Canadian Law Update

Critical Trends

The Procurement Office

Focus on Disclosing Evaluation Criteria

Feature Case Study

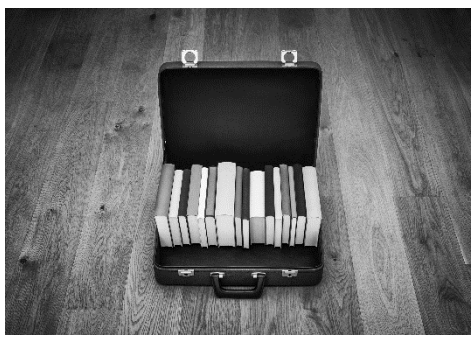
Court Awards Lost Profits Due to Hidden Evaluation Criteria

Inappropriate Use of Privilege Clause for Past Experience

In its May 2020 decision in *Triton Hardware Limited v. Torngat Regional Housing Association*, the Supreme Court of Newfoundland and Labrador awarded lost profit damages to a bypassed low bidder after the Housing Association improperly relied on a privilege clause to award the contract to a higher bidder based on its undisclosed prior performance preference.

The dispute dealt with a tender call for the supply of materials for the construction of houses. The plaintiff submitted the lowest compliant bid in what the court found to be a Contract A bidding process, but the Housing Association awarded to another bidder because that other bidder had reliably performed similar work for it in the past.

The court ruled that the Housing Association was not entitled to rely on its privilege clause to apply an undisclosed prior performance preference and, in its summary decision, awarded the low bidder its lost profits. (see Lost Profits Awarded Over Hidden Preference)



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their solicitation drafting to ensure transparency in their bid evaluation and award decisions.

Cold Weather Testing Challenge: The procedures and standards used during technical assessments remain subject to legal challenge. While in this case the Tribunal deferred to the government evaluators, greater clarity in the tender call regarding the use of technical testing materials may have prevented the bid protest.

Feature Article

Lack of Clarity Over Evaluation Triggers Protest

Sniper Weapons Fail Cold Weather Testing

In its February 2022 determination in *Cadex Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the government's technical compliance assessment and rejected a non-compliant bidder's assertions that its proposed product was improperly evaluated. The dispute deal with a solicitation issued by the Department of Public Works and Government Services on behalf of the Department of National Defence for 229 multi-calibre sniper weapon systems. The complainant's proposed product was rejected as non-compliant after it failed to fire during a cold weather test.

The complainant alleged that the government conducted an unfair evaluation and improperly assessed its proposed product by using an inappropriate degreasing solvent while conducting the cold weather testing of the weapon. However, the Tribunal noted that complainant's product literature did not restrict or prescribe the use of any specific solvents when testing the product, and that the solicitation terms were also silent on this technical issue. The Tribunal ultimately deferred to the technical expertise of the government personnel who conducted the weapons testing over the assertions of the complainant regarding the appropriate use of solvents.

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

Losing Bidder Alleges Use of Hidden Criteria

Tribunal Accepts Technical Factors Related to the Disclosed Criteria

In its December 2021 determination in *Marine Recycling Corp. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected the complainant's allegations that the government used hidden evaluation criteria.

The dispute dealt with a solicitation issued on behalf of the Department of Fisheries and Oceans for the disposal of the former vessel CCGS *W.E. Ricker*. A losing bidder brought a legal challenge and asserted that the government relied on hidden evaluation factors when it assessed the technical aspects of the bidder's proposed dry dock facility to determine whether that dock was suitable for the vessel in question.

While the Tribunal recognized that the evaluators relied on unstated sub-criteria, it rejected the complaint after determining that evaluators can rely on unstated technical factors provided that those factors are reasonably related to the evaluation criteria that are disclosed in the solicitation:

> It is well-established that while an RFP must identify all major evaluation criteria, it does not have to identify all aspects of each criterion that may be considered in an evaluation, as long as the unidentified aspects are reasonably related to the criterion. Factors such as expected (not necessarily accurate or exact) vessel weight at lift, and a process capable of verifying that weight, are reasonably related to the evaluators determining whether a dry dock can accommodate a particular vessel. The Tribunal agrees with PWGSC that such factors can be an implicit part of demonstrating that a dry dock's capacity is sufficient to accommodate a specific vessel, particularly where dry dock capacity appears to be in issue, and as such, they do not constitute undisclosed criteria.

As this case illustrates, evaluations that rely on unstated sub-factors expose evaluation and award decision to legal challenge based on allegations of hidden evaluation criteria. Rather than relying on implied sub-factors, purchasing institutions should disclose those subfactors and ensure greater transparency to better mitigate the risk of bid protests. (see Tribunal Rejects Hidden Criteria Challenge)

Clarity Required: Where purchasing institutions seek to impose restrictions on performance methods, or score certain approaches higher than others, they should ensure that those factors are disclosed in their solicitation documents since any hidden factors that impact evaluation and award decisions can undermine the legal defensibility of those decisions.

Paul Emanuelli

Evaluators Fail to Disclose Performance Preferences

Tribunal Finds Hidden Criteria

In its October 2019 decision in *Pacific Northwest Raptors Ltd. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal found that the government relied on hidden criteria in its evaluation process. The dispute dealt with a Request for Proposals issued for the Department of National Defence for wildlife control services for a commercial airport and military aerodrome in British Columbia.

A losing proponent challenged the contract award, claiming that the government relied on hidden criteria since its evaluators gave lower scores to proposals that planned to use falconry as part of the wildlife control plan. The Tribunal agreed, finding that this undisclosed restriction on performance methods was a hidden factor that breached the trade treaty transparency rules.

Paul Emanuelli

Bid Instruction Errors Lead to Re-Evaluation

Contradictory Content

In its December 2020 determination in *Construction Galipeau Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal ordered the government to evaluate a rejected bid after finding that the originating solicitation contained contradictory bid submission instructions.

The dispute dealt with a tender call for the provision of general contractor services for on-demand construction work required for Government of Canada buildings and properties located in the municipalities of Québec and Les Escoumins. The complainant's bid was rejected. The complainant argued that its bid should not have been rejected since it was submitted according to the physical bid submissions instructions on the cover page of the solicitation, which were different than the electronic bid submission instructions contained elsewhere within the body of the solicitation document.

The Tribunal agreed, finding that the bid should not have been rejected since the solicitation allowed for more than one means of bid submission, including the method used by the complainant. The Tribunal therefore ordered the government to evaluate the complainant's bid and to award lost profits if that evaluation found that complainant's bid to be the best bid.

Paul Emanuelli

Flawed Reference Checks Fatal to Process

Non-Transparent Procedures

Compromised "Beyond Repair": The Tribunal ruled that the improper reference check procedures "compromised the evaluation beyond repair."

In its March 2016 determination in *The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency*, the Canadian International Trade Tribunal ordered the government to retender a challenged contract award and pay the complainant lost profit compensation until a new contract was awarded. The dispute dealt with a request for proposal for translation and editing services valued at $35 million over 7 years.

The complainant challenged the validity of the evaluation process, arguing that the government evaluators applied hidden and subjective evaluation criteria and scoring mechanisms into their reference checks. The Tribunal agreed, noting that the improper reference checks used a non-transparent scoring process that damaged the evaluation results beyond repair:

> The Tribunal finds that this evidence demonstrates that the CRA evaluators acted improperly by involving a non-reference in the exercise. They further altered the integrity of the exercise by prompting half-point answers when conducting reference checks when the option to award half points was clearly not provided for by the RFP. In fact, the evaluation grids show that CLS was awarded a half-point, whereas MKTG was not. Further, there is conflicting evidence as to whether all references were given the opportunity to provide half-points.

As this case illustrates, reference checks must be performed with the same level of transparency and rigour that applies to all other aspects of a bid evaluation. The failure to meet these standards when performing a reference check can compromise the defensibility of an evaluation and award decision. (see Flawed Reference Checks Lead to Retender and Lost Profit Award)

Paul Emanuelli

Past Experience Scoring and Reference Checks Subject to Multiple Legal Challenges

Governing Principles for Defensible Evaluations

Past experience requirements have been subject to a high rate of bid protest challenges and should therefore be drafted and applied with a high degree of precision. The case law has established a series of governing principles to guide public institutions in those evaluations. (see Assessing Past Experience in Bid Evaluations).

The use of references in public sector bid evaluations has also been subject to multiple bid protests. The case law on this topic can also be distilled down to a series of governing principles for how reference checks should be administered as part of a defensible evaluation and award process. (see Using References in Bid Evaluations)

Selective Use of Test Results: As this case illustrates, where government evaluators plan on conducting tests where they will be disregarding certain test results, they should disclose those plans in their solicitation documents to guard against future challenges to the reasonableness and transparency of their evaluation procedures.

Evaluators Disregarded Some of the Results

Flawed Testing Results in Re-Evaluation Order

Spotlight on Transparency

In its November 2018 determination in *Harris Corporation v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal ordered a re-evaluation after finding that the government conducted a flawed technical evaluation. The dispute dealt with a Royal Canadian Mounted Police bidding process for night vision binoculars and replacement parts. The complainant alleged that the testing of the proposed equipment was not conducted in accordance with the process set out in the solicitation document.

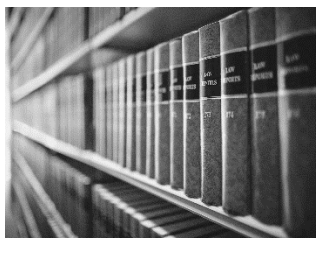
While there was nothing in the solicitation document stating that the technical assessments would be limited to the best-performing units, the Tribunal found that the government ignored the results for the worst performing units and only used the results from the best-performing units to calculate each bidder's technical score.

The Tribunal concluded that the government's technical testing was unreasonable and ordered a re-evaluation. (see Flawed Technical Assessment Triggers Re-Evaluation Order)

Hidden Procedures Lead to Flawed Results: Recent adjudications put a high premium on the transparency of evaluation and award decisions.

Federal Court of Appeal Upholds Transparency

Lost Profit Damages Awarded Due to Hidden Evaluation Stage



Hidden evaluation stages can invalidate the results of a contract award. In addition to disclosing their evaluation criteria, purchasing institutions need to also disclose the procedures they will use to assess those criteria.

While the government sought a judicial review of this determination, the Federal Court of Appeal dismissed that application in a January 2018 decision after finding that the Tribunal's determination was reasonable.

For example, in its January 2017 determination in *L.P. Royer Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal awarded lost profit damages and ordered the government to cancel a contract award and award the remainder of the contract to the complainant after finding that evaluators applied a hidden evaluation stage to improperly disqualify the complainant as non-compliant.

The dispute dealt with a request for proposal issued on behalf of the Department of National Defence for the purchase of Mukluk boots for extreme cold weather. The Tribunal determined that the complainant should have been awarded the contract as the top-scoring compliant proposal but was improperly disqualified after the evaluators applied an undisclosed post-field test compliance assessment to the complainant's sample products.

The Tribunal ruled that the government's application of a hidden evaluation stage breached the trade treaty rules. The Tribunal determined that the contract that was improperly awarded to a competing bidder should be terminated and awarded to the complainant and that the complainant should be compensated for lost profits for any purchases that were made under the improperly awarded contract.

> "This is either a case of failure to respect the sequence of steps in the evaluation process or an arbitrary addition of a new evaluation procedure, both cases necessarily being non-compliant procedures."
>
> - Canadian International Trade Tribunal

As this case illustrates, government evaluators should be careful to disclose all of their planned evaluation stages and should avoid using undisclosed criteria and procedures since non-transparent evaluations can undermine the defensibility of any resulting evaluation and award decision.