Managing Fair Evaluations

Special Feature on the New York Office of the State Comptroller

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by Who’s Who Legal as one of the top ten public procurement lawyers in the world. His portfolio focuses on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul 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 *Procurement Law Update* newsletter. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations including NIGP, SCMA, the University of the West Indies and Osgoode Hall Law School.
Managing Fair Evaluations
Special Feature on New York State

Fair evaluations are a core requirement of the public tendering process. Featuring a series of bid protest determinations from the New York Office of the State Comptroller, this session will provide key insights for purchasing professionals across all jurisdictions on how to properly manage bid evaluations to avoid becoming the latest local bid-protest case study. The following case studies are divided into the following four topics: (i) biased specification disputes; (ii) compliance controversies; (iii) scoring challenges; and (iv) due process disputes.
Biased Specification Disputes
Branded Specifications Struck Down as Unfair Sole-Source

American Sports and Fitness Services, Inc.
New York State Comptroller General

In its September 1998 decision in *American Sports and Fitness Services, Inc.*, the New York Office of the State Comptroller struck down a contract award after finding that the State University of New York’s branded specifications constituted an unfair sole-source. The bid protest involved a Request for Quotation for exercise equipment containing a list that specified certain brands and stated “Must Be Equipment Listed – No Substitutes”. The Comptroller determined that the university had no basis for determining that the costlier equipment was worth the additional expense without quantifying its advantages through a competitive procurement. It therefore rejected the contract award.

Restrictive Specifications
In its July 2009 decision in *Textron Inc.*, the New York Office of the State Comptroller rejected a contract award by the Department of Parks and Recreation due to branded specifications. The dispute involved a solicitation for 50 electric golf carts that named a specific manufacturer. The Department defended the specifications on the basis that the branded golf carts came with lighter aluminium frames, which caused less wear and tear on the golf course. The Comptroller disagreed, finding that the Department was unable to provide any empirical evidence to support its claim regarding the branded technical specifications. The contract award was denied.
Restrictive Experience Requirements Lead to Voided Award

Robert Konefal
New York State Comptroller General

In its September 2010 decision in Robert Konefal, the New York Office of the State Comptroller rejected a Department of Environmental Conservation contract award due to unnecessarily restrictive past experience requirements. The dispute involved an Invitation for Bids for a cafeteria and cocktail lounge concession. The solicitation required five years experience over the last ten as a concessionaire. This led to only one responsive bid. The Comptroller ruled that the requirement of experience as a concessionaire, as opposed to general food and beverage experience, was unnecessary since other state contracts did not contain that same requirement. The contract award was rejected.
Compliance
Controversies
Late Bid Ruled Timely Due to Post Office Acceptance

All State Distributors Northeast, Inc.
New York State Comptroller General

In its March 2000 decision in All State Distributors Northeast, Inc., the New York Office of the State Comptroller ruled that a late bid was valid since it arrived on time at the designated post office. The case dealt with a bidding process for the Orleans Correctional Facility. The bid arrived at the Albion Post Office on the right day, but after the daily mail pick up by the correctional facility. The bid was rejected as late. However, the Comptroller overruled this rejection, finding that by its practices the correctional facility had “made the Post Office its official address for the delivery of mail.” Since the bid was received at the official address before the deadline, it was deemed to be on time.
Unsigned Bid Ruled Non-Responsive

A.S. Hardy Co., Inc.
New York State Comptroller General

In its February 2000 decision in A.S. Hardy Co., Inc., the New York Office of the State Comptroller rejected an unsigned bid. It noted past cases that found that “the failure to sign the bid is fatal and requires that the bid be rejected.” It also noted that “in every case but one where the courts allowed a waiver of an unsigned bid, there was some other document signed by the bidder,” such as a cover letter or bid bond, and that the courts “viewed the signature of the bidder on such document as legally binding the bidder to its bid under the contract laws of that jurisdiction.” It therefore found that an unsigned bid must be rejected unless the bidder commits itself by signing some other binding document.
In its August 2009 decision in Touro Contracting Corporation, the New York Office of the State Comptroller rejected a State University of New York contract award due to the post-bid “clarification” of a conditional bid. The dispute involved the construction of a university medical center. The University maintained that it had simply sought a clarification when it allowed its selected bidder to withdraw a bid condition regarding completion time. The Comptroller disagreed, finding that the condition put the bidder at an advantage over other bidders who were bound to the stated completion time. The conditional bid was ruled non-responsive and incapable of acceptance.
Non-Responsive Bid Not Curable Through “Clarifications”

Bank of America, N.A.
New York State Comptroller General

In its October 2010 decision in Bank of America, N.A., the New York Office of the State Comptroller ruled that the Department of Taxation and Finance improperly repaired a non-responsive bid through clarifications. The dispute involved a financial services RFP that required three free bank machine withdrawals per month. The selected bidder failed to meet that requirement, but was allowed to add that commitment through a post-bid clarification. The Comptroller ruled that this “constituted an impermissible revision of its proposal after the deadline for the submission of proposals and could not be characterized as a permissible "clarification". The award was rejected.
Bid Award Ruled Invalid Due to Non-Responsive Pricing

Group Health, Inc.
New York State Comptroller General

In its February 2006 decision in Group Health, Inc., the New York Office of the State Comptroller struck down a contract award by the Department of Civil Service after finding that the winning bidder submitted non-compliant pricing. The bid dispute involved an employee drug benefits plan RFP that required guaranteed percentage discounts for named and generic drugs, including specialty drugs. However, the selected bidder’s proposal did not offer the required percentage discount for specialty drugs. It was therefore held to be non-responsive to a material requirement of the RFP. The contract award was therefore returned unapproved.

Tender Compliance – Pricing
Contract Voided Due to Vague Experience Requirements

Biltwel General Contracting Corp.
New York State Comptroller General

In its August 2011 decision in *Biltwel General Contracting Corp.*, the New York Office of the State Comptroller rejected a Department of Environmental Conservation contract award due to vague experience requirements. The solicitation document stated that the Department would examine and evaluate "the bid as responsive by considering the contractors understanding of: the overall project scope, estimated cost, utilization of proposed subcontractors and expertise in completing similar contracts." The Comptroller ruled that this failed to properly specify the minimum experience requirements. The contract award was therefore rejected.
Scoring Challenges
Flawed Volume Estimates Lead to Flawed Price Evaluation

*Trade-Winds Environmental Restoration, Inc.*

New York State Comptroller General

In its May 2007 decision in *Trade-Winds Environmental Restoration, Inc.*, the New York Office of the State Comptroller found that the State University of New York’s price evaluation in an environmental services tender was flawed due to inaccurate volume estimates. In its decision the Comptroller stated that “while the hours used to evaluate proposals need not mathematically track historic usage, such hours must have a reasonable relationship to historic patterns of use, except where the agency can document that there is some reasonable basis to believe that there will be major changes in future usage.”
Flawed Volume Estimates Lead to Flawed Price Evaluation

Trade-Winds Environmental Restoration, Inc.
New York State Comptroller General

However, it found “significant unexplained discrepancies between the levels of historical usage and the weight given such categories for evaluation purposes, which materially affected the outcome of this procurement.” For example, the evaluators calculated the cost of non-emergency tank trucks for petroleum, sewage and chemical cleanup at 1,000 hours when annual usage had historically only been 5.3 hours. Similarly, emergency tank truck costs were calculated at 200 hours and remediation services at 1,000 hours when historical usage was 2.5 hours and 18 hours, respectively. The resulting contract award was therefore rejected and a re-evaluation ordered.

Price Evaluations – Volume Estimates
Skewed Cost Evaluation Unfairly Impacts Rankings

*Computer Aid, Inc.*

New York State Comptroller General

In its October 2010 decision in *Computer Aid, Inc.*, the New York Office of the State Comptroller rejected a contract award by the Office for Technology due to a flawed price evaluation. The dispute involved an RFP for over 850 IT staff support positions. Pricing was divided into a one-time placement fee and ongoing hourly rates. The evaluators weighed the two categories equally, which meant that they were only evaluating one hour of the hourly rates instead of assessing the cost for the thousands of hours of actual work required for each position. Since this failure to assess actual costs impacted the evaluation rankings, the Comptroller rejected the contract award.
In its March 2001 decision in *US Filter Operating Services*, the New York Office of the State Comptroller ruled that a low bid award by the Department of Correctional Services in a wastewater treatment plant services RFP breached the state procurement guidelines and finance law. As the decision noted, the rules required that services be evaluated for “best value” (generally meaning price and other technical factors). The Comptroller found that “without considering the technical merit of all proposals, we cannot say which proposal offered best value. Therefore, this competitive process was not conducted in accord with the law.” The award was rejected and a new tender ordered.
Low Bid Award for Solid Waste Services Not Transparent

Republic Services of New York d/b/a Upstate Disposal

New York State Comptroller General

In its December 2002 decision in Republic Services of New York d/b/a Upstate Disposal, the New York Office of the State Comptroller ruled that the State University of New York’s low bid evaluation in a solid waste removal services RFP breached the procurement rules since it failed to disclose that the required “best value” assessment would be conducted on price alone. As the Comptroller stated, the solicitation “did not describe the method of award or the relative importance or weight of cost in its determination of best value and, therefore, did not satisfy the requirements of State Finance Law.” The contract was therefore ruled invalid.
Contract Voided Over Inconsistent Reference Evaluation

Tailwind Associates
New York State Comptroller General

In its June 2007 decision in Tailwind Associates, the New York Office of the State Comptroller upheld a complaint against the Office of Children and Family Services (“OCFS”) over the use of different evaluators to score different proponent references. The dispute involved an RFP for IT service standby agreements. The Comptroller stated that the rules require “the same individual (or group of individuals) conduct and score all the reference checks. Otherwise, the scoring of the reference checks may be distorted based on the individual biases of the particular evaluators conducting the reference checks or because one may tend to score higher generally than another evaluator.”

Fair Evaluations - References
Contract Voided Over Inconsistent Reference Evaluation

Tailwind Associates
New York State Comptroller General

The Comptroller found that the OCFS

...utilized multiple evaluators for the references, but provided that each individual reference to be scored was contacted only by a single member of the reference evaluation team, and only that person scored the proposer with respect to that reference. This approach created an inherently unfair and unbalanced scoring methodology, since it resulted in individuals, with apparently very different scoring philosophies, scoring different references - creating the very real possibility that the outcome of this procurement was determined by which evaluator scored one or more of a particular proposer's references.

The resulting contract awards were therefore rejected.
Contract Voided Due to Evaluation Irregularities

LMGI, Ltd. And Summit Security Services, Inc.
New York State Comptroller General

In its February 2012 decision in *LMGI, Ltd. And Summit Security Services, Inc.*, the New York Office of the State Comptroller found a series of significant evaluation errors in a medical fraud investigation services RFP issued by the New York State Office of Medicaid Inspector General, Division of Medicaid Investigations ("OMIG"). These errors included the inconsistent interpretation and application of scoring instructions when assessing bidder past experience, second-language capabilities, and experience testifying in court. While some remediation measures were apparently discussed during the process, the evaluation record did not indicate whether they were actually implemented.
Contract Voided Due to Evaluation Irregularities

LMGI, Ltd. And Summit Security Services, Inc.
New York State Comptroller General

In its decision, the Comptroller stated that:

A fundamental principle of section 163 of the State Finance Law (and, indeed of the State's competitive bidding laws generally) is that the award of contracts be based upon a balanced and fair process. This requires that the award methodology, both as designed and as applied, must be balanced and fair. Here, however, our review shows many errors and inconsistencies in the scoring of the proposals. It also appears that the evaluation teams did not fully understand how to properly execute the scoring methodology and, even upon re-review of the scoring sheets by each evaluator as directed by OMIG, errors remained in the final scoring. This raises the additional questions of whether OMIG failed to properly instruct the evaluation teams and also whether at least some of the evaluation criteria, as stated, were too vague to be applied consistently.

Fair Evaluations
Contract Voided Due to Evaluation Irregularities

LMGI, Ltd. And Summit Security Services, Inc.

New York State Comptroller General

The Comptroller also stated the following:

We recognize that evaluators, in reviewing subjective criteria, may, and frequently do, reach different conclusions and assign different scores. Furthermore, this Office will generally give significant deference to the technical judgments made by agencies particularly with respect to matters within their expertise. However, the process must demonstrate that: 1) the scoring system itself was clear and reasonably developed in a manner designed to arrive at best value; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions. Here, we cannot say that these standards were met.

The contract award was therefore rejected.
Due Process Disputes
In its June 2016 decision in *Technology Innovation & Strategy*, the New York Office of the State Comptroller struck down a sole-source contract award by the Department of Law (“OAG”) for eDiscovery services. As noted by the Comptroller General, under New York State law, discretionary purchases under $50,000 do not require open competitive bidding. However, discretionary purchases that exceed that amount require a public posting and approval by the Comptroller. In this case, that approval was denied since the required three quotes or other documentation of cost-reasonableness were not provided.
Rather, the public posting process conducted by the OAG denied other suppliers the opportunity to bid:

In the instant matter, in response to our audit questions, OAG has stated that it placed the advertisement in the Contract Reporter after an award had been made to W&K and W&K had already performed a substantial amount of the work. Then, once the advertisement was placed and OAG received interest from TIS, the record reveals (and OAG does not dispute) that OAG failed to respond to TIS’s inquiries about bidding on the project. In fact, the advertisement itself, which stated that bids would be received until February 18, as well as the Purchasing Memorandum issued by OAG on February 22, appear to be meaningless as no bids were accepted by OAG and, in fact, the work had been substantially completed.
The Comptroller found that OAG should have sought an exemption to public posting when it realized that the work would exceed the $50,000 limit:

The initial misestimate by OAG does not negate the need to comply with the applicable legal requirements once OAG realized that the purchase would exceed the $50,000 threshold. We believe the proper course of action at that time would have been to contact our Bureau of Contracts and seek an exemption from the advertising requirement.

The contract award was therefore overturned.
Comptroller General Strikes Down Piggy-Back Purchase

*LDV, Inc.*

New York State Comptroller General

In its May 2014 decision in *LDV, Inc.*, the New York Office of the State Comptroller rejected a contract award by the Department of Financial Services under a “piggy-back” process after finding that the specifications were ambiguous. While the Controller recognized that in certain circumstances government entities may purchase from other government contracts, it also confirmed that those “piggy-back” processes must still comply with other general procurement rules. More specifically, it stated that where standing arrangements include multiple contractors, second-stage processes must be complied with and that specifications and criteria must be clearly stated:

Open Competition – Piggy-Backing
Comptroller General Strikes Down Piggy-Back Purchase

**LDV, Inc.**

New York State Comptroller General

State agencies are authorized to "piggyback" onto federal government contracts, or contracts of other governmental entities...However, where, as here, there are multiple vendors available under the GSA contract, we would generally require as a part of our review...that the agency engage in a reasonable competitive process...We would additionally require that such competitive process be fair, that the determination of a bidder’s responsiveness reflect an objective assessment of whether a bidder’s proposal meets clearly specified criteria, and that the contract be awarded to the lowest responsive and responsible bidder.

In this case, the process failed to meet those standards and the contract award was therefore rejected.

Open Competition – Piggy-Backing
Inconsistent Experience Requirements Lead to Retender

Touro Contracting Corporation
New York State Comptroller General

In its January 2008 decision in *Touro Contracting Corporation*, the New York Office of the State Comptroller found that the State University of New York listed 10 years required past experience in its public advertisement but included less onerous requirements in its actual Invitation for Bids. As the Comptroller stated, a potential bidder that could have performed the work but did not have the 10 years experience required in the notice “would have reasonably concluded that it was not qualified to bid on the project and would not have requested the actual bid specifications.” It therefore rejected the contract award and ordered a retender.
Comptroller General Overturns Award Due to Conflict
Transportation Resources Associates Inc.
New York State Comptroller General

In its September 2017 decision in Transportation Resources Associates Inc., the New York Office of the State Comptroller struck down a contract award after finding that a bidder was improperly permitted to substitute a subcontractor that was in a conflict of interest. The case dealt with an RFP for consulting services for safety oversight of heavy rail systems. The complainant launched a bid protest alleging that the contract was awarded to a non-compliant competitor. The Comptroller agreed, finding that the Department of Transport had permitted the winning contractor to replace a named subcontractor that was in a conflict of interest. The contract award was overturned.
In its August 2006 decision in *Sunoco, Inc.*, the New York Office of the State Comptroller ruled that the New York State Thruway Authority improperly terminated contract negotiations over the wording of a contract extension. The dispute involved an RFP for the operation of 29 fuel service facilities on the New York State Thruway. The Comptroller ruled that where a proponent’s terms are not acceptable, a public authority should provide its alternate terms and then provide the proponent with a clear notice period for accepting the final offer before proceeding to the next-ranked proponent. The Authority was ordered back to the bargaining table for failing to provide that proper notice.
Upcoming Free Webinars:
Case of the Year

Focusing on the critical defects of biased specification and irregular scoring methods, our feature on the *Passenger Rail Agency of South Africa v. Swifambo Rail Agency (Pty) Ltd.* decision will provide recommendations for mitigating against these major exposures in complex government procurement projects. This is a must-attend session for all government procurement professionals and government evaluators involved in major procurement projects.

Wednesday March 7, 2018, 1:00 – 2:00 pm EST

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Managing Fair Evaluations
February 7, 2018 @ 1:00 pm - 2:00 pm EST

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Electronic Reverse Auctions
April 4, 2018 @ 1:00 pm - 2:00 pm EDT

Building a Better Framework for Open Procurement
May 16, 2018 @ 1:00 pm - 2:00 pm EDT
For more information please contact:

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