Strategic Procurement Update

Critical Trends

The Procurement Office

Focus on Process Improvement

Feature Case Study

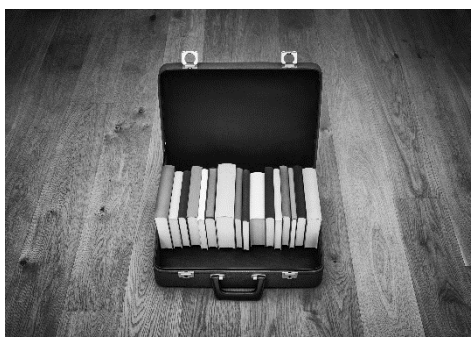
Pandemic Exposes Systemic Flaws

Expedient Non-Compliance

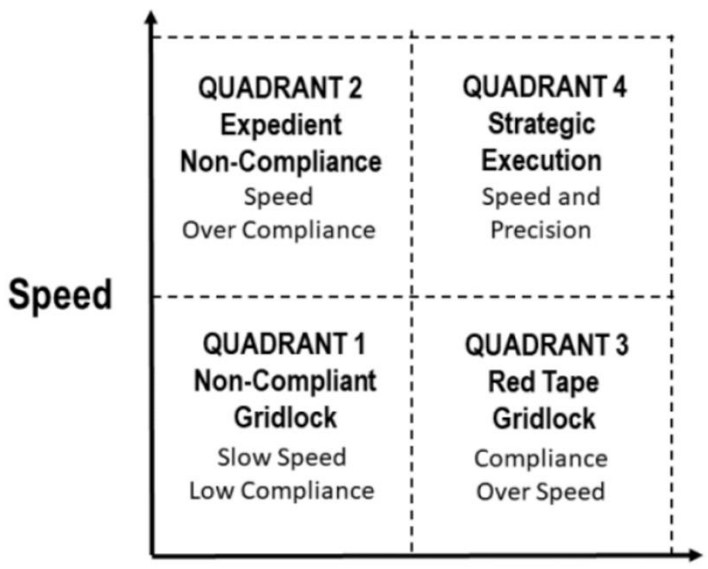
The global pandemic shone a light on weak procurement practices across multiple jurisdictions. Recent audits reveal how pre-existing defects in government procurement systems undermined pandemic response efforts and how these systemic weaknesses compromised the management of public resources during a period of unprecedented government spending. (see COVID-19 Exposes Systemic Weaknesses)

In fact, rushed pandemic purchasing resulted in significant lapses in transparency, record-keeping, probity, value-for-money, and oversight as public institutions across multiple jurisdictions parted company with due process and prioritized expedience over good governance. (see Pandemic Purchasing Bypasses Due Process)

These rushed contract awards raised a series of red flags relating to uncompetitive practices and flawed decision-making processes (see Rushed Awards Raise Red Flags and The Emergency Rule) and highlighted how rushed spending increases the risk of irregularities and fraud in the government procurement process. (see Rushed Procurements Raise Fraud Risks)



Lessons Learned: Public institutions that practice strategic execution are serious about procurement governance and embrace a formal culture of proactivity and advance planning. They adopt updated procedures that enable high-speed precision. They allocate sufficient time and resources to better ensure successful project execution.



Senior-Level Infractions: While Strategic Execution may be a road less travelled in public procurement, it is the clear path forward for institutions that put a premium on good governance.

Feature Article

Forging a Road Less Travelled

While many public purchasing bodies lack a cohesive operating culture, all public institutions have at least one de facto organizational culture that governs their procurement practices. In fact, most institutions have multiple competing cultures that operate at cross-purposes with one another. As this article discusses, these organizational cultures can be divided into four quadrants, with three common but flawed cultures, and a fourth less common culture that adopts a balanced and strategic approach to procurement governance.

The natural state of public procurement is anarchy, not order. In fact, if left ungoverned, the crosscurrents created by operational time pressures and due process standards are guaranteed to cause turbulence in your tendering cycle. Organizations that are trapped in Quadrant 1: Non-Compliant Gridlock suffer from slow and inconsistent procedures and a high level of non-compliance.

Many institutions attempt to flee the state of procurement anarchy by rushing north to Quadrant 2: Expedient Non-Compliance, where they embrace a de facto organizational culture that places operational deadlines over everything else. Institutions that want to escape the anarchy of Quadrant 1 but have no appetite for the high-speed pursuits of Quadrant 2 tend to head east and seek refuge in Quadrant 3: Red Tape Gridlock. The de facto culture in this quadrant prioritizes compliance over speed, at least superficially. Project teams will remain mired in red tape for only so long before they panic due to time pressures, break ranks, and start cutting corners.

Strategic Execution is the opposite of procurement anarchy. In this quadrant, time pressures are properly balanced against due process standards as organizations strategically forge a path between expedience and gridlock.

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

Planning and Training Key to Innovation

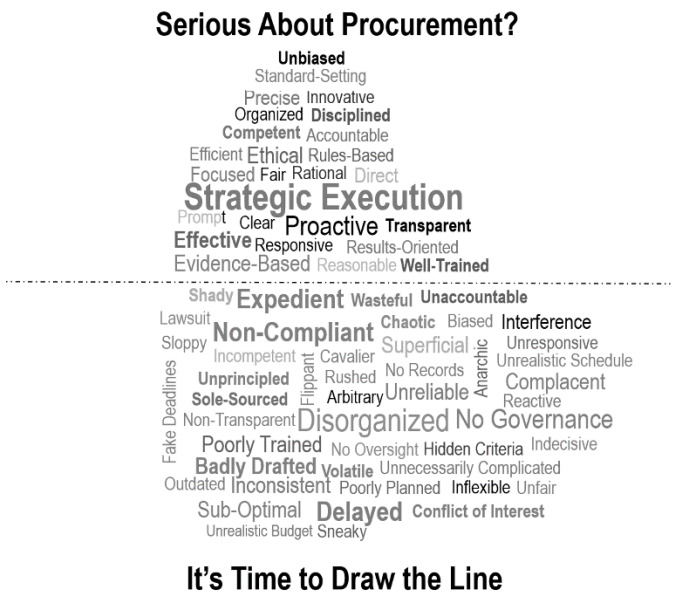
Proactivity Critical to Successful Project Delivery

While public procurement audits often raise concerns over recurring major project failures, an increasing number of recent audits are finding projects that were delivered on time, on budget, and in compliance with due process rules. These case studies illustrate how planning and training are key to innovation and successful project delivery.

Notwithstanding ongoing concerns over project delays, project teams should be careful to avoid rushing a procurement based on artificial contract award deadlines, since rushed procurements are a key cause of flawed contracts and long-term project failures. While it may seem paradoxical, many recent reports highlight the importance of slowing down the project planning process to ultimately help accelerate proper project delivery.

For example, in its May 2021 report entitled *Megabang for megabucks: Driving a harder bargain on megaprojects*, the Grattan Institute, an Australian think tank, warned against rushing headlong into poorly planned projects since this approach often leads to disputes and delays. The report recommends that public institutions formalize procedures for proper contract scoping, while building sufficient time into their procurement planning to properly consider those key design decisions. Not all recent audits paint the same bleak picture regarding recurring process breaches, cost overruns, and delays. In fact, in its November 2020 report entitled *Scottish Public Pensions Agency*, Audit Scotland found that the Scottish Public Pensions Agency extended an existing contract for its new pensions platform replacement project to establish appropriate project governance and conduct proper project planning.

Similarly, in its January 2021 report entitled *Management of the Search and Rescue Aircraft Contract*, Australia's National Audit Office concluded that the government's project was delivered on time, on budget, and in compliance with its original project scope. As the audit noted, the project team was granted sufficient advanced planning time to ensure proper execution. In fact, many recent public audits have concluded that staff training is key to effective project execution. In its December 2020 report entitled *Government of Guam Procurement Training and Certification Program*, Guam's Office of Public Accountability found that procurement disputes decreased as procurement training increased. As these reports illustrate, building in time for strategic planning and ensuring that project teams are properly staffed with trained personnel increases the success rate of major procurement projects.



Getting Serious About Procurement Delays: Many organizations complain about procurement delays but few are serious about leveraging the strategic principles needed to proactively avoid them.

Paul Emanuelli

How to Avoid Procurement Delays

Leveraging Annual Procurement Plans

While some may be surprised and frustrated by your organization's annual cycle of procurement gridlock, systemic procurement delays are inevitable unless you adopt proactive strategies to avoid them. You can accelerate your tendering cycle by developing an annual procurement plan with advanced planning for major projects and by establishing supplier rosters for repeat purchasing.

Every year, many institutions sit in procurement limbo, waiting for budget approvals. Every year, those same institutions find themselves in procurement gridlock once their budgets are approved and everyone converges on the procurement department at the same time to develop and release their bid solicitations.

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Failing to Plan for Peak Demand

Since carrying excess procurement capacity to meet peak demand is not a realistic strategy for most resource-constrained organizations, the solution lies in flattening the demand curve through strategic planning and a realistic understanding of procurement timeframes. Organizations could quickly reduce their level of procurement gridlock, and the compliance risks that it creates, by adopting annual procurement plans that help flatten the curve of peak demand. By allowing work to begin on time-sensitive and complex projects prior to annual budget approvals, bid solicitations can be finalized in advance for quick release once budgets are confirmed.

Further, time-sensitive contracts tend to fall in recurring areas. An annual procurement plan should stream recurring purchases to pre-established supplier roster framework agreements that use fast-tracked invitational tendering, as well as direct rotational awards for lower value contracts, so that repeat purchases never have to take up space in the annual gridlock of publicly posted projects in the first place.

Rather than remaining trapped in an annual cycle of gridlock, advanced planning and portfolio management would go a long way to resolving the existing logjams in your procurement cycle.

Paul Emanuelli

Establishing Proper Approval Protocols

Avoiding Improper Interference

Oversight Procedures: Public institutions should establish proper approval protocols to ensure that their contract awards are administered in accordance with the complex due process standards that apply to public procurement.

In public sector tendering, the evaluation of bids is typically delegated to an internal team who scores competing offers against pre-established criteria and makes a recommendation to a higher-level oversight body for a formal award.

Since these procedures are subject to strict due process standards, public institutions should establish award protocols that protect against improper interference, guard against conflict of interest, and properly balance the competing duties of transparency and confidentiality.

While providing the ultimate contract award approvers insufficient or misleading information can prevent them from making an informed contract award decision, which can prove fatal to the legal validity of the resulting contract, a careful balance must be struck since providing too much information to the final approvers can open the door to out-of-scope interference with the evaluation process, which can also undermine the legal validity of the final award decision.

In fact, when internal award procedures are not clearly defined, there is a heightened risk that the ultimate approvers will overreach in the scope of their oversight function.

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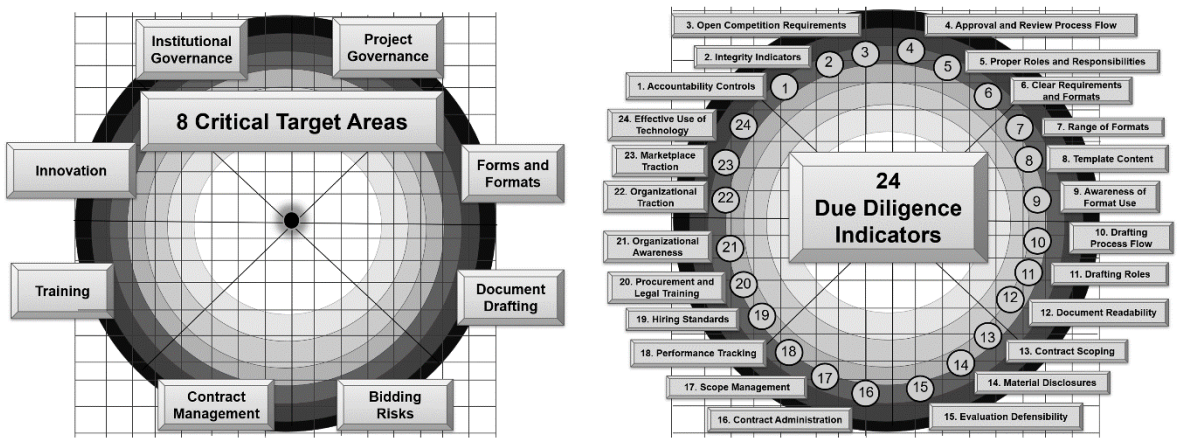
For example, senior approvers do not have the authority to change the evaluation rules after bids are submitted. Nor is it typically appropriate to revisit the scoring decisions made by the evaluation team since, as proven by a long line of recent rulings across multiple jurisdictions, this can result in improper interference with the independent authority delegated to the evaluation team and undermine the integrity of the award decision. To be defensible, a public procurement process must also be shielded from conflicts of interest. The individuals involved in the process, including the senior officials who ultimately make the contract award decision, should be screened to ensure they are free from conflicts. Contract award approvals also remain subject to confidentiality duties, even when the ultimate approval authority is a body, such as a municipal council or school board, that typically conducts its business in a public forum. (see Establishing Proper Approval Protocols and Recent Cases Reveal Weak Approval Practices)

How Do You Measure Up?

Assessing the Results



Identifying Governance Gaps: Public institutions need to update their procurement practices or risk becoming the next non-compliance case study.

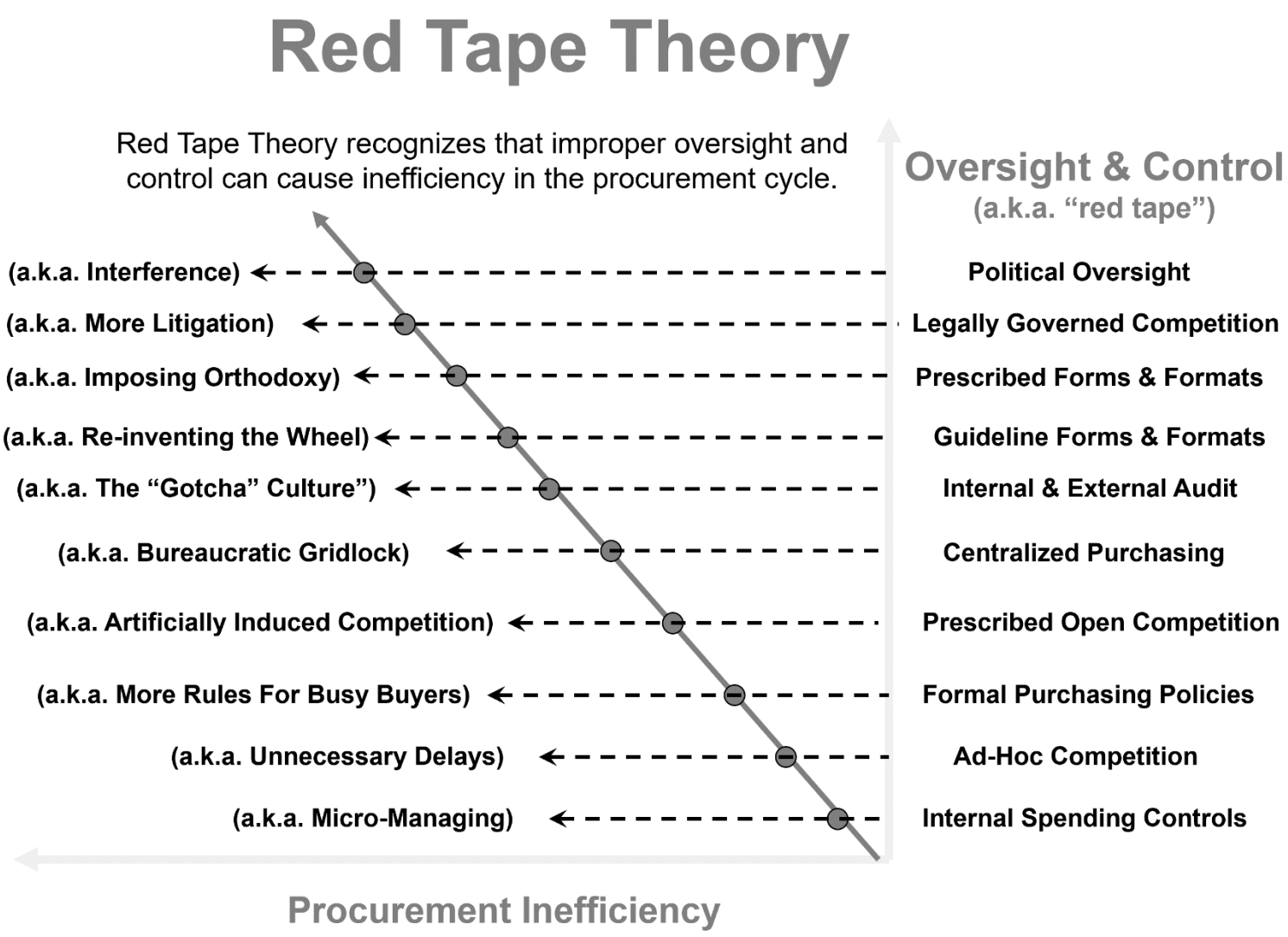
Navigating the Complexities of Public Procurement

The State of Compliance

Spotlight on Trade Treaties

After adopting the Canada-European Union *Comprehensive Economic and Trade Agreement* (*CETA*) and the domestic *Canadian Free Trade Agreement* (*CFTA*) in 2017, Canadian public institutions continue to face significant challenges in meeting the global governance standards contained in those trade treaties.

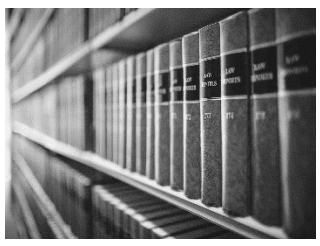
Public institutions need to leverage lessons learned under the new trade treaties and adopt an updated suite of policies, procedures, and templates, along with related training programs, to help achieve compliance with the most current legal developments and industry practices.



Striking the Right Balance: The Presumed Efficiency Fallacy assumes that increasing oversight and control will increase the efficiency of the procurement process. However, Red Tape Theory recognizes that improper oversight and control can cause inefficiency in the procurement cycle. While some public institutions have failed to implement appropriate procurement oversight, others have mired their operations in overregulation and red tape. Moving forward, public institutions need to strike the right balance between accountability and efficiency by fine-tuning their delegation practices and updating the procurement training provided across their organizations.

Audits Call for Improved Oversight

Adding More Red Tape Does Not Improve Outcomes



Recent audits have put the spotlight on procurement governance. While some reports identify the need for improved central oversight, others warn that over-regulation increases the risk of waste, fraud, inefficiency, and delay.

For example, in its February 2021 follow-up audit entitled *Medicaid: CMS Needs to Implement Risk-Based Oversight of Puerto Rico's Procurement Process*, the U.S. Government Accountability Office found that the federal Centers for Medicare & Medicaid Services failed to provide adequate oversight over Puerto Rico's Medicaid program procurements. These concerns were exacerbated by a July 2019 Department of Justice indictment of three individuals, including the former executive director of the Puerto Rican government agency responsible for overseeing Medicaid procurements, for unlawfully steering contracts to preferred individuals. Similarly, in its October 2020 report entitled *75th Guam Island Fair and Liberation Day Carnival Procurement*, Guam's Office of Public Accountability found weak oversight and record-keeping for goods and services procurements supporting Guam's Liberation Day celebrations. The report attributed the lack of effective oversight to weak delegation procedures, which led to a fragmented subcommittee planning structure that lacked proper oversight and co-ordination. Further, in its June 2021 report entitled *2019 Audit Report on General Administration Sector*, Fiji's Office of the Auditor General found weak oversight controls in many government departments, which led to multiple procurement irregularities.

However, the Ontario Auditor General's December 2020 report entitled *Business Case Development in the Ontario Public Service* raised concerns that the over-centralization of Cabinet approvals for lower-value procurements significantly increased project delays and recommended that the government reconsider the contract value thresholds for the delegation of approvals.

> "Public institutions need to strike the right balance between accountability and efficiency."
>
> - Paul Emanuelli

Similarly, in its 2020 report entitled *Business Regulation in South Asia and The Belt and Road Initiative,* the World Bank Group warned that excessive bureaucracy, overregulation, and red tape, along with corruption and lack of transparency, "all impose significant economic costs on doing business." As the World Bank Group cautioned, burying the procurement process under layers of outdated rules and regulations does not ensure effective outcomes, but instead undermines the integrity and efficiency of the procurement process.