Strategic Procurement Update

Critical Trends

The Procurement Office

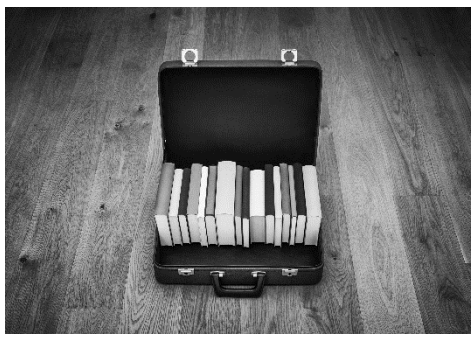
Focus on Group Evaluations

Feature Case Study

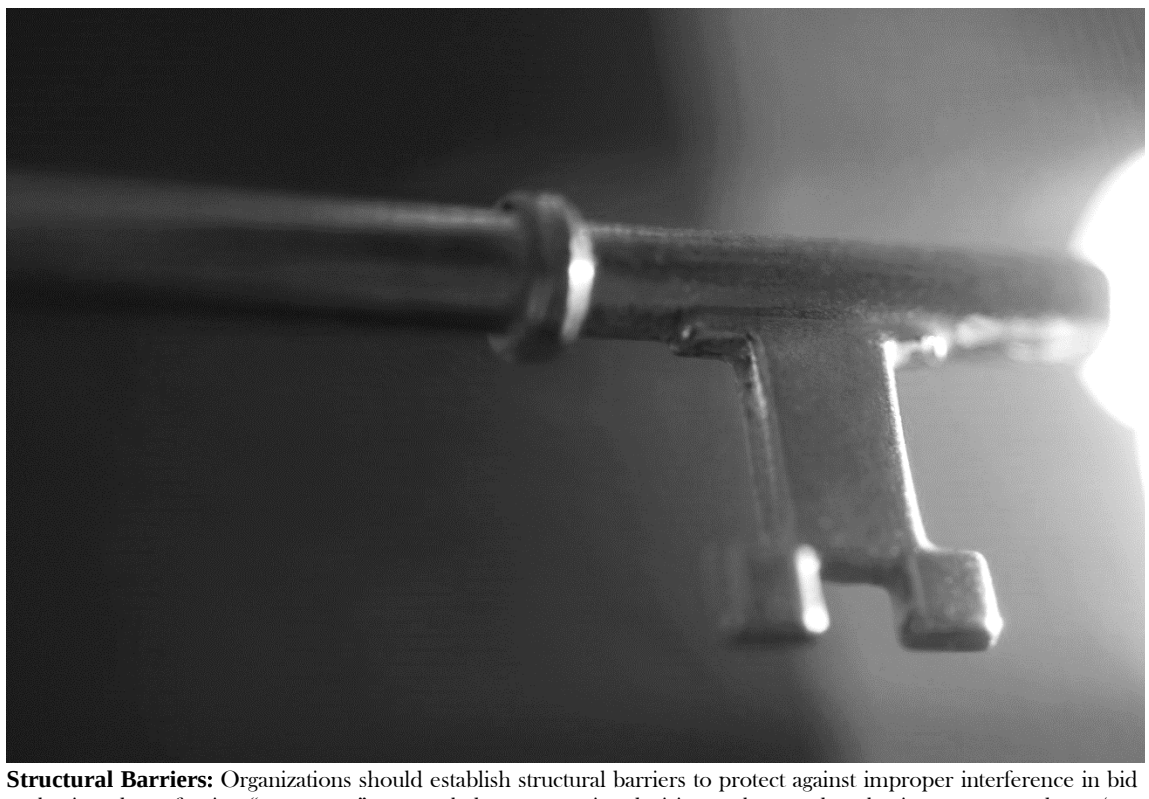
Adopting Evaluation Protocols for Senior Decision-Makers

Guarding Against Interference

In public sector procurement, the role of senior decision-makers is to provide project oversight by facilitating a clear decision-making and delegation process in support of project execution by project teams, and to ultimately approve the contract award recommendations of the project team when those recommendations fall within delegated authority. Providing senior-level oversight should be distinguished from interfering with the work of project teams, since interfering with the bid evaluation process can undermine the integrity of the process and, among other things, nullify any resulting contract award decision. Senior decision-makers should avoid revisiting their prior decisions once those decisions have been delegated and implemented. The scope of opportunity to set the rules and requirements of a tendering process is limited to the design, drafting, and approval process that leads to the public release of a solicitation document. Once those rules are established and bids are received, senior decisions-makers do not have the authority to change those ground rules. (see Bidding Principles for Senior Decision-Makers)



Lessons Learned: While senior decision-makers may be involved in initial project approvals, related funding decisions, and in determining the composition of project team members for delegating the authority to execute a project, they should not be involved in bid evaluations.



Structural Barriers: Organizations should establish structural barriers to protect against improper interference in bid evaluations by enforcing "no-contact" protocols between senior decision-makers and evaluation team members. (see Bidding Principles for Senior Decision-Makers)

Feature Article

Public Sector Needs to Bolster Group Evaluation Standards

As a pre-condition to participating in an evaluation process, each evaluator should sign an attestation confirming that he or she is free from any conflicts of interest that could adversely impact the fairness of the evaluation process. This attestation should also confirm that the evaluator is under an ongoing responsibility to disclose any actual or potential conflicts and clarify that an evaluator may need to recuse himself or herself from further participation in the evaluation process if a newly discovered conflict prejudices their ability to continue in the role of an evaluator. Each evaluator should also confirm that he or she has sufficient knowledge of the established evaluation criteria to independently perform the role of an evaluator without relying on other evaluators or third parties to assist in the application of those criteria to the supplier submissions.

Each evaluator should acknowledge and agree that the role of the evaluator is to apply the pre-established evaluation criteria and procedures to the supplier submissions and that evaluators cannot change the pre-established evaluation criteria, apply additional evaluation criteria that are not included in the pre-established criteria, or deviate from the evaluation procedures established in the solicitation document that they are directed to follow by the evaluation moderator. Evaluators should also acknowledge that they are responsible for maintaining their own individual evaluation records in the manner prescribed by the evaluation moderator, since all evaluation records are potentially subject to public release under access to information legislation or bid protests, and must therefore be clear, fair, and defensible. (see Ten Principles for Evaluator Attestations)

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

Guiding Principles for Government Evaluators

Evaluators Are Under a Spotlight of Scrutiny

Whether it's a formal bid protest, a public audit review, or a newsreel report, government evaluators often find themselves under a spotlight of scrutiny over their evaluation and award decisions. Given the glare of second-guessing that follows the public tendering process, this discussion offers guiding principles for lowering the temperature in evaluation rooms.

1. No Volunteers: In almost all cases, evaluation groups are made up of individuals who are moonlighted from their day jobs and assigned to evaluation teams; however, notwithstanding this double duty, evaluators don't get a free pass on meeting fairness standards. Claiming "We did our best with limited resources" is not an adequate defense for failing to meet your due process duties. Evaluators need to set aside enough time to independently review, evaluate, and score each proposal. They also need to prioritize their participation in group evaluation sessions since "no-shows" are a no-go that cause rescheduling delays or trigger the need to remove evaluators.

2. No Freestyling: Defending a legal challenge is no substitute for doing things properly the first time. The evaluation process is not a freestyle competition or an opportunity to second-guess established evaluation rules and criteria. Embarking on procedural deviations and employing hidden criteria can result in re-evaluation orders or the nullification of a contract award. Evaluators should therefore take the time to properly review the evaluation rules and criteria, and then stick to the script.

3. No Conflicts or Bias: Conflicts of interest and bias are bad news for the defensibility of an evaluation. Evaluators should have no personal or financial interest in the result and should avoid bias and come to the evaluation process with an open mind regarding the merits of each competing proposal.

4. No Records Means No Defence: Keeping inadequate records can result in re-evaluation orders and voided contracts. Team members are accountable for maintaining their own notes and scores and responsible for recording why they made any changes to their scores during group scoring sessions. (See Guiding Principles for Government Evaluators)

"We've Been Doing it This Way for Years": While your institution may have a long track record of taking liberties with the due process of its evaluation decisions and not being challenged, you should never confuse poor but untested past practice with proper practice. In the face of a legal challenge, denial of the rules is not a winning defense. When it comes to protecting the integrity of the evaluation process, it's never too late to rectify your procedures to establish defensible practices. (see Guiding Principles for Government Evaluators)

Paul Emanuelli

Ombudsman Delivers Wake-Up Call on Evaluations

Report Finds Multiple Irregularities

In its July 2020 report, Canada's Office of the Procurement Ombudsman found multiple evaluation flaws in its review of the procurement practices of Environment and Climate Change Canada (ECCC). The report highlighted how the development of evaluation criteria, the drafting of solicitation documents, and the administration of the evaluation process are three of the highest risk areas in government procurement. The report found multiple instances of flawed evaluations, including several files where the mandatory criteria "were not communicated in a clear, precise or measurable manner".

It also found several instances where solicitations "contained missing, incorrect or unclear information regarding point-rated criteria".

Further, the report also found that in about 20 percent of reviewed files, selection methodologies "contained inaccurate or contradictory information, or both" as well as evaluation processes with "inconsistencies in the evaluation of bids and deviations from the planned approach".

For example, the report noted two cases where contracts were awarded to non-compliant bidders, one case where a bid was evaluated after the contract was already awarded, two cases where evaluators used an evaluation grid that was inconsistent with the criteria stated in the solicitation document, seven cases where evaluators awarded partial points for technical evaluations in a manner that was inconsistent with the solicitation document rating scales, and four cases where evaluation comments were inadequate.

To address these gaps, the Procurement Ombudsman recommended that ECCC "establish mechanisms to ensure bid evaluations adhere strictly to the evaluation criteria in solicitations" and ensure that the evaluations "are carried out in accordance with planned approaches". After finding significant record-keeping gaps, the Procurement Ombudsman also recommended that measures be put in place to ensure that evaluations are properly documented. For example, the report noted that "18 of 40 files were missing key documents", including four cases where the identity of evaluators was not recorded, four cases where individual evaluations were missing, five cases where financial evaluations were missing, and five cases that contained an incomplete record of pre-bid question-and-answer and addenda correspondence.

As the Procurement Ombudsman warned, these incomplete procurement files "resulted in inadequately supported procurement actions that risk undermining the integrity, fairness and transparency of the procurement process".

Paul Emanuelli

Legal Challenges Target Group Evaluations

Taking Aim to Team Scoring

Nowhere to Hide: The days of jotting down cryptic shorthand on sticky notes or showing up to evaluation meetings with incomplete work and hoping that someone else will prepare a consolidated evaluation record are over. (see Guiding Principles for Government Evaluators)

Recent legal decisions highlight the importance of establishing transparent bid evaluation criteria and procedures to guard against allegations of improper evaluation and award decisions. For example, in the July 2021 decision *In the Matter of a Complaint by Commercial Truck Equipment Corporation Against Beaver Emergency Services Commission,* an arbiter dismissed a bid protest filed against an Alberta municipal firefighting agency after rejecting allegations of bias and improper scoring.

The arbiter rejected the complaint after finding that the evaluators had followed the established scoring criteria. Further, the arbiter found no evidence of bias in the specifications or in the evaluation process. In fact, the arbiter found that the complainant had breached the single-point-of-contact protocols by circumventing the official contact person and directly lobbying the fire chief to attempt to influence the outcome of the bidding process.

Similarly, in its November 2020 decision in *OLM Systems Limited v. Fife Council,* the Scottish Court of Session rejected a bid protest after finding no evidence to support allegations that the evaluators were coerced into changing their scores. The dispute dealt with a solicitation for a new municipal software system. The complainant, who was the incumbent software provider, ranked third in the evaluations and alleged that its proposal was improperly scored during evaluator consensus scoring sessions. The Court ultimately rejected the complaint, finding that the evaluation was conducted in accordance with a predetermined two-staged process where the evaluators scored each submission individually and then participated in moderated consensus scoring sessions that facilitated the consolidation of the final scores.

In rejecting the complainant's allegations that undue influence was exerted over the evaluators during the consensus scoring sessions, the Court found no evidence "that pressure was being placed on the evaluators to agree on a score contrary to their individual judgement." Further, the Court found that the evaluators were not subjected to time pressure during the consensus scoring sessions that would result in a pressure to agree on scores. Rather, the Court found that the evaluators were given the opportunity to seek further information and defer their scoring if required to consider that additional information.

While the complaint was ultimately rejected, this case highlights why public institutions need to adopt rigorous group evaluation procedures that protect the independence of individual evaluators against future allegations of undue influence and why those institutions need to rely on transparent criteria and thorough recordkeeping to demonstrate the consistency of how competing proposals were scored to arrive at the final rankings. In fact, inconsistencies in scoring procedures can result in successful legal challenges and adverse audits findings. (see Transparency Critical to Defending Evaluations and Audit Calls for Enhanced Group Scoring Procedures)

Peer Review, Not Peer Pressure: Group scoring sessions should not be a forum for fudging results or pressuring evaluators into changing their scores. In fact, emerging enhanced consensus scoring procedures now typically include detailed protocols for ensuring that each group member exercises independent judgment as part of the evaluation. While group scoring sessions should enable peer review and discussion, each evaluator is a potential witness in a legal challenge and should therefore exercise unfettered judgment and be ready to stand behind his or her individual score, even under cross-examination.

Allegations of Interference Dismissed

Protecting the Identity of Evaluators

Federal Probe into JEDI Cloud Procurement

In its report entitled *Report on the Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement*, the U.S. Department of Defense (DoD) Inspector General presented the results of its review into allegations of political interference and ethical misconduct related to the JEDI Cloud procurement. Notwithstanding a flurry of allegations, the Inspector General ultimately concluded that the award of a single contract, rather than multiple contracts, complied with relevant federal laws, that the RFP specifications were not unnecessarily restrictive, and that the evaluation was conducted in accordance with the RFP rules.

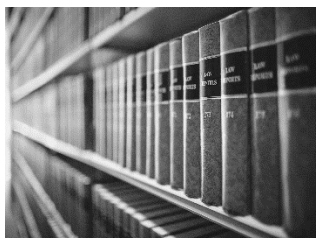
The Inspector General ultimately dismissed the allegations of improper interference by White House staff or senior DoD officials since the identity of the evaluators was not known to either group, which protected those evaluators from the alleged outside interference.

This case study underscores the importance of protecting evaluation teams from interference to ensure the integrity and defensibility of their evaluation and award decisions. (see Report Dismisses Allegations of Outside Interference)

No Executive Privilege: No one involved in a government evaluation decision is above the law. When it comes to protecting the integrity of the tendering process, there is no executive privilege. This means that senior officials cannot simultaneously delegate responsibility for the evaluation process and then reserve the right to arbitrarily second-guess and override an outcome they disagree with. Senior officials should therefore either formally delegate the power to make evaluation and award decisions, or they should be prepared to actively participate according to the same due process standards that apply to everyone else.

Implementing Enhanced Consensus Scoring

Following Due Process in Group Scoring



In recent years, group evaluations and consensus scoring have been the subject of numerous successful legal challenges that have exposed serious flaws in the evaluation practices of many purchasing institutions.

The Procurement Office has developed the following Enhanced Consensus Scoring protocols, which allow evaluation teams to operate efficiently, while staying within the bounds of their due diligence duties.

Enhanced Consensus Scoring seeks to strike a balance between the mechanical averaging of individual evaluator scores, which forgoes the benefit of any peer review, and the collective group scoring of every evaluation score, which tends to lead to protracted evaluation sessions with questionable end results. To balance efficiency and defensibility, the objective of Enhanced Consensus Scoring is to set the balance between these two extremes.

Enhanced Consensus Scoring sessions occur after each evaluator is provided enough time to conduct an individual evaluation and to record his or her initial evaluation results. Only those scores that fall outside the pre-set variation tolerance are addressed during the consensus scoring sessions. Scores that fall within the pre-established range of variation tolerance are not discussed during consensus scoring and are instead simply averaged. Instead of diluting the limited resources of the evaluation team, one of the main advantages of Enhanced Consensus Scoring is that it focuses the team's efforts on the areas with the largest divergence in initial scoring since those areas are most likely to contain errors that would impact the ultimate rankings and undermine the fairness of the process.

The variation tolerance should be set before the Enhanced Consensus Scoring session. There is no single formula for variation tolerance since evaluation teams use different scoring ranges between, and even within, specific RFPs. Those scores that fall within the acceptable range would be averaged at the end of evaluations and would not be raised for group discussion.

> The moderator should brief the evaluation panel on meeting protocols before any group sessions."
>
> - Paul Emanuelli

The outlier scores (those falling outside of the variation tolerance) should be identified by the group evaluation moderators (typically procurement advisors who are not members of the evaluation team) prior to the enhanced consensus scoring sessions. Enhanced Consensus Scoring sessions should be conducted in accordance with formal rules of order. They should be presided over by a moderator (not a member of the evaluation team, typically a procurement advisor) who chairs the meeting. The moderator should prepare the agenda ahead of time based on a pre-identified summary of outliers and ensure that evaluators are briefed on the meeting protocols and their responsibility to maintain their own notes documenting the reasons any scoring changes.