

POWER



R TOOLS FOR general counsel

Creating RFPs that really deliver the goods

Exponential expansion in the use of Requests for Proposals (RFPs) has placed a powerful tool in the hands of general counsel — one that they use with uneven skill. Here are the pitfalls to avoid and the keys to making RFPs clear, fair and effective.

By Pamela H. Woldow

Recently, the general counsel of a major corporation met with us to discuss consulting support for a Request for Proposal (RFP) process that would winnow down the number of outside law firms they would use in the future. But he mentioned an astonishing twist: “Of course, we’ve already selected the firms we’ll use.”

When I asked why they would go through an expensive and time-consuming exercise (for them and for law firms that responded) when the outcomes were already determined, the GC replied: “Well, to make the selection process look fair.” It turns out that the real purpose of this RFP

was not to select the best counsel, but to avoid hard conversations and potential acrimony with the firms that would be “de-selected.”

I suggested that rather than go through an elaborate and costly charade, they simply start using only the firms they knew they wanted to use. The senior members of the legal team looked at me as if I had uttered heresy. “You have to understand,” the GC objected, “*we want to get rid of a bunch of firms*. An RFP will provide a gentlemanly way to do so that appears fair and objective.” For obvious reasons, we declined to participate in an engagement that would be an exercise in avoidance rather than a valid way to change the company’s status quo.

This GC and his senior colleagues, let me emphasize, are not devious or disingenuous people suffering from Integrity Impairment Disorder. They are fine lawyers with a record of sound management of the corporate legal function. But their aversion to conflict illustrates how the stresses accompanying the new face of client-law firm relations can distort the RFP process.

Shifts in the balance of bargaining power mean that to an unprecedented degree, the client now can call the shots in selecting and retaining outside counsel. The problem, a lot of chief legal officers admit somewhat sheepishly, is they don’t necessarily know who to shoot, when to shoot, or how to shoot. Many have been thrust into dramatically altered relationships with outside counsel that require them to be more aggressive, make decisions that are bound to displease someone,

and perhaps put longstanding friendly relationships at risk.

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KINDER AND GENTLER IS NOT BETTER

On one hand, one can’t blame general counsel for seeking non-confrontational options for tough decisions. On the other hand, however, a “kinder, gentler” approach can backfire, producing distrust and

resentment that erodes the lawyer-client relationship. We have assisted several law firms with responding to RFPs, and many have voiced their suspicion that the RFP process may be a pre-determined and artificial beauty contest, or even that their RFP responses may be shared with their competitors.

Law firms face a tough decision about whether to even bother spending the hours and the thousands of dollars required to prepare a thoughtful, thorough RFP response. In many cases, we often suggest that the firm take a

pass on responding unless it already enjoys some form of relationship and service history with the client. Incumbents rule, and newbies are very much long shots unless they can boast some extraordinary differentiator in expertise, experience or price that will get them through the screening process. On the other hand, if a well-crafted RFP suggests a level playing field and if an RFP “win” really is likely to provide actual economic gain, we will help them frame a competitive response.

NEW PRESSURES, NEW PRIORITIES

General counsel have always had to exercise judgment about which firms and vendors will best serve their companies across a spectrum of legal matters. Historically, however, the approved vendor list expanded almost without limit (and often without discipline). It seemed a win-win situation for everybody; the only damage was to the corporate legal budget.

Those days are done. Unlimited client rosters of “acceptable” outside counsel led to an entitlement mentality among law firms that chief legal officers are now using RFPs to unwind. We hear about law firms expressing outrage that their annual bite out of the fatted calf might not be as big as before; so imagine the wrath a General Counsel contemplates when pushing firms away from the table altogether. GCs aren’t coaching peewee baseball, where everyone gets an equal chance to play. “Today,” one American GC told us, “it’s a new game. It’s called ‘Tough Darts.’” In England, it’s called “Hard Cheese.”

CUTTING BOTH WAYS

Serving as a law firm to a corporate client is neither an entitlement nor a sinecure, and firms cannot behave as if it is. They must earn the right, every day, to sell their services to a company by delivering excellent results, predictability, and consistent value.

But that cuts both ways. General counsel have the responsibility to exercise sound judgment and make choices that support the company’s goals, not the vendors’ interests. Hiding behind a bogus RFP process to avoid taking heat from disenfranchised law firms is not merely a waste of everyone’s time and money; it also undermines the GC’s authority. We are entering a “Strong General Counsel” epoch in the legal profession, one in

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which GCs must learn to wield, and appear comfortable wielding, their strengthened leverage.

WHY ISSUE AN RFP?

Even if they're not always skillfully drafted or implemented, most RFPs can confer enormous value in selecting outside counsel if the time and circumstances are right. Here are the three most common situations in which RFPs are called for:

1. A new general counsel needs to put his or her personal stamp on the office, or act as a new broom sweeping clean.

When a GC joins a company, she is obliged to examine the law firms that served her predecessor and she is fully entitled to select firms that support her philosophy, strategy and objectives. She is also permitted to give preference to vendors whose loyalties run to her, not to the previous occupant of her chair. Finally, changes in the legal marketplace call for her to aggressively seek out fresh ideas and approaches. An RFP can be an excellent way both to become acquainted with a broad range of law firms and to help get the GC

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2. The company is confronting new or unique challenges and legal needs that cannot be addressed by the current roster of firms.

There will be times when a company faces a new issue, a new technology, or a matter of first impression. It might involve a new regulation in a specialized area or an unusual

case in a faraway jurisdiction. If the incumbent law firms do not have the requisite expertise or geographic coverage, an RFP can be the best way to identify a firm that can provide what the company needs right now.

3. The GC wants to send a clear, unequivocal message about new priorities within the company or the legal department.

In the last few years, we have seen RFPs clearly intended to communicate to firms one simple fact: the company's legal priorities have changed. In 2008, 2009 and 2010, as economic pressures mounted, flurries of RFPs appeared

seeking services at lower prices and in more creative configurations: they were vehicles announcing that “business as usual” was over. These RFPs shook firms out of their complacency; equally important, they demanded that firms back away from automatic annual rate increases that far exceeded inflation and other costs of doing business. Their message was clear: “You are in serious competition for the company’s business. Compete or lose.”

WHAT MAKES A GOOD RFP?

Someone once defined a camel as a horse designed by a committee. Many RFPs, it’s fair to say, suffer from “camel syndrome.” Many people want a hand in the process, so the end product looks like an aggregation of random information requests, few of which are relevant.

In my experience, many RFPs ask for far too much information — and when that information arrives, no one knows quite what to do with it. I’ve seen RFPs ask hundreds of questions that generated hundreds of pages of answers, but most of the requested information has no bearing on the purpose of the RFP and will not be used to evaluate or select law firms.

It’s disrespectful, in my opinion, to require law firms to spin their wheels like this. They are squandering significant resources answering questions that no one cares about or will ever review. In most situations, only a few core items of information really bear on the suitability of the competing firms.

For that reason, I’m delighted to report an emerging trend in which RFPs concentrate only on a few essential questions. Recent RFPs issued by FMC Technologies (which made a point of calling their request a “Non-RFP”) and Pfizer were both brilliant. Each was concise and was tightly focused on relationships, collaboration, and company values. The fundamental issue was not about legal competency; it was about trust. After all, GCs want firms they can trust to deliver value and high-quality legal services, so why not get right to the all-important trust issue up front?

GET IT RIGHT OR LOSE THE RELATIONSHIP

The question of trust suggests a final and supremely negative impact of a bogus RFP: the lamentable but all-too-common lack of follow-through with the selection process after RFP responses have arrived. What message

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RFP trends

Here are examples of demands made by corporate law departments in recent RFPs. Get used to them.

What we will not pay for:

- *Time spent by summer associates and first- and second-year associates*
- *Third-year associate time (except in limited circumstances)*
- *Time spent debriefing lawyers on the results of meetings or teleconferences*
- *Time spent educating new or replacement lawyers added to the team to become familiar with the project*
- *Lawyers who are not part of the core team.*
- *Rate increases in 2011*
- *Busted deal fees in transactions*

What we want at no additional cost:

- *Open counseling line*
- *Multiple short-term secondees (less than six months)*
- *Non-billable advice*
- *Continuing legal education training*
- *Extranet technology*
- *Online research resources*
- *Educational seminars*

does a law department send to law firms when, after issuing an RFP with a strict deadline and receiving all the replies, it dawdles over evaluation, or worse again, never finishes the process or makes its selections known?

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There are legal departments that have become infamous for sending out RFPs that result in nothing but profound radio silence. For a law firm, responding to those legal departments is like tossing \$30,000 to \$50,000 worth of time and effort into a black hole. The result is a once-burned-twice-shy law firm that either hesitates to respond to future RFPs — a lose-lose outcome for both sides — or turns out mundane, off-the-shelf RFP responses.

Similarly, if a company does complete an RFP process but either does not send the promised business to the “winners” or continues to send business to friends at firms that were supposedly “de-selected,” both the company’s and the GC’s credibility are eroded. The law firm-client relationship will suffer accordingly.

If GCs want to be seen as trustworthy within their own organizations, in their legal departments, among their outside counsel, and in the legal marketplace, then they need to stand tall, play it straight, and show respect for the RFP process they rely on to identify the best and most loyal alliance partners. •



Transformative innovation

Pamela Woldow has earned global recognition for her pioneering approaches to transforming today’s law firm-client relationships. Drawing on her deep expertise in Legal Project Management, Convergence Programs, Alternative Fee Arrangements, RFPs and law firm selection, Pam helps law firm lawyers work more profitably while also providing better value to clients, and she counsels corporate legal departments in containing costs and creating stronger alliances with outside counsel.

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