

Procurement's Role in Purchasing Legal Services: A Counterpoint ... to a Degree

Toby Brown

Director of Strategic Pricing & Analytics
Akin Gump Strauss Hauer & Feld LLP

Much has been written and discussed about the rise of Procurement's role in the selection of legal service providers. The focus of this dialog has been on how Procurement can help a legal department in making more informed purchasing decision to drive down costs and how Procurement is here to stay as part of this process.

Offered here is another point of view on this subject. As a seasoned pricing director for a large firm, I have had extensive involvement with Procurement and purchasing departments. Having watched the evolution of this effort, I hope to bring some insights and points of discussion that bring value to the discussion.

In the Beginning ...

Early experiences with Procurement were not favorable. In one instance, I reviewed a large spreadsheet showing the number of hours purchased by a company by time keeper type (partner associate, etc.), by practice type (labor, securities, etc.) and by jurisdiction. This example was no small deal either. Some categories had hundreds of hours, obviously representing a significant legal spend. The basic RFP request was that law firms should review the spreadsheet and then submit their bid for next year's work. Firms were supposed to include a spreadsheet with their hour and rate bid numbers input in to each cell of the spreadsheet.

These RFP efforts have evolved since then. Now the most typical scenario is one where a brief and general scope is provided. An example would be for an acquisition of a certain value along with the statement that due diligence is included and up to four rounds of negotiation. Some of these requests will include a deadline, or closing date in this example. Then a fee cap with discounted rates is suggested as the fee type. Although not all of the Procurement driven RFPs are exactly like this, I would suggest this is a reasonable, representative example.

On closer inspection, the scope is moderately useful; however it does not include the more meaningful information about the intention and goals of the client. Is this a strategic acquisition? Is the acquiring entity one that should be trusted or not? Are their known tax concerns? Answers to question like these will give the bidding firm the type of information that drives a quality response. And as much as a client will say they want their firms to be healthy and profitable, fee caps with discounts are not the best recipe for that. In these situations, the client generally limits the list of submitting firms to those they deem 'competent' so the bid processes focuses primarily on price.

Procurement's Role

These examples represent the traditional Procurement methodology. Procurement's primary role within a company is driving costs down while holding quality at an acceptable level. For many purchases this means unitizing the product or service; then securing bids from vendors on a per unit basis to push vendors to compete on price. The problem raised in the example above is that the best known unit for legal services is hours, so the result is forcing firms to compete on hourly rates to the exclusion of other factors.

Procurement's role with Legal continues to evolve; however, for the most part I am seeing similar problems arise across the board when Procurement takes over the process for bidding on legal work. Of course there are some sterling exceptions. But these are truly exceptions.

This is not to say Procurement will not eventually figure out the best fit in working with a legal department to secure legal services. For legal departments working with Procurement, I hope this is the case.

An Alternative

My counsel to in-house counsel when it comes to working with Procurement is Be Proactive. I have an old saying, "The guild was broken in the General Counsel's (GCs') office." Which is to say that in 2008 when the CEO came in for the annual 'save money' talk, s/he didn't take "I Can't" for an answer. Instead, the CEO introduced Procurement to the GC and let them know they were there to help. What this demonstrates is that GCs have been waiting too long to get in the cost savings game. Waiting means someone else is going to come in and address that need for you: Procurement in this case.

In what I would consider to be a best case scenario – Procurement serves as an advisor to the legal department. In this scenario Legal must take a very proactive role in cost savings. This means directly confronting the issue with outside counsel and working in partnership with them to achieve this goal. There are numerous examples of GCs who have taken on this challenge and succeeded. One often quoted example (for good reason) is Jeff Carr at FMC Technologies. Jeff's company has grown dramatically in the past five years, while his total legal spend has gone down. He did that by aggressively taking on a cost savings role.

Recently I moderated a panel with another GC who is taking on this challenge. He made a very good point about holding Procurement at bay. He commented that Procurement is very comfortable about achieving savings, but when it comes to living with the result of that effort, the legal department is left holding the bag. Legal not only has to deal with securing legal services, they also have to manage the services over time. This GC sees tremendous value in embracing a cost savings role so that his client (a.k.a. the company) will receive the right level of service as the best possible price.

Taking this thinking to the next level, I suggest a GC set savings targets and refocus the conversation with outside counsel on that goal. Merely saying you want to "save money" and "realize efficiencies" as requested in numerous RFPs is not enough. Instead, pick a category of

work and set a savings goal for the year. For arguments sake, let's say this is 10%. Then the GC can sit down with its trusted, outside firms and ask them how they can help meet that goal. This would lead to a conversation about scope and a meaningful dialog on how costs can be reduced, the nature of desired efficiencies and most importantly, how the GC and the firms can meet this goal together.

I believe a partnership towards a cost goal will be far more productive than a one-sided request. On numerous occasions I have seen engagements go over budget based on the client's actions instead of the law firm's. Admittedly, the firms do need to take serious steps towards reducing costs at the fee level, but that can be a bigger challenge when the client is not aligned with that goal.

Maintaining Alignment

To demonstrate this misalignment, consider our acquisition example above. A client, perhaps overly concerned about risk on a deal, makes continued and on-going due diligence requests. With a fee cap in place, the client has little concern over the cost of expanded diligence, so why not be safe and make the expanded requests? These types of requests can unnecessarily drive up the cost of the service and even complicate the negotiation phase, as the acquiring party is now more suspect of the purchaser and will push harder on certain issues. The client, inadvertently, is creating an unhealthy relationship with its outside counsel. The goals and incentives for each side are misaligned. So although the client may come out reasonable well in this specific example, the long-term relationship will suffer.

I submit that clients will benefit from healthy long-term relationships with outside counsel. When outside counsel is truly a trusted advisor, clients receive better results. And by making cost savings a combine goal, meeting budgets will be an integral part of these successful results.

Does this means Procurement should be locked out of the process? Definitely not. However, I think they will bring the highest value to the process by serving in an advice and counsel role to GCs. GCs are experts in the law and hiring law firms. Procurement brings expertise for qualifying and quantifying savings. So it is best to keep the GC in their role, allowing them to select the right outside counsel for a given engagement. If a company allows cost to become the driving factor in selecting law firms, then companies will succeed at lowering cost, but likely at the cost of trusted relationships and getting the right level of service.

To highlight this possibility, consider again our acquisition example. First, Procurement will not be involved in the management of the matter and will have no knowledge when things are not going well. And likely, at the end-of-matter review, Procurement will conclude the outcome a success since the acquisition was completed and the budget was met.

Procurement, by design, works to neutralize relationship in the selection process. In a formal RFP process driven by Procurement, all informal communications are cut off. In order to neutralize relationships and level the bidding field, all communications go through pre-defined, formal channels and are shared with the entire group of bidders. Although this process is fair and drives prices down, per its intent, it also neutralizes what should be a trusting relationship

between lawyer and client. In my experience, the most successful fee deals, both in terms of legal outcomes and meeting cost savings goals, come about due to a trusting relationship.

Address the Challenge

The moral of this story is essentially the same that is being told to law firm partners: The world has changed and now so must you. Partners and GCs are both far better served when they face the challenges of change. Sitting back and waiting to see how things will play out means you are letting others take over what should be your role and your business. Recently I heard a consultant suggest that in the future if things continue down this procurement path, GCs will no longer be part of the executive suite in a company. Instead, they may answer to the CFO or another executive.

In an ideal world, Procurement would act ... ideally. But from what I am seeing in the market, this ideal world is some ways off. Instead, GCs may be bending to the will and drive of Procurement out of frustration and necessity. Are there some legal services that can be purchased on the basis of price? Yes. However, I would argue that legal services are at their highest value when they serve the strategic goals of a company. Savvy GCs will work hard and take on new challenges in order to maintain this level of value for their clients. Otherwise, as my old friend and mentor used to say, "we will be left with law firms standing in line with the toilet paper sales people, waiting to bid on the next RFP."

Partnership, Partnership, Partnership

In my opinion, the keys to successful fee deals are trust and communication. These two things come about when lawyer and client sit down and define goals in a partnering approach. In my experience, most lawyers and firms really want to help clients succeed. Unfortunately as the market has evolved, clients and their lawyers have not been adapting well. Conversations about rates and fees have always been something to avoid. Now they need to be central to the conversation and to the success of the partnership between client and lawyer. Procurement can be an asset; however, I suggest GCs will be better served by driving this process. In turn the GC's client's best interest will be served.