

I'VE BEEN MULTI-SOURCED – LESSONS LEARNED FOR ITO AND BPO TRANSACTIONS¹

Richard Austin
July 31, 2011

I spent many years giving legal advice to internal business units and external clients about responding to multi-sourcing RFPs. But I developed a whole new perspective on the issues in multi-sourcing transactions and, not coincidentally, on the advice I had so earnestly been giving, when I responded to an RFP seeking multiple law firms to provide legal services. As the prospective service provider, playing by the rules of the customer's multi-sourcing RFP and overly-sensitive to its competitive subtleties, it was as if I were suddenly actually living the issues. They were no longer academic, theoretical or neutral but, instead, were very real and affected me personally.

That was several months ago and I have thought a lot about the RFP in the intervening time. At this distance, I can look at the customer's RFP process from a professional perspective and, in my view, the customer "got it right". It used a multi-vendor sourcing strategy, and designed and implemented procurement processes that allowed it to achieve its articulated objective of obtaining innovative, cost effective and efficient legal services. Because the level of multi-sourcing in outsourcing transactions is rising, I'd like to use the customer's legal services RFP as a foil to talk about four aspects of multi-sourcing in information technology and business process outsourcing transactions. To distinguish the customer and its legal services RFP from customers and RFPs generally, in what follows I will refer to them as the Legal Services Customer and the Legal Services RFP.

Two preliminary points are in order. First, the reference to "multi-sourcing in information technology and business process outsourcing transactions"² refers to circumstances in which different components of the services are provided by different service providers. The dividing lines among the services and service providers are often along tower lines, e.g. in an information technology outsourcing, one service provider is performing application development, maintenance and support services, a second service provider is responsible for desktop support services and a third is responsible for mainframe and hosting

¹ I would like to express my appreciation to Al Hurd for this thoughtful comments and insights on this document.

This article is not intended to provide legal advice or opinions of any kind. No person should take any actions or refrain from acting, based upon the information contained in this article, without seeking appropriate legal or other professional advice.

² There are numerous definitions of multi-sourcing ranging from the descriptive ("multiple suppliers") to the value-laden ("sourcing that prevents reliance on any one supplier"). I am using the following (from <http://www.businessdictionary.com/definition/multisourcing.html>):

The division of activities or services involved in the execution of an essential business function among a combination of providers, both internal and outsourced, in order to gain more control over costs and accountability while reducing dependence on any one provider.

services. These services can be procured simultaneously or in sequence, depending on the customer's procurement processes and resources. The term "multi-sourcing" also encompasses transactions in which the customer selects more than one provider to supply the same services, e.g. the Legal Services Customer selecting multiple law firms or, in the case of application development services, a customer selecting two or more firms who win the right to bid on specific work packages.

Second, it is worth providing more detail about the Legal Services RFP. The contractual arrangements arising from the Legal Services RFP resemble the Vendor-of-Record arrangements implemented by many provincial governments and the Task Authorization contracts established by the Federal Government. The RFP was seeking law firms to provide legal services in defined practice areas (the legal "service towers"). In each practice area, several law firms were to be selected using evaluation criteria developed based on the customer's objectives of achieving a balance among innovation, cost and results. One of the evaluation criteria for each practice area was the hourly rates quoted by bidders for the legal resources it identified. The successful law firms won the right to bid to provide legal services for future projects at rates that were not allowed to exceed the quoted rates. These were not exclusive arrangements and even being selected as one of the successful bidders did not guarantee a law firm any work at all. Moreover, the Legal Services Customer reserved the right, during the term, to refresh its list of qualified suppliers.

I. Qualified Service Providers

In preparing the Legal Services RFP, the Legal Services Customer did not have to worry about whether there would be enough law firms responding with the necessary skills and expertise and having experience working in a multi-vendor environment to make for a competitive procurement; there does not appear to be any shortage of lawyers or law firms in Canada, even in the more arcane of the different practice areas identified by the Legal Services Customer. Further, as a general matter, lawyers are accustomed to working with other law firms, not just in adversarial circumstances but also in "co-counsel" situations or as members of project teams. It would not normally require a large adjustment in its business practices or culture for a law firm to commit in its response to be part of a multi-vendor sourcing model. Finally, and considering the importance of skill and multi-sourcing experience to a successful transaction, the Legal Services Customer did not have to rely on the law firms' claims about their expertise and experience: the Legal Services Customer was able to validate any claims about knowledge or ability to work in a multi-sourcing environment through widely-available law firm rankings and client references.

What is true for legal services may not be true for information technology or business process outsourcing transactions: there may not be a large enough number of suppliers with both the necessary technical expertise and the experience working with other vendors for the procurement to be successful. And both – the quantity of suppliers and their quality – should be important to the customer. The customer needs there to be enough qualified suppliers to subject the suppliers to competitive pressures as they develop their solutions. As well, it is important to the customer that suppliers have both technical expertise and multi-sourcing experience. Clearly, without the necessary technical expertise, the supplier will be unable to deliver the solution required by the customer. Equally however, if the supplier has only provided services in a single vendor environment, it may well not have the processes, procedures, understanding and attitude necessary for a successful multi-sourcing. For example, the supplier is unlikely to appreciate the extent to which multi-sourcing relationships require a more flexible approach to issues such as protection of confidential information or may insist on using unique or even proprietary procedures in areas like change management or governance. If the

customer selects a service provider without multi-sourcing experience, the customer may find itself in difficult, protracted contract negotiations as it is forced to educate a service provider about multi-sourcing issues and, similarly, facing post-signing problems as the service provider comes to grips with the exigencies of multi-sourcing.

The customer can and should address these issues through its procurement processes:

- Before issuing the RFP, the customer can fine-tune the specific experience-related questions and get a sense of the population of qualified suppliers through the use of Requests for Information or Requests for Expressions of Interest. (For information about the population of qualified suppliers, the customer can also speak with knowledgeable third party intermediary firms and consultants.)
- In its Request for Proposal, the customer should require bidders who are responding to the RFP to:
 - provide evidence of technical expertise;
 - provide client references from previous multi-sourcing engagements;
 - describe their understanding of multi-vendor outsourcing transactions and the processes and procedures that customers should implement generally in multi-sourcing situations; and
 - document any specific measures the bidder recommends the customer implement to ensure the customer's multi-sourcing transaction is successful.

II. Scope of Services

The Legal Services RFP was focused on selecting several law firms to provide legal services in each practice area based on quoted rates, for projects to be defined in the future. The RFP also set out the Legal Services Customer's expectations around the administrative and support services that were deemed to be included as part of "legal services" without being separately charged for and provided some guidelines to the law firms about rates, e.g. there were certain types of expenses for which the Legal Services Customer would not reimburse the law firms and rates were not allowed to increase during the term, even in respect of inflation. Because the bidders were not being required to commit to providing a specific scope of services for a fixed price in their proposals, the Legal Services RFP did not need to deal with many of the hard issues around scope of services that can arise in multi-sourcing transactions.

Typically, the "scope issues" that need to be addressed in an RFP for services to be provided as part of a multi-sourcing solution are significantly more complicated. As is the case even with single-vendor outsourcing transactions, the RFP will need to define the services to be provided by each vendor comprehensively and ensure that, for each vendor, all of the related "ancillary services" (the potential white space between the lines of the service description) are in-scope. But in a multi-sourcing, faced with multiple vendors, the customer must deal with two additional issues. First, the customer needs to ensure that, in the aggregate, the services are described comprehensively and seamlessly and there are no gaps or overlaps between the different services. Such a gap might exist, for example, if in an IT outsourcing the customer were using one vendor to provide wide area network services between its facilities and another vendor for local area network and hosting services at each site but did not ensure that the demarcation point between the WAN vendor and the LAN vendor was the same in each contract.

Second, and as the first step in avoiding evasive finger-pointing amongst the vendors when faced with a service delivery problem, the dependencies among the different services must be identified clearly and accepted by all vendors. This includes not only dependencies around the major deliverables but also includes the assumptions, conditions, provisions for relating to third parties, service levels and other terms in each outsourcing agreement. Consider, for example, the fairly common multi-sourcing situation in which one supplier is responsible for the applications development services being provided to a customer and another supplier is responsible for hosting services. The customer will want to ensure that the hosting service provider's uptime commitments and service level agreements are not restricted to the production environment. They should also extend to the development and test environments used by the applications service provider and be accepted by the applications service provider as appropriate and adequate for its development work. Otherwise, in the face of development delays, the applications service provider may allege that the delays are the result of the unavailability of the development and test environments and its concomitant inability to perform testing in a timely manner (rather than, say, inexperienced resources or lack of planning).

In addressing the scope of services under a multi-sourcing arrangement, the customer will want to:

- Define the services and service deliverables precisely, with the dependencies among the various vendors clearly identified. (Some customers try to have the terms related to dependencies worded identically in the adjacent contracts).
- Clarify the obligation of each service provider to cooperate with other suppliers who require access to the service provider's infrastructure in order to provide services to the customer.
- Set out the service levels to be satisfied by each vendor including situations in which a vendor's ability to meet the service levels depends on the performance of another vendor or its failure to achieve a metric may impact the performance of another service provider.
- Deal with confidentiality issues in the RFP, setting out the expectation that and the terms and conditions under which the vendors will share confidential information (including operational data about the services) with other vendors as required in order to deliver the services.
- Address fundamental aspects of the services such as security, disaster recovery and business continuity planning at an aggregate, cross-service provider level. After the customer has defined its requirements, the customer should flow these requirements down to the individual service providers and require the service providers to cooperate in the interests of the customer in addressing any issues that arise.
- Require on an ongoing basis that the service provider document the services being provided clearly including descriptions of normal course services, any interfaces with other service providers and the termination transition services. The documentation should be updated on a regular basis and a copy provided to the customer. The customer should have the right to make a copy of the documentation available to other services providers as required for the effective integration of services provided by different vendors or in connection with any termination.³

³ For all of these issues, and as a segue to the next topic, the customer will need to determine processes to ensure its solution is implemented at an operational level. With respect to documentation for example, it is not enough for the customer just to state in its RFP the service provider must provide documentation. The customer should establish standards that the documentation must satisfy, a right of approval in favour of the customer, timelines for delivery and schedules for updating. And having done so, the customer needs to monitor the service provider's compliance. Otherwise, the obligation,

Some of these issues can be dealt with in the customer's RFP or its attachments, e.g. the customer should ensure that the RFP when it is issued defines the services and service deliverables precisely. Similarly, the obligation of the service provider to cooperate with other suppliers and the confidentiality obligations can be included in a Master Services Agreement attached to the RFP that bidders are required to accept in responding. In some cases however, the customer will not be able to deal with an issue comprehensively when the RFP is issued. For example, it may not be possible for the customer to document all of the service level dependencies at the time the RFP is issued. For these types of items, which will need to be addressed in the multi-sourcing contract, the customer should ensure that the requirements for dealing with the issues in the final contract are clearly spelled out in the RFP.

III. Governance and Performance Management

The governance and performance management regime of an outsourcing contract consists of a complicated web of inter-related processes and procedures that allow the customer to manage the performance of the services and the vendors effectively. The regime includes processes and procedures for change control, contract compliance, risk management, annual planning, relationship management, issue and problem management and dispute resolution.

The governance and performance management issues confronting the Legal Services Customer as it prepared its Legal Services RFP were simpler than those that will face a customer seeking to multi-source information technology or business process outsourcing services. First, lawyers and legal services have been regulated for many years. There is a culture within the legal profession that provides a susceptibility to and a basis for effective governance regimes. The Legal Services Customer did not have to persuade bidders that there was a purpose and benefit to effective governance regimes before dealing with the substance of the requirement: the law firms should already have been there and understood their importance.

Second, the services provided by each law firm to the Legal Services Customer will be project-based and likely distinct from the services provided by other law firms: the services will not be tightly integrated and in most cases the "interfaces" can likely be accomplished by way of a comprehensive client reporting letter or transition memorandum once the work is completed. For this reason, in preparing the Legal Services RFP, the Legal Services Customer did not need to be excessively concerned with seamless service delivery across service providers, complicated coordination of services or trying to establish consistent governance procedures in all the areas set out above to allow the service providers to integrate their services.

Finally, it appears that the Legal Services Customer's in-house legal department was involved in the preparation of the RFP and will participate on a going-forward basis in managing the services delivered by law firms. The involvement of an internal team with expertise in the services being delivered strengthens the Legal Services Customer's governance and performance management regime in a number of ways. At the Legal Services RFP stage, the legal department was able to ensure that the

like others that perform an insurance role but do not regularly impact day-to-day performance, can get short shrift.

governance processes that the RFP required, e.g. reporting, issue management and annual planning procedures, were integrated into and supported the in-house legal department's internal procedures. Further, by continuing to be involved in managing the services, the in-house legal department will be able to evaluate and assess on a regular basis whether the services being delivered meet the customer's objectives (obtaining innovative, cost effective and efficient legal services). It should also facilitate regular knowledge transfer from the law firms to the in-house team, simplifying any termination transition activities.

Similarly, in an IT or BP multi-sourcing transaction, the customer usually acts as a services integrator, but the responsibility for sewing together highly inter-related individual services provided by different vendors into one seamless service that addresses the customer's business requirements can be a considerably more complex task. The governance and performance management regime needs to be particularly robust to support the customer's services integrator role: it must be designed for the efficient management and direction of the aggregate service provided by all vendors, not focussed on the individual service components. Consider two examples. A customer's annual planning processes will encompass much more than the outsourcing transaction but will certainly need to take account of it. If the annual planning processes, as implemented for a multi-sourcing, are to be effective, they will need to require all vendors to provide standardized proposals according to a common schedule that enables the customer to compare and prioritize the different recommendations as part of its planning. The customer's annual planning is unlikely to be effective if it consists of a series of sequential, ad hoc or silo-ed discussions with the vendors, each of whom is strenuously competing to preserve and grow its scope of service.

The second example relates to issue and problem management procedures. As the causes and effects of service issues and problems in a multi-sourcing often will transcend service boundaries and service providers, the customer's issue and problem management processes need to manage issues effectively until they are resolved, not be interrupted by maladroit handoff procedures each time two vendors are required to interact. This requires, for example, common standards, an integrated trouble-ticketing regime (likely under the customer's control), consistent escalation points and an obligation to co-operate.

In a multi-sourcing context, the governance and performance management regimes and procedures:

- Should be integrated, apply across service providers and be developed in advance of issuing the RFP. The customer will then be able to require any bidder responding to its multi-sourcing RFP to commit to complying with this regime and both the customer and the bidder will be able to include the costs of compliance in their deal cost models.
- Must provide the customer with more control than is required in a single-vendor situation. The customer should retain a degree of control that will allow it to determine standards, processes and solutions if it is not to be held hostage by a recalcitrant or uncooperative vendor. The change management procedures established for vendors involved in a multi-sourcing transaction, for example, should of necessity include "mandatory change" or "directive" provisions that allow the customer to direct the vendor to start implementing a change even before agreement has been reached or the terms and conditions of the change order have been resolved. Otherwise, faced with a change order requiring cooperation between vendors, the customer may find its ability to implement the change held hostage to a vendor who seeks to take advantage of the customer's need to implement the change or refuses to cooperate.

- Should require greater interaction and cooperation among vendors. This applies to the various processes making up the governance and performance management regime and to the relationship as a whole. For example, most risk management procedures under outsourcing agreements require that the service provider perform Privacy Impact Assessments or Threat and Risk Assessments with respect to changes in the services being delivered. If these assessments are to be effective in a multi-sourcing environment, the service providers will need to cooperate in assessing changes to the services to ensure that impacts, threats and risks that transcend service boundaries do not get missed or are underweighted. Therefore, the customer should ensure that, whether as part of the change management or the risk management procedures, there are specific obligations on all service providers to consult with others in respect of any changes to the services or related assessments being undertaken and an obligation to cooperate in all consultations.
- Should include, as part of the customer's governance structure, committees with defined mandates and in which all service providers are required to participate. These committees should meet regularly, thereby providing a forum for the service providers to deal with recurring matters such as operational issues, integrated planning, strategic questions and perhaps relationship issues. The governance structure should also provide for working groups to be established by the customer to deal with isolated issues or problems on an ad hoc basis and, again, in which the service providers are required to participate.

IV. Evaluation Criteria

In the Legal Services RFP, the Legal Services Customer adopted a three-phase evaluation process to identify the winning firms in each practice area. During the first phase, the Legal Services Customer reviewed the proposals to confirm which proposals complied with the mandatory submission requirements. The second phase involved scoring the compliant vendors in two categories, "Experience and Qualifications" and "Quality, Services and Value Add", where each category carried the same number of points. Significantly, all of the questions in each category related, directly or indirectly, to the Legal Services Customer's service delivery objectives (in this case innovation, cost and results and achieving a balance among them). The questions did not include, as is sometimes the case with public sector RFPs, extraneous items such as the law firm's adherence to policies promoting work force diversity or requirements to provide industrial or regional benefits. In the third and final phase, the rates provided by each law firm in the practice areas on which it was bidding were scored based on a relative pricing formula. The top scoring respondents for each identified practice area were invited to sign a Master Retainer Letter with the Legal Services Customer in the form attached to the Legal Services RFP. As mentioned earlier, execution of a Master Retainer Agreement did not entitle a supplier to an exclusive arrangement or guarantee any work.

For the Legal Services RFP, the Legal Services Customer developed evaluation criteria and a framework based on its business objectives, communicated the criteria and framework to prospective bidders and applied the criteria for selection of successful bidders (although it reserved the right to select additional suppliers outside the defined processes).

All of these considerations apply to an RFP issued as part of an IT or BP multi-sourcing transaction. Indeed, it may be even more important that such RFPs define the customer's requirements for the services and the evaluation criteria in advance and that these be precise and unambiguous. Because a

multi-sourcing involves multiple suppliers delivering inter-related services, the failure of a bidder to commit to an essential component of the solution because it is not a mandatory requirement or a bidder's proposal for an alternate but non-compliant solution that the customer is not entitled to reject can leave the customer with gaps in its solution or disrupt the balance among service providers.

Therefore, in defining the evaluation criteria and framework for the bids submitted as part of a multi-sourcing transaction, the customer should:

- Have regard to its objectives for the multi-sourcing and develop meaningful evaluation criteria that will support those objectives and not introduce extraneous, unrelated considerations;
- Define appropriate mandatory requirements that are consistent with the customer's multi-sourcing objectives
- As discussed above under the heading "Qualified Service Providers", require prospective bidders to demonstrate their experience working in a multi-vendor environment
- Include as part of the RFP, the contractual terms that will apply to the services delivered by the vendors. This means attaching a sample contract to the RFP that sets out in full any terms that have the potential to affect how the vendor relates to other service providers, for example those relating to confidentiality or third party services. If the customer attempts to make do with a term sheet that sets out principles to be incorporated into an outsourcing agreement but leaves the wording to be negotiated in future, the customer will have compromised its ability to ensure that the services are defined seamlessly and that consistent integrated processes apply to all services
- Preserve the flexibility to select additional or other bidders both in the RFP process and in future

V. Conclusion

My experience with the Legal Services RFP, the most basic of multi-vendor transactions, gave me a new perspective on multi-sourcing. The Legal Services RFP brought home how much complexity multi-sourcing introduces and how formidable are the issues multi-vendor transactions present, for both the customer and the service provider. The customer, confronted by disparate entities more inclined to competition than cooperation, faces the challenges of defining service requirements, an infrastructure, governance processes and a contractual framework that will enable it to manage all service providers effectively and allow it to achieve cost-effective and seamless service delivery. Each of the service providers on the other hand, is trying to satisfy the customer and achieve its own internal objectives, without at the same time setting up its competitors for success. These are delicate balancing acts. And, for now, there does not seem to be any general agreement about common, widely-accepted processes that will achieve these results. Perhaps, as the outsourcing industry gets more experience with multi-vendor transactions, it will develop standard approaches, processes and governance structures so that it is no longer necessary (or at least no longer seem to be) to resolve these issues afresh for each transaction.