Strategic Procurement Update

Critical Trends

The Procurement Office

Focus on Contract Management

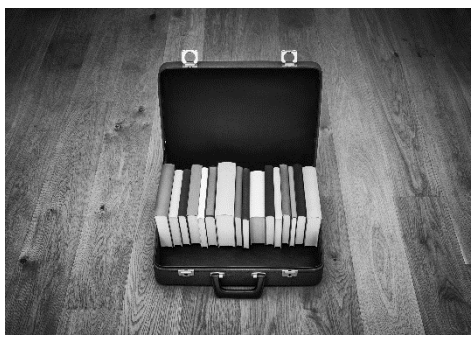
Feature Case Study

Aligning Pricing and Contract Requirements

Evaluating Price Realism

During bid evaluations, public institutions typically score technical factors before evaluating price. The primary reason for employing this two-envelope approach is to reduce the risk of technical evaluators biasing their scores based on an advanced knowledge of bid prices. Under this two-staged process, once technical scoring is completed, pricing is then evaluated separately, usually by scoring each bid relative to the low bid.

The separate technical and price scores are then added together to calculate the final ranking of bidders for contract award. However, in some situations, this approach may result in a flawed evaluation with the contract award going to a bid with unreasonably high, unbalanced, or abnormally low pricing. Purchasing institutions should therefore apply an additional due diligence step in their evaluations and consider pricing within the context of overall contractual requirements. (see Unbalanced and Abnormally Low Bids)



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their contract management practices.

Full-Cycle Compliance: While the bidding process may be fraught with legal risks, to achieve full cycle compliance, purchasing institutions must also manage the post-award stage of the procurement process. To meet their due diligence duties, public institutions should establish clear governance frameworks for managing their suppliers.

Feature Article

Weak Oversight Causes Contracting Issues

Recent audit reports reveal how weak oversight practices are creating systemic contract administration issues for government institutions. In fact, successful contract management calls for a commitment to project oversight and to proper staffing and training.

For example, in its report entitled *Management Advisory Memorandum Concerning the Department of Justice's Administration and Oversight of Contracts*, the United States Office of the Inspector General (OIG) concluded that recurring weaknesses in contract administration reflected systemic issues within the Department of Justice.

The report noted that in reviewing $54 billion in contracts for products and services, various OIG audits "identified significant issues linked to inadequate contract solicitation, award, administration, and oversight." More specifically, those audits regularly identified: "(1) inadequate execution of contract oversight responsibilities, (2) insufficient quality assurance practices, and (3) non-compliance with contracting-related laws and regulations." However, the OIG noted that the Department Enterprise Level Risk Profile plan did not address these contract management challenges, which raised concerns that the Department was failing to properly prioritize contract management oversight.

Training Retreats

Leveraging Lessons Learned

Procurement Training Office

We will be hosting our in-person Strategic Procurement Retreats each October and May at our new training centre.

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.

RFx Drafter v. Training

Software or Deeper Learning

Procurement Advisory Office

Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

Paul Emanuelli

Lack of Training Leads to Lack of Enforcement

Weak Oversight Causes Contracting Issues (continued...)

The OIG report found that this failure to prioritize contract oversight was further evidenced by a lack of adequate training for contracting staff. As the OIG noted, while the Federal Acquisition Regulation requires that contracting officers "be qualified by training and experience commensurate with the responsibilities to be delegated", over a four-year period, correctional facility contracting officers were only provided a single 60-minute lecture on roles and responsibilities.

In another example, the report noted that the contracting officers responsible for administering a $700 million federal detention centre contract "had minimal training and experience" and that those officers "did not have the technical proficiency to perform the responsibilities they were assigned."

In another example of weak oversight, the report found that contracting officers "maintained an infrequent onsite presence at the Leavenworth Detention Center (LDC)", that they "did not document the inspection activities performed," and that they "did not develop an inspection program or monitoring procedures."

The OIG warned that these findings reflected broader systemic issues since the "lack of effective continuous monitoring at the LDC presented risks that could extend throughout all its other contract detention facilities." As the report concluded, "adequate training and experience is crucial" to the "ability to perform the delegated contract oversight responsibilities."

Similarly, in an audit of the Department of Justice entitled *Audit of the United States Marshals Service's Contract Awarded to The GEO Group, Incorporated to Operate the Robert A. Deyton Detention Facility, Lovejoy, Georgia*, the OIG found that the United States Marshals Service (USMS) needed to improve contract oversight procedures to address weak contractor staffing and training standards. The report concluded that the GEO Group, a federal contractor, "did not comply with the contract terms and law pertaining to mandatory training for officers transporting detainees." As the report concluded, a lack of training of federal contracting officers created a ripple effect in the lack of enforcement of the contractor's training and staffing obligations.

Lack of Clarity: In an audit of the Department of Justice entitled *Audit of the United States Marshals Service's Contract Awarded to The GEO Group, Incorporated to Operate the Robert A. Deyton Detention Facility, Lovejoy, Georgia*, the Office of the Inspector General recommended enhanced training for government contracting officers to better deal with performance monitoring and related payment holdback protocols when contract breaches are discovered.

Paul Emanuelli

Choppy Waters for Ship Construction Project Due to Lack of Oversight

Weak Oversight Causes Contracting Issues (continued...)

In its report entitled *MV Veteran and MV Legionnaire*, the Auditor General of Newfoundland and Labrador found that the Department of Transportation and Infrastructure failed to effectively manage the construction, operationalization, and initial operations of two ships, the *MV Veteran* and *MV Legionnaire*.

The report raised multiple concerns over how the Department's passive management of the project "may have contributed to the significant operational delays, service disruptions and unplanned costs" and found that the Department's staff failed to adhere to the established project management manual.

While the Auditor General found that the Department initially established a project management team, it noted that "the team only formally met five times between May 2009 and November 2009, four years prior to the award of the contract for the first vessel" and then failed to conduct any further formal meetings.

Unsurprisingly, the report concluded that "the Department did not conduct adequate construction oversight during the construction and operationalization of *MV Veteran* and *MV Legionnaire*" and that it failed to "appropriately evaluate, monitor and take corrective action regarding the contracted onsite supervisor role." In fact, the Auditor General found that "there was no onsite departmental representation present for 67 per cent of the construction period of the *MV Veteran*, and 63 per cent of the construction period of the *MV Legionnaire*." The report also found that "the Department did not have representation for more than half of the quality control inspections and that "the Department could not provide evidence that supported all progress payments to the shipbuilder." The report also found that the Department cut corners on staff training prior to deploying the ships. In summary, the Auditor General concluded that the Department failed to follow expected project management planning processes, had no overarching project management plan, had no reliable overall cost estimate, and had inadequate planning for the human resource requirements of the new vessels.

Paul Emanuelli

Audit Calls for Better Oversight

Steering for Success

Prioritizing Contract Management: As recent reports reveal, the failure to prioritize contract oversight and allocate adequate resources and training to contract administration can undermine the success of contracting initiatives. Purchasing institutions should bolster their contract oversight practices if they hope to improve their future contracting outcomes.

In its report entitled *Defence's Administration of Enabling Services — Enterprise Resource Planning Program: Tranche 1*, Australia's Auditor-General raised concerns over the need to improve program oversight.

The report warned that "for programs that rely heavily on contractors, consideration should be given to the nature of the roles the contractors are undertaking and how program governance arrangements are structured to ensure that there is an appropriate accountability framework in place and that potential conflicts of interest are managed."

The report also highlighted the importance of improved communications to assist decision-makers, stating that the Department should "establish a structured and documented meeting and reporting pattern that ensures a regular flow of information that is appropriate for the program size and risks."

These communications should be geared to providing decision-makers with sufficient information "to understand how the program is tracking against scope, schedule and budget" and should "include information on any targets or milestone due dates." (see Weak Oversight Causes Contracting Issues)

Paul Emanuelli

Audits Uncover Contract Management Flaws

Recent United States federal government audit reports released by U.S. Department of Justice Office of the Inspector General (OIG) reveal ongoing weaknesses in contract administration and serve as a useful reminder to public institutions across all jurisdictions of the need to bolster contract oversight practices. For example, the OIG found weak invoice approval practices in the Department of State's overseas contracts and found that the Department did not always manage and monitor selected awards in accordance with contractual requirements. The OIG also found that the United States Army failed to maintain proper inventory records for assets managed by its contractor at a military base in Kuwait. In fact, while the contractor self-reported $13.5 million in losses over the life of the contract, without accurate records, the Army could not verify that the contractor had accurately reported all its losses.

Strengthening Contract Training: Noting that "there has been a high turnover of officers responsible for the management of the contract and the department has not ensured that each of its contract managers had appropriate training or experience,"Australia's Auditor-General found that the government's contract management was ineffective.

Performance Failures Found Notwithstanding Multiple Change Orders

Audits Call for Better Contract Training

Policies Need to Be Followed in Practice

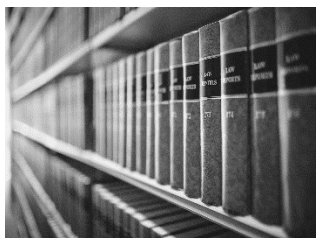
Recent Australian audits reveal ongoing weaknesses in contract administration and serve to remind public institutions that while better staffing and training can help support contract performance and avoid cost increases and delivery delays, they need to ensure that their training programs are properly implemented.

As these case studies illustrate, cutting corners on contract management training only serves to increase the risk of flawed delivery. Public institutions that are serious about avoiding these risks need to focus on improving their training strategies to better ensure that their contracts are effectively managed.

Benchmarking for Results: In its decision in *Blackpool Borough Council v Volkerfitzpatrick Limited,* the England and Wales High Court of Justice found that the failure to clearly define life-cycle expectations undermined the Council's right to recover full damages in connection with a breach of contract claim. As recent case studies illustrate, purchasing institutions should ensure that they clearly define their contract performance benchmarks if they hope to enforce future contractual obligations. (see Establishing Performance Benchmarks)

Details Matter in Contract Enforcement

Establishing Performance Benchmarks



Recent audits and legal decisions underscore the importance of establishing clear contract performance benchmarks to measure contract success and enforce contractual obligations.

While the GAO concluded that none of the aircraft achieved the desired 80 percent mission capable target, the report provides a useful example of the importance of establishing performance benchmarks to assist in measuring the success of achieving portfolio management goals.

For example, in the report entitled *New Zealand Transport Agency: Maintaining state highways through Network Outcomes Contracts,* New Zealand's Auditor-General found that while the New Zealand Transportation Agency had achieved good outcomes in managing a new results-based contract structure for highway maintenance, the new program continued to use outdated, specification-based performance benchmarks to manage those new contracts. Rather than repurposing old contract management strategies to administer new contract structures, this report underscores the importance of developing new contract performance benchmarks when deploying new contracting strategies.

Similarly, in its report entitled *Weapon System Sustainment*, the U.S. Government Accountability Office (GAO) reviewed the mission readiness of 46 different types of military aircraft and recommended the adoption of better performance tracking metrics. By way of background, the report noted that the Department of Defense "spends tens of billions of dollars annually to sustain its weapon systems in an effort to ensure that these systems are available to simultaneously support today's military operations and maintain the capability to meet future defense requirements." As the report explained, the "mission capable rate" measures "the percentage of total time when the aircraft can fly and perform at least one mission". This benchmark is "used to assess the health and readiness of an aircraft fleet."

> "Clear benchmarks are critical to enforcing contract performance."
>
> - Paul Emanuelli

Finally, in its report entitled *Defence's Contract Administration – Defence Industry Security Program*, Australia's Auditor-General noted the need to adopt escalation procedures for contractor non-performance. The Auditor-General concluded that the Defence Industry Security Program (DISP), which is aimed at supporting Australian contractors in meeting their security obligations under Department of Defence contracts, failed to establish "fit for purpose arrangements to monitor compliance with contracted DISP requirements." The report recommended that when implementing new contract performance standards, government institutions should ensure that those new contract performance requirements are "supported by an agreed implementation plan and appropriate levels of resourcing."