GROUND. ESTABLISHING BEST PRACTICES.

More than 100 influential construction, design and buyer professionals came together on October 20, 2014 for the inaugural Procurement Day forum. It was a candid discussion of the issues being faced by all sides of the procurement equation. The goal was to seek common ground and identify mutually satisfactory ways to address identified issues.

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EXECUTIVE SUMMARY

Through discussions within the Procurement Day committees, and those attending previous events, there was a desire to add, improve and build on the preceding procurement days. In essence, leave a distinct 'footprint in the sand', providing the basis for discussion with government and buying groups that would affect positive change in construction procurement.

It is this reasoning that lead to Procurement Day 2014 addressing the issues of 'Government Procurement – Moving Forward' 'Best Practices' and providing information in 'E-Tendering'.

Marian Macdonald, the Assistant Deputy Minister Supply Chain Management Division of the Ministry of Government and Consumer Services (MGCS), gave a well-received glimpse into the state of government procurement practices today and where it is heading in the near future.

With regards to the "Best Practices, a Case Study", constructed, delivered and moderated by Rob Kennaley of McLauchlin & Associates, the intention was to get the audience to look at key areas in the procurement cycle, with an eye on best practices from their perspective.

The afternoon session provided information on the cutting edge trend in construction procurement, E-Bidding. Two experts in existing, and successful, E-Bidding construction bidding systems, Robert Brown of the Le Bureau des soumissions déposées du Québec (BSDQ) and Steve Sulpher of Infinite Solutions, were brought in.

Robert Brown gave an in-depth look at the Electronic Bid Depository system in Quebec. Steve Sulpher finished up the day with a summary on how E-Bidding has reduced risk in a Bid Depository tender closing system in British Columbia.

“Seek first to understand, then be understood.”
- Stephen J. Covey



From left to right: Tom Vivian, Rob Kennaley, Martha George, ???, ???

PROCUREMENT IN ONTARIO

Moving Forward - Government Perspective

Marian Macdonald, ADM Ministry of Government and Consumer Services (MGCS) highlighted her efforts to improve the procurement process in Ontario including streamlining procedures to lessen vendor burden; and encouraging vendors to articulate the key barriers in the process and strengthening trust.

Ministry of Government and Consumer Services (MGCS) – is responsible for half million vendor record program, provides support to ministries doing their own procurement, consulting services, network services for public service, support supply chain transfer payments, provide funding to change behaviours, and advertising. Barriers to the procurement process that were identified included:

- Long, complicated procurement documents;
- Inappropriate requirements;
- Inappropriate timelines;
- Multiple amendments;
- Responses to questions are delayed and unclear;
- No status updates during evaluation period; and
- Award announcements take too long – resources kept on standby.

Macdonald listed possible solutions to these barriers which included:

- Appropriate abstracts;
- Improved commodity codes;
- More relevant information on the Doing Business site;
- Direct responses from ministry clients; and
- Keep vendors informed during the evaluation process.

A ten (10) year plan was developed to improve the procurement process.

Areas of concern and/or improvements were identified as follows:

- Dismantling procurement policy group;
- Supporting IT procurement;
- Work with IO and Lands Corp;
- Accommodation and leasehold for Ontario Public Service (OPS);



Marian Macdonald, ADM Ministry of Government and Consumer Services

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- Wealth of agencies doing procurement are governed by the same principles, there are rules that all have to follow, stemming from trade and commercial law, accountability act;
- Believe that MGCS are uniquely positioned to influence, provided there are strong relationships with vendor community, no huge tenders closing within two week period of closing, regularly review the processes,
- Expand use of technology as public sector procurement is lagging in technology, engaging a new firm providing tendering services, open competitive process started three years ago, interested in how we use a tendering service, yearlong consultation, Bravo Solutions, BidNGo, ubiquitous in Europe and UK, strong partner, ahead of plans, first electronic tender launched this summer (car detailing), downloading of documents now free, bidding incurs a charge; and
- Recognizing the unique role of MGCS, colleagues at Metrolinx, IO, talking more regularly, bringing public sector procurement professionals together.

In addition to these key initiatives, SCO has several other vendor-focused improvement projects underway including:

- Vendor engagement sessions, consultations, beginning 2020, Northern Ontario
- Continue to introduce online bidding, out of pilot, go mainstream
- Encourage use of vendor record database
- Working on next strategic plan

During Q & A Macdonald was asked several questions and highlights follow.

One issue raised was a request for clarity on how MGCS determines value. She responded by stating that they provide a multiple envelope format, with change terminology. We focus on mandatory requirements, asking the question, "Can you do the business?" We use rated criteria, "How well can you do the business?" Everyone that passes is equally able, then we move to price. Price then becomes important. I have to say the hardest debriefing is when the vendors lose on a tight price.



We look for those who can demonstrate qualification and relevant experience."

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The policy framework talks about making sure we evaluate all relevant factors including skills, ability to deliver, time to deliver, any other factors critical and important. There is equal weighting and equal importance to price, we cannot ignore price.

Weighting depends on the type of project. Sometimes price is the only important aspect (skid of peas). It is tough for us, because we buy everything from helicopters to bow ties and services. We need to treat some commodities differently. When questioned about their transition toward QBS, Macdonald was asked how does MGCS deal with the pre-quals becoming so onerous and so difficult that new contractors can't bid? How do you encourage new contractors to participate? Construction is not a commodity, and am glad to hear that we will be differentiated. How do you balance to create opportunity?

Ben Sopol responded by stating that they are trying to understand each industry, categories, and profiles. One of the issues was where do they start? MGCS does not want to restrict markets, category management. A first step would be removing disqualification upfront. Only evaluate on the ability to deliver, skills and qualifications. Macdonald

elaborated by explaining that part of the issue is risk. Public service is risk averse. Lack of money, increases risk and MGCS wants to go with someone they know can perform successfully.

A Case Study - “Best Practices – Best Practices?”

Rob Kennaley is a construction lawyer with the firm McLaughlin and Associates in Toronto. Rob shared a Case Study of best practices. Which stimulated a dialogue about the tender process and the consequent allocation of risk. Some people are more willing to take it on than others. Case law is changing; as the law develops, we see that our Courts, in addressing the tendering process, attempt to balance fairness and equity with the right of contracting parties to allocate risk.

The case involved budget allocation and fast-track design. Case study raised interesting questions such as: Is it a problem or risk worth assuming? What are the advantages and disadvantages of fast-track, how can the disadvantages be avoided, what about the design budget allocations, put your top two or three thoughts on this item.

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Attendees agreed that early occupancy (schedule), start earning revenue, wait for inflation, budgetary concerns (spend it now), and domino effect (allow you to move to the next project) are variables that factor into the risk equation. Further, participants agreed that to avoid disadvantages practice should include tender before final design - don't use a fixed price contract, (sometimes that's what the owner wants, flexibility, control costs), go to design-build, phase tenders.

A participant asked how can you do the structural if you are significantly changing the design (Hotel added to Skydome for example)? Kennaley answered that some changes will be beyond the scope or character of the tendered contract; the parties will not be locked in and committed to proceeding in this circumstance.

When determining a common starting point, it was suggested that projects start with construction management. In response, Kennaley stated that CCDC documents are available. It was recommended that the contractor makes sure if the form of agreement is to change to a general contract, the contract documents reflect the change. Note as well, there are Construction Lien Act consequences to the change from

construction management to a general contract.

Kennaley then addressed risk aversion vs. risk allocation. Some want to offload all the risk to make themselves bullet proof, others say it's a function of price - they are willing to take on the risk for a price. Those who look to make contracts bullet-proof often impose a lot of risk on the contractors. While contractors and subcontractors say that that it isn't fair, the response - which makes some sense - is that we will make the market decide what is 'too unfair' - in the sense that it is not fair, don't bid it.

Kennaley went on to that that we are told that owners are risk averse, but that they are also looking for value over price. Many participants struggle a bit with lawyers, architects or engineers who are hired to put together the tender package and who go to their standard set of clauses, to transfer as much risk as possible to protect the owner.

The attendees engaged in a healthy discussion, ultimately about classifying the risk. The consensus appeared to be that,



**You cannot offload
all the risk to make
yourself
bulletproof."**

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ultimately, the owners should be taking on some of the risk. It was noted that the stage in process where risk is classified is important. It was suggested that making contracts as bullet proof as possible is not necessarily to anyone's economic advantage.

Another issue raised was concern over the Underlying Obligations Bid Form – what if the bidder is not able to perform the work that they are bidding on and everyone knows it? The current case law suggests that there is no duty on the owner to look behind the bid and investigate. Investigations can, however, be allowed. The question was raised whether or not post-closing investigations should be undertaken? All agreed it was worthwhile provided it was done in the prequalification stage.

Kennaley then raised the issue of construction budget and expanded the scenario to include that all bids are over budget, does that give you license to cancel the tender call? What do you do? What do you do when you are over budget? Consensus from the group what that if over 15%, we can go back and visit the scope of the work, talk to the compliant bidders, and hierarchy in our documentation. Further, CCDC #23 covers this. It deals with over budgets, under 15% deal with low bidder, if over go to the three lowest. Don't use

post tender addenda, use CCDC #23. If over budget, owner can do what they like. They might not get bids.

Finally, when summarizing best practices it was agreed to start at the top of the process by asking the right questions. Do we have enough money in the budget for design? How are we allocating risk? What are the important elements? Is there value in using a bid depository? Is there value in naming subs?

The afternoon session had two presentations by eTendering systems. The first was Robert Brown of the Quebec Bid Depository System (BSDQ) and the second was Steve Sulpher from Infinite Source. The purpose of the two (2) afternoon presentations was to provide information on the challenges and successes facing these two bid depository systems as they transitioned from manual to electronic.

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