Canadian Law Update

Critical Trends

The Procurement Office

Focus on Federal Procurement

Feature Case Study

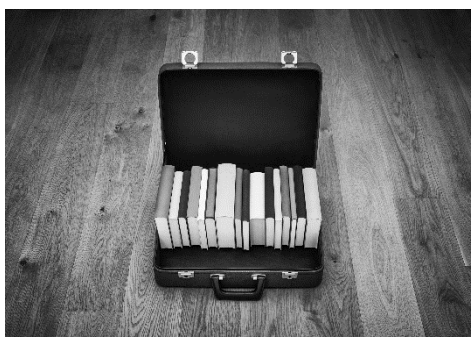
ArriveCan Audit Exposes Weak Oversight

Auditor General Investigation

The federal ArriveCAN project put a fresh spotlight on conflict of interest in federal procurement. The scandal is symptomatic of a broader pattern of weak conflict controls across government institutions.

In its February 2024 *ArriveCAN* report, Canada's Auditor General found a surprising lack of records documenting "how and why GC Strategies was awarded the initial ArriveCAN contract through a non-competitive process". After its $2.35 million sole-source award, the audit found that GC Strategies "was subsequently involved in the development of the requirements" that were included in a downstream bid solicitation for further project work.

In fact, in its parallel January 2024 audit entitled *Procurement Practice Review of ArrivCAN*, Canada's Procurement Ombud found that the bid solicitation included seven specific instances of overly restrictive requirements that favoured the incumbent. While 40 prequalified suppliers were invited to bid, GC Strategies was the only bidder and was awarded a new $25 million deal. (See Weak Conflict Controls in Canadian Procurement)



Lessons Learned: The failure to establish proper oversight for emergency procurements can undermine spending controls, increase the risk of contract award irregularities, and lead to sub-standard project delivery.

Federal Infractions: The Auditor General's 2024 *Professional Services Contracts* report found "a frequent disregard for procurement policies." The report raised concerns over a lack of evaluation records, lack of sole-source justifications, questionable scope changes, repeated contract splitting, and weak conflict of interest screening. The Procurement Ombud's parallel report concluded that "the lack of diligence and oversight" was "troubling" and stated that "swift action is required" to address sole-sourcing issues. However, the jury remains out on whether these high-profile reports will prompt substantive reforms given the lack of remedial action in response to similar prior audits.

Feature Article

McKinsey Reviews Reveal Chronic Contracting Flaws

Federal Consulting Audits Raise Systemic Concerns

While the 2024 audits by the Auditor General of Canada and Procurement Ombud reveal widespread irregularities in the award of multiple federal contracts to the same consulting firm, these findings are far from isolated incidents. Rather, they highlight chronic systemic deficiencies in federal procurement practices that have been well-documented in prior audits. Whether these new reports serve as a catalyst for long overdue procurement governance reforms or simply add a new chapter to the ongoing legacy of unresolved federal contracting deficiencies remains to be seen.

The audits notably failed to find any political interference or coordinated government-wide effort to show favoritism to McKinsey. Rather, as noted in the audits themselves, these new reports simply offered another snapshot with more examples of ongoing systemic irregularities in federal government contracting practices. The high-profile nature of the new reports should serve as a wakeup call to federal institutions to bolster their internal governance practices and commit to a higher level of training for all public servants who participate in the public procurement process.

Training Retreats

Leveraging Lessons Learned

Procurement Training Office

We will be hosting our in-person Strategic Procurement Retreats each October and May and are also offering custom private group training.

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

Federal Cabinet Caught in Multiple Conflicts

Minister Breaches Conflict Law

Canada's Conflict of Interest and Ethics Commissioner recently confirmed that urgent low-value contracts remain subject to federal conflict rules. In the December 2022 *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.

The ruling serves as a reminder to elected officials and their senior advisors that public contracts, no matter how small, should not be awarded to friends, no matter how urgent the circumstances. In fact, the Commissioner found that proactive conflict measures should have been adopted by the Minister upon first entering public office.

This is not the first conflict case involving Canada's federal Cabinet in recent years. Given prior high-profile cases involving Canada's Prime Minister, including the SNC Lavalin and WE Charity scandals, the new ruling underscores the need for federal public institutions to implement proactive protocols to avoid becoming the next conflict of interest case study. (See PM Breaches Conflict Law and Watchdog Clears PM in "Strictly Business" Ruling)

Eroding Transparency for Shady Sole-Sourcing: The Tribunal questioned the legality of the new regulations, noting that the government misused the new exception to justify sole-sourcing the purchase of pandemic supplies under the guise of "national security". The ongoing erosion of the Tribunal's oversight powers raises the risk that more federal institutions will misuse the new national security loophole to engage in shady sole-sourcing.

Paul Emanuelli

Security Loophole Exposed

Feds Invoke "National Security" to Limit Tribunal Oversight

After its decision in *Harris Corporation v. Department of Public Works and Government Services*, where the Canadian International Trade Tribunal ruled that government bodies cannot unilaterally declare themselves exempt from their trade treaty duties by declaring security exemptions, Canada's federal government passed a statutory amended that removed the Tribunal's oversight powers over those procurements.

In subsequent rulings the Tribunal found that the amendment breached international legal standards by removing the transparency requirements that previously applied to national security sole-sourcing and that the invocation of the national security exemption enabled a broad and non-reviewable right to exempt procurements from the Tribunal's jurisdiction even when the matters at issue do not pertain to national security.

Paul Emanuelli

"Agile Procurement" Remains a Work in Progress

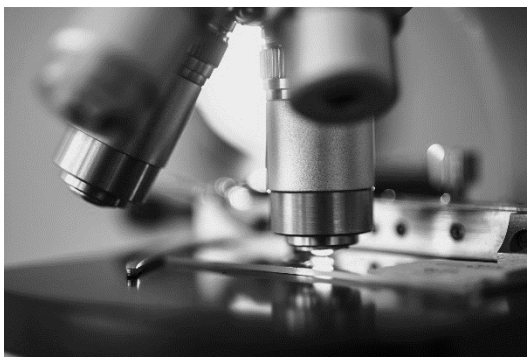
More Training Needed

In its report entitled *Procuring Complex Information Technology Solutions*, Canada's Auditor General noted that Canada's federal government adopted agile procurement as a means of modernizing its aging information technology portfolio, which currently includes 21 large procurement projects valued at $6.6 billion. The report explained that "agile procurement aims to achieve business outcomes by establishing close collaborations between procurement experts, end users (those who use the procured systems), and private sector suppliers through multiple phases." This process "permits course corrections and helps federal organizations apply lessons learned." The report also stated that agile procurement "is best used for complex projects in which it may not be clear at the outset what the best potential solution is to address business needs." However, the Auditor General found that responsible departments "did not provide sufficient guidance or training to employees on how to conduct agile procurement for major IT initiatives, including how to effectively collaborate and respond to suppliers' questions and feedback." (see Planning and Training Key to Innovation)

Paul Emanuelli

Incumbency Issues Spark Bid Protests

Tribunal Rules Against Government



Under the Microscope: Public institutions are increasingly under scrutiny over how they manage incumbencies in the public procurement process, which has sparked multiple recent rulings by the Canadian International Trade Tribunal. (see Failure to Warn Incumbent of New Bids Breaches Treaty)

In its recent determination in *Marine International Dragage Inc. v. Canada (Department of Public Works and Government Services*, the Canadian International Trade Tribunal awarded lost profits to the complainant after determining that the government allowed an unfair incumbent advantage during the challenged bidding process.

While the Tribunal acknowledged that incumbents may enjoy some inherent business advantages when they bid on retendered work, public institutions are required to level the playing field to the extent possible by ensuring that incumbents do not enjoy special access to information about the bidding opportunity that is not available to other bidders. (see Inside Advantage Breaches CFTA)

In its recent determination in *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services*, the Tribunal ordered the government to disclose more information controlled by the incumbent bidder to level the playing field with other bidders. The dispute dealt with a request for proposal for services for visa application centre services. The complainant alleged that the government failed to provide material volume data that was required by non-incumbent bidders to submit competitive proposals. The Tribunal agreed that the government should disclose that historic volume information to level the playing field for new bidders against incumbent suppliers. (see Tribunal Orders Disclosure of Incumbent Information)

Paul Emanuelli

Bidders Challenge Specifications

Targeting Technical Requirements

As evidenced by multiple recent rulings, bidders are becoming increasingly assertive in challenging the technical evaluation criteria used by federal public institutions in evaluation and award decisions. For example, in its *PricewaterhouseCoopers LLP v. Canada* decision, the Canadian International Trade Tribunal determined that the government failed to disclose the necessary level of detail regarding its evaluation criteria and its preference of institution-specific experience. It therefore determined that the complainant should be compensated for its lost opportunity and bid preparation costs. Further, in its determination in *Rampart International Corp. v. Canada*, the Tribunal upheld a complaint after finding that the government improperly relied on restrictive specifications. The government was ordered to cancel the RFP and redraft its technical requirements to, at minimum, allow bidders to bid equivalent products. (see Canadian Bidders Challenge Technical Criteria)

Striking the Right Balance: Many public institutions are averaging individual evaluator scores when those scores fall within a predetermined variation tolerance and limiting group evaluation discussions to areas where there were significant discrepancies between the original scores. Group evaluation sessions should be properly moderated with clear procedures that protect the autonomy of individual evaluators so that group discussions do not open the door to improperly pressuring evaluators to change their scores. As recent legal rulings reflect, evaluator independence should prevail over artificially imposed uniformity. (see Anarchy in the Evaluation Room)

Averaging Scores Ruled Reasonable

Tribunal Rejects Outdated Evaluation Practices

Fairness Monitors Ruled Non-Essential

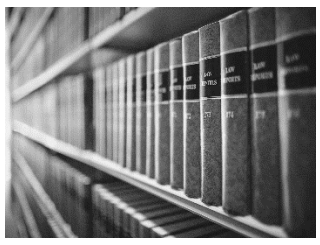
In its recent determination in *Temprano and Young Architects Inc. v. National Capital Commission*, the Canadian International Trade Tribunal confirmed that there is no duty to use fairness monitors in group evaluations or to engage in group consensus scoring. (see Fairness Monitors Ruled Unnecessary)

In fact, several recent Tribunal determinations have recognized a public institution's right to average individual evaluator scores instead of using group scoring to arrive at final bid evaluation scores. (see Tribunal Upholds Averaging Individual Evaluator Scores)

Laying Down the Law: Other notable recent federal rulings include the 2021 decision in *Heiltsuk Horizon Maritime Services Ltd.* where the Federal Court of Appeal ruled on a mandatory technical requirement that was the subject of three prior Tribunal determinations and two re-evaluation orders (see Single Technical Requirement Triggers Multiple Protests), 2022 Tribunal rulings in *Gregory Kerr Ltd.* over the validity of an electronic bid bond (see Canada's Federal Tribunal Rejects Electronic Bid Bond) and in *University of Guelph* over a flawed electronic bid submission (see Legal Challenge Rejected Over Electronic Bid Imbroglio), and 2023 Tribunal rulings in *Cistel Technology Inc.* where the Tribunal upheld the government's decision to cancel and retender an award due to procedural flaws (see Procedural Defects Lead to Cancelled Award) and in *Chantier Davie Canada Inc.* where the Tribunal ordered a re-evaluation after finding latent defects and bias in the government's evaluation criteria (see Defective Criteria Leads to Re-Evaluation Order).

Evaluation Infractions Lead to Legal Remedies

Irregularities Trigger Multiple Re-Evaluation and Retender Orders



Recent Canadian International Trade Tribunal rulings reveal an increasingly litigious tendering terrain for federal institutions. This article highlights a series of remedies awarded over the past decade against federal institutions over evaluation infractions.

In its 2016 determination in *The Masha Krupp Translation Group Ltd.*, the Tribunal ordered the government to retender an awarded contract and pay the complainant lost profit compensation until a new contract was awarded due to flawed reference checks in the original evaluation process. (see Flawed Reference Checks Lead to Retender and Lost Profit Award)

In its 2017 determination in *L.P. Royer Inc.*, the 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. (see Lost Profit Damages Awarded Due to Hidden Evaluation Stage)

In its 2018 determination in *Sunny Jaura*, the Tribunal ordered a re-evaluation after finding that the government awarded a contract to a non-compliant bid. (see Tribunal Orders Re-Evaluation After Flawed Compliance Assessment)

In its 2018 determination in *Harris Corporation*, the Tribunal ordered a re-evaluation after finding that the government conducted a flawed technical evaluation. (see Flawed Technical Assessment Triggers Re-Evaluation Order)

In its 2019 decision in *Pacific Northwest Raptors Ltd.*, the Tribunal found that the government relied on hidden criteria in its evaluation process. While this did not impact the ultimate scoring and contract award, the Tribunal still awarded the complainant its bidding costs and complaint costs. (see Tribunal Finds Hidden Criteria)

> "Recent remedies include re-evaluation and retender orders and monetary awards."
>
> - Paul Emanuelli

In its 2020 determination in *Bluenose Transit Inc.*, the Tribunal found that the government improperly awarded a contract to a non-compliant bidder and issued a cancel and retender order. (see Tribunal Orders Retender After Flawed Evaluation)

In its 2020 determination in *Construction Galipeau Inc.* the Tribunal ordered the government to evaluate a rejected bid after finding that the solicitation contained flawed bid instructions. (see Bid Instruction Errors Lead to Re-Evaluation Order)

In its 2021 determination in *Falcon Environmental Inc.* the Tribunal ordered a re-evaluation over flawed evaluation records. (see No Evaluation Records Means No Defence in Bid Challenge)