January
2025

Critical Trends

The Procurement Office

2024
Year in
Review

Feature Case Study

Federal Audits Expose Widespread Irregularities

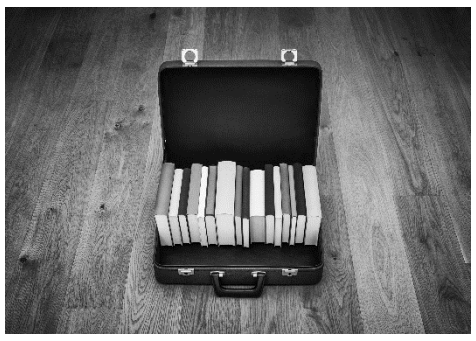
Canada's Auditor General released three high-profile audits in 2024 that exposed widespread irregularities in federal government spending.

The February 2024 *ArriveCAN* report revealed problematic sole-sourcing practices on a major technology project where GC Strategies was allowed to draft specifications and won a major award as the sole bidder. (see ArriveCan Audit Exposes Weak Oversight)

The subsequent *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 in McKinsey contract awards. (see Federal Consulting Audits Raise Systemic Concerns)

Finally in its report entitled *Sustainable Development Technology Canada*, Canada's Auditor General found rampant and long-term conflicts of interest at a federally funded non-profit foundation. (see Audit Finds Chronic Conflicts at Federal Foundation)

As these recent public audits illustrate, federal sector entities continue to struggle in their efforts to implement proper spending oversight practices.



The jury is still out on whether recent federal reports will prompt any procurement reforms given the lack of remedial action in response to prior audits.

Legal Grey Zone: While general administrative law principles could apply to narrow judicial review challenges in circumstances where a public institution in Ontario adopts its own internal bid protest procedures, it is not clear whether the Ontario courts will recognize local bid protest mechanisms as limiting their judicial review powers.

Case of the Year

Supreme Court of Canada Rejects Ontario Bid Protest

In its October 2024 decision in *Thales DIS Canada Inc. v. Ontario*, the Supreme Court of Canada dismissed a bid dispute over made-in-Canada requirements in an Ontario government identification card solicitation. While the ruling was a victory for the Ontario government, the Supreme Court's decision leaves other Ontario public institutions in a state of uncertainty regarding treaty-based bid protest procedures.

By way of background, the complainant, Thales DIS Canada Inc. (Thales), who is part of a French-based multinational company with a Polish subsidiary that produces identification cards and passports at its facility in Gdansk, Poland, challenged the domestic production requirements contained in an Ontario government tender call but ultimately lost that protest.

While the Ontario government set up an opaque internal bid protest mechanism for itself, it left other Ontario public sector institutions who are subject to the same treaties fending for themselves in a legal vacuum. While bid protest procedures could have been implemented as they were federally through the creation of a specialized tribunal, or as they were in Western Canada through binding commercial arbitration procedures, the Ontario government's lack of leadership in this area, when combined with the Ontario Court of Appeal's restrictive approach, and the Supreme Court of Canada's lack of interest in considering these critical issues, does little for Ontario's international credibility at a time when global trade issues are a matter of increasing national importance. (see Supreme Court Rejects Ontario Bid Protest)

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

Process Defects Lead to Legal Disputes

Flawed Procedures Trigger Litigation

As revealed by recent case law, flawed bidding processes are leading to re-evaluation orders and legal disputes over cancelled contract awards.

For example, in its January 2023 determination in *Cistel Technology Inc. v. Department of Health*, the Canadian International Trade Tribunal rejected the complaint of a winning bidder who had its contract award revoked after the federal government's discovery of a process error. Even though the Tribunal ultimately upheld the Department's decision to cancel and retender, this case serves as a useful reminder that bidding procedures should be carefully followed to avoid downstream bid disputes. (see Procedural Defects Lead to Cancelled Award)

Further, in its February 2023 determination in *Chantier Davie Canada Inc. and Wärtsilä Canada Inc. v. Department of Public Works and Government Services*, the Tribunal ordered a re-evaluation after finding latent defects in the government's evaluation criteria. The Tribunal found that the government was unreasonable in its interpretation of the criteria since the evaluators sought to eliminate all risk of work stoppages. As the ruling stated, "it is impossible to completely eliminate the risk that a workplace will be in a strike or lockout through an evaluation criterion." As this case illustrates, public institutions should avoid applying unrealistic standards in their evaluations. (see Defective Criteria Lead to Re-Evaluation Order)

Finally, in its November 2024 decision in *Canada (Attorney General) v. EllisDon Corporation*, the Federal Court of Appeal upheld a Tribunal decision that awarded damages against the federal government over a contract award termination. After the contract award, EllisDon Corporation was put under a stop work order for several months while the government investigated an evaluation error and ultimately revoked the award. EllisDon successfully argued that this improperly prevented it from bidding on other projects during that stop work period. As these cases illustrate, after-the fact rectifications can prove to be costly and time-consuming exercises when compared to doing things properly in the first place.

Murky Procurement Practices: Public institutions need to implement proper procurement policies and practices to better protect the expenditure of public funds. (see Weak Conflict Controls in Canadian Procurement, Ontario Audits Probe Liquor and Gaming Contracts, Collusion in Public Procurement, External Consultants and Inside Advantage, Establishing Proper Approval Protocols, Using Framework Agreements for Centralized Spending, City Deals with Bid Access Request, and Defending Canada from Trump's Tariff Firewall)

Paul Emanuelli

Sub-Federal Infractions

Audits Reveal Problematic Provincial Procurements

While Canadian federal audits have attracted widespread national attention in recent years, provincial governments and agencies are not immune from adverse audit reports exposing their own problematic procurement practices. For example, in its 2024 annual report, Ontario's Auditor General found that the provincial government failed to follow its established procedures in a call for development (CFD) process for the redevelopment of Ontario Place.

Citing many instances in which the process rules were not followed, the report concluded that the CFD decisions "were not fair, transparent or accountable to all participants."

The Auditor General recommended that future land development contract awards follow more clearly defined procurement procedures and best practices. (see Audit Finds Flawed Ontario Place Process)

In its February 2024 report entitled *Value for Money: Development of Transitional Care Facilities*, Nova Scotia's Auditor General also found a lack of due diligence in Nova Scotia healthcare facility procurements. (see Nova Scotia Health Audit Finds Lack of Due Diligence)

Further, in its 2024 performance audit, New Brunswick's Auditor General reviewed $173 million in travel nurse contracts and concluded that a lack of clearly defined vendor selection processes and poor contract oversight resulted in undue risk to the province.

Turning to Western Canada, in its November 2024 report entitled *Highway Maintenance Contracts – Transportation and Economic Corridors*, Alberta's Auditor General found multiple oversight gaps in the administration of provincial highway maintenance contracts.

Finally, in its 2024 report entitled *Procurement and Contracting – Government of Yukon*, Canada's Auditor General found multiple instances where public bodies failed to comply with the advice given by the government's central procurement agency, noting 110 instances out of 291 consultations where "the department's advice was not followed."

As these reports illustrate, procurement governance within provincial and territorial institutions remains a work-in-progress. Moving forward, these institutions need to redouble their efforts to implement proper procurement policies and practices to better protect the expenditure of public funds.

Paul Emanuelli

Municipal Audits Target Local Procurement

Montreal and Toronto Reports

Spotlight on Due Process: As these recent municipal audits reveal, municipal institutions should bolster their oversight practices to better ensure fair competition and value for money in their procurements.

While federal and provincial audits tend to attract widespread attention, recent municipal audits have exposed serious concerns over local procurement practices.

In its 2023 annual report, Montreal's Inspector General noted an increase in the number of complaints from bidders, suppliers and subcontractors. Those cases accounted for 42 percent of all complaints received that year by the oversight office.

The report identified biased specifications and anti-competitive bidding practices as two increasing risk areas in municipal procurement. For example, the report cited a snowblower procurement where the specifications were "so detailed as to suggest that a specific product was being targeted" and that the solicitation was "directed at a single company." The Inspector General's intervention ultimately led to the cancellation of the tender call so the specifications could be revised. As the report noted, the snowblower complaint was reflective of a broader trend of suppliers pressuring municipal institutions to bias their specifications. As the Inspector General cautioned, "the tactics used by certain suppliers to promote their products clearly compromised a transparent, fair, neutral and impartial competitive bidding process" and resulted in significantly higher bids. In fact, the report documented a situation where a vendor attempted to position itself as a "sole supplier" by offering its competitors "substantial amounts to withdraw from a public call for tenders." Citing potentially fraudulent and criminal conduct, the Inspector General transferred the case to the police for further investigation.

Similarly, in its February 2024 report entitled *Auditor General's 2023 Annual Report on the Fraud and Waste Hotline*, Toronto's Auditor General released the results of an internal investigation that was initially prompted by a complaint to the City's fraud hotline. That investigation uncovered multiple conflicts of interest involving a now-former City employee. On four separate occasions, while still working for the City, the former employee performed work as a subcontractor under City-issued contracts. The employee failed to disclose or seek the City's approval prior to any of those engagements. The report recommended improved fraud awareness training for staff. (see Municipal Fraud Hotline Uncovers Employee Conflict)

Finally, in a December 2024 report entitled *Audit of Software Acquisition and Licence Management*, Toronto's Auditor General found that the City of Toronto spent over $11 million for unused software licenses between 2020 and 2024. The Auditor General concluded that the City needed to improve its project planning "to ensure timely deployment of licences when making bulk purchases" in order to "avoid purchasing licences that are not ready to be deployed."

Transit Intrigues: After determining that the TTC had no control over the new PRESTO card system and had little choice but to adopt it as part of a broader regional initiative, and after ruling that the union waited too long to bring its legal challenge, the arbitrator dismissed the case. Similarly, the Alberta Labour Relation Board's ruling in the matter of *Amalgamated Transit Union, Local 569 v. City of Edmonton* concluded that the new work did not fall within the scope of the existing collective bargaining agreement since the City did not exercise "common control and direction" over the operations of the new contractor.

Unions Challenge Transit Outsourcings

Toronto and Edmonton Transit Disputes

Spotlight on Contract Scoping

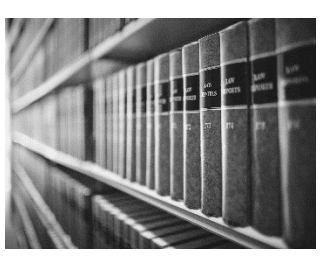
In two recent labour relations rulings, municipal transit authorities faced legal challenges in connection with the partial outsourcing of their public transit operations. These cases highlight some of the additional risks that should be considered when institutions plan on contracting out services that intersect with work that is currently performed by unionized employees.

In light of these recent cases, project teams should add labour and employment considerations to the expanding list of due diligence issues that they need to consider when scoping contracts and developing material disclosure procedures for complex outsourcing procurements.

Tendering Time Warp: While some Canadian construction associations want to keep government tendering practices tied to the outdated principles of *Ron Engineering,* a 1981 Supreme Court of Canada case that dealt with a bid dispute from the 1970s, legal and industry developments in the subsequent decades have rendered that case law largely obsolete. After over two decades of innovation in the use of negotiated RFPs in public sector procurement, it is safe to say that *Ron Engineering* and its "Contract A" principles have run their course. In 2025 Canadian public institutions should no longer tie themselves to tendering procedures from the 1970s.

Industry Groups Try to Turn Back Time

Legal Considerations for Negotiated RFPs in Canadian Public Procurement



In response to construction industry concerns in British Columbia and Alberta, in 2024 The Procurement Office released two practice advisories and a white paper to clarify the use of negotiated RFPs (NRFPs) in the Canadian public sector.

On June 18, 2024, the British Columbia Construction Association (BCCA) released an industry alert entitled "Removal of Contract A" which contained a series of assertions in relation to the use of non-"Contract A" solicitation documents by public institutions in British Columbia. Then on August 16, 2024, the Alberta Construction Association (ACA) issued an industry alert entitled "Information Bulletin: Contract A Provisions in Procurement" regarding the removal of Contract A bidding rules by public institutions in Alberta. Both associations raised concerns that the removal of "Contract A" bidding rules would compromise the integrity of the public procurement process. The Procurement Office released two practice advisories and a detailed whitepaper to address those concerns.

The Procurement Office's first practice advisory, issued in response to the BCCA's industry alert, clarified that NRFPs are not a new practice, that public sector NRFPs remain subject to strict legal standards and fairness duties, that the use of "Contract A" tendering rules has never been legally required in Canadian public procurement, and that the reports of non-enforceable rules under NRFPs were greatly exaggerated.

The practice advisory also highlighted some of the key benefits for bidders under NRFP procedures, including not being exposed to financial penalties when bidding, as well as the ability to rectify bids before being rejected for non-compliance. (see Procurement Office Practice Advisory Regarding BCCA Industry Alert as well as Alberta Arbiter Upholds NRFP Award)

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>
> - Paul Emanuelli, Procurement Law Office

The Procurement Office's second practice advisory, issued in response to the ACA's industry alert, further clarified that NRFPs do not preclude the use of CCDC contract documents, do not violate public procurement rules, and do not remove public sector due process duties. (see Procurement Office Practice Advisory Regarding ACA Industry Alert) These practice advisories were a supplement to the detailed legal analysis contained in The Procurement Office's related legal whitepaper. (see Legal Considerations for Negotiated RFPs in Canadian Public Procurement).