Negotiated RFPs and Judicial Review

Paul Emanuelli
General Counsel and Managing Director
Procurement Law Office
paul.emanuelli@procurementoffice.ca
416-700-8528

www.procurementoffice.ca
About the Author

Paul Emanuelli is 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.
An increasing number of Canadian purchasing institutions are adopting negotiated RFPs to increase the speed and flexibility of their bidding process and reduce the risk of lost profit claims. However, even when using flexible formats, public institutions must still follow due process or risk having their unfair contract award decisions struck down by the courts. Using the recent decision in *Rapiscan Systems Inc. v. Canada* as a case study, this presentation will provide an update on the legal analysis that applies to judicial review challenges in public procurement.
Negotiated RFPs Remain Subject to Legal Challenge
By Paul Emanuelli, Procurement Law Office

The past ten years has seen a rapid expansion in the use of flexible negotiated RFPs (“NRFPs”) in the Canadian public sector as a means of increasing flexibility in the bidding process while reducing the financial risk of lost profit lawsuits. However, as the recent decision in *Rapiscan Systems Inc. v. Canada (Attorney General)* shows, when using flexible formats public institutions must still follow due process rules or face legal challenges that can result in unfair contract award decisions being struck down by the courts.

This article by Paul Emanuelli was previously published in the June 2014 edition of *Purchasing b2b* magazine.
If properly drafted, NRFPs operate under traditional contract law rules instead of the high-risk and inflexible fixed-bid “Contract A” tendering model. This enables greater flexibility in evaluating creative solutions and in fine-tuning contract terms to reflect unique solution-based performance terms. It also helps protect against the financial exposures of lost profit claims from losing bidders. However, this does not mean that a public institution can now part ways with due process.
Negotiated RFPs and Judicial Review
No Contract A Not An Out From Legal Challenge

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 those responsible for making the ultimate contract award decision can get you sued even if you are not in Contract A.
Negotiated RFPs and Judicial Review
Court Strikes Down the Contract Award

In the case, the Canadian Air Transport Security Authority (“CATSA”) issued a non-Contract 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, granting Rapiscan’s application and declaring that the award to its competitor was invalid, unlawful and unfair. By way of remedy, the court directed CATSA to redo its future procurement process for the required equipment.
Negotiated RFPs and Judicial Review

Fatal Flaws in the Contract Award Process

In its lengthy decision the court found: (a) that the evaluation “was not a fair or competitive process” since there was “the concealment of minimum requirements and performance standards” which unfairly favoured the applicant’s competitor and constituted bad faith on the part of CATSA; (b) that CATSA’s management failed to advise its board “that it had derogated drastically from the Contracting Procedures during the procurement process”; and (c) that “management did not provide the Board with accurate information upon which to base its decision” and that this conduct undermined “the integrity of the government’s tendering processes”.
Based on these findings, the court determined that the board’s decision “was unfair, unreasonable, made without proper consideration of relevant factors and in bad faith.” As the Rapiscan case illustrates, public sector procurement remains subject to legal challenge even when the tendering process does not create Contract A. While lost profit damages were not available as a remedy for the unfair process, the unfairly treated bidder still had legal recourse through the administrative law remedy of judicial review.
Negotiated RFPs and Judicial Review
Long Line of JR Cases Establish Four-Part Test

This remedy gives the courts broad powers, including the ability to strike down government decisions when those decisions constitute an unreasonable exercise of statutory powers. The Rapiscan case is just one example in a long line of recent judicial review judgments that have established the following four-part legal test for reviewing government procurement decisions:
Negotiated RFPs and Judicial Review

1. Does the Decision Involve a Public Body?

Does the procurement process involve a public institution? The judicial review remedy only applies to public institutions and does not apply to private sector purchasers.
Negotiated RFPs and Judicial Review

2. Are there Alternative Remedies?

Are there alternative remedies available? If the process is subject to legal challenge based on Contract A lost-profit claims or trade treaty-based challenges at the Canadian International Trade Tribunal, then the courts may not entertain a judicial review application.
3. Was the Award Made Under Statutory Power and Did the Contract Include Public Interest Elements?

Did the decision involve the exercise of statutory power in a manner that attracts public interest concerns? While the courts will not generally review policy or budgetary decisions, they may review specific procurement decisions made under statutory powers (which captures most public procurement decisions) if the specific procurement decision is significant enough to attract public interest concerns. While the “public interest test” may be met by the size or public nature of the contract, it can also be informed by the gravity of the alleged misconduct.
Negotiated RFPs and Judicial Review

4. Was the Decision Unreasonable?

Was the challenged decision unreasonable? If the court finds that the decision was unfair, absurd, made in bad faith, or made arbitrarily or in a procedurally unsound manner then it may order a reconsideration or strike down the decision.
In its February 2014 decision in Rapiscan Systems Inc. v. Canada (Attorney General), the Federal Court granted an application to set aside a contract awarded by the Canadian Air Transport Security Authority after finding that the contract was unlawfully awarded pursuant to an unfair bidding process. The dispute arose over the procurement of airport security screening equipment. The contract was awarded to the incumbent equipment provider, Smiths Detection Montreal Inc.
A competing supplier of security screening equipment, Rapiscan Systems Inc., brought the legal challenge after submitting an unsuccessful bid. Rapiscan alleged that the process was unfairly biased in favour of Smiths after CATSA had previously awarded Smiths sole-source contracts for the provision of similar equipment and had relied on hidden evaluation criteria.
The Rapiscan Case Study
CATSA’s Governance Structure

In its judgment, the court noted that CATSA operates under federal statute with a mandate that includes screening passengers and their carry-on and checked baggage. While it is not subject to the Treasury Board contracting policies or federal government contracting regulations, CATSA’s governing statute, the *Canadian Air Transport Security Authority Act*, provides that CATSA is governed by a board of directors comprised of a chairperson, ten other directors, and a chief executive officer, which is responsible for financial oversight, corporate oversight and good governance.
The court also noted that CATSA’s internal contracting policy called for open competitive bidding to obtain and demonstrate value for money and promote openness, transparency and fairness in its contracting process. That policy also required the use of transparent evaluation criteria in contract award decisions.
The Rapiscan Case Study
A Legacy of Sole Sourcing

As the court noted, since its creation in 2002, CATSA had purchased its screening equipment exclusively from Smiths. While CATSA was criticized by the Auditor General of Canada in a December 2006 report for its sole-sourcing practices, the court observed that in 2009, after conducting informal internal comparisons of the Smiths and Rapiscan security screening equipment, CATSA awarded another sole-source contract to Smiths.
The Rapiscan Case Study
Generating Multiple “Views” of Baggage

As the court explained, CATSA officials preferred the new Smiths equipment since it was able to generate baggage images or “views” from four different vantage points. According to CATSA officials, the multiple view capture function helped expedite the screening process for security staff. The Rapiscan equipment, while considerably less expensive, was only able to capture views from two different perspectives.
The Rapiscan Case Study
Technical Rationale For $30 Million Sole Source

These technical considerations were relied on by CATSA management to obtain board approval for the $30 million sole source award to Smiths in 2009. Under that contract CATSA replaced the single view equipment that had previously been provided by Smiths through a prior sole-sourced contract.
The Rapiscan Case Study
Plan for a Competitive Process

In July 2010, CATSA prepared a new plan to competitively procure additional security screening equipment at an estimated cost of $40.5 million and went to market in August 2010 with a solicitation document that it referred to as a Request for Submissions (“RFS”). The court described the RFS as follows:
The Rapiscan Case Study
No Contract A

The RFS contained the following exemption clause in the body of its contract and the disclaimer:

This RFS does not constitute an offer by CATSA, nor is it intended to give rise to any legally binding obligations (sometimes referred to as a Contract "A" under Canadian law) on the part of CATSA. It is not a tender, request for tenders or a request for proposals.

[Emphases added by court throughout]
The Rapiscan Case Study
Vague Process

33 The RFS further described Phase I of the process as follows:

During Phase I of the Process [...] following a review of the Submissions [...], if CATSA determines that one (1) or more Suppliers are able to provide the required Equipment and related goods and services at a price which offers the best value to CATSA, in CATSA's sole discretion, then CATSA may create a short list of Suppliers with whom to enter into further discussions regarding the Supplier's Submission and/or negotiate a Standing Offer Agreement.
The RFS further reserved the right not to proceed to a competitive bid in respect of the award of contract in the following terms:

CATSA reserves the right not to proceed to a competitive bid or other form of selection process and may select one or more Suppliers to establish a Standing Offer Agreement with (in the form attached at Schedule "C" as may or may not be negotiated with a Supplier) based on their respective Submission, other information provided by the Supplier under this RFS, and other information obtained by CATSA from third parties, including without limitation, other agencies.
35 Even though the contract contained no requirements, the RFS contained a further exception not requiring it to comply with requirements, stated as follows:

3.5 TERMS. Notwithstanding anything to the contrary in this RFS, CATSA reserves the right in its sole and absolute discretion, without any liability whatsoever to any Supplier to:

Accept submissions which **fail in any respect to comply with the requirements** of the RFS; [...]
The Schedule "A" Statement of Requirements in the RFS consisted of a series of requests to provide information on available checkpoint multiview advanced technology x-ray products, including product technical information and information on accessories, maintenance, training and documentation. It did not contain any requirements, mandatory or otherwise, that CATSA demanded be met by the RFS. It also did not include any selection criteria, weighted or otherwise.
The Rapiscan Case Study
CATSA Encourages Rapiscan’s Bid

After discovering that Rapiscan had failed to download the solicitation from MERX, CATSA directly approached Rapiscan to encourage Rapiscan to participate in the bidding process:
Having posted a summary of the RFS on the electronic tendering service MERX, Ron McAdam, the General Manager of New Technology at CATSA, noticed that Rapiscan was not among the list of suppliers on MERX. After some internal discussion, CATSA decided to contact Rapiscan and notify it of the RFS. CATSA accordingly contacted Rapiscan and drew Rapiscan's attention to the 2010 RFS, inviting it to participate in the procurement process. Rapiscan subsequently responded to the RFS along with Smiths, L-3 Communications, and Reveal. Rapiscan was the only party submitting a bid that was not an existing supplier of CATSA.
By October 2010 CATSA officials sought approval from the board to award a new contract to Smiths. According to the briefing note provided to the board, Smiths had been selected pursuant to a process that was designed to “obtain competitiveness, openness, fairness, transparency and value for money” and the Smiths equipment had “rated highest in each category” of evaluation. The briefing note also indicated that the Rapiscan equipment had not met the requirement of being able to generate at least three views of scanned baggage.
The Rapiscan Case Study
CATSA CEO Responds to Board Queries

In response to questions by the board, CATSA’s CEO provided assurances that Smith’s equipment “meet the needs required now” and was “the highest performing technology that exists today with the most potential for improvement.” The board approved the award of a five-year standing offer to Smiths, with an option to extend for up to five additional years.
The Rapiscan Case Study
Rapiscan Challenges Contract Award

Rapiscan brought a legal challenge against this contract award, seeking a court declaration that the award decision was unlawful and unfair and seeking that the court direct CATSA to conduct a new procurement process that complied with CATSA’s statutory obligations and contracting procedures.

In its decision, the court set out the following three legal issues that had to be assessed in considering Rapiscan's judicial review application:
The following are the issues for consideration in this matter:

a. Is the matter coloured with a public element, flavour or character sufficient to bring it within the purview of public law and therefore review by this Court on the rationale that: (i) it involves a breach of a statutory duty, or (ii) it involves the integrity of government procurement processes?
b. If the matter is reviewable, what is the applicable standard of review?

c. In the circumstances, did the Board's decision meet the standards of legality, reasonableness and fairness required for good governance?
The Rapiscan Case Study
Summary of Court’s Conclusions

With respect to the first issue, the court determined that CATSA's procurement process had a sufficient public element to bring it within the scope of an administrative law review based both on the statutory duties that applied to CATSA and on the need to protect the integrity of the procurement process in light of how CATSA conducted the procurement process. With respect to the second issue of determining the standard of review, the court found in favour of the more deferential reasonableness standard as opposed to the stricter review standard of correctness. On the final issue, the court ultimately concluded that CATSA’s contract award was unlawful.
The Rapiscan Case Study
Long Complex History of Judicial Review

In providing its reasoning for reviewing CATSA’s contract award decision, the court acknowledged that the judicial review of government commercial decisions has a long and complex history and that the courts have traditionally hesitated in reviewing these contracting decisions:
The Rapiscan Case Study
Traditional View, No Judicial Review

As the Federal Court of Appeal noted in the first sentence of Irving Shipbuilding Inc v Canada (Attorney General), 2009 FCA 116, [2010] 2 F.C.R. 488 [Irving Shipbuilding] at para 1, "Public contracts lie at the intersection of public law and private law." It is common ground that a procurement contract, being commercial in nature, does not normally permit recourse to administrative law remedies. Irving Shipbuilding at para 46:
The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.
In Irving Shipbuilding, the Court went further in its remarks at paras 61 and 62 concerning exceptions to allow a subcontractor to rely on a public law duty. It limited deviations from the rule to situations where the integrity of the procurement process was at risk, which at least by the examples cited would occur only in situations of crimes.
I discuss below whether the high threshold to exceptions was intended to apply only to subcontractors, whose right to seek public law remedies was rejected on a number of bases relating to various other limitations on their rights to sue owners in contract and negligence. The Court also cited with approval the text of Paul Emanuelli, Government Procurement, 2d ed (Markham, Ontario: LexisNexis, 2008), which (at page 698) formulates a more generalized threshold to determine whether judicial review is permitted in a contractual context:
The Rapiscan Case Study
Proximity to Statutory Power

This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, Government Procurement, 2nd ed. (Markham, Ontario: LEXISNEXIS, 2008) at 697-706, who concludes (at 698):

As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.
English authorities on public contracts and judicial review are considered in Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, de Smith's Judicial Review, 6th ed. (London: Sweet & Maxwell Ltd., 2007), 138-45, where courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.
In considering whether a government contracting decision contains a sufficient public element to warrant a judicial review remedy, the court referred to a number of factors cited by the Federal Court of Appeal in its 2011 *Air Canada v. Toronto Port Authority* decision.
The factors adopted from that decision included: whether the contract was a private commercial matter or one of broader interest to the public, whether the decisionmaker in question was performing public responsibilities, whether the contracting decision was based on laws rather than private discretion, whether the contracting institution was operating within the network of government and exercising powers as part of that network, and the extent to which the decisionmaker was an agent or controlled or influenced by a public entity.
The Rapiscan Case Study
Public Element and Public Interest Test Met

After finding that these public element considerations applied to CATSA’s contract award decision, and after finding that judicial intervention was required to protect the integrity of the public procurement process in the circumstances, the court determined that the matter should be subject to judicial review.
The court then confirmed that CATSA’s contract award decision should be assessed on the reasonableness standard of review and concluded that CATSA’s contract award decision was not legally valid since CATSA officials had misled the board into believing that the RFS was conducted in compliance with the organization's contracting procedures.
The court found that CATSA, rather than holding a fair and open process, had disclaimed any fairness duties, failed to state its requirements and failed to disclose its evaluation criteria to prospective bidders. With respect to CATSA's failure to adhere to its contracting procedures, the court stated that:
The Rapiscan Case Study
RFS Contrary to CATSA Contracting Policy

64 The overall failure of management was in not advising the Board that it had derogated drastically from the Contracting Procedures during the procurement process. The two areas of significant deviation from the Contracting Procedures in terms of outcomes are firstly, the drafting of an "RFS" procedure that was not a fair or competitive process; and secondly, the concealment of minimum requirements and performance standards with the result of unfairly favouring Smiths.
The Rapiscan Case Study
RFS an “Ad Hoc” Process

65 The RFS did not comply from its very conception with any authorized procurement process under the Contracting Procedures. An "RFS" was not included among the several authorized procurement processes in the list of Open Procurement Processes. It was, as the applicant described it, an "ad hoc" or concocted process to which the misdescriptive label of RFS was attached. No explanation is found in the certified record explaining why the management chose to craft its own process having no relation to any of those authorized by the Contracting Procedures. The respondent argues that it complied with the procedures throughout.
The RFS consisted of two distinct steps. The first was a Request For Information (RFI). The purpose stated in the Contracting Procedures for an RFI was to obtain information to be used in advance of initiating a procurement process. A CATSA RFI therefore contemplates a further procurement process for the purpose of awarding a procurement contract. It does not contemplate that the contract would be awarded on the basis of the information supplied to an RFI.
The second step in the RFS procedure was an undocumented process to evaluate information and award the contract. Given the arbitrariness of the procedure, the RFS contained numerous disclaimers to authorize its conduct. These included specifying that no Contract A would arise from presenting a submission to the RFS, that CATSA could ignore any requirement in the RFS (in fact there were none), and that CATSA was not to be held to any limitations that would prevent it from conducting the second step as a non-competitive selection processes including obtaining information from undisclosed third parties.
The Rapiscan Case Study
Arbitrary Process With No Transparency

It was clearly therefore an arbitrary, unbounded process whereby the CATSA could select the supplier on the basis of requirements and evaluation criteria known only by its officers.
The fact that CATSA's management had run an arbitrary process that lacked the substantive elements of a genuine competition, and had then misled the board into believing that they were awarding a contract based on an open and fair competition, tipped the scales towards judicial intervention in order to protect the integrity of the procurement process.
The Rapiscan Case Study
Inducing Rapiscan to Bid Was Bad Faith

The court found that CATSA's conduct during the bidding process constituted bad faith since CATSA had encouraged Rapiscan to participate in a process where it had no chance of succeeding because of hidden technical preferences so that CATSA’s management could provide the appearance of a fair and open competition to the board:
I accept Rapiscan's submission that it would not have bid against a requirement that it knew in advance it could not meet. By concealing the minimum requirement of three views, in combination with offering a specific invitation to Rapiscan to participate despite knowing that it would bid the same product as was compared with Smiths equipment a year earlier, without giving any warning that its equipment would not meet requirements, CATSA knowingly induced Rapiscan to participate in a process in which it had no fair chance of its submission being considered.
Thus the process had the appearance that all industry leaders had participated in a competitive procurement, when management knew in advance that Rapiscan would be eliminated. In my view this conduct constitutes bad faith on the part of CATSA.
Secondly, Rapiscan points out that because it was eliminated at the minimum requirement stage, the Board was not provided with an opportunity to consider the cost advantage from its bid. If the pricing differential had been known to the Board it would have been required to seriously consider the immediate cost advantage versus the future savings argument of management. This would have entailed a diligent review of the evidence supporting the position that Smiths was the highest performer and the likelihood or not that Smiths' equipment could be successfully upgraded in the future.
In the circumstances, including CATSA's tendering history, it would appear to be a reasonable inference that the minimum requirement was adopted to prevent the Board from carrying out a fair and a proper evaluation by limiting its access to information on the significant cost advantage offered by Rapiscan's equipment. Whether or not that was the intention, that was the result.
The Rapiscan Case Study
Board Misled on Technical Merits of Selected Bid

The court also found that CATSA's management misled the board on the technical merits of the Smiths equipment, which was characterized as being “the highest performing technology that exists today”. The court found that there was no apparent basis for arriving at that conclusion:
The conclusions of the report are based on mathematical calculations; no actual performance evaluations of any screening equipment was carried out or reported on in the report. While Rapiscan challenges the report on a number of bases, the validity of the report is not reviewable in this setting. Accordingly, there is sufficient justification to support CATSA's statement that greater potential for improvement may be obtained with Smiths' equipment. However, there is no information contained in the certified record to support management's advice to the Board that Smiths was the "highest performing technology that exists today".
This is an important conclusion because the Board's decision was justified by the two very short factual representations from management on existing and future highest performance of Smiths' equipment. While I am satisfied that the justification relating to potential performance is reasonable, I find no basis in the RFS or the materials upon which the decision was said to be made that could support a conclusion that Smiths was the highest performing technology that existed at the time of the Board's decision.
The Rapiscan Case Study
A Perverse Finding of Facts

I therefore conclude that the Board based its decision on an erroneous finding of fact made by management in a perverse or capricious manner and without regard to the material in front of it.
While the fact that the RFS did not create Contract A and therefore shielded CATSA from lost-profits claims was a factor in deciding to grant the judicial review remedy, the court acknowledged that the absence of Contract A was not ultimately determinative since in the circumstances the need for good governance would have called for a judicial review remedy even if the RFS had created Contract A:
The primary rationale advanced over the years to exclude public law remedies in matters involving commercial procurement contracts was the existence of an alternate contract remedy to the public law duty of fairness, found in the implied terms of Contract A. This point is made in a review of jurisprudence under the title of "The Adequate Alternative Remedy Bar" in Anne C. McNeely, Canadian Law of Competitive Bidding and Procurement, (Aurora, Ontario: Canada Law Book, 2010) at 83 et seq.
"Of the various grounds for denying [public law] review or relief, an argument that the applicant for review has an adequate alternative remedy is the one which is most commonly litigated."
Because the Board was misled by management to believe that fairness was a component of the RFS, Rapiscan is caught in a Catch-22 of unfairness. If it seeks redress in the courts on the basis of contract, its arguments based on a breach of the duty of fair and equal treatment are met with the submission that by responding to the RFS Rapiscan has agreed that no duty is owed. Conversely, when it shows up seeking a judicial review of CATSA's actions, it is told it must look to its contract remedies because of the commercial context of a procurement contract.
125 I conclude that if the court is satisfied that management significantly misled the Board, resulting in it unknowingly making decisions that undermined the integrity of CATSA’s procurement process and conflicted with its mandate, where no satisfactory remedy may be achieved, or is at risk, under contract law, the matter is coloured with a public element sufficient to bring it within the purview of public law.
The Rapiscan Case Study
Yet, JR Would Apply Even With Contract A

126 Although not necessary, I further am of the view that even were a satisfactory remedy for the applicant available in contract law, a sufficient public law element exists whenever a statutory decision-maker is significantly misled by those responsible for advising it, resulting in the suborning and misalignment of the decision with the institution's mandate and objectives.
The Rapiscan Case Study
Contract Award Legally Invalid

After determining that CATSA's contract award decision was unfair, unreasonable, arbitrary, made in bad faith and procedurally illegal for its failure to consider relevant factors, the court ruled that the contract award should be declared unlawful and set aside.
Conclusion
Key Points for Future Reference

- CATSA's contract award was reviewable by the court because CATSA is a public body exercising statutory powers and the contract it awarded contained significant public interest elements.

- The court intervened and struck down the contract award because CATSA officials breached their contracting policies by not properly conducting a fair and open competition. CATSA senior management misled their board about the integrity of the process and the technical merits of the selected equipment.
One of the factors relied on by the court to justify the judicial review was the fact that the RFS did not offer an alternate remedy to the complainant. Since the RFS did not create Contract A, Rapiscan could not sue for its lost profits on the disputed $40 million contract award. However, the court acknowledged that it would have intervened to protect the integrity of the bidding process even if the RFS had created Contract A.
Conclusion
Key Points for Future Reference

- While the RFS shielded CATSA from Contract A and any resulting lost profit claims, this did not eliminate the public institution's duty to conduct an open and fair process.

- However, the RFS did not meet the open competition standards required to meet public sector administrative due process requirements or open competition duties.
Conclusion

Key Points for Future Reference

- A properly constructed public-sector NRFP must do more than simply disclaim Contract A to shield the institution against lost profit claims.

- An NRFP should clearly scope the institution's general requirements while disclosing any applicable minimum standards or material performance conditions. While final contract terms may need to be tailored through a post-bid dialogue to incorporate details from the selected supplier's proposal, due process standards still apply to NRFPs.
Hidden preferences and unfair advantages are not permitted in any public tendering process. An NRFP should contain transparent process details. While rectification protocols may be incorporated to permit a pre-established cure period, minimum threshold evaluation standards must be transparently disclosed, all proponents must be provided an equal opportunity to benefit from any cure period, and, after any permitted cure periods, minimum evaluation requirements must ultimately be enforced to reject non-compliant proponents.
Conclusion
Key Points for Future Reference

- An NRFP should also include transparent ranking and selection criteria, along with transparent process terms for conducting evaluations. Evaluations must be conducted according to clearly disclosed scoring criteria that include weightings and sub-weightings for each category, along with any applicable minimum scoring thresholds. Those criteria should enable the institution to assess the unique aspects of competing proposals and enable those aspects to be incorporated into the final contract terms.
In addition to following general open competition protocols, including pre-bid Q&A and addenda procedures, prescribed submission procedures, and formal evaluation processes, an NRFP should also include detailed protocols for the selection of a proponent and for the finalization of contract awards.
Conclusion
Key Points for Future Reference

Rather than improvising with “ad hoc” tendering formats, public institutions should ensure that their suite of tendering templates are professionally designed and drafted to meet the standards of competitive bidding in the public sector. Those tendering templates should be aligned with the institution’s internal contracting policies and with its general open competition duties.
As *Rapiscan* and other recent judicial review decisions illustrate, public institutions cannot escape judicial scrutiny simply by contracting out of Contract A. In government procurement, the duty to follow due process is an inherent condition of exercising statutory powers. Using NRFPS and other flexible formats may offer some significant advantages, but breaking the rules with impunity is not one of them.
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- 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
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For more information please contact:

**Paul Emanuelli**
General Counsel
Procurement Law Office
paul.emanuelli@procurementoffice.ca
416-700-8528

**Marilyn Brown**
Senior Counsel
Procurement Law Office
marilyn.brown@procurementoffice.ca
416-700-8531

**Rosslyn Young**
Senior Counsel
Procurement Law Office
rosslyn.young@procurementoffice.ca
416-700-8529

**Jennifer Marston**
Legal Counsel
Procurement Law Office
jennifer.marston@procurementoffice.ca
416-700-8537

www.procurementoffice.ca