February
2023

Quarterly Report

The Procurement Office

Issue
#2
RFx Drafting
Edition

Quarterly Trend

The Perils of Past Experience

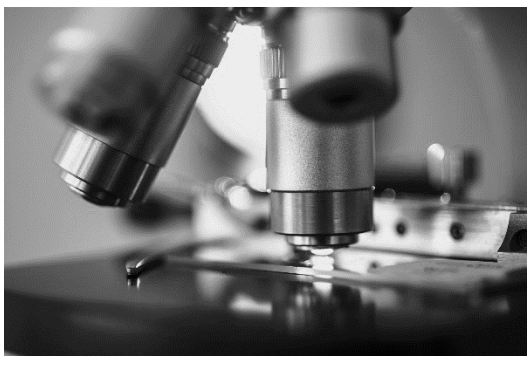
Ongoing Challenges

The assessment of contractor experience continues to be a hot button issue in bid protest challenges.

Bidders can gain an unfair advantage by misrepresenting the qualifications of their proposed team members or by misrepresenting the availability of those individuals to perform the required work. Those misrepresentations can compromise the validity of evaluation and award decisions (see Personnel Issues Create Compliance Concerns).

Past experience requirements have been subject to a high rate of bid protest challenges and should therefore be drafted and applied with a high degree of precision (see Assessing Past Experience in Bid Evaluations).

The use of references in public sector bid evaluations has also been subject to multiple bid protests. As the long line of cases in the article linked below illustrates, purchasing institutions need to double down on their due diligence when it comes to the proper use of reference information since the failure to meet proper legal standards can undermine the defensibility of their evaluation and award decisions (see Using References in Bid Evaluations).



Focusing on the Details: Past experience criteria have repeatedly been the subject of bid protest challenges. Purchasing institutions should exercise a high degree of precision in drafting and applying those requirements to better ensure defensible awards.

A Matter of Precision: A Department of Transportation award was voided after the judge ruled that the RFP was "not drafted with the precision and attention to detail that a solicitation of this magnitude calls for."

Quarterly Feature

Sloppy Drafting Triggers Evaluation Dispute

Judge Voids Award Over Subjective Interpretation

In its recent decision in *Conduent State and Local Solutions, Inc. v. Florida Department of Transportation*, the Florida Division of Administrative Hearings voided a contract award after finding that the winning bidder did not meet past experience requirements.

The dispute dealt with a Request for Proposals (RFP) for customer relations and quality management services for the Department of Transportation's toll operations. While the winning prime contractor was a new company and did not possess the minimum ten years' experience required by the RFP, the Department argued that this requirement could be satisfied by other members of the prime contractor's bidding team, which included the prime contractor's affiliates and subcontractors.

The judge disagreed. After interpreting the RFP's convoluted provisions, the judge concluded that the RFP terms did not support the Department's evaluation decision. As the judge summarized, the issue turned on the proper interpretation of the RFP definitions of "Proposer" and "Vendor", which incorporated members of a prime contractor's bidding team into the meaning of proponent for some but not all purposes. The judge ultimately concluded that the prime contractor could not rely on other members of its bidding team to satisfy the experience requirement and that if the Department had intended otherwise, it should have clearly stated so in its RFP documents (see Sloppy Drafting Triggers Evaluation Dispute).

Training Certificate

Leveraging Lessons Learned

Procurement Training Office

We will be running our open enrolment Precision Drafting Certificate in a month-long format starting May 1, 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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"Cobbled Together" Construction Contract Leads to Alberta Payment Dispute

Disclaimers Did Not Protect Owner from Out-of-Scope Work

In its recent decision in *Maxim Excavating Ltd v. Peace Regional Waste Management Company*, the Court of Queen's Bench of Alberta awarded $300,000 plus interest to a contractor after determining that the owner and the owner's engineer were unreasonable in refusing to adjust the project schedule and make additional payments for out-of-scope work.

The dispute dealt with a construction contract for three industrial waste cells for Peace Regional Waste Management Company (Peace Regional) awarded to Maxim Excavating Ltd (Maxim) following a tendering process. Peace Regional withheld payments due to project delays. Maxim brought a claim for those outstanding payments, as well as a claim for excess payments for additional out-of-scope work performed on the project.

The Court noted that the contract documents had been "cobbled together" by the project engineer and had clearly not been proofread, which the engineer blamed on his administrative staff. The Court also raised concerns over the engineer's testimony, expressing difficulty in finding the witness credible or reliable.

As the Court noted, the project engineer responsible for contract administration has an obligation to act in good faith and to be fair and reasonable to both the owner and the contractor. However, the Court ruled that the engineer made the entire project more difficult by improperly siding with Peace Regional's unreasonable denial of payments to Maxim over delays caused by undisclosed site conditions and rain-related work stoppages outside of the contractor's control.

In its arguments against the extra payment claims, Peace Region relied on the legal disclaimers in the bidding documents, which stated that quantities were estimates only and that no claims should be made based on increases or decreases in estimates or based on the site data provided to bidders. However, the Court ruled that the disclaimers did not apply to out-of-scope work.

As this case illustrates, purchasing institutions, including their external advisors, should be careful to draft contract performance requirements that capture the full scope of anticipated work since out-of-scope work increases the risk of downstream performance delays and payment disputes (see Scope Changes Trigger Delay Dispute).

Letter of the Law: Recent rulings in South Africa upheld government awards that bypassed top-scoring proponents since solicitation rules contained clear clarification and rescoring protocols. However, those rulings also included the quashing of a contract award due to a procedural irregularity in a bid evaluation process.

Paul Emanuelli

Ruling on Due Process

South African Cases Recognize Clarifications

Recent court decisions in South Africa reveal the ongoing risks associated with procedural challenges to bid evaluations. These cases, enumerated in the linked article below, serve as a reminder to public institutions across all jurisdictions of the importance of following clear tendering procedures to better ensure the defensibility of contract award decisions.

Further, as the cases illustrate, the defensibility of award decisions, when challenged, will often turn on how clearly an institution defined its evaluation and award process and how carefully it adhered to that process in practice (see Courts Rule on Due Process Disputes).

Paul Emanuelli

GAO Voids Restrictive Requirements

Enforcing Neutrality

As evidenced in recent rulings by the U.S. Government Accountability Office (GAO), the use of unnecessarily restrictive requirements remains subject to successful legal challenge for breaching open tendering rules.

For example, in its decision in *InfoPoint LLC*, the GAO ruled that the security clearance requirement applied to a small business joint venture was unnecessarily restrictive. Similarly, in *Computer World Services Corporation*, the GAO found that the evaluation rules imposed unjustified restrictions on past experience. Further, in *Westwind Computer Products, Inc.*, the GAO ruled that the government engaged in improper branding in its software licensing solicitation. Finally, in *Insight Technology Solutions, Inc.*, the GAO found that the government imposed unnecessarily restrictive time constraints on its proof of certification requirements.

These cases serve as a useful reminder to public institutions across all jurisdictions of the importance of avoiding restrictive requirements in their solicitation documents (see Rulings Strike Down Restrictive Requirements).

Paul Emanuelli

Rulings Enforce Compliance Requirements

Multiple Disputes

Careful Calibration: Compliance requirements need to be drafted with precision and interpreted consistently.

Recent legal decisions highlight the importance of properly enforcing tender compliance requirements since the defensibility of a tendering process often turns on the validity of a purchasing institution's tender compliance assessments.

As the cases in the linked article illustrate, purchasing institutions should ensure that they enforce their tender compliance requirements with a high degree of precision as tender compliance assessments remain a high-risk target for legal challenge (see Courts Enforce Compliance Requirements).

Technical issues can trigger tender compliance disputes, particularly when the timing or substance of those technical requirements are not clearly defined in solicitation documents. The lack of precision in drafting technical solicitation requirements can lead to significant downstream risks to the defensibility of evaluation and award decisions. Purchasing institutions should ensure that their technical requirements are clear and capable of proper interpretation. Further, once those requirements are set, evaluators should ensure that they carefully interpret and enforce those requirements during the evaluation and award process (see Technical Issues Create Compliance Concerns).

Paul Emanuelli

Scoring Schemes Under Scrutiny

Multiple Re-Evaluation Orders

Recent U.S. Government Accountability Office (GAO) rulings illustrate that the failure to properly define and score non-price factors can undermine the defensibility of bid evaluations.

In one recent case, the GAO found that the government failed to qualitatively score corporate experience and improperly assessed that experience on a pass-fail basis. In another case, the GAO found that evaluators improperly converted a solicitation's "best-value" assessment into a "lowest-priced, technically acceptable" award. Both cases resulted in re-evaluation orders.

As these and other recent GAO rulings illustrate, purchasers should ensure that they clearly define their scoring criteria since the lack of precision undermines the defensibility of contract awards (see Flawed Non-Price Scoring Triggers Re-Evaluations).

Laying Down the Law: Malta's Public Contracts Review Board offers an expanding body of case law that serves as a useful model for the enforcement of public procurement rules.

Spotlight on Malta: Bid Protests Under EU Laws Enforce Global Standards

Board Deals with Technical Compliance

Multiple Rulings Consider Drafting and Interpretation Issues

As recent rulings from Malta's Public Contracts Review Board illustrate, the enforcement of technical compliance and the resulting rejection of non-compliant bids often leads to bid protests. Notwithstanding these legal challenges, the decision to reject technically non-compliant bids will ultimately be upheld when those requirements are properly interpreted and enforced (see Board Upholds Technical Compliance Rejections).

However, drafting and interpretation errors can undermine technical compliance evaluations and compromise the legal validity of evaluation and award decisions. These cases serve as a useful reminder to all public institutions of the importance of drafting precise technical requirements that lend themselves to clear interpretation and enforcement (see Board Orders Technical Compliance Re-Evaluations).

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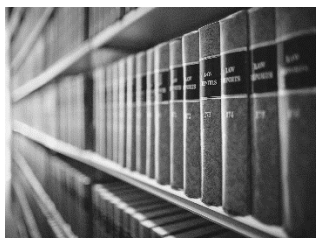
Balancing the Scales: Price evaluation strategies need to be carefully calibrated and clearly drafted to better ensure defensible evaluation results.

Flawed Price Evaluations Lead to Protests

Legal Rulings Void Bid Assessments



Price evaluations remain a leading source of bid protests. As these cases illustrate, flawed price assessments can undermine the integrity of evaluation and award decisions and subject public institutions to successful legal challenges and voided contract awards.

For example, a recent ruling overturned a price evaluation for the delivery of commercial vehicles after finding that the shipping cost calculations were not based on the actual shipping routes required to deliver the vehicles. Another ruling determined that the government's price evaluation was unreasonable since the solicitation required vendors to price a base year and nine option years for evaluation purposes, but bidders were awarded contracts for less than ten years depending on their actual availability. This allowed bidders to artificially lower their prices for later years when they would not be providing any services and distort the price evaluation to their advantage. These cases serve as a reminder to public institutions across all jurisdictions of the importance of establishing and implementing defensible price evaluation procedures (see Flawed Price Assessments Trigger Re-Evaluations).

The defensibility of evaluation decisions will often turn on the accuracy and transparency of price evaluation rules. Purchasing institutions should ensure that those rules are precisely defined in their solicitation documents. In fact, one recent ruling ordered a re-evaluation after finding that a bid was rejected due to errors in the government's pricing form, while another terminated a tendering process after finding that the evaluation committee applied non-transparent pricing assumptions in its evaluation of bids (see Board Rules on Price Evaluation Disputes).

Another recent decision ordered the government to redraft and reissue its solicitation after determining that gaps in the government's historical volume data led to a distorted price evaluation. This particular dispute dealt with a solicitation for a blanket purchase agreement to support retail operations at military facilities where future quantity requirements of multiple price categories were unknown.

> "Flawed pricing strategies undermine the defensibility of bid evaluations."
>
> - Paul Emanuelli

The ruling found that the market basket of categories used for the price evaluations was not reasonably representative of actual requirements since it was based on incomplete historical data. As this case illustrates, scoping a contract to include multiple price categories with unknown future quantities creates significant evaluation challenges. When historical volume data serves to anchor a representative sampling, the scope of a contract should be limited to those categories that are supported by that data (see Missing Data Distorts Price Evaluation).

In summary, flawed pricing strategies undermine the defensibility of bid evaluations and compromise value-for-money objectives by removing incentives for efficient performance (see Flawed Pricing Triggers Downstream Problems).