Procurement Law Update
Year in Review
Special Global Risk Rating Edition

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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 includes advising 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.
The Procurement Law Update Global Year in Review features our first ever Global Risk Rating. Based on our analysis of historical precedents and recent critical case law trends, this countdown explains why Canada tops the charts, beating out the United Kingdom as the world’s all-time highest risk jurisdiction for government procurement legal challenges. We also explain why the United States only comes in fifth on the Global Risk Rating index, ranking as less litigious than New Zealand and Australia, and just above the Caribbean, South Africa, India and the South Pacific.
## 2016 Bid Protest Global Risk Ranking and Rating Guide

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2016 Global Analysis

Government Bid Protests
Litigation Risk Ratings

Canada
United Kingdom
New Zealand
Australia
Caribbean
India, Fiji, Papua
New Guinea, Philippines
South Africa
United States

Commercial Lost Profit Remedies

Administrative Procedural Remedies
Historical Context: Commonwealth Case Law Highlights

Canada made an early and profound contribution to the emerging international tendering law jurisprudence. The ripple effect of the Supreme Court’s 1981 decision in Ontario v. Ron Engineering & Construction (Eastern) Ltd. was a jurisprudential tsunami that swept across Canada from coast to coast and beyond as these fair tendering principles were adopted by courts in multiple international jurisdictions including Northern Ireland, Scotland, England, Wales, Australia and New Zealand.

This section includes extracts from Paul Emanuelli’s The Laws of Precision Drafting: A Handbook for Tender and RFPs.
Canada in Context
Supreme Court of Canada Launches Jurisprudential Tsunami

Ontario v. Ron Engineering & Construction (Eastern) Ltd.
January 27, 1981

The Supreme Court of Canada renders its seminal decision, recognizing that the tendering process creates a preliminary “Contract A” that gives rise to pre-award duties between the parties. The decision foreshadows common law developments in Canada and across the Commonwealth.
The Four Part Analysis, Privilege Clauses and Non-Compliance

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.,
April 22, 1999

The Supreme Court of Canada confirms the purchaser’s duty to reject non-compliant tenders and confirms that the purchaser cannot rely on its reserved rights and privileges to override this obligation. The Court establishes a four-part analysis for assessing tendering disputes.
The Supreme Court of Canada finds the BC government liable for $3.3 million for awarding a contract to a non-compliant bidder. In awarding damages to the plaintiff bidder, a narrow 5-4 majority applies a new three-part test to strike down the government’s limitation of liability clause.
The Formation of “Process Contract” (Contract A and Contract B)

1. **Purchaser Issues Tender Call**
   - Purchaser’s Offer to Enter Into Contract A
   - Purchaser’s Invitation to Treat on Contract B

2. **Bidder Submits Compliant Tender**
   - Bidder’s Acceptance of Contract A Offer
   - Contract A Formed
   - Bidder’s Binding Offer to Enter Contract B

3. **Purchaser Selects Bidder’s Tender**
   - Purchaser Accepts Bidder’s Contract B Offer
   - Bidder Must Honour its Tender to Comply With Contract A
Legal Risks and Remedies

Lost Profit Claims

Where a bidder loses a Contract A bidding process, it has the right to bring a legal claim and may be entitled to its lost profits if it can show that it lost the contract award due to a breach of the tendering rules. The larger the tendered contract, the greater the amount of potential lost profit damages. This remedy creates considerable legal exposures:

Contract Value x Profit Margin = Lost Profit Damages
(e.g. $25 million x 10% profit = $2.5 million in damages)
Legal Risks and Remedies

The Cost of Litigation
Win or lose, the direct and indirect costs of defending against these lost profit claims can have a significant adverse impact on the purchasing institution.
New Zealand, Australia and the Privy Council
New Zealand Court Recognizes Ron Engineering Principles

Markholm Construction Co Ltd. v. Wellington City Council
August 6, 1984

The New Zealand High Court applies the principles of Ron Engineering’s preliminary tendering process contract to a municipal land auction and finds the City of Wellington liable for breaching that process contract by cancelling a tender call that was issued for the sale of land.

The decision provides an early indication of the potentially widespread application of common law rules to the bidding process across the Commonwealth.
The New Zealand High Court recognizes that a process contract applies to a construction tender call. The Court recognizes an implied low bid rule and finds that the Council breached the tendering rules by bypassing the low bidder and selecting a competing bid based on an alternative construction approach.

The case involved a tender call for the construction of the Summerhill Drive flyover. The low bidder sued, arguing that it was entitled to the contract award as the lowest compliant bidder. The Court agreed, finding that the City was required to make an award based on the rules it established in its tender call.
The Federal Court of Australia recognizes that an invitation to tender for an aviation system was governed by a process contract. The Court determines that the implied terms of that contract included a duty of fair dealing which required tenders to be evaluated fairly and in accordance with the disclosed evaluation criteria. The Court finds the government authority liable for conducting an unfair evaluation of bids based on undisclosed evaluation factors.
Privy Council Sets a Precedent Across the Commonwealth

Pratt Contractors Ltd. v. Transit New Zealand
December 1, 2003

The Judicial Committee of the Privy Council recognizes that “in light of modern authority” a request for tender can give rise to a preliminary process contract between the purchasing institution and the bidders and that, depending on the circumstances, the implied terms of that process contract can include fairness and good faith duties. It recognizes that the duty to evaluate tenders fairly and in good faith is an integral term of the tendering process. This sets a binding precedent for many Commonwealth jurisdictions around the world and cements the permanent relevance of Canada’s Contract A as part of the international tendering terrain.
New Zealand Court Awards Damages for Breach of Process Contract

Roading and Asphalt Ltd v. South Waikato District Council
June 8, 2012

The High Court of New Zealand awards a bypassed low bidder lost profit damages after finding that the Council has breached the tender process rules. The case deals with a municipal solid waste disposal tender. Citing the Supreme Court of Canada’s Martel v. Canada decision, the Court holds that the Council was under an implied duty of fairness during the tendering process and that it breached that duty by relying on hidden factors in making its low bid bypass decision. The court also finds that the Council’s privilege clause did not give it the discretion to apply hidden evaluation factors.
Case Law From England, Wales, Northern Ireland and Scotland
The Court of Appeal of England and Wales recognizes that a tendering competition can give rise to a “process contract” that creates implied tendering process duties for the purchasing institution.

The case dealt with a tender call issued by the Blackpool Borough Council for an airport concession. As the Court of Appeal observed, a representative for the Aero Club had submitted the tender before the deadline, but the Town Clerk’s Office had mistakenly marked it as late. The Court of Appeal concluded that the Council had breached the implied process contract when it improperly rejected the plaintiff’s tender.
House of Commons Liable For Undisclosed “Buy British” Policy

Harmon CFEM Facades (UK) Ltd v. The Corporate Office of the House of Commons
October 28, 1999

The UK High Court of Justice – Queen’s Bench Technology and Construction Court finds that the defendant improperly bypassed the low bidder based on an undisclosed and improper “Buy British” preference. The Court refers to the vague “best value for money” evaluation process as a “charade” and finds the House of Commons in contravention of the EU Directive. It awards lost profit damages to the prejudiced foreign consortia bidder.
The Northern Ireland High Court of Justice, Queen’s Bench Division, finds Edina Manufacturing Ltd. liable for seeking a second round of price-improvement bids that turn its tendering process into an illegal auction. The Court awards the plaintiff low bidder damages for its bidding costs and for 80 percent of its estimated lost profits. As this case illustrates, once a purchasing institution, whether public or private, engages in a formal bidding process and obtains competing bids, it cannot easily shift lanes into direct negotiations in an attempt to obtain better pricing.
Northern Ireland School Board Held to Fair Process Duties

Scott v. Belfast Education and Library Board
June 15, 2007

The High Court of Justice in Northern Ireland recognizes that a tender call for construction work created a tendering process contract with implied fairness and good faith duties. The Court determines that ambiguity in the evaluation criteria undermined the transparency obligations owed to bidders. The Court enumerates a number of specific duties relating to the disclosure of material information and to the fair evaluation of tenders.
Undisclosed Criteria Lead to Lost Profit Award in Scottish Tender

Aquatron Marine v. Strathclyde Fire Board
November 16, 2007

The Scottish Court of Session finds that the application of undisclosed evaluation criteria is a breach of the tendering rules. The Court recognizes that the legal duty to conduct a transparent evaluation requires the disclosure of clear tender evaluation criteria.

The Court finds that the specific factors relied on by the evaluators were vague and imprecise and awards lost profit damages to the prejudiced plaintiff.
Open-Ended Pricing Structure Sparks Belfast Bid Battle

McConnell Archive Storage Limited v. Belfast City Council
January 25, 2008

The High Court of Justice in Northern Ireland recognizes the purchasing institution’s right to correct an evaluation error, rescind a contract award and re-award to another bidder. The rescinded bidder’s claim is rejected after the Court applies implied industry practices to determine that its competitor was compliant. While the City successfully defended the legal challenge, this case serves as a useful study of the risks inherent in using open-ended pricing structures in formal tenders.
Caribbean Controversies
The Trinidad and Tobago Court of Appeal upholds a trial judge’s decision that found that the Prime Minister’s negative public remarks about a proponent constituted an apparent bias that compromised the evaluation process and prejudiced the proponent’s right to an impartial evaluation. The trial court had previously determined that the Prime Minister made biased remarks against the rejected plaintiff bidder and also failed to follow the evaluation process established in the cell phone licence RFP. The Court of Appeal upholds the trial court’s award of damages to the prejudiced bidder and quashes the PM’s evaluation recommendation.
Court Considers Judicial Review in Trinidad Infrastructure Tender

NH International (Caribbean) Ltd. v. Urban Development Corporation of T&T Ltd.
March 17, 2006

The Trinidad and Tobago Court of Appeal determines that the purchasing agency in question is a public body and therefore potentially subject to judicial review. However, it finds no reason to reverse the agency’s evaluation decision in a contract awarded for the construction of administrative offices for the Ministry of Health.
Process Contract Recognized
By Caribbean Court

Next Level Engineering Ltd. v.
Antigua Public Utilities Authority
June 18, 2007

The Eastern Caribbean Supreme Court in Antigua and Barbuda recognizes the Contract A tendering process principles in a bidding dispute involving the procurement of electricity generating equipment. Citing the Supreme Court of Canada’s Ron Engineering precedent, as well as the Privy Council’s Pratt decision and the UK Court of Appeal’s Blackpool judgment, the court acknowledges that the bidding process could give rise to a preliminary tendering contract. However, the court ultimately determines that the Request for Quotation used in the procurement process in this particular case did not give rise to Contract A.
The South African East Cape Local Division Court upholds the government’s rejection of a counter-offer bid. The school construction tender call specified that “only conventional brick-type structures were to be erected.” The low bidder submitted a tender based on an alternative “Tuffwall” system with simulated brick finish. Its tender was rejected in favour of the second-lowest bidder whose bid complied with the specifications. The low bidder sued, arguing that the government was required to award it the contract as low bidder. The Court disagreed, noting that the low bidder’s failure to follow the prescribed specifications entitled the government to reject the low bid. No Contract A “process contract” was recognized in this case.
South African Court Strikes Down Government Contract Award

Sanyathi Civil Engineering & Construction v. Thekwini Municipality
September 30, 2011

The Kwazulu-Natal High Court in South Africa strikes down a government contract award for the construction of a 50 kilometre pipeline after determining that the tendering process was tainted by irregularities in the tender evaluation weightings. The court finds that the evaluation scheme is inconsistent with the governing statutory framework and is thus legally invalid. As the court explains, “procurement law is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation.” It orders the government to cancel the contract award as an administrative law remedy.
Critical Trends:
Recent Global Case Law Highlights

Our analysis of recent cases explains why the United States only comes in fifth on the Global Risk Rating index, ranking as less litigious than New Zealand and Australia, and just above the Caribbean, South Africa, India and the South Pacific.
Payment and Pricing Disputes
Canada, United States, Fiji
Fiji Court Rules Contract Extension Invalid

*Kabara Development Corporation Ltd. v. Attorney General*

Court of Appeal of Fiji

In its October 2009 decision in *Kabara Development Corporation Ltd. v. Attorney General*, the Court of Appeal of Fiji ruled that an alleged contract extension was invalid due to the contravention of applicable statutory rules. The case dealt with a three-year contract for shipping services valued at $30,000 that was originally awarded pursuant to a tendering process. The Court of Appeal ruled that, even if the alleged extension had been agreed to by government officials, it would have been void for contravening the statutory rules that required the open tendering any such contracting opportunity.
Government of Fiji Liable for Low Volume Orders

*Printhouse Ltd. v. Land Transport Authority*

High Court of Fiji

In its April 2014 decision in *Printhouse Ltd. v. Land Transport Authority*, the High Court of Fiji found the government liable for breach of contract and awarded the plaintiff contractor $157,300 in damages. The case dealt with a tender call for 150,000 wheel tax stickers. The plaintiff contractor was awarded the contract after bidding $1.21 per unit for a total of $181,000. However, the government failed to follow through with the full order. It ultimately only purchased 20,000 stickers for a total of $24,200. The contractor sued for the difference. The court found in favour of the contractor.
In its March 2015 decision in *CGI Federal Inc. v. United States*, the U.S. Federal Court of Appeals ruled that delayed payment provisions contained in the federal government’s Medicare and Medicaid overpayment recovery contracts violated government regulations that mandate commercially reasonable contract terms with suppliers. The case dealt with a federal government Request for Quotations issued in 2014 for overpayment recovery services relating to the federal Medicare and Medicaid programs.
The contract terms contained in the new RFQs amended prior payment provisions that typically entitled government contractors to commission payments for the collection of Medicare and Medicaid overpayments 41 days after the issuance of a demand letter. The contract terms in the new 2014 RFQs required government contractors to wait until the overpayment demand process passed the second level of a five-level appeal process, which, as the court noted, “typically occurs somewhere between 120 and 420 days after the demand letter.”
Rather than bidding on the new terms, CGI filed a bid protest. The U.S. Court of Federal Claims rejected the protest after ruling that the payment terms did not violate statutory or regulatory provisions. CGI appealed. The U.S. Federal Court of Appeals reversed the trial decision, ruling in favour of CGI after finding that the revised payment terms in the new federal government RFQs were in contravention of Part 12 of the Federal Acquisition Regulations, which prohibit the federal government from including terms in its solicitations or contracts that are inconsistent with customary commercial practice.
New Brunswick Court Project Extra Cost Claim  
*Brad Gould Trucking & Excavating Ltd. v. Bird Construction Co.* 
New Brunswick Court of Appeal

In its July 2015 ruling in Bench in *Brad Gould Trucking & Excavating Ltd. v. Bird Construction Co.*, the New Brunswick Court of Appeal reversed a November 2013 trial decision of the New Brunswick Court of Queen’s Bench that had previously found the provincial government liable for extra costs incurred by a contractor due to unforeseen soil conditions. The case dealt with the construction of the Saint John Law Courts building in Saint John, New Brunswick.

No Negligent Misrepresentation or Omission – Extra-Costs Claim Rejected
While the trial court found that there were no negligent misrepresentations or omissions in the original tendering process, it held that this was irrelevant when determining extra costs for subsequently discovered unforeseen soil conditions. The trial court found that the province was responsible for paying for those additional costs since the contract provided for additional payment in the event of such unforeseen circumstances.
New Brunswick Court Project Extra Cost Claim

New Brunswick Court of Appeal

However, the Court of Appeal disagreed and found that the contractors were not entitled to additional payments. In support of its conclusion, the Court of Appeal noted that the contractors had the information required to reasonably anticipate the soil conditions that they encountered on the project.
In its February 2015 decision in *Montana Construction Corp Inc. v. J. Fletcher Creamer & Son, Inc*, the Superior Court of New Jersey, Appellate Division, upheld the Township of Lyndhurst’s rejection of an unbalanced bid. The case dealt with a solicitation for emergency water main and sewer main repairs. The Township rejected two bids that contained unbalanced pricing, and the bidders challenged this decision.
Jersey Court Upholds Rejection of Unbalanced Bids

Montana Construction Corp Inc. v. J. Fletcher Creamer & Son, Inc
Superior Court of New Jersey, Appellate Division

As the appeal court summarized, the bidders had submitted bids that contained nominal pricing in certain price categories which, according to a prior lower court decision, rendered the bids unbalanced.

Judge Friscia concluded that the term "unbalanced bids/penny bids" in the township's bid proposal form clearly meant "nominal amounts," and bidders were forewarned that including nominal amounts in a bid would result in disqualification. The court agreed that the specification regarding unbalanced, penny bids was a non-waivable, material term.
Montana's bid was non-responsive. It included fourteen nominal bid amounts. Its bid "would have produced substantial disparities in costs" that would be "detrimental … to the municipality" and "adversely affect [ ] a fair and competitive bidding process." Judge Friscia concluded that Montana failed to establish that the municipality was arbitrary or capricious in finding that Montana's bid was unbalanced. In doing so, she noted the record evidence that Montana proposed inflated prices for some contract items to compensate for its nominal bid costs.
The appeal court acknowledged that, while not technically illegal, unbalanced bids caused significant public interest concerns and that the municipality was justified in expressly prohibiting these bids in its solicitation documents.
In its December 2015 decision in *Dynamic Painting v. Ball Construction*, the Ontario Superior Court of Justice rejected a lost profit claim brought by a losing bidder for a municipal painting contract. The case dealt with a tender call issued by Ball Construction, a City of Brantford contractor, for a painting contract at the Wayne Gretzky Sports Centre. After the initial bids were submitted, Ball Construction sought post-bid price revisions from the bidders and then awarded a contract for the work. Dynamic Painting, one of the two bidders, sued for lost profits, alleging that Ball had engaged in bid shopping.
However, the court rejected the claim, finding that the time-sensitive project was run under the “fast-track construction management model” which involved tenders for sub-trades being completed during various stages of the project. Dynamic was one of the two bidders on the painting portion of the project, but, after post-bid price refinements were made to clarify pricing for the anti-graffiti spraying component of the work, the contract was awarded to the other bidder.
Court Rejects Bid Shopping Claim at Wayne Gretzky Arena

*Dynamic Painting v. Ball Construction*

Ontario Superior Court of Justice

After a detailed consideration of the pricing and follow-up pricing submitted by the competing bidders, the court ultimately rejected Dynamic’s bid shopping allegations. In coming to its decision, the court also concluded that Dynamic’s bid contained a number of errors that rendered its bid substantially non-compliant.
Close Call in $21 Million Calgary Community Centre Bid

*Elan Construction Ltd. v. South Fish Creek Recreational Assn.*

Alberta Court of Queen’s Bench

In its May 2015 decision in *Elan Construction Ltd. v. South Fish Creek Recreational Assn.*, the Alberta Court of Queen’s Bench determined that the defendant purchasing institution ran an unfair evaluation process. However, the court ultimately ruled against awarding the plaintiff bidder lost profit damages after finding that the contractor who actually won the bidding process lost money on the project.
Framework Agreement Challenges
United Kingdom and United States
In its June 2015 decision in Medicure Ltd v. The Minister for the Cabinet Office, the England and Wales High Court of Justice (Technology and Construction Court) rejected a supplier’s claim that the government was engaging in out-of-scope procurements under a new framework agreement (“FA”). The dispute dealt with the use of a new FA for health services. The complainant was in the business of providing doctors to health authorities but it was unable to provide the additional managed services required under the new FA.
The complainant alleged that the scope of the new FA only covered the supply of managed services rather than the direct provision of doctors. It challenged the government’s direct acquisition of doctor’s services as falling outside the proper scope of the FA. In reviewing the FA contract terms, the court noted that the agreement was unnecessarily long and complex, which undoubtedly contributed to the confusion over its proper scope:
I have been through the FA, which runs to over 500 pages. I question the wisdom of contracts of this length: nobody ever reads the detail until something goes wrong, and then the parties scrabble around trying to find bits and pieces of the small print that help their case. It would make this Judgment even duller than it already is if I included within it every clause or section of the FA to which I was taken, or which I have read. Accordingly the parties can take it that I have considered all of the sections to which I was referred, but I confine myself to setting out below what I consider to be the particularly relevant sections of the FA, in order to explain my views in the subsequent sections of this Judgment.
U.K. Court Rejects “Out-of-Scope” Claim

Medicure Ltd v. The Minister for the Cabinet Office

England and Wales High Court of Justice (Technology and Construction Court)

The court ultimately determined that the complainant’s interpretation was incorrect since the scope of the FA included both the direct provision of doctors as well as the supply of managed services. However, the court expressed sympathy for the complainant who had been providing doctor’s services to government institutions for eighteen years. As the court noted, the expanded scope of the new FA put these contracting opportunities out of reach of smaller firms.
In its January 2015 decision in *Fairview Valley Fire, Inc. v. California Department of Forestry*, the California Court of Appeal upheld the California Department of Forestry’s stand-by emergency fire services agreements after finding that the agreements were not subject to the open competitive bidding requirements under the relevant state procurement statute. The case dealt with the creation of agreements, referred to as Cal-Fire 294s, for the provision of stand-by emergency fire services.
California Court Upholds Emergency Stand-By Contracts

*Fairview Valley Fire, Inc. v. California Department of Forestry*

State of California Court of Appeal

The court found that the agreements did not constitute a contract award since a contract would only be created if the emergency services were actually called upon. The court also found that the contract awards would be exempt from the open bidding requirements under a California Public Contract Code exemption that applies to “cases of emergency where a contract is necessary to the immediate preservation of the public health, welfare or safety, or protection of state property.”
Restrictive Specifications
United States and Canada
In its January 2015 decision in Matter of Smith and Nephew, Inc., the Government Accountability Office found that the Department of Veterans Affairs issued a solicitation with unnecessarily restrictive specifications. The case dealt with a solicitation for sterile wound dressings. The complainant alleged that the required dressing absorption capacity was not necessary to meet the Department’s needs and therefore undermined fair and open competition.
“Top Tier” Specs Struck Down as Restrictive
Matter of Smith and Nephew, Inc.
Government Accountability Office

Rather than explaining how the requirements were geared to actual needs, the Department maintained that its goal was to “procure the most absorbent and fluid-handling capable dressings available” and therefore selected a “top tier” product. The GAO found that the Department had the onus of establishing that the requirement reasonably met its needs and that it failed to meet that onus.
The GAO directed the Department to engage in an internal review process that properly documented its product requirements and to develop revised RFQ specifications that were appropriately aligned to those needs. As this case illustrates, public institutions should carefully consider the minimum specifications they establish in their solicitation documents to ensure that they do not create unnecessarily restrictive barriers to open competition.
In its February 2015 decision in *Airbus Helicopters Canada Ltd. v. Canada (Attorney General)*, the Federal Court of Canada rejected the legal challenge of a supplier who alleged that the government’s specifications were biased in favour of a competing supplier. The case dealt with a federal government tender call for a $172 million light-lift helicopter purchase. The applicant, Airbus Helicopter Canada Ltd., brought a judicial review application after it engaged in pre-bid consultations with the government but then refused to bid due to what it alleged were biased specifications.
Spec Drafting Decisions Subject to Judicial Review

Airbus Helicopters Canada Ltd. v. Canada (Attorney General)
Federal Court of Canada

As the court noted, the case was unique when compared to most other judicial review challenges in that the complainant never actually submitted a bid in the challenged process. One of the key issues in the decision was whether the complainant had the right to initiate a legal challenge in those circumstances. The court ultimately concluded that the applicant did have standing to bring the lawsuit since the government had engaged in pre-bid consultations regarding its requirements.
The court found that the government was under a duty to develop fair and unbiased specifications and also found that the government’s market outreach created legitimate expectations that all consulted suppliers would be treated fairly during the consultation process. While the court determined that the government’s specification setting decision was subject to a more deferential reasonableness standard, it also concluded that the consultation process leading up to the creation those specifications was subject to a more stringent correctness standard.
However, notwithstanding the right to challenge the specification setting decision and the process that led to that decision, the court ultimately held that the complainant failed to make its case. With respect to the Minister’s technical decision on the helicopter specifications, the court found the favouritism alleged by the applicant was never proven.
Due Process Duties
Jamaica, Papua New Guinea, Philippines, India, United States, Canada, South Africa, New Zealand
Jamaican Court Upholds Rejection of Incumbent’s Late Bid
Moores Air Express Services Limited v. The Postmaster General
Supreme Court of Jamaica

In its March 2004 decision in Moores Air Express Services Limited v. The Postmaster General, the Supreme Court of Jamaica upheld the government’s rejection of a late bid that was submitted by a long-term incumbent. The case dealt with a tender call by the Jamaican Postmaster General for the provision of staff and mail transportation services. The legal challenge was launched over the rejection of the incumbent’s bid, which it had attempted to submit on behalf of a large group of mail contractors across Jamaica.
Jamaican Court Upholds Rejection of Incumbent’s Late Bid

*Moores Air Express Services Limited v. The Postmaster General*

Supreme Court of Jamaica

After summarizing the competing version of events, the Supreme Court noted that government procurement decisions are subject to reversal where they are made on irrational or unreasonable grounds:

In reviewing the decision of the Postmaster General (PMG) to determine whether it may be deemed to be irrational or unreasonable, the Court is to investigate whether the PMG took into account matters that she ought not to have considered or disregarded matters that she should have taken into account. In either case the decision may be impugned. However, the decision having satisfied these primary considerations may yet be impugned if it can be assailed on the ground of perversity or irrationality.

Late Bid Dispute
Jamaican Court Upholds Rejection of Incumbent’s Late Bid

Moores Air Express Services Limited v. The Postmaster General

Supreme Court of Jamaica

The test for such a course being; if no reasonable PMG acting on the circumstances presented before this PMG could come to a decision that the advertised time for the tendering of bids had passed and that she was justified in refusing the Plaintiff’s bid.

On the production of such evidence, the reviewing Court acting in its supervisory capacity will quash the decision. It takes evidence of a very high standard to satisfy this test. The applicant would be required to demonstrate by way of evidence that the decision of the PMG to use language of Lord Green is so “absurd that no sensible person could ever dream that it lay within the power of the authority”, see Associated Provincial Picture Houses Ltd. v Wednesbury Corp. (1947) 2 ALL. E.R.
Jamaican Court Upholds Rejection of Incumbent’s Late Bid

*Moores Air Express Services Limited v. The Postmaster General*

Supreme Court of Jamaica

The Supreme Court ultimately ruled in favour of the government, finding that the bid had been validly rejected as late and that there was no breach of the applicable tendering rules. As this case illustrates, the rejection of late bids can be a contentious decision that gives rise to legal disputes. Government bodies should therefore ensure that their bid submission procedures are clearly defined and administered with a high degree of precision in order to ensure that those decisions are defensible in the face of inevitable legal challenges.
In its February 2011 decision in *Mountain Catering Ltd v. Punangi*, the Papua New Guinea National Court of Justice upheld a controversial government contract award decision that overruled an evaluation committee’s contract award recommendations. The dispute dealt with a tender call for supply of catering and hospitality services for the Papua New Guinea Defence Force.
Papua New Guinea Court Upholds Incumbent Preference  
*Mountain Catering Ltd v. Punangi*  
Papua New Guinea National Court of Justice

The complainant’s bid was initially recommended for award by the Defence Technical Evaluation Committee but that recommendation was ultimately reversed after military officials expressed their preference for the incumbent service provider. As the court noted, members of the evaluation committee took issue with what they perceived to be interference in the evaluation process. The Minister of Finance wrote to the Central Supplies and Tenders Board (“CSTB”), raised concerns over the perceived interference and insisted that the contract be awarded as recommended by the evaluation committee.
However, as the court noted, the Minister eventually reversed that position after receiving an explanation from the relevant military officials and instead “re-endorsed the decision by the CSTB” to award to the other bidder. The court ultimately upheld the contract award decision after finding that the CSTB, in its statutory position as a central tenders board, was not compelled to follow the recommendations of the evaluation committee and could take other factors into account in making its contract award decision.
In its September 2009 decision in *Harry L. Roque v. Comelec*, the Supreme Court of the Philippines dismissed allegations that the government awarded a contract to a non-compliant bidder. The case dealt with the procurement of a technology system to assist with national elections. The contract award was challenged in the courts on the basis that the winning joint venture bidder was not incorporated at the time of bidding and that the proposed technical solution failed to meet the minimum technical standards. The Supreme Court rejected these claims.
Philippines Supreme Court Rejects Non-Compliant Bid Claim

*Harry L. Roque v. Comelec*

Supreme Court of the Philippines

With respect to the incorporation of the joint venture parties, the Supreme Court found that the relevant solicitation rules did not require the formal incorporation of all of the proposed joint venture parties at the time of bidding. The challenge to the status of the joint-venture parties at the time of bidding was accordingly rejected by the Supreme Court.
The Supreme Court also dismissed the assertion that the selected bidders were technically non-compliant, finding that from “the records before us, the Court is fairly satisfied that the Comelec has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria … to ensure compliance with the above minimum systems capabilities.” The complainant’s legal challenge was therefore dismissed.
India High Court Upholds Rejection of Non-Compliant Bid

Process Color v. Secretary of Home
High Court of Madras

In its May 2007 judgment in *Process Color v. Secretary of Home*, India’s High Court of Madras upheld the government’s decision to reject a non-compliant bid. The case dealt with tender call for the manufacture and supply of polyester hologram labels. The complainant’s bid was rejected since its manufacturing facilities were not contained in one premises as required by the solicitation rules and since its specimen samples did not meet the required specifications.
India High Court Upholds Rejection of Non-Compliant Bid

*Process Color v. Secretary of Home*

High Court of Madras

In its legal challenge, the rejected bidder alleged that its constitutional rights were breached by the government’s biased, arbitrary and unreasonable rejection decision. The court disagreed. In its judgment, the court noted that the “materials available on record clearly show that the petitioner is not having all the facilities under one roof as prescribed by Tender Conditions.”
Furthermore, with respect to the government’s finding that the submitted samples failed to meet the required specifications, the court held that it is not the role of the courts to second-guess the technical assessment of government bodies in commercial matters unless the government’s decisions are arbitrary, discriminatory or made with malice:

The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tenders as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.
India High Court Upholds Rejection of Non-Compliant Bid

Process Color v. Secretary of Home

High Court of Madras

In supporting this conclusion, the court cited the Supreme Court of India’s decision in Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. That decision recognized a modern trend towards judicial non-interventionism when dealing with government procurement decisions unless those decisions are unreasonable, arbitrary, biased or made in bad faith.
India High Court Upholds Rejection of Non-Compliant Bid

Process Color v. Secretary of Home

High Court of Madras

The court ultimately held that in the absence of the above-noted unfairness factors, it was not appropriate for the courts to intervene in the technical evaluation decisions of government bodies. The rejected bidder’s legal challenge was therefore dismissed.
Supreme Court of India Rejects Judicial Review in Land Tender

*Rishi Kiran Logistics Ltd. v. Board of Trust of Kandla Port*

Supreme Court of India

In its April 2014 decision in *Rishi Kiran Logistics Ltd. v. Board of Trust of Kandla Port*, the Supreme Court of India dismissed a legal challenge flowing out of the government’s decision to cancel a public tender for land leasing rights. One of the bidders appealed to the Supreme Court of India after a lower court rejected its initial legal challenge. In dismissing the bidder’s appeal, the Supreme Court of India articulated a number of governing principles for the judicial review of government procurement decisions.
The Supreme Court noted that a government procurement decision is subject to judicial review where that decision is made arbitrarily but that this would not prevent the government from cancelling a tendering process with a view to obtaining more favourable financial terms for the disposal of public assets.
Supreme Court of India Rejects Judicial Review in Land Tender

*Rishi Kiran Logistics Ltd. v. Board of Trust of Kandla Port*

Supreme Court of India

As the Supreme Court noted, the review of government decision making to ensure due process must be balanced against the need to enable government bodies to make decisions in the public interest:

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. The duty of the court is to confine itself to the question of legality. Its concern should be: (i) Whether a decision making authority exceeded its powers? (ii) Committed an error of law, (iii) Committed a breach of rules of natural justice, (iv) reached a decision which no reasonable tribunal would have reached or, (v) Abused its powers.
Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationally, namely Wednesbury unreasonableness. (iii) Procedural impropriety.
Rhode Island Court Rejects Low Bidder’s Lawsuit

HK&S Construction Holding Corp. v. Town of Middletown
Rhode Island Supreme Court

In its April 2015 decision in *HK&S Construction Holding Corp. v. Town of Middletown*, the Rhode Island Supreme Court upheld a lower court ruling that had dismissed a non-compliant bidder’s legal claim. The dispute dealt with a tender call for a drainage improvement project. The plaintiff submitted a $1.6 million low bid, but that bid was rejected as non-compliant on the grounds that it was non-responsive, and the contract was awarded to a competing $3.7 million bid. The low bidder sued but its case was dismissed. The low bidder appealed.
Rhode Island Court Rejects Low Bidder’s Lawsuit

HK&S Construction Holding Corp. v. Town of Middletown
Rhode Island Supreme Court

As the Supreme Court noted, the trial judge found that a non-compliant bid is “not a bid at all” and is legally ineligible for acceptance:

…he also stated that the town lawfully exercised its discretion when it determined that plaintiff’s bid was nonresponsive and therefore was not a bid at all….On April 8, 2014, the hearing justice entered an order granting defendants’ motions for summary judgment and, on that same day, entered final judgment on behalf of all defendants.
Rhode Island Court Rejects Low Bidder’s Lawsuit
HK&S Construction Holding Corp. v. Town of Middletown
Rhode Island Supreme Court

The Supreme Court therefore upheld the trial court’s summary dismissal of the low bidder’s claim. In so finding, the Supreme Court stated that government bodies were entitled to a presumption of correctness, that bidders bore the onus of establishing that the public authority had acted improperly, and that the courts should avoid putting public officials in a “legalistic straightjacket” by allowing every contract award decision to be contested in the courts:
It is well settled that, in reviewing a public bidding process, the courts will not interfere with the award of a state or municipal contract unless the awarding authority “acted corruptly or in bad faith, or so unreasonably or arbitrarily as to be guilty of a palpable abuse of discretion.” Paul Goldman, Inc. v. Burns, 109 R.I. 236, 240, 283 A.2d 673, 676 (1971); see also Gilbane Building Co. v. Board of Trustees of State Colleges, 107 R.I. 295, 300, 267 A.2d 396, 399 (1970). “[W]hen officials in charge of awarding a public work[s] contract have acted fairly and honestly with reasonable exercise of a sound discretion, their actions shall not be interfered with by the courts.” Blue Cross & Blue Shield of Rhode Island v. Najarian, 865 A.2d 1074, 1081 (R.I. 2005) (quoting H.V. Collins Co., 696 A.2d at 302).
Rhode Island Court Rejects Low Bidder’s Lawsuit

HK&S Construction Holding Corp. v. Town of Middletown
Rhode Island Supreme Court

This Court has recognized that “[t]he decision of any official, board, agent, or other person appointed by the state concerning any controversy arising under or in connection with the solicitation or award of a contract shall be entitled to a presumption of correctness.” Id. (quoting G.L. 1956 § 37-2-51) (emphasis in original). Finally, we have cautioned that “[t]o hold otherwise would place the Judiciary in the position of litigating the award of every state and municipal contract and would place public officials in charge of awarding such contracts in [a] ‘legalistic straitjacket’ * * *.” H.V. Collins Co., 696 A.2d at 305 (quoting Gilbane, 107 R.I. at 302, 267 A.2d at 400).
In its November 2014 decision in *Mogale City Municipality v. Fidelity Security Services*, South Africa’s Supreme Court of Appeal upheld a lower court decision that struck down the award of a security services contract due to the improper rejection of a competing bidder. The rejected bidder was disqualified after it was discovered that one of its directors was listed on the registry of contractors and individuals prohibited from doing business with the government. The bidder was unaware of the listing at the time of bid submission and failed to declare the listing as required by the tendering rules.
South African Security Screening Leads to Improper Rejection

*Mogale City Municipality v. Fidelity Security Services*

South Africa Supreme Court of Appeal

The court determined that the rejection was “patently wrong” since a “bar on awarding a tender does not mean that a possible obstacle to the award of the tender cannot be removed before the decision on the tender is made.” In fact, the bidder had offered to remove the listed director but was not provided with an opportunity to do so. The court ultimately determined that the process was fundamentally flawed due to the procedural error and upheld the lower court decision to strike down the resulting contract award.
In its December 2014 decision in *Nelson Mandela Bay Metropolitan Municipality v. MTN Service Provider Ltd*, South Africa’s Eastern Cape High Court set aside a contract award decision after finding fundamental flaws in the government’s evaluation process. The dispute dealt with a municipal tender call for mobile voice and data services. The government struck a “pre-evaluation” committee to screen the submitted proposals before forwarding the remaining proposals to the Bid Evaluation Committee.
South African Court Voids Contract Due to Evaluation Flaws

_Nelson Mandela Bay Metropolitan Municipality v. MTN Service Provider Ltd_

South Africa Eastern Cape High Court

This process was challenged by one of the bidders. In reviewing the process, the court determined that the “pre-evaluation” screening committee was improperly constituted and was not authorized by the municipality’s Supply Chain Management Policy (“SCMP”):

No provision was made in the SCMP for a pre-evaluation committee. This committee was not appointed by the City Manager, as required by the SCMP and, in the words of Hani, [the] committee was, ‘in truth, an ad hoc meeting of the individuals concerned which had no formal or legal status and which had no powers whatsoever’.
The court concluded that the use of this unauthorized process was fatal to the legal defensibility of the tendering process and struck down the resulting contract award:

As the pre-evaluation committee had no lawful existence, provision for it not having been made in the SCMP, it had no lawful authority in terms of the SCMP – the empowering provision – or any other law, for that matter, to disqualify bids. In the result, the award of the tender must be reviewed and set aside on this basis.
As this case illustrates, government bodies should ensure that their bid evaluation and award procedures strictly adhere to applicable rules since procedural irregularities can be fatal to the defensibility of an evaluation process and to the validity of any resulting contract award.
New Zealand Court Strikes Down Flawed Evaluation

*Problem Gambling Foundation of New Zealand v. Attorney General*

High Court of New Zealand

In its July 2015 decision in *Problem Gambling Foundation of New Zealand v. Attorney General*, the High Court of New Zealand struck down a contract award after finding flaws in the government’s evaluation and award process. The dispute dealt with an RFP for treating problem gamblers. The Problem Gambling Foundation, a losing proponent, asserted that the government’s evaluators relied on undisclosed evaluation criteria and improper procedures during the evaluation process.
The court found that the government improperly conducted consensus scoring during what was referred to as a “moderation stage”. This had the effect of lowering the complainant’s score based on undisclosed “alignment with strategic plan” criteria. These evaluation problems were compounded by the government’s failure to maintain proper evaluation records. As the court noted, efforts were then made to retroactively document the evaluation process to fill in the gaps in prior record keeping.
The court was unimpressed with the after-the-fact efforts made to correct the evaluation process deficiencies. It concluded that the government’s “moderation stage” breached the RFP rules. The court therefore granted the complainant’s application and set aside the contract award decision. As this case illustrates, the use of undisclosed criteria, unsound processes and improperly documented procedures can prove fatal to the ultimate defensibility of government contract award decisions.
Florida Bidder Swap-Out Results in Voided Contract

Community Maritime Park Associates Inc. v. Maritime Park Development Partners LLC

United States Court of Appeals

In its March 2015 decision in Community Maritime Park Associates Inc. v. Maritime Park Development Partners LLC, the Unites States Court of Appeals struck down a contract award for violating a Florida state purchasing statute due to a flawed evaluation and award process that saw a selected bidder substituted with another firm during contract award negotiations.
Florida Bidder Swap-Out Results in Voided Contract
Community Maritime Park Associates Inc. v. Maritime Park Development Partners LLC
United States Court of Appeals

The case dealt with an RFQ for professional urban development services issued by Community Maritime Park Associates, Inc., a non-profit organization created by the City of Pensacola, Florida, to oversee the city’s Community Maritime Park project. The appeal court found that the procurement was governed by Florida’s Consultants’ Competitive Negotiation Act and that the contract award was legally void since it breached the requirements of that statute.
In its decision, the appeal court noted that the relevant statutory provisions required contract award negotiations to proceed based on the results of prior stages of the bidding process and found that the attempt to substitute a new firm after the originally selected firm became insolvent was in breach of those provisions.
Given this breach of the applicable statutory provisions, the appeal court concluded that “the Agreement was void as a matter of public policy”. As this case illustrates, public institutions that are subject to procurement statutes should ensure that their evaluation and award procedures comply with all applicable statutory requirements since non-compliance can undermine the legal validity of a contract award.
In its April 2015 ruling in *Rapiscan Systems Inc. v. Canada (Attorney General)*, the Federal Court of Appeal upheld a February 2014 Federal Court trial decision that set aside a contract awarded by the Canadian Air Transport Security Authority (“CATSA”) 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.
While the Federal Court of Appeal ultimately upheld the trial court’s decision to strike down the contract award, it disagreed with the trial decision, and with other prior Federal Court rulings, regarding the applicable standard of review for government procurement. Rather than adopting the more deferential “reasonableness” standard, the Federal Court of Appeal concluded that the standard of review for procedural fairness in a government procurement process was the stricter correctness standard.
In so finding, the Federal Court of Appeal parted company with the majority of recent decisions across Canada that have applied the more deferential reasonableness standard of review to government procurement. The Federal Court of Appeal drew a distinction between the substantive decisions made in government procurement (which would presumably include technical assessments of proposals by subject matter experts), to which a reasonableness standard would apply, and the procedural rules administered in a government procurement process, which should be subject to a less deferential correctness standard.
Appeal Court Applies Procedural Correctness to Procurement

Rapiscan Systems Inc. v. Canada (Attorney General)

Federal Court of Appeal

Notwithstanding the prior jurisprudential trend towards a more deferential general reasonableness standard, this aspect of the Federal Court of Appeal judgment could represent a watershed moment in introducing a new era of procedural correctness to government procurement decisions.
2016 Global Analysis

Government Bid Protests
Litigation Risk Ratings

Canada
United Kingdom
Australia
New Zealand
Caribbean
India, Fiji, Papua
New Guinea, Philippines
South Africa
United States

Administrative Procedural Remedies

Commercial Lost Profit Remedies
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<th>Global Litigation Risk Rating</th>
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<th>Criteria</th>
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<th>Criteria</th>
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<td>8.0</td>
<td>4.0</td>
<td>Extreme Volume Lost Profit Claims</td>
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<td>3.0</td>
<td>High Volume Lost Profit Claims</td>
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<td>2.0</td>
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<td>8. India, Papua New Guinea, Fiji, Philippines</td>
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<td>Lost Profits Generally Not Available</td>
<td>1.0</td>
<td>Courts Non-Interventionist</td>
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- December 16, 2015, 1:00 pm EST, Top Ten News Stories of 2015
- January 13, 2016, 1:00 pm EST, National Tendering Law Update Year in Review — Canadian Edition
- February 17, 2016, 1:00 pm EST, National Tendering Law Update Year in Review — U.S. Edition
- March 16, 2016, 1:00 pm EST, National Tendering Law Update Year in Review — Global Case Law Countdown

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