Strategic Procurement Update

Critical Trends

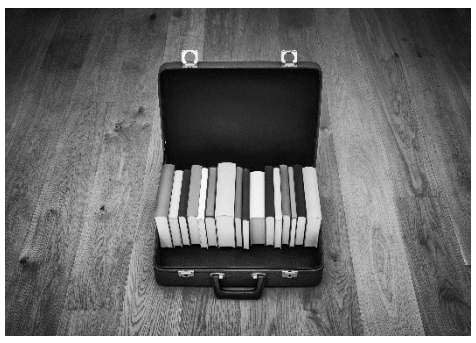
The Procurement Office

Focus on Portfolio Management

Piggybacking Struck Down in Legal Challenges

Successful legal challenges against piggybacking schemes have been well-documented across multiple jurisdictions.

For example, in *LDV, Inc.*, the New York State Comptroller rejected a contract award under a "piggyback" process, ruling that a second-stage process was required when standing agreements include multiple suppliers. (see State Comptroller Strikes Down Piggyback Purchase) In *Accela, Inc. v. Sarasota County,* the Florida Second District Court of Appeal struck down a piggyback contract due to scoping issues since the award was outside the scope of the original contract. (see Court Rules Against Out-of-Scope Piggyback) In *Autorità Garante della Concorrenza v. Azienda Socio-Sanitaria*, the European Court of Justice determined that public procurement rules prohibit open-ended piggybacking onto the standing agreements of other institutions. (see Court Strikes Down Piggybacking Clause) In *Société de transport de Montréal regarding contract management of the Bellechasse Transit Centre*, Montreal's Inspector General determined that a construction management agreement clause that allowed direct awards to third-parties breached applicable public procurement rules. (see Agency Engages in Bid-Shopping Sole-Source)



Lessons Learned: In *Knowledge Circle Learning Services Inc. v. Department of Health*, the Canadian International Trade Tribunal ruled that the extension of supplier roster agreements beyond their original terms breached the trade treaties and awarded damages to the complainant. (see Tribunal Narrows Use of Urgency Exception)

Open Framework Arrangements: Current Canadian trade treaty rules call for the use of Open Framework Agreements that comply with global standards and restrict the use of prequalification lists and supplier rosters that create barriers to open competition.

Feature Article

Leveraging Compliant Framework Agreements

In situations involving multiple, relatively small contracts for the same type of good or service, it may not be efficient or cost-effective to initiate a new open procurement process each time that a good or service is required. As recent government procurement audit reviews have shown, there remains a great untapped potential to consolidate the large volume of small-scale government expenditures that are often conducted through the department-specific use of purchasing cards, or otherwise through fragmented purchasing, into a more cohesive and organized government procurement system. Through the proactive and strategic development of open Framework Agreements, public institutions could address an area of widespread inefficiency and waste, while also enabling further participation by smaller suppliers within the government procurement cycle.

The 2017 *Canadian Free Trade Agreement* (*CFTA*) and *Canada-Europe Comprehensive Economic and Trade Agreement* (*CETA*) both contain protocols governing the use of Framework Agreements. The *CFTA* regulates the prequalification of suppliers and now requires an annual re-posting where supplier prequalification lists will be used for more than three years. It also prescribes general disclosure requirements surrounding the evaluation and use of supplier lists and standing arrangements, including the call-up processes for awarding specific work under those frameworks. The *CETA* provisions regarding the use of prequalification processes and supplier lists are similar to the *CFTA* rules, but the *CETA* rules include the ongoing obligation to allow new suppliers onto existing suppliers lists.

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

Are Centralization Savings a Myth?

Ontario Remains a Slow-Motion Work-in-Progress

In Ontario, the idea of achieving significant procurement savings through centralization is not new. In fact, in February 2012, Don Drummond, the Chair of the Commission on the Reform of Ontario's Public Services, released a cost-cutting report entitled *Public Service for Ontarians: A Path to Sustainability and Excellence*, also known as the *Drummond Report*. The report made recommendations on how to balance the provincial budget, maintain a sustainable fiscal environment for government operations, and achieve value-for-money. To address Ontario's escalating fiscal crisis, Drummond recommended cutting procurement-related bureaucratic red tape and achieving better value-for-money by removing duplication and consolidating public sector purchasing. (see Report Says Pool Purchasing to Cut Costs)

However, centralization savings have proven hard to realize in practice. For example, in its 2009 annual report, Ontario's Auditor General determined that OntarioBuys, a provincial initiative launched to help the broader public sector save money through the consolidation of procurement functions, was unable to substantiate its claimed savings. As the report noted, OntarioBuys failed to properly administer the $148 million in funding it provided to the broader public sector. The report noted that "other than for one project with savings of $20 million, the reported savings provided to us were questionable". In fact, those saving were never directed back to the health sector but were instead redirected to a back-office technology project. (see Ontario Buys Bureaucracy in Cost Saving Scheme)

In 2020 the Ontario government created Supply Ontario, a provincial procurement agency with a mandate to "strengthen supply chain management and procurement across the public sector, ensuring that Ontario ministries, provincial agencies, hospitals, school boards, children's aid societies and more have access to high-quality, timely, reliable products at the best value." As of 2024 Supply Ontario's website states that the new agency is "currently working on developing our capacity, including strategies for data management and category leadership. When fully operational, we will centralize contracts for common products to build a smarter, stronger and more connected public sector supply chain." The jury is still out on whether real cost-savings or process efficiencies will ever be realized through this centralization initiative.

More Transparency: When compared to the bid protest mechanisms that have operated for decades at the federal level in Canada, sub-federal bid protest mechanisms remain a relatively new and evolving area under international and domestic trade treaty rules. However, provincial-level jurisdictions in Western Canada have recently implemented treaty enforcement mechanisms at the sub-federal level. (see Western Canada Implements Bid Protest Mechanisms)

Paul Emanuelli

Anti-Competitive Practices Overruled

Rulings Regulate Sole-Sourcing and Restrictive Rosters

Recent bid protests have brought greater attention to the sole-sourcing and prequalification practices of Alberta municipalities. In *PMH Insights Inc. v. Parkland County,* an arbiter found that Parkland County's software sole-source breached the trade treaty rules. The dispute dealt with the direct acquisition of management software. The arbiter ruled that the County failed to properly document its expenditure to establish that the award fell below the thresholds. The arbiter found the County in breach of the treaty and ordered the County to pay the complainant $10,000 in fees and costs.

In *Parkland Geotechnical Consulting Ltd. v. The City of Red Deer,* an arbiter found that the municipality breached the trade treaty rules by using unnecessarily restrictive conditions in a pre-qualification process for consulting services. The arbiter ruled that reducing the roster list to only five consultants and extending the duration of the closed framework arrangement to five years was too restrictive to competition and was in violation of the trade treaty rules. The arbiter directed the municipality to rectify the breach and ordered it to pay the complainant $28,000 in fees and costs.

Federal Infractions

In *Re Polaris Inflatable Boats (Canada) Ltd.*, the Canadian International Trade Tribunal confirmed that the duty to compete contract awards under the trade treaties goes beyond the creation of master agreements and also applies to the specific work awarded under those master agreements. The case involved the creation of a National Master Standing Offer for the acquisition of rigid-hull inflatable boats, parts, and accessories. The complainant was awarded a master agreement, but took issue with the manner in which the product orders were managed in favour of a competing contractor on the roster. The Tribunal found that the treaty requirements continued to apply beyond the award of the master agreement and regulated how the government orders a service or product under the master agreement.

Concerns over the transparency of awarding discrete contract assignments under master agreements led to amendments to the federal *Supply Manual*, which now contains express provisions acknowledging the application of relevant trade treaty rules, along with protocols that now include a minimum posting period, refresh provisions to allow new suppliers to prequalify on request, and annual refresh opportunities for new suppliers to prequalify. These rules also acknowledge that where individual call-ups are valued above the trade treaty thresholds, they must comply with trade treaty competitive bidding requirements. (see Canadian Group Purchasing in the Spotlight)

Paul Emanuelli

Audits Scrutinize Central Spending

Better Resourcing Required

Due Process: In March 2022, Jamaica's Integrity Commission raised concerns over the administration of the government's contractor registry system and recommended that the government update its procedures to avoid the risk of fraud and arbitrary decision-making. The report is a useful reminder to all public institutions that prequalification procedures are subject to due process. (see Registry System Subject to Due Process)

A long series of audits across multiple jurisdictions have exposed ongoing governance gaps in centralized spending. For example, in its March 2012 report entitled *The Government Procurement Card*, the UK National Audit Office (NAO) found irregularities, poor data management, and fragmented spending in its review of the government purchasing card program. (see Audit Finds Flaws in Use of Purchasing Card)

In its February 2013 report entitled *Improving government procurement*, the UK NAO reviewed the government's central purchasing practices and found duplication, weaknesses in central administration, and a lack of strategic planning and internal accountability. (see Deficiencies in Central Purchasing)

In its March 2013 report *Police procurement*, the UK NAO found that a lack of centralization in police procurement left untapped opportunities for cost savings and efficiency. The report concluded that the central government's "light touch" approach to local government undermined its ability to achieve value-for-money. (see Lost Opportunities in Police Procurement)

In its May 2014 report entitled *A review of collaborative procurement across the public sector*, the United Kingdom National Audit Office found inefficiency and duplication in collaborative purchasing across government. The report found that government bodies were not maximizing their group purchasing potential and needed to co-ordinate their efforts more effectively to better achieve value-for-money for the taxpayer. (see Inefficiency in Collaborative Purchasing)

In its October 2017 report entitled *Obtaining the Best Value Through the Use of Vendor Rosters*, Toronto's Auditor General recommended that the City develop clearer selection guidelines to prioritize cost in framework arrangements. (see Audit Calls for Improvements to City Frameworks) In its December 2018 report entitled *Managing the Bank of England's Central Services*, the UK NAO found that the Bank of England needed to bolster compliance with its central procurement processes. (Bank of England Centralization a Work-in-Progress) In its 2019 annual *Report to the Legislative Assembly,* the Auditor General of Prince Edward Island found weak procurement oversight in low-value contracts, noting that one-third of reviewed awards were improperly sole-sourced. (see Report Finds Rule Breaches in Small Contracts) In its March 2020 report entitled *Australian Government Procurement Contract Reporting Update*, Australia's National Audit Office found a disproportionate allocation of work under supplier roster arrangements went to a small percentage of contractors and 40 percent of scope changes more than doubled the value of the originally awarded contracts. (see Audit Finds a Lack of Post-Award Transparency)

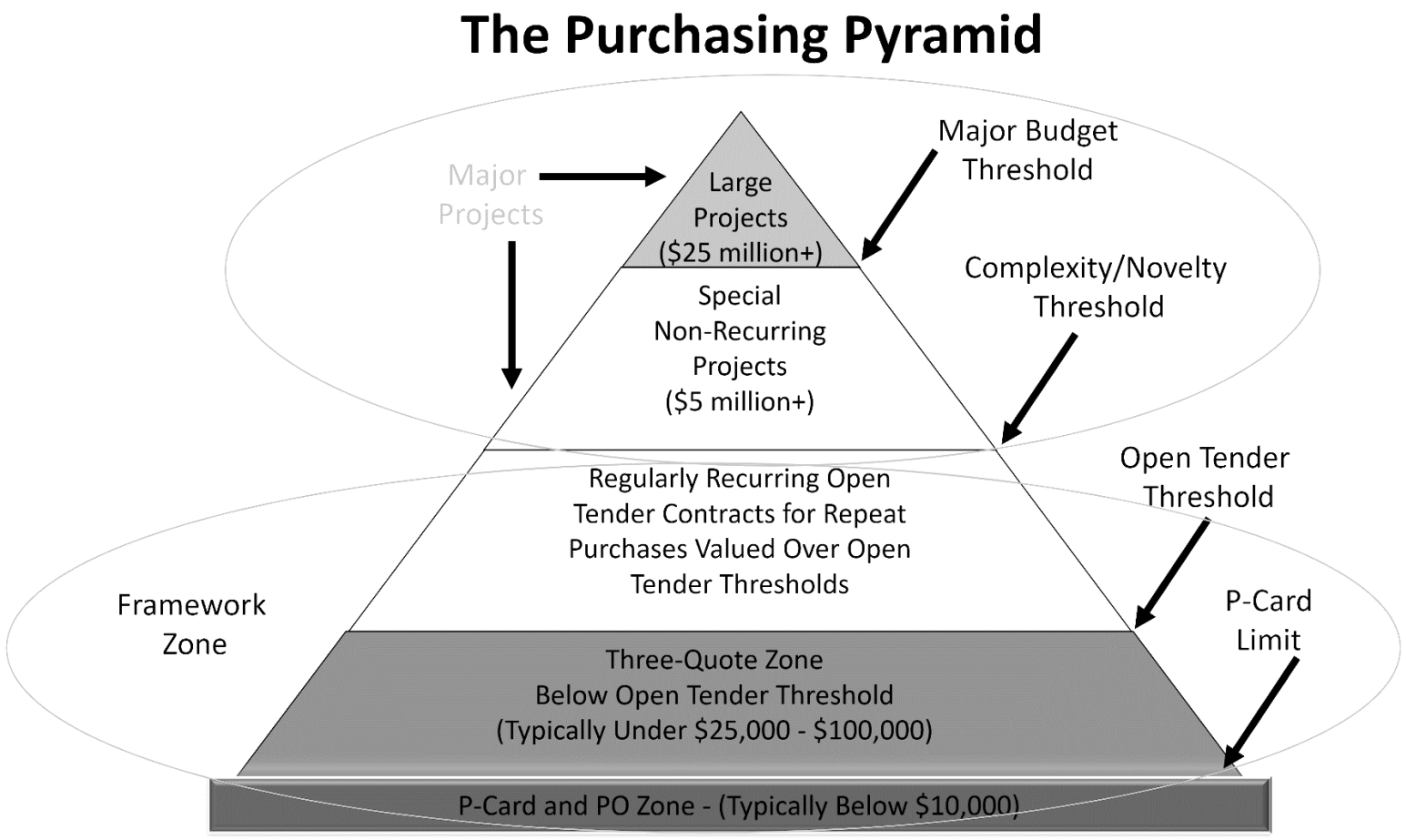
Buyer Beware: The days of public institutions engaging in non-transparent contract award practices under supplier lists, prequalification rosters, and vendor-of-record arrangements are coming to an end. In recent years, these "piggybacking" or "onboarding" arrangements have been repeatedly challenged in bid protests and audit reports as a source of non-competitive and non-transparent contracting. (see Buyer Beware of Piggybacking and Onboarding and Piggyback Schemes Lead to "Procurement Free-for-All") However, proper administered framework arrangements have been successfully defended in multiple legal challenges (see Court Upholds Stand-By Contracts for Fire Services, Framework Agreement Not Anti-Competitive, UK Framework Agreement Challenged, and Court Rejects Attempt to Disrupt Reverse Auctions)

Scope Changes Under Scrutiny

Is "Onboarding" Just Another Word for Sole-Sourcing?

While most of the scrutiny on improper group purchasing practices in Canada has historically been directed towards the federal government, the trend has changed in recent years, with greater attention being paid to the transparency of provincial and broader public sector practices. For example, in its November 2016 report on workstation support services entitled *Workstation Support Services Contract: An Audit of Due Diligence*, the British Columbia Auditor General raised concerns over provincial onboarding practices.

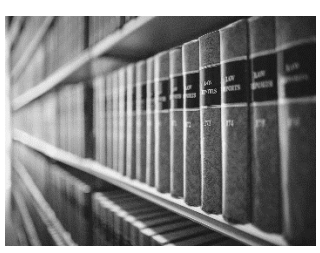
The report found that the provincial government onboarded an additional 50,000 workstations onto a 2004 contract, which was originally valued at $300 million over 10 years, thereby adding an additional $395 million to the original contract award. The audit found inadequate due diligence and a failure to explore other procurement options for the services in question. The report recommended that the government establish better practices to manage any future onboarding initiatives.



Taking a Big-Picture Approach: Public institutions need to take a big picture approach to portfolio management when dealing with multiple interrelated procurements. As these case studies illustrate, the failure to adopt proactive and long-term strategic approaches can have severe adverse consequences on government operations. (see UK Battles Ongoing Project Funding Shortfalls, Audit Warns of P3s Coming Home to Roost, Big-Firm Bias and State-Sponsored Monopolies, and Big Firms Monopolize Brexit Consulting) While leveraging new technologies can help accelerate the tendering cycle, those emerging strategies remain subject to due process scrutiny. (see Audit Calls for Improvements in Reverse Auctions)

Audits Call for Portfolio Management

Multiple Jurisdictions Impacted by a Lack of Co-Ordinated Spending



Recent audits highlight the need for improved strategic portfolio management to better ensure the proper co-ordination of interrelated procurements that support a common program area.

For example, in its 2021 report entitled *Securing Personal Protective Equipment and Medical Devices*, the Auditor General of Canada found that Canada's federal government was forced to play catch-up in securing personal protective equipment due to the long-standing and well-known deficiencies in the emergency stockpiling program run by the Public Health Agency of Canada. In fact, the COVID-19 crisis revealed systemic weakness in the portfolio management practices of government institutions at all levels. The Ontario Auditor General's November 2020 report entitled *COVID-19 Preparedness and Management Special Report on Emergency Management in Ontario—Pandemic Response* documented long-standing deficiencies in Ontario's emergency planning portfolio. While all jurisdictions were forced to cope with the COVID-19 crisis, from a comparative perspective, Ontario's Auditor General found that other Canadian provinces had followed better emergency management practices to respond to the pandemic.

Weak portfolio management in the health sector has also been recently documented in other jurisdictions. For example, in its 2020 report entitled *Performance Audit of Select District Hospitals in Arunachal Pradesh*, India's Comptroller and Auditor General found that poor planning resulted in major delays in drug procurements relied on by District Hospitals.

Similarly, in its September 2020 report entitled *VA Acquisition Management: Actions Needed to Improve Management of Medical-Surgical Prime Vendor Program and Inform Future Decisions*, the U.S. Government Accountability Office (GAO) found weak portfolio management practices in Department of Veterans Affairs drug procurements.

> "Poor portfolio planning is a widespread problem."
>
> - Paul Emanuelli

Weak portfolio management is not limited to the health sector. In its January 2021 report entitled *Most Acquisition Programs Are Meeting Goals but Data Provided to Congress Lacks Context Needed For Effective Oversight*, the GAO noted that the Department of Homeland Security needed better coordination in multiple portfolio spending areas. In its November 2020 report entitled *Joint Cyber Warfighting Architecture Would Benefit from Defined Goals and Governance*, the GAO identified the need to enhance the governance structures and better define uniform technology goals. The GAO came to a similar conclusion in its September 2020 report entitled *Selected Federal Agencies Need to Take Additional Actions to Reduce Contract Duplication* and in its December 2020 report entitled *Federal Agencies Need to Take Urgent Action to Manage Supply Chain Risks*. Finally, in its December 2020 report entitled *Information Technology (IT) Systems and Cybersecurity at Metrolinx*, Ontario's Auditor General identified the need for better portfolio co-ordination to deal with IT security threats and business continuity issues.