Canadian Law Update

Critical Trends

The Procurement Office

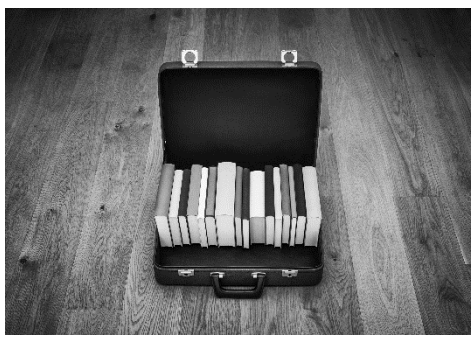
Focus on Project Governance

Feature Case Study

Interpretation Issue Leads to Past Experience Dispute

In its July 2022 determination in *PricewaterhouseCoopers LLP v. Canada*, the Canadian International Trade Tribunal rejected a bid evaluation complaint. The dispute dealt with a solicitation issued on behalf of the Department of National Defence for the provision of supply chain identification and risk assessments for military defence systems. While the complainant alleged that the evaluators overlooked its relevant experience, the Tribunal disagreed.

As the Tribunal explained, "bidders were required to demonstrate that they had analyzed a complex system, with the value of the system serving as a proxy for its complexity" in which maximum points "were awarded for a system with a value of $5 billion or above." However, the parties disagreed on how to quantify the value of a system for evaluation purposes. While the Tribunal ultimately rejected the complaint after noting that the interpretation of "system" and "value" used by the bidder were inconsistent with the plain meaning of those terms, the Tribunal also noted that the government could have avoided the interpretive dispute by adopting a more precise approach to describing the evaluation criteria.



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their project governance practices.

Saskatchewan Lockout: An Alberta bidder successfully challenged what it alleged to be a long pattern of discriminatory practices by the Saskatchewan government that unfairly favoured local bidders.

Feature Article

Saskatchewan Scheme Breaches Treaty

Arbiter Strikes Down Arbitrary Past Performance Evaluation

In its February 2022 decision in *Ministry of Highways for the Province of Saskatchewan v. West-Can Seal Coating Inc.,* the Saskatchewan Court of Queen's Bench rejected the Saskatchewan government's judicial review application after finding no reason to set aside an arbitration ruling that found the government in breach of the *Canadian Free Trade Agreement.*

In a March 2021 decision in *New West Partnership Bid Protest Mechanism Arbitration HWY-20126, Saskatchewan,* an arbiter determined that the Saskatchewan government breached the trade treaty by improperly evaluating past performance criteria and applying improper local labour requirements. The complainant asserted that the award reflected a long pattern of discriminatory procurement practices by the government that unfairly favoured local bidders in highway surfacing bids.

The arbiter ruled that government's retroactive inclusion of a pre-November 2018 contract in the complainant's bid evaluat ion was unfair since the scoring process used prior to that date was substantially different than the process used under the new scoring scheme. The arbiter also found that the complainant was not provided proper notice that its prior score would be used in future bid evaluations and was denied a meaningful opportunity to contest that prior score. Further, the arbiter found that the government's treatment of the complainant in scoring that category was markedly different than the treatment the government afforded the winning local bidder. The arbiter ruled that the government should rectify these evaluation flaws.

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

Undefined "Term of Art" Triggers Bid Protest

Drafting Clear Criteria Preferable to Relying on Implied Meanings in Litigation

In its March 2022 decision in *Belanger v. Canada (Patented Medicine Prices Review Board)*, the Canadian International Trade Tribunal rejected a complaint after finding that the government conducted a reasonable evaluation of the complainant's proposal. The dispute dealt with a request for proposal ("RFP") issued by the Patented Medicine Prices Review Board for scientific literature search services. The complainant alleged that the government failed to properly evaluate its past clinical pharmacy experience.

While the RFP failed to define "clinical pharmacy experience", the government asserted that it evaluated "the clinical pharmacy experience requirement based on its collective experience and shared expertise as professionals in this field and what it believed would be a common understanding of that term among professionals in the field and not based on a specific definition or practice in a specific Canadian jurisdiction."

While the Tribunal noted that the RFP would have been more transparent had it defined the term in question, it found that the evaluation committee "used its knowledge of what clinical pharmacy experience meant to professionals in the field" and that the evaluation committee's determination that the provision of drug information services in a non-clinical environment did not qualify as "clinical pharmacy experience" was reasonable in the circumstances.

Sketchy Records: As evidenced in a recently challenged airport services contract award, the failure to maintain proper evaluation records can compromise the defensibility of an evaluation and award decision.

Paul Emanuelli

"Benefit of the Doubt" Leads to Re-Evaluation Order

No Evaluation Records Means No Defence in Bid Challenge

In its January 2021 determination in *Falcon Environmental Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal ordered a re-evaluation after finding flawed evaluation records. The dispute dealt with a request for proposal for the provision of aerodrome wildlife control services at Canadian Forces Base Trenton and Canadian Forces Detachment Mountain View.

The complainant challenged the evaluation process, alleging that the contract was awarded to a non-compliant competitor who lacked the required experience. The Tribunal determined that it was improper for government evaluators to give a bidder the benefit of the doubt where compliance was not clearly established from the information in the bid. The Tribunal also found that the evaluators failed to keep proper records.

Paul Emanuelli

Tribunal Upholds Averaging Scores

No Consensus Required

Recent Canadian International Trade Tribunal rulings have recognized a public institution's right to average individual evaluator scores instead of using group consensus scoring to arrive at final scores.

For example, in its February 2019 determination in *Temprano and Young Architects Inc. v. National Capital Commission*, the Tribunal confirmed that averaging individual evaluator scores rather than conducting group consensus scoring sessions is an acceptable evaluation practice even in instances where suppliers were required to meet a minimum scoring threshold in a specific evaluation category.

Similarly, in its August 2019 decision in *Harris Corporation v. Department of Public Works and Government Services,* the Tribunal ruled that there is no obligation to conduct consensus scoring and that averaging out the scoring variations between evaluators was just as acceptable as addressing those variations through group consensus scoring meetings.

Finally, in its February 2022 determination in *Pacific Northwest Raptors Ltd. v. Canada*, the Tribunal rejected a complaint after recognizing the government's right to average individual evaluation committee member scores to arrive at final evaluation scores, particularly where the range between initial individual scores is relatively small.

Paul Emanuelli

Fairness Monitors Ruled Unnecessary

Rulings Leave Role Unclear

Defining Roles: Project teams should be careful to properly define the roles and responsibilities of various members of their advisory group. While some purchasing institutions may elect to retain the services of fairness advisors, those services should be in addition to, and not a substitute for, obtaining appropriate procurement and legal advice on major procurement projects.

The use of fairness advisors has recently been subject to legal disputes that underscore the importance of establishing policies to identify when fairness advisors are required and to define their role within a procurement process. For example, in its February 2019 determination in *Temprano and Young Architects Inc. v. National Capital Commission*, the Canadian International Trade Tribunal confirmed that there is no duty to use fairness monitors in evaluations.

Rather, the Tribunal found that the NCC met its due diligence duties without using a fairness monitor and confirmed that there was nothing in the trade treaties that compelled the use of a fairness advisor.

Similarly, in its October 2018 decision in *CG Acquisition Inc. v. P1 Consulting Inc.*, the Ontario Superior Court of Justice summarily dismissed a $150 million damages claim brought by a disqualified losing bidder against a fairness monitor, Infrastructure Ontario and the LCBO. That decision was upheld on appeal by the Ontario Court of Appeal in an October 2019 ruling.

P1 Consulting Inc. was hired as a fairness monitor on the project. The plaintiff challenged the decision not to reinstate its proposal after a reconsideration, and challenged the failure of the project team to include the fairness monitor in that reconsideration decision.

However, as the Court of Appeal determined, there was no requirement to include the fairness monitor in the reconsideration decision, which was made after having received legal advice, since the fairness monitor was not a decision-maker or evaluator, and it had no authority to provide legal or quasi-legal advice.

Paul Emanuelli

Court Rejects Jury Trial Due to Complex Evaluation

In its November 2020 decision in *Canada Forgings Inc. v. Atomic Energy of Canada Limited*, the Ontario Superior Court of Justice determined that a government tendering process was too complex for a jury trial. The dispute dealt with a bidding process for the refurbishment of the Bruce "A" CANDU 9 nuclear reactor where Atomic Energy of Canada Limited failed to accept any bids during the 180-day bid validity period and decided to deal with a different supplier for its requirements.

One of the bidders sued for nearly $20 million in damages and brought a motion for a jury trial. The court rejected the motion since the complexity of the issues made a jury trial inappropriate. The court raised concerns "that even with proper instructions, the jury would not be able to fully appreciate and understand the many technical/legal issues that must be understood to achieve justice between the parties". The ruling puts in plain view the challenges faced when conducting legally defensible evaluation processes with evaluation teams.

Assessing Experience: The evaluation of past experience continues to be a treacherous journey for evaluation teams.

Avoiding Subjective Considerations

"Past Reputation" No Substitute for Evidence of Experience

Technical Services Tender

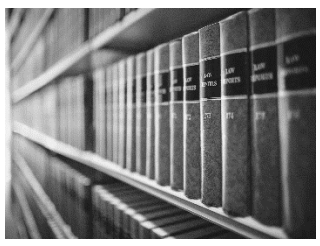
In its April 2021 decision in *SL Ross Environmental Research Limited v. Department of Fisheries and Oceans*, the Canadian International Trade Tribunal rejected a challenge based on allegations that the government had improperly scored the complainant's past experience. The dispute dealt with a Department of Fisheries and Oceans Request for Standing Offer for the provision of scientific and technical advisory services.

The Tribunal rejected the complainant's assertion that, based on its international reputation, it should have been given the benefit of the doubt by the government evaluators when they scored its past experience. The Tribunal ruled that "relying on such subjective information would have been unfair to other bidders" and would be contrary to the government's obligations under the trade agreements. The complaint was therefore dismissed.

Project Governance: Evaluation teams should diligently correct any evaluation errors that could otherwise compromise the defensibility of their award decisions.

The Duty to Correct Evaluation Errors

Tribunal Rulings Lay Down the Law



Recent Canadian International Trade Tribunal rulings underscore the importance of conducting proper bid evaluations and correcting evaluation errors to better ensure the defensibility of an evaluation and award decision.

In its November 2018 determination in *KPMG LLP v. Department of Public Works and Government Services*, the Tribunal recognized the government's right to correct evaluation errors. The complainant took issue with the initial evaluation of its bid and then legally challenged the government's decision to re-evaluate both the complainant's bid and a competing bid. However, the Tribunal determined that the government acted reasonably in re-evaluating both bids since re-evaluating only the complainant's bid would have resulted in unequal treatment. (see Tribunal Recognizes Right to Correct Evaluation Errors)

In fact, the Tribunal recently upheld two contract award recissions by the federal government after the post-award discovery of evaluation errors led to a reconsideration of the original awards. In its August 2017 decision in *Francis H.V.A.C. Services Ltd. v. Canada*, the Federal Court of Appeal dismissed a losing bidder's application for the judicial review of a Tribunal decision that rejected that bidder's original complaint. The complainant was originally awarded the contract, but that award was rescinded when the government discovered that it had mistakenly disqualified a competing lower bidder. The Tribunal and Federal Court of Appeal both agreed that the government acted properly in reversing the original award decision after the evaluation error was discovered.

Similarly, in its July 2021 determination in *Leistritz Advanced Technologies Corp. v. Canada (Department of Public Works and Government Services)*, the Tribunal dismissed a complaint after finding that the government had the right and duty to correct its evaluation errors and revisit its contract award decision.

> "...a contracting authority must take appropriate steps to correct errors in the procurement process, in keeping with the terms of the solicitation and in a manner that preserves the integrity of the competitive procurement process."
>
> - Canadian International Trade Tribunal

The dispute dealt with a request for proposal issued on behalf of the National Research Council of Canada for the purchase of a high free volume twin-screw extruder. The government rescinded the complainant's selection during contract award negotiations after discovering that a competing bid was improperly rejected as non-compliant. The Tribunal recognized the government's right and duty to take this proactive remedial action and dismissed the complainant's protest. As these cases illustrate, public institutions are under a duty to run a fair evaluation and award process and cannot rely on their own errors to prejudice a bidder's right to a contract award. Rather, when evaluation errors are discovered, they should take proactive steps to mitigate those errors. (see Rescinded Awards Upheld Due to Evaluation Errors)