

## **THE ROAD TO HELL IS PAVED WITH GOOD INTENTIONS**

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### **ABSTRACT**

Public procurement, expected to achieve an ever-increasing number of often incompatible objectives, achieves fewer. Public officials trying to please everyone please few. Finding ‘the best solution’ defers to ‘following the rules’. The idea of a procurement profession conflicts with an ever-growing framework of rules that effectively deny professionalism.

While every new rule has a reason, the resulting ‘system’ does not work. Sober reflection by a practitioner concludes that it is time to redefine the hallmarks of ‘good’ public procurement.

We need to set better priorities, to be achieved by better people. Our approaches have to be more flexible, based on broader understanding of the marketplace, within a more effective legal and policy framework. We have to accept that perfection is simply not achievable – and that the quest for it carries an unacceptable cost.

We have lost sight of helping operational managers to deliver programs and services efficiently and effectively.

### **INTRODUCTION**

Drawing on actual or hypothetical events around the world, each apparently independent of the other (but demonstrating that you can find motivation and ideas in many places), a common thread leads to an uncomfortable conclusion.

Many good things are happening in public procurement these days, but the sum of those good things is creeping paralysis. The whole is less than the sum of its parts. The Road to Hell is indeed Paved with Good Intentions.

Join me as I travel that Road around the world.

### **TANZANIA**

I ‘met’ the East African Community (EAC) through Deployment for Democratic Development (DDD), a program launched in May 2007 with funding by the Canadian International Development Agency (CIDA) and implemented by the Institute of Public Administration (IPAC)<sup>i</sup>. DDD sends Canadian subject matter experts around the world in response to requests for assistance from CIDA partner countries.

The EAC, in Arusha, Tanzania, is a regional intergovernmental group seeks to deepen political, economic and social co-operation among its Partner States (Tanzania, Kenya, Uganda, Rwanda and Burundi.)<sup>ii</sup> IPAC retained me to work with the EAC to develop of a comprehensive procurement manual.

The EAC operates under the authority of *Financial Rules and Regulations* – legislation established by the Partner States. I concluded quickly that the *Rules* would have to be amended to permit effective procurement practices. Two examples:

- they made absolutely no provision for dealing with emergency situations; and
- they required that after a call for bids at least nine (9) bids had to be received for the process to proceed to contract award.

Each in itself poses significant operational difficulties - but put them together: what do you do if you face a crisis?

To amend the *Rules*, Partner State approval would be required; to approve, the Partner States would want to see the Procurement Manual that would govern EAC procurement; in reviewing that Manual, they would likely take guidance from their own country-specific procurement legal framework. So, I reviewed those five frameworks.

Two things stick in my mind from that review. First: paper! Those are very long statutes – compounded by the fact that they tend to deal with goods, services and works in one part, and then reproduce much of the same material in a separate section covering consulting services. Second – more germane to this paper – one statute had four pages of detail on how to conduct a public bid opening. Four pages, on one small step – and in legislation?

## AUSTRALIA

2004: Adelaide: at a procurement conference Ken James, then head of the Chartered Institute of Purchasing and Supply, spoke eloquently about our calling: procurement needs to be, and to be seen to be, a profession unto itself.

A 'profession' is "the body of people in a learned occupation"<sup>iii</sup>, or perhaps "...a vocation founded upon specialised educational training, the purpose of which is to supply disinterested counsel and service to others, for a direct and definite compensation, wholly apart from expectation of other business gain".<sup>iv</sup>

Either definition applies to public procurement. You simply cannot do our job well if you have not received highly specialized training; you obviously must be learned; and you must be disinterested – no conflicts. In Tanzania I asked myself how you can be a professional if your life is governed and regulated by 4 pages *of law* on how to conduct a public bid opening. How can you be a professional as defined, when every aspect of your working life is prescribed by law, and you have absolutely no discretion to apply seasoned professional judgement, training and experience?

A side trip: in 1993-94, right after joining the procurement world, I led a working group to overhaul and update the Supply Policy Manual that directed the procurement activities of Canada's federal common service procurement department, now called Public Works and Government Services Canada.

During that process, I found that there are two kinds of procurement specialists:

- half say 'tell me what to do and how to do it, and I will do just and only that';
- the other half say 'tell me what you want me to achieve, and what I cannot do – and then let me do my job'.

I belong to the second group, and that is the approach we used for developing the new Manual. Our timing was exquisite – exquisitely wrong. After most of the work was done, in January 1994 the North American Free Trade Agreement (NAFTA) came into force. In terms of government procurement, it was a 'tell me how to do it' approach: as interpreted by Canada's independent bid dispute process<sup>v</sup>, it became even more so.

## **MOROCCO**

In 2007-08 as part of an Organization for Economic Cooperation and Development (OECD) panel of experts reviewing public procurement in Morocco, I saw a lot of the really excellent OECD public procurement work. The 2005 report *Integrity in Public Procurement: Good Practice from A to Z* “...offers practical insights into how the profession of procurement is evolving to cope with the growing demand for integrity, drawing on the experience of procurement practitioners as well as audit, competition and anti-corruption specialists.”<sup>vi</sup> Then, there is the October 2008 *Recommendation of the Council on Enhancing Integrity in Public Procurement*<sup>2</sup>. While these two reports are superb, the content is not the issue here - the focus is.

The OECD web site has many documents about procurement – all grouped within the general topics of governance and fighting corruption. Look at the web page that sets out the topics that the OECD works on<sup>vii</sup>: you will not see ‘public procurement’ in its own right. Fascinating. Jurisdictions that I know spend a huge portion of their annual budget through procurement. What I saw on the OECD web site was a focus, not on achieving increasing value for that money in terms of operational results, but rather on making sure that there is no corruption.

Morocco was in fact two trips. First we did the field work – document review and a week of interviews with Moroccan public and industry officials. At the end of the second interview day, the mission leader took me aside, commented that I was being overly aggressive in my questioning, and asked me to tone it down – to be more careful – to be nicer and more supportive.

The second trip included participating in a regional conference on public procurement. The first day, we enjoyed probably the best conference lunch I have ever had. Now, you really don’t want to be the speaker right after lunch, and certainly not after the meal we had – but I was a right-after-lunch panel member. I spoke about planning and reporting documents, as I recall in the context of accountability to and oversight by elected officials. The conference was taking place in french: stating specifically that I had no knowledge of such documents in Morocco, I said: “D’après moi, la plupart de ces documents sont de la merde.” Roughly translated, ‘In my view, most of these documents are shit’.

Well! Heads came up - bodies became alert – whispered side conversations stopped...at the end of the day, the OECD mission head made his unhappiness manifest. I had been rude, offensive and insulting: he thought that maybe a formal apology was called for.

That evening, I asked one of the most senior Moroccan officials if I had created a problem: he assured me that I had not – that no further action was needed.

Still, I left Morocco with three conclusions:

1. My father was a diplomat – apparently I am not;
2. The OECD has not asked me back; but
3. Sometimes the Emperor has no clothes.<sup>viii</sup> Was the reaction because of my language – or because I had actually dared – in public - to be critical?<sup>3</sup>

The OECD review team included three ‘international experts’: me; one from France, and one from Dubai. As we met in the evenings with the OECD team to discuss each day’s events it became apparent that I and the gentleman from France were working from two quite different approaches. I like the ‘freedom to act within parameters’ approach – he seemed to be coming from the ‘rule for everything’ world. It *seemed* to confirm what was already my view of procurement within the European Community: rules!

There is nothing inherently wrong with differences in this regard – but it came back to me when reviewing the procurement legislation in the EAC Partner States. Their commonality was the heavy rules approach – like, I thought, my OECD colleague from France. I concluded that (i) it was quite likely that some if not all of the Partner States’ procurement legislation had been developed by consultants, and (ii) it was likely that many if not all of those consultants had been from Europe. So, here I saw the European rules-heavy approach being spread around the world.

## **HUNGARY**

Budapest, 2003: the first workshop of the International Research Study of Public Procurement (IRSPP). The main aim was to conduct exploratory qualitative research to identify critical factors that appear to impact significantly on purchasing and supply in the public sector in the context of major government reform. Leading international academics and senior public procurement practitioners from 13 countries submitted

case studies: in Budapest fifteen cases were critically evaluated by case authors, invited senior practitioners and academics.<sup>ix</sup>

Dr. Jan Telgen<sup>4</sup> said the senior executives of most major corporations have no idea how reliant their organizations are on procurement; that those executives probably have no idea where their procurement staff are; and that if they do, it is probably in the basement beside the furnace room.

Here is procurement in perspective. We are little known – less appreciated – and only permitted to show our faces when something blows up and someone has to be blamed.

## **THE UNITED KINGDOM**

### **London**

In 2006 I saw a very interesting reference in documents from the U.K. Ministry of Defence<sup>5</sup>. It was a reminder of an internal notice circulated a couple of years earlier. Directed at everyone who might be in the review and approval of procurement proposals, it guided them:

- to limit their review activities to their area of responsibility (and it *may* also have said to their area of competence – but that might be asking too much of my memory); and
- to remember that the purpose of their review was to help move the proposal forward, including contributing to the identification of risks and the development of risk mitigation measures.

Words of wisdom, in my experience most often honoured in the breach. Most reviewers I know get their kicks out of finding ways to say ‘no’ – or from trying to get things done ‘their way’.

### **Cardif**

A short visit by telephone. Early 2010, I spoke with Martin Sykes<sup>6</sup>. He said that in talking to other public authorities he emphasizes that he does not automatically understand their business – the best he can do is talk about his operating context. More important, everyone has to look at their own particular operating context/environment in determining what is ‘best’.

One size does not fit all.

## **FRANCE**

Spring, 2007: at a small village Sunday market looking at the book vendor's stock, I find a motivational/how to succeed book written by Harvey Mackay more than 20 years earlier – and in it, I find a gem.<sup>7</sup>

Mr. Mackay wrote about a major infrastructure project that the Mayor of Boston had overseen. Later the Mayor and a number of others involved in the project went to jail for fraud. Justice, you may say – but Mr. Mackay raised interesting points. Yes, there was corruption – but:

- the job got done – which, given the nature of such public projects, might not have happened if the project had followed a 'normal' public approval process;
- it got done quickly – which again, given experience with such public projects, was quite possibly an anomaly; and
- the total cost, even including the corruption, was likely significantly less than had a 'normal' public procurement process been carried out.

I have tried unsuccessfully to confirm the details of the story on the Internet. True or not, it raises an interesting question: does the end justify the means – or conversely, can complying with the means justify not meeting the end?

## **BOTSWANA**

I was in Gaborone for a conference of the Commonwealth Public Procurement Network, speaking about procurement leadership and innovation.

I asked the audience of more than 100 senior procurement people from at least twelve countries – all involved in procurement policy development and operational overview – how many had direct operational procurement experience. No hands. I asked how many had experience in the supplier/business community. No hands

This struck home. When I retired from government and became a self-employed consultant, my view of the procurement marketplace changed radically. How can you design and/or oversee a function as complex as public procurement, if you have never actually tried to put a contract in place? You may build 'on paper' policy and procedures that look good, but which may create huge implementation difficulties. How can you create and manage a system that is supposed to result in effective working relationships between a public authority and its suppliers, if you have no idea of what the real world of the business community is? 'On paper' may look wonderful – but the effects on your ability to attract the

best contractors, and therefore to use procurement to best effect to support program operations, can be calamitous.

At the conference I heard and saw first-hand the problems of the participating countries, trying to deal concurrently with:

- major corruption issues – where one way to reduce the risks is to regulate every detail of procurement closely so that the ‘rules’ make corrupt behaviour much more difficult if not impossible; and
- the need to develop large procurement communities that can function well – but where the staff may lack knowledge, training and experience – and again, where one way to keep the process running is to set out every step in detail so that there is no doubt as to who is to do what, and when.

In both cases, a reasonable answer is masses of rules – like four pages of law on bid openings. This is the complete opposite of my philosophy that effective public procurement requires highly skilled professionals with the freedom/discretion to tailor their actions to the specifics of every procurement requirement. It confirmed what Martin Sykes had told me – don’t blindly follow the paths of others - do what your particular operational context requires.

So – seven countries yielding interesting information. Time to turn my attention closer to home.

## **UNITED STATES**

### **Washington(1)**

It is 2004: a dinner with David Drabkin <sup>8</sup> produces far more than either of us would ever have thought. We were talking (surprise!) about public procurement. I was saying that the U.S. government’s approach to competition in procurement was (i) clearly different from the Canadian one, and (ii) in my view not consistent with accepted international practice. While the different views are not relevant to my use of this anecdote, my view was based on the requirement to issue a proper open call for bids to meet every specific requirement; his I think was coming from the U.S. GSA Schedules, where much more buying can be done without such a formal call <sup>9</sup>.

He responded with (I think) eight words that changed my professional life: “It depends on what you mean by competition”. Talk about an eye-opener!

What I heard was: things are not always what they seem...just because you think something is true does not mean that it is; if all around you hold something to be ‘best’, it does not mean that it necessarily is for you.

### **Washington(2)**

I am now pretending to be in the Headquarters of the World Bank – seen by some to represent best practices in public procurement because of the clarity with which it defines procurement processes that recipients of bank funds must use to spend that money.

Those processes are very well defined: if you are lending someone money, you want to make sure that it is being well spent.

When a procurement is carried out using Bank funding, the Bank has a very explicit review and approval role. It seems to me, reviewing Bank documents, that this role focuses on whether a procurement was carried out *in strict accordance with procedures*: don’t follow the rules, no resulting contract. I have not yet found references to verifying that the procurement process will result in a strong contract that will produce needed results. Best value appears to take second place to compliance with rules.

One process supported by the Bank and used widely by the international community is the two stage approach: stage 1, solicit expressions of interest, and shortlist respondents; stage 2, issue the formal call for bids to those on the short list. Improperly used, this is a recipe for disaster. How difficult is it, having seen the short list, to then develop the actual call for bids – terms of reference and evaluation criteria – to deliberately favour/disfavour any short-listed supplier?

Notionally, a very effective approach – but in practice?

### **Atlanta**

At a Procurement Conference of the Americas shortly after hurricane Katrina had devastated New Orleans, there was an interesting snippet of conversation: in the U.S. emergency procurement authorities exist and obviously had been used extensively to deal with the disaster – but to use

those authorities you have to go higher in the management chain for approval.

In Canada, we also have emergency contracting authorities in the federal government. Interestingly, the core policy framework is to push those authorities *down* the food chain, not up. Personally I support this approach – when you are faced with an emergency, surely the last thing you want to do is try to chase down some senior executive to get approval to contract.

Here we have two countries, arguably at similar stages of development, working under essentially the same legal, moral and ethical values – and the same international rules - but doing things quite differently.

### **The White House**

This is a geographic location of convenience: I have never been there, and am not likely to be invited (remember my earlier comment about not being a diplomat?)

February 2009: President Obama signs a Stimulus Bill requiring maximum use of fixed price contracts for spending the stimulus money. A March 4, 2009 Memorandum from the President to Heads of Executive Departments and Agencies<sup>x</sup> reinforces that (i) Administration Policy is not to engage in non-competitive contracts except where they can be fully justified, and (ii) the preference will now be for fixed-price contracts, with cost-reimbursable contracts only permitted when circumstances do not allow an agency to define its requirements with sufficient detail to allow a fixed-price contract to work.

Fixed price contracts *can be* highly effective. However, making them the default approach is fraught with danger:

- people who know that in order to use another basis of payment they must argue and justify *ad nauseam* will be inclined to use a fixed price where it is simply not appropriate (because it is less onerous);
- the more you specify exactly what you want to buy: (i) the less scope there is for potential suppliers to give you innovative solutions (accepting that innovation is a key driver of economic development); (ii) the fewer suppliers will actually be able to bid, which starts to limit competition in the marketplace (and competition is supposed to be ‘good’); and
- if you are really good at specifying your requirement so that you can use a fixed price contract, you may deliberately or

accidentally (yeah, right!) end up in a situation where there is only one possible supplier – leading you to a sole-source situation which could have been avoided had you not been so wedded to putting a fixed price contract in place. One element of the ‘policy’ negates the other.

A simple and reasonable action taken to achieve a noble purpose can turn out to be something quite different: another version of the perils of the two-stage approach.

### **The Ivy Lea Bridge**

Another location of convenience, this is one of the major bridges that link the U.S. and Canada - and this is a Canada-U.S. issue. Again we are dealing with the American 2009 economic stimulus initiatives: Canadian businesses and politicians were highly upset. Contrary to public statements that free international trade is a good thing there appeared to be a growing protectionist ‘Buy American’ mentality in the U.S. Congress.

Pragmatism enters the scene here. Find a politician who is prepared to say to a constituent: ‘Sorry that you are going to lose your job, or your company – oh, you already lost it? Too bad – but first of all we can buy what we need more cheaply off-shore, and second, we are encouraging the globalization of trade, so we have to give off shore suppliers the chance to beat you out.’

Not going to happen, is it? Politics and pragmatism take center stage: in the right circumstances, ‘rules’ can become flexible.

### **CANADA**

The Ivy Lea Bridge is not far from where one of the battles of the War of 1812 was *fought* between the U.S. and Canada <sup>10</sup> – which opens the door for me to talk about *FOT* (sorry – bad pun).

### **Parliament Hill**

Welcome to the seat of Canada’s government – home of the House of Commons and the Senate – where our federal laws are made.

FOT is ‘fair, open and transparent’. In 2005, the Canadian government added a provision to its *Financial Administration Act*: “40.1 The Government of Canada is committed to taking appropriate measures to

promote *fairness, openness and transparency* in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.” (emphasis added)<sup>xi</sup>

Concurrently, the government created the Procurement Ombudsman, whose mandate in the *Department of Public Works and Government Services Act* includes: “22.1(3)(a) review the practices of departments for acquiring materiel and services to assess their *fairness, openness and transparency* and make any appropriate recommendations to the relevant department for the improvement of those practices...” (emphasis added)<sup>xii</sup> Neither statute defines what fair, open or transparent mean: the supporting Regulations<sup>xiii</sup> provide no clarification. The government will promote something, but does not actually say what it is.

The amendment to the *Financial Administration Act* relates clearly, specifically and only to the *bidding* process - only half the battle. What about designing a procurement for sole-sourcing: there is no bidding process. Since the government had the obvious opportunity to extend FOT to sole-sourcing, but did not, does not that argue that it has made absolutely no commitment to be fair, open and transparent in any activities that do not result in a call for bids?

The Ombudsman has defined ‘fair’ as meaning fairness to suppliers and potential suppliers. The federal government also disburses many millions of dollars using contributions, part of what we know as transfer payments. The federal policy on transfer payments says that ‘transfer payment programs are designed, delivered and managed in a manner that is fair, accessible and effective for all involved - departments, applicants and recipients.’<sup>xiv</sup>

Note the significant difference: ‘all involved - departments, applicants and recipients’ is not at all the same as ‘suppliers and potential suppliers’ – and even more distant from no definition at all. The ‘procurement’ approach seems to ignore the users – the operational managers: process trumps results.

In the procurement context ‘fair’ generally means level playing field – same information at the same time to all potential bidders; clear disclosure of what is to be bought and equally clear disclosure of how the winning bid will be selected; full presentation of relevant contextual information.

Certainly this is what Canada's courts – including the Supreme Court – have been telling us – but even they needed time to decide what 'fair' actually is. Robert C. Worthington, one of Canada's leading experts on contract law, wrote in 2004<sup>xv</sup> about the confusing nature of 'fairness'. After noting that "[f]or many years following this case, the courts floated a variety of phrases as they struggled to give us a definition that we could use to predict with reasonable certainty whether some action was fair or not," he referenced the decision of the Supreme Court of Canada in *MJB Enterprises Ltd. V. Defence Construction Ltd.*<sup>xvi</sup>:

"In essence, this means that the court should first look at the terms of the invitation/Request and then determine what degree of 'fairness' exists as the standard to be met. It is not an abstract concept of fairness (e.g., reasonableness) but fairness 'according to the rules', so the court must first see what the owner stated (and what the bidders by bidding agreed to be bound by) in the Invitation or Request. Then, the issue becomes did the owner follow the rules it originally laid out or did it do something else, which could have resulted in unfairness (the onus of which is on the bidder to prove)."

So – legal fairness is then after the rules for a procurement have been set – but public sector fairness starts well before that. Is that a step too far?

In a private home in Ottawa, a house painter is talking to the homeowner about the fact that even after he has won a public contract, and performed the work perfectly well, the next time around he has to go through the same bidding process. "I am a painter," he says. "I am a very good painter, I do very good work. I am not a filler-in of bids. It is not my skill set – and I don't have the time. I get no credit at all for being known to a public authority as a competent painter under contract. Besides, when I am preparing a bid, I am not painting and earning money – and for my small contracts, it is just not worth my time".

This gets us to the 'level playing field'. It has been defined as where "...they all play by the same set of rules"<sup>xvii</sup>. Let's get beyond the fact that any supplier that has already dealt with the public body calling for bids has an inherent advantage. The bidding process for public contracts is growing in length and complexity, and consequently is almost certainly being limited at least to some extent to larger firms with the resources to devote to bid preparation. The 'little folk' are likely being shut out. A level playing field, perhaps - but 'fair'?

What about the operational manager? Who is looking out for him/her?

**Place Vincent Massey**

This office building in the National Capital Region is a proxy for any of the offices of the many federal departments.

I developed for a client a statement of work and bid evaluation criteria for a major procurement. By the end of March one year, it was ready – from the program manager’s perspective. My contract ended – I lost sight. A year later I learned that it had taken almost 6 months to move the file through the department’s contracting organization. The requisition was then sent to Public Works and Government Services Canada for the actual conduct of an open call for bids. Shortly after its arrival there, the client was informed by the contracting officer that it *might* be possible to get the call for bids posted in 9 to 12 months.

People involved in the process would doubtless rationalize that these (to me) huge elapsed times are part of due process: I say it is delays. They would say that they needed the time to run the file through approval channels, to make sure that risks were properly identified and mitigation measures developed – all well and good: I say that they are becoming increasingly afraid of shadows – that there is a growing practice of not taking any action unless it can be demonstrated to be absolutely safe – that no-one can possibly object to any aspect of the process.

If we as individuals lived this way, we would never get out of bed in the morning because we might slip in the shower, or cut ourselves shaving – but then if we stay in bed that can be dangerous also, with things like bed sores and blood clots – so if we can’t get up and we can’t stay lying down, maybe we should just kill ourselves – but that might not work and we could end up crippled...

Paralysis.

**Esplanade Laurier**

Our final government visit is to the Treasury Board of Canada – general manager of the government, setter of the government’s overarching contracting policy. Until 2007, that policy was clear. While the Government Contracts Regulations provide that one of the few exceptions to the general requirement to call for bids was where the anticipated value of a contract was less than \$25,000, the policy

encouraged departments to call for bids at lesser values to achieve the benefits of competition.

As of September 2007, the policy – or at least its effect - was somewhat less clear. The Board, in its Contracting Policy Notice 2007-04<sup>xviii</sup>, said: “From the perspective of value for money, the high cost of awarding a Crown procurement contract far outweighs any economic advantage associated with competing goods and services contracts under \$25,000 - low dollar value buys, whether or not the requirement is subject to open bidding or otherwise competed.” To me, this says for requirements under \$25,000 do not call for bids – but in many departments the “old’ guidance applies, and there will be some form of competition for requirements valued at as little as \$10,000.

The door to fast and effective procurement was open – but departments refuse to walk through it because they are preoccupied with FOT...and process.

### **Toronto**

An interesting perspective from Dr. Matti Siemiatycki, Assistant Professor, University of Toronto, presented at the conference *Strategic Procurement and Sourcing: What does the Future Hold*, organized by IPAC in Toronto November 26-27, 2009. Using in-depth research into major real property projects around the world, Prof. Siemiatycki in his presentation *Improving Public Service Delivery through Corporate Performance Benchmarking* concluded that such major projects are consistently completed late and over budget, and once completed often fail to meet their stated expectations. For example, 28% of projects had cost overruns; 30% did not meet results expectations. He also noted that in most, substantive legitimate reasons for the problem(s) could be identified.<sup>xix</sup>

I took from this presentation several points. First, things are going to go wrong: you cannot avoid that. Second, project managers need to be alert: having undertaken such an initiative there is a major risk of performance issues that will have to be addressed – knowing that statistically the project is at significant risk of timeline, budget and/or results difficulties, that will have to be managed. There will be trouble: trying to avoid it using public service procurement rules is not going to work (remember Mr. Mackay and Boston?) Third, who is doing the work to try to reduce the incidence of those problems?

My travels are done: time now to come with me and talk with my wife.

### **MEET SUZANNE**

I do procurement, she does human resources, and we talk shop. During our chats, I have satisfied myself that there are huge similarities between the two disciplines, at least as they are *supposed* to be practiced by public authorities. Jobs and contract opportunities are advertised – anyone who feels qualified can apply/bid. Selection or evaluation criteria are disclosed in advance, and applied by committees of several members, rather than one person. The eventual ‘winner’ is chosen (one hopes) through due process in accordance with the published rules.

Suzanne noted that both procurement and human resources have two main objectives:

1. get the wherewithal to do the job; and
2. in the process, don’t favour your brother-in-law, cousin, golf partner, whoever.

So you have to get whatever it is you need, using a process that is not biased: you have a purpose, and a constraint.

The question is, how many constraints, and to what effect? Canadian federal departments that I speak with tell me that it can take up to 15 months to fill a staff vacancy – the procurement community is reporting completion times that are approaching that length...in either case where does that leave the operational manager, with program or policy objectives to be reached? Between a rock and a hard place.

### **ALICE IN WONDERLAND**

This then is the procurement world as I see it - as Alice remarked, becoming ‘curiouser and curiouser’.<sup>xx</sup>

American comedian Bill Cosby said: “I don't know the key to success, but the key to failure is to try to please everyone.”<sup>xxi</sup> He was not talking about procurement, but could well have been. Procurement today is being asked to deliver so many different and sometimes contradictory results to everyone that it cannot help but fail.

In fact, some clients of procurement services (is this limited to Canada?) would likely say it has already failed. If an operational manager cannot get what he/she needs to provide services to taxpayers in a reasonable

time, at a reasonable cost, and with a reasonable effort, surely that is a definition of 'failure'?

The situation becomes even bleaker, however, when you consider not just the growing array of rules being put in place, but the reason for those rules. The development of a rule that is designed to make procurement faster, better, cheaper, more accessible to suppliers – all those noble purposes – is increasingly rare. Instead, we seem obsessively focussed with fairness, openness and transparency – and with stopping crooks who will subvert the process – and concurrently with making sure that everyone involved in the process is 'safe'.

The situation becomes yet worse when one considers that virtually every rule put in place ostensibly relating to improving procurement processes – with the best of good intentions, mind you – almost always has a negative effect on the actual conduct of procurement and therefore on the ability of procurement to meet operational requirements quickly, efficiently and with strong operational results. Consider that:

- every added review process consumes time;
- efforts to open opportunities to as many bidders as possible require more effort (and resources) to develop statements of work and bid evaluation criteria that can cope with multiple solutions from increasingly unknown suppliers;
- increasingly complex bid documents takes more time to assemble, more time to prepare bids; more time to evaluate those bids;
- the more transparency there is in the system, the more people are likely to question and criticize, with resulting demands on public authorities to explain and justify their actions; and
- dealing with these and myriad other actions and consequences requires significant resources – all too often drawn away from direct operations (helping operational managers) to explain and justify.

Dealing with corruption is an excellent example. It is possible to conclude from my various references to corruption that I am sanguine<sup>11</sup> about the issue – but that would be wrong. I have no time for corruption – I take professional offence any time it is suggested that procurement people are corrupt. What I do not do is speak directly about it. It has never been a part of my professional life – and what I have not seen or experienced directly I treat with kid gloves.

That said, while eliminating corruption is both necessary and noble, at some point it needs to be guided by prudence and common sense. Every anti-corruption measure produces (at least, one hopes) benefits in terms of lessened opportunities for, and less actual, corruption. Concurrently, though, actions to reduce corruption will inevitably have an effect on areas of procurement where corruption has already been wrestled to the ground.

Simplistically, if you have a system that is 100% corrupt, obviously you want and need to take strong action. Likely the same holds if you have 50% corruption. However, consider a situation where corruption is limited to only a few of your procurement areas (perhaps a 10% corruption incidence) – what then?

If you take action to deal with the 10%, you will almost likely make it more difficult to support operational managers in the 90% of your business where corruption is not an issue: you affect negatively 90% of your work, seeking benefits in the remaining 10%.

In the overall procurement context, this is *not* a trade-off that should be made without serious consideration. As the Internet has demonstrated over the past 10+ years, the ‘bad guys’ are always one step ahead of the ‘good guys’ – they find and exploit flaws in the system, and even as the system develops defences the ‘bad guys’ move on to exploit other weaknesses. 100% safety is simply not achievable – but the cost of seeking to achieve it can be high.

I have seen a cartoon that illustrates the situation well: the road to Hell (you know the one – paved with good intentions) is under repair – so the only option is to go to Hell in a handcart. Take your pick – the mode of travel may change, but the destination is the same.

Not funny – not funny at all.

#### **TAKING ANOTHER ROAD**

In preparing this paper I benefitted from the sage advice of several people, one of whom suggested that I am arguing that there is a gap between the theory of effective public procurement theory and its implementation.

Clearly there is such a gap - but I am going down a slightly different path. We have the theory, but it has several dimensions: the problem is that we

are giving too much emphasis to one core element, and not enough to another.

The issue – the challenge – is achieving balance between on the one hand meeting the legitimate operational needs of public sector managers, and on the other clear public expectations for the best value expenditure of public funds.

My experience is that almost all attention is going to the latter – with the result that operational managers are receiving short shrift. We seem to have decided that when public procurement is fair, open, transparent and free from corruption we will have achieved ‘best’ – but give far less – *too* far less – thought to the fact that for procurement to be ‘best’ it must also meet the needs of operational managers.

To the extent that the ‘theory’ allows the legitimate needs of those managers to take a distant second place (at best) to the integrity of the process, the successful delivery of public programs and services must suffer.

How can we redress the balance?

Here are nine core steps, which are likely so self-evident that I take little time (in most cases) to explain them.

**1. Provide solid context.** We need to understand and tell people what public procurement is all about. This means clear priorities.

**2. Put some backbone into the procurement system.** If it is true that the road to failure is trying to please everyone, then the road to success means that whenever a decision is made or an action taken someone is going to be unhappy. So be it. We need to be led by competent people, who are allowed to do their jobs well, and who are empowered and ready to justify their decisions and actions openly and honestly.

**3. Put the right people in charge.** Whether it is politicians or senior bureaucrats, the ‘people in charge’ have to: have an appropriate level of seniority and experience; be recognized for their high level of professionalism, general competence and integrity; and possess the technical competence and skills required for the discharge of their functions.

**4. Put the right people to work.** Procurement people are special, and not everyone can be part of our calling: people should not be given

procurement roles because 'it is a job', or a stepping stone on the path to promotion.

**5. Promote excellence through flexibility.** Since no set of rules can anticipate and provide for every eventuality, sometimes the path to excellence lies elsewhere. That requires flexibility, rather than the rigid 'rule of law' that seeks to prescribe every aspect of every procurement activity.

**6. Dare to be Different.** When everyone is doing something the same way, it means that there is a common approach – but that does not automatically mean that it is a 'best practice' - either in general, or for any particular public procurement authority. You have to do what will work for you – even if that means flying in the face of conventional wisdom.

**7. Take the Broad Perspective.** Procurement is all about finding the best suppliers – and you can only do that if you deliberately and specifically look at the supplier side of every issue. One of the best ways to work effectively with suppliers is to simplify.

**8. Get the Framework Right.** Legislation, policy and procedures are very different things, and they should be created, managed and treated as such.

**9. Double the Value of every 'Step Forward'.** Every new rule has a reason for being. The problem is that all rules seem to be considered 'equal'. It is time to change this. We need to ensure that new rules – which tend to relate to process, oversight and control rather than improving the effectiveness of procurement – do not simply add to administrative burden and service deterioration.

Whenever a new rule is proposed - that will almost inevitably make procurement slower, more expensive and less supportive of operational managers - at least one existing rule should be removed such that the net result is procurement service improvement. This Darwinian approach should get rid of the adequate or good, and gradually replace it with 'the best'.

The question arising here is, if these prescriptions for improvement are so self-evident, why are they not being applied?

Now, here are five more that may be somewhat different.

**10. Stop using procurement to compensate for deficiencies elsewhere in 'the system'.** If it takes a long time to recruit new staff, public authorities may use procurement to acquire needed resources. A

procurement solution to a human resources problem may produce results in the short term – but with longer term negative consequences, such as higher costs, disenchanted staff and adverse publicity.

**11. Ensure an effective budgeting process.** Quality procurement takes time. In jurisdictions (like Canada) where procurement spending is tied closely to the fiscal cycle, delays in getting operating funds into the hands of operational managers inevitably result in strong pressures on procurement to achieve results faster. While this can be beneficial, if it means an ongoing seeking of improvements in the process and its cycle times, it can also be highly detrimental when spending fast (cutting corners to ‘get me what you can’) takes priority over spending well. Further, when efforts are ‘caught’ the corner-cutter is far more likely to be fired for breaking the process rules, than for not achieving operational objectives.

**12. Don’t expect procurement to cure all ills.** Public procurement and the potential for or actual corruption go hand in hand. Changing the procurement rules can achieve significant improvements – but those rules by themselves cannot be the entire solution (even excluding the harmful effects throughout the procurement system.)

No mountain of procurement rules can deal with procurement staff salaries that are not enough to raise a family, or a justice system that allows corruption to go unpunished<sup>12</sup>. Enforcing rules on public servants cannot succeed when politicians have the power to influence or direct decisions while concurrently owning or being associated with major service providers.

A former boss of mine used to say ‘first you change behaviour, and then you change attitudes’. Procurement rules can if implemented (and that is not always the case) change behaviour. If you not deal with the attitudes, you are never going to solve the problem – and changing attitudes is not a role for procurement.

**13. Stop closing the door on suppliers.** No amount of rules will give the results you need if quality suppliers will not deal with you – and a plethora of actions may have this result. The perils of slow payment are well-known – but providing poor answers to supplier questions may have the same result (‘why should I deal with you when you obviously have no interest in me as a bidder’) – or refusing to tell a losing bidder who won a contract and how much it was worth (‘I should trust you – what are you hiding?’) – or mismanaging letters of interest.

This last point needs explanation. Frequently, a public body will invite letters of interest and specify that only short listed suppliers will be contacted. I presume that this is an administrative savings measure – but you can only expect a supplier to send off so many letters into the blue, before they decide that it is not worth the effort. Potentially worse, though, is the situation where a supplier gets a call a year after the fact, asking them to bid on an opportunity – so much time has passed, they have forgotten<sup>13</sup>.

**14. Beware of unintended consequences.** I have said that for me procurement is like human resources. There may be important benefits to be realized if we start running our staffing processes like we are supposed to do procurement – full and open disclosure, non-discriminatory selection criteria, ruler-straight candidate evaluation, award according to the rules, and the right to a debriefing. How can you expect someone to believe that your procurement processes are fair and open, if your hiring practices are not?

I have experienced this first-hand in human resources – perhaps there are other areas of public sector operations where the same may occur?

## CONCLUSION

The Pareto Principle says generally that for many events, roughly 80% of the effects come from 20% of the causes.<sup>xxii</sup> It can be ‘applied’ to procurement in many ways, such as:

- 20% of the actions will cause 80% of the grief; or
- 80% of the results will accrue from focussing on 20% of the files; or
- 80% of procurement actions will unfold well, 20% will not.

With absolutely no scientific research to back me up, I believe that the last numbers cited are pessimistic. Rather, with the support of the measures I have set out 80% of procurements will be completed successfully almost by themselves. Another 10-15% will be successful with some special care and attention such as handling by experienced staff, some quality assurance measures, and real consultation with stakeholders.

No matter what you do, though, a small number – 5-10% – will cause problems. **You cannot avoid this.** They may be unusually complex, or difficult to define; circumstances or staff may change; political considerations may have unusual importance.

What I see, though, is inordinate concern, sometimes amounting to paranoia, stemming from that 5-10%: people simply are not prepared to accept any problems at all. To protect themselves they put in place all sorts of measures designed to avoid any dissatisfaction on the part of any stakeholder.

I suggest that this is doomed to failure:

- you simply are not going to make everyone happy all of the time. Something is going to go wrong: when it does, deal with it, and move on;
- much more damaging, in trying to achieve 100% happiness organizations tend to extend their 'preventative' measures across the entire spectrum of their procurement activities. Seeking to avoid the 5-10% of problem files, the 80% of files that would have gone off perfectly well are then at significant risk.

What I see is lots of good intentions, but the result is that everything gets messed up. The road we are taking has us perilously close to an unpleasant destination: people will use our wonderfully transparent approach to see that we are fair, and open, and free of corruption – and that public procurement has ceased to work.

We are on the Road to Hell, paved with good intentions.

#### **POSTSCRIPT**

As this paper was being completed, I thought it would be interesting to see whether others submitted for IPPC 2010 in Seoul provide any indication – one way or the other – as to whether the 'theory' it expresses is valid. My theorem: if my thesis is correct, virtually all of the papers should deal with just about any issue other than how to use procurement well to support program operations.

Dr. Khi Thai <sup>14</sup> was kind enough to provide a list of the papers, by title only – and I tried to allocate them to various topics: (i) the use of procurement to support socio-economic development; (ii) procurement as a profession; (iii) fairness, openness and transparency (including corruption); and (iv) the effective use of procurement. I quickly found that using paper titles is like trying to determine the actual subject of a procurement – not easy. My conclusions for 163 papers:

- (i) socio-economic: 27;
- (ii) profession: 4;
- (iii) FOT; 14;

- (iv) effective procurement: 25; and
- (v) unable to allocate: 93.

Some might say that of the 70 papers I could ‘identify’, the largest single number relate to effective procurement – so my theory must be wrong. Others would argue that only 20 of the 70 – 36% - are for effective procurement, so obviously effectiveness is not getting enough attention and the theorem is correct.

I say this quick and dirty proves nothing – too many unknowns. Only Seoul will tell.

I said earlier that I am not a diplomat: obviously, I am not an academic either.

#### NOTES

- <sup>1</sup>. More information about this company is at [www.rfpsolutions.ca](http://www.rfpsolutions.ca)
- <sup>2</sup>. I have tried without success to find this document on the OECD website: it was sent to me by e-mail.
- <sup>3</sup>. U.S. Senator Robert Byrd used the story in a speech on October 17, 2003. I use this reference with some trepidation: Neil Galman, U.S. novelist, apparently said “It has always been the prerogative of children and half-wits to point out that the emperor has no clothes. But the half-wit remains a half-wit, and the emperor remains an emperor.” [On-line] Available at <http://thinkexist.com/quotations/clothes/> [Retrieved March 10, 2010]. Since I am neither child nor emperor...
- <sup>4</sup>. Dr. Jan Telgen, PhD: Professor of Applied Operations Research and the NEVI Professor of Purchasing Management at the University of Twente, Enschede, the Netherlands; CEO and a partner of the consulting firm Significant; and chairman of the Netherlands Platform for Public Procurement.
- <sup>5</sup>. When I retired from the government, I lost access to these documents, and so cannot cite properly. They were not classified.
- <sup>6</sup>. Martin Sykes, now Chief Executive, Value Wales; formerly head of the Government Procurement Service, U.K. Office of Government Commerce. I will always turn to him to understand public procurement in the U.K.
- <sup>7</sup>. Harvey Mackay is a well-known motivational speaker, and at the time headed the Mackay Envelope Company. This book (approximately 1984) is titled *Beware the Naked Man Who Offers You His Shirt*: unfortunately it is sitting on my bookshelf in France, and I cannot find

- proper citation information on the Internet – but it does exist: see a 1990 book review at <http://www.ew.com/ew/article/0,,316769,00.html>
- <sup>8</sup>. David Drabkin, is now Deputy Associate Administrator, Acquisition Policy and Senior Procurement Executive of the U.S. General Services Administration on January 11, 2008. He is, I think, the most senior non-political procurement executive in the U.S. government.
  - <sup>9</sup>. I found out early in 2010 that I was less than right – but that is another story.
  - <sup>10</sup>. For history buffs – the Battle of Crysler’s Farm: November 11, 1813: sometimes called the Battle that Saved Canada - we won.
  - <sup>11</sup>. Someone else said this of my position, and I had to look it up. I think it was being suggested that I am optimistic, cheery – otherwise put, too accepting of corruption as a way of business life.
  - <sup>12</sup>. Too long ago to be included in my travels – I was in a country where returning people would routinely pack in the top of their suitcases ‘gifts’ for the customs officer: no ‘gift’, and apparently (so the people told me) the officer would go through the suitcase until an appropriate item was found, and then take it.
  - <sup>13</sup>. This actually was experienced by a colleague of mine in Africa, who was there for the conversation between government buyer and supplier – I did not include in my travels because it did not happen to me.
  - <sup>14</sup>. Dr. Khi Thai, professor at Florida Atlantic University, editor of a number of major procurement journals, initiator of IPPC, and both a driving force behind IPPC 2010 and Co-Chair of its Scientific Committee.

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- <sup>ii</sup> East African Community: *Portal*: [On-line] Available at <http://www.eac.int/> [Retrieved June 2, 2010]
- <sup>iii</sup> Princeton University: *WordNet*. [On-line] Available at [www.wordnetweb.princeton.edu/](http://www.wordnetweb.princeton.edu/) [Retrieved March 2, 2010]
- <sup>iv</sup> Wikipedia: *Profession*. [On-line] Available at [www.en.wikipedia.org/wiki/Profession](http://www.en.wikipedia.org/wiki/Profession) [Retrieved March 2, 2010]
- <sup>v</sup> Canadian International Trade Tribunal: *Procurement*. [On-line] Available at [http://www.citt.gc.ca/procure/index\\_e.asp](http://www.citt.gc.ca/procure/index_e.asp) [Retrieved March 2, 2010]
- <sup>vi</sup> Organization for Economic Cooperation and Development: *Integrity in Public Procurement: Good Practice from A to Z*. [On-line] Available at

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[http://www.oecd.org/LongAbstract/0,3425,en\\_2649\\_37405\\_38561148\\_1\\_1\\_1\\_1\\_00.html](http://www.oecd.org/LongAbstract/0,3425,en_2649_37405_38561148_1_1_1_1_00.html) [Retrieved March 2, 2010]

<sup>vii</sup> Organization for Economic Cooperation and Development: *Topics*. [On-line] Available at [http://www.oecd.org/maintopic/0,3348,en\\_2649\\_201185\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/maintopic/0,3348,en_2649_201185_1_1_1_1_1,00.html) [Retrieved March 2, 2010]

<sup>viii</sup> Hans Christian Anderson, *The Emperor's New Clothes*, 1847. An excellent summary of the story is at Common Dreams.org: *The Emperor Has No Clothes*. [On-line] Available at <http://www.commondreams.org/views03/1018-01.htm> [Retrieved March 10, 2010]

<sup>ix</sup> This was the first of four (so far) IRSPP sessions: for more information see International Research Study of Public Procurement [On-line] Available at <http://www.irspp.com/index.htm> [Confirmed March 2, 2010]

<sup>x</sup> The White House, Office of the Press Secretary *Subject: Government Contracting*. [On-line] Available at [http://www.cdc.gov/fmo/topic/Recovery\\_Act/recovery\\_act\\_files/POTUS\\_Memo\\_Contracting.pdf](http://www.cdc.gov/fmo/topic/Recovery_Act/recovery_act_files/POTUS_Memo_Contracting.pdf) [Confirmed March 2, 2010]

<sup>xi</sup> Financial Administration Act: R.S., 1985, c. F-11

<sup>xii</sup> Department of Public Works and Government Services Act (1996. C. 16

<sup>xiii</sup> This includes the *Government Contracts Regulations*; [On-line] Available at <http://laws.justice.gc.ca/en/ShowTdm/cr/SOR-87-402//20090812/en> [Confirmed March 15, 2010]; and the *Procurement Ombudsman Regulations* [On-line] Available at <http://www.gazette.gc.ca/rp-pr/p2/2008/2008-05-14/html/sor-dors143-eng.html> [Confirmed March 15, 2010]

<sup>xiv</sup> Treasury Board *Policy on Transfer Payments*. [On-line] Available at <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13525> [Confirmed March 15, 2010]

<sup>xv</sup> Worthington, Robert C.: *The Public Purchasing Law Handbook*. ©LexisNexis Canada Inc., 2004: pages 127 – 129.

<sup>xvi</sup> Supreme Court of Canada: *MJB Enterprises Ltd. V. Defence Construction Ltd.*: [2000] S.C.J. No. 60, [2000] 2 S.C.R. 860

<sup>xvii</sup> Wikipedia, *Level playing field*. [On-line] Available at [http://en.wikipedia.org/wiki/Level\\_playing\\_field](http://en.wikipedia.org/wiki/Level_playing_field) [Retrieved March 12, 2010]

<sup>xviii</sup> Treasury Board of Canada: *Contracting Policy Notice 2007-04 – Non-Competitive Contracting*. [On-line] Available at [http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/ContPolNotices/2007/0920-eng.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0920-eng.asp). [Retrieved March 2, 2010]

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<sup>xix</sup> Siemiatycki, Dr. Matti: *Improving Public Service Delivery through Corporate Performance Benchmarking*. Presentation at the conference *Strategic Procurement and Sourcing: What does the Future Hold*, organized by IPAC in Toronto November 26-27, 2009. The IPAC web site at <http://www.ipac.ca/IPACpresentations> says that presentations are only available to IPAC members. [Retrieved June 2, 2010]

<sup>xx</sup> Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter 2, line 1

<sup>xxi</sup> Quoteland.com: *Success and Failure*. [On-line] Available at [http://www.quoteland.com/topic.asp?CATEGORY\\_ID=137](http://www.quoteland.com/topic.asp?CATEGORY_ID=137) [Retrieved March 2, 2010]

<sup>xxii</sup> Wikipedia: *Pareto Principle*. [On-line] Available at [http://en.wikipedia.org/wiki/Pareto\\_principle](http://en.wikipedia.org/wiki/Pareto_principle). [Retrieved March 2, 2010]