Canadian Law Update

# Critical Trends

The Procurement Office

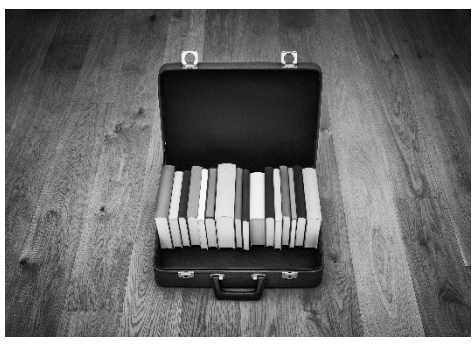
Focus on Incumbent Advantage and Biased Specifications

Feature Case Study

## Equivalency Processes Required for Unbiased Bidding

Mandatory Training Order

In its June 2023 report entitled *Report on the Rehabilitation of the Roussin Centre (Calls for Tenders IMM.SP20-05, IMM22-01 and IMM22-08)*, Montreal's Inspector General found that two municipal tender calls for a community centre upgrade project included biased specifications and that those tender calls did not include a required clause allowing potential bidders to submit equivalency requests during the pre-bid tender posting period. As the Inspector General noted, the applicable legal standards required the municipality to prepare specifications that were described in terms of neutral performance or functional requirements rather than descriptive characteristics and, if that was not possible, required that bidders be permitted to propose equivalencies. However, the Inspector General found no evidence that the consultant retained by the municipality to draft the requirements had attempted to prepare neutral specifications before adopting specific brands and models into those specifications.



The Inspector General prescribed mandatory training for all municipal employees involved in the design and preparation of tender documents and instructed that those employees advise external consultants of applicable neutrality standards at the beginning of each project.

**Incumbent Advantage:** The Tribunal determined that the federal government breached its fair competition duties under the *Canadian Free Trade Agreement* by allowing, at minimum, the appearance of an unfair advantage through its failure to disclose material information in the possession of the incumbent about the required work to other bidders and by allowing the incumbent to influence the tendered contract requirements.

Feature Article

## Incumbent Influence Overruled

Inside Advantage Breaches CFTA

In its January 2021 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. The dispute dealt with an invitation to tender for the removal of concrete structures located at the bottom of the Richelieu River in Lacolle, Quebec. The complainant, M.I.D., alleged that the bidding process was marred by conflict of interest since the contract was unfairly awarded to the incumbent supplier, MVC, who was involved in inspecting the concrete structures that had to be removed under its prior contract and had provided a report on the required work that influenced the plans and specifications for the new work.

The complainant asserted that this resulted in the incumbent being privy to privileged information about the contract requirements that was not available to other bidders, which rendered the new tendering process unfair. 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. As this case illustrates, giving certain bidders, including incumbents, advanced access to information and influence over the scoping of future requirements can create an unfair advantage and breach applicable trade treaty fair competition rules.

### 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

# Complainants Held to Burden of Proof

## Tribunal Rejects Biased Specification Challenges

The Canadian International Trade Tribunal recently rejected multiple bid protests that were based on allegations of biased government specifications. In its January 2020 determination in *Lions Gate Risk Management Group v. Canada (Department of Public Works and Government Services)*, the Tribunal rejected a complaint after finding that the incumbent failed to prove that the past evaluation criteria were biased in favour of the less qualified, lower-priced winning bidder. The dispute dealt with a request for proposal issued on behalf of the Royal Canadian Mounted Police for the provision of crime scene security and emergent scene security. The complainant, Lions Gate, was the incumbent supplier. It lost the contract award to The British Columbia Corps of Commissionaires who were awarded a contract valued at $3,047,619.05.

The complainant argued that the government biased the process by recognizing past commissionaire experience since that allowed its competitor to bid at lower commissionaire rates when compared to the rates paid to the peace officers that it proposed in its bid. The Tribunal determined that the government's decision to recognize commissionaire experience did not bias the process but instead allowed for greater competition.

Further, in its March 2021 determination in *2484726 Ontario Inc. (c.o.b. Brion Raffoul) v. Canada (Department of Public Works and Government Services)*, the Tribunal dealt with a bid protest filed by a losing bidder that alleged that the government relied on unnecessarily restrictive and biased prior experience criteria for patent agent services.

The Tribunal rejected these arguments, finding that the need to show recent experience in the relevant jurisdictions was a legitimate operational requirement. Furthermore, while these requirements may advantage certain suppliers over others, the Tribunal concluded that the trade agreements do not require government institutions to compromise legitimate operational needs to ensure that all suppliers are on an equal footing. As the Tribunal stated, "requirements are not discriminatory or unreasonable for the sole reason that they may be more onerous or burdensome for certain suppliers". As these cases illustrate, suppliers have the right to challenge the neutrality of tender call specifications and bidding procedures. However, complainants continue to bear the onus of proving their case when alleging breaches of the trade treaty rules.

**Blurred Messaging:** The incumbent's contract was repeatedly extended on an emergency basis during the pandemic before it was blindsided by a new bidding process.

Paul Emanuelli

# Incumbent Blindsided by New Tender Call

## Failure to Warn Incumbent of New Bids Breaches Treaty

In its August 2021 determination in *Aqua Valley Water v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal found that the government put the incumbent complainant at an unfair disadvantage by extending its existing contract on an emergency basis and then failing to warn the incumbent that a new bidding process was pending.

The Tribunal found that the government's miscommunications put the incumbent at a disadvantage over other bidders since the incumbent, through the government's silence, was led to believe that there was no pending new solicitation when in fact the government was already working on the release of the new bidding opportunity.

Paul Emanuelli

# CFTA Arbitration Rules Against Local Warranty

## Arbiter Finds Treaty Violation

In a May 2019 *Canadian Free Trade Agreement* arbitration ruling in the matter of *Parker Johnston Industries Ltd. v. The Calgary Board of Education*, an arbiter struck down The Calgary Board of Education local warranty requirement as unnecessarily restrictive. The dispute involved a roofing replacement project at two Calgary schools. The complainant challenged the process as being discriminatory against out-of-province suppliers and unfairly favouring Alberta suppliers due to the specification that required an Alberta Roofing Contractor's Association warranty. The complainant, a British Columbia contractor, had attempted to register for certification under the Alberta warranty program but its application was rejected.

As this case illustrates, unfair local preference practices breach applicable procurement treaty standards and are subject to legal rulings that nullify those practices. In this case, the arbiter confirmed that the local preference practice was in contravention of the treaty and should be discontinued moving forward.

Paul Emanuelli

## Tribunal Finds Biased Hidden Criteria

### Awards Lost Profits

**Hidden Biases:** The Tribunal found that evaluators applied a hidden bias in favour of past experience working with the Immigration Review Board.

In its December 2020 ruling in *PricewaterhouseCoopers LLP v. Canada (Immigration and Refugee Board)* decision, the Canadian International Tribunal determined that the Immigration and Refugee Board of Canada (IRB) relied on hidden and biased evaluation criteria in a bidding process for business consulting and change management services.

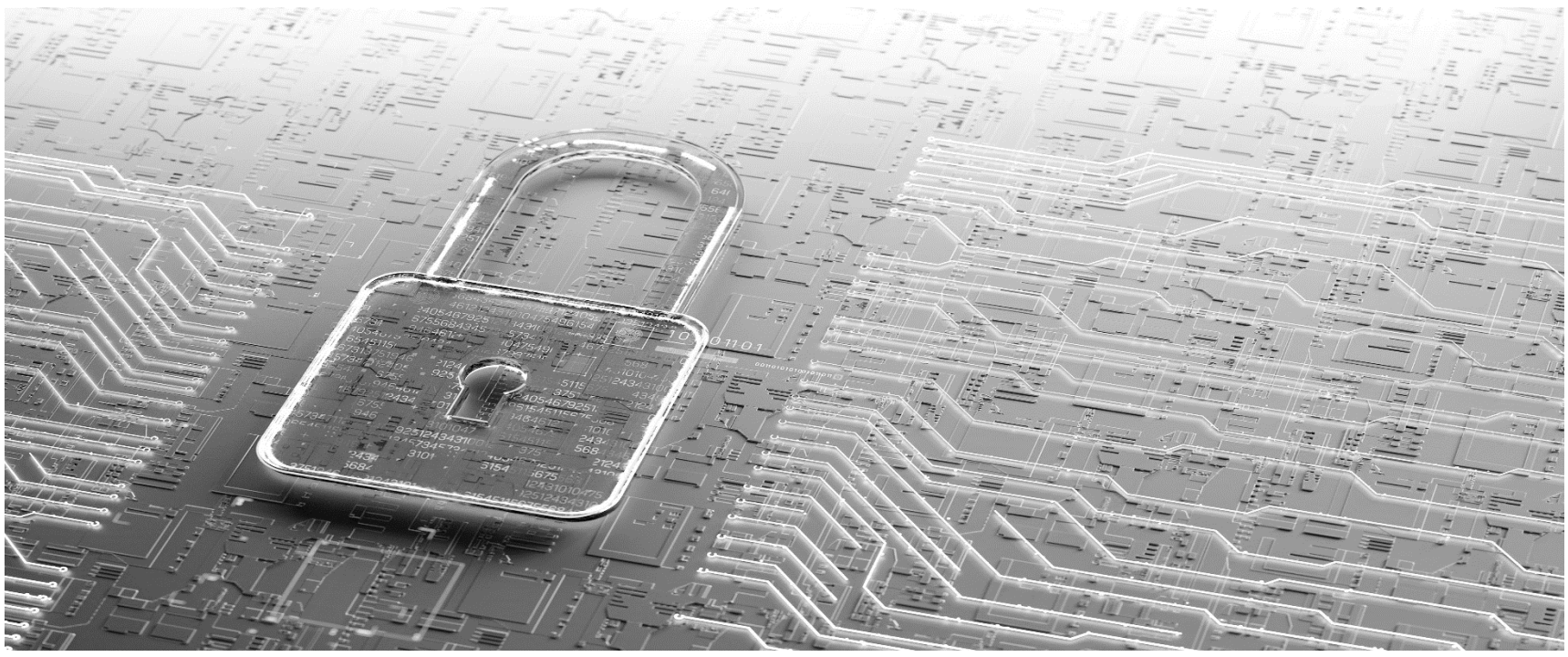
The complainant failed to meet the minimum technical scoring thresholds and challenged the evaluation result. The Tribunal determined that the government's technical scoring process was "inconsistent and unduly fluid." More specifically, the Tribunal found that government evaluators applied undisclosed evaluation criteria that biased past experience scoring in favour of prior work performed specifically for the IRB over more general public sector experience. The Tribunal determined that the government failed to disclose the necessary level of detail regarding its evaluation criteria and its preference of institution-specific experience. The Tribunal ultimately determined that the complainant should be compensated for its lost opportunity and bid preparation costs. As this case illustrates, public institutions should ensure that their criteria are transparently defined in their solicitation documents and should avoid applying hidden preference with biased requirements in their evaluations. (see Canadian Bidders Challenge Technical Criteria).

Paul Emanuelli

## Target Practice on Biased Specifications

### Reverse Engineered Designs

In its November 2021 determination in *Rampart International Corp. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld a complaint after finding that the government improperly relied on restrictive specifications. The dispute dealt with an RFP issued by the Department of Public Works and Government Services on behalf of the Department of National Defence for a replacement pistol and holster system for the Canadian Armed Forces. The complainant successfully asserted that the RFP contained technical specifications that were biased in favour of a specific competing pistol design and that those specifications were reverse engineered to align with that competing product. (see Canadian Bidders Challenge Technical Criteria).



**Unlocking Fair Competition:** To avoiding becoming the next bid protest case study, public institutions should adopt internal procedures that mandate project team members to avoid using hidden and biased criteria and should stress test their evaluation criteria and specifications against fair competition standards before releasing their solicitation documents.

### Public Institutions Must Be Ready to Defend Their Requirements and Criteria

## Tribunal Enforces Open Competition

### Spotlight on Neutrality

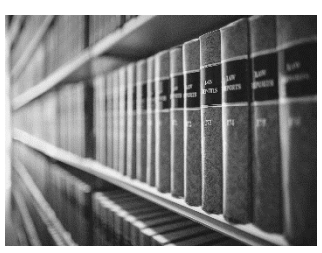
As evidenced by multiple legal rulings across Canada in recent years, bidders are becoming increasingly assertive in challenging the technical evaluation criteria used by public institutions in evaluation and award decisions. While many evaluation challenges are ultimately dismissed, the Canadian International Trade Tribunal has recently upheld multiple bid protests after finding that the government used biased criteria in the bidding processes.

These recent rulings serve as a reminder to all public institutions that their bid evaluation and award decisions should be based on the transparency and neutrality standards mandated by the trade treaties. The increasing level of bidder assertiveness, coupled with expanding bid protest enforcement mechanisms, underscores the importance of avoiding technical evaluation traps since unfair bidding procedures face an increasing risk of being invalidated. (see Canadian Bidders Challenge Technical Criteria).

**Deeper Disclosure:** In order to ensure that the incumbent was not unfairly advantaged, the Tribunal ordered further disclosure of work volume information.

# Ruling Puts Spotlight on Incumbent Advantage

## Tribunal Orders Disclosure of Incumbent Information



In its July 2017 determination in *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services*, the Canadian International Trade 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 ("VAC") services issued by the Department of Public Works and Government Services ("PWGSC") on behalf of the Department of Citizenship and Immigration. As the Tribunal summarized, the complainant alleged that the government failed to provide material volume data that was required by non-incumbent bidders to submit competitive proposals:

> Bronson asserted that these program objectives require volume data for bidders to respond to the current RFP. It argued that this need is particularly acute for new entrants because they must invest significantly in a new VAC network. By contrast, incumbents have direct knowledge of current service volumes at actual VAC locations, which Bronson submits constitutes a significant advantage regarding the financial bid (from a cost of operations, expected revenue, and risk analysis perspective). Bronson argued there cannot be a fair competition when the incumbents have non-proprietary historical visa volume data but new entrants do not.

The Tribunal agreed that the government should disclose that historic volume information to level the playing field for new bidders against incumbent suppliers:

> In order to ensure that the incumbents are not unfairly advantaged, PWGSC should provide further disclosure of the information identified by Bronson, or provide an explanation as to why the data in issue is not available.

> "The Tribunal has previously held that, in order for a solicitation to be fair, the government institution must release "all relevant information, including historical data". Leaving this data uniquely in the possession of the incumbents provides them an advantage in formulating a competitive financial bid that is unavailable to new entrants."
>
> - Canadian International Trade Tribunal

As this case illustrates, the trade treaties require government institutions to establish a level playing field between incumbent bidders and new suppliers who are bidding on those same contract opportunities by ensuring that new bidders have access to volume data that will be material for future performance since limiting access to that data to incumbents can give those incumbents an unfair competitive bidding advantage.