How Do You Measure Up?

Cross-Canada Due Diligence Survey Results

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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.
How Do You Measure Up?
Cross-Canada Survey Results

In the fall of 2013, the Procurement Law Office released its first ever due diligence survey to National Tendering Law Update subscribers. Based on the Snapshot Review process we use to conduct legal reviews of client institutions, the survey was created to help institutions assess how they measure up to legal due diligence standards and compare to other organizations. The response was overwhelming, with feedback received from institutions from all across Canada. These slides highlight how purchasing institutions assessed their procurement operations across eight target areas and twenty-four due diligence indicators, providing an in-depth snapshot of the state of the practice across Canada.
Observation 1: For Institutional Governance, organizations reported their strongest results for complying with open competition duties, but scored weaker when assessing their integrity indicators and much weaker (with 65% saying “Somewhat Agree” or worse) on whether their current accountability controls measure up to emerging due diligence standards.
1. Our organization has recently completed an institutional legal review to identify governance gaps and ensure that our procurement policy, procedures and protocols comply with emerging due diligence standards.
2. Integrity Indicators

2. We have ethical rules in place that include procurement-specific provisions addressing issues like evaluation bias, bidder conflict of interest, lobbying and Competition Act offences such as price-fixing conspiracies and bid rigging.
3. Our policies require us to conduct an open competitive process for purchases above the thresholds set out in the trade treaties that apply to our organization, and we have procedures in place to prevent improper sole-sourcing, unauthorized branding and the use of biased specifications.
Observation 2: For Project Governance, a majority or organizations reported “Strongly Agree” or “Agree” when it came to creating clear requirements and formats, but were less confident with their project approval and review process flow or with the proper definition of roles and responsibilities at the outset of a project.
4. Approval and Review Process Flow

4. Our policies and procedures include clear project review and approval processes that link the procurement process to the budget approval process, stream procurements into risk categories, and ensure sufficient time for necessary safeguards and expert involvement on complex projects.
5. Proper Roles and Responsibilities

5. We have a process for establishing project teams and documenting roles and responsibilities at the beginning of procurement projects, so that everyone knows what they need to do to complete the project and we don't have overlapping roles or gaps in accountability.
6. Clear Requirements and Formats

6. At the start of our procurement projects, before drafting any documents, we engage in a planning process to determine the best choice of procurement format, based on the project requirements, pricing structure, evaluation plans, and specific contracting needs of the project.
**Observation 3:** For Forms and Formats, over 70% of organizations responded “Strongly Agree”, “Agree” or “Somewhat Agree” when asked if they promote awareness of format use, regularly update their templates and use flexible non-Contract A formats. However, a significant minority (16-29%) responded “Somewhat Disagree” or worse when asked those same questions about managing legal risks in their tendering templates.

7. We encourage the use of non-Contract A flexible, low-risk tendering formats, including Pre-Qualification Frameworks, Requests for Quotations, and Negotiated RFPs.

8. Our procurement templates are current and are regularly updated to comply with the constantly changing requirements arising from treaties, statutes, directives and guidelines.

9. Our organization has a clear understanding of the legal risks created by certain procurement templates and formats and our templates have been designed to protect us from claims of bid repair, unfair process or bid shopping.
7. Range of Formats

7. We encourage the use of non-Contract A flexible, low-risk tendering formats, including Pre-Qualification Frameworks, Requests for Quotations, and Negotiated RFPs.
8. Our procurement templates are current and are regularly updated to comply with the constantly changing requirements arising from treaties, statutes, directives and guidelines.
9. Our organization has a clear understanding of the legal risks created by certain procurement templates and formats and our templates have been designed to protect us from claims of bid repair, unfair process or bid shopping.
Observation 4: For Document Drafting, 89% of institutions responded positively (“Strongly Agree”, “Agree”, “Somewhat Agree”) when asked whether their solicitation documents were easily readable. However, only 78% responded similarly when asked whether their institutions clearly define drafting roles and responsibilities. That number dropped to 72% when asked whether they properly defined their internal drafting process.
10. Drafting Process Flow

10. Our organization has a clearly defined document drafting process that avoids delay and allows sufficient time for all aspects of the document to be completed properly.
11. Drafting Roles and Responsibilities

11. We have clarified the “who does what” of our drafting process, eliminating duplication and ensuring that procurement advisors, legal counsel, technical experts and decision-makers are all involved at the appropriate stage of the drafting and assembly process.
12. We use plain language in the main body of our procurement documents and limit detailed technical content to appendices and schedules.

12. Document Readability

- Strongly Agree: 25%
- Agree: 42%
- Somewhat Agree: 22%
- Somewhat Disagree: 5%
- Disagree: 2%
- Strongly Disagree: 1%
- Don't Know: 2%
Bidding Risks

Observation 5: For Bidding Risks, 60% of organizations said they “Strongly Agree” or “Agree” that they properly scope their procurement documents and 75% responded the same about the transparency of their evaluations. However, that number dropped to 46% when it came to having built-in protocols for meeting material disclosure duties.

13. Contract Scoping

14. Material Disclosures

15. Evaluation Defensibility
13. Contract Scoping

13. We minimize scoping risk by ensuring that our procurement documents include clearly drafted project requirements, pricing structures that are aligned to those requirements, and well-tailored legal agreements.
14. Material Disclosures

14. Our drafting process includes built-in protocols to ensure that material disclosures are made, and to mitigate against project delays and supplier extra-cost claims.
15. Evaluation Defensibility

15. We ensure that our evaluations include clear, streamlined mandatory requirements, transparent price-calculation formulas, and disclosure of any non-price factors.
Observation 6: Contract Management contained the weakest confidence levels of any survey area, with a majority of institutions responding “Somewhat Agree” or worse to all questions. Only 48% stated that they “Strongly Agreed” or “Agreed” when asked if they had clear post-award scope management practices. That number dropped to 46% for clearly defined contract administration structures and sank to 29% for vendor performance tracking.
16. Contract Administration

16. Our organization has a proactive and clearly defined accountability structure for contract administration.
17. Scope Management

17. Our policies and procedures include clear scope-management practices, roles and responsibilities, to prevent against improper scope increases and related sole-sourcing.
18. Our organization has performance tracking measures in place to create the "paper trails" necessary to defensibly terminate problematic contractors and bar them from future work.
Training

Observation 7: For Training, over 80% of organizations expressed overall confidence (“Strongly Agree”, “Agree” or “Somewhat Agree”) in their procurement hiring standards and ongoing procurement training. However, that number dropped to 73%, with 60% responding “Somewhat Agree” or worse, when asked whether there was broad organizational awareness and proactive avoidance of procurement-related legal risks.

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19. Our hiring standards and practices are properly targeted to the skill set and experience required by today's procurement professional.
20. Our procurement and legal advisors are provided with ongoing training to ensure that their skills keep pace with the changing procurement landscape.
21. There's widespread awareness across our organization of the legal considerations impacting our procurement operations, so that we are not simply operating in reactive mode and dealing with damage-control.
19. Our hiring standards and practices are properly targeted to the skill set and experience required by today's procurement professional.
20. Procurement and Legal Training

20. Our procurement and legal advisors are provided with ongoing training to ensure that their skills keep pace with the changing procurement landscape.
21. Broader Organizational Awareness

21. There's widespread awareness across our organization of the legal considerations impacting our procurement operations, so that we are not simply operating in reactive mode and dealing with damage-control.
**Observation 8:** For Innovation, 54% of organization’s responded very favourably ("Strongly Agree" or "Agree") when asked if their procurement operations received sufficient attention from senior management. However, that confidence level dropped to 41% when it came to technological innovations and sank to 31% when it came to effectively tracking market conditions and maintaining commercially reasonable procurement practices.
22. Our organization's procurement operations receive sufficient attention from senior management.

- Strongly Agree: 16%
- Agree: 38%
- Somewhat Agree: 26%
- Somewhat Disagree: 11%
- Disagree: 5%
- Strongly Disagree: 3%
- Don't Know: 1%
23. Market Traction

23. We have effective strategies and processes in place for keeping track of market conditions and ensuring that we maintain commercially reasonable practices.
24. Effective Use of Technology

24. Our organization uses readily accessible, low-cost technological innovations to enhance our procurement operations.

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Main Trends

1. While institutions generally expressed confidence in complying with some of the “hard” due diligence indicators that can be addressed through top-down measures (e.g. open competition policies, standard templates, evaluation criteria protocols, formal training) they were less confident with some of the subtler “soft” indicators where compliance calls for more integrated governance across the organization (e.g. roles and responsibilities, approval and drafting processes, contract administration, internal accountability awareness).
Main Trends

2. The majority of organizations responded positively when asked whether they encouraged the use of flexible formats outside of Contract A to mitigate legal risk and increase the efficiency of their tendering processes. However, a significant minority continue to lag behind in the adoption of flexible formats.

3. Marketplace traction and maintaining commercially reasonable practices also stood out for negative confidence levels, highlighting the need to rebalance red tape accountability controls against the promotion of greater procurement efficiency to obtain value for money for the organization.
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. Starting in July 2013, we will be offering free monthly one-hour webinars on specific topics for our subscribers. The upcoming webinar line-up is below.

- February 12, 2014, 1 pm EST: Why CETA is Bigger than NAFTA
- March 5, 2014, 1 pm EST: How do you Measure Up? Cross Canada Survey Results
- April 2, 2014, 1 pm EDT: Negotiated RFIs Part III: Virtual Town Hall Meeting
- May 14, 2014, 1 pm EDT, The Privilege Clause Paradox

Please fill out the subscription form at the link above to receive the National Tendering Law Update and webinar invitations, and other office notices.
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