What's wrong with information technology solicitation and what government lawyers can do about it

by William W. Warren Jr., partner, Saul Ewing LLP, Harrisburg. This article reflects solely the opinions of the author. Any comments on this article should be submitted to the editors.

The commonwealth's procurement of information technology (IT) services and equipment is a source of recurring problems. Contrary to the views of many state administrators, the issue is not whether there are too many bid protests. Given the great fear on the part of IT vendors of adverse consequences associated with protesting (whether that fear is real or perceived), in my view there are not enough protests and challenges testing the adequacy, propriety and sometimes the wisdom of IT procurements in an effective manner. Neither is the problem rapacious vendors clamoring to rip off the state treasury. Instead, the issue as I see it is whether there are sufficient numbers of qualified vendors willing to weather the rather harrowing processes, risks and great expense of preparing proposals. At stake is the credibility of and confidence in state IT procurement. There are too few vendors participating and too little credibility in the process. This problem is not of recent vintage or connected to any particular political administration. As Walt Kelly in the *Pogo* comic strip famously said, "We have met the enemy and he is us." It is in our culture. The question for government attorneys is whether there is anything that can be done to improve that culture and make IT procurement more successful. And the answer is yes.

There are two things that government attorneys advising state agencies in connection with commonwealth IT procurements can do. Neither can be accomplished overnight. I think that these ideas can be implemented successfully without statutory change, but I leave that question to others and to the process and evolving nature of common law and administrative agency policy. I am simply being prescriptive here, out of my desire to see the legal aspects of IT procurement improve.

At stake is the credibility of and confidence in state IT procurement. There are too few vendors participating and too little credibility in the process.

First, the "seven-day rule," as it is commonly called, must be applied with greater circumspection and waived when necessary. Because the "seven-day rule" in my view isn't a rule and is really two separate and distinct requirements, I reject the proposition that government attorneys have no choice but to approach timeliness issues during the course of solicitations inflexibly and rigidly.

Secondly, bid protests must be handled, not as a litigation game, but as a method of airing doubts about the propriety of the procurement, the decisions of the involved officials and the like. We need to change the rules and practices that prevent vendors from getting answers to their questions and instead facilitate review by granting more freely to the protesting vendor the documents and information relevant to and relied upon in responding to protest. In short, the disclosure procedures need to be applied more flexibly and no longer used as tactical litigation weapons against the agencies' IT contracting partners — the vendors. The Commonwealth Procurement Code was, after all, specifically adopted to provide a remedy to disappointed bidders that was realistic, substantive and readily available. The Code was not adopted to provide a remedy that was illusory or a remedy that in reality is a sham.

The Death of Reason: the Seven-Day Rule

The "seven-day rule" has been applied with undue inflexibility. In my view, too many protests are responded to reflexively by an objection as to timeliness. Dismissals grounded in the "seven-day rule" are issued by the agencies and courts, and all too often the substance of the protest receives inadequate attention. In the vernacular, the analysis of the substance of the protest becomes only "make-weight," by which I mean to say that substance is given inadequate attention. Vendors want to know what happened substantively; a dismissal on this procedural ground suggests to vendors that the state is hiding behind an unfair rule of mere procedure.

The "seven-day rule" in actuality consists of two separate components: As all understand, a vendor has seven days to file, measured from when the vendor knew or should have known of the grounds for a protest.[2] Title 62 Pa. C.S. §1711.1(b) provides, in pertinent part, that

> … the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest.

I call this the first seven-day period for the filing of a protest.

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However, subsection (b) continues, again in pertinent part, providing that "… in no event may a protest be filed later than seven days after the date the contract was awarded." This second seven-day period could have easily been five days or 10. The drafters of the Commonwealth Procurement Code created this second, seven-day period as an absolute bar to *any* protest by a disappointed bidder. Here, there is clear intent to create a final and very inflexible deadline for action. Can the same be said for the Code's first seven-day period?

What seems to attract little attention, perhaps because both periods are seven days in duration, is that it is only the second seven-day period that is explicitly inflexible, hard and fast. The first seven-day period is triggered by a "knew or should have known" standard. There is nothing inflexible or rigid about a standard of this nature. While the second seven-day period has to be inflexible in order for procurements to proceed in a timely manner, it makes considerably more sense, putting aside the tactical advantage an inflexible approach provides to the agencies, for the commonwealth to think twice before applying the first seven-day period to bar a protest.[3]

Application of the first seven-day period should instead be flexible. For example, there is no reason to compel vendors to protest an RFP within seven days of its issuance if the RFP includes a question-and-answer process that could resolve the issue. The state's interest is in avoiding a delay in a procurement unnecessarily; prematurely filed protests create delay. Why adopt a policy that encourages interference in the solicitation process prematurely?

Moreover, knowledgeable commonwealth counsel know how reluctant vendors are to raise objections. If anyone doesn't know this, let me tell you: there is great reluctance. In any event, this fact should be clear from the number of occasions when protests are filed and commonwealth lawyers see the opportunity to argue that the protest is late and untimely. Vendors hold off filing until circumstances force them to take action. But merely because this procedural objection can be raised by agency counsel does not mean it should be.

There is no reason to use the first seven-day period to bar necessary, legitimate and, I respectfully suggest, helpful inquiry into the solicitation process. Which is preferable from the standpoint of the citizens of the commonwealth: successful avoidance of a necessary inquiry through aggressive use of this defense or the securing of answers to legitimate questions raised in the course of a solicitation process? The question answers itself. When a serious question has been raised, applying the first seven-day period rigidly is a mistake. In order for vendors to participate on an on-going basis in commonwealth procurement, they require honest answers to important questions.[4] What they often get instead is a defend-at-any-cost reaction that is short-sighted and self-defeating.

It would be better to look at the application of the first seven-day period with a measure of flexibility. Was it absolutely certain that the problem could have been identified when the RFP was issued, when the amendment or addendum was received or when the question during Q&A was answered? Most potential problems arise in a factual matrix that is somewhat complex. Close questions should be called in a way that favors the securing of answers to legitimate questions. Stated another way, agencies are required to apply the "knew or should have known" standard according to the facts presented.

Even where there is neither doubt nor ambiguity as to whether a matter could have been raised at an earlier time, it often would make perfect sense to permit the protest to be heard on the merits and the objection based upon the seven-day period waived. The solicitation process may not have reached the point where proposals are due. Even if proposals have been received, the tactical objection can be waived so that serious questions can be answered. Waivers are allowed in contexts too numerous to mention. Constitutional rights can be waived. Courts can allow time periods to be extended, both before and after a deadline. Courts also treat seemingly mandatory legislative commands as merely directory instead.[5]

What the agencies are really saying when the first seven-day period is invoked rigidly for tactical advantage is that the concerns of the protesting vendor are not significant enough to be heard. Nothing in the mere existence of the first seven-day period suggests that waiver is beyond the discretion of the agencies and agency counsel. Sure, it is nice to be rid of a case and check off a box on the list of things to do. But be aware that invocation of the first seven-day period as a tactical defense leaves vendors believing the worst. This contributes to disrespect for the process and contributes to decisions to withdraw from the commonwealth IT market. And many important potential vendors have done just that.

At the same time, the second seven-day period, by its very nature, must be applied as a true "drop dead" deadline. In contrast to the first period, the second has all the elements of a mandatory and not merely directory statutory command.

The benefit to commonwealth IT procurement from a policy change led by agency attorneys will be substantial. Such a change would benefit the commonwealth through greater vendor confidence in decision-making and higher levels of vendor participation.

Hiding the Ball: Access to Documents and Information

Similarly pernicious is the way in which the statutory provisions on access to documents and information are applied. In my view, there are re-

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ally two stages of the protest process that involve access to documents and information.[6] The first involves a disclosure under 62 Pa. C.S. §1711.1(d) of documents and information the contracting officer "deems relevant" to the protest during the course of the contracting officer's review of the protest.[7] The second occasion for disclosure is during the evaluation of the protest by the agency head or designee under §1711.1(e). The documents and information to be disclosed by the head or designee are those "deemed necessary" to render a decision.[8]

These provisions would seem to be easily understood. If the contracting officer has used documents or information in responding to the protest, then those documents and information were deemed relevant or he or she wouldn't have used them. The documents and information must be "include[d]" in the contracting officer's response. Documents and information are therefore producible under subsection (d).

Likewise, if documents or information are used by the head or designee in resolving the protest under subsection (e), then they should be producible. Specifically, the head or designee is required to "provide" documents and information "deemed necessary" for a decision. Documents and information are therefore producible under subsection (e).

For what reason, other than a tactical one, would a state agency seek to withhold documents or information that fall within one or both of these subsections? Does it make any difference that documents and information are to be *included* in the contracting officer's response under subsection (d), while documents and information are to be *provided* in the decision of the head or designee? Or is this a difference without a distinction?

Notwithstanding what the courts decide,[9] agencies and their counsel should be generous in making decisions on disclosure. There is, of course, a way of protecting information that is truly confidential. At the same time, ultimately, the documents used by the contracting officer and the head or designee will be obtainable under Right-to-Know. Agency counsel should be most interested in any arguments that can be fashioned from documents or information connected to the protest while the protest is still pending. Finding out that something was done incorrectly after-the-fact is hardly helpful to building a trusting relationship and attracting vendors.

If the disclosure of documents and information occurred liberally, the agencies could be more confident of their decisions, and vendors, more confident of the fairness of the protest process. If information that is relied upon is not tested, i.e. is not presented to the protestant to see if there is contrary information that may affect the decision making, the quality of protest decisions will suffer. The failure of the contracting officer or the head or designee to disclose documents or information that he or she views as pertinent is bad policy and is a practice that agency counsel need to address. If the documents and information are not provided, the prospective vendor will believe the worst. There is no reason for this state of affairs. No one likes to have his or her decisions questioned and challenged. But instilling confidence, increasing participation and assuring propriety in the IT procurement process are overriding policy objectives and in everyone's interests in the long run.

An anecdote from my experience as a governmental attorney for school districts and local governments illustrates the point I am attempting to make here. Sometimes in public construction contract bidding, contractors believe that they are being treated unfairly. The practice at the local level is to open the bids for examination at the time of bid opening. Thereafter and historically, the bids and all associated attachments, the bid tabulation and the like are not available for review. The construction bidders do not attend bid openings with counsel. Indeed, construction bidders are often represented by individuals who are not the highest-ranking or most-experienced individuals in the organization. Oftentimes, the right questions are not asked at time of bid opening. Tactically, when asked thereafter for disclosure of the bid documents, the local government's solicitor can "hide the ball," and force the bidder to either file a taxpayer challenge in local court blindly or abandon the effort. Abandonment involves leaving at least one bidder unsatisfied, disgruntled and lacking confidence in the local government's bidding process. Contrary to this tactical position, it is often immediately apparent that the grounds being asserted for the challenge, based on surmise, rumor and the like, are in fact baseless. Local government entities can and should be advised to put the information and documents that will answer the questions on the table and available for bidder review, even if the time for unfettered access to the bidding documents has passed. Doing this as a practice resolves the overwhelming majority of bidding complaints without bid protests. Allowing access even when not required is in the interests of local governments.

Conclusion

Whether it is the invocation of the so-called "seven-day rule" or a narrow view of the documents and information to be produced in a protest, use of these tactics will result in more apparent "wins" for the state. The fact that most bidders abandon challenges or never mount them in the first place does not, however, mean that they believe that they have been treated fairly. Making the protest process seem fairer to vendors ultimately will benefit the commonwealth.

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With the merits of a protest considered, and with information and documents provided, the commonwealth will still win the cases that should be won. And in any event, the vendor community will have greater confidence in the fairness of the process. Having qualified vendors at the table with increased regularity will accomplish much and secure great additional benefit to the commonwealth's procurement process. These objectives are within the reach of agency counsel willing to move the procurement processes in the direction advocated here. ■

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[2] Title 62 Pa. C.S. §1711.1(b) provides:

(b) Filing of protest.--If the protestant is a bidder or offeror or a prospective contractor, the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest except that in no event may a protest be filed later than seven days after the date the contract was awarded. If the protestant is a prospective bidder or offeror, a protest shall be filed with the head of the purchasing agency prior to the bid opening time or the proposal receipt date. If a bidder or offeror, a prospective bidder or offeror or a prospective contractor fails to file a protest or files an untimely protest, the bidder or offeror, the prospective bidder or offeror or the prospective contractor shall be deemed to have waived its right to protest the solicitation or award of the contract in any forum. Untimely filed protests shall be disregarded by the purchasing agency.

[3] Thinking twice and being flexible in applying the "knew or should have known" standard does no violence to the commonwealth's sovereign immunity in my view. The Legislature waived sovereign immunity when the standard was created. What remains is for the standard to be applied in accordance with the circumstances presented in a particular case.

[4] Post-bid debriefings have not been shown to solve this problem. Often, if not always, debriefings are limited to matters within the vendor's own proposal. Operating from instructions from agency counsel or as a matter of policy, agency officials say so little that the debriefings often fail to inform to a degree sufficient to reestablish the vendor's confidence in the commonwealth's process. I would like to add to our list of matters that agency counsel can and should address, the unnecessarily paranoid restrictions placed on commonwealth procurement officials. Telling the truth about a procurement can never be bad. If telling the truth results in more protests, then perhaps more protests are needed.

[5] See, e.g., *JPay, Inc. v. Department of Corrections,* No. 625 CD 2013, Slip opinion at 11 (Cmwlth. Court, April 8, 2014), holding that the 60-day period allowed for rendering a decision under 62 Pa. C.S. §1711.1(f) will not be applied to render an agency decision on a protest announced on the 62nd day invalid. Speaking for the panel, Judge Colins found that, under all the circumstances, the 60-day period was directory, rather than mandatory. There is no reason that this same analysis cannot be applied to instances where the first seven-day period is at issue.

[6] Commonwealth attorneys like to call this "discovery," pejoratively. Rather, what the Code so clearly requires is disclosure of a limited scope of documents and information that have been relied upon by state officials in addressing protest issues.

[7] Section 1711.1(d) provides:

Within 15 days of receipt of a protest, the contracting officer may submit to the head of the purchasing agency and the protestant a response to the protest, including any documents or information he deems relevant to the protest. The protestant may file a reply to the response within ten days of the date of the response.

[8] Section 1711.1(e) provides:

The head of the purchasing agency or his designee shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may, at his sole discretion, conduct a hearing. The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.

[9] In *JPay v. Department of Corrections*, No. 625 CD 2013, Slip opinion at 8-9 (Cmwlth. Court, April 8, 2014), the court held that subsection (d) did not entitle a protestant to review documents cited by the contracting officer.