May
2023

Quarterly Report

The Procurement Office

Issue
#3
Negotiated
RFPs
Edition

Quarterly Trend

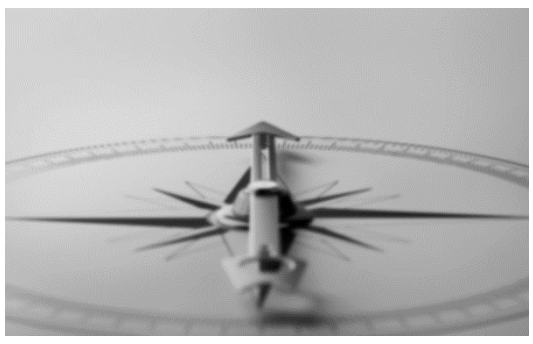
Dialogue RFPs Subject to Legal Challenge

Bolstering Due Process

Recent rulings by the U.S. Government Accountability Office (GAO) highlight the increasing use of negotiated RFPs with dialogue stages and best and final offers (BAFOs). These decisions underscore the importance of due process and transparency.

For example, in its decision in *Rice Solutions, LLC*, the GAO ordered a re-evaluation after finding that the government applied unclear short-listing rules and improperly limited the dialogue stage and BAFO to a single proponent. Similarly, in its decision in *Academy Leadership, LLC*, the GAO ordered the government to reopen its dialogue process, receive updated proposals, and conduct a new evaluation after finding that the government gave insufficient feedback during its dialogue sessions.

As these cases illustrate, while dialogue RFPs, like all public procurement processes, remain subject to potential legal challenge, the outcome of those challenges will turn on the defensibility of the procedures used by a public institution in arriving at its evaluation and award decisions (see Legal Challenges to Dialogue RFPs).



Lessons Learned: Recent rulings serve as navigation points for charting proper negotiated RFP procedures.

Enabling Innovation: While the last decade has seen a rapid adoption of negotiated RFPs across the public sector, public institutions should ensure that they are using professionally designed tendering documents and obtaining project-specific advice when leveraging negotiated bidding procedures (see Negotiating Beyond Contract A: 20 Points of Law).

Quarterly Feature

Courts Reject "Contract A" Process Contract

Cases Turn on the Terms Contained in Tendering Documents

Recent UK cases show how the courts are parting company with the process contract and are refusing to impose its implied terms to every public tendering process. As these cases illustrate, the courts do not apply process contract rules, originally referred to as "Contract A" by the Canadian courts, to every public tendering process, and instead, look at the specific terms of the solicitation document before determining which rules apply to that process.

For example, in its recent decision in *Adferiad Recovery Limited v. Aneurin Bevan University Health Board*, the England and Wales High Court of Justice refused to apply an implied process contract as a means of regulating the contract award decision under contract-based common law rules.

The Court cautioned that a process contract should not be lightly implied to impose an additional regulatory scheme on the bidding process.

Similarly, in its recent decision in *Excession Technologies Limited v. Police Digital Service*, the same court rejected a legal challenge after dismissing the complainant's assertion that the bidding process created an implied process contract that would allow the court to regulate the contract award decision under implied common law rules.

As these recent cases illustrate, the Contract A process contract, and its additional common law duties, can be avoided through clearly drafted tendering documents (see Courts Reject "Contract A" Process Contract).

Training Certificate

Leveraging Lessons Learned

Procurement Training Office

We will be running our open enrolment Governance and Project Execution Certificate in a month-long format starting June 5, 2023.

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

In 2023, Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

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Canada's Deployment of Agile Procurement Remains a Work-in-Progress

Feature extract from Planning and Training Key to Innovation

The broader adoption of agile procurement is a prime example of how public institutions can leverage lessons learned to improve procurement outcomes. 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 distinguished agile procurement from traditional procurement, noting that "while the traditional procurement process is linear and awards a single large contract, the agile procurement process is iterative and awards multiple smaller ones".

Further, 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." While the audit found that the Canadian government "made good progress toward adopting agile procurement practices for large IT systems", the Auditor General concluded that better training was required.

The report found that the Canadian government rolled out its agile procurement program with insufficient staff training, noting that the 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." The Auditor General confirmed that other jurisdictions, including the US and the UK, supported their agile procurement deployments with more extensive staff training and recommended that the government "develop more comprehensive guidance and training for employees to improve understanding of agile procurement and how to apply collaborative methods."

Team Building: Public institutions need to hone their group negotiating skills to leverage dialogue-based procurement formats (see Demystifying Dialogue RFPs and Canada Dumps Contract A, Launches Negotiated RFPs).

Paul Emanuelli

Deploying Deep Strategy

Close the Deal or Lose the Deal

When using a negotiated RFP process, purchasing institutions should govern their contract award negotiations with a high degree of professionalism and be ready to deal with tactics that could be used to undermine their objectives.

In fact, negotiating teams should have strategies in place to ensure that their contractual requirements and project timelines are not compromised (see Defending Against Sharp Negotiation Practices).

Paul Emanuelli

Protecting Confidentiality in Dialogue RFPs

Rules Require Clarity

The duty to protect confidentiality is amplified when using negotiated Dialogue RFPs since proponents competing for major project awards typically invest significant resources in the development of unique project-specific proposals.

To address concerns over the protection of confidential and proprietary bidder information, some jurisdictions have adopted specific codes that expressly recognized the need to implement clear, non-discriminatory restrictions on the sharing of bidder information during a competitive bidding process.

Unfortunately, while some jurisdictions have addressed these confidentiality issues through a combination of legislation and guidelines, many others have failed to clearly codify the confidentiality duties that apply to a public sector competitive bidding process, leaving it to individual public institutions to adopt their own procedures to address these duties when managing major projects (see Protecting Confidentiality in Dialogue RFPs).

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Rectifying Compliance Controversies

Cure Periods Reduce Risk

Preventative Law: Public insitutions should proactively apply lessons from recent rulings and adopt rectification procedures that avoid tender compliance traps.

Recent rulings highlight the need for negotiated RFPs with transparent rectification protocols that address compliance issues before they escalate into legal challenges.

Tender compliance issues continue to be a focal point of bid protests, with multiple recent examples of bid protests based on allegations that a contract was awarded to a non-compliant bidder. To ensure procedural probity, public institutions should establish transparent rectification procedures if they plan to allow bidders to rectify any irregularities in their initial submissions and should avoid engaging in non-transparent and inconsistent processes where some bidders are held to strict tender compliance standards while others are permitted to improperly repair their bid defects.

Probity and due process remains paramount during bid evaluations since compliance issues can be used by losing bidders to challenge a contract award decision. Permitting a transparent cure period in a negotiated RFP process is preferable to exposing a contract award decision to protracted litigation (see Rectifying Compliance Controversies).

Paul Emanuelli

Moving Beyond One-Shot Bid Submissions

Evolving the Practice

Recent legal decisions continue to underscore the inherent limitations of dealing with bid compliance issues using one-shot bid submissions. In fact, recent rulings are encouraging the use of multi-staged bid procedures that not only allow bidders to rectify compliance irregularities that would otherwise force a disqualification, but also allow competing bidders to receive evaluator feedback on their initial submissions so they can submit improved final offers and receive higher scores. Rather than discouraging this practice, recent cases are increasingly calling out evaluators for failing to provide sufficient feedback to proponents to address areas of weakness in initial submissions (see Moving Beyond One-Shot Bid Submissions).

Laying Down the Law: Resourcing your project team is a critical cornerstone for effective negotiations.

Spotlight on Negotiations – Planning and Staffing Critical to Strategic Execution

Harsh Verdicts for Weak Negotiations

Courts Will Scrutinize Negotiation Processes

Recent audits confirm that weak negotiation planning can compromise a government's ability to obtain winning outcomes (see Audit Finds Weak Negotiations in Major Deal) and warn that governments need to properly resource negotiation teams on major projects (see Audit Calls for Proper Resourcing of Negotiations).

Contract award negotiations remain subject to successful legal challenge if negotiators materially change the parameters of award from the scope of the original solicitation (see Court Restricts Scope of Award Negotiations) or if they impose new award conditions that were not part of the original process rules (see Court Overturns Flawed Negotiation).

In fact, cancelled negotiations can expose public institutions to common law lost profit claims if the original solicitation rules were not clearly defined to address Contract A process contract risks (see Failed Price Negotiations Lead to Contract A Claim).

Since negotiated RFPs remain subject to the core due process principles that apply to all public sector tendering (see Seven Due Process Principles for Negotiated RFPs), they should be managed in a procedurally correct manner (see Strategic Execution in Negotiated RFPs).

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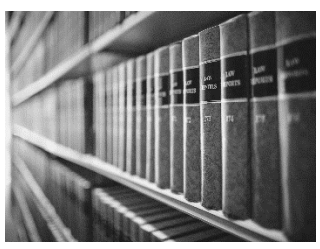
Balancing the Scales: As Canada's Competition Bureau recently cautioned, "it is important to get RFP requirements right" since "failing to do so can create barriers to market entry, particularly for innovative companies and SMEs."

Opening Competition Through Dialogue RFPs

Institutions Need to Adapt or Risk Being Another Case Study



Unnecessarily strict procedures, overly narrow evaluation criteria, and overly prescriptive specifications stifle competition and expose the procurement process to unnecessary litigation.

Bidders are becoming increasingly vigilant in challenging what they perceive to be unnecessarily restrictive public procurement procedures. In addition to taking issue with unnecessarily strict procedures, bidders are also increasingly challenging what they perceive to be overly restrictive evaluation criteria and performance requirements.

In fact, in its recent report entitled *Improving health care through pro-competitive procurement policy: Digital Health Care Market Study Part 2*, Canada's Competition Bureau recommended that government institutions use less prescriptive evaluation criteria and specifications and use negotiated RFPs to enable bidders to propose market-based solutions rather than being tied to unnecessarily narrow government requirements. As the Competition Bureau stated, while buyers "want to make sure that they buy the right solution at the right price", the use of requirements that are "ill conceived or too demanding" can result in the unnecessary elimination of potential bidders.

Similarly, in its *Annual Report 2021-2022*, Canada's Office of the Procurement Ombudsman cautioned against the use of unnecessarily restrictive evaluation criteria, noting that concerns over unfair, overly restrictive, or biased evaluation criteria were the top issues raised by its industry stakeholders.

In fact, an OECD report recently found that "contracting authorities have a tendency to develop very detailed technical specifications, not leaving room for innovation or new solutions" and that they "require excessive qualification requirements for personal and past experience" including criteria "not justified by the scope or size of the contract".

> "...the OECD recommends the adoption of agile procurement methods."
>
> - Paul Emanuelli

To remedy the situation, the OECD recommends the adoption of agile procurement methods that leverage direct dialogues with suppliers and allow for innovative solutions, stating that "competitive dialogue is a public-sector tendering option that allows bidders to develop alternative proposals in response to a client's outline requirements." However, the OECD report found that public institutions were limited by "a lack of guidance on how to use the competitive dialogue procedure in practice and feared incorrectly applying it to their procurements."

Rather than stifling innovation with anti-competitive procedures, public institutions need to open competitions to more suppliers and open the door to more innovation by leveraging negotiated RFPs and competitive dialogues (see Opening Competition Through Dialogue RFPs).