A State of Peril
Navigating Major Project Risks

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Law Office. He has been ranked by Who’s Who Legal as one of the ten leading public procurement lawyers in the world and his firm was selected by Global Law Experts and Corporate INTL as Canada’s top public procurement law firm. Paul’s portfolio focuses on major procurement projects, developing innovative procurement formats, negotiating commercial transactions and advising institutions on the strategic legal aspects of their purchasing operations. Paul also has an extensive track record of public speaking, publishing and training. He is the author of Government Procurement, The Laws of Precision Drafting, Accelerating the Tendering Cycle and the National Tendering Law Update. Paul hosts the Procurement Law Update webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across Canada and internationally.
We can measure the success and failure of governments by how well they marshal resources for the greater public interest. Functioning state institutions, national defence and security, transportation systems, clean water, affordable power supply, public education and health care are the core underpinnings of government operations. When governments fail to provide these core public needs, they are often referred to as “failed states”.

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A State of Peril
The Impact of Major Procurement Failures

When government institutions fail to deliver on the procurement projects critical to meeting those needs, they can equally be defined as failed institutions. Using recent case studies dealing with many of these core government areas, this article will analyze a number of high-profile procurement failures that have put the government’s ability to maintain its core operations in a state of peril.
Procurement failures have had a major impact in recent years on military operations. Newsreel highlights have featured an incessant cycle of stories about bureaucratic infighting between the defence and public works departments, resulting in delays in the procurement of everything from helicopters, maritime patrol aircraft and close combat vehicles to naval ship repairs and helicopter flight hangers.
The government’s ongoing epic retreat on the F-35 fighter jet file, which came after it took heavy fire from the Auditor General over the controversial multi-billion dollar sole source decision, remains the single biggest example of indecision and delay on the defence procurement front.
This ongoing comedy of errors is no laughing matter when we consider the adverse impact on Canada’s military capability as we face threats to our Arctic sovereignty, ponder escalating military campaigns against Russian aggression in Eastern Europe and consider a new Middle East mission to fight terrorism in Syria and Iraq.
Transportation procurements have also attracted significant recent attention. In February 2014 the Federal Court ruled against the Canadian Air Transport Security Authority, the agency responsible for security at Canada’s airports, after finding that the agency’s RFP for new security screening equipment was tainted with hidden evaluation criteria and a flawed internal reporting process.
The court ordered CATSA to redo its procurement process, resulting in delays in upgrading the equipment used to ensure the safety of airline passengers. Procurement failures have also impacted transportation at the local level. In April 2013 the Ontario Superior Court of Justice granted an injunction against Southwestern Ontario Student Transportation Services that effectively put the brakes on school transportation tendering across Ontario.
A State of Peril
Intrigues in Transportation Tendering

The case was one of many lawsuits launched by small bus operators who claim that new provincial tendering rules are stacked against them as they are bid out of business by large corporate operators. These legal battles have put what is Canada’s largest transportation system in a state of ongoing uncertainty.
Public infrastructure projects have also provided high-profile case studies. For example, the Alberta government faced an uprising from local school boards in March 2014 after it received only one bid in response to a major P3 tender for the construction of nineteen new schools and cancelled the project. As Canada’s third-largest city, Calgary has an unprecedented number of students crammed into temporary portables.
A State of Peril
Infrastructural Entanglements

After the P3 failure the Calgary School board called on the province to abandon large scale P3 projects due to delays and to proceed with traditional single-school construction projects. Meanwhile, the City of Brampton, Canada’s ninth largest city, remains mired in a $28.5 million lawsuit over a controversial downtown redevelopment project that has attracted allegations of secret procedures and inappropriate political lobbying.
A State of Peril
Infrastructural Entanglements

In its February 2014 interim decision in Inzola Group Ltd. v. Brampton (City), the Ontario Superior Court of Justice ordered the winning bidder to turn over the contents of its bid to the losing bidder in what promises to be a protracted legal battle. These municipal case studies illustrate the impact of project failures on local public services.
The health care file recently delivered a trilogy of high-profile provincial audits involving the procurement of emergency air-ambulance services. First, in March 2012 the Ontario Auditor General found significant oversight issues at the ORNGE air ambulance agency, which included concerns over procurement practices and the ability to properly care for transported patients.
Then in March 2013 the BC Auditor General found that the contract award process for air ambulance services in BC had not ensured that “paramedics and aircraft are located and dispatched to best meet patient needs.”
Finally, the March 2014 report of the Manitoba Auditor General concluded that the provincial government breached its procurement rules by sole sourcing air ambulance services and failing to conduct adequate cost assessments after finding that the rates “were likely to be 231% to 618% higher than other province’s programs.”
A State of Peril
Air Ambulance Audits

These recent audits can be added to an escalating pile of health sector procurement scandals that are undermining public confidence in the state of our health care system.
The Ontario power plant scandal is probably the most compelling recent case study on the perils of failed procurement projects. As the Ontario Auditor General found, the politically motivated decision to cancel a power plant construction contract during an election campaign could ultimately costs Ontario taxpayers up to $1 billion.
The resulting fallout led to a legislative inquiry, to contempt charges against a government minister, to the premier’s resignation, to the proroguing of the legislature while a new party leader and premier was chosen, to a police investigation and police raids of the premier’s office over deleted emails, and, in the spring of 2014, to the ultimate collapse of the provincial government.
As this crisis escalated and brought government business to a grinding halt, it served as a prime example of how failed procurement projects can put ongoing government operations in a state of peril. To avoid a similar fate, Canadian public institutions must reboot their procurement practices and put a greater focus on ensuring that their procurement projects achieve their operational needs on budget, on time and according to the rules.
A State of Peril: Navigating Major Project Risks
A State of Peril
Navigating Major Project Risks

Project failures tend to recur in the same four areas and are typically caused by the inability to properly address inherently competing objectives. Project teams that ignore these ever present risks do so at their peril. Featuring recent newsreel highlights, audit reports and case law reviews from a broad range of portfolios, this presentation will identify the four risk areas for major projects and show how failed procurements have a serious negative impact on institutional operations.
A State of Peril
Defining Project Success to Guide Project Planning

Project failures typically manifest themselves in one or more of the following ways:

1. failure to meet operational needs
2. failure to stay within budget
3. failure to deliver on time
4. failure to follow the process rules
A State of Peril
Defining Project Success

Based on these recurring risk areas, the definition of project success can be distilled into one simple question:

*Did we buy what we need, on budget, on time and by rules?*
A State of Peril
Defining Project Success to Guide Project Planning

Yet, without proactive planning, it is almost impossible to properly balance the inherent tension between operational needs, budgets constraints, time pressures and process rules. Project teams should therefore address all four of these major risk factors and use them as performance benchmarks for properly designing their project plans.
To measure project results in a broad range of case studies, the four performance benchmarks will be scored on the following four point scale:

1. Significant Failure
2. Marginal Result
3. Meets Expectations
4. Exceeds Expectations
Project Scoring Grid

- Timing
- Cost
- Operational Needs
- Process Rules
Project Scoring Grid

Timing

1  2  3  4

Cost

1  2  3  4

Process Rules

1  2  3  4

Operational Needs

1  2  3
Project Scoring Grid

Timing

Cost

Process Rules

Operational Needs

Significant Failure
Project Scoring Grid

Timing

Cost

Process Rules

Operational Needs

Marginal Result
Project Scoring Grid

Meets Expectations

Timing

Cost

Process Rules

Operational Needs
Project Scoring Grid

- **Exceeds Expectations**: 4

- **Timing**: 4
- **Cost**: 4
- **Process Rules**: 4
- **Operational Needs**: 4
Exceeds Expectations

Project Scoring Grid

- Cost
  - 1
  - 2
  - 3
  - 4

- Timing
  - 1
  - 2
  - 3
  - 4

- Process Rules
  - 1
  - 2
  - 3
  - 4

- Operational Needs
  - 1
  - 2
  - 3
  - 4

Score: 4.0
Project Scoring Grid

Meets Expectations: 3

Timing: 3

Cost: 1

Process Rules: 1

Operational Needs: 1

Score: 3.0
Project Scoring Grid

- Marginal Result: 2
- Timing: 2.0
- Cost: 1
- Process Rules: 1
- Operational Needs: 1

The diamond grid represents the project scoring system with four criteria: Timing, Cost, Process Rules, and Operational Needs. Each criterion is scored on a scale of 1 to 3, with 3 being the highest score. The Marginal Result score is calculated as the average of the scores for each criterion.
A State of Peril
Defining Project Success to Guide Project Planning

By applying this scoring grid to a series of high-profile case studies, we can show how a failure in any particular risk area can undermine the success of an entire project. This will also help illustrate the competing objectives that organizations must balance to achieve project success.
The Purchasing Pyramid

- **Large Projects** ($100 million+)
  - Special Non-Recurring Projects ($5 million+)
  - Regularly Recurring Open Tender Contracts for Repeat Purchases Valued Over Open Tender Thresholds
  - Three-Quote Zone Below Open Tender Threshold (Typically Under $25,000 - $100,000)
  - P-Card and PO Zone - (Typically Below $10,000)

- **Major Budget Threshold**
- **Complexity/Novelty Threshold**
- **Open Tender Threshold**
- **P-Card Limit**
The Major Project Zone

- Major Projects
  - Large Projects ($100 million+)
  - Special Non-Recurring Projects ($5 million+)
  - Regularly Recurring Open Tender Contracts for Repeat Purchases Valued Over Open Tender Thresholds
  - Three-Quote Zone Below Open Tender Threshold (Typically Under $25,000 - $100,000)
  - P-Card and PO Zone - (Typically Below $10,000)

- Complexity/Novelty Threshold
- Open Tender Threshold
- P-Card Limit
- Major Budget Threshold
The Structure of Government in Canada

Federal Parliament
- PWGSC
- Treasury Board

Federal Departments
- Crown Corporations

Provincial and Territorial Legislatures

Central Government Departments
- Ministry of Municipal Affairs
- Ministry of Colleges & Universities
- Ministry of Education
- Ministry of Health
- Other Ministries

Regional Government
- City Government
- Police
- Hydro
- Transit
- Universities
- Colleges
- School Boards
- School Boards
- Regional Health Authorities
- Hospitals
- Frontline Care

Municipal Sector

Academia

School Sector

Health Sector
The following case studies feature a large number of Canadian public sector projects that reinforce the universal application of the four major project risk factors.
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Case Study Focus Areas

The case studies are organized under the following five major project subject areas:

- National Defence
- Infrastructure
- Transportation
- Health Care
- Energy
National Defence
Major Delays on Multiple Fronts

Canadian defence procurement has been the subject of ongoing criticism over major project failures caused by widespread process delays. By way of illustration, a single week in February 2014 (under “Military” on the Procurement Office Blog tag cloud) included the following media reports:

• A National Post column citing a defence industry report of an “aimless” Canadian military “ruled by balance sheets not foreign policy” that characterized the management of the military procurement file as “delinquency of one’s government duty”.

National Defence
Major Delays on Multiple Fronts

• A CBC News report that delays in replacing planes forced a $35 million upgrade of existing CP-140 Aurora maritime patrol aircraft and reflected “another tacit admission that Canada’s military is somehow structurally unable to swiftly procure the gear it needs.”

• A Maclean’s story on the disclosure of government documents that showed how “National Defence was left scrambling” over delays in the construction of a new hangar and flight line in Petawawa that were needed for the “long-awaited CH-147F Chinook helicopters.”
National Defence
Major Delays on Multiple Fronts

• A Courier-Islander story about the government’s reversal on the F-35 sole source, and the failure to announce a new procurement strategy, which led “many in the defence industry to predict a decision on replacement aircraft would be delayed until after the 2015 election.”

• A Globe and Mail report quoting a speech by retired general Andrew Leslie at a Liberal Party convention where he stated that the government had “the worst record” on military procurement of any government in the last fifty years and that it “can’t even buy a modest fleet of trucks that are painted green.”
National Defence
Major Delays on Multiple Fronts

These widespread media reports came after the government announced its reorganization of military procurement, which will result in enhanced civilian oversight of procurement planning, along with more budget cuts and spending delays.

These reports illustrate a significant failure in two of the four key benchmarks that define successful procurement projects:
Project Scoring: Military Procurements

Projects score 1.5 out of 4 due to significant failures relating to timing and meeting operational needs.

Cost and process rules not at issue, scored as neutral 2.5 out of 4.

Major project delays resulting in a failure to meet the operational needs of the military.
In fact, military cuts, and related project delays and cancellations, were the subject of ongoing media reports even before the government announced its overhaul of the military procurement file. In an October 10, 2013, National Post report entitled “$2B military procurement still alive despite rumours to the contrary, senior government officials say,” J. Ivison stated that government officials were denying rumours of the federal government’s cancellation of a $2 billion tendering process for close combat vehicles. The story noted that the procurement was already two years behind schedule.
In a follow-up story in the *National Post* on December 19, 2013, entitled “Conservatives mum as CCVs become latest military procurement debacle,” J. Ivison reported that the federal government was on the verge of allowing the bids on the $2 billion Close Combat Vehicles procurement to lapse without making an award. As the story stated, “To the long list of Canadian military procurement debacles it seems we can now add the $2.1-billion purchase of 108 medium weight infantry fighting vehicles. The cost to taxpayers on the cancelled bidding process was estimated at $70 million, which did not include the potential costs of any resulting litigation.”
Projects score 1.25 out of 4 due to significant timing failure and related marginal results in other categories.

Major project delays resulting in a failure to meet the operational needs of the military.

Marginal process result due to lapse of bids without award and significant sunk bidder costs.

Ultimate costs undetermined, large sunk process costs, potential lawsuits looming.
The federal government has also faced ongoing criticism over its military ship procurements. For example, a January 23, 2014, story in Canadian Manufacturing entitled “Failed navy supply ship bid costs Harper government up to $8 million” reported on a previously secret multi-million dollar legal settlement:

OTTAWA—The Harper government paid out as much as $8 million to settle legal claims arising from the collapse of the first failed bid to build new supply ships for the navy, The Canadian Press has learned. One of the companies that received payment has subsequently been hired to work with Vancouver-based Seaspan Shipyards to provide the design for the new program, which hopes to deliver vessels by 2018-19.
National Defence
Ships

...[b]uried deep in National Defence documents obtained under the Access to Information Act, is a reference to a previously unknown litigation fund related to the first failed procurement. The issue of compensating defence contractors over failed procurements was front and centre last month when the Harper government announced it was cancelling a multi-billion dollar armoured vehicle program. A spokeswoman for the Department of Public Works confirmed that one of the bidders, ThyssenKrupp Marine Systems of Germany, filed a statement of claim, which was quietly settled through negotiation in late 2010.

The story stated that the government relied on confidentiality terms in the secret deal to justify its original refusal to disclose the cost of the settlement to taxpayers.
Projects score 1.25 out of 4 due to cancellation of bidding process and related marginal results in other categories.

Cancellation of tendering process results in delays, adverse impact on military’s operational needs.

$8 million cost to settle legal dispute over cancelled project.

Tendering process cancelled, legal dispute and out of court settlement constitute significant process failure.
Notwithstanding other failures, the federal government’s National Shipbuilding Strategy has been held out as a successful procurement project, receiving relatively positive media coverage. In fact, “Chapter 3 – National Shipbuilding Procurement” of the Auditor General of Canada’s fall 2013 report stated that the “competitive process for selecting two shipyards resulted in a successful and efficient process independent of political influence, consistent with government regulations and policies, and carried out in an open and transparent manner.” Based on these findings and generally positive media reports, this could be scored as a successful project:
Project Scoring: National Shipbuilding

Project scores 3.5 out of 4 for meeting or exceeding expectations in all categories.

- No reported delays, along with long term program planning to help meet long term operational needs.
- Process included additional protections and procedures, including fairness monitors and de-politicization.

- No reported cost overruns to date.
National Defence
Ships

However, there was more to the story. The otherwise high scoring for this project was compromised by the Auditor General’s finding of post-bid process irregularities. As the reported found “Following the selection, the shipyards negotiated changes to the terms of the draft agreement that was included in the request for proposals (RFP) to ensure they would be compensated for their capital investments should a project be cancelled, delayed, or reduced in scope.”
The report found a lack of transparency in the contract award procedures that led to the post-bid changes:

As a result, the agreements that were signed with the shipyards differ significantly from the draft agreements that had been included in the RFP, as these did not include such backstop provisions. It was not clear from the wording of the RFP that the negotiation of backstop provisions was anticipated. Consequently, based on lessons learned from the RFP issued under the NSPS and the negotiations that came after the winning bidders were selected, Public Works and Government Services Canada should consider how the terms of future RFPs could be made clearer and more explicit as to the extent of negotiations of post-bid changes with successful contractors.
Original Scoring: National Shipbuilding

Project originally scores 3.5 out of 4 for meeting or exceeding expectations in all categories.

- No reported delays, along with long term program planning to help meet long term operational needs.

- Process included additional protections and procedures, including fairness monitors and de-politicization.

- No reported cost overruns to date.
Project Re-Scoring: National Shipbuilding

Project re-scores at 2.5 out of 4. While it met or exceeding expectations in some categories, there was a marginal process result.

No reported cost overruns to date.

No reported delays, along with long term program planning to help meet long term operational needs.

Process included post-bid contract changes that were not expressly allowed in the RFP rules.
National Defence
Stalled Helicopter Projects

Helicopter project delays have also made the news. According to a September 12, 2013, Globe and Mail story entitled “Troubled helicopter deal has already cost Ottawa more than $1-billion,” another stalled helicopter purchase was on the brink of a high-cost cancellation. As the story stated, if the government cancelled due project delays “Sikorsky, the manufacturer of the Cyclone helicopters, would likely launch a countersuit.” The article noted that, if cancelled, this deal would be added to a growing list of failed military procurements overseen by the federal government in recent years.
In a prior October 11, 2012, *Globe and Mail* story entitled “Sea King replacements still up in the air as Ottawa renegotiates contract,” M. Brewster provided more background on the project delays:

The $5.7-billion contract to buy 28 helicopters was signed by the Liberal government of Paul Martin in 2004 – a milestone event in the two-decade fight to find a replacement for the CH-124 Sea Kings – after former prime minister Jean Chrétien cancelled the first deal in 1993.

Sikorsky was required to deliver new state-of-the-art aircraft within four years, but the Harper government was forced to extend the contract in 2008 and toss in an extra $117-million after the program bogged down.
Canada’s auditor general slammed National Defence over the Cyclone purchase two years ago, saying the department underestimated the complexity of developing the helicopter and wrongly defined it as being an “off-the-shelf” purchase.

The article noted that in June of that year, Defence Minister Peter MacKay referred to this purchase as “the worst procurement in the history of Canada.” As subsequent case studies will illustrate, other projects are also in contention for this dubious distinction.
Project Scoring: Stalled Helicopters

Project scores 1.25 out of 4 due to significant failures relating to timing, operational needs and process.

Major project delays resulting in a failure to meet the operational needs of the military.

Cost overrun not clear yet, scored as neutral 2.5 out of 4.

Publicly reported threats of lawsuit and countersuit reflect a marginal process result.

Project scores 1.25 out of 4 due to significant failures relating to timing, operational needs and process.

Cost overrun not clear yet, scored as neutral 2.5 out of 4.

Publicly reported threats of lawsuit and countersuit reflect a marginal process result.
The ongoing saga involving the F-35 fighter jets, with its cost overruns, project delays and procedural irregularities, represents one of the most high-profile project failures in Canadian procurement history. An April 2014 CBC News story entitled “F-35 rivals report done as cabinet considers fighter jet options” confirmed that the federal cabinet received a report setting out competing alternatives to the procurement of the F-35 fighter jets. As the story stated, the study was commissioned after a “scathing auditor general’s report” relating to the initial decision to sole-source the acquisition of the F-35s.
In fact, Chapter 2 of the Auditor General of Canada’s spring 2012 annual report, entitled “Replacing Canada’s Fighter Jets,” contained a critical assessment of the federal government’s involvement in the US-led Joint Strike Force (“JSF”) program:

When National Defence decided to recommend the acquisition of the F-35, it was too involved with the aircraft and the JSF Program to run a fair competition. It applied the rules for standard procurement projects but prepared key documents and took key steps out of proper sequence.
National Defence
The F-35 Saga

As a result, the process was inefficient and not managed well. Key decisions were made without required approvals or supporting documentation. Information provided to decision makers was incomplete, and no plan was developed for extending the life of the CF-18 fleet in the event of prolonged delays in the delivery of a jet that is still being developed. For its part, PWGSC, in its role as the government’s procurement authority, did not do enough to ensure the integrity—the fairness and transparency—of the procurement process. National Defence did not follow the basics of good management that would be expected for a $25 billion commitment by the government.

The report was one of many high-profile critiques levelled against the government over the F-35 file.
National Defence
The F-35 Saga

For example, in a March 6, 2014, National Post story by D. Pugliese entitled “Canada’s multi-billion dollar F-35s ‘irrelevant’ without U.S.-only F-22 as support, American general says,” US general Michael Hostage claimed that the F-35 fighter jets are incapable of flying solo missions. Since they cannot properly defend themselves against enemy aircraft, they require companion F-22s to fly shotgun to provide aerial mission support. The catch is that the F-22s are proprietary to the US due to their advanced technology and are not available to other countries even if Canada could afford them. The F-35 decision remains “under review” by the Canadian government.
Project Scoring: Canada’s F-35 Program

Project scores 1.0 out of 4 due to significant failures in all four categories.

Significant project delays resulting in a significant failure to meet military’s operational needs.

Significant procedural non-compliance due to initial sole source decision, subsequent reversal, and resulting adverse impact on future competition.

Significant cost overruns, with grossly underestimated original cost projections.
Studies have shown that the “optimism bias” leads to systemic, widespread and prolonged cost overruns and delays in major infrastructure projects. In a 2012 *Asper Review of International Business and Trade Law* article, L.B. Jatto noted that:

A number of studies have yielded empirical evidence, which strongly suggests that, the world over, significant cost overruns and time delays characteristically attend conventional public procurement of capital-intensive infrastructure projects, but not the procurement of such projects via PPPs. This global phenomenon, characteristic of conventional public procurements, is known either as "appraisal optimism" or "optimism bias."
Infrastructure
Conventional Projects vs. P3 Projects

Turning to Canada, Jatto noted a Conference Board of Canada study of fifty-five P3 infrastructure projects initiated between June 2004 and November 2009 in Alberta, BC, Ontario and Québec which found very low rates of cost overruns or delays:

All of the projects examined proceeded according to budget, even where there were contract variations and time delays, resulting in cost certainty and ultimately guaranteeing the realization of the cost savings indicated for P3s in the first instance through the forward-looking VfM estimates…[F]urthermore, out of the nineteen projects that had reached their substantial completion dates by November 2009, and which could thus be assessed for time certainty in the Conference Board report, only three experienced delays.
Infrastructure

P3 Projects

However, concerns have been raised over P3 market saturation. In a February 26, 2014, Journal of Commerce article entitled “Alberta school procurement halted and restarted,” R. Gilbert reported that Alberta was forced to cancel a P3 project for 19 schools after receiving only one response:

In November last year, the government announced that Build to Learn, with team leads Gracorp Capital Advisors Ltd. and Bird Capital Limited Partnership, was the single respondent to the RFQ stage for the Building Alberta’s School Construction Program (BASCP). Despite this, the government invited Build to Learn to enter the Request for Proposal (RFP) stage of the procurement process.
Infrastructure

P3 Projects

In a related March 10, 2014 Journal of Commerce article entitled “School board asks for traditional procurement,” R. Gilbert reported that the Calgary School Board was calling on the province to use traditional design-bid-build formats for the new schools to avoid building delays:

The Calgary Board of Education (CBE) has asked the Alberta government to use a traditional design-bid-build approach for new school construction, due to worries about delays with the public-private partnership process. “We are concerned that if a public-private partnership (P3) approach is used for any new schools, which are approved, that the schools would not be available until September 2017,” said Sheila Taylor, chair of the board of trustees.
Project Scoring: Alberta Schools P3s

Project scores 2.0 out of 4.0 due to significant concerns over impact of market saturation on timing, operational needs and future costs.

Concerns over price escalation due to overheated market and reduced number of bids.

Cancellation over no bids results in project delays that impact operational needs of school boards.

Open competition compromised by lack of bids on P3 project due to current price competition.
Infrastructure
P3 Projects

Concerns over alleged improprieties relating to a P3 project were raised in a February 7, 2014, *Toronto Star* article entitled “Developer sues Brampton for $28.5 million,” where S. Grenwal reported that:

A local developer’s $28.5-million lawsuit against the City of Brampton claims there was political interference, undue secrecy and “bias” by city staff during the bidding process for one of the largest projects in the city’s history. Inzola Group Ltd., in its statement of claim, argues that as a result it was “improperly disqualified” from bidding on a plan to redevelop Brampton’s downtown, a project that could cost taxpayers more than $500 million. The Dominus Group was eventually awarded the contract.
Infrastructure
P3 Projects

“Certain individuals within the city’s administration were also biased in favour of the selected respondent, Dominus,” Inzola alleges in its claim.

The city’s statement of defence denies the claims and says they are without merit. The city claims Inzola is part of a faction “who are using the process of this court to cast aspersions upon the mayor (Susan Fennell) and the reputation and good character of the city’s staff.”

As the story illustrates, large infrastructure projects can attract significant fair process concerns and are a vulnerable target for protracted legal disputes launched by losing bidders.
Project Scoring: Brampton P3

Project currently scores 2.5 out of 4 due to ongoing legal challenge of procurement process.

No current issues over project delays or adverse impact on operational needs reported. Both scored as neutral 2.5.

No current issues over additional costs reported, scored as neutral 2.5.

Allegations of unfairness in RFP, along with $28.5 million lost profit claim, results in marginal interim process score.
Infrastructure
Public Housing

A September 8, 2014, CBC News story by Geoff Leo entitled “Province abandons low-income housing project after cost overruns” noted that the provincial government “has walked away from a highly touted housing project in Regina that would have provided homes for 48 low-income families, because of a contract dispute with the developer,” and that the “province entered into a $9.9 million fixed-price contract with Deveraux to build the units to guarantee the finished building would be delivered without cost overruns.”
As the story revealed, the deal fell through after Deveraux incurred $400,000 in unanticipated cost overruns, which it admitted were due to its own miscalculations, and was then unable to convince the government to cover half of those additional costs. After returning the government’s multi-million dollar deposit, the developer was allowed to walk away from the deal and keep the properties to rent out at full market rates.
Infrastructure
Public Housing

In a September 8, 2014, companion story entitled “NDP questions province’s failed low-income housing project,” G. Leo of CBC News quoted the opposition as stating that “the provincial government should have taken Deveraux Developments to court after it failed to deliver a low-income housing project within the terms of the contract.” The story stated that developers should not be allowed to raise cost overrun issues with government and then use that opportunity to walk away from the deal and commercialize the opportunity themselves.
Infrastructure
Public Housing

In a follow-up story on September 9, 2014, entitled “Minister defends decision to return low-income housing to private company,” CBC reporter G. Leo quoted Saskatchewan’s Minister of Social Services Donna Harpauer as admitting that, “We did basically let them off the hook for the contract rather than go through any legal hassle and that way we’re (the provincial government) out no money.” In response to CBC questions about the long waiting list for social housing in Saskatchewan, the Minister was quoted as replying that “you’re assuming that there’s these desperate homeless people” in the province.
Infrastructure
Public Housing

In a scathing editorial published on September 10, 2014, entitled “Desperate homeless people don’t exist?,” the Daily Herald criticized the Minister’s prior remarks, stating:

“Hey, Saskatchewan Minister of Social Services Donna Harpauer, there are a couple of questions that have come up about your job title and how in-touch you are with your community. It is interesting to hear that you don’t seem to think there are any ‘desperate homeless people’ in this province. Can you clarify if that is just denial, or you really don’t believe there are desperate homeless people? In case you missed it, people in Prince Albert have died in snowbanks – last winter and the winter before that. Would those people have been considered desperate homeless people?”
The editorial asked the Minister, “have you considered the desperate families who may not be homeless, but are squeezing eight or 10 family members into one-bedroom apartments?” The editorial also asked, “Does this mean that fixed-price contracts the government enters into with builders, or developers, or for any project for that matter, are now optional? Will these projects now say complete within a fixed-price… if you can?”
Infrastructure
Public Housing

In a follow-up story on September 11, 2014, entitled “Minister apologizes for ‘desperate homeless people’ remark,” CBC News noted that the Minister’s statement regarding homeless people had “generated outrage” on social media and among front-line housing providers. As the story stated, “Housing coordinators like Tyler Gray at Carmichael Outreach in Regina were outraged over the statement.” It quoted Carmichael as stating “she said there’s this assumption that there (are) desperate homeless people. It’s not an assumption. It’s reality.”
The story confirmed that “Gray and his coworkers are currently looking for homes for more than 50 people.” The story also reported on the government’s damage control efforts, noting “In a statement issued by the government today, Harpauer said, ‘I want to deeply apologize for my remarks earlier this week. Those words should have never been said and I apologize. In no way was I trying to say there are no homeless people in Saskatchewan.’”
Project Scoring: Saskatchewan Public Housing

Project scores 1.25 out of 4 due to cancellation, significant delays due to retendering and potentially higher future costs.

Retender will result in significant bidding and building delays. Urgent need for more public housing units means delay is a significant operational failure.

Heated market raises risk of increasing costs when project is rebid.

Failure to enforce original contract terms raises process concerns, sets bad precedent for future bids.
Transportation
Airport Security Screening Equipment

Transportation related procurements also attract significant attention. For example, airport security is a matter of high public importance due to public safety considerations. However, safety concerns do not exempt the procurement of security equipment from due process requirements. As the recent Federal Court of Canada decision in *Rapiscan Systems Inc. v. Canada (Attorney General)* illustrates, running an unreasonable or unfair competition with hidden preferences and providing misleading information to decision makers can result in the courts striking down a award.
Transportation
Airport Security Screening Equipment

In the case, the Canadian Air Transport Security Authority ("CATSA") issued a solicitation for airport security screening equipment. After submitting an unsuccessful proposal, Rapiscan Systems launched a legal challenge alleging that CATSA had conducted an improper process. The court agreed, finding that, among other things, CATSA had applied hidden evaluation criteria. The court struck down the award as invalid, unlawful and unfair. It also directed CATSA to redo its future procurement process for the required equipment.
Project Scoring: Airport Screening Equipment

Project scores 1.25 out of 4 due to significant process failure, leading to marginal results in other categories.

Cancellation results in delay in procurement of new equipment, failure to promptly satisfy operational needs.

Court found flawed price competition due to rejection of complainant’s bid due to hidden criteria.

Process flaws result in court striking down contract award and ordering a retender. Constitutes a significant process failure.
Transportation
Transit Fare Card System

In a December 18, 2012, Globe and Mail article entitled “System builder of Presto fare card had poor track record,” J. Lorinc reported that Accenture, a large US consulting firm hired to build Ontario’s struggling Presto fare-card system, had a history of poor performance on contracts with the Ontario government at the time it was awarded the project. The allegation followed the release of the Ontario Auditor General’s 2012 annual report, which, according to the article, raised concerns over delays and scope increases on the Presto project. The article noted that the audit found significant deficiencies even though the process was vetted by a fairness monitor.
Transportation
Transit Fare Card System

As the Auditor General report stated, the Presto Next Generation Project ("PNG") encountered significant change order issues, noting that "a total of 330 change requests, adding $146 million to total costs, have been made under the contract." The Auditor General found that some change orders were for work already covered under the original contract price. The audit also noted concerns over the cost calculations and timing of the change requests.
Project Scoring: Fare Card System

Project scores 1.5 out of 4, due to significant contract management issues, cost overruns and delays.

Audit found questionable extras paid for work that should have been done in original contract scope.

Partner transit systems found change order performance was slow and expensive. Delays impacted system deployment.

No issues raised with bidding process for initial contract award, which had fairness monitor “sign off”.

- **Cost**: Score of 1
- **Timing**: Score of 1.5
- **Operational Needs**: Score of 1
- **Process Rules**: Score of 1
Transportation
School Bus Transportation Services

In an October 25, 2012, story on Simcoe.com entitled “Local companies lose bus contract,” L. Watt reported that local residents, including Simcoe North MPP Garfield Dunlop, were concerned over the impact of new school bus tendering procedures on local service providers:

“It’s mind-boggling that policies can be in place that allow someone to come in and undercut you knowing you have to get rid of your equipment and then after a few years from now these companies … can jack up the prices. It’s despicable. I’m really opposed to this,” said Dunlop.
The story detailed how local providers were losing out to larger out of town competitors:

This year, the Simcoe County Student Transportation Consortium (SCSTC) – a joint venture of both the Simcoe County District School Board and the Simcoe Muskoka Catholic District School Board – issued proposals. In the spring, it awarded contracts for buses in Midland and Penetanguishene and Orillia. Late last week, it awarded proposals for Bradford and Alliston, Collingwood and Wasaga Beach, and Barrie and Elmvale. Long-time major service providers Sinton Transportation and First Student are losing a lot of business to companies based outside the region, such as Aurora-headquartered Landmark Student Transportation and Switzer-Carty and Attridge, both from Burlington.
Project Scoring: School Bus Services

Notwithstanding protest by small operators, projects initially score 3.5 out of 4 for meeting or exceeding expectations.

Larger corporate operators underbid smaller operators, resulting in cost savings.

Contract awards proceeded on a timely basis with no apparent adverse impact on operational needs of school boards.

Open competitive bidding processes had external procurement advisors to ensure due process, as well as fairness monitor “sign off”.
Transportation
School Bus Transportation Services

The new school bus service procurement processes triggered a number of legal challenges by small school bus operators. For example, in its April 2013 decision in *F.L. Ravin Ltd. v. Southwestern Ontario Student Transportation Services*, the Ontario Superior Court of Justice granted an injunction against Southwestern Ontario Student Transportation Services (“STS”). The dispute arose over the third and final RFP issued by STS for school bus transportation services in southwestern Ontario.
Transportation
School Bus Transportation Services

As this case illustrates, while instances where the courts will grant an injunction to stop a tendering process are rare, they are not unprecedented. Furthermore, when successful, such injunctions can have a significant impact on government operations. In this case, the injunction had the impact of effectively suspending competitive bidding for school bus transportation services across much of Ontario.
Project Scoring: School Bus Services

Notwithstanding protest by small operators, projects initially score 3.5 out of 4 for meeting or exceeding expectations.

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Cost

Timing

Process Rules

Operational Needs
Project Re-Scoring: School Bus Services

Project re-scores at 2.0 out of 4. Legal challenges cause delays, raise fairness and operational concerns.

Legal challenges delay future bidding for new contracts, creating deployment delays and raising safety concerns over operations.

Concerns over future cost increases if larger operators eliminate smaller competitors.

Lawsuits allege that bidding processes are stacked against small operators.
In an April 8, 2013, Ottawa Citizen article entitled “Federal government ordered to pay nearly $30 million to losing bidder in relocation deal,” K. May reported that an unsuccessful bidder was awarded $30 million in lost profit damages due to an unfair evaluation process in a federal relocation services RFP:

The federal government has been ordered to pay nearly $30 million in lost profits to the losing bidder of a controversial mega-million-dollar relocation deal that an Ontario Superior Court judge found was “intentionally” steered by bureaucrats to a preferred supplier.
In its April 2013 decision in *Envoy Relocation Services Inc. v. Canada (Attorney General)*, the Ontario Superior Court of Justice found the government of Canada liable for $30 million for having unfairly favoured the incumbent service provider over competing bidders by making inaccurate disclosures of anticipated work volumes in its solicitation document. The case dealt with an RFP issued in 2004 for the provision of relocation services and contemplated two contract awards: the first for the Canadian Forces and the second for the government of Canada and the Royal Canadian Mounted Police.
In its follow-up judgment in May 2013, the court increased the lost-profit damages award by approximately $1 million based on revised lost-profit calculations. It also awarded over $3 million in pre-judgment interest, as well as legal costs at the full indemnity scale (rather than at a lower partial compensation scale) which amounted to almost $4.8 million. As the court noted, awarding legal costs at the full indemnity scale is reserved for extreme situations of defendant misconduct. The court found that the government’s conduct in the procurement process and subsequent legal proceedings warranted this higher award of legal costs in favour of the plaintiff.
Transportation
Federal Relocation Services

The subsequent tendering process was then reviewed by the Auditor General of Canada. In Chapter 2 of the Spring 2014 report, entitled “Procurement Relocation Services,” the Auditor General concluded that the government “did not facilitate access and encourage competition, which resulted in limiting the response to one service provider.” The report found that the scoping of the contract cut out domestic competition while also failing to attract international bids.
Project Scoring: Federal Relocation Services

Project scores 1.75 out of 4. Significant process issues result in lack of fair open competition and litigation costs.

$40 million lost profit award due to unfair tendering process in 2004 RFP process.

Ongoing awards to incumbent result in continuity of service, no apparent procurement-related timing delays or operational impacts.

2004 RFP process unfairly favoured incumbent, 2009 RFP failed to attract any competing bids.
Health Care

Federal Parliament
- PWGSC
- Treasury Board

Federal Departments
- Crown Corporations

Provincial and Territorial Legislatures
- Central Government Departments
  - Ministry of Health
    - Agencies

Ministry of Municipal Affairs
- Agencies

Ministry of Colleges & Universities
- Agencies

Ministry of Education
- Agencies

Regional Government
- City Government
  - Police
  - Hydro
  - Transit
- Universities
- Colleges
- School Boards
- School Boards

Regional Health Authorities
- Hospitals
- Frontline Care

Municipal Sector
- Academia
- School Sector
- Health Sector
In its March 2012 special report entitled “Ornge Air Ambulance and Related Services,” the Ontario Auditor General found significant issues with the government’s access to information about the air ambulance program:

From a quality-of-care perspective, the Ministry receives limited information on whether requests for patient pick-up and transfer are being responded to in a timely and appropriate manner or whether patients are receiving the appropriate level of care during transport. As well, we questioned whether the Ministry had adequate oversight over Ornge’s procurement practices and its intercompany arrangements with management and the board to ensure that Ornge was following appropriate public-sector business practices.
The Auditor General also found that the changes made to Ornge’s corporate structure hindered the government’s ability to ensure proper oversight:

We suspected that the changes Ornge made to its corporate structure were not contemplated when the Ministry originally negotiated the performance agreement that governs the accountability relationship between the two parties. The Ministry acknowledged this and indicated that these changes hindered its ability to obtain the information needed to exercise adequate oversight.
Project Scoring: Ontario Air Ambulance

Project scores 2.0 out of 4. Unclear if standards are being met due to lack of oversight. Marginal overall outcome.

Lack of transparency over whether procurements are conducted in timely manner and whether contracts are meeting patient care needs.

Audit also raises concerns over whether program is achieving value for money.

Lack of transparency regarding whether government open procurement standards are being met.
In its March 2013 report entitled “Striving for Quality, Timely and Safe Patient Care: an audit of air ambulance services in BC,” the British Columbia Auditor General determined that the government ran a fair open competition for the award of the air ambulance services. The Auditor General’s report also found that the project received a positive review from external fairness monitors.
However, the Auditor General found that the contract failed to ensure that operational needs were being met:

My overall conclusion is that the BC Ambulance Service is unable to demonstrate the quality, timeliness and safety of its patient care. This is largely because the BC Ambulance Service lacks a performance-based approach for managing its air ambulance services. It has not clearly defined objectives or measures and—while it has processes to support quality care, timeliness and patient safety—it does not assess its own performance to find out how well it is doing and look for ways to improve. Further, it has not undertaken an overall assessment of service demands to ensure that paramedics and aircraft are located and dispatched to best meet patient needs.
Project Scoring: BC Air Ambulance

Project scores 2.75 out of 4. Marginal overall result due to failure to clearly establish that service met operational needs.

No apparent timing issues on bidding process. However, marginal operational result due to failure to show that contract met patient needs.

No apparent cost issues.

Open competitive bidding processes had no apparent process issues, received fairness monitor “sign off”.

Operational Needs

Timing

Process Rules
In its March 2014 annual report, the Auditor General of Manitoba concluded that the government “was not in compliance with provincial tendering principles, policies and legislation” when it sole sourced a 10 year $159 million air ambulance services contract. The report also found that the government failed to perform the appropriate value for money analysis, noting that “Health obtained budgets during SPA negotiations showing costs-per-mission were likely to be 231% to 618% higher than other province’s programs. Despite these significant variances, Health performed inadequate procedures to assess if it would obtain value for money.”
Project Scoring: Manitoba Air Ambulance

Project scores 1.5 out of 4. Significant failure due to improper sole sourcing and related value for money concerns.

Audit report raises concerns over failure to obtain value for money, citing higher costs than other provinces.

No apparent operational issues or timing issues relating to procurement process.

Audit finds that government broke its procurement rules by improperly sole sourcing the $160 million contract.
Energy
Power Plants Scandal

In its May 17, 2013, story entitled “Minority Liberals have faced intense criticism over the cancellations,” CBC News reported that former Ontario premier Dalton McGuinty testified in legislative committee hearings over his mid-election campaign decision to cancel a power plant project. The controversial cancellation had previously led to the former premier’s resignation and would subsequently lead to the collapse of the minority government.
In a July 10, 2013, *Toronto Star* article entitled “Gas plant controversy: Investigation recovers deleted emails,” R. Benzie reported on a scathing critique by Ontario’s Information and Privacy Commissioner Ann Cavoukian over the government’s failure to disclose documents to assist the Commissioner’s investigation into the controversial cancellation of power plant contracts. As Cavoukian stated, “I am appalled that we were provided with incorrect information during the course of my investigation.” The story also noted that the Ontario Provincial Police had launched an investigation into the matter.
In an October 8, 2013, *Globe and Mail* article entitled “Ontario Liberals’ gas-plant cancellations cost $1-billion: auditor,” A. Morrow and K. Howlett reported that Ontario’s Auditor General estimated that the provincial government’s politically motivated decision to cancel two gas power plants will cost taxpayers $1 billion. The story also stated that government officials at Ontario Power Authority were sidelined from termination talks by the former premier’s political aids who promised to pay the terminated contractors their full lost profits. This political interference undermined the government’s ability to exercise contractual protections to limit taxpayer liability.
Energy
Power Plants Scandal

In a February 19, 2014, *Toronto Star* story entitled “OPP search data storage firm in probe of deleted power plant emails,” R. Ferguson and R. Benzie reported that the OPP’s anti-rackets squad executed a search warrant in an attempt to retrieve deleted power plant cancellation emails from the government’s external technology service provider that allegedly related to the contract termination.
In the spring of 2014, after supporting the minority Liberals for two successive budgets, the NDP finally withdrew support for the government. NDP leader Andrea Horwath cited the long litany of scandals as the final cause of her non-confidence move. The alleged destruction of records relating to the power plant cancellation was the last chapter in the long line of spending scandals that ultimately led to the government’s collapse and a provincial election in June 2014.
Project Scoring: Ontario Power Plant Scandal

Project scores 1.0 out of 4. Significant failures in all four categories. Scandal is a prime cause of government’s collapse.

Cancellations result in significant project delays and significant delays in meeting original objectives of reducing coal plant pollution.

Cancellations could result in up to $1 billion in additional costs to taxpayers.

Government admitted to cancelling contracts for political reasons. Audit found political staff interfered and waived contractual termination protections.
Conclusion

Key Points for Future Reference

- Project failures tend to recur in the same four areas and are typically caused by the inability to properly address inherently competing objectives.

- High profile case studies illustrate the endemic nature of cost overruns, project delays and process irregularities and how these risks adversely impact on the operation needs of an organization and lead to project failures.
Conclusion

Key Points for Future Reference

- Organizations should adopt advance project planning to balance the challenges of meeting operational needs while keeping their projects on budget, on time and in compliance with the rules.

- The project risk areas identified in the case studies can serve as navigation points for proper project planning, helping project teams balance competing priorities to better ensure project success.
National Tendering Law Update

Our free National Tendering Law Update newsletter is released three to four times annually and includes updates on the latest Canadian tendering case law, newsreel highlights from across Canada and around the world, and commentary articles written by our legal team highlighting the latest legal trends in the procurement field. We also offer our newsletter subscribers access to our free Procurement Law Update webinars, highlighting the latest cross-Canada developments dealing with public sector procurement treaties, statutes, regulations, directives and best practices. Since last summer, we have been offering free monthly one-hour webinars on specific topics for our subscribers. The upcoming webinar line-up is below.

- September 30, 2014, 1 pm EDT, **Negotiated RFPs and Judicial Review**
- October 15, 2014, 1 pm EDT, **Cooperative Purchasing at a Crossroads**
- November 12, 2014, 1 pm EST, **A State of Peril: How Failed Projects are Undermining Government Operations**
- December 10, 2014, 1 pm EST, **Political Interference in Public Procurement**

Please fill out the subscription form at the link above to receive the National Tendering Law Update and webinar invitations, and other office news including announcements of upcoming seminars, events and service offerings.
Papers and Other Resources

Research and Policy Papers

This White Paper on Group Purchasing commissioned by the National Joint Purchasing Alliance and released in July 2014 provides an in-depth overview of the industry practices and related legal rules that apply to cooperative purchasing across Canada.

This Report to Lethbridge City Council was prepared for the City of Lethbridge in April 2014 to assist them in assessing and evaluating a proposal by members of the public that the City’s real estate department be transformed into a licensed brokerage.

This Local Preference White Paper by Paul Emanueli was commissioned by the Ontario Public Buyers Association and presented on March 31, 2009, to help inform the issue of Canadian content and local preference as it impacts public procurement in the Ontario municipal sector.

This paper, Defending the Public Interest, was commissioned by the Ontario Public Buyers Association to provide a public sector perspective in response to the assertions raised in the September 2009 paper published by the Residential and Civil Construction Alliance of Ontario entitled “Towards a Fair and Balanced Approach: A RCCAO Commentary on Government Procurement of Construction in the GTHA”.

Other Resources

This presentation, titled “State of Peril: Navigating Major Project Risks” will be presented at the CPPC Forum Under Public Scrutiny in Montreal in October 2014.

This slide presentation titled “Cooperative Purchasing at a Crossroads” was presented at the OPBA’s Conference, London Links: Bringing Purchasing Together in September 2014.

This paper, Protecting the Public Interest, was released in 2014 by the Residential and Civil Construction Alliance of Ontario, to provide a public sector perspective in response to the assertion raised in the September 2009 paper published by the Residential and Civil Construction Alliance of Ontario entitled “Towards a Fair and Balanced Approach: A RCCAO Commentary on Government Procurement of Construction in the GTHA”.


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