January 2023

Quarterly Report

The Procurement Office

Issue #1 Year in Review

Trend of the Year

Inside Advantage Claims on the Rise

Governance Gaps Exposed

The past year saw a surge of inside advantage rulings, including a case where a bidder was improperly awarded an assignment to review its own work (see Secret Service Fails to Screen for Conflicts), a general counsel breached conflict rules by improperly interfering with a board's contract award decision (see Lawyer Breaches RFP Conflict Rules), a public institution allowed a potentially conflicted external advisor to exert undue influence in drafting specifications and evaluating bids (see Process Tainted by Perception of Conflict), a school board approved its own contract service invoices out of trust funds it managed for two schools (see School Board in Trust Fund Conflict), and two bidders hired former government employees who were involved in drafting specifications (see Employee Conflict Taints Specifications) or who had access to sensitive incumbent information (see Inside Information Undermines Bid Process) that tainted the integrity of the tendering process.

These recent rulings also included a case where a conflict claim was dismissed after proper recusal protocols were established to guard against the risk of inside advantage (see Bidder Builds Effective Conflict Firewall), which proved that proactive conflict measures are possible when public institutions prioritize good governance in their procurement operations.

Staying in Your Lane: Public institutions and bidders need to stay within the guardrails of conflict of interest rules to avoid becoming the next high-profile case study.

Business Not Personal: The new Canadian federal ruling serves as a reminder to elected officials that public contracts, no matter how small, should not be awarded to friends, no matter how urgent the circumstances. The Minister apologized in Parliament for breaching the federal statute. This was not the first conflict case involving Canada's federal Cabinet in recent years (see PM Breaches Conflict Law and Watchdog Clears PM in "Strictly Business" Ruling).

Case of the Year

Federal Minister Breaches *Conflict of Interest Act*

Urgent Low-Value Awards Remain Subject to Conflict Rules

Canada's Conflict of Interest and Ethics Commissioner recently confirmed that urgent low-value contracts remain subject to federal conflict rules. In the *Ng Report*, the Ethics Commissioner found that the Minister of International Trade, Small Business and Economic Development was involved in awarding two government sole-source contracts to a firm owned by her friend, which breached the *Conflict of Interest Act*.

According to the report, the Minister failed to implement proper mitigation measures, including recusals and conflict screening. As the Ethics Commissioner stated, "The simple fact of receiving a service under contract from a friend should have prompted Ms. Ng to withdraw herself completely from the process and obtain similar services from another provider."

The two media training contracts, performed in March-April 2019 and April-May 2020, were each worth under $25, 000 and did not require public tendering under federal Treasury Board policy. According to the report, the Minister maintained that the second contract involved pandemic-related media training "sought in the time of a pressing emergency during which a delay would have been injurious to the public." However, the Ethics Commissioner determined that the awards breached the conflict law since, irrespective of the contract values, they furthered the financial interests of the Minister's friend. The Ethics Commissioner also concluded that the Minister had "ample time" to implement conflict compliance measures, including recusals and screening, since the first award occurred prior to the pandemic. (see Minister Breaches Conflict Law).

Global Research

Newsreel-Audits-Case Law

Procurement Publishing Office

The 2023 edition of *The Art of Tendering* consolidates our global research with analyses of newsreel highlights, audit reports and case law developments.

Governance 2.0

Policy-Protocols-Templates

Procurement Law Office

We are pleased to announce our new 2.0 Policy and Protocols and 5.0 Annotated RFx Templates.

Governance Training

Leveraging Lessons Learned

Procurement Training Office

We will be running our open enrolment Governance and Project Execution Certificate in a month-long format starting February 1, 2023.

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Unsolicited Proposals and Sole-Sourcing Raise Global Governance Concerns

Public Institutions Worldwide Need to Bolster Their Tendering Practices

As recent case studies illustrate, unsolicited proposals and unregulated sole-sourcing are creating increasing procurement governance concerns worldwide.

For example, Jamaica's Integrity Commission recently found that the government violated open tendering rules by awarding a contract to an unsolicited proposal (see Unsolicited Proposal Raises Conflict Concerns), Papua New Guinea's former Prime Minister was charged with a criminal offence over an emergency sole-source contract he awarded while in office, and Australia's Auditor-General found that the National Capital Authority improperly preferred incumbents over open competition (see Sole-Sourcing in the South Pacific).

In fact, a series of recent Australian audits revealed flawed conflict controls within multiple public institutions, raising concerns relating to unsolicited proposals, biased specifications, unfair advantage, and inadequate conflict screening procedures (see Reports Reveal Flawed Conflict Controls). These are not isolated reports. Public institutions worldwide are facing increasing scrutiny over their sole-source decisions, with widespread concerns raised over the probity and transparency of direct awards and the failure to obtain value-for-money for the taxpayer. For example, the New York State Comptroller's Office found systemic irregularities across the local government and school board sectors in its latest round of procurement audits (see Comptroller Expands Compliance Audits).

Those recent New York State audits involved 16 local institutions and showed that no institution is too remote, and no expenditure is too small, to escape public audit scrutiny. In addition to suffering the reputational harm of adverse audit reports, public institutions that engage in unlawful sole-sourcing also run the risk of seeing their improper contract awards struck down in legal challenges. In fact, South Africa's courts recently quashed a series of illegal sole-source awards (see Courts Strike Down Illegal Sole-Sourcing). These recent decisions serve as a useful reminder to public institutions across all jurisdictions that the failure to follow open tendering rules remains subject to potential legal challenge and can result in the invalidation of non-competed awards.

Protectionism undermines procurement: While some politicians want to award contracts to local contractors to boost the local economy, open competition is a two-way street that works on the foundation of geographic neutrality (see The State of Compliance and "Buy Ontario" Scheme a Protectionist Pantomime).

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Local Preference Pitfalls

Canadian Provinces Lose Legal Challenges

Local preferences can lead to legal challenges, including recent rulings where two Canadian provincial governments were found in breach of their trade treaty duties. In *The Ministry of Highways for the Province of Saskatchewan v. West-Can Seal Coating Inc.*, a Saskatchewan court upheld an arbitration decision that ruled against a provincial "community benefits" scheme (see Saskatchewan Case Study webinar).

In *Thales DIS Canada Inc. v. Ontario*, an Ontario court struck down a provincial driver's licence and health card RFP after the government failed to justify Canadian production restrictions. The Ontario government sought leave to appeal the decision, which was granted by the Ontario Court of Appeal in the fall 2022, setting the stage for a higher court ruling on the use of restrictive requirements (see Ontario Case Study webinar).

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Destroying Records is a Losing Strategy

Evaluators Need Training

A recent audit found that the City of Las Cruces in New Mexico administered a flawed RFP process that lacked proper evaluation records. The audit also recommended that the City establish clearer bid protest procedures so that losing bidders do not escalate their concerns directly to elected officials (see Missing Records Undermine Transparency).

Another recent audit determined that the Denver Airport should stop destroying its evaluation records. While airport employees claimed that "destroying score sheets might deter unsuccessful proposers from suing the airport", the audit noted that this practice breached record retention rules (see Destroyed Records Breach Retention Rules).

In fact, as recent rulings from the U.S. Government Accountability Office confirmed, the failure to maintain proper evaluation records undermines the legal defensibility of contract award decisions. Those bid protest decisions resulted in re-evaluation orders since the federal government could not justify its original contract award decisions due to a lack of proper evaluation records (see Lack of Records Leads to Voided Awards).

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Rushed Awards Breach Due Process

Lead to Systemic Delays

Strategic Procurement: Rushed awards lead to transparency issues and actually cause project delays, which raises the importance of a balanced approach to portfolio management.

As recent reports from the UK and EU reveal, rushed pandemic purchasing resulted in significant lapses in transparency, record-keeping, probity, value-for-money, and oversight as public institutions across multiple jurisdictions parted company with due process and prioritized expedience over good governance (see Pandemic Purchasing Bypasses Due Process).

The risk of rushed contracts goes beyond pandemic-related purchasing. Recent federal audits in the United States raised concerns over how rushed awards in multiple procurement areas led to open-ended contracts that lacked clear requirements or proper supporting documentation and adversely impacted competition and value-for-money objectives (see Audits Raise Concerns Over Rushed Awards). These audits serve as useful warnings to public institutions across all jurisdictions of the risks associated with rushed awards and the need to bolster contract oversight.

In fact, notwithstanding the urge to rush awards, recent audits from the Cayman Islands, Malta, Tanzania, and Scotland revealed how weak contract oversight remains a leading cause of procurement delays in the public sector (see Oversight Flaws Cause Project Delays). Rather than rushing to a dead end, public institutions should accelerate their tendering cycles by developing annual procurement plans and adopting proper portfolio management strategies (see How to Avoid Procurement Delays).

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Commission Uncovers Kickback Scheme

More Collusion Cases

Western Australia's Corruption and Crime Commission recently found that weak oversight enabled a newly hired government employee to manipulate contract awards in exchange for contractor kickbacks on public housing projects (see Weak Oversight Enables Kickback Scheme).

In other collusion news, a South African Court overturned a collusion conviction due to a lack of direct evidence of anti-competitive practices beween a manufacturer and competing bidders (see South African Court Overturns Collusion Ruling), while a Trinidad and Tobago court allowed a civil trial to proceed based on bid-rigging allegations under a tort-based "unlawful means conspiracy" claim, a relatively new remedy recognized by multiple Commonwealth courts in recent years (see Court Recognizes New Collusion Claim).

Inspector General Lays Down the Law: Recent rulings serve as a wake-up call against sole-sourcing, bid-shopping, and flawed evaluation decisions.

Spotlight on Montreal

Inspector General Renders Adverse Rulings

Finds Bid-Shopping Sole-Source and Non-Compliant Cloud Award

Montreal's Inspector General recently ruled against a transit agency's bid-shopping and sole-sourcing scheme and against the City's non-compliant cloud award. In a report entitled *Recommendations to Société de transport de Montréal regarding contract management of the Bellechasse Transit Centre construction project*, the Inspector General found that the Société de transport de Montréal engaged in bid-shopping and improper sole-sourcing in a transit centre construction project. The report found that the agency failed to act in good faith when it extended over-budget bids and used pricing from those bids to negotiate an out-of-scope award to another contractor (see Agency Engages in Bid-Shopping Sole-Source).

In a report entitled *Recommendations Regarding Call for Tenders 17- 6146 Involving the Acquisition of a Cloud Solution by Ville de Montréal*, the Inspector General found that the City of Montreal improperly awarded a $16 million cloud services contract to a non-compliant bidder. The report found that the winning bidder failed to provide firm pricing for the full contract term and that evaluators failed to disqualify the bidder for technical non-compliance. The Inspector General determined that the City should terminate the flawed contract award (see City Awards Cloud Contract to Non-Compliant Bid).

Balancing the Scales: Time pressures need to be properly balanced against due process duties.

Reports Reveal Ongoing Governance Gaps

Proper Governance Requires Strategic Execution

Procurement Law Office

Recent public sector audits and legal rulings have exposed ongoing governance gaps across multiple jurisdictions, providing fresh evidence of how many public institutions are struggling to implement and maintain proper procurement practices.

These broad ranging case studies, which include reports and rulings from Mozambique, South Africa, the Solomon Islands, Tonga, Papua New Guinea, Australia, New Zealand, Canada, and the United States reflect systemic governance issues that are global in scale.

Maintaining global procurement standards remains a widespread challenge. To avoid becoming the next non-compliance case study, public institutions should update their current governance practices and prioritize procurement training and resourcing within their organizations (see Recent Audits Reveal Ongoing Governance Gaps).

In fact, recent case studies show how weak project oversight can lead to irregularities in the procurement process, including compromised evaluation and award decisions, flawed conflict of interest procedures, unauthorized spending commitments, and the increased risk of corruption and fraud (see Weak Oversight Leads to Governance Gaps).

Where public institutions fail to follow proper contract approval procedures, they increase the risk of litigation over the validity of their contract awards. For example, while in certain instances an improperly awarded contract may be unenforceable, in other cases a public institution may still be responsible for payment for work performed under a flawed award (see Recent Cases Reveal Weak Approval Practices).

Recent reports also reveal ongoing weaknesses in contract administration and serve as a reminder to public institutions across all jurisdictions of the need to improve contract oversight by bolstering contract payment practices, monitoring contractor performance, and ensuring that government-owned assets are properly managed by contractors (see Audits Uncover Contract Management Flaws).

> “Strategic execution enables high-speed precision.”
>
> - Paul Emanuelli

While additional training can help support contract performance and avoid cost increases and delivery delays, recent studies indicate that these objectives can only be achieved if strategic training plans are properly developed and implemented (see Audits Call for Better Contract Training).

Strategic execution enables high-speed precision. To properly balance time pressures with due process duties, public institutions need to formally embrace a culture of proactivity and advanced planning through the implementation of updated policies and procedures and the adoption of strategic training programs (see Forging a Road Less Travelled).