

WHAT WE KNOW AND NEED TO KNOW ABOUT LEGAL PROCUREMENT

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General counsel and legal departments are no longer the only buyers of corporate legal services. Legal procurement, the department or corporate function responsible for acquiring goods and services, is quickly gaining importance.¹ “The involvement of procurement is one of the side effects of a ‘power shift’ to the client.”² Procurement compares and contrasts, uses data, and develops evidence-based rationales for major reductions in legal spending.³

Companies with significant legal spending started to involve procurement in the evaluation and selection of legal services providers in the early-to-mid-2000s, with the earliest legal procurement activities dating back to the mid-to-late 1990s.⁴ Among the first industries to embrace legal procurement were highly regulated industries such as pharmaceutical companies and financial services institutions, as well as energy companies and utilities.⁵

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1. Purchasing insight.com defines procurement as “the overarching function that describes the activities and processes to acquire goods and services. Importantly, and distinct from ‘purchasing’, procurement involves the activities involved in establishing fundamental requirements, sourcing activities such as market research and vendor evaluation and negotiation of contracts. It can also include the purchasing activities required to order and receive goods.” *Definition of Procurement—Procurement vs Purchasing*, PURCHASING INSIGHT, <http://purchasinginsight.com/resources/what-is/definition-of-procurement-procurement-vs-purchasing/> (last visited Apr. 1, 2016). Purchasing is defined as “the process of ordering and receiving goods and services. It is a subset of the wider procurement process. Generally, purchasing refers to the process involved in ordering goods such as request, approval, creation of a purchase order record (a Purchase Order or P.O.) and the receipting of goods.” *Id.*

2. Silvia Hodges Silverstein, *Buyers, Influencers and Gatekeepers: Firms Must Learn the Ins and Outs of Legal Service Procurement*, N.Y. L.J., May 12, 2014, at S6 [hereinafter *Buyers, Influencers and Gatekeepers*].

3. Silvia Hodges Silverstein, *Do It Before the #Activist Investors Call for #Cost-Cutting*, THE LAW FIRM AS A BUSINESS (Aug. 11, 2015), <http://www.silviahodges.com/?p=2041>.

4. See, e.g., *About the DuPont Legal Model*, DUPONT LEGAL MODEL, <https://web.archive.org/web/20150826085232/http://www.dupontlegalmodel.com/initiatives/about-the-dupont-legal-model/> (last visited Apr. 1, 2016) (procurement activities dating back to 1992); HEIDI K. GARDNER & SILVIA HODGES SILVERSTEIN, GLAXOSMITHKLINE: SOURCING COMPLEX PROFESSIONAL SERVICES 2, 4 (Harv. Bus. Sch. Case No. 414-003, rev. 2014) (finding that the legal industry has undergone great transformation in the past two decades prompting greater incorporation of legal procurement in the early 2000s).

5. See, e.g., Silvia Hodges, *Power of the Purse: How Corporate Procurement Is Influencing Law Firm*, LAW PRACTICE TODAY (Jan. 2012), http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/january12/power-of-the-purse-how-corporate-procurement-is-influencing-law-firm.html [hereinafter *Power of the Purse*] (finding that “corporate purchasing departments started sourcing engineering and architectural services in the late 1980s, marketing, public relations and advertising services in the mid-to-late 1990s, accounting and tax services in the mid-2000s . . .”).

In many corporations, legal services used to be largely exempt from the intense cost scrutiny other business units and functions have been facing for years.⁶ The recent financial crisis acted as a catalyst and accelerated the adoption of legal procurement, particularly in large corporations.⁷ Publicity about billing practices, big ticket spending, and profit pressure is at the root of this seismic shift.⁸

Legal departments have been using some procurement tools for over two decades.⁹ DuPont spearheaded the convergence trend in legal services in 1992.¹⁰ Many legal departments have since adopted the “DuPont Model.”¹¹ It is based on the ideas of reducing the number of suppliers to facilitate management of outside counsel and increasing purchasing power to obtain lower rates from outside counsel.¹² Current approaches are built on this pioneering model.

I. RESEARCH AND PUBLICATIONS

Legal procurement as a discipline is still very young and there is a dearth of research in the field.¹³ No rigorous academic studies have been conducted on the topic to date. There is only one Harvard Business School case on legal procurement, on GlaxoSmithKline.¹⁴

Consulting firm Altman Weil first included questions on procurement in its annual *Chief Legal Officer Survey* in 2010.¹⁵ The author of this Paper conducted

6. *See id.* (“Until recently, the legal department was excluded from company-wide cost cuttings. This is no longer the case.”).

7. Anthony Licata, *A CFO’s Perspective*, 14 STRATEGIES 10, 10 (Mar./Apr. 2012) (finding that the market crash spurred CFOs of large companies to adopt legal procurement).

8. *See, e.g., Rep-Less Medical Sales Model: Wake Up—It’s Just Part of a Bigger Procurement Trend*, CHRIS PROVINES (Mar. 28, 2015), <http://chrisprovines.com/2015/03/28/rep-less-medical-sales-model-wake-up-its-just-a-part-of-a-bigger-procurement-trend> (finding bundled billing practices, cost pressure, and new disruptive service providers accelerated the shift to procurement).

9. *See, e.g., About the Dupont Legal Model*, *supra* note 4 (finding that the DuPont Legal Model has been in use since 1992).

10. Symposium, *Evolving Role of the Corporate Counsel: How Information Technology Is Reinventing Legal Practice*, 36 CAMPBELL L. REV. 383, 438 (2013) [hereinafter *Technology Is Reinventing Legal Practice*].

11. Maurice S. Byrd, Esq., Exec. Legal Consultant, Lexis Nexis, *The Effective Utilization of Paralegals in Corporate Legal Departments*, Presentation for ACC LA Roundtable 30 (Oct. 2, 2014).

12. According to the website, the “DuPont Legal Model has provided a solid, dynamic, integrated approach to providing services to the DuPont Company since 1992. The Legal Model’s competitive edge has been derived by applying business discipline to the practice of law.” *About the Dupont Legal Model*, *supra* note 4.

13. Silvia Hodges, *Getting to Know Procurement*, 14 STRATEGIES 3, 3 (Mar./Apr. 2012).

14. GARDNER & SILVERSTEIN, *supra* note 4.

15. Altman Weil, Inc. has been conducting Chief Legal Officer Surveys since 2000. In 2010, the consulting firm added procurement-related questions to its annual survey. For the 2010 survey, 174 responses were received, 14.4% of the 1,210 corporate law departments invited to participate. In 2011, 176 responses were received, 13% of the 1,355 corporate law departments invited to

specific studies on the influence of legal procurement on the buying of legal services in 2011, 2012, and 2014.¹⁶ The author edited a collection of articles on this topic published in two books; *Buying Legal: Procurement Insights and Practices* and the *Legal Procurement Handbook*, published in 2012 and 2015, respectively.¹⁷ A number of specialized consultants and practitioners authored articles on legal procurement, including Kenneth Bunge, Danny Ertel, Lynn Krauss, Susan O'Brien, Ute Rajathurai, Beth Wallace, and Jason Winmill.¹⁸

Lynn Krauss appears to be the first professional in legal procurement.¹⁹ Trained as an engineer as well as a lawyer, Krauss has been in-house counsel at Dow Corning since 1991 and was seconded to the procurement department from 1997 to 2000 as Global Strategic Procurement Manager where she bought legal and other services and products.²⁰ Her 1999 article, *I Bought the Law*, is likely

participate. In 2012, 204 responses were received, 15.7% of the 1,297 corporate law departments invited to participate. In 2013, 207 were received, 16.3% of the 1,269 corporate law departments invited to participate. In 2014, 186 responses were received, 15.6% of the 1,189 corporate law departments invited to participate. See *Law Department Surveys and Reports*, ALTMAN WEIL, INC., http://www.altmanweil.com/index.cfm/fa/r.resource_list/subcat_id/b8e4c0b1-47f1-4f2f-a4a2-4d2f7f9a4bb8/cat_id/4fd03b75-a828-46f9-a429-4ef2331c3bae (last visited Apr. 1, 2016) [hereinafter ALTMAN WEIL].

16. Legal Procurement studies were conducted in 2011, 2012, and 2014. Links to the 2014 Qualtrics survey were posted to LinkedIn procurement groups and sent to a list of legal procurement professionals by email. Of respondents, 40% had the title procurement/sourcing manager, 32% chief procurement officer or director. The majority of respondents came from Fortune 500 companies. The 2011 study was conducted on SurveyMonkey, the 2012 study on Qualtrics.

17. The books include: *BUYING LEGAL: PROCUREMENT INSIGHTS AND PRACTICES* (Silvia Hodges ed., 2012) and *LEGAL PROCUREMENT HANDBOOK* (Silvia Hodges Silverstein ed., 2015).

18. Susan O'Brien, *Achieving Value Through Sensible Collaboration*, in *LEGAL PROCUREMENT HANDBOOK*, *supra* note 17, at 189; Susan O'Brien, *A Primer on Reducing Outside Counsel Spend*, in *LEGAL PROCUREMENT HANDBOOK*, *supra* note 17, at 163; LYNN D. KRAUSS, DOW CORNING, *I BOUGHT THE LAW: PURCHASING LEGAL AND OTHER PROFESSIONAL SERVICES* (1991) (publication for the Annual Conferences of the Institute for Supply Management Conference 1999); Ute Rajathurai, *Choosing Preferred Suppliers Abroad*, in *LEGAL PROCUREMENT HANDBOOK*, *supra* note 17, at 172; Beth Wallace, *A Marriage Made in Heaven?*, *PROF'L MKTG. MAG.*, May 2014; Jason Winmill & Celia Parsons, *Legal Sourcing Steps in to the Spotlight*, *INST. FOR SUPPLY MGMT.* (Nov. 15, 2012), <http://www.argopoint.com/legal-services-sourcing/institute-for-supply-management-ism/>; Danny Ertel & Mark Gordon, *Points of Law: Unbundling Corporate Legal Services to Unlock Value*, *HARV. BUS. REV.* (July–Aug. 2012), <https://hbr.org/2012/07/points-of-law-unbundling-corporate-legal-services-to-unlock-value>; Kenneth E. Bunge, *Legal Services Procurement 101: The Two-Step Process*, *REPORT TO LEGAL MGMT.* (July–Aug. 2009), http://www.altmanweil.com/dir_docs/resource/3f56b514-ffb1-483b-9c1a-34306f1d5195_document.pdf.

19. See, e.g., Silvia Hodges, *You Better Know Their Names and Understand Their Metrics: Corporate Procurement Influences the Law Firm Selection*, 14 *STRATEGIES* 4, 4–5 (Mar./Apr. 2012) [hereinafter *You Better Know Their Names*] (citing Lynn D. Krauss, *I Bought the Law: Purchasing Legal and Other Professional Services*, 14 *STRATEGIES* 8 (Mar./Apr. 2012)) (finding that Krauss “[s]witched from legal to the company’s procurement department in the 1990s and was responsible for sourcing legal services for a number of years”).

20. Her LinkedIn profile states that as Global Strategic Procurement Manager, Krauss “Managed annual spend of \$75 million for legal services, raw materials, and IT hardware/software. Developed strategies, negotiated purchase contracts and managed supplier relations worldwide to

the first article ever published on legal procurement. The Royal Bank of Scotland and Barclays appear to be the first companies to run e-auctions for legal services as early as 2002.²¹

In September 2014, the industry organization, Buying Legal Council, was formed to support and educate legal procurement professionals and other buyers of legal services.²² It counts many Fortune 500 companies as well as European multinationals among its members.²³

II. LEGAL BUDGETS ARE NO LONGER EXEMPT FROM COST SCRUTINY

A. *More and More Companies Take a Rigorous Approach to Buying Legal Services*

The number of Fortune 500 companies and major international corporations with dedicated legal procurement personnel is quickly increasing.²⁴ While there currently are no reliable data on the exact number of procurement professionals in the legal category, estimates by Buying Legal Council, based on conference and networking group participation, indicate that two-thirds of the Fortune 500, as well as an increasing number of multinational companies, have dedicated legal procurement professionals.²⁵

The sophistication and effectiveness of legal procurement is influenced by the maturity and experience of the procurement professionals involved, “their awareness and understanding of the distinction of legal services and of the quality of the legal work product.”²⁶ “It is also influenced by the way procurement professionals are being measured and rewarded” and by the “level of collaboration between the company’s procurement professionals and in-house lawyers.”²⁷

maximize value and minimize costs. Documented cost savings of \$3.5 million. Achieved Certified Purchasing Manager accreditation from National Association of Purchasing Management. Spoke and published at Annual Meeting of National Association of Purchasing Management on purchasing legal and professional services.” Lynn Krauss, LINKEDIN, <http://linkedin.com/pub/lynn-krauss/21/437/9b1> (last visited Apr. 1, 2016).

21. E-mail from Beth Wallace, Procurement Consultant, Wallace Consulting Ltd., to author (Apr. 14, 2015, 13:55 EST) (on file with author); Telephone Interview with Collette May (June 12, 2015) (worked as a senior purchasing manager for RBS in 2002).

22. Buying Legal Council, LINKEDIN, <https://www.linkedin.com/company/buying-legal-council> (last visited Apr. 1, 2016) (stating the council was formed in 2014).

23. See Silvia Hodges Silverstein, *Ready for Efficiency? London, 28 September*, THE LAW FIRM AS A BUSINESS (Sept. 12, 2015), <http://www.silviahodges.com/?p=2054> (The legal procurement conference, hosted by Buying Legal Council, will be attended by its Fortune 500 and multinational corporations members.).

24. See *id.* (“More and more FTSE 350, Fortune 500, and multinational corporations now involve business people in the sourcing of legal services and the management of legal service providers.”).

25. LEGAL PROCUREMENT HANDBOOK, *supra* note 17.

26. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at S6.

27. *Id.*

In 2010, consulting firm Altman Weil asked chief legal officers for its *Chief Legal Officer Survey*: “Are Procurement/Purchasing/Strategic Sourcing professionals in your corporation involved in outside counsel selection decisions?” In response, 81.4% answered “Never,” 17.4% said “Sometimes,” and 1.2% answered “Always.”²⁸ By contrast, in 2014, 74% answered “Never,” 16.6% said “Sometimes,” 3.6% said “Usually,” and 5.9% said “Always.”²⁹ This is a significant shift towards companies including procurement in the sourcing of legal services and promises rapid growth in the future.³⁰

Often without dedicated human resources for legal procurement, some medium-sized companies have started to hire specialized consultants to help manage legal spending.³¹ How legal procurement consultants support corporate clients can vary; however, they can bring with them tested procurement methodologies successfully applied elsewhere (usually in other complex/professional services) as well as procurement tools that are customized for the legal marketplace.³² There is even talk of legal procurement consortiums to achieve greater buying power and lower spending.³³

B. Who Wants to Involve Legal Procurement?

Procurement’s involvement is typically a top management mandate by the organization’s chief executive officer or chief legal officer.³⁴ The main drivers of procurement are managing costs and reducing supplier spending, ensuring that the company buys goods and services in compliance with company policies, and making sure the company gets good products and services from reputable suppliers.³⁵ Other drivers of procurement include the desire to achieve more objective comparisons of legal service providers through measuring and benchmarking outside counsel’s value; and the desire to streamline operations, improve efficiencies, find better ways to structure both fee arrangements and budgeting; and the desire to increase predictability and transparency.³⁶ These

28. 2010 *Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15, at 8.

29. 2014 *Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15, at 14.

30. Compare *id.*, with 2010 *Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15.

31. See Alexandra Nuth, *Good to Know: Why Companies Really Hire Consultants*, THEMUSE, <https://www.themuse.com/advice/good-to-know-why-companies-really-hire-consultants> (last visited Apr. 1, 2016).

32. See David J. Parnell, *Dr. Silvia Hodges Silverstein, On the Evolution of Legal Consumers*, FORBES BUSINESS (Sept. 8, 2014, 03:21 PM), <http://www.forbes.com/sites/davidparnell/2014/09/08/dr-silvia0hodes-silverstein-on-the-evolution-of-legal-consumers/print/>.

33. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 56.

34. See *id.*

35. See, e.g., *Procurement Competency Framework*, NEW ZEALAND GOV’T PROCUREMENT, <http://www.business.govt.nz/procurement/pdf-library/agencies/procurement-academy/Competency%20Framework%20-%208%20Nov%20final.pdf> (last visited Apr. 1, 2016).

36. See, e.g., *id.*

areas fall into procurement's core competencies and are examples of where procurement can make value-added contributions for their employers.

In the past, few general counsel approached procurement to help source legal services. They often worried whether procurement really understands the legal department's priorities. According to legal consultant Danny Ertel, general counsel often "opt to bring some operations and sourcing expertise into the legal department, so they can rely on their own resources."³⁷ Resisting procurement's involvement helps the legal team (hereinafter legal) to preserve control and autonomy; allows legal to apply their own professional judgment and expertise to assess providers, and enables legal to continue to use lawyers they know, trust, and who have always come through for them (and whom they can call and say "I need this" and they'll deliver).³⁸ Resisting procurement means that legal can focus its time and attention on "really important things" and legal can always agree to take another look at procurement when they are "not really busy" or under pressure to perform.³⁹ The downside is (just) "upset[ting] procurement."⁴⁰ Involving procurement, on the other hand, has many consequences for in-house counsel, according to Ertel: Procurement will want legal to stop using their current set of trusted law firms; legal will have to build relationships with new law firms; legal will have to use an "unproven" firm that may not be as good ("after all, they command a lower rate in the market"); legal will have to teach new outside counsel about its business; and if the new, "cheaper" firms make a mess, legal is worried about still being held responsible.⁴¹ The upside of involving procurement is lowering legal spending.⁴² However, unless spending for outside counsel comes out of the legal department's own budget and/or is tied to in-house counsel's performance and rewards, this may not be a strong enough argument.⁴³

There are additional reasons that kept procurement out of the legal department: legal was seen as "different," in the sense that a normal business approach could not be taken to sourcing and managing legal services.⁴⁴ The unforeseeable nature of legal matters made budgeting and planning impossible. What is more, in-house counsel saw "trust" as emanating from long relationships with certain suppliers, much more so than in any other area of the business.⁴⁵

Consultant Paul Gilbert argues that the general counsel may "side with a law firm against a procurement colleague" when it comes to defending their

37. Danny Ertel, *A Primer for Sourcing LPO Services*, in LEGAL PROCUREMENT HANDBOOK, *supra* note 17, at 83.

38. *Id.* at 84.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Parnell, *supra* note 32.

43. Ertel, *supra* note 37, at 83.

44. See Parnell, *supra* note 32.

45. Ertel, *supra* note 37, at 84.

relationship with particular law firms.⁴⁶ He suggests that clients may experience a form of “Stockholm Syndrome” for legal services “that plays out between law firms and their hostage clients.”⁴⁷ This buy-side inertia may stem from in-house teams not finding it “feasible to make significant changes quickly,” as they often have little time for genuine (strategic) law firm management.⁴⁸ Thus, procurement’s involvement is seen as unwanted interference despite possibly leaving significant savings on the table.⁴⁹

For many purchasers of goods and services inside a company, not wanting to have procurement involved in sourcing a particular category is not uncommon.⁵⁰ When the Royal Bank of Scotland ran its first e-auction for legal services in 2002, “[t]here was complete uproar in the legal press about this and how it commoditized such a high value service,” according to procurement consultant Beth Wallace.⁵¹ Consultant Kevin Doolan suggests that the bank’s bidding approach for both routine work (on fixed fees) and higher-end work (on hourly billing) was not deemed a success as it was used at a time when the market was not yet ready for it and did not focus on how the work was delivered.⁵²

Other buyers and users of professional services (e.g., management consulting, engineering, advertising, IT) had a similar reaction to having procurement involved in the sourcing of their services: “The incursion of procurement on the marketing organization has caused no shortage of pain at agencies. . . . Among the concerns are that creative process will be devalued, client services squeezed, and strategic account planning shrunk to a line item by procurement agents who may lack marketing experience.”⁵³

Other aspects of concern are the loss of choice and influence.⁵⁴ When faced with an electronic auction for legal work, the (fictional) in-house lawyer in the GlaxoSmithKline case study asks herself: “Is this really how I want to practice law? Will I be the pariah at next year’s law school reunion? I thought I’d return

46. Paul Gilbert, *Guest Post: “Stockholm Syndrome” in Legal Services—GCs Are Captured by Their Advisers*, LEGAL BUSINESS (July 28, 2014, 06:00), <http://www.legalbusiness.co.uk/index.php/lb-blog-view/2673-guest-post-stockholm-syndrome-in-legal-services?tmpl=component&print=1&layout=default>.

47. *Id.*

48. *Id.*

49. *See id.*

50. *See, e.g.*, CONSUMERS INT’L, THE RELATIONSHIP BETWEEN SUPERMARKETS AND SUPPLIERS: WHAT ARE THE IMPLICATIONS FOR CONSUMERS? tbl.3 (Sept. 2012), <http://www.consumersinternational.org/media/1035301/consumer%20detriment%20briefing%20paper%20sept2012.pdf> [hereinafter CONSUMERS INT’L].

51. E-mail from Beth Wallace, *supra* note 21.

52. *See* Leo Staub, *Impact of Market Segmentation on Leadership and Recruiting in Law Firms*, UNIVERSITÄT ST. GALLEN, <http://www.lam.unisg.ch/de/interviews/kevin-doolan-02-2014.php> (last visited Apr. 1, 2016).

53. Zach Rodgers, *Why Is Procurement Necessary?*, AD EXCHANGER (Jan. 22, 2013), <http://adexchanger.com/agencies/procurement>.

54. *See, e.g.*, CONSUMERS INT’L, *supra* note 50, at tbl.3.

as the hero [when going in-house] who does out work, not the villain who pushed the legal industry into online bidding wars.”⁵⁵

However, in-house counsel’s attitude to legal procurement may be changing. When Altman Weil asked chief legal officers how helpful the involvement of procurement/purchasing/strategic sourcing professionals was, none said “Very Negative,” 4.7% said “Somewhat Negative,” 37.2% said “Neither Positive Or Negative,” 30.2% said “Somewhat Positive,” and 27.9% said “Very Positive.”⁵⁶

III. LEGAL PROCUREMENT—PROponents AND OPponents

Legal procurement commonly takes a process-driven, market-based business-to-business sourcing approach also used in other areas of spending.⁵⁷ In all three legal procurement studies from 2011, 2012, and 2014, respondents underlined that procurement significantly facilitates the legal sourcing process, by allowing in-house lawyers to focus on what they do best—the world of law—rather than negotiating prices or specific terms or managing the general legal services supplier relationship. Respondents further argued that legal procurement’s involvement makes the selection more objective and transparent and helps companies reduce legal spending without negative effects on quality. Krauss, who returned to Dow Corning’s legal department as assistant general counsel and chief of staff after working in procurement, says that she “appreciate[s] procurement handling many of the non-legal aspects of the vendor management so [she] can concentrate on the [legal] strategy, work product, and results.”⁵⁸

Opponents of legal procurement warn that the process-driven business approach collides with the traditional relationship-driven, trust-driven selection by in-house counsel.⁵⁹ In the 2014 procurement study, some respondents commented on lawyers’ warning that procurement’s spend savings are illusions as they are not *sustainable* spend reductions. According to the comments in the study, procurement’s approach was said to “ruin” the law firm-client relationship and jeopardize the quality of legal advice and outcome. Legal procurement consultant Winmill reported that an in-house lawyer accused his legal procurement colleague, who suggested and outlined a standard and simple procurement process, of “destroying the profession.”⁶⁰ Emotions run high in this arena.

55. See also GARDNER & SILVERSTEIN, *supra* note 4, at 9.

56. 2014 Chief Legal Officer Survey, ALTMAN WEIL, *supra* note 15, at 16.

57. See Parnell, *supra* note 32.

58. E-mail from Lynn Krauss, Assistant Gen. Council & Chief of Staff, Dow Corning, to author (July 2, 2015, 07:03 EST) (on file with author).

59. See *You Better Know Their Names*, *supra* note 19, at 4.

60. E-mail from Jason Winmill, Procurement Consultant, Argopoint Consulting, to author (May 28, 2015, 14:23 EST) (on file with author).

IV. LEGAL PROCUREMENT'S ROLE AND RESPONSIBILITIES

The legal procurement studies from 2011, 2012, and 2014 found that procurement practices have been quickly gaining influence. In 2011, sophisticated legal procurement was still a minority capability at large companies; by 2014, major buyers of legal services had turned to procurement professionals (in some capacity) to help source legal services. Legal procurement professionals either source legal services exclusively, or as part of a portfolio of professional services.⁶¹

The studies confirmed that legal procurement's main responsibility is that of the "influencer" and the "buyer." As influencers, legal procurement professionals aim to affect either the process or the outcome of a decision. The idea is to support in-house counsel with decision-grade data.⁶² As buyers, legal procurement professionals are most likely to be involved in the development of the general purchasing strategy, process and criteria, as well as in negotiation and contract development phases, and engagement letter, retainer, or framework agreements.⁶³

Some legal procurement professionals are responsible for fee negotiations.⁶⁴ Procurement's expertise in negotiating favorable economics and contracts for their employers has the potential to put law firms under significant and often new pressure to deliver more for less.⁶⁵ Procurement's involvement in fee negotiations is still evolving. Law department consultant Richard Stock observes that he "would be really surprised to find any widespread expertise in negotiating alternative fee arrangements [AFAs] including performance-based fees. It is early days for law departments and procurement specialists alike on this score."⁶⁶ However, developing these skills is essential. Stuart Dodds, Director, Global Pricing and Legal Project Management at Baker & McKenzie, believes that legal procurement teams need "to become more comfortable with discussing, negotiating and placing a value on AFAs. What I mean by this is that typically procurement . . . prefer to negotiate hourly rate discounts as these make it easier to quantify their own value contribution (e.g., law firm A gave me a 10% discount, but I negotiated them up to 15%, therefore, I have contributed a further 5% saving on a spend of X), and this sets the tone of the discussion."⁶⁷ Experienced legal procurement professionals are more comfortable discussing

61. See Parnell, *supra* note 32.

62. See *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 57.

63. See *id.*

64. See *id.* at 56.

65. See *id.* at 57.

66. E-mail from Richard Stock, Partner, Catalyst Consulting, to author (May 7, 2015, 9:18PM EST) (on file with author).

67. E-mail from Stuart Dodds, Global Pricing & Legal Project Management, Baker & McKenzie, to author (June 23, 2015, 15:30 EST) (on file with author).

and placing a value on comparable AFA offerings, which allows for “a better all-round discussion between law firm and client,” according to Dodds.⁶⁸

In addition to negotiating on price, procurement is responsible for monitoring firms’ billing behavior and adherence to billing guidelines.⁶⁹ Anecdotally, law firms are said to “give away a lot at the tender stage,” such as significant discounts, but “it is never really picked up during the term of the relationship to ensure that these cost savings are achieved.”⁷⁰ Legal procurement’s responsibility is hence to follow up and check on legal services firms’ compliance with billing agreements, and to intervene if necessary.⁷¹ Electronic billing, when properly set up, is used to support procurement, flagging invoices with violations and prompting the firm to revisit the bill in question.⁷²

Post-purchase performance evaluation of legal services providers has become an increasingly important part of legal procurement’s responsibilities. The GlaxoSmithKline case study describes the pharmaceutical company’s approach to firm evaluations, asking both in-house counsel and outside counsel to evaluate outside counsel’s performance on a given matter using a set number of dimensions (such as overall management of a matter).⁷³ When not scheduled after the completion of a matter, more and more companies evaluate firms at certain intervals or when reaching pre-defined milestones.⁷⁴ This is particularly true for multi-year portfolios of legal work.⁷⁵

Beyond putting in place contracts with outside counsel, procurement also is ever more involved in supplier relationship management (SRM), i.e., strategically managing interactions with suppliers of (legal) services to maximize the value of those interactions.⁷⁶ SRM can include regular, formal, two-way feedback and evaluation between the company and the law firm as well as monitoring incremental and phase improvements, and troubleshooting.⁷⁷

Legal procurement professionals also may act as purchasing “gatekeepers” who control the flow of communication and information from the firm to the deciders.⁷⁸ They are less likely to be “deciders” themselves.⁷⁹ Rarely—if ever—do legal procurement professionals make the final decision on which firm to choose nor do they have the ability to veto in-house counsel’s decision.⁸⁰

68. *See id.*

69. *Power of the Purse*, *supra* note 5.

70. E-mail from Beth Wallace, *supra* note 21.

71. *See Power of the Purse*, *supra* note 5.

72. *See Technology is Reinventing Legal Practice*, *supra* note 10.

73. *See generally* GARDNER & SILVERSTEIN, *supra* note 4.

74. *See id.* at 3.

75. *See, e.g., id.* at 2 (quoting Richard A. Epstein, *The Rule of Lawyers*, WALL ST. J. (May 5, 2013 6:41 PM), <http://www.wsj.com/articles/SB10001424127887323494504578342612775060362>).

76. *See Power of the Purse*, *supra* note 5.

77. *See Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

78. *See Technology is Reinventing Legal Practice*, *supra* note 10, at 442.

79. *See id.*

80. *See id.*

According to Winmill, procurement professionals typically “don’t care about the specific firm selected, but care deeply that the process was followed”⁸¹ The general counsel and designated in-house legal team retain the right to short-list firms and make the final decision.⁸² “In some companies, senior executives such as the CEO or the board are also involved in short-listing law firms.”⁸³ Business management, such as division heads or business unit managers, appear to have lost some influence on which firms are short-listed, when comparing the 2014 to the 2012 study.⁸⁴ Chief executive officers and other top management are typically not involved in the final decision.⁸⁵ This may be perhaps because while chief executive officers care about the total cost and the win rate, they typically delegate specific choices to the general counsel, and rely on their expertise and judgment.

“Legal procurement professionals are [] rarely the ‘initiators’ of sourcing legal service.”⁸⁶ “It is typically the in-house lawyers suggesting which [and when] legal services are needed and outlining the specific business/legal requirements.”⁸⁷ Exceptions may include the creation of “panels,” which is often done on procurement’s initiative.⁸⁸

Altman Weil’s *Chief Legal Officer Surveys* confirm the findings of the legal procurement studies and suggest an increasing role for legal procurement.⁸⁹ The 2010 study found that procurement never has “Final Authority” to make (legal sourcing) decisions, whereas 19.4% said that procurement had an “Advisory Role,” 75% said that procurement is “Available as Needed,” and 5.6% stated that procurement professionals “Assist with the RFP Process.”⁹⁰ This changed significantly in 2014, when 4.5% of procurement professionals had “Final Authority” to make sourcing decisions, 27.3% had an “Advisory Role,” 20.5% were “Available as Needed,” and 47.7% “Assist with the RFP Process.”⁹¹

V. WHO ARE THE LEGAL PROCUREMENT PROFESSIONALS?

Legal procurement professionals tend to be experienced procurement professionals with a background in professional and complex services, such as

81. E-mail from Jason Winmill, Procurement Consultant, Argopoint Consulting, to author (May 19, 2015, 10:44 EST) (on file with author).

82. See *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 57.

83. *Id.*

84. See *id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See *Power of the Purse*, *supra* note 5.

89. See generally *2010 Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15 (analyzing how Chief Legal Officers manage their corporate law departments in 2010); *2014 Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15 (analyzing how Chief Legal Officers manage their corporate law departments in 2014).

90. *2010 Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15, at 8.

91. *2014 Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15, at 15.

management consulting, marketing services, information technology, human resources, and financial services.⁹² It is uncommon for major corporations to put a novice procurement manager in charge of sourcing legal services.⁹³ “Given the sensitivities, the legal category is usually assigned to ‘one of the procurement team’s top performers,’” said a senior, skilled professional.⁹⁴

While lawyers often accuse legal procurement of lacking in-depth legal substance, or being ill-equipped to understand and buy legal services, the 2014 legal procurement study found that about 20% of legal procurement professionals have a legal background (defined as having a J.D. degree or having worked as a lawyer in-house or in private practice).⁹⁵ The remaining respondents held MBA degrees or bachelor degrees in business subjects.⁹⁶

More experienced, specialized legal procurement professionals— independent of their academic background—appear to be judged more favorably by in-house counsel.⁹⁷ According to a comment by an in-house lawyer in the Chief Legal Officer Survey, the success of legal procurement is “very dependent on the procurement individual—we have seen more benefit by identifying one or two people within procurement who are the ‘legal sourcing’ experts so we can educate them about the pros and cons of price-driven legal services sourcing and build ways to work together collaboratively.”⁹⁸

It will be interesting to see the development of legal procurement specialists as procurement professionals often switch from one category to another, promising a continued stream of procurement professionals that are new to the legal industry.

VI. WHAT (LEVEL OF) LEGAL SERVICES DOES PROCUREMENT INFLUENCE?

While there are many ways legal procurement gets involved, procurement typically first sources, manages, or influences ancillary legal services such as court reporting and medical records.⁹⁹ Then follows routine legal services including document review and due diligence.¹⁰⁰ The 2014 legal procurement survey also suggests that, at some companies, legal procurement is making progress getting involved in sourcing, managing, and influencing so-called

92. See, e.g., *Power of the Purse*, *supra* note 5 (stating many procurement officers have background legal knowledge, either through education or work experience).

93. See *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 56.

94. E-mail from Jason Winmill, *supra* note 60.

95. See *Power of the Purse*, *supra* note 5.

96. *Id.*

97. See Silvia Hodges, *Legal Procurement: Sourcing Is a Team Sport*, BLOOMBERG L. REPORTS, Aug. 29, 2012, www.bloomberglaw.com (search article title in search bar) (quoting Jason Winmill, *Working with In-House Lawyers: A Significant Sourcing Opportunity*, 19 INSIDE SUPPLY MGMT. 36, 36–37 (Sept. 2008)).

98. 2014 *Chief Legal Officer Survey*, ALTMAN WEIL, *supra* note 15, at 16.

99. See *Technology is Reinventing Legal Practice*, *supra* note 10, at 443

100. See *id.*

“bread and butter” legal services (those between high-stakes work and routine, repetitive work) and even complex, high-value, high-stakes legal services.¹⁰¹ According to the case study of GlaxoSmithKline, the pharmaceutical giant uses a procurement approach to all legal matters in excess of \$250,000.¹⁰² The company bids out work through requests for proposals (RFPs) and uses “reverse” auctions or “e-auctions” where multiple firms compete to offer the best price that meets all of GlaxoSmithKline’s specifications of the bid.¹⁰³ The e-auction approach for major work is still relatively unusual, as companies typically use them—if at all—for small, lower-value matters.¹⁰⁴

According to the legal procurement studies, procurement is involved in a broad range of legal services—including litigation, transactional, and, to a somewhat lesser degree, advisory work—in a wide range of practice areas, from commercial law and M&A to real estate, employment, and intellectual property law.¹⁰⁵ “It appears that no stones are left unturned. All types of matters have become subject to [legal procurement’s] scrutiny.”¹⁰⁶

VII. INFLUENCE ON THE BUDGET FOR LEGAL SERVICES

Over the past four to five years, legal procurement appears to have been gaining influence on legal budgets.¹⁰⁷ In the 2012 legal procurement survey, half of the respondents said that they had influence on only a small part (less than 20%) of their employer’s legal budget.¹⁰⁸ This number shrank to 28% of participants in the 2014 study.¹⁰⁹ At the same time, in 2012, less than 10% of respondents claimed to influence over 90% of the legal budget.¹¹⁰ This number rose to 25% of respondents in the 2014 survey.¹¹¹

Readers should note that a portion of spending on legal services may not be part of the legal budget, but owned by different business unit stakeholders. Nevertheless, while procurement may not be the final decision-maker, the findings suggest that firms are well advised to work with procurement, understand what is important to them, and to create a capability to respond to procurement’s needs and demands.

101. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 57.

102. *See* GARDNER & SILVERSTEIN, *supra* note 4, at 1.

103. *See id.*

104. *See* Timothy B. Corcoran, *The Role of Procurement in the Selection of Outside Counsel*, CORCORAN’S BUS. L. BLOG (Nov. 24, 2012), <http://www.corcoranlawbizblog.com/2012/11/procurement/>.

105. *See* *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 57.

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

VIII. WHAT IS IMPORTANT TO LEGAL PROCUREMENT PROFESSIONALS?

Legal procurement professionals look for lawyers and law firms who have experience with similar matters and whose know-how and skills are well matched for the legal matter at hand.¹¹² They often want to know if the firm has done similar work or solved a similar issue for another client.¹¹³ More advanced versions of this are whether the lawyer or firm has argued before a particular judge or court.¹¹⁴ Procurement wants to be sure outside counsel will be able to deliver the desired outcome and be efficient.¹¹⁵ Many lawyers may be qualified and have the general expertise in a particular field, but which firm will not need to do extensive (read expensive) research to get up to speed? It is good procurement practice to ask firms to present examples or case studies that showcase how they have solved similar problems, know the industry very well, and demonstrate how they work with clients and other law firms. New software programs coming to market are promising to go even further, giving clients access to lawyers' win rates on particular matter types, in some cases broken down by court and individual judge.¹¹⁶

According to Winmill, "procurement wants law firms that 'play by the rules' of procurement," which means "following procurement's process; providing information that procurement wants, when they want it; participating in bids, even when there is no guarantee of work; professional and polite treatment of procurement professionals; avoiding 'end runs around procurement' [as well as] help documenting savings (vs. vague marketing-driven pitches about 'efficiency' and 'best value')." ¹¹⁷ Value¹¹⁸ for money and service excellence are other very important factors for procurement according to the legal procurement surveys in 2012 and 2014.¹¹⁹ Clients appear to have become less shy about their intent to lower legal spending.¹²⁰ The 2014 study identified the "lowest price" as one of the most important factors.¹²¹

Unless alternative fee arrangements are used, legal procurement professionals clearly expect discounts on law firms' rack rates according to both studies.¹²² In the 2014 study, a legal procurement manager at a Fortune 100

112. *Id.* at 3.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Technology is Reinventing Legal Practice*, *supra* note 10, at 443.

117. E-mail from Jason Winmill, *supra* note 81.

118. Different from the in-house legal community that has established the Association of Corporate Counsel (ACC) "Value Challenge" (www.acc.com/valuechallenge/) in 2007, legal procurement professionals have not (yet) established a definition of value—with corresponding metrics—for legal services.

119. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

120. *Id.*

121. *Id.*

122. *Id.*

company commented: “You would not buy sticker price at the car dealer.”¹²³ Half of the respondents in the 2014 study expected a discount of over 20%.¹²⁴ Nearly a quarter of respondents expected a discount of over 25%.¹²⁵ However, discounts in excess of 15% are rare for both regular and complex work unless the volumes are large or there are commitments for such work in the future.¹²⁶

Procurement also looks for firms offering value-added options.¹²⁷ Continued legal education (CLE) seminars for in-house counsel and business-level training as well as hotline/helpline access for in-house counsel and line management to ask quick questions were favorites among procurement professionals.¹²⁸ “Other desired value-adds included[]: in-person visits of the client’s office/plant/facility to get to know their business; participation on internal calls that provide insight into a specific business or practice area; secondments; provision or development of basic templates and forms; conducting pre-matter planning sessions; and share-points with real-time access to the company’s documents.”¹²⁹ The challenge for firms is that many of these “value adds” are no longer differentiating factors, but have become expected offerings.

Some procurement professionals have started to push firms to improve the value of the service itself.¹³⁰ Law firms’ project management and process improvement capabilities have become important to legal procurement professionals: 48% of survey respondents deemed them “very important,” and another 16% deemed them “important.”¹³¹

Peer recommendations and industry rankings, often coveted among lawyers and law firms, have little importance for legal procurement professionals according to both the 2012 and 2014 studies.¹³² Procurement professionals did not seek out rankings and directories to compare lawyers and law firms.¹³³ With more and more software available that measures and evaluates lawyers, it will be interesting to see how procurement will approach rankings and similar elaborations in the future. Particularly for non-routine and/or high-stakes work, it may be useful and necessary to distinguish between evaluating law firms and evaluating lawyers going forward.

123. *Id.*

124. *Id.*

125. *Id.*

126. E-mail from Richard Stock, *supra* note 66.

127. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *You Better Know Their Names*, *supra* note 19, at 6.

133. *Id.*

IX. WHAT ARE PROCUREMENT'S TOOLS?

Even though procurement's involvement may result in lowering spending on outside counsel, this does not mean that procurement professionals are only interested in cost savings and that in-house lawyers are only interested in the quality of the service, regardless of spending. More and more procurement and legal departments together—often supported by a legal operations function—use a range of metrics and benchmarks in addition to price when selecting and evaluating the offerings of different law firms.¹³⁴

Legal procurement regularly conducts industry benchmarking analysis (71% of respondents in the 2014 survey), followed by rate increase analysis (67% of respondents) and invoice audits (67%).¹³⁵ Invoice reviews are promising to gain more scrutiny “given how poorly invoices are prepared.”¹³⁶ Stock believes procurement is well advised to evaluate a firm's performance against agreed-upon key performance indicators.¹³⁷ “Half of the respondents forecast budgets, followed by alternative fee arrangement analysis and key performance indicator analysis,” including non-financial metrics.¹³⁸ “Procurement also embraces legal spend management (75%) and e-billing (71%).”¹³⁹

Procurement typically gets involved with the negotiation of master service agreements, management of the panel selection, or legal commodities such as e-discovery.¹⁴⁰ Legal procurement and in-house counsel commonly use billing guidelines, and require firms to accept the organization's terms and conditions (T&C) even before a request for proposal is issued.¹⁴¹ “Attempts to deviate from the T&C typically count against [a] firm during the evaluation process.”¹⁴²

As discussed above, reducing the number of legal service provider firms, also known as “convergence,”¹⁴³ has been used to lower and better manage outside counsel spend.¹⁴⁴ Giving fewer firms a larger share of business puts clients in a better position to negotiate more favorable prices.¹⁴⁵ However, Ertel warns that “when such concessions are gained through bargaining leverage, they last only as long as the leverage does; rates inevitably climb back up as the economy recovers and supply and demand come back into balance.”¹⁴⁶ He

134. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

135. *Id.*

136. E-mail from Richard Stock, *supra* note 66.

137. *Id.*

138. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

139. *Id.*

140. *You Better Know Their Names*, *supra* note 19, at 5.

141. *Buyers, Influencers and Gatekeepers*, *supra* note 2, at 510.

142. *Id.*

143. E-mail from Danny Ertel, Consultant, Vantage Partners, to author (May 14, 2015, 20:25 EST) (on file with author).

144. *Id.*

145. *Id.*

146. *Id.*

believes that procurement's participation in the convergence process could be "a real game changer" if procurement introduced sophisticated sourcing and supplier management strategies intended to explore different pricing models, staffing models, and joint process improvement.¹⁴⁷

X. CONCLUSION

Although still a relatively recent phenomenon, legal procurement is quickly gaining traction, particularly among companies with significant legal spending. Nevertheless, research in this area is sparse. In particular, academic research is needed to better understand the phenomenon and its key drivers, as well as to refine data and develop analytical frameworks.

Few today believe that companies will return to sourcing legal services through the legal department alone, without procurement's involvement.¹⁴⁸ Looking at other professional services, it is clear that procurement changed the way these services are bought during the last twenty-five years,¹⁴⁹ beginning with engineering and architectural services in the late 1980s; expanding to marketing, public relations and advertising services in the mid-to-late 1990s; accounting, auditing, and tax services in the early-to-mid 2000s; and legal services in the last five-plus years.¹⁵⁰

For law firms, the involvement of procurement in the sourcing of legal services means that new management approaches to the delivery of legal services are called for, such as the introduction of business thought and project management, more flexibility in regards to fee arrangements, and stricter cost management.¹⁵¹ Law firms are advised to get acquainted with the changes that procurement's involvement brings and make the necessary adjustments sooner rather than later. This means focusing on expertise, process re-engineering, cost management, and use of lower-cost labor.

The change is also significant for in-house legal departments, as they no longer can mandate the choice of law firms based on existing relationships, but are expected to adhere to corporate sourcing principles, including regular competitive bidding, and to share budget responsibility.¹⁵²

In the future, legal procurement's involvement is likely to go further than streamlining the sourcing process or reducing the cost of legal services. Procurement may look at the cost and benefits of long-term relationships and partnering with legal services suppliers as well as the cost to retender.

Procurement also may focus more on unbundling services and matching specific tasks with the most appropriate suppliers, such as using top-tier

147. *Id.*

148. *Technology is Reinventing Legal Practice*, *supra* note 10, at 441.

149. *You Better Know Their Names*, *supra* note 19, at 4.

150. *Id.*

151. *Id.* at 5.

152. *Id.* at 6.

providers for some tasks and low-cost providers for other tasks. Ertel believes that “[s]trategies for dealing with law firms who handle complex, one-off types of matters should be different from those that will be effective with firms handling simpler . . . matters.”¹⁵³ It matters what the tasks are within each matter and what skills it takes to carry them, more so than whether a matter is large or small. Procurement has learned this in working with other professional services. Standardization and automation have also provided significant gains in other professional service categories and managing “peaks, troughs, and scope risk across portfolios of work has brought real efficiencies” to many other corporate services.¹⁵⁴

Another potential area for procurement’s involvement is the assessment and qualification of information security capabilities of outside counsel firms. Krauss says: “Since law firms often handle highly sensitive company information and matters, a security breach at a law firm could be very embarrassing and costly to a company. Procurement could play a key role in linking company information technology (IT) (or external IT security firms) with existing or potential firms to perform information security reviews. They could also help assure that IT security is considered in the law firm selection process.”¹⁵⁵

The industry view is that legal procurement has only started to “scratch the surface” of managing outside legal spending.¹⁵⁶ To date, legal procurement has “been playing second fiddle to the technical experts [in-house counsel] . . . The relationship with their internal legal stakeholders . . . has a long way to go,” according to Wallace.¹⁵⁷ How legal procurement will be viewed by its colleagues in the legal department and in the legal industry at large, what it will buy, what influence it will have, and how it will assist the legal department in getting better value and being good stewards of their employer’s money, will continue to change.

It is likely that instead of measuring hours, clients will focus on measuring output, results, service levels, overall cost, and time to resolution. The future holds the prospect of ‘more for less’ and advantage to the sophisticated, procurement-enabled client. Law firms are advised to be ready for their new counterparts in procurement.

153. E-mail from Danny Ertel, *supra* note 143.

154. *Id.*

155. E-mail from Lynn Krauss, *supra* note 58.

156. *Technology is Reinventing Legal Practice*, *supra* note 10, at 441.

157. E-mail from Beth Wallace, *supra* note 21.