Strategic Procurement Update

Critical Trends

The Procurement Office

Focus on Debriefings

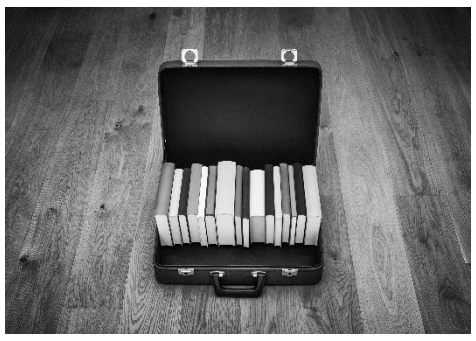
Feature Case Study

Flawed Debriefings Trigger Legal Sanctions

Transparency is Critical

As evidenced in multiple legal rulings, flawed debriefings can trigger legal sanctions. In its determination in *Ecosfera Inc. v. Canada*, the Canadian International Trade Tribunal found that trade treaty debriefing duties are far broader than had previously been assumed. (see Debriefing Duties Trigger a Legal Tidal Wave) Similarly, in *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation* the Tribunal subsequently ruled that debriefing duties call for a significant degree of disclosure of evaluation records. (See Flawed Evaluation Triggers Multiple Bid Complaints)

In fact, the European Court of Justice has ruled that the failure to provide a proper debriefing to a losing bidder can nullify the award to the winning bidder (see Award Struck Down Due to Flawed Debriefing) or entitle a losing bidder to lost profits. (see Flawed Debrief Results in Lost Profit Award). Where institutions fail to disclose evaluation records during a debrief, those records can still be compelled as part of a subsequent lawsuit. (see Court Orders Disclosure of Evaluation Records)



Lessons Learned: Debriefing duties require a purchasing institution to provide sufficient information for the losing bidder to understand why it did not win the contract.

Under Scrutiny: Legal rulings interpreting debriefing duties confirm that losing bidders have the right to a greater degree of disclosure about the evaluation process than was previously assumed. (For example, see Court Finds Lack of Detail in Flawed Debriefing)

Feature Article

US Bid Protest Study Recommends Better Debriefings

In a study sponsored by the United States Congress entitled *Assessing Bid Protests of U.S. Department of Defense Procurements*, the *RAND Corporation* presented a series of findings in what is known as the *RAND Report* regarding the effectiveness of the US federal bid protest system in the area of military procurement. The report ultimately recommended against any significant changes to the bid protest system, but called for improved government debriefings.

As the *RAND Report* noted, the US federal bid protest system has a long and well-established history, which includes the establishment of the U.S. Government Accountability Office and the Court of Federal Claims as venues for suppliers to bring challenges against federal government contract award decisions.

While this system of checks-and-balances results in greater government accountability, the *RAND Report* noted a significant difference between how Department of Defense (DoD) personnel view the bid protest system and how the system is viewed by private sector suppliers. As the report explains, while the DoD viewed bid protests as obstructive to operational needs, suppliers view bid protest mechanisms as an essential element of a fair tendering system and felt that the government should work to enhance the transparency of its debriefing practices. According to the *RAND Report,* improved communications in the form of debriefings can result in improved bidder understanding of the bidding process and fewer bid protests, results that both bidders and government departments can agree with.

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

No Records Means No Defence

Failure to Maintain Records Prompts Sanctions

Maintaining thorough evaluation records is a core duty in the public procurement process. The failure to maintain proper evaluation records can undermine the defensibility of contract award decisions.

For example, in its decision in the matter of *C&B Construction, Inc.*, the U.S. Government Accountability Office (GAO) ordered the Department of Agriculture to conduct a re-evaluation in a solicitation for steam restoration work after finding that the Department maintained inadequate records during its original evaluation of bids. In its decision in the matter of *ITT Systems Corporation*, the GAO ordered the Department of the Army to conduct a re-evaluation after finding that the Department's original evaluation record failed to document changes to the selected bidder's staff pricing models.

Similarly, in its decision in *Castro & Company, LLC*, the GAO ordered a re-evaluation in the context of a Request for Quotations (RFQ) for internal controls support services on the grounds that the government had failed to maintain proper evaluation records. Additionally, in its decision in *Deloitte Consulting, LLP*, the GAO once again ordered a re-evaluation in the context of a management support services Request for Proposals after finding that the government had failed to properly assess the winning bidder's prior experience. The GAO found inconsistencies between the government's defence and its contemporaneous evaluation records and determined that the winning bidder had failed to meet the necessary five-year prior experience requirement.

In keeping with these GAO rulings, in its determination in *Oshkosh Defence Canada Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal ordered a re-evaluation and possible lost profits after finding faulty evaluations and poor record-keeping in a dispute over a military transport vehicle RFP. The Tribunal found that the government had ignored relevant technical information submitted by the complainant and had failed to keep adequate records to explain the contradictory conclusions reached by government evaluators during technical testing. The Tribunal awarded lost profits in the event that the complainant ranked first after the re-evaluation. These and other recent rulings underscore the heightened scrutiny over procurement record-keeping.

Lack of Transaprency Fatal to Defensibility: As recent rulings illustrate, no records means no defense when public institutions face contracting challenges. (see below and see Failure to Maintain Proper Records Prompts Sanctions for more examples)

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Failure to Maintain Proper Records Prompts Sanctions (continued..)

Public Institutions Need to Update Their Practices

As recent global rulings illustrate, no records means no defense when public institutions face contracting challenges since those institutions bear the onus of maintaining proper records to demonstrate that their procurement decisions were conducted in a manner that is consistent with government due diligence standards.

For example, in *Special Report on Jamaica 50 Celebration Activities*, Jamaica's Contractor General found that government officials breached government procurement rules when they failed to maintain proper contract award records. Further, in its *Special Report on St. Ann Municipal Corporation Contracts*, Jamaica's Contractor General found widespread contracting irregularities.

The report found an absence of bid evaluation records, a lack of records substantiating work for contract payments, political interference and favouritism, and a general lack of procurement oversight.

In its report on the District Council of Robe entitled *Full investigation pursuant to referral under section 24(2)(a) of the Independent Commissioner Against Corruption Act 2012*, the South Australia Ombudsman found that weak record-keeping practices resulted in breaches of applicable procurement standards in the municipality's vehicle procurements.

Recent US examples also support the heightened scrutiny over procurement record-keeping, as demonstrated in the decision in V*erdi Consulting, Inc.*, where the Government Accountability Office (GAO) ordered the re-evaluation of a financial services tender after finding inadequate evaluation records. Similarly, in its decision in *Global Aerospace Corporation,* the GAO ordered a re-evaluation after finding that NASA failed to maintain proper records. As the GAO stated, "it is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged." Further, in its decision in *Soft Tech Consulting, Inc.*, the GAO ordered a re-evaluation after finding the absence of proper contemporaneous records of the evaluation process.

Paul Emanuelli

Weak Records an Ongoing Issue

Multiple Jurisdictions Impacted

Flawed Records: In its determination in *Falcon Environmental Inc. v Department of Public Works and Government Services*, the Canadian International Trade Tribunal ordered a re-evaluation after finding flawed evaluation records for the assessment of prior experience.

As highlighted by a series of recent audit reports and successful bid protest challenges, government institutions continue to face pressure to ensure that they maintain appropriate records of their evaluation processes since the failure to maintain proper records can undermine the downstream defensibility of any resulting contract award decisions.

For example, in its report entitled *Establishment and Use of ICT Related Procurement Panels and Arrangements,* Australia's Auditor-General made a series of record-keeping recommendations in connection with the award of $2.8 billion in information technology contracts under supplier roster panel arrangements. The report concluded that the government agencies "could not fully demonstrate that the arrangements supported the achievement of value for money outcomes" due to, among other things, a lack of adequate documentation. Similarly, in its report entitled *Defence's Procurement of Offshore Patrol Vessels – SEA 1180 Phase 1*, Australia's Auditor-General once again identified the need to enhance record-keeping in support of procurement-related decision-making. Further, in its report entitled *Probity of the processes for the heavy rail service contract*, South Australia's Auditor-General found weak record-keeping practices in relation to the probity of the government's award of a heavy rail services contract.

Recent rulings have also shown how the failure to maintain such records can undermine the defensibility of contract award decisions. For example, in its decision in *Northstone (NI) Ltd v Department for Regional Development (Transport NI)*, Northern Ireland's High Court of Justice found that the government failed to clearly define the rules that would apply to contract awards in a multiple award solicitation and failed to maintain a proper record of its contract award decisions. As the Court noted, the purchasing institution failed to provide any minutes of the meetings where the award decisions were made, which constituted a "manifest error" that entitled the complainant to damages. Similarly, in its decision in *Hoover Properties*, the U.S. Government Accountability Office (GAO) ordered a re-evaluation after finding weak evaluator recording-keeping in a flawed price evaluation process. Further, in its decision in *HomeSafe Alliance, LLC*, the GAO found that government evaluators failed to properly document the scoring of oral presentations and ordered that those presentations be repeated.

Paying the Price for Evaluation Gaps: As multiple ruling show, the failure to properly document evaluations can undermine the defensibility of any resulting contract award decision. (see Lack of Records Leads to Voided Awards, Weak Records Result in Re-Evaluation, and Flawed Records Prompt Re-Evaluation)

Even Large Organizations Are Failing to Meet Proper Due Process Standards

Flawed Records Derail Defensibility

Weak Price Evaluation Records Trigger Re-Evaluation Orders

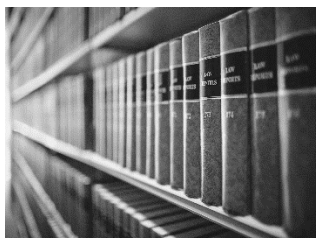
In its decision in *Apogee Engineering, LLC*, the U.S. Government Accountability Office (GAO) ordered a re-evaluation after finding that the government failed to maintain proper evaluation records. The dispute dealt with a Department of Transportation Request for Proposals for the provision of security assessment services. The complainant argued that the contract award went to an abnormally low bid and that the government failed to conduct a proper price realism analysis. (see Flawed Price Evaluation Results in Re-Evaluation Order)

Similarly, in its decision in *ATA Aerospace, LLC,* the GAO ordered a re-evaluation after finding that the government evaluators were unable to support the conclusion of their price realism analysis with proper evaluation records. The case dealt with a bid protest in relation to a Request for Proposals issued by the Department of the Air Force for research and development services in relation to space experiment programs. (see Weak Records Prompt Price Re-Evaluation)

Adverse Audit: In its report entitled *Compliance Review of ARPA Funding Eligibility Process*, the Las Cruces City Auditor found that the City of Las Cruces administered a flawed RFP process that lacked proper record-keeping for funding awards. Noting that proper procurement records serve as the cornerstone for transparent and reviewable contract award decisions, the audit concluded that "the consistency and appropriateness of the eligibility review process followed could not be confirmed." (see Missing Records Undermine Transparency)

Flawed Record-Keeping Undermines Results

Evaluation Teams Struggle to Maintain Contemporaneous Records



Whether its court-based legal challenges or due diligence probes launched by public audit offices, the record-keeping practices of government bid evaluators are coming under unprecedented scrutiny.

For example, in its decision in *Resource (NI) v. Northern Ireland Courts & Tribunals Service*, the High Court of Justice in Northern Ireland, Queen's Bench Division, struck down a contract award after finding flaws in the evaluation record-keeping process and ordered that the contract award be redirected to the complainant. The Court gave little weight to the evidence provided by the government evaluators due to concerns over the flawed group scoring process. As the Court noted, during group evaluations, a procurement advisor was tasked with preparing consolidated notes on behalf of the individual evaluators who then approved those notes. Notwithstanding the government's attempt to document the group evaluation process, during litigation the head of the evaluation panel later disagreed with the accuracy of those consolidated group evaluation notes, claiming that they contradicted his notes and were approved in error. The lack of consensus regarding the accuracy of the consolidated evaluation records, together with a lack of contemporaneous records of the individual evaluators that could have been relied on to reconcile any such inconsistencies, undermined the credibility of competing versions of events and of the evaluation process. In fact, the Court found that neither of the government's evaluation team witnesses were persuasive given the lack of care they put into the preparation of the contemporaneous evaluation records. The Court ultimately determined that these irregularities constituted manifest errors that impacted the evaluation and award decision. (see Weak Evaluation Records Lead to Redirect Order)

Weak evaluation record-keeping practices have also been the subject of multiple adverse audit findings. For example, in its report entitled *Denver International Airport – Concessions Management*, Denver's Office of the Auditor determined that the Denver Airport should revise its current procurement practices so that it no longer destroys its evaluation records.

> "The lack of evaluation records makes it impossible to properly defend an evaluation process when that evaluation is challenged."
>
> - Paul Emanuelli

The Auditor concluded that "how exactly a particular vendor scores in that process is secret" since the "selection panel's individual and summary score sheets are not kept once a concessionaire's contract is signed." The audit found that the destruction of evaluation records was by design, rather than error or oversight, noting that the "procedures maintained by the airport's Business Management Services group say the score sheets must be destroyed; only the final ranking and comments are kept." As the report summarized, airport employees claimed that the reasons for not keeping the score sheets was that "destroying score sheets might deter unsuccessful proposers from suing the airport." However, the Auditor concluded that this practice was "not consistent with the Colorado Open Records Act and not compliant with the city's records retention policy or other leading practices." (see Destroyed Records Breach Retention Rules)