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Complying with New Trade Treaties: Rebooting Public Sector Procurement

Presented by:

The Procurement Office

Procurement Law Office | Procurement Training Office

Complying with New Trade Treaties:

Rebooting Public Sector Procurement

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Complying with New Trade Treaties:
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Program Overview

Effective July 1, 2017, procurement professionals practicing in the public sector will be impacted by recent trade treaty developments flowing out of the new *Canadian Free Trade Agreement (CFTA)* and *Canada-Europe Comprehensive Economic & Trade Agreement (CETA)*. This seminar is essential training for procurement professionals practicing in the public sector and will provide comprehensive training on:

1. Open and fair competition
2. Anti-avoidance rules and exemptions
3. New bid dispute regime
4. Canadian International Trade Tribunal (CITT) as a case study in treaty enforcement and interpreting the treaty requirements

Part 1: Open and Fair Competition

Drawing on the general protocols contained in the new trade treaties, this module covers:

- open, fair and transparent competition duties
- contract value thresholds
- tender call posting, disclosure and amendment rules
- tender evaluation, award and debriefing duties
- bidder prequalification and debarment protocols
- the use of buying groups, negotiated RFPs and electronic auctions

Part 2: Anti-Avoidance Rules and Exemptions

Highlighting the main anti-avoidance protocols contained in the new trade treaties, this module covers:

- trade treaty rules relating to valuation and contract splitting
- local preference and Canadian content
- prohibited practices (biased specifications, unfair requirements, unnecessarily restrictive criteria and conflict of interest)
- standard exemptions (confidentiality, security, urgency, small business set-asides, entrenched incumbents and sole source exclusions)

Part 3: The New Bid Dispute Regime

Detailing the formal bid dispute enforcement rules contained in the new trade treaties, this module covers:

- key differences between local bid dispute protocols, provincial bid protest panel procedures, and the new treaty-based formal bid dispute enforcement mechanisms
- the due process rules contained in the new trade treaty enforcement regime (document disclosure and discovery rules, the right to representation, and more)
- the substantive remedies contained in the new enforcement regime (contract award suspensions and compensation for losses or damages)

Part 4: The CITT's Role and Jurisdiction

Serving as a case study in formal trade treaty bid dispute mechanisms, this module covers the role, jurisdiction and enforcement powers of the CITT with topics including:

- the scope of the Tribunal's jurisdiction
- procedural remedies including re-draft, re-evaluation and contract termination orders
- financial remedies including bidding costs, complaint costs and lost profits awards

This seminar will study leading Tribunal case studies dealing with the trade treaty duties that now apply across all levels of government in Canada, including cases covering the expanded posting requirements, debriefing duties, biased and unfair specifications and sole source challenges. It will highlight the implications of these changes with practical takeaways for your day-to-day activity.

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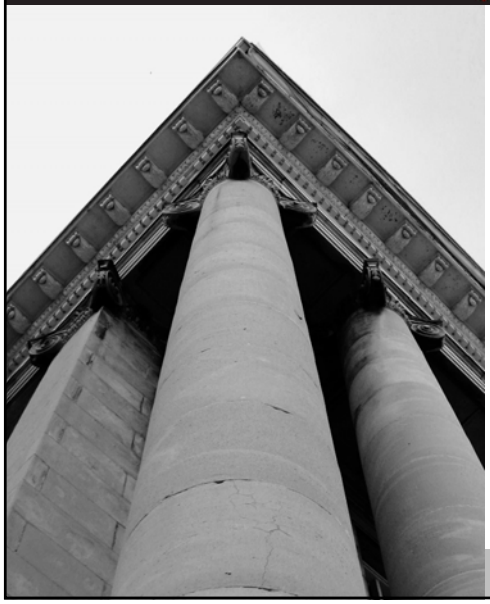

Complying With the New Trade Treaties: Rebooting Public Sector Procurement

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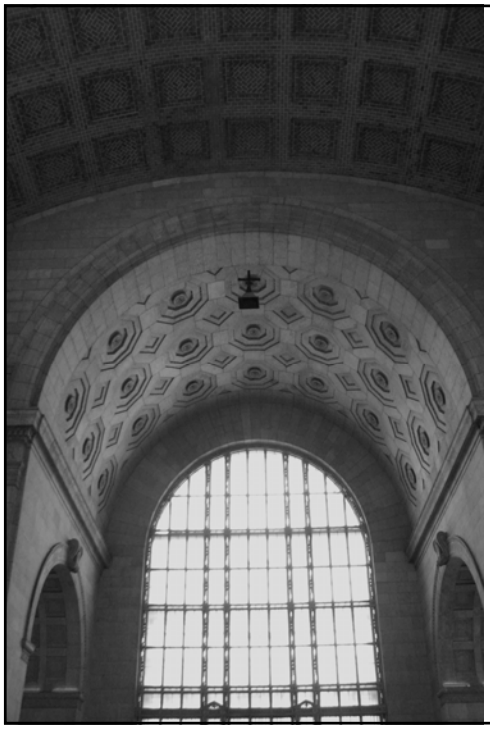

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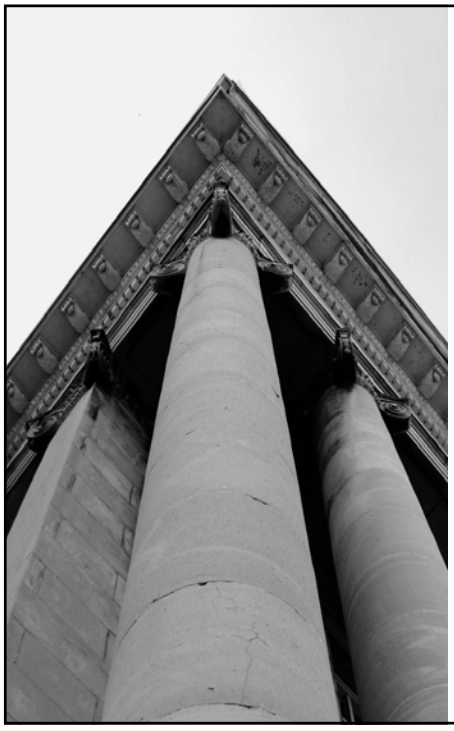
About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Law Office. He has been ranked by *Who's Who Legal* as one of the ten leading public procurement lawyers in the world and his firm was selected by *Global Law Experts* and *Corporate INTL* as Canada's top public procurement law firm. Paul's portfolio focuses on major procurement projects, developing innovative procurement formats, negotiating commercial transactions and advising institutions on the strategic legal aspects of their purchasing operations. Paul also has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement, The Laws of Precision Drafting* and *Accelerating the Tendering Cycle.* Paul hosts the *Procurement Law Update* webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across Canada and internationally.



Introduction

Introduction

The Challenges of Government Procurement

Government purchasing institutions must navigate a complex web of trade treaty rules while also complying with an increasingly complex list of common law duties. To effectively manage these legal obligations, public bodies must proactively establish institutional frameworks so that their project teams can succeed in their specific procurements.

Introduction

The Challenges of Government Procurement

By entrenching policies in favour of open public procurement, the trade treaties create a core distinction between government procurement and private sector procurement. While private sector institutions may voluntarily adopt tendering procedures to award certain contracts, most public institutions are compelled by trade treaties to openly tender all contracts over specifically prescribed values. These contract value thresholds are relatively low, particularly when compared to the costs of administering a tendering process.

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The Challenges of Government Procurement

The treaties contain a series of anti-avoidance rules that restrict direct contract awards to narrow exceptions. These “sole source” exceptions must be clearly documented, are typically subject to high-level internal approvals, and are sometimes subject to public disclosure duties that give other suppliers the right to legally challenge the sole source before the contract award.

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The Challenges of Government Procurement

The treaties also regulate and restrict the ability to expand or extend a contract, compelling government institutions to retender in situations where a private institution may have added new requirements to an existing contract or extended a contract beyond the original extension options.

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The Challenges of Government Procurement

The trade treaties also give suppliers the right to launch bid disputes to challenge everything from direct award decisions, to the neutrality of technical specifications, to the fairness of an evaluation and award process. These bid challenges can result in financial or procedural remedies against the government body.

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The Challenges of Government Procurement

Financial penalties can be significant since they are typically quantified as the amount of the complainant's lost profits on the challenged contract award. Procedural sanctions can also have significant impacts since they can result in the voiding of a contract award, the ordering of a re-evaluation or even a direction that the contract be awarded to the complainant supplier.

Introduction

The Challenges of Government Procurement

While formal treaty-enforcement mechanisms within Canada have historically been limited to federal government bodies, the new Comprehensive Economic and Trade Agreement between Canada and Europe, and the new domestic Canadian Free Trade Agreement will expand these legal enforcement mechanisms to sub-federal levels so that most public bodies across Canada will soon be subject to treaty-based legal challenges.

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The Challenges of Government Procurement

In the interim, decades of administrative and commercial law court rulings involving public bodies at all levels of government across Canada have filled that regulatory gap with a series of case law precedents. These precedents have long-established similar legal duties and sanctions to those that are enforced under trade treaty disputes.

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The Challenges of Government Procurement

For project teams, the trade treaties, along with the implied common law duties, heavily regulate the content of their tender call documents, prescribing the detailed public disclosure of bidding process rules, bid evaluation criteria and contract requirements. These duties also require project teams to carefully consider material background information that could have an impact on the cost of contract performance.

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The Challenges of Government Procurement

The failure to meet those material disclosure duties can result in extra cost claims from contractors and cause significant cost overruns and project delays. Once established, these bidding rules must be followed with a high degree of precision since competing bidders can challenge everything from tender compliance assessments, to the scoring of competing proposals, to the decision to cancel a bidding process due to budgetary constraints.

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The Challenges of Government Procurement

These fair process duties also require project teams to carefully manage and document their bid evaluations to ensure that they are fairly conducted and not compromised by bias or conflict of interest. The failure to keep proper evaluation records can also result in the failure to defend against a legal challenge.

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The Challenges of Government Procurement

While ensuring that their internal houses are in order, public institutions must also be mindful of the risks imposed by improper supplier conduct and should establish debarment processes to sanction poor supplier performance and deter unethical supplier conduct, including inappropriate lobbying, collusion and price fixing.

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The Challenges of Government Procurement

Addressing these challenges is no easy task. While project teams should implement project-specific good governance practices, compliance with open public procurement duties is far too complex to be efficiently managed on an ad hoc project-level basis. Full and timely compliance can only be realistically achieved by proactively establishing winning conditions through the creation of proper institutional policies and procedures and the adoption of advanced document drafting and bid evaluation protocols, systems and tools.

Introduction

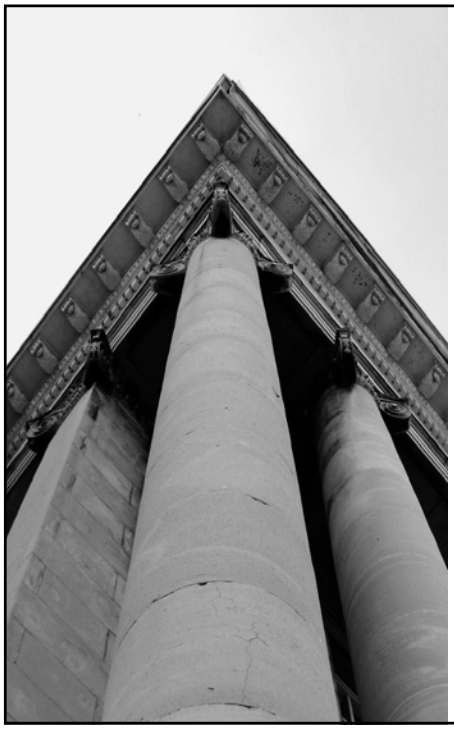
The Challenges of Government Procurement

The current state of the law calls on a heightened level of institutional governance. Failing to meet that challenge is not a realistic option for those public bodies that are serious about properly serving the public interest by maintaining standards of open, fair and transparent competition.

Introduction

The Challenges of Government Procurement

As those practising in the area of public procurement can appreciate, the need to keep abreast of legal trends in this field is becoming increasingly crucial to the success of our purchasing initiatives. This course was designed to assist procurement professionals in developing their procurement strategies and in meeting their future challenges.



Open and Fair Competition

Treaty Compliance

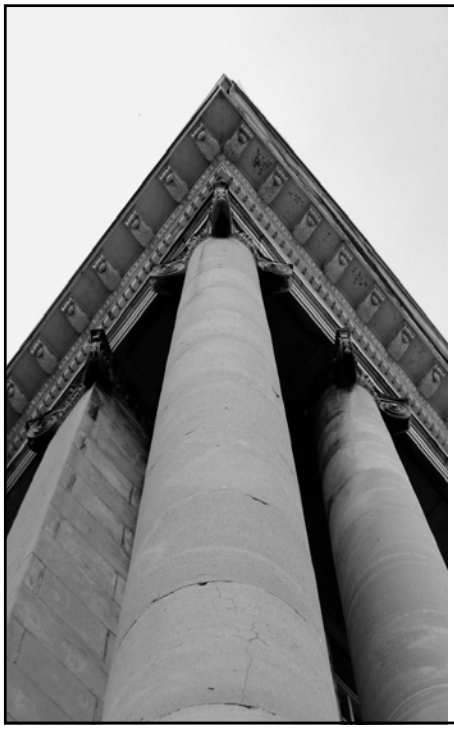
Open and Fair Competition

This module covers the recent trade treaty developments flowing out of the new *Canadian Free Trade Agreement* and *Canada-Europe Comprehensive Economic and Trade Agreement*. Drawing on the general protocols contained in the new trade treaties, this module covers: (i) open, fair and transparent competition duties; (ii) contract value thresholds; (iii) tender call posting, disclosure and amendment rules; (iv) tender evaluation, award and debriefing duties; (v) bidder prequalification and debarment protocols; and (vi) the use of buying groups, negotiated RFPs and electronic auctions.

Treaty Compliance

Open and Fair Competition

In April 2017, Canada's trade ministers formally announced that effective July 1, 2017 the Canadian Free Trade Agreement ("CFTA") would replace its predecessor, the Agreement on Internal Trade ("AIT"). For the most part, the CFTA carries forward the same open public procurement obligations contained under the AIT and now adds Nunavut to its geographic scope. The carried-forward and new provisions in the CFTA include the following areas discussed in this module.



Threshold Considerations for Open Competition

Treaty Compliance

Open Tender Thresholds

Duty to Compete: Article 502 of CFTA carries forward the general commitments to open public procurement.

Open Tender Thresholds: Article 504.3 carries forward the prior AIT contract value thresholds for open tendering but now consolidates them all into the main body of the chapter for easier reference, while Article 504.4 now makes those thresholds subject to future adjustments for inflation based on a prescribed formula.

Treaty Compliance

Open Tender Thresholds

The initial CFTA thresholds, which as noted above are subject to future adjustments, were set out in Article 504.3 as follows: For federal, provincial and territorial departments, ministries, agencies, boards and commissions $25, 000 for goods, $100, 000 for services and construction. For broader public sector entities (municipalities, universities, colleges, school boards and the health sector) $100, 000 for goods and services and $250, 000 for construction. For crown corporations and government enterprises $500, 000 for goods and services and $5 million for construction.

Off-Track Posting Breaches Competition Rules

Bluehorse Corporation
U.S. Government Accountability Office

In its October 2016 decision in *Bluehorse Corporation,* the GAO ruled that the Bureau of Indian Affairs failed to properly publicize its diesel fuel RFQ and ordered it to cancel and re-issue its solicitation. The agency maintained that it met its posting obligations since it invited three bidders by email on the Saturday prior to the Monday bid deadline and over the weekend placed a copy of the RFQ in a three-ring binder at the reception desk of the closed government building. The GAO disagreed, finding that the contract value required a proper electronic posting.

Disclosing Evaluation Criteria

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

The December 2001 decision of the Federal Court of Appeal in *BCE Nexxia Inc. v. Canada (Commissioner of Corrections)* shows that the Canadian International Trade Tribunal's jurisdiction is subject to limits and that the deference it typically enjoys is subject to exceptions.

The case involved a contract awarded by Corrections Services of Canada ("CSC") for telephone services for the inmates of a federal correctional facility. The Federal Court of Appeal found that the Tribunal did not have the jurisdiction to consider the complaint.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

The issue was whether the contract in question could be considered a "procurement" for the purposes of the *Agreement on Internal Trade*. If it was, then the Tribunal had jurisdiction, otherwise it did not. With respect to the applicable standard of review, the Court of Appeal noted it will typically apply a deferential patently unreasonable standard but that the application of a less deferential correctness standard is not without precedent in the appropriate circumstances:

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

In the absence of a reasoned interpretation of the definition of "procurement value" in this case, the Court must, while acknowledging the general expertise of the CITT as compared to the Court, perform its own analysis and the judicial review must be conducted on a correctness standard.

The Court of Appeal then considered whether the contract in question was a procurement for the purposes of the treaty and, by extension, for the purposes of determining the Tribunal's jurisdiction.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

According to Article 502(1) of the *Agreement on Internal Trade*, the procurement obligations apply to procurements with a "procurement value" of $25,000 or greater for goods and $100,000 or greater for services and construction. Article 518 of the *Agreement on Internal Trade* defines "procurement value" as the estimated "total financial commitment resulting from the procurement". Two interpretations of "procurement value" were considered by the Court of Appeal, a broad interpretation and a narrower one.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

The broader interpretation maintained that "procurement value" should be assessed on the basis of the benefit flowing to the party who is awarded the contract, irrespective of the "financial commitment" made by the government. This was material to the specific case since payment would be flowing to the contractor directly from the inmates using the telephones rather than from the government. The broader definition would bring the contract within the scope of the monetary thresholds of the *Agreement on Internal Trade* and within the jurisdiction of the Tribunal. However, the Court of Appeal rejected this broader interpretation.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

Since the court found that the Tribunal failed to properly consider the concept of "financial commitment" when it determined the "procurement value" of the particular contract, it performed its own analysis of that issue. For the purposes of determining the "procurement value", the Court of Appeal was careful to distinguish between the benefit that the contractor would enjoy, which was immaterial to the analysis, and the narrower but more material concept of how much the government would be spending on the transaction in question.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

The Court of Appeal noted that the source of the payment is the material factor in determining the "procurement value" for the purposes of the monetary thresholds that trigger the treaty obligations:

In this case, the supplier wishes to supply the telephone services to the prisoners and, in return, expects to be remunerated in the form of telephone tolls and charges that will be paid by the prisoners. That is the remuneration that will flow to the supplier. However, it will come from the prisoners, not CSC.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

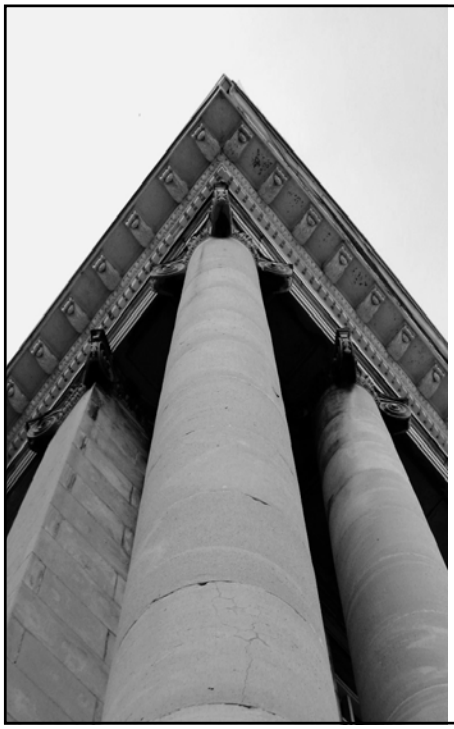
This finding limited what could otherwise have been a broadly expanded scope to the application of Chapter 5 of the *Agreement on Internal Trade* and to the Tribunal's jurisdiction. The court held that this was not the intention behind the treaty:

… the drafters of the AIT never intended that Chapter Five be applicable in every situation … Construing the term "financial commitment" to exclude procurements where the government is not assuming a monetary obligation to pay the supplier is not inconsistent with the less than pervasive scope of Chapter Five.

"Financial Commitment" Determines CITT Jurisdiction

BCE Nexxia Inc. v. Canada (Commissioner of Corrections)
Federal Court of Appeal

As this decision illustrates, for the transaction to be considered a "procurement", the government must be spending government funds. Furthermore, that expenditure must exceed the designated monetary thresholds before the trade treaties will apply to the procurement. From a practical standpoint, this is a reasonable interpretation since it would be difficult to quantify the "benefit to the contractor" interpretation ahead of time, whereas the government's "financial commitment" can be assessed with reasonable accuracy at the initial planning stages of a contemplated transaction when funding approvals are obtained.



Disclosing Evaluation Criteria

Treaty Compliance

Tender Call Posting and Disclosure Rules

Tender Notices/Single Point of Access: Article 506 regulates tender notices and requires that notices be published on a website designated by the Parties (the senior level governments that signed the treaty). It also recognizes that the Government of Canada will create a new single point of access (SPA) and that all entities will eventually be required to make their opportunities accessible through that SPA. Furthermore, Article 506 requires that all tender notices be made available free of charge and that the content of those notices include the traditional disclosures of key procurement details previously contained in the AIT.

Treaty Compliance

Tender Call Posting and Disclosure Rules

Article 506 now also includes the requirement to expressly state whether the procurement method used by the entity in the specific procurement will include negotiations or electronic auctions.

Disclosure of Requirements and Criteria: Article 509.7 prescribes that tender call documents contain all the necessary information required for suppliers to submit responsive tenders, including detailed evaluation criteria, technical requirements, warranties, transition costs and reasonable delivery times.

Case Study

The Standard "Value for Money" Clause

The new head of finance just contacted you stating that project teams no longer have time to prepare detailed evaluation criteria for their RFPs. Instead, he wants to insert a standard clause in all RFPs stating that "contracts will be awarded on an overall value for money basis at the sole discretion of the purchasing entity." He states that he used this clause in the private sector for years and never had any issues. How do you advise?

Tribunal Strikes Down Award Due to Unclear Criteria

Re Cardinal Industrial Electronics Ltd.
Canadian International Trade Tribunal

In its August 1990 determination in *Re Cardinal Industrial Electronics Ltd.*, the Procurement Review Board of Canada ("Board") found that the government inaccurately represented that it would award the contract based on "value-for-money" considerations which in fact were never applied. The case involved the procurement of 750 work station grounding kits by the Department of National Defence. The Request for Proposal expressly stated that the contract award would be based on "value-for-money" considerations, rather than simply being based on the lowest tendered price. However, the Board found that:

Disclosing Evaluation Criteria

Tribunal Strikes Down Award Due to Unclear Criteria

Re Cardinal Industrial Electronics Ltd.
Canadian International Trade Tribunal

Having announced in the RFP that contractor selection would be based on a determination of best value to the Crown (rather than on the lowest-priced responsive offer), the government then did nothing of any kind to determine best value. Instead they sought to determine the lowest-priced responsive offer and purported to award the contract on that basis. Put another way, the government set out the rules of the game — and then didn't play by them. The investigation bears this out. No scheme of any kind that could actually have been used to determine best value was ever set out in the RFP — and the procurement file contains no record that any such scheme was ever drawn up between DSS and DND for use in the evaluation process. However, the RFP implies that such work had been done.

Tribunal Strikes Down Award Due to Unclear Criteria

Re Cardinal Industrial Electronics Ltd.
Canadian International Trade Tribunal

The Board ordered that the awarded contract be cancelled and that a new tender call be issued that clearly articulated: (a) mandatory and desirable requirements; and (b) the relative importance of evaluation criteria. This case illustrates the need for accuracy in the disclosure of evaluation criteria since there should be consistency between disclosed criteria and the criteria that are actually applied.

Tribunal Rejects Argument of Implied Technical Standard

Re Accutel Conferencing Systems Inc.
Canadian International Trade Tribunal

In its June 1997 determination in *Re Accutel Conferencing Systems Inc.*, the Tribunal found that the government applied undisclosed evaluation criteria in its contract award decision. The case involved a Department of Public Works and Government Services Request for Proposal for teleconferencing services and equipment. The complainant alleged that it was disqualified as non-compliant on the basis of the Department's undisclosed preference for teleconference services that could commence both on the hour and on the half-hour.

Disclosing Evaluation Criteria

Tribunal Rejects Argument of Implied Technical Standard

Re Accutel Conferencing Systems Inc.
Canadian International Trade Tribunal

The Department asserted that this requirement could be implied in the circumstances. However, the Tribunal disagreed, finding that there was insufficient disclosure of the evaluation factor and that the application of this hidden preference was unfair and in breach of the trade treaty rules.

Disclosing Evaluation Criteria

Tribunal Rejects Argument of Implied Technical Standard

Re Accutel Conferencing Systems Inc.
Canadian International Trade Tribunal

As this case illustrates, it remains open to a purchaser to argue that an impugned evaluation factor can be reasonably implied to fall within generally stated evaluation rules. However, it also remains open to a bidder to argue the contrary and assert that the purchaser applied on improper hidden preference. The clear and full disclosure of evaluation rules can help to avoid future disagreement and dispute, particularly in instances where the implicit application of a particular requirement remains open to debate.

Disclosing Evaluation Criteria

Purchasing Policy Calculations Ruled Hidden Criteria

Re Goodfellow Cleaners
Canadian International Trade Tribunal

In its November 2003 determination in *Re Goodfellow Cleaners*, the Tribunal found that the government relied on undisclosed criteria when it rejected the complainant's tender and cancelled its procurement process. The case involved a Department of National Defence Request for Standing Offer for dry cleaning and laundry services. The complainant was the sole bidder. Instead of awarding the contract to that bidder, the Department applied "fair value to the Crown" considerations from the Treasury Board Contracting Policy and cancelled the procurement process.

Disclosing Evaluation Criteria

Purchasing Policy Calculations Ruled Hidden Criteria

Re Goodfellow Cleaners
Canadian International Trade Tribunal

Since those Treasury Board policies were not contained in or referred to in the tender call documents, the Tribunal found that the Department improperly applied undisclosed criteria in its decision to cancel its process. This reliance on an undisclosed rule was found to compromise the integrity of the process and constitute a serious breach of the applicable trade treaty provisions. The Tribunal therefore ordered a cancellation of the subsequently awarded contract and ordered the award of a contract to the complainant.

Purchasing Policy Calculations Ruled Hidden Criteria

Re Goodfellow Cleaners
Canadian International Trade Tribunal

The Department's failure to properly disclose the internal governance rules that applied to its decision making proved fatal to the fairness of its process. As this case illustrates, a purchaser's disclosure duties may compel the disclosure of internal policies when those policies can have an impact on contract award outcomes.

Past Experience Requirement Lost in Translation

Re 144314 Canada Inc./Nexys
Canadian International Trade Tribunal

In its July 2008 determination in *Re 144314 Canada Inc./Nexys*, the Canadian International Trade Tribunal upheld a complaint after finding that the government had inaccurately interpreted a vague technical requirement and had improperly rejected the complainant's proposal. The case dealt with an RFP for the provision of translation and revision services in both official languages.

Tender Compliance – Technical Non-Compliance

Past Experience Requirement Lost in Translation

Re 144314 Canada Inc./Nexys
Canadian International Trade Tribunal

The complainant disputed the government's application of a mandatory requirement calling for proof of a minimum of five years' past experience delivering the required services. The RFP contained a discrepancy between the English and French versions of the requirement. The English version of the requirement clarified the discrepancy in the French version and confirmed that evidence of incorporation was required to satisfy the five-year past experience requirement.

Tender Compliance – Technical Non-Compliance

Past Experience Requirement Lost in Translation

Re 144314 Canada Inc./Nexys
Canadian International Trade Tribunal

However, the Tribunal determined that the ambiguity in the French version could not be reconciled by referring to the English version since the primary language of the complainant was French and it would be unreasonable to expect the French proponent to read the English version of the RFP to clarify the ambiguity. The Tribunal cited the *contra proferentem* rule and determined that the ambiguity should be resolved against the government as author of the ambiguous provision. It ordered a re-evaluation of the complainant's proposal.

Tender Compliance – Technical Non-Compliance

Vague Licensing Requirements Breach Treaty Rules

Space2place Design Inc. v. Parks Canada Agency
Canadian International Trade Tribunal

In its October 2015 determination in *Space2place Design Inc. v. Parks Canada Agency*, the Canadian International Trade Tribunal ordered a re-evaluation after determining that the government relied on undisclosed factors to reject a bid. The case dealt with a Parks Canada Request for Standing Offer for landscape architecture services. The Tribunal found that the government had improperly rejected a proposal after applying licensing requirements to individuals named in the bid, whereas the RFSO required that the licensing requirements be satisfied by the "person or entity" submitting the bids.

Disclosing Evaluation Criteria

Vague Licensing Requirements Breach Treaty Rules

Space2place Design Inc. v. Parks Canada Agency
Canadian International Trade Tribunal

The Tribunal found that the application of the general licensing requirements to each specific individual constituted a breach of the trade treaty duties that require bids to be evaluated based on properly disclosed criteria. The Tribunal therefore ordered the government to re-evaluate all proposals in a manner consistent with its stated evaluation criteria.

Vague Licensing Requirements Breach Treaty Rules

Space2place Design Inc. v. Parks Canada Agency
Canadian International Trade Tribunal

As this case illustrates, purchasing institutions should be careful to precisely define the requirements that apply to a bidding entity and the requirements that apply to the individuals who are being proposed to perform the work on behalf of that entity. Failing to define bid compliance requirements with this level of precision can undermine the defensibility of any subsequent evaluation decision.

Hidden Criteria Lead to Re-Evaluation Order

Talk Science to Me Communications Inc. v. Canadian Nuclear Safety Commission
Canadian International Trade Tribunal

In its January 2016 determination in *Talk Science to Me Communications Inc. v. Canadian Nuclear Safety Commission,* the Canadian International Trade Tribunal ordered the re-evaluation of bids in an English writing and editing services RFP after the government relied on hidden criteria to disqualify the complainant. The Tribunal found that the government had relied on undisclosed criteria since the RFP did not set out the qualifications or specify the full-time employee requirements that the government relied on when it rejecting the complainant's proposal. The government was therefore directed to re-evaluate the submissions.

Fair Evaluations – Hidden Criteria

Case Study

Weightings, Formulas and Financial Calculations

Your IT department is pressed for time and needs to release its RFP by next Tuesday to meet its contract "go-live" target. It has prepared general evaluation categories and high-level weightings, but has run out of time on the details. Rather than delaying the release of the RFP, it asks you whether it can prepare the next level of detail, including the breakdown of sub-criteria and weightings and price score formulas, and include those details in the evaluation team's internal evaluation guide. How do you advise?

Tribunal Rejects Challenge to Undisclosed Evaluation Guide

Re DMR Consulting Group Inc.
Canadian International Trade Tribunal

In its September 1997 determination in *Re DMR Consulting Group Inc.*, the Tribunal found that the government did not rely on improper hidden evaluation preferences when it used an undisclosed evaluation guide. The case involved a Department of Justice Request for Proposal for systems integration services for the Canadian Firearms Registration System. The complainant took issue with the evaluation team's use of an evaluation guide because that guide was not disclosed to bidders.

Tribunal Rejects Challenge to Undisclosed Evaluation Guide

Re DMR Consulting Group Inc.
Canadian International Trade Tribunal

However, the Tribunal found that the guide was used to promote consistency in evaluation rather than to introduce undisclosed new criteria. As this case illustrates, it is not always necessary to disclose all of the background documents that will be utilized in an evaluation process. However, purchasers should ensure that there is consistency between the evaluation criteria that are disclosed to bidders and any supplemental background documents used by the evaluation team.

Court of Appeal Accepts Sub-Weighting Disclosure

Elite Bailiff Services Ltd. v. British Columbia
British Columbia Court of Appeal

In its February 2003 decision in *Elite Bailiff Services Ltd. v. British Columbia*, the British Columbia Court of Appeal found that the purchaser had a duty to disclose the relative weighting of its various evaluation categories. The case involved a tender call for court services. The Court of Appeal held that in the specific instance the purchaser had satisfied its disclosure obligations by setting out the following general overall scoring for each weighted category in its tender call:

Disclosing Evaluation Criteria

Court of Appeal Accepts Sub-Weighting Disclosure

Elite Bailiff Services Ltd. v. British Columbia
British Columbia Court of Appeal

Proposals meeting the mandatory requirements will be further assessed against the following criteria which represents the Proponent's responses to the requests set out in section 8.0 of this RFP. The relative weighting for each evaluation criterion is provided below:

8.1 Contract Service Area - 20 points
8.2 Deposits - 20 points
8.3 Searches - 20 points
8.4 Agents and Costs - 30 points
8.5 Payment Proposals - 30 points
8.6 Sale - 30 points

Disclosing Evaluation Criteria

Court of Appeal Accepts Sub-Weighting Disclosure

Elite Bailiff Services Ltd. v. British Columbia
British Columbia Court of Appeal

8.7 Workload Variation - 30 points
8.8 Accounting Issues/Trust Funds - 40 points
8.9 Contract Administration - 50 points
8.10 Background, Past Performance & Suitability of Proponent's Business - 150 points
8.11 Business Viability - 30 points
8.12 Qualifications - 100 points
8.13 Suitability as Officers of the Court - 100 points
8.14 Revenue Share - 50 points

TOTAL - 700 points

Court of Appeal Accepts Sub-Weighting Disclosure

Elite Bailiff Services Ltd. v. British Columbia
British Columbia Court of Appeal

The Court of Appeal held that this amount of disclosure was sufficient and that a further breakdown into weighted subcategories was unnecessary:

The listing in para. 11.2 of the RFP (quoted above at para. 10) was in my view an adequate disclosure of the criteria to be applied, and which were in fact applied, by the assessment committee. It would not be practical or fair to require that the points be broken down further among the sub-criteria, or sub-sub-criteria — a process that could go on into infinitesimal detail.

Court of Appeal Accepts Sub-Weighting Disclosure

Elite Bailiff Services Ltd. v. British Columbia
British Columbia Court of Appeal

As this decision illustrates, the disclosure duty does not call for the absolute breakdown of weightings in infinitesimal detail. That said, to reduce the risk of dispute and increase the defensibility of an evaluation process, a purchaser would be well served to be as transparent as possible in the disclosure of its evaluation factors.

Disclosing Evaluation Criteria

Hidden Financial Viability Factors Breach Treaty Rules

Re K-W Leather Products Ltd.
Canadian International Trade Tribunal

In its November 2003 determination in *Re K-W Leather Products Ltd.*, the Tribunal found that the government improperly applied undisclosed financial capability criteria to its contract award decision. The case involved a Department of National Defence procurement of tactical vests. In its evaluation the Department had applied an undisclosed "419 criterion" as part of its assessment of the financial capability of the proponents. The complainant alleged that it was prejudiced by the application of these undisclosed rules, which resulted in the award of the contract to its competitor. The Tribunal agreed.

Disclosing Evaluation Criteria

Hidden Financial Viability Factors Breach Treaty Rules

Re K-W Leather Products Ltd.
Canadian International Trade Tribunal

K-W alleges that the "419 criterion" used in the assessment of its financial capability was not mentioned at all in the RFP and that, therefore, its bid was unfairly evaluated.

The complainant was awarded its lost profit damages, which, in light of the $10.7 million contract value, proved to be a costly sanction for the failure to ensure proper disclosure of its evaluation criteria.

Disclosing Evaluation Criteria

Undisclosed Partial Points Scoring Breaches Treaty Rules

TPG Technology Consulting Ltd. v. Canada
Canadian International Trade Tribunal

In its November 2007 determination in *TPG Technology Consulting Ltd. v. Canada (Department of Public Works and Government Services)*, the Tribunal found that the government failed to properly disclose is evaluation criteria. The case involved an RFP for engineering and technical support services for the Information Technology Services Branch of the Department of Public Works and Government Services.

Disclosing Evaluation Criteria

Undisclosed Partial Points Scoring Breaches Treaty Rules

TPG Technology Consulting Ltd. v. Canada
Canadian International Trade Tribunal

The RFP disclosed an evaluation matrix which allocated two points to a number of rated criteria. During its evaluation process, the government allocated 0, 1 or 2 points to proponents for each of the relevant criteria. The complainant challenged this scoring method, claiming that the government never disclosed an intention to allocate partial points. The complainant argued that the scoring should have been either 0 or 2 per category:

Disclosing Evaluation Criteria

Undisclosed Partial Points Scoring Breaches Treaty Rules

TPG Technology Consulting Ltd. v. Canada
Canadian International Trade Tribunal

TPG submitted that, based on ordinary or plain language in each of the requirements at issue, it was reasonable for TPG to believe that it would receive full, not partial, points if it provided details substantiating its experience in each of the listed criteria. It argued that there was no discretion for evaluators to award points falling between 0 and 2. TPG submitted that, given PWGSC's argument that 0, 1 or 2 points could have been awarded, the evaluators could conceivably also have awarded 0.5, 0.8, 1.5 or any other score falling between 0 and 2. It submitted that this was not consistent with the RFP. TPG also submitted that criterion 3.6.3 was also scored inconsistently with the RFP specifications, i.e. awarding a score of 1 where the scale clearly allows only 0 or 2 points.

Disclosing Evaluation Criteria

Undisclosed Partial Points Scoring Breaches Treaty Rules

TPG Technology Consulting Ltd. v. Canada
Canadian International Trade Tribunal

TPG contended that the effect of the introduction of these intermediary scores is that a weak response, which should have received 0 under the RFP methodology, might have been awarded 1 point and that a strong, but not perfect, response, which should have been awarded 2 points under the original scheme, might have only received 1 point. It submitted that PWGSC's modifications of the published scoring criteria might well have resulted in the lowering of TPG's score or the raising of CGI's score, either of which could have contributed to CGI being declared the successful bidder. TPG presented a table which it purported demonstrates that the potential skew for criteria 1.3.2.4.11.4, 1.3.2.4.11.10, 1.3.3.4.11.4, 1.3.3.4.11.10, 1.3.4.2.11.4, 1.3.4.4.11.10 and 3.6.3 amounted to the possibility of a bidder obtaining more than 5 additional points.

Disclosing Evaluation Criteria

Undisclosed Partial Points Scoring Breaches Treaty Rules

TPG Technology Consulting Ltd. v. Canada
Canadian International Trade Tribunal

The Tribunal agreed, finding that the government failed to disclose its intention to allocate partial points to proponents. The Tribunal therefore found "that PWGSC failed to observe the evaluation methodology that it had set out for itself in the RFP and determines that the procurement was not conducted in accordance with the requirements set out in the applicable trade agreements." As this case illustrates, purchasers should be careful to disclose the details of their evaluation criteria in order to better ensure the defensibility of their evaluations and compliance with applicable trade treaty obligations.

Disclosing Evaluation Criteria

Hidden Price Scoring Formula Breaches Treaty Rules

Immeubles Yvan Dumais Inc. v. Canada
Canadian International Trade Tribunal

In its July 2008 determination in *Immeubles Yvan Dumais Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld a complaint after finding that the government applied an undisclosed formula to score the pricing of the complainant's bid. The case dealt with a tender call to lease office space. complainant alleged that notwithstanding its pre-bid request for clarification, the government failed to clearly establish how the proposed office space and per-square-metre leasing rates submitted by competing bidders would be scored.

Disclosing Evaluation Criteria

Hidden Price Scoring Formula Breaches Treaty Rules

Immeubles Yvan Dumais Inc. v. Canada
Canadian International Trade Tribunal

Instead of multiplying each competing lease rate by the minimum 562 square metres required in the tender call, the government multiplied each bidder's lease rate by the actual total number of square metres offered in each bid. By applying this apples-to-oranges calculation, the complainant's tender was assessed as more expensive than competing bidders who proposed higher per-square-metre rates but offered less space. The Tribunal determined that in making this calculation, the government used an undisclosed formula.

Disclosing Evaluation Criteria

Hidden Price Scoring Formula Breaches Treaty Rules

Immeubles Yvan Dumais Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal noted that the ambiguity relating to the evaluation of price had prejudiced the complainant. The Tribunal determined that the government had breached the relevant trade treaty obligations relating to the proper disclosure of evaluation criteria and awarded the complainant lost profit damages.

Disclosing Evaluation Criteria

Treaty Compliance

Amendment Rules

Tender Amendments: Article 510 regulates the modification of tender call documents, requiring that any new information be made available to all potential bidders in an open, fair and timely manner, and requiring the extension of the bid deadline in instances where new information would require bidders more time to prepare their tenders. Article 511 requires that tender calls remain open for a reasonable amount of time when considering the complexity of the procurement.

Uneven Pre-Bid Disclosures Breach Treaty Rules

Re Partnering & Procurement Inc.
Canadian International Trade Tribunal

In its August 2006 determination in *Re Partnering & Procurement Inc.*, the Tribunal found that the government failed to properly disclose its requirements to all prospective suppliers. The case dealt with the procurement of information technology project management services.

Uneven Pre-Bid Disclosures Breach Treaty Rules

Re Partnering & Procurement Inc.
Canadian International Trade Tribunal

Prior to the submission of proposals, Environment Canada had communicated with some prospective suppliers and clarified where the past experience requirements in the RFP applied to specific proposed project personnel and where it applied to the proponent's entire organization. The Tribunal found that the government's failure to communicate this information to all prospective proponents through a formal addendum breached the relevant trade treaty obligations for fair and open competition:

Uneven Pre-Bid Disclosures Breach Treaty Rules

Re Partnering & Procurement Inc.
Canadian International Trade Tribunal

The Tribunal believes that one of the cornerstones of the fair and transparent procurement process envisioned by the trade agreements is the equal sharing of significant information with all potential suppliers. Not only does this allow the bidders to know exactly what is expected of them, but it also ensures that the procuring entity obtain the most appropriate goods and services at the best price, under the best circumstances. In conducting the procurement in such a haphazard fashion, Environment Canada has not only discriminated against and inconvenienced PPI and, potentially, other bidders, but also it could have affected its own ability to obtain the best possible solution for its requirement.

Disclosing Evaluation Criteria

Uneven Pre-Bid Disclosures Breach Treaty Rules

Re Partnering & Procurement Inc.
Canadian International Trade Tribunal

The Tribunal therefore ordered Environment Canada to modify its future procurement practices to ensure that all potential suppliers are provided access to pertinent information relating to the requirements of a solicitation.

Disclosing Evaluation Criteria

Late Specification Change Breaches Treaty Requirements

Re Paradise Co.
Canadian International Trade Tribunal

In its March 2007 determination in *Re Paradise Co.*, the Tribunal considered allegations of procedural irregularities in a Department of National Defence swimsuit solicitation. The complainant claimed that the government amended its specifications too close to the tender submission deadline without granting an extension to allow it to properly accommodate the specification change and prepare the required swimsuit samples. The Tribunal agreed with the complainant, finding that the government was in breach of the relevant trade treaty rules:

Disclosing Evaluation Criteria

Late Specification Change Breaches Treaty Requirements

Re Paradise Co.
Canadian International Trade Tribunal

In the Tribunal's view, to the extent that new samples were required and possibly a new bid needed to be prepared, PWGSC did not provide sufficient time for potential suppliers to submit a compliant bid. The Tribunal is of the opinion that this was especially true for bidders with offshore suppliers, as in the case of Paradise. Despite requesting an extension, Paradise was denied this request and, accordingly, the restrictive timing requirements in the RFSO, following an amendment issued late in the bidding process, prevented Paradise from submitting a bid. Therefore, the Tribunal finds that PWGSC breached Article 504 of the *AIT*.

Disclosing Evaluation Criteria

Late Specification Change Breaches Treaty Requirements

Re Paradise Co.
Canadian International Trade Tribunal

As this case illustrates, the disclosure of evaluation criteria should be performed in a timely fashion. Where significant new disclosures are made after a solicitation is issued, purchasers should consider extending the tender submission deadline to allow prospective bidders sufficient time to respond to the new information. As a remedy for the inadequate disclosure, the Tribunal ordered the government to accept and evaluate the complainant's late bid as if it had been submitted on time.

Disclosing Evaluation Criteria

Case Study

Upper Air Weather Monitoring

The Department of the Environment issues a tender call for its "upper air" weather monitoring program for Inukjuak Station in the Quebec arctic region of Nunavik. The tender call, which had a two week response deadline, is posted on the Internet and is published in the Nunatsiaq News, a regional newspaper with a head office in Iqaliut, Nunavut. After its proposal is rejected as late, a proponent challenges the timeframe, claiming that two weeks was an insufficient timeframe to enable responses. Would you reject the complaint since two other bidders submitted on time or would you order the acceptance and evaluation of the late bid?

Insufficient Posting Time for Arctic Tender

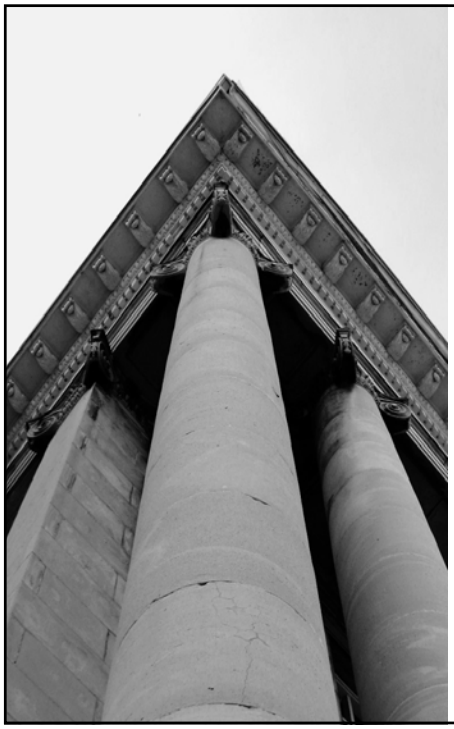
Luc Coulombe v. Department of the Environment
Canadian International Trade Tribunal, May 23, 2006

The May 2006 determination of the CITT in *Luc Coulombe v. Department of the Environment* involved a federal government procurement for services at the Inukjuak Station in the Quebec arctic region of Nunavik. The RFP was published electronically on the internet and was also distributed by way of newspaper. The complainant alleged that it was not provided sufficient time to respond to the RFP.

Insufficient Posting Time for Arctic Tender

Luc Coulombe v. Department of the Environment
Canadian International Trade Tribunal, May 23, 2006

The Tribunal agreed, finding that the fourteen days provided by the RFP was not a reasonable amount of time in the circumstances since "it did not take into account the difficulties frequently associated with disseminating information in remote regions." By way of remedy the Tribunal ordered an extension to the submission deadline to provide the complainant with an additional three weeks to submit its proposal.



Fair Process Duties

Treaty Compliance

Tender Evaluation and Awards

Tendering Evaluations and Awards: Article 515 regulates the treatment of tenders and contract awards according to fair and impartial procedures. It also includes a new provision that expressly allows for the correction of unintentional errors in form, provided that the same opportunity is made available to all participating suppliers. This Article also states that the contract award should go to the best compliant tender based on the criteria established under the tender call and contains new price verification protocols for situations involving abnormally low bids.

Air Force Fails to Defend Against Unfair Inside Advantage

AT&T Government Solutions, Inc.
U.S. Government Accountability Office

In its July 2016 decision in *AT&T Government Solutions, Inc.*, the GAO found that the Air Force failed to guard against unfair bidder advantage in a potential conflict of interest situation. As the GAO noted, the federal procurement rules recognize conflict of interest arising out of: (i) biased ground rules; (ii) unequal access to information; and (iii) impaired objectivity. The GAO found that one of the winning bidder's proposed subcontractors had prior access to information relevant to the bidding process and that the government evaluators had failed to provide a basis for concluding that the potential conflict had been avoided or mitigated. The GAO ordered a re-evaluation and re-award process.

Unfair Evaluations – Conflict of Interest

Veterans Affairs Fails to Enforce Conflict Rules

ASM Research
U.S. Government Accountability Office

In its January 2016 decision in *ASM Research,* the GAO found that the Department of Veterans Affairs failed to properly enforce its conflict of interest rules in a solicitation for cloud-based software infrastructure services. The GAO found that the winning bidder should have been rejected due to impaired objectivity since the awarded contract would require the contractor to evaluate its own prior work and assess fault as between itself and third-parties for performance failures. The GAO found that the government failed to avoid, neutralize or mitigate the potential conflict of interest and therefore ordered a re-evaluation.

Unfair Evaluations – Conflict of Interest

Case Study

Inside Advantage Scenarios

You are approached for advice from a local municipality. The mayor, who is also the owner of a local business, wants to bid on an upcoming municipal project. Do you see any issues with this? If so, would there be a workaround if the mayor's spouse bid on the project instead?

Court Prohibits Contract Award in Conflict of Interest Case

Coughlan & Mayo v. Victoria (City)
British Columbia Supreme Court

In its August 1893 decision in *Coughlan & Mayo v. Victoria (City)*, the British Columbia Supreme Court found that an alderman was in a conflict of interest because he owned an interest in a company that was involved in the city's bidding process. The case dealt with a tender call for the construction of a surface drain. One of the bidders sued over the award to a competitor because the alderman who had the deciding vote on the contract award owned an interest in the successful bidder.

Court Prohibits Contract Award in Conflict of Interest Case

Coughlan & Mayo v. Victoria (City)
British Columbia Supreme Court

The court found that the alderman was in an ongoing conflict of interest, noting that his personal interest could undermine his ability to properly discharge his public duties in the event that a contract dispute arose between the city and the successful bidder. Having found that there was a conflict of interest, the court then concluded that the tendering process had been tainted with illegality. After finding that the contract award process had been unfair and illegal on account of the conflict of interest, the court prohibited the city from carrying out the contract.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

In its March 1979 decision *New Brunswick v. Wheeler*, the Supreme Court of Canada determined that the Mayor of Moncton should be removed from office on account of a conflict of interest. The Supreme Court described the facts as follows:

The facts are not in dispute. The Mayor of Moncton was at all material times in 1977 a shareholder in four private companies, in one of which he was also President and in another he was also Secretary-Treasurer.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

The record is silent as to the extent of his holdings but counsel for the respondent Mayor advised this Court in the course of argument that the respondent's shareholdings ranged from 10 per cent in two of the companies, to 26 per cent in a third and to 49 per cent in the fourth company. The identity of the remaining shareholders in each company does not appear in the record.

At least three of the four companies listed in the form of disclosure mentioned below, during the term of office of the Mayor commencing in June 1974 and ending in May 1977, entered into contracts with the City of Moncton with respect to the installation of watermains and sewer services, the spraying of mosquitoes and for other purposes not disclosed in the record.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

Several contracts were entered into in connection with the provision of certain local improvements by the municipality to lands owned by one of these companies. When these contracts came before the Council of the City of Moncton, the Mayor filed with the City Clerk a document sometimes referred to as a "Form of Disclosure" but which stated in various phraseology that the Mayor had "a conflict of interest" with respect to the contract in question.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

The Supreme Court noted that there had been no attempt to conceal the conflict and that the mayor had proceeded on the advice from the city solicitor and the New Brunswick Department of Justice and that "counsel before us stated that the Mayor signed some contracts both as Mayor of the city and as an officer of the contracting company".

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

Furthermore, in the face of public criticism, the Minister of Municipal Affairs had looked into the matter and had responded to the Moncton Citizens' Committee by stating that the "investigation proves to me beyond any doubt that Mayor Wheeler has not been guilty of the improprieties referred to in your letter". The Appeal Division of the Supreme Court of New Brunswick also dismissed an application for a writ of *quo warranto* aimed at removing the mayor from office on account of the conflict of interest.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

In its decision, the New Brunswick Court relied on the House of Lords decision in *Lapish v. Braithwaite* where it was held that there should be no disqualification "by reason only of having any share or interest" in the private company. The Supreme Court saw the matter differently, distinguishing the House of Lords decision and stating that:

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

It is unrealistic to believe that as a general principle of human conduct a director or officer of a contracting company does not have at least an indirect interest in the company's contracts. On the facts before this Court, the provision has an even clearer impact. A director or officer of a construction company or of a service company must, in ordinary parlance and understanding, have an interest, albeit indirect, in the welfare of the company as it relates to or results from "contracts".

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

The Supreme Court also found that conflict of interest could not be addressed simply through disclosure and transparency:

As I have indicated, qualifications for the election to and the holding of high office in all levels of government are a matter of considerable importance in the functioning of the democratic community. The sanctity of these offices and the strict adherence to the conditions of occupying those offices must be safeguarded if democratic government is to perform up to design.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

Therefore, these enactments as they are brought before the courts in applications in quo warranto and otherwise, must be given their full application according to law. This is so whether or not there be any moral deficiency or whether the record reveal, as is the case here (and I emphasize this), that the business at hand, involving as it has in my opinion, a conflict with statutory requirements, was conducted openly without any lack of communication to the Council by the respondent of his interest in the contracting corporations. It may be that the extent of disclosure was not as full as it might have been, but the evidence indicates that such disclosure as was made took the form that it did on the strength of advice from the City Solicitor. There certainly is no evidence of any attempt on the part of the respondent to be deceptive in the form and mode of disclosure chosen by him.

Supreme Court Ousts Mayor For Contracting Conflict

New Brunswick v. Wheeler
Supreme Court of Canada

Ultimately, disclosing the conflict of interest proved to be no substitute for avoiding the conflict of interest. The Supreme Court allowed the appeal and directed the issuance of a Writ of Quo Warranto removing the mayor from office.

Spousal Conflict Prompts Order for Fairness Advisor

Re J. Molson & Associates
Canadian International Trade Tribunal

In its August 2004 determination in *Re J. Molson & Associates*, the Tribunal considered a case where the spouse of an Assistant Deputy Minister was the owner of one of the bidding companies. The case involved the procurement of professional services for the Department of Public Works and Government Services. The complainant alleged that its competitor was given preferential treatment on account of the personal relationship between the bidder's owner and the Assistant Deputy Minister.

Spousal Conflict Prompts Order for Fairness Advisor

Re J. Molson & Associates
Canadian International Trade Tribunal

The Department agreed to cancel the process. The Tribunal ordered that the contract awarded to the conflicted bidder be terminated, that the contract be re-tendered and that a fairness monitor be appointed in the subsequent process to better ensure the impartiality of the results.

Case Study

Bidding Innovation Program

The mayor is proposing a new Bidding Innovation Program that will introduce two new revenue streams to help pay for long-promised property tax cuts:

(i) the municipality plans on bidding to provide services to other government entities; and

(ii) the municipality plans on offering its technical advisors as consultants to external suppliers to help them bid on contracts for the municipality.

How do you advise?

Lack of Inside Information Critical in Unfair Advantage Case

Re Atlantic Safety Centre
Canadian International Trade Tribunal

In its May 1997 determination in *Re Atlantic Safety Centre*, the Tribunal dismissed the complainant's allegations of conflict of interest and unfair advantage. The case involved a Request for Proposal for on-site health and safety inspection services for contaminated site remediation activities at the former U.S. naval facility at Argentia, Newfoundland.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

In its July 2006 determination in *Calian Ltd. v. Canada (Department of Public Works and Government Services)*, the Tribunal considered allegations of bias and conflict of interest in a Department of National Defence RFP for driver training and vehicle maintenance services. One of the complainant's competitors had hired Canadian Forces members to serve as advisors in preparing its tender. The complainant challenged the fairness of this process, claiming that the practice of allowing Department of Defence members to serve as advisors to suppliers gave its competitor an unfair inside advantage.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

The Tribunal agreed. The following highlights from its analysis of the conflict of interest issues in this case provide useful general guidance on the adverse impact that unfair inside advantage can have on the public procurement process:

The Tribunal believes that the issues raised in this matter constitute a violation of Article 504 of the *AIT*, Article 1008 of the *NAFTA* and Article VII of the *AGP*.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

These violations arise from the fact that: Valcom hired and/or obtained the services of the two named serving CF members, employees of DND; Valcom was actively trying to obtain a contract with DND; and the two named serving CF members performed a service connected with that procurement. In and of itself, this creates a situation that violates the spirit of the trade agreements and the letter of the above-mentioned articles…[i]n the Tribunal's opinion, a conflict of interest or, at minimum, an appearance of conflict of interest, exists when active CF members enter into a relationship with a potential supplier to DND because those CF members will be actively promoting the bid and capabilities of one potential supplier over those of another. The Tribunal wishes to emphasize that this behaviour is also potentially to DND's disadvantage.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

Such activities, even though they appear to be permitted under current DND practices, provided an advantage to Valcom over Calian. It is in that sense that DND's practice resulted in a violation of the non-discriminatory provisions of the three trade agreements.

This conclusion is in line with the intent and purpose of those agreements which, as the Tribunal has stated on numerous occasions, is so aptly put in Article 501 of the *AIT*, which reads as follows: "… the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

More precisely, the Tribunal finds that the conflict of interest of the named CF members, in and of itself, raises concerns relative to the information that they could provide to the potential suppliers for which they are working and would have no interest in making available to all other potential suppliers. To cite but one example, current internal knowledge of training regimes might allow a bidder to bid unduly low on the portions of the financial proposal being evaluated, while adding significant extra profit on those portions of the proposal that were not being evaluated but were more likely to be called up.

The Tribunal does not agree with PWGSC's argument that the CF members did not have access to information that would have precluded competition or provided an unfair competitive advantage to Valcom.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

> Rather, the Tribunal believes that the conflicts of interest tolerated by DND's practice and, more particularly, by the scheme of this procurement were enough to poison the procurement process. In fact, allegations surfaced in documents provided to the Tribunal with the GIR that Calian itself was vying for, and had allegedly hired, "inside help" of its own. In the Tribunal's view, this potential second wrong cannot be viewed as cancelling out the one attributed to Valcom, nor can it be seen as having levelled the playing field among those bidders, let alone with respect to the other members of the supplier community. Rather, if true, it would appear to be further evidence of a culture that permits bid applicants to hire serving CF members to improve their chances of submitting the winning bid.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

> The Tribunal considers that such hiring, in and of itself, provides at least the appearance of a conflict of interest that should have been sufficient to vitiate the winning bid by Valcom. This constituted discriminatory treatment, in that Valcom had or could have had access to information relevant to the procurement that was not otherwise available to the other potential suppliers. Such a result is specifically prohibited by the language of Article 1008 of *NAFTA*. It is also inherently prohibited under Articles 504(1) and 504(2) of the *AIT* and under Article VII of the *AGP* even though the language of those provisions is not as precise. It is clear to the Tribunal that, as a result of this procurement scheme, Calian ended up, in fact, receiving a treatment that was less favourable than the treatment received by Valcom, and this is precisely what these provisions are prohibiting.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Inside Advantage Scheme Poisons Procurement Process

Calian Ltd. v. Canada
Canadian International Trade Tribunal

Conflict of interest or appearance of conflict of interest that may result in an advantage to certain potential suppliers over others cannot be tolerated by a framework that is intended to provide equal access to all suppliers. The Tribunal therefore concludes that the complaint is valid.

The Tribunal prohibited the government from extending the impugned contract. As this case illustrates, public institutions should guard against giving specific suppliers special access to information that is not available to other suppliers since this can significantly undermine the fairness of of the competitive procurement process.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Case Study

Compliance Assessments

Concerns have been raised by senior management about the high level of non-compliant submissions that are being rejected by your organization. They want to take a more flexible approach to bid irregularities. How do you advise?

Tribunal Finds Uneven Rectifications Breach Treaty Rules

Re Nico-Arret Inc.
Procurement Review Board

The May 1991 determination of the Procurement Review Board in *Re Nico-Arret Inc.* provides an example of bid repair. The case dealt with the acquisition of hand-held flags by the Department of the Secretary of State for use in Canada Day celebrations. The Tribunal determined that the Department had acted improperly when it permitted some of the bidders to re-submit samples after the close of bidding:

Tribunal Finds Uneven Rectifications Breach Treaty Rules

Re Nico-Arret Inc.
Procurement Review Board

The issue in this case turns upon the significance of the government having fixed *mandatory* requirements and then exercising an uncontrolled discretion on an unannounced basis to reject one bidder and then, through the inconsistent application of that discretion, to give three others a second chance. It is of no avail to argue that notwithstanding that impropriety, each bidder got a chance to submit only one sample (because three of them got two chances to submit that sample). And even using their reasoning, they overlook the fact that only the complainant got *its* samples in (however inadequate) before the bidding closed.

Tribunal Finds Uneven Rectifications Breach Treaty Rules

Re Nico-Arret Inc.
Procurement Review Board

> The others got their second chance *after* the bidding was over, and this constitutes an unfair and unevenly applied opportunity for altering their bids. Indeed, the contract awardee, in addition to stating in writing to the Board that it submitted samples with its bid (which DSS says it didn't receive), provided details in its proposal (which DSS did receive) of the inadequacies of the samples it said it submitted and implied how they would modify those samples to make them to specification. The Board does not understand why the government treated the bids of Nico-Arret and Canadiana in such a different manner.
> (Emphasis added)

Tender Compliance – Post-Close Clarifications and Bid Repair

Tribunal Rejects Substantial Compliance Argument

Re R.E.D. Electronics Inc.
Canadian International Trade Tribunal

In its July 1995 determination in *Re R.E.D. Electronics Inc.,* the Tribunal determined that the design-based nature of the specifications did not permit the application of a substantial compliance standard based on end-functionalities:

> The Tribunal understands that the solution proposed by the contract awardee does meet the needs of the Department of Finance, in that, as a whole, it allows for the monitoring of the network and the collection of the data that results. Had the specification been written more in terms of performance criteria, the acceptance of a solution, such as that proposed by the contract awardee, might have been in accordance with the essential requirements of such a specification.

Tender Compliance – Substantial Compliance

Tribunal Rejects Substantial Compliance Argument

Re R.E.D. Electronics Inc.
Canadian International Trade Tribunal

However, the specification is written, to a large degree, in terms of specific design criteria, which has the effect of limiting the options available to the bidders by narrowing the range of acceptable solutions.

The purchaser was therefore found to have awarded the contract to a non-compliant bidder. This case provides an example of how the specific terms of a tender call may play against the application of a substantial compliance standard, particularly where that standard is not expressly set out in the tender call documents.

Tender Compliance – Substantial Compliance

Uneven Post-Bid Price Clarifications Breach Treaty Rules

Re Huron Consulting
Canadian International Trade Tribunal

In its February 2003 determination in *Re Huron Consulting*, the Canadian International Trade Tribunal held that the government's post-bidding collection of pricing information amounted to bid repair. The case involved a Department of National Defence procurement for software training services. The Tribunal found that the Department's post-close conduct unfairly favoured the selected bidder and violated the trade agreements:

Tender Compliance – Post-Close Clarifications and Bid Repair

Uneven Post-Bid Price Clarifications Breach Treaty Rules

Re Huron Consulting
Canadian International Trade Tribunal

The Tribunal is of the view that contacting CTC to obtain additional information in relation to its bid after bid closing was contrary to the terms of the RFSO. To have afforded CTC the opportunity, after bid closing, to provide additional information regarding its per diem rate for the option year, without providing the same opportunity to the other compliant bidders, favoured CTC to the detriment of the other bidders. In this regard, the Tribunal is of the opinion that PWGSC breached the provisions of the trade agreements and, therefore, finds the grounds of complaint to be valid.

The Tribunal therefore awarded the complainant its lost profit damages and complaint costs.

Tender Compliance – Post-Close Clarifications and Bid Repair

Counter-Offer Renders Tender Non-Compliant

Re Montage-DMC eBusiness Services
Canadian International Trade Tribunal

In its September 2003 determination in *Re Montage-DMC eBusiness Services, A Division of AT&T Canada*, the Tribunal recognized that the bidder's tender could be rendered non-compliant on account of a counter-offer. The case involved a Canada Customs and Revenue Agency tender call for business intelligence software and support. Rather than providing pricing information in the format set out in the tender call, the bidder proposed an alternative pricing structure. The tender was rejected.

Counter-Offer Renders Tender Non-Compliant

Re Montage-DMC eBusiness Services
Canadian International Trade Tribunal

The Tribunal held that the tender was non-compliant and properly rejected, noting that "the pricing model did not allow for bidders to provide two prices and that the requirement to provide a firm unit price that could be used for incremental purchasing was unambiguous". Furthermore, the Tribunal held that if the complainant had been unclear about the required pricing structure, it should have sought clarification before bidding. The determination was also significant as a rare early example of the Tribunal awarding costs against an unsuccessful complainant.

"Clarification" of Price Errors is Bid Repair in Contract A

Maystar General Contractors Inc. v. Newmarket (Town)
Ontario Court of Appeal

In its May 2008 decision in *Maystar General Contractors Inc. v. Newmarket (Town)*, the Ontario Superior Court of Justice found that the municipality improperly corrected a mathematical error in a tender and held the municipality liable for awarding a contract to a non-compliant bidder. The case involved a tender call for the construction of a recreational facility. The plaintiff, Maystar General Contractors, was an unsuccessful bidder. It alleged that the contract was awarded to a non-compliant competing bidder.

"Clarification" of Price Errors is Bid Repair in Contract A

Maystar General Contractors Inc. v. Newmarket (Town)
Ontario Court of Appeal

It sued for $3.3 million in lost profits. Newmarket, the defendant municipality, argued that the selected tender was compliant and that its mathematical corrections were permitted within the tendering rules. The court disagreed, finding that the bid price in the selected tender was uncertain and that the post-bid "clarifications" and "corrections" amounted to improper bid repair. As the court found, the inconsistent pricing information in the selected tender was capable of two different interpretations, thereby leading to uncertainty with respect to the tendered price.

Tender Compliance – Post-Close Clarifications and Bid Repair

"Clarification" of Price Errors is Bid Repair in Contract A

Maystar General Contractors Inc. v. Newmarket (Town)
Ontario Court of Appeal

This failure to submit a clear offer on price was a material mistake that rendered the bid non-compliant and incapable of acceptance. The court determined that this type of mistake could not be properly cured by a post-bid "correction" or "clarification" and that this amounted to bid repair. In its September 2009 decision in *Maystar General Contractors Inc. v. Newmarket (Town)*, the Ontario Court of Appeal upheld this decision, noting that the lower court had correctly concluded that the error in the pricing information was a material mistake that could not be fairly corrected after the submission of bids.

Tender Compliance – Post-Close Clarifications and Bid Repair

Tribunal Applies Maystar Rule to Price "Clarifications"

Maritime Fence Ltd. v. Parks Canada Agency
Canadian International Trade Tribunal

In its November 2009 determination in *Maritime Fence Ltd. v. Parks Canada Agency*, the Canadian International Trade Tribunal awarded the complainant lost profits after finding that the government awarded a contract to a non-compliant competing bidder. The case dealt with a tender call for guardrail removal and sign post installation in the Banff, Kootenay and Jasper National Parks.

Tribunal Applies Maystar Rule to Price "Clarifications"

Maritime Fence Ltd. v. Parks Canada Agency
Canadian International Trade Tribunal

The Tribunal determined that the competing bidder had submitted contradictory pricing information which rendered its bid non-compliant and incapable of acceptance. It also found that the government's attempt to "clarify" the pricing discrepancy after the bid submissions constituted bid repair in violation of the *Agreement on Internal Trade*. With respect to the contradictory pricing information, the Tribunal found that pricing was a material term of the tendering process and that the uncertainty created by the pricing error rendered the bid incapable of acceptance.

Tribunal Applies Maystar Rule to Price "Clarifications"

Maritime Fence Ltd. v. Parks Canada Agency
Canadian International Trade Tribunal

As the Tribunal concluded, when left with more than one possible interpretation regarding a price offer, and having no way to determine which of the two interpretations were correct, the government was not within its rights to seek further clarification and was compelled to reject the bid.

Tender Compliance – Post-Close Clarifications and Bid Repair

Bidder's "Essential Compliance" Argument Rejected

ISE Inc. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

In its May 2009 determination in *ISE Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal upheld the government's decision to reject a non-compliant proposal. The case dealt with a Request for Standing Offer (RFSO) issued by the Department of Public Works and Government Services for the provision of free-standing office furniture. The complainant's proposal was rejected because it met most, but not all, of the mandatory requirements set out in the RFSO.

Tender Compliance – Substantial Compliance

Bidder's "Essential Compliance" Argument Rejected

ISE Inc. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

The complainant challenged its rejection, claiming that the government had included too many onerous requirements and that its proposal should be accepted since it met all of the "essential requirements" contained in the solicitation document. The Tribunal disagreed, citing provisions in the RFSO that required proponents to meet *all* of the requirements.

Tender Compliance – Substantial Compliance

Bidder's "Essential Compliance" Argument Rejected

ISE Inc. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

The Tribunal noted that it is not up to a proponent to determine which mandatory requirements are essential and which are not and that, subject to the prohibition against relying on unreasonably restrictive requirements, it remains the prerogative of the purchasing institution to set its mandatory requirements. The Tribunal noted that if a proponent wants to take issue with the reasonableness of a solicitation requirement, it should do so prior to bidding, as required by federal regulation. The rejected bidder's complaint was therefore dismissed and the government was awarded its complaint costs.

Tender Compliance – Substantial Compliance

Missing Letter of Validation Leads to Bid Rejection

Dymech Engineering Inc. v. Canada
Canadian International Trade Tribunal

In its December 2011 determination in *Dymech Engineering Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the government's decision to disqualify a bidder for failing to submit the required certification. The case dealt with a solicitation for the manufacture, supply and delivery of aluminum poles for the support of wind measuring equipment. The solicitation called for proof of welding certification and for the performance of the work by a certified welder.

Tender Compliance – Technical Non-Compliance

Missing Letter of Validation Leads to Bid Rejection

Dymech Engineering Inc. v. Canada
Canadian International Trade Tribunal

As the Tribunal summarized, the complainant's bid was rejected since it failed to submit a letter of validation to confirm that its welding certificate was current. The complainant challenged the rejection of its bid since the solicitation did not specify the need for a letter of validation. However, the Tribunal rejected this argument since the need for the letter of validation arose by necessary implication through the requirement for a valid certificate.

Tender Compliance – Technical Non-Compliance

Missing Letter of Validation Leads to Bid Rejection

Dymech Engineering Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal therefore found that the complainant's bid was properly rejected by the government and dismissed the complaint. As this case illustrates, tender compliance requirements should be carefully drafted and interpreted since bidders that are rejected for failing to meet these threshold eligibility requirements can, and often do, launch legal challenges to contest their disqualifications.

Tender Compliance – Technical Non-Compliance

Joint Bid Rejected After OEM Letter Only Names One Bidder

Team Sunray v. Canada
Canadian International Trade Tribunal

In its October 2012 determination in *Team Sunray v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the government's decision to reject a complainant's proposal for failing to provide a required declaration from an original equipment manufacturer. The case dealt with a Department of Defence RFP for the provision of an integrated suite of communication and data equipment. The RFP required that proponents provide written assurances from the original equipment manufacturer regarding the availability of the required equipment.

Tender Compliance – Technical Non-Compliance

Joint Bid Rejected After OEM Letter Only Names One Bidder

Team Sunray v. Canada
Canadian International Trade Tribunal

The complainant was a joint venture comprised of Team Sunray and CAE Inc. However, the required certification provided from the OEM only referred to CAE Inc. and did not refer to Team Sunray. The proposal was rejected as non-compliant for failing to mention both members of the joint venture team. The complainants challenged their rejection, arguing that the provision of the certification naming one joint venture party should be sufficient for meeting the mandatory requirement for the entire team.

Tender Compliance – Technical Non-Compliance

Joint Bid Rejected After OEM Letter Only Names One Bidder

Team Sunray v. Canada
Canadian International Trade Tribunal

The Tribunal disagreed, finding that the RFP required each member of the joint venture to provide the required certification and that the government had properly rejected the proposal as non-compliant for failing to meet this requirement.

Tender Compliance – Technical Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

In its July 2014 determination in *Valcom Consulting Group Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected a complaint after finding that the disqualified bidder had failed to properly submit its tender documents into the government's electronic bid submission system.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

The case dealt with a solicitation for the provision of task-based informatics professional services to all federal government departments and Crown corporations. Valcom challenged the rejection of its bid, claiming that it had followed the required process for electronic bid submission. It blamed the problem on an internal error or failure in the government's electronic tendering system.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

However, as the Tribunal noted that, according to the government's electronic records, Valcom had entered the required information onto the site but had failed to select the "Submit" option on the Data Collection Component ("DCC") of the system. The Tribunal also noted that the bid submission verification process for the federal government's electronic bid submission system provided three types of confirmation to bidders.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal ultimately found that Valcom had failed to properly submit its bid and that the onus was on Valcom to make follow-up inquiries when it did not receive any bid receipt confirmation notices from the government system:

The lack of any confirmation messages should have raised a red flag for Valcom that something was wrong—especially given that it is a sophisticated firm specializing in informatics services—and prompted it to verify the receipt of its bid with PWGSC without delay. However, Valcom failed to raise the matter directly with PWGSC and question the lack of confirmation of receipt following what should readily have been recognized as an unsuccessful attempt to submit the electronic component through the DCC.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

In its determination, the Tribunal also provided some useful guidance for the use of electronic bid submissions systems, stating that bidders should be provided with clear instructions for using the system. It found that the federal government met these obligations in the current case:

The Tribunal recognizes that, in general, conducting procurements using information technology systems and software has become increasingly common in modern society and can provide a variety of benefits to both procuring entities and potential suppliers, such as procedural efficiencies, more effective use of resources and improved accessibility for suppliers.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

Of course, electronic means of bid submission are not always perfect, and system malfunctions are a real possibility. The potential for human error by users of an electronic system is also a factor. Yet, the possibility of such errors may be minimized to some extent where the procuring entity provides clear and detailed information to potential suppliers regarding the operation of the software and systems being used to conduct a particular procurement and maintains mechanisms for handling questions or concerns from users and for providing technical support.

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

In the present case, the TBIPS solicitation documents provided clear and detailed instructions for bidders on how to access, register and use the CPSS Supplier Module and, in particular, the DCC, for the submission of bids. In the event of any questions or concerns regarding any aspect of the electronic transmission of data through the DCC, suppliers were encouraged to submit these questions and concerns to PWGSC ". . . as early as possible in the solicitation period . . . ."

Tender Compliance – Procedural Non-Compliance

Supplier Fails to Push "Submit" Button on Online Bid

Valcom Consulting Group Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal therefore rejected the complaint and awarded bid complaint costs to the government. As this case illustrates, when deploying electronic bid submission systems, purchasing institutions should ensure that their systems are capable of maintaining electronic audit trails in order to rebut bidder claims that the system lost their documents. They should also ensure that users are provided with clear bid submission instructions and bid submission confirmations to help reduce the occurrence of human error.

Tender Compliance – Procedural Non-Compliance

Bid Submitted Right Time, Wrong Place

Falcon Environmental Services Inc. v. Canada
Canadian International Trade Tribunal

In its May 2015 determination *in Falcon Environmental Services Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the government's decision to reject a non-compliant proposal. The case dealt with an RFP issued on behalf of the Department of National Defence for the provision of wildlife control services. The complainant's proposal was rejected as late but it contested its disqualification and maintained that it had submitted a timely bid.

Tender Compliance – Procedural Non-Compliance

Bid Submitted Right Time, Wrong Place

Falcon Environmental Services Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal disagreed, upholding the rejection after finding that the proposal was delivered on time but to the wrong location. As this case illustrates, the use of physical bid submissions processes continues to result in bid disputes, further underscoring the need to transition to electronic bid submission systems, which, while not error free, significantly reduce the risks associated with human error that often arise with physical bid submissions.

Tender Compliance – Procedural Non-Compliance

Case Study

Timing of Compliance

You just received a complaint from a losing proponent that claims that your organization awarded a contract to a non-compliant competitor. The project manager just emailed you stating that "There were no compliance issues with the winning supplier. In fact, we just received delivery last week and their product fully met specification." Is this a complete answer to the non-compliance allegations?

Non-Compliance Cannot Be Cured Through Performance

Re Mechron Energy Ltd.
Canadian International Trade Tribunal

In its August 1995 determination in *Re Mechron Energy Ltd.*, the Tribunal was careful to distinguish between a bidder's compliance with tender call requirements and a contractor's compliance with performance requirements. The Tribunal determined that compliance with the latter cannot cure non-compliance with the former. The case involved a Department of Transport Request for Proposal for power systems. The complainant challenged the contract award, asserting that the Department selected a non-compliant tender.

Tender Compliance – Timing of Compliance

Non-Compliance Cannot Be Cured Through Performance

Re Mechron Energy Ltd.
Canadian International Trade Tribunal

The Department maintained that the products that were ultimately provided by the successful bidder met the stated requirements. The Tribunal held that this was insufficient:

… the Tribunal cannot accept the Department's proposition that the ultimate determination of compliance is made at acceptance testing under the contract. The Tribunal's difficulty with this proposition is that it associates two separate events, that is, proposal compliance and contract compliance. It is erroneous, in the Tribunal's view, to suggest, as the Department does in its comments, that the compliance of a proposal can only be fully determined once the contract is performed.

Tender Compliance – Timing of Compliance

Non-Compliance Cannot Be Cured Through Performance

Re Mechron Energy Ltd.
Canadian International Trade Tribunal

The compliance of a proposal should be fully determined once the evaluation of the proposals is completed. What is fully determined at acceptance testing under the contract is compliance with the contract terms and conditions, a matter different from proposal compliance and, in the Tribunal's view, not under consideration here.

Due to the improper assessment of compliance, the Tribunal ordered a cancellation of the awarded contract and directed the Department to either award the contract to the complainant or compensate the complainant in the amount of its lost profits.

Tender Compliance – Timing of Compliance

Future Technical Requirements Not a Compliance Standard

Re Cognos Inc.
Canadian International Trade Tribunal

In the August 2002 determination of the Tribunal in *Re Cognos Inc.*, the complainant alleged that the government awarded the contract to a non-compliant bidder. The case involved the acquisition of business intelligence software by the Department of Transport. In its defence the Department asserted that the particular technical requirement spoke to future performance capability rather than current capability and was therefore not a pass/fail requirement that went to the selected tender's compliance. Based on the specific facts, the Tribunal agreed:

Tender Compliance – Timing of Compliance

Future Technical Requirements Not a Compliance Standard

Re Cognos Inc.
Canadian International Trade Tribunal

The wording of item C13 states that the "multi-dimensional reporting tool's front end component (reporting agent) *must be able to* connect to and access all of the advanced functionality within Microsof[t's] OLAP Services and Microsoft's Analytical Services 2000 software" [emphasis added]. According to the Tribunal, this phrase in item C13 has to be interpreted in context. In this case, it is clear to the Tribunal that "must be able to" does not mean that the software "must connect to" the advanced functionality, but rather, that the software "must be able to", i.e. "must have *the capability to*" connect to and access the advanced functionalities at some point in the future.

Tender Compliance – Timing of Compliance

Future Technical Requirements Not a Compliance Standard

Re Cognos Inc.
Canadian International Trade Tribunal

While the allegations that the government awarded to a non-compliant tender were dismissed, this case illustrates how ambiguities regarding the nature of a requirement and when it must be met can give rise to contract award challenges. Purchasers should therefore be clear with respect to the nature of their requirements and how and when those requirements will be assessed.

Tender Compliance – Timing of Compliance

"In Possession" Rule Leads to Non-Compliant Toilet Tender

Ready John Inc. v. Canada
Federal Court of Appeal

The July 2003 determination of the Tribunal in *Ready John Inc. v. Canada (Department of Public Works and Government Services)* involved a Department of National Defence tender call for portable chemical toilets. The tender call required the contractor to have 250 such toilets in its possession. The Tribunal held that the bidder's lease option for 250 toilets was sufficient since the possession requirement referred to the "contractor" rather than to the bidder and therefore spoke to the contract performance stage rather than to the tender evaluation stage.

Tender Compliance – Timing of Compliance

"In Possession" Rule Leads to Non-Compliant Toilet Tender

Ready John Inc. v. Canada
Federal Court of Appeal

The tender was therefore held to be compliant and properly accepted. However, in its June 2004 decision in *Ready John Inc. v. Canada (Department of Public Works and Government Services)*, the Federal Court of Appeal took the opposite view and found that the selected bidder did not meet the "in possession" requirement. After concluding that the relevant specification called for the literal possession of the required toilets at the time that tenders were submitted, the Federal Court of Appeal returned the matter back to the Tribunal.

Tender Compliance – Timing of Compliance

"In Possession" Rule Leads to Non-Compliant Toilet Tender

Ready John Inc. v. Canada
Federal Court of Appeal

This reversal further underscores the need to clearly distinguish between tender compliance requirements and contract performance requirements since ambiguities can serve to increase the risk of challenges to a tendering process.

Tender Compliance – Timing of Compliance

Case Study

Duty to Investigate

A proponent has written you during pre-award evaluations claiming that its competitor made misrepresentations in its competing proposal. If true, these could render that competing proposal non-compliant or subject to disqualification. Are you under a duty to investigate these allegations or are you restricted from doing so?

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

The Supreme Court of Canada's January 2007 five to four split decision in *Double N Earthmovers Ltd. v. Edmonton (City)* serves as a perfect case study to illustrate the contentious and controversial nature of tender compliance disputes. The case involved a City of Edmonton tender call for refuse removal services that required contractors to use equipment dated 1980 or newer. The Supreme Court was deeply divided on whether the city had a duty to confirm allegations that the winning bidder's equipment did not meet the required standard.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

The majority decided that the city could take the winning bidder's assertions of compliance at face value without further investigation. The minority disagreed, finding that this undermined the integrity of the tendering process by allowing a deceitful bidder to win a contract based on an inaccurate tender. The plaintiff, Double N Earthmovers, raised its competitor's alleged non-compliance prior to the award of the contract. The city failed to investigate this allegation and awarded the contract.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

When it later discovered that the winning bidder had misrepresented the date of its equipment, the city waived the requirement and proceeded with the performance of the awarded contract. Double N Earthmovers sued. Twenty years later the case ultimately culminated with a controversial Supreme Court split decision. The five-judge majority held that the city was not under an implied duty to investigate whether a bidder will actually perform as promised under its tender.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

In concluding that the city was entitled to accept a bidder's assertions of compliance at face value, the majority rejected the appellant's assertion that the allegations of non-compliance put the city under a duty to investigate and look behind the representations made in a tender:

… contrary to Double N's suggestions, allegations raised by rival bidders do not compel owners to investigate the bids made by others. This would encourage unwarranted and unfair attacks by rival bidders and invite unequal treatment of bidders by owners. This would frustrate, rather than enhance, the integrity of the bidding process.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

The majority concluded that the city was not aware of the winning bidder's deceit until after the contract was awarded and found that, by this point in the process, the issue was a matter to be dealt with between the city and the contractor as a matter of contract administration under Contract B. Competing bidders no longer had standing to challenge the process under Contract A since Contract A came to an end once Contract B was awarded.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

However, the majority left open the possibility that a purchaser may have a duty to take action if it becomes aware of tender misrepresentations prior to awarding the contract:

Importantly, the trial judge made a finding that the City was unaware of Sureway's deceit until *after* it had accepted Sureway's tender. In his words, "no one in the City knew as a matter of fact that [Sureway] had bid the 1979 unit until August 28 or 29, 1986 and that is after the contract had already been let to [Sureway]" (para. 27). There was, as a result, no collusion between the City and Sureway to disregard the tender terms.

Supreme Court Rejects Duty to Investigate Compliance

Double N Earthmovers Ltd. v. Edmonton (City)
Supreme Court of Canada

Therefore, while the majority concluded that a purchaser may not be under a duty to investigate allegations of non-compliance, it did not go so far as to find that a purchaser can knowingly accept a deceitful tender with impunity and left open the possibility of an exception in instances where collusion can be shown between the deceitful bidder and the purchaser. However, on the facts of the case before it, the majority ultimately concluded that the city had not acted improperly, had not colluded in the acceptance of a deceitful bid and was entitled to accept the bidder's assertions at face value.

Court Applies the Double N Principle

Penney v. Eastern Region Integrated Health Authority
Newfoundland and Labrador Supreme Court

In its August 2016 decision in *Penney v. Eastern Region Integrated Health Authority*, the Newfoundland and Labrador Supreme Court rejected the argument of a losing bidder in a transportation services tender and found that the public body was under no legal duty to confirm representations of compliance made by other bidders. As the court noted, unless there is collusion or the tender call rules expressly create an obligation to investigate compliance, a purchasing body is entitled to take a bidder's representation of compliance at face value.

Tender Compliance – The Duty to Investigate Non-Compliance

Bidder Compliance Self-Assessments Breach Treaty Rules

Re Noël Import/Export
Canadian International Trade Tribunal

In its February 2003 determination in *Re Noël Import/Export*, the Tribunal held that the determination of compliance should not be based on the bidder's unconfirmed self-assessment or self-declaration. The case involved a Parks Canada tender call for inflatable ice and water rescue craft. One of the mandatory requirements called for a proven capacity for rescue operations in specific types of ice and open water conditions. While the selected bidder asserted that it met these requirements, it did not provide information to support this assertion.

Tender Compliance – Timing of Compliance

Bidder Compliance Self-Assessments Breach Treaty Rules

Re Noël Import/Export
Canadian International Trade Tribunal

The Tribunal held that a mere assertion was insufficient to satisfy the mandatory requirement and that actual information, such as information from prior field tests, was needed. The Tribunal also held that the purchaser's subsequent post-close field tests could not be relied on to retroactively establish a tender's compliance:

Tender Compliance – Timing of Compliance

Bidder Compliance Self-Assessments Breach Treaty Rules

Re Noël Import/Export
Canadian International Trade Tribunal

… the RFP states that PWGSC "may ask for trials with the proposed rescue craft by the lowest bidder which will meet the above mentioned technical criteria". ...In other words, the RFP requires PWGSC to determine, first, whether the proposed rescue craft meets all the mandatory criteria (including the criterion at issue). Once this is established, the RFP requires PWGSC to identify the lowest-priced compliant bid. It is only after PWGSC has identified the lowest bid that meets all the mandatory criteria that PWGSC is entitled to request trials if it so desires.

Tender Compliance – Timing of Compliance

Bidder Compliance Self-Assessments Breach Treaty Rules

Re Noël Import/Export
Canadian International Trade Tribunal

Consequently, the evaluation process, as established in the RFP, does not permit PWGSC to use the trials as an element in determining whether the criterion at issue has been met. This interpretation of the wording of the RFP is reinforced by the fact that the RFP entitles PWGSC to request trials only for the lowest bidder whose proposed rescue craft meets the mandatory technical requirements. If the trials had been intended to be used to determine whether the mandatory technical requirements had been met, the Tribunal would have expected the RFP to allow PWGSC to require trials for all bidders, not just for the lowest bidder.

Tender Compliance – Timing of Compliance

Bidder Compliance Self-Assessments Breach Treaty Rules

Re Noël Import/Export
Canadian International Trade Tribunal

The attempt to use the post-bidding selection verification process to confirm compliance was held to be in contravention of the procurement rules and the complainant was awarded its lost profit damages.

Tender Compliance – Timing of Compliance

Bidder's Blanket Statements Fail to Establish Compliance

Export 220Volt, Inc.
U.S. Government Accountability Office

In its January 2016 decision in *Export 220Volt, Inc.,* the GAO ordered a re-evaluation of transformer tenders after finding that the government had failed to establish the compliance of the winning bidder's proposed equipment. The RFP required suppliers to submit product literature to substantiate the acceptability of their proposed products. However, the GAO found that the government neglected to enforce this requirement, simply reliying on the winning bidder's general representation of compliance. The GAO ordered a re-evaluation after noting that "blanket statements of compliance" are insufficient when a solicitation specifically calls for product literature to demonstrate compliance.

Bid Compliance – Self Declarations

Tribunal Imposes Higher Duty to Investigate

Re Bluedrop Performance Learning Inc.
Canadian International Trade Tribunal

In its September 2008 determination in *Re Bluedrop Performance Learning Inc.*, the Canadian International Trade Tribunal ordered the government to terminate a contract award due to conflict of interest. The case dealt with a re-issued RFP for learning services for the Department of National Defence. The commanding officer who oversaw the development and release of the original RFP retired while the RFP was on the market. That RFP lapsed and was then reissued. In the interim, the former commanding officer was hired as vice-president of a firm that submitted a bid on the re-issued RFP.

Tender Compliance – The Duty to Investigate Non-Compliance

Tribunal Imposes Higher Duty to Investigate

Re Bluedrop Performance Learning Inc.
Canadian International Trade Tribunal

That firm was awarded the contract. A competing bidder challenged the contract award, alleging conflict of interest. In considering the detailed conflict of interest provisions in the tendering documents, the Tribunal determined that the government had a duty to look behind the winning bidder's "no conflict" misrepresentation and reject the bid. Since the Tribunal found that this failure to reject the bid compromised the integrity of the bidding process and violated the applicable trade treaty provisions, it ordered the government to terminate the contract or pay the complainant its lost profits.

Tribunal Imposes Higher Duty to Investigate

Re Bluedrop Performance Learning Inc.
Canadian International Trade Tribunal

As this case illustrates, a purchaser's ability to rely on bidder representations is not absolute. Where a bidder's inaccurate self-declarations compromise the integrity of a tendering process, a purchaser may be exposed to legal challenges launched by competing bidders who, in addition to any applicable common law rights, are also entitled to fair competition under the relevant trade treaty rules.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

In its September 2014 decision in *Rankin Construction Inc. v. Ontario*, the Ontario Court of Appeal dismissed the appeal of a trial decision and upheld the government's right to reject a non-compliant bid. The dispute dealt with a tender call issued by the Ontario Ministry of Transportation for the widening of Highway 406 in the Niagara region. Rankin's low bid was rejected as non-compliant. It challenged its rejection and sued the Ministry for lost profits.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

In the January 2013 trial decision, the Ontario Superior Court of Justice upheld the government's decision to disqualify Rankin's low bid since it contained misrepresentations. The trial court determined that the bid was validly rejected due to Rankin's failure to accurately disclose the amount of domestic steel it intended to use for its project. Following the public opening of bids and prior to the award of a contract, a competing bidder and the local construction association disputed the accuracy of the Canadian content representations in Rankin's tender.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

The Ministry decided to look behind the accuracy of Rankin's Canadian content calculations. It found that the concerns were valid. The Ministry ultimately determined that Rankin's low bid should be rejected to preserve the integrity of the bidding process. Rankin challenged its disqualification, arguing that the Supreme Court of Canada's precedent setting decision in *Double N Earthmovers v. Edmonton (City)* prohibited purchasers from looking behind representations made in a bidder's tender.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

The trial court disagreed, noting that the *Double N* decision held that purchasers were not required to investigate allegations of misrepresentation and non-compliance raised by competing bidders, but that they continued to have the right to investigate the accuracy of bidder representations. In distinguishing the two cases, the trial court noted that in *Double N* the City of Edmonton was sued for failing to look behind the low bidder's misrepresentation, but in this case the Ministry had chosen to exercise its right to make further inquiries after receiving bids.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

The Court of Appeal upheld the right to investigate for non-compliance even if the *Double N* rule did not require the purchasing institution to do so. However, unlike the trial court, the Court of Appeal determined that Contract A was formed between Rankin and the Ministry since Rankin's non-compliance in misstating its Canadian content was an inadvertent minor informality that was not fatal to the overall compliance of the bid.

Court of Appeal Recognizes Right to Investigate

Rankin Construction Inc. v. Ontario
Ontario Court of Appeal

The Court of Appeal also noted that even when adjusted to remove the inappropriately claimed Canadian Content preference, Rankin's bid remained the low bid. However, while the tender call terms allowed the Ministry to waive minor informalities, the Court of Appeal found that the tendering rules did not require the Ministry to do so and ultimately upheld the right to reject the bid.

Clarification Properly Used to Confirm Non-Compliance

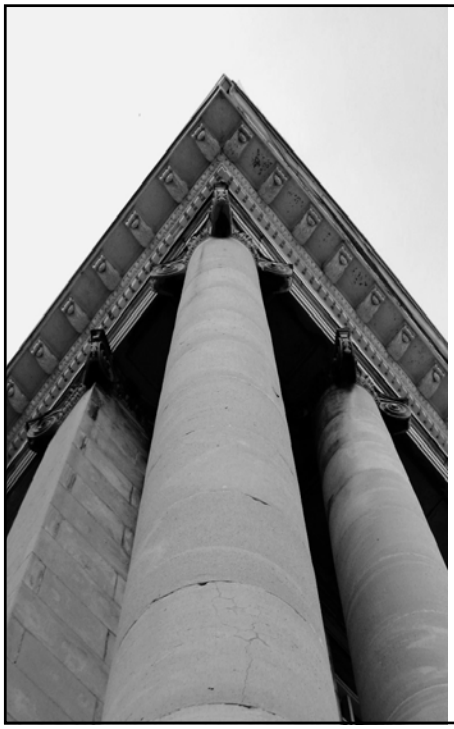
Re SNC Technologies Inc.
Canadian International Trade Tribunal

In its September 2005 determination in *Re SNC Technologies Inc.*, the Tribunal confirmed that the government had the right to verify whether a proposal met the relevant mandatory requirement and that such verification did not constitute "bid repair" in a situation where the post-bidding verification was relied on to reject (rather than accept) a tender. The case involved a Department of National Defence RFP for services to market and sell surplus military assets.

Clarification Properly Used to Confirm Non-Compliance

Re SNC Technologies Inc.
Canadian International Trade Tribunal

The dispute revolved around the government's rejection of the complainant's proposal on the basis of the failure to meet the requirement relating to the availability of proposed personnel. After the submission of proposals, but prior to the award of a contract, the government became aware of allegations that the individuals who were proposed in the complainant's proposal had subsequently left the complainant's employment. After investigating and confirming these allegations, the government rejected the proposal. The Tribunal upheld the government's decision and rejected the complaint.



Debriefings

Treaty Compliance

Tender Evaluation, Award and Debriefing Duties

Notice of Award and Debrief: Article 516 contains transparency protocols that require an entity to promptly inform suppliers of its contract award decisions. This Article includes new provisions that requires an entity, on the request of a supplier, to provide a losing supplier with an explanation of why it did not win the contract award. This article also contains new protocols requiring that a detailed public disclosure of the contract award, including the name of the supplier and value of the contract, be made within 72 days of the contract award.

Case Study

Debriefings and Post-Bid Challenges

A losing proponent team expresses frustration over the lack of details that your organization has been providing during your standard debriefing session. They claim that they have the right to know why they lost the bidding process and that they shouldn't be forced to make an access request to get those details. They also want to see a copy of the winning proposal and state that you will be required to disclose that document if they decide to launch a formal legal challenge. How do you deal with this situation?

Irish Court Orders More Detailed Evaluation Reasons

RPS Consulting Engineers Limited v. Kildare County Council
High Court of Ireland

In its February 2016 judgment in *RPS Consulting Engineers Limited v. Kildare County Council*, the High Court of Ireland ordered a municipality to provide detailed evaluation reasons in an engineering consulting tender. The court rejected the standard-form "high-medium-low" scoring statement letters provided by the municipality to all bidders as non-transparent "platitudinous responses". The court ruled that a public body is required to explain its scoring, particularly where a contract is not awarded to the low bid. It also found that losing bidders are entitled to comparative information relative to the winning bid to help them assert their bid protest rights and prepare future bids.

Scottish Court Rejects Claim in Competitive Dialogue RFP

Shetland Line (1984) Limited v. The Scottish Ministers
Scottish Court of Sessions

In its March 2016 judgment in *Shetland Line (1984) Limited v. The Scottish Ministers*, the Scottish Court of Sessions rejected a lost profit claim involving a ferry services competitive dialogue RFP. While the plaintiff claimed that the government withheld material information about the scope of the contract award, the court disagreed, finding that there was sufficient information provided by the government to enable reasonably well informed diligent bidders to submit responsive proposals. Notwithstanding the close final score of 93.99 to 91.58 between the winning bidder and the second-placed plaintiff, the court upheld the scoring after finding no evidence of hidden criteria or arbitrary evaluations.

Fair Evaluations – Competitive Dialogue RFP

Poor Evaluation Records Result in Re-Evaluation Order

Castro & Company, LLC
U.S. Government Accountability Office

In its January 2016 decision in *Castro & Company, LLC*, the GAO ordered a re-evaluation in the context of an RFQ for internal controls support services on the grounds that the government had failed to maintain proper evaluation records. The GAO found that the scores of the winning bidder in the technical and past performance categories were not supported in the contemporaneous evaluation records. The GAO found that that the government had failed to document how the selected bid measured up to the competing bids or substantiate how the awardee's technical scores justified paying a $298,000 premium over the cost of the best competing offer.

Fair Evaluations – Evaluation Records

Sketchy Evaluation Records Result in Re-Bid Order

Deloitte Consulting, LLP
U.S. Government Accountability Office

In its April 2016 decision in *Deloitte Consulting, LLP*, the GAO ordered a re-evaluation in the context of a management support services RFP after finding that the government had failed to properly assess the winning bidder's past experience. The GAO found inconsistencies between the government's defence and its contemporaneous evaluation records and determined that the winning bidder had failed to meet the necessary five-year past experience requirement. After concluding that the government's explanations did not line up with its evaluation records, the GAO ordered the government to seek new bid submissions and conduct a new evaluation process.

Fair Evaluations – Evaluation Records

Court Awards £200 Million in "Fudged" Nuclear Bid Evaluation

Energy Solutions EU Limited v. Nuclear Decommissioning Authority
High Court of Justice – Queen's Bench Division Technology and Construction Court

In its July 2016 decision in *Energy Solutions EU Limited v. Nuclear Decommissioning Authority*, the High Court of Justice of England and Wales awarded a losing bidder its lost profits on a nuclear facility decommissioning contract after finding that the government agency had "fudged" the bid evaluation process. The court concluded that the agency had avoided keeping contemporaneous records of its consensus scoring sessions in a failed attempt to avoid legal liability and had manipulated the process by rescoring the winning bid after it fell short of the minimum technical scores. The court also identified numerous other manifest errors in the scoring process, which it found cost the complainant the contract award.

Fair Evaluations – Consensus Scoring – Evaluation Records

Flawed Evaluation Records Lead to Potential Lost Profits

Oshkosh Defence Canada Inc. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

In its May 2016 determination in *Oshkosh Defence Canada Inc. v. Department of Public Works and Government Services,* the Canadian International Trade Tribunal ordered a re-evaluation and possible lost profits after finding faulty evaluations and poor recordkeeping in a dispute over a military transport vehicle RFP. The Tribunal found that the government had ignored relevant technical information submitted by the complainant and had failed to keep adequate records to explain the contradictory conclusions reached by government evaluators during technical testing. The Tribunal awarded lost profits in the event that the complainant ranked first after the re-evaluation.

Fair Evaluations – Hidden Criteria

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

In its July 2010 decision in *Almon Equipment Ltd. v. Canada (Attorney General)*, the Federal Court of Appeal struck down a Canadian International Trade Tribunal determination and ordered the Tribunal to reconsider the complaint. The case dealt with the procurement for aircraft de-icing services and chemical removal services. The Tribunal found that the government evaluators failed to keep proper notes during their evaluation process.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

While it determined that the irregularity undermined the fairness of the evaluation process for the chemical removal services, the Tribunal found that the failure to keep proper evaluation notes had no impact on the outcome of the evaluation for the de-icing services.

The Federal Court of Appeal disagreed, finding that the Tribunal's determination to be unreasonable since the procedural irregularity compromised the evaluation process for both of the tendered services.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

In so finding, the Federal Court of Appeal considered the Tribunal's statutory framework and noted that the purposes of the Tribunal's regulatory regime was to protect the public interest by ensuring fair, open, efficient and transparent public procurement:

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

The purposes of this regulatory regime, deduced from the above provisions, are as follows:

(1) *Fairness to competitors in the procurement system*. A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

(2) *Ensuring competition among bidders*. When bidders are placed on a level playing field and compete, it is more likely that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. Competition also gives taxpayers value for the taxes they pay.

(3) *Efficiency*. This speaks directly to the government getting good quality goods and services at minimum expense. This also speaks to the need for a procurement system to run in a timely, practical manner without causing unnecessary expense.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

(4) *Integrity*. A procurement process with integrity increases participants' confidence in the procurement system and enhance their participation in it. This increases the probability that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. A procurement process with integrity also gives taxpayers value for the taxes they pay.

These four purposes, and the overarching concept of value for taxpayers, are essential aspects of good governance. Important as they are, they must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

The Federal Court of Appeal then determined that the Tribunal failed to consider the serious detrimental impact on the regime caused by the evaluation team's failure to keep proper notes of its evaluation process:

This body of evidence shows that the three evaluators considering the competitors' multi-million dollar proposals did not write their own comments on their own copies of the bids, nor did they make comments on separate sheets. Instead, they restricted their comments to a very small space on the consensus scoring sheets, except for one evaluator who scrawled additional observations on "sticky notes" attached to one of the proposals.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

Before the Tribunal, the evaluators testified that "the comments on the consensus scoring sheets were not a complete list of the important factors taken into account in determining their scoring" (at paragraph 39); yet, the evaluators could not point to a single note of their own that would corroborate this.

In this significant procurement, Public Works' contracting officer did not give the evaluators any instruction on how to use the "comments" column and did not tell them to attach separate sheets, if necessary. Finally, the most basic characteristics of the evaluation process pursued by the evaluators remain a mystery.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

For example, did the evaluators considering this large procurement ever meet as a group of three to discuss the proposals and their evaluation? The Tribunal reviewed the conflicting testimony of the evaluators and could not make any finding on this elementary fact. In a general observation about the procedures that the evaluators followed, the Tribunal found a lack of "clear recollections [by the evaluators] of certain aspects of the evaluation process" (at paragraph 41). Looking at this body of evidence with the important purposes of this regulatory regime front of mind, this is a rather mild statement; the Tribunal may not have appreciated that this body of evidence could be significant to the broader "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

As mentioned above at paragraph 27, the Tribunal used this body of evidence to make credibility assessments about the evaluators' testimony. But, in my view, the Tribunal was obligated to analyze and use this body of evidence for another purpose: to consider whether the evaluators' modest record-keeping and the unknowable nature of the procedures they followed fundamentally compromised the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

The Federal Court of Appeal provided three reasons to support the conclusion that the Tribunal failed to properly take the significance of the evaluation team's failure to keep records into account when making its determination. As noted below, those reasons put a high premium on the need to maintain transparency in decision-making in public procurement:

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

There are three reasons for this conclusion.

First, this issue was intimately related to Almon's complaint that the evaluators used improper criteria to evaluate Almon's proposal for the de-icing services and the glycol collection services. In order to consider this, the Tribunal had to know what criteria the evaluators actually employed in their scoring, assess whether the scores were credible and fair, and ensure that the evaluations were conducted as a result of a process with substance and integrity. The body of evidence, above, is relevant to all these matters.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

Second, evaluators and their evaluations of proposals are at the heart of the procurement system. How the evaluators conduct themselves in their evaluation process determines whether the system has integrity and whether the important purposes of this regulatory regime are met. If evaluators can shield themselves from scrutiny by refraining from making adequate records and by following procedures that are later unknowable, the Tribunal cannot discharge its oversight responsibilities. Parliament's regulatory regime is then frustrated, along with the purposes underlying it.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

For all these reasons, the Tribunal erred by failing to consider whether the evaluators' record-keeping and procedures might have affected the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(c) of the Act.

Given the above, the Court of Appeal directed the Tribunal to re-assess the procurement in a new determination. In its March 2011 redetermination, the Tribunal stressed the need to ensure proper evaluation team record-keeping in order to protect the integrity of the public procurement process:

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

In the Tribunal's view, these inconsistencies are the likely result of imperfect recollection and do not, in and of themselves, impugn the good faith and integrity of the evaluators; they do however undermine, at least to some extent, the reliability of the evaluators' testimony about events central to this matter.

Indeed, the evaluators' imperfect recollection of events in this case underscores the importance of proper record keeping to the integrity and efficiency of the competitive procurement system. In this regard, and as examined in greater detail below, faulty record keeping fails both purchasers and suppliers, and poses serious challenges to the Tribunal's procurement review mandate. In short, it fails the public procurement system as a whole.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

The credibility and integrity of the competitive procurement system rest, in large part, not only on bids being properly assessed against the prescribed evaluation criteria in actual fact but also on the supplier community's perception that bid evaluations have been conducted in a fair and transparent manner. In this regard, adequate record keeping by procurement authorities is integral to the ability of a potential supplier to assess whether its bid has been fairly evaluated against the rated criteria contained in a solicitation and to identify and assess potential grounds of complaint.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

Proper record keeping allows the procurement authority to justify its decisions and the reviewing body to determine precisely what has transpired. In addition, it is conducive to fulfillment by a procurement authority of its duty of fairness to all potential suppliers. Finally, proper record keeping contributes to the Tribunal's ability to fully assess the validity of procurement complaints brought before it. It is therefore incumbent upon procurement authorities to keep proper records.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

> Having reviewed the typewritten and handwritten consensus scoring sheets, the Tribunal considers that the explanatory comments that support the specific scores were at times deficient, illegible, unintelligible or even non-existent. With respect to the comments that those documents did contain and to which both the Government Institution Report (GIR) and testimony at the hearing referred, the Tribunal is of the view that they did not reflect the totality of the factors that were taken into account in determining the specific scores for Almon's bid. The failure to fully identify the factors upon which the scoring was based renders it difficult for the Tribunal to assess whether Almon's bid has been fairly evaluated against the rated criteria prescribed in the RFP.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

> In considering the appropriate remedy, the Tribunal noted that proper record-keeping is a broadly established requirement under the relevant trade treaties and that the failure to follow this requirement resulted in an otherwise avoidable dispute with the complainant. The Tribunal therefore recommended that the government review record-keeping procedures with its procurement officials.

Evaluation Recording Keeping

Lack of Evaluation Records Fatal to Treaty Compliance

Almon Equipment Ltd. v. Canada (Attorney General)
Federal Court of Appeal

The Tribunal also awarded the prejudiced complainant one-third of its lost profits due to the government's treaty violation. As this case illustrates, the failure to maintain proper evaluation records can fundamentally undermine contract award decisions and result in protracted legal disputes. To guard against these risks, purchasing institutions should ensure that their evaluators receive the training and support necessary to ensure the defensibility of their evaluation processes.

Evaluation Recording Keeping

Failing to Honour Debriefing Duties Breaches Trade Treaty

Re Discover Training Inc.
Canadian International Trade Tribunal

In its May 1999 determination in *Re Discover Training Inc.*, the Tribunal considered the need to balance the protection of confidential business information with the need to ensure the transparency of the public tendering process. The case involved a Canada Post RFP for the provision of retail training services and the request for debriefing information by an unsuccessful bidder pursuant to the debriefing rights contained in Chapter 10 of the *North American Free Trade Agreement.*

Balancing Confidentiality and Transparency

Failing to Honour Debriefing Duties Breaches Trade Treaty

Re Discover Training Inc.
Canadian International Trade Tribunal

While Canada Post ultimately provided the requested information, the Tribunal was critical of the fact that it did not do so until after a complaint was filed. Furthermore, the Tribunal noted that the need to protect the confidentiality of bidder information should be balanced against the need to honour the transparency obligations prescribed in the *North American Free Trade Agreement.*

Balancing Confidentiality and Transparency

Government Fails to Meet Treaty Debriefing Duty

Re TireeRankinJV
Canadian International Trade Tribunal

In its January 2005 determination in *Re TireeRankinJV*, the Canadian International Trade Tribunal considered the balance between a bidder's debriefing rights and the need to protect the confidential information of competing bidders. The case involved a Department of Public Works and Government Services Request for Standing Offer for real property consulting, advisory and project delivery services.

Balancing Confidentiality and Transparency

Government Fails to Meet Treaty Debriefing Duty

Re TireeRankinJV
Canadian International Trade Tribunal

The complainant alleged that the Department had provided an inadequate debriefing. The Department argued that it could not provide additional information in light of the confidentiality obligations owed to the winning bidder. While the Tribunal agreed with the Department's general position, it stated that the Department could have provided some additional information to assist the complainant in understanding why it had been unsuccessful:

Balancing Confidentiality and Transparency

Government Fails to Meet Treaty Debriefing Duty

Re TireeRankinJV
Canadian International Trade Tribunal

PWGSC argued that it must maintain confidentiality regarding the contents of all bidders' proposals. In this regard, the Tribunal agrees with PWGSC's stance and believes that the intent of Article 1015(6)(b) of *NAFTA* and Article XVIII(2)(c) of the *AGP* is not to reveal confidential commercial information, but rather to allow unsuccessful bidders insight into how they can better respond to future procurement opportunities, thereby assisting the procuring entity, in that it will have superior proposals to review in future solicitations.

In this case, the Tribunal is of the view that PWGSC could have discussed the relative merits of the successful bidders' proposals with TireeRankinJV without breaching confidentiality.

Balancing Confidentiality and Transparency

Government Fails to Meet Treaty Debriefing Duty

Re TireeRankinJV
Canadian International Trade Tribunal

PWGSC had five successful proposals to draw upon to provide examples of relative merit to TireeRankinJV, and nothing on the record indicates that this was impossible to do without breaching the confidentiality of the other proposals. For example, regarding criterion 3.2.3-Personnel Experience-PWGSC could have stated that other proposals included resources with more experience or higher educational levels, etc. These comments would have assisted TireeRankinJV in recognizing that its own resources' experience or education needed to be improved and would have allowed it to understand the reason for which the other bidders' resources were rated higher than its own.

Government Fails to Meet Treaty Debriefing Duty

Re TireeRankinJV
Canadian International Trade Tribunal

The Tribunal determined that this failure to be more fulsome in the debriefing process constituted a breach of the Department's obligations under the *North American Free Trade Agreement*. The complainant was therefore awarded its complaint costs.

Government Fails to Run a Proper Debriefing

Re Access Information Agency Inc.
Canadian International Trade Tribunal

In its March 2007 determination in *Re Access Information Agency Inc.*, the Tribunal found that the government failed to conduct a proper debriefing process since the complainant was never informed of the reasons behind its failure to win the contract award. While the government disclosed the annotated evaluation grid used in scoring the proponent, the Tribunal noted that this was insufficient to inform the complainant of the reasons why it was not selected. The Tribunal found that the government was interpreting its disclosure obligations in an unnecessarily narrow fashion:

Balancing Confidentiality and Transparency

Government Fails to Run a Proper Debriefing

Re Access Information Agency Inc.
Canadian International Trade Tribunal

As it appears from the wording of the above-mentioned provisions, the purpose of these requirements is, *inter alia*, disclosure of pertinent information concerning the reasons why the bidder in question was not selected. In the present case, the evaluation grid gives little indication as to why AIA's proposal was not selected. An objective analysis of the details revealed by this evaluation grid alone gives no inkling of all the reasons why the proposal was not selected. In the absence of a minimum of additional information, the annotations made in the evaluation grid do not provide sufficient details. Therefore, Transport Canada never acted on AIA's specific request, dated October 19, 2006, by providing more detailed information.

Balancing Confidentiality and Transparency

Government Fails to Run a Proper Debriefing

Re Access Information Agency Inc.
Canadian International Trade Tribunal

It seems clear that it would have been entirely possible for Transport Canada to provide more details of the reasons for refusing the request. Neither the arguments nor the evidence cited in support of them reveal reasonable grounds that could justify the non-disclosure of this information. The provisions of the agreements are intended to establish a framework in which government procurement can take place in a context of transparency and efficiency. The disclosure of the reasons for not selecting a proposal is one means of applying this concept of transparency, which also assures bidders a fair and equitable system of procurement. In refusing to provide detailed information, Transport Canada breached the letter and intent of the relevant provisions of the agreements.

Government Fails to Run a Proper Debriefing

Re Access Information Agency Inc.
Canadian International Trade Tribunal

The Tribunal also found that the mere disclosure of the names, scores and contract award amounts for the other two proponents was insufficient to meet the transparency obligations of the debriefing process, stating that such disclosure:

… provides no information that could enable the bidder not selected to compare the characteristics and respective advantages of the proposals submitted in the context of the bid solicitation.

Government Fails to Run a Proper Debriefing

Re Access Information Agency Inc.
Canadian International Trade Tribunal

The Tribunal is therefore of the opinion that, without disclosing confidential marketing intelligence, Transport Canada could have discussed, in a general way, the characteristics of the proposals selected which gave them an advantage over AIA's proposal, so that AIA could understand how it might have, and how it could in the future, better meet the needs of Transport Canada specifically and of the government generally.

As this case illustrates, debriefings should be conducted in a manner that protects the confidential business information of other suppliers while also informing unsuccessful suppliers of the reasons why they were unsuccessful.

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

In its July 2007 determination in *Ecosfera Inc. v. Canada (Department of the Environment)*, the Tribunal took an expansive view of the debriefing obligations owed by the federal government under the *North American Free Trade Agreement.* The complainant alleged that the government failed to provide sufficient explanations of the evaluation process or sufficient information about the winning tender. The Tribunal agreed, finding that the government had interpreted its debriefing duties too narrowly and that those duties extended beyond merely assisting unsuccessful bidders in preparing for future bids:

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

> The Tribunal is of the opinion that EC's arguments in this regard are reductionist. EC's arguments seem to be inspired by a narrow view of the object and purpose of the requirement. Contrary to EC's suggestion, the requirement set out in Article 1015(6)(b) of *NAFTA* is intended to do much more than simply allow unsuccessful bidders to understand how they can better respond to future procurement opportunities. The Tribunal notes that it would be wrong to conclude that, by virtue of its statement in *TireeRankinJV*, it intended to give such a reductive interpretation of the purpose of the requirement.

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

> While the Tribunal has stated in the past that the purpose of Article 1015(6)(b) of *NAFTA* is to allow unsuccessful bidders to understand how they can better respond to future procurement opportunities, it is unlikely that the latter meant for the provision to be applied so narrowly. Although the objective suggested by EC is among the practical objectives of the requirement, its primary purpose, according to the Tribunal, is to provide transparency as to the reasons for not selecting the proposal, while respecting the confidential nature of the content of all the bidders' proposals. This requirement enables the unsuccessful bidder to determine, if need be, the nature of its rights in view of the requirements set out in *NAFTA*. The Tribunal is of the view that it is more from this perspective that Article 1015(6) ought to be interpreted and ultimately applied.

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

The Tribunal acknowledged that a balance must be struck between promoting the transparency of the procurement process and protecting the confidential business information of competing bidders. However, it found that the legal duty to protect confidential information could not be used as a reason to completely deny a losing bidder an explanation of why it lost the opportunity. The Tribunal then made the following general statements about the federal government's debriefing duties under the *North American Free Trade Agreement*:

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

…the information should focus on the considerations of those who were involved in making the decision that resulted in the proposal of the unsuccessful bidder not being selected. This includes, obviously, the communication of the reasons why the proposal was not selected, the communication of the justification for taking those reasons into account and the approach used to examine them. In fact, the entity concerned ought to provide any information that could reasonably be expected to reveal the reasons for which the proposal was not selected. However, the precise nature of the information that can reasonably be expected to explain the rejection in a given case can be determined only in light of the particular circumstances of each case, and the notion of "pertinence" becomes important for the purposes of making this determination.

Balancing Confidentiality and Transparency

Tribunal Adopts Expansive Interpretation of Debriefing Duty

Ecosfera Inc. v. Canada (Department of the Environment)
Canadian International Trade Tribunal

While this determination technically only applies to the federal government, it serves as a useful reminder for all public institutions to revisit their debriefing practices in order to consider the balance that must be struck between the promotion of transparent procurement practices, the protection of confidential bidder information and the impact of these two considerations on the overall administration of the procurement process.

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

In the fall of 2014, the Canadian International Trade Tribunal issued a trilogy of interrelated determinations in *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation*. The complaint involved an RFP issued by Canada Post for the award of master services agreements for the provision of data centre services. CGI was an unsuccessful proponent. It launched a series of legal challenges, taking issue with the debriefing process, with the failure of Canada Post to maintain its evaluation records, and with Canada Post's use of information collected during site visits.

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

In September 2014, the Tribunal released the first of the three interrelated determinations. It found that Canada Post failed to comply with its debriefing duties under the North American Free Trade Agreement (NAFTA). In its determination, the Tribunal provided the following overview of the debriefing duties under NAFTA:

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

Transparent government procurement procedures further these goals and are mandated by various provisions of *NAFTA* regulating different aspects of the solicitation process. The requirement in Article 1015(6)(b) of *NAFTA* that a procuring entity explain to an unsuccessful bidder the reasons for not selecting its tender is a means towards reaching these goals.

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

The Tribunal determined that Canada Post failed to meet its obligations in the debriefings provided by CGI. In coming to this conclusion, the Tribunal rejected Canada Post's assertion that disclosing more detailed information about its evaluation process would result in the disclosure of confidential and proprietary Canada Post information and would compromise the quality of future proposals.

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

The Tribunal found that Canada Post failed to provide reasonable arguments to support these assertions. It also reiterated the obligation to maintain the individual notes of the different evaluators when using consensus scoring since the individual scoring sheets of the different evaluators should be provided to proponents during debriefings to satisfy NAFTA debriefing duties:

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

> Thus, information regarding the individual evaluators' assessments of CGI's proposal shows part of the reasons for or approach to establishing the final scores and outcome of this solicitation; as such, it is pertinent information for the purposes of Article 1015(6)(b) of NAFTA that can help provide transparency to an unsuccessful bidder seeking to understand how its tender was evaluated. Canada Post's failure to provide this information is rendered more egregious by the fact that the Tribunal has found, in previous decisions, that, where consensus scoring is used, the debriefing must still include the communication of the considerations of each individual evaluator who contributed to the establishment of the consensus evaluation.

Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

The Tribunal found that the failure on the part of Canada Post to provide a proper debriefing was a serious deficiency in the integrity of the procurement process:

> The deficiency found is serious due to its broader impact on the integrity and efficiency of the competitive procurement system. Disregarding debriefing obligations risks significantly affecting the trust of bidders and the public in the integrity of the procurement system, as well as the efficiency of the system. As stated, the debriefing obligations contemplated by NAFTA are one means of ensuring the transparency of the procurement system, which underpins the objectives of the procurement regime under the CITT Act and the trade agreements.

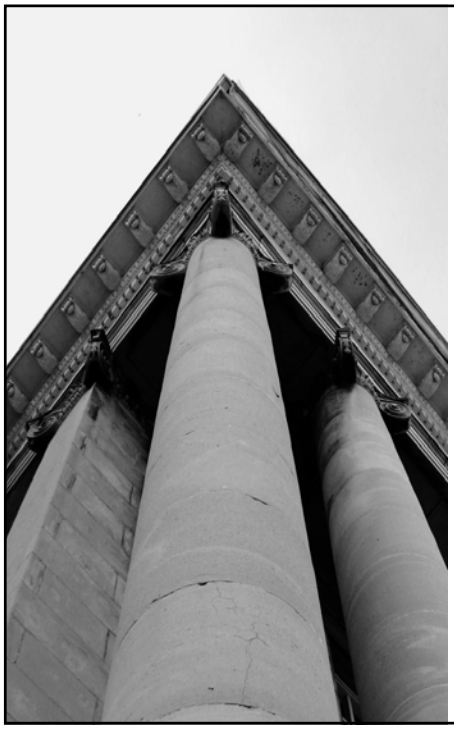
Tribunal Doubles Down on Expansive Debriefing Duties

CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation
Canadian International Trade Tribunal

> In particular, debriefings serve to demonstrate that the procurement has been conducted with integrity, they provide bidders with the necessary information to assert, if need be, their NAFTA rights, and they can facilitate an early resolution of disputes between the parties. All of these are essential for the system to function efficiently.

In light of these findings, the Tribunal directed Canada Post to align its debriefing policies and practices with its NAFTA obligations and ordered Canada Post to provide the required debriefing information to CGI.

Balancing Confidentiality and Transparency



Prequalification Frameworks

Treaty Compliance

Bidder Prequalification

Prequalification Frameworks: Article 508 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 processes for awarding specific work under those frameworks.

Treaty Compliance

Buying Groups

Buying Groups: Article 504.5 requires a procurement entity to ensure that any purchases made through a buying group comply with the general open procurement obligations, while Articles 504.6 through 504.9 create further regulatory requirements for using buying groups.

U.K. Court Rejects "Out-of-Scope" Claim

Medicure Ltd v. The Minister for the Cabinet Office
England and Wales High Court of Justice (Technology and Construction Court)

In its June 2015 decision in *Medicure Ltd v. The Minister for the Cabinet Office*, the England and Wales High Court of Justice (Technology and Construction Court) rejected a supplier's claim that the government was engaging in out-of-scope procurements under a new framework agreement ("FA"). The dispute dealt with the use of a new FA for health services. The complainant was in the business of providing doctors to health authorities but it was unable to provide the additional managed services required under the new FA.

Framework Agreement Scope Dispute Claim

U.K. Court Rejects "Out-of-Scope" Claim

Medicure Ltd v. The Minister for the Cabinet Office
England and Wales High Court of Justice (Technology and Construction Court)

The complainant alleged that the scope of the new FA only covered the supply of managed services rather than the direct provision of doctors. It challenged the government's direct acquisition of doctor's services as falling outside the proper scope of the FA. In reviewing the FA contract terms, the court noted that the agreement was unnecessarily long and complex, which undoubtedly contributed to the confusion over its proper scope:

Framework Agreement Scope Dispute Claim

U.K. Court Rejects "Out-of-Scope" Claim

Medicure Ltd v. The Minister for the Cabinet Office
England and Wales High Court of Justice (Technology and Construction Court)

> I have been through the FA, which runs to over 500 pages. I question the wisdom of contracts of this length: nobody ever reads the detail until something goes wrong, and then the parties scrabble around trying to find bits and pieces of the small print that help their case. It would make this Judgment even duller than it already is if I included within it every clause or section of the FA to which I was taken, or which I have read. Accordingly the parties can take it that I have considered all of the sections to which I was referred, but I confine myself to setting out below what I consider to be the particularly relevant sections of the FA, in order to explain my views in the subsequent sections of this Judgment.

Framework Agreement Scope Dispute Claim

U.K. Court Rejects "Out-of-Scope" Claim

Medicure Ltd v. The Minister for the Cabinet Office
England and Wales High Court of Justice (Technology and Construction Court)

The court ultimately determined that the complainant's interpretation was incorrect since the scope of the FA included both the direct provision of doctors as well as the supply of managed services. However, the court expressed sympathy for the complainant who had been providing doctor's services to government institutions for eighteen years. As the court noted, the expanded scope of the new FA put these contracting opportunities out of reach of smaller firms.

Framework Agreement Scope Dispute Claim

California Court Upholds Emergency Stand-By Contracts

Fairview Valley Fire, Inc. v. California Department of Forestry
State of California Court of Appeal

In its January 2015 decision in *Fairview Valley Fire, Inc. v. California Department of Forestry*, the California Court of Appeal upheld the California Department of Forestry's stand-by emergency fire services agreements after finding that the agreements were not subject to the open competitive bidding requirements under the relevant state procurement statute. The case dealt with the creation of agreements, referred to as Cal-Fire 294s, for the provision of stand-by emergency fire services.

California Court Upholds Emergency Stand-By Contracts

Fairview Valley Fire, Inc. v. California Department of Forestry
State of California Court of Appeal

The court found that the agreements did not constitute a contract award since a contract would only be created if the emergency services were actually called upon. The court also found that the contract awards would be exempt from the open bidding requirements under a California Public Contract Code exemption that applies to "cases of emergency where a contract is necessary to the immediate preservation of the public health, welfare or safety, or protection of state property."

Out-of-Scope Blanket Purchase an Improper Sole Source

Tempus Nova, Inc.
U.S. Government Accountability Office

In its June 2016 decision in *Tempus Nova, Inc.,* the GAO ruled that the Internal Revenue Service improperly used a blanket purchase agreement to make an out-of-scope acquisition. The GAO found that the agency acquired a cloud-based product under a standing agreement that did not permit the purchase of cloud-based products but was instead "limited to acquiring updated or replacement versions of the agency's pre-existing software portfolio that is installed in the agency's own computing environment." The GAO ordered the IRS to either conduct a new tendering process or seek appropriate sole-source approvals for its cloud-based requirements.

Fair Competition – Sole Source

Awards Under Standing Offers Subject to Treaty Challenge

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

In its March 1999 determination in *Re Polaris Inflatable Boats (Canada) Ltd.*, the Tribunal clarified that the trade treaty obligations apply to the entire procurement process and not just to the creation of a master agreement. The case involved the creation of a National Master Standing Offer for the acquisition of a rigid hull inflatable boat, 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 master agreement roster. The Tribunal found that the treaty requirements continued to apply beyond the award of a master contract.

Awards Under Standing Offers Subject to Treaty Challenge

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

For the purposes of the treaty requirements, the Tribunal determined that the procurement process remains alive until the government actually orders a service or product under the master agreement:

… the Tribunal's jurisdiction over any procurement process in relation to a designated contract extends to any aspect of that procurement's process, up to and including the award of a contract. It is widely accepted in the procurement community that a standing offer is not a contract. Rather, it is a framework agreement which sets out pre-negotiated terms and conditions against which specific orders (call-ups) can be made by authorized users. It is these call-ups which are the actual contracts.

Awards Under Standing Offers Subject to Treaty Challenge

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

Though it is correct to say that the procurement process is significantly engaged and performed once a standing offer is issued, it is not correct to conclude, as the Department does, that the procurement process is completed. In the Tribunal's opinion, the process for the procurement of goods or services, acquired by means of standing offer, and, by way of consequence, the Tribunal's jurisdiction to receive complaints, conduct inquiries and make determinations, continue until (1) the last call-up against that standing offer is made, and (2) until potential suppliers are satisfied that the last contract has been awarded in accordance with the criteria and essential requirements specified in the tender documents or that the time frame prescribed to file a complaint has expired.

Awards Under Standing Offers Subject to Treaty Challenge

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

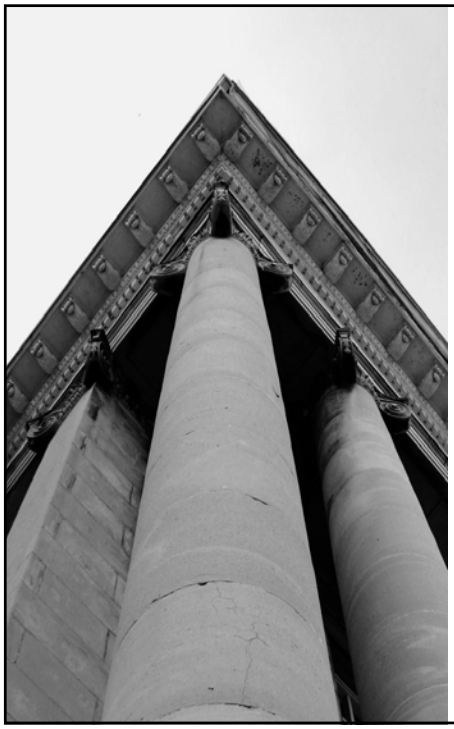
For master agreements that are intended to permit multiple ongoing assignments, the trade treaty obligations would therefore presumably apply for the duration of the master agreement.

Government Uses Flawed Framework Agreement Process

The Access Information Agency Inc. v. Department of Global Affairs
Canadian International Trade Tribunal

In its August 2016 determination in *The Access Information Agency Inc. v. Department of Global Affairs*, the Canadian International Trade Tribunal found that the government had used an improper call up process to secure professional services under a standing agreement and that those evaluation flaws had cost the complainant a contract award opportunity. However, the Tribunal refused to award a remedy since the complainant was subsequently awarded another contract under the standing agreement, which offset any prior lost business. The Tribunal ultimately ordered the government to follow its call up procedures more closely in the future.

Open Competition – Call Up Procedures Under Standing Agreements



The Procurement Playbook

Treaty Compliance

Negotiated RFPs

Recognition of Negotiated RFPs: Article 512 introduces express new protocols for using negotiations during a procurement process. These protocols require the disclosure of the intention to use a negotiation process, require that transparent criteria be used in the elimination of any suppliers during that process, and prohibit unfair or discriminatory treatment of any suppliers during the negotiations.

Treaty Compliance

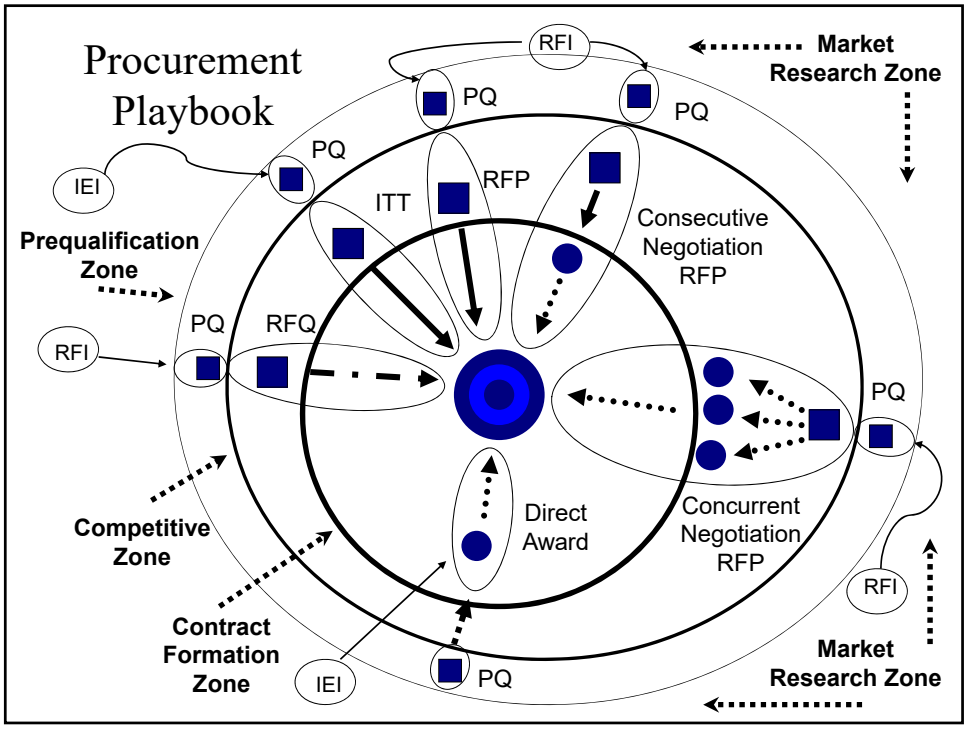
Negotiated RFPs

For processes using concurrent negotiations, the protocols require that suppliers be provided with the same deadline to submit their new or revised tenders. For processes using consecutive negotiations, the protocols require that a specific amount of time be specified for a supplier to submit its final offer prior to proceeding to negotiate with the next-ranked supplier. The Article 512 protocols also allow for the use of a negotiation process for tie-breakers when the original evaluation resulted in no clear winning tender.

Treaty Compliance

Electronic Auctions

Electronic Auctions: Article 514 contains new protocols that expressly recognize the use of electronic auctions and call for the disclosure of relevant competition information to competing suppliers.



The Procurement Playbook

Overview

Determining the appropriate method of procurement based on a broad range of options and an analysis of the specific circumstances should be the first step in the proper planning of a procurement process. In the Canadian public sector, purchasers tend to use the formal legally binding tendering process as a preferred method for procuring a wide range of goods and services. However, public institutions may be incurring unnecessary legal risks or may be undermining their value-for-money objectives if they employ a formal legally binding tender call without first assessing the suitability of that format to the particular circumstances.

The Procurement Playbook

Overview

Empowered procurement calls for a clear understanding of the benefits and legal duties that flow from the tendering process and calls for informed decision-making regarding the appropriate procurement method. Because of the inherent legal risks and restrictions created in a formal legally binding bidding process, purchasers should recognize situations where they should elect a different procurement format.

The Procurement Playbook

Overview

In fact, in July 2011 the United Nations Commission on International Trade Law adopted its *Model Law on Public Procurement* (the "UN Model Procurement Law"), which replaced the 1994 *Model Law on Procurement of Goods, Construction and Services*. The UN Model Procurement Law recognizes that public institutions can meet their mandates for open transparent procurement and value-for-money by utilizing a varied array of procurement formats.

The Procurement Playbook

Overview

As the UN's Web site states, the UN Model Procurement Law:

… contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed.

The Procurement Playbook

Overview

In order to promote economic efficiency, protect the integrity of the procurement process and enhance public confidence in government procurement, the UN Model Procurement Law contains a number of clear procurement standards governing the various phases of the procurement cycle. Many of the principles from the UN Model Procurement Law are reflected in the World Trade Organization's *Agreement on Government Procurement* and in the procurement chapters of Canada's other trade treaties.

The Procurement Playbook

Overview

The UN Model Procurement Law remains a useful benchmark for public institutions to measure their procurement practices, particularly as they relate to the proper use of various procurement formats and processes, setting the standard by which all public institutions should measure the transparency of their procurement practices and the diversity of their procurement methods.

The Procurement Playbook

Overview

The UN Model Procurement Law recognizes the use of a broad range of procurement formats and processes:

Article 27 Methods of procurement

1. The procuring entity may conduct procurement by means of:

(a) Open tendering;
(b) Restricted tendering;
(c) Request for quotations;
(d) Request for proposals without negotiation;
(e) Two-stage tendering;
(f) Request for proposals with dialogue;
(g) Request for proposals with consecutive negotiations;
(h) Competitive negotiations;
(i) Electronic reverse auction; and
(j) Single-source procurement.

The Procurement Playbook

Overview

While many public sector institutions have treaty obligations that call for the use of open tendering procedures, those treaties generally do not prescribe the format of the open tendering process. The UN Model Procurement Law therefore provides useful guidelines for the use of a broad range of commonly used formats and processes.

The Procurement Playbook

Overview

Public institutions should revisit their organization's purchasing policies and compare them against the UN Model Procurement Law to ensure that their own procurement practices have sufficient flexibility to enable the use of the appropriate procurement method for the appropriate circumstance. Internal purchasing policies should allow for the discretion and flexibility needed to operate in an increasingly complicated marketplace.

The Procurement Playbook

Overview

Given its broad range of recognized procurement formats, the UN Model Procurement Law should be required reading for all procurement professionals interested in measuring up to the modern international standards of an increasingly global economy. The following discussion includes an overview of many of these internationally recognized procurement standards and methods and discusses some governing principles to assist in determining which format and process best suits the particular circumstances.

The Procurement Playbook

The Invitation to Tender and No-Negotiation RFP

The Invitation to Tender, which is often used by the construction industry and for the procurement of goods, is one of the most common legally binding tender call formats. Under Canadian common law, this format typically operates under the procurement paradigm known as “Contract A”. This format is typically used when the primary or only rated evaluation factor is price.

The Procurement Playbook

The Invitation to Tender and No-Negotiation RFP

Many of the norms prescribed in the UN Model Procurement Law for the Invitation to Tender format, along with its close cousin, the No-Negotiation RFP, have found their way into the procurement practices of public institutions and have been recognized in the case law as implied duties of the formal legally binding tendering process.

The Procurement Playbook

The Invitation to Tender and No-Negotiation RFP

From this perspective, Canadian practices and legal rules tend to fall within generally recognized international norms and, with the development of the Contract A paradigm, are arguably at the forefront of international practices for the use of the formal legally binding Invitation to Tender format. However, as discussed below, Canadian practices appear less evolved with respect to the use of the other formats and processes recognized by the UN Model Procurement Law.

The Procurement Playbook

Range of RFP Options

The UN Model Procurement Law recognizes three different RFP formats:

1) Request for proposals without negotiation ("No-Negotiation RFP");
2) Request for proposals with dialogue ("Concurrent Negotiation/BAFO RFP"); and
3) Request for proposals with consecutive negotiations ("Consecutive Negotiation RFP").

The suitability of each option depends on the particular circumstances.

The Procurement Playbook

Range of RFP Options

No-Negotiation RFP: Of the three options, the No-Negotiation RFP is the most similar to the Invitation to Tender. The main distinction between these formats is that the latter determines the highest ranked supplier based on the lowest price, whereas the former determines the highest ranked supplier based on the highest score when combining price and other rated criteria.

The Procurement Playbook

Range of RFP Options

Like the Invitation to Tender format, in a No-Negotiation RFP format, evaluation criteria are predetermined and disclosed, and competing proposals are evaluated based on those predetermined criteria. The contract terms are generally non-negotiable. The highest ranked compliant proposal is selected.

The Procurement Playbook

Range of RFP Options

In the Canadian context, the No-Negotiation RFP, like the Invitation to Tender format, typically falls within the formal legally binding Contract A procurement paradigm. For purchasers, the basic advantages of using a formal binding tender call process, whether an Invitation to Tender or a No-Negotiation RFP, are increased control over the tendering process and potentially lower costs. Purchasers can predefine both the process by which they receive legally binding commitments from suppliers and the terms of the contemplated contract.

The Procurement Playbook

Range of RFP Options

Once the binding tenders are submitted, purchasers can carefully weigh the competing irrevocable offers before selecting their supplier. Furthermore, unrestricted, transparent and structured competition between all interested suppliers can increase the potential for lower costs, particularly when cost is the major evaluation factor in the tender call.

The Procurement Playbook

Range of RFP Options

However, using a formal legally binding tendering process typically creates a pre-contractual legally binding relationship between the purchaser and compliant bidders, along with the corresponding legal risks, restrictions and duties. In general terms, this requires each bidder to honour its tender if selected and requires the purchaser to conduct the process according to the rules established in its tender call and according to the implied duty of fairness.

The Procurement Playbook

Range of RFP Options

If the purchaser breaches any of these rules, a prejudiced bidder may be entitled to legal remedies including its lost profits. Among other things, this process requires the purchaser to front-end most of its planning and decision-making since its ability to make post-bidding changes to the contemplated transaction or evaluation criteria is significantly restricted.

The Procurement Playbook

Range of RFP Options

While this format has its advantages, purchasers should recognize that there are certain circumstances that are inherently at odds with the formality and legal obligations of the formal legally binding tendering process. Purchasers should exercise their discretion based on the merits of their specific situation and be flexible when selecting their method of procurement to better ensure that the format they utilize is the most effective in the specific circumstances.

The Procurement Playbook

Range of RFP Options

In many instances, an analysis of the particular situation can lead to the conclusion that an Invitation to Tender or No-Negotiation RFP process is ill-suited to the situation and that a different procurement format, such as one of the negotiated RFP formats discussed below, is more appropriate in the circumstances.

The Procurement Playbook

Range of RFP Options

A typical norm of a legally binding tendering process is that negotiations are replaced with competition and that a contract will be awarded based on predetermined terms incorporated into the tender call's *pro forma* agreement. In this paradigm, post-bidding negotiations are significantly curtailed or eliminated since the contract should be awarded based on the unaltered offer submitted by the bidder in its legally binding tender.

The Procurement Playbook

Range of RFP Options

The project details and tender offers crystallize at the tender submission deadline and the parties are typically not at liberty to make any material changes after that point. Bidders can challenge the process if after the bidding deadline the purchaser seeks more favourable terms or grants a competing bidder the opportunity to repair deficiencies in its tender. The courts have found such conduct to constitute “bid-shopping” or “bid repair” and have sanctioned purchasers for seeking such post-bidding variations.

The Procurement Playbook

Range of RFP Options

Given the restrictions associated with the no-negotiation tender call format, this approach is not appropriate in all circumstances. In many instances, a purchaser should consider using a format that allows suppliers to make non-binding preliminary submissions and then allows the purchaser to enter into negotiations with some or all of these suppliers based on pre-determined evaluation criteria.

The Procurement Playbook

Range of RFP Options

Such processes typically operate on a more flexible set of norms than those that attach to the formal legally binding tendering process under the Contract A paradigm. When using a negotiated format, purchasers should be clear regarding their intention to engage in a contract formalization process by way of non-binding submissions and subsequent negotiations.

The Procurement Playbook

Range of RFP Options

While the UN Model Procurement Law's Invitation to Tender and No-Negotiation RFP formats are compatible with Canada's Contract A paradigm, its other formats are more compatible with the legal paradigm that applies under the traditional law of contract negotiations (*i.e.*, the law of offer and acceptance that pre-existed and continues to operate parallel to the Contract A paradigm).

The Procurement Playbook

Range of RFP Options

Recent common law developments in Canada have confirmed that purchasers can elect the procurement paradigm that they intend to have govern their tendering processes. At common law, this facilitates the purchaser's ability to conduct a negotiated procurement process rather than a formal legally binding tendering process.

The Procurement Playbook

Range of RFP Options

Historically, federal government procurement is an exception to this general rule since, rather than being based primarily on the common law, the legal duties owed by the purchaser in this context are predominantly statute and treaty-based and apply even where no Contract A would otherwise apply at common law. All public institutions that are subject to trade treaty procurement obligations should carefully consider those obligations when assessing various procurement formats.

The Procurement Playbook

Range of RFP Options

Concurrent Negotiations/ BAFO RFP: The UN Model Procurement Law provides useful guidance in this regard, offering detailed guidelines for conducting negotiated procurement processes openly and transparently. For example, its Concurrent Negotiations/ BAFO RFP format recognizes a best and final offer approach that allows the public institution to enter into simultaneous negotiations with multiple suppliers.

The Procurement Playbook

Range of RFP Options

The public institution can seek and accept revisions to supplier proposals as part of its negotiation process. Each supplier that satisfies the RFP threshold requirements is entitled to an opportunity to participate in such negotiations. Once negotiations are completed, this process requires the public institution to request all eligible suppliers to submit their best and final offers by a specified date. The price for each proposal should be assessed only after the successful completion of a technical evaluation. The proposal that best meets the institution's needs based on the criteria and weighting established in the RFP should then be selected.

The Procurement Playbook

Range of RFP Options

Since conducting multiple concurrent negotiations can be a complex and labour-intensive exercise, the BAFO approach is more common in connection with large and complex transactions where the economies of scale or level of contract complexity warrant the introduction of the greater degree of specialization required to properly administer such a process.

The Procurement Playbook

Range of RFP Options

While this approach may have historically been less common in the Canadian public sector, it has long been a common approach in other jurisdictions and in major outsourcings in the private sector where private sector customers are introducing an element of open competition into the selection of their service providers but are retaining the flexibility to negotiate their contracts.

The Procurement Playbook

Range of RFP Options

Consecutive Negotiations RFP: The UN Model Procurement Law's third standard RFP option, the Consecutive Negotiations RFP, offers a balance between the control of the traditional non-negotiation formats and the flexibility of the BAFO multiple negotiations format. This approach utilizes a supplier ranking process similar to traditional Invitation to Tender format or No-Negotiation RFP, but then allows the contract to be formalized with the single highest-ranked supplier through direct negotiations.

The Procurement Playbook

Range of RFP Options

It therefore provides a balance between the rigidities of the traditional no-negotiation formats while avoiding the complexities of multiple negotiations contemplated in the BAFO/Simultaneous Negotiations RFP format. This format has seen increasing adoption across the Canadian public sector in recent years.

The Procurement Playbook

Range of RFP Options

With the Consecutive Negotiations RFP format, the public institution enters into negotiations with the proponent who, based on the predetermined criteria established in the RFP, obtained the highest ranking. The other suppliers that meet the basic threshold requirements are put on a waiting list and notified that they may be eligible for negotiations if negotiations with higher-ranked suppliers fail to result in a contract.

The Procurement Playbook

Range of RFP Options

Those that fail to meet the basic threshold requirements are notified of their ineligibility for future negotiations. This process permits the public institution to terminate negotiations where it becomes apparent that the negotiations will not result in the formalization of a contract. Where negotiations fail, the next-ranked supplier is invited to participate in negotiations until a contract is formed or all eligible suppliers have been rejected.

The Procurement Playbook

Range of RFP Options

Negotiated RFP formats are particularly useful in situations where there are no universally applicable standard contract performance terms in the particular industry. Specific market intelligence regarding the particular industry is therefore a crucial ingredient in performing an informed analysis of the appropriate procurement format in the particular situation.

Paperless Procurement

Clearing the Path to Paperless Bidding

The paper-based bidding process hasn't changed much with the times. In fact, bid submission practices remain trapped in a tendering time warp, frozen throwbacks to the pre-internet era. That's about to change. Inherent systemic inefficiencies, accelerating timeframes, trade treaty developments and technological innovations are all converging to convert our out-dated bidding systems into a paperless procurement process.

This is a condensed version of an article by Paul Emanuelli that was previously published in the June 2011 edition of *Purchasing B2b* magazine.

Paperless Procurement

Systemic Inefficiencies and Waste

It's a tale of two technological eras trapped within a single tendering cycle. While electronic *posting* may have become a mainstream standard for many public institutions, this technological advancement has only served to obscure the technological atrophy that continues to plague the bidding stage of the tendering process. While tender calls can be downloaded electronically at any time of day and night, public institutions continue to manage manual bid receipt processes, where bids are only accepted in paper form during business hours, at prescribed locations, within strictly enforced timeframes.

Paperless Procurement

Systemic Inefficiencies and Waste

In addition to being slow and inefficient, this paper-based bidding process creates a colossal carbon footprint. Add up the thousands of bidding processes run by public institutions every day, multiply those competitions by the number of suppliers who respond to each tender call, and then multiply that number by the multiple copies of each bid that has to be shipped to the purchasing institutions only to be shredded after the evaluation of tenders and what you get is a T-Rex sized mountain of waste. Time is running out on these soon-to-be-extinct paper-bound tendering practices.

Paperless Procurement

Increasing Time Pressure

With ever-accelerating time-pressures, institutions need to increase tendering cycle efficiencies somehow. The planning and drafting stages of the procurement process are already squeezed to the breaking point, as are the post-bidding evaluation and contract finalization stages. This puts purchasing institutions under greater pressure to shorten the period between tender call posting and bid submission. However, in a system where the bidding window can determine whether a supplier responds to a tender call, and in an environment where lawsuits are fought over bids that are submitted even seconds after a bid deadline, timing is everything.

Paperless Procurement

Increasing Time Pressure

Shortening the posting period threatens to undermine the open competition value-for-money objectives that lie at the heart of the public procurement process. Purchasing institutions need to buy some time somewhere without compromising open competition. Electronic bidding offers a clear solution for accelerating the bidding process while preserving an adequate window for bid submission.

Paperless Procurement

Increasing Time Pressure

Those institutions that set their bid submission deadlines to the minimum amount of time required by local suppliers may actually be setting themselves up for a bid protest by engaging in a form of prohibited local preference. Enabling electronic bidding will help institutions address this risk by giving all eligible suppliers, regardless of location, an equal opportunity to submit their bids.

2020 Vision:

How to Relaunch Your Tendering System

Do you feel trapped in a tendering time warp, working in an institution that clings to technological platforms created in the 1990s? Are you worried about keeping up with time pressures that seem destined to double between now and 2020? You are not alone. Fortunately, as this article explains, leading-edge innovations in tender call drafting, bid evaluation and price negotiations are taking the art of tendering to new heights of speed and precision.

This article by Paul Emanuelli is from the
June 2016 edition of *Purchasing B2b* magazine.

2020 Vision:
Smart Tendering Templates

Most organizations remained mired in outdated tendering templates that work on the same “fill in the blanks” logic of the standard form documents we once rolled into manual typewriters. Word processing software, high-powered computers and shared drive technologies only serve to obscure the fact that tendering templates remain dumb documents that require manual data entry, produce drafting gridlock and create version control chaos. These problems are made worse when your drafting team realizes mid-stream that they started drafting in the wrong template and now have to start over.

2020 Vision:
Smart Tendering Templates

Smart templates that talk to drafting software represent a quantum leap in RFX drafting speed and precision, helping end-users develop project blueprints, automatically identify appropriate tendering templates, and assign drafting roles to different project team members. Smart templates take us light years ahead of current drafting procedures by enabling team members to concurrently upload their content to facilitate coordinated document drafting and editing and allowing for final document assembly with the push of a button.

2020 Vision:
Automated Evaluations

Current bid evaluations tend to drag on for days. Evaluation team members get buried in a mountain of paper, inputting individual scores in spreadsheets, sitting through lengthy group scoring debates and waiting for someone to manually tally their individual scores into a final scorecard. Manual evaluations are also prone to high rates of human error and are associated with notoriously poor recordkeeping practices. In recent years, these evaluation procedures have become easy targets for audit reviews and legal challenges. The delays and risks are compounded when projects get more complicated and evaluation teams get larger.

2020 Vision:
Automated Evaluations

Automated evaluation platforms help accelerate the evaluation process and enhance its defensibility in three key ways. First of all, electronic evaluation platforms accept online bid submissions and provide evaluators with direct access to those bids. This reduces the risks created when bids get lost in traffic jams and have to be rejected as late and also eliminates the mountain of paper created by physical bid submissions and evaluations.

2020 Vision:
Automated Evaluations

Secondly, automated evaluation platforms allow individual evaluators to enter their scores and notes into a system that maintains a reliable audit trail. This enhances the defensibility of the evaluation process. Thirdly, automated evaluation platforms quickly identify areas with a significant divergence in scores. This helps evaluators quickly identifying potential problem areas, which reduces the risk of evaluation errors and cuts group evaluation times down from days to hours.

2020 Vision:
Online Price Negotiations: Reverse Auctions

When it comes to price negotiations, best-and-final-offer tendering formats represents the current state of the art. Two or three short-listed finalists engage in concurrent negotiations with the purchasing institutions and are typically given about a week to submit their final price offers. These final offers are then scored to identify the best bid. As cutting edge as this may appear compared to a “one-shot” bidding process, two-stage tendering remains a primitive first step in the evolution to electronic reverse auctions.

2020 Vision:

Online Price Negotiations: Reverse Auctions

In electronic reverse auctions, multiple finalists (not just two or three) can compete head-to-head in real-time online auctions. These finalists are given multiple opportunities to bid down their prices to beat their competitors. In addition to price only competitions, purchasing institutions can pre-load the technical scores of finalists into the system so that each bidder knows in real-time exactly how much it needs to lower its price to overtake the total score of its competitors.

2020 Vision:

Online Price Negotiations: Reverse Auctions

Rather than waiting a week to receive and evaluate a final slow motion bid, electronic reverse auctions enable multiple bids from a larger group of competitors and convert the process from days to minutes. This results in significant price improvements over dramatically accelerated timeframes and allows the purchasing organization to declare its winners in real-time.

2020 Vision:

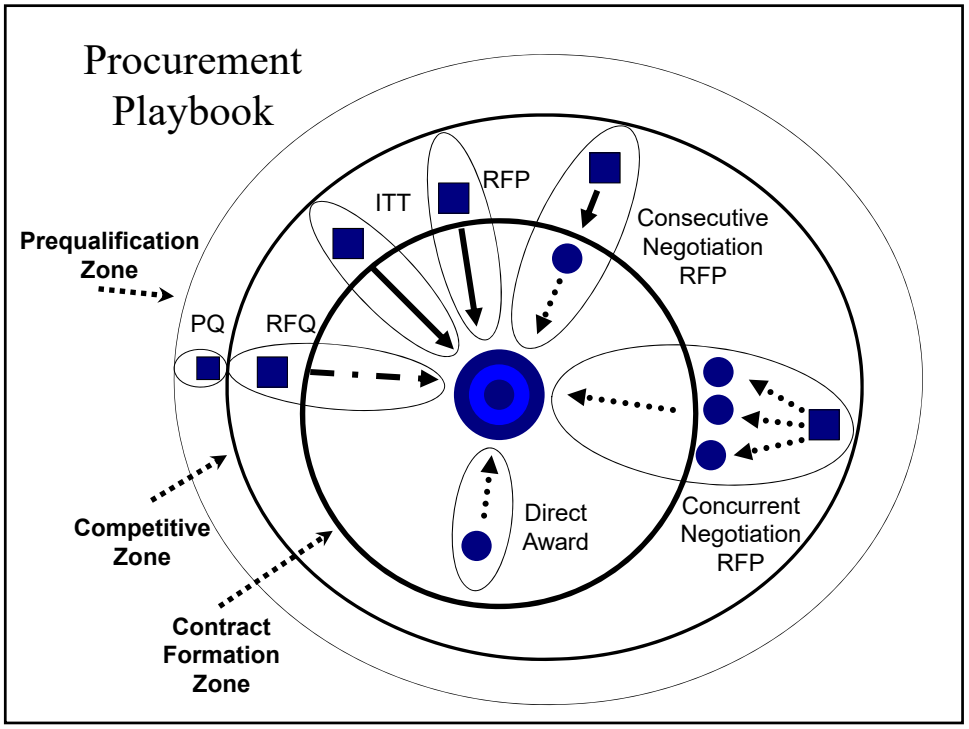
Accelerating the Tendering Cycle

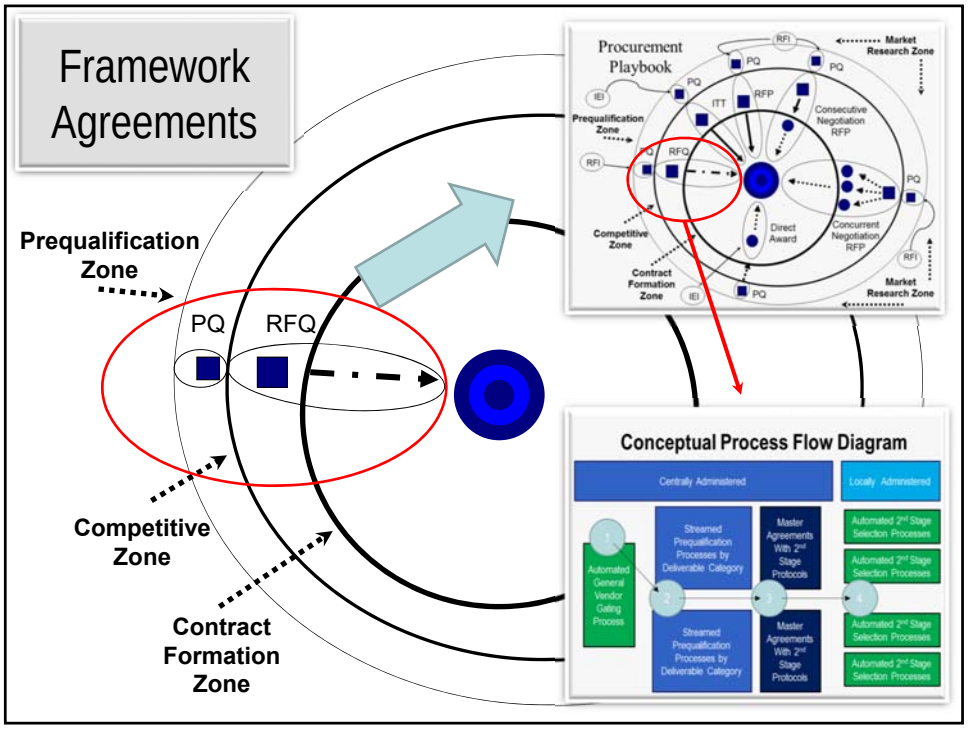
It doesn't take 2020 vision to recognize that time pressures will continue to accelerate at unprecedented rates in the next few years. To keep up with the pace of change, purchasing institutions need to invest in the technological innovations that will enable them to take tender call drafting, bid evaluations and price negotiations to the next level of speed and precision.

UN Model Law

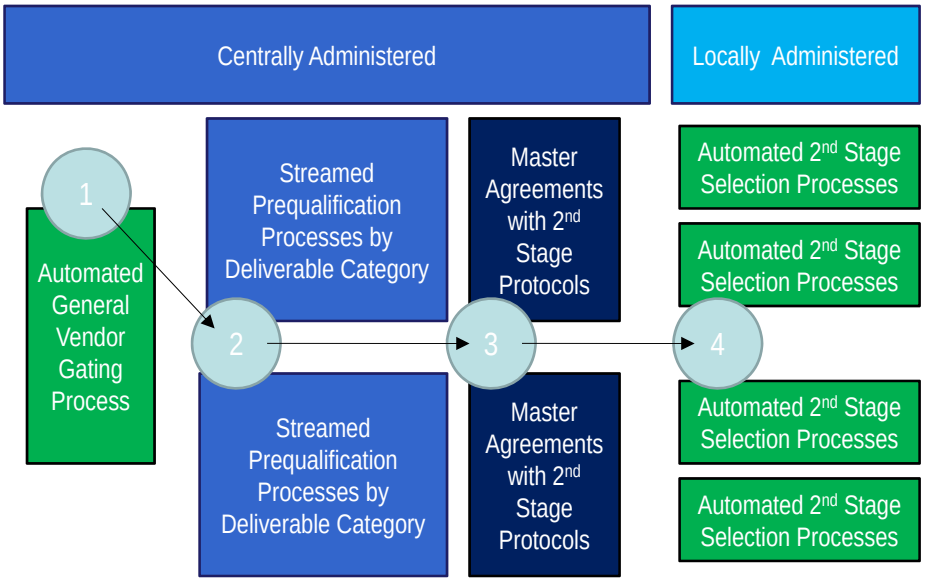
A New ERA of Online Bidding

The 2011 UN Model Procurement Law defines an "electronic reverse auction" ("ERA") as "an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids." As the new UN protocols recognize, public institutions should be leveraging the use of technology and enhancing price competition by utilizing ERAs to seek multiple real-time bids from competing suppliers.


Procurement Playbook
Prequalification Zone
PQ
RFQ
ITT
RFP
Consecutive Negotiation RFP
Competitive Zone
Contract Formation Zone
Direct Award
Concurrent Negotiation RFP


Framework Agreements
Prequalification Zone
PQ
RFQ
Competitive Zone
Contract Formation Zone
Procurement Playbook
Conceptual Process Flow Diagram
Centrally Administered
Locally Administered

Conceptual Process Flow Diagram



Conceptual Process Flow Diagram

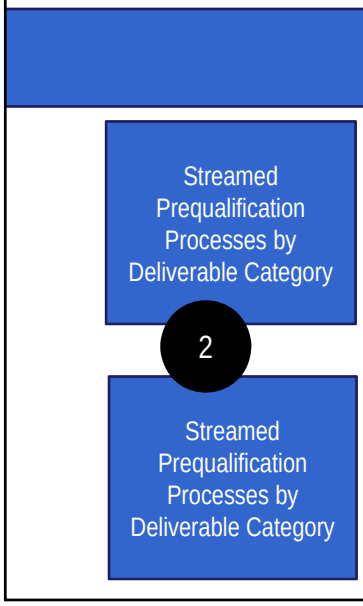
Centrally Administered

1

Automated General Vendor Gating Process

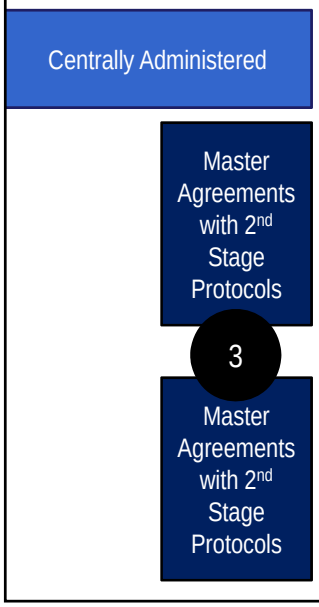
To reduce unnecessary duplication, the purchasing institution should implement an automated general vendor gating process for universally recurring prequalification criteria such as basic vendor background information (e.g. incorporation information, contact information, tax compliance, proof of insurance, GST registration numbers etc.).

Conceptual Process Flow Diagram



Vendors that are pre-screened in a particular category of deliverables (e.g. consulting services) can then be invited to participate in prequalification processes for particular sub-categories within that general category using prequalification criteria applicable to that sub-category.

Conceptual Process Flow Diagram



Vendors meeting the prequalification criteria for a particular sub-category can then be invited to enter into standardized Master Agreements.

These Master Agreements should contain second-stage competitive protocols governing the selection processes for awarding discrete assignments to particular suppliers.

Conceptual Process Flow Diagram

To draw down from the Master Agreements the purchasing institution should use automated second stage processes that include electronic competitive invitations to prequalified suppliers, the electronic submission of supplier responses and the electronic selection of suppliers and execution of service level agreements.

Locally Administered

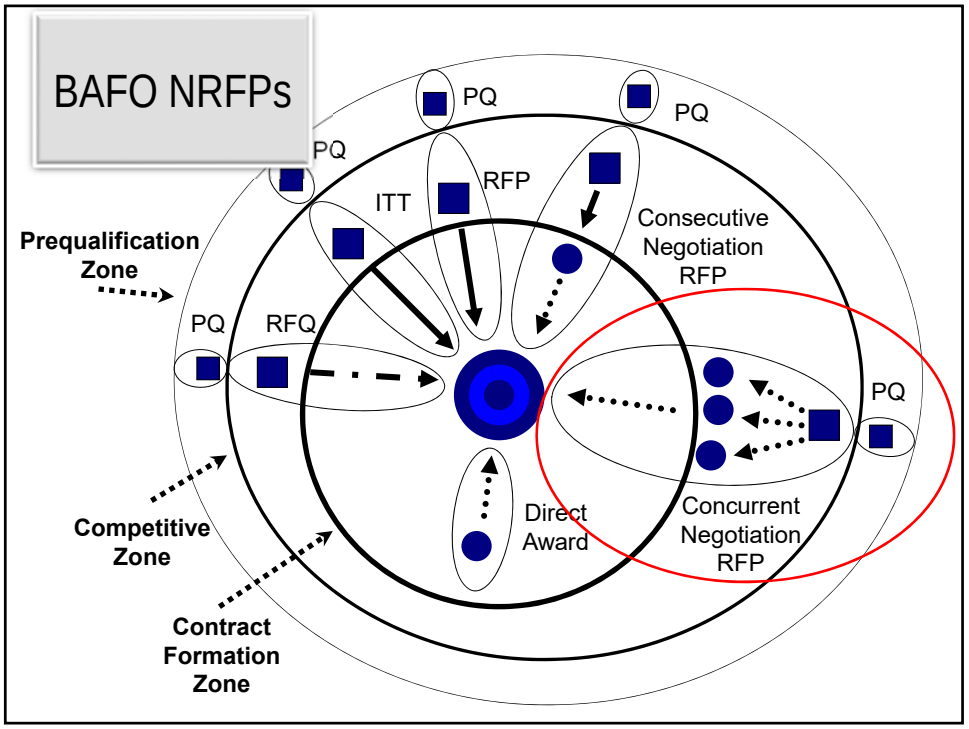
Automated 2nd Stage Selection Processes

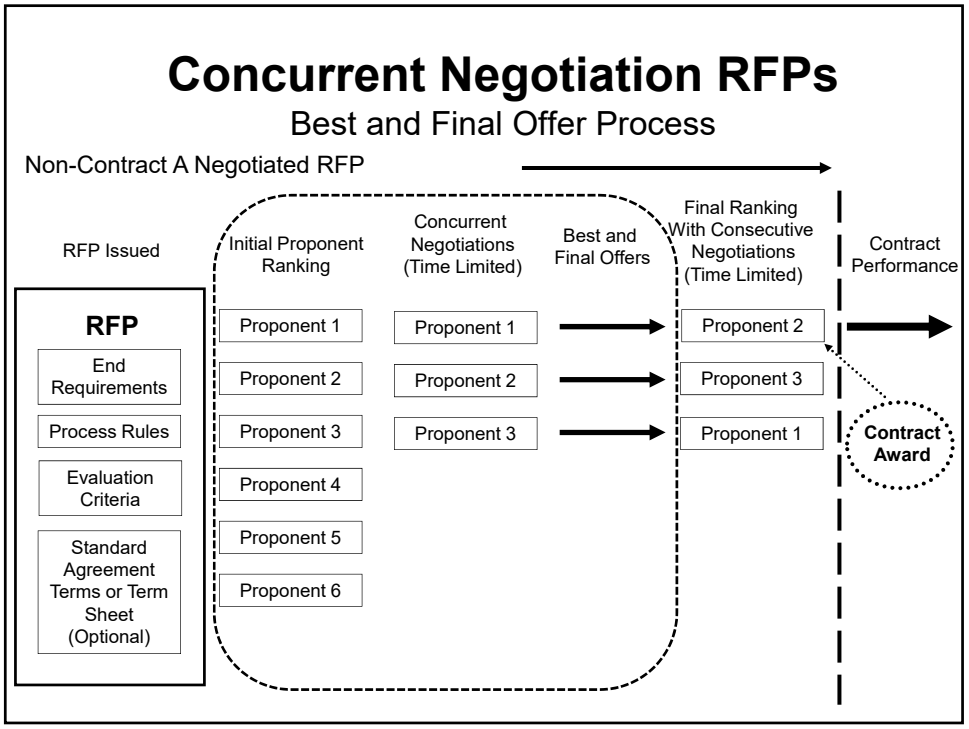
Automated 2nd Stage Selection Processes

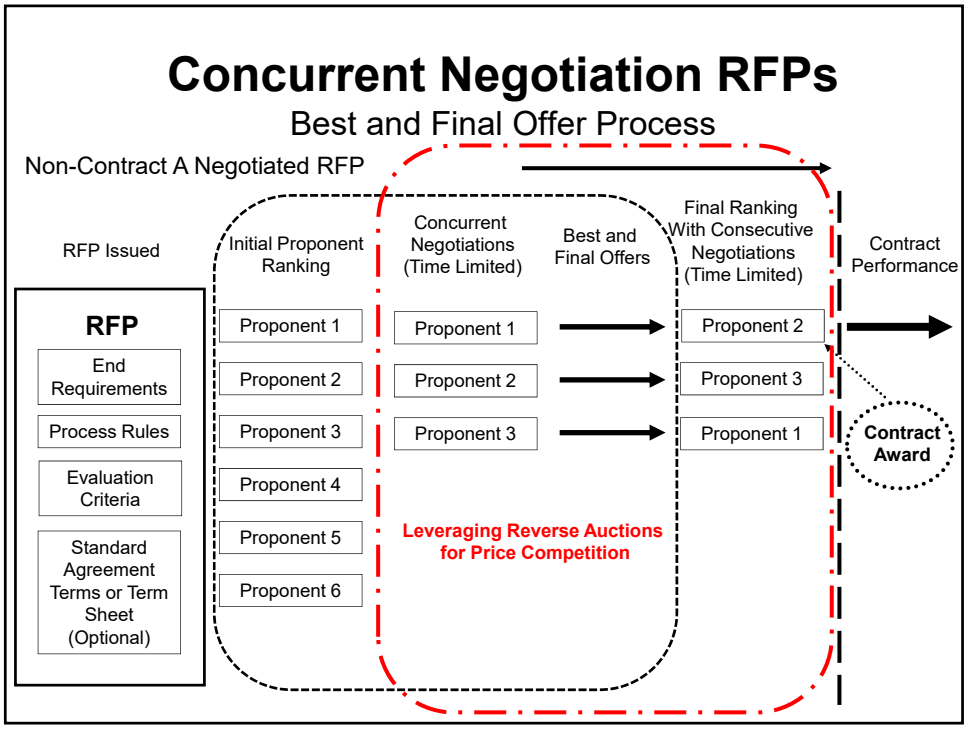
4

Automated 2nd Stage Selection Processes

Automated 2nd Stage Selection Processes




Concurrent Negotiation RFPs
Best and Final Offer Process
Non-Contract A Negotiated RFP
RFP Issued
RFP
End Requirements
Process Rules
Evaluation Criteria
Standard Agreement Terms or Term Sheet (Optional)
Initial Proponent Ranking
Proponent 1
Proponent 2
Proponent 3
Proponent 4
Proponent 5
Proponent 6
Concurrent Negotiations (Time Limited)
Proponent 1
Proponent 2
Proponent 3
Best and Final Offers
Final Ranking With Consecutive Negotiations (Time Limited)
Proponent 2
Proponent 3
Proponent 1
Contract Performance
Contract Award


Concurrent Negotiation RFPs
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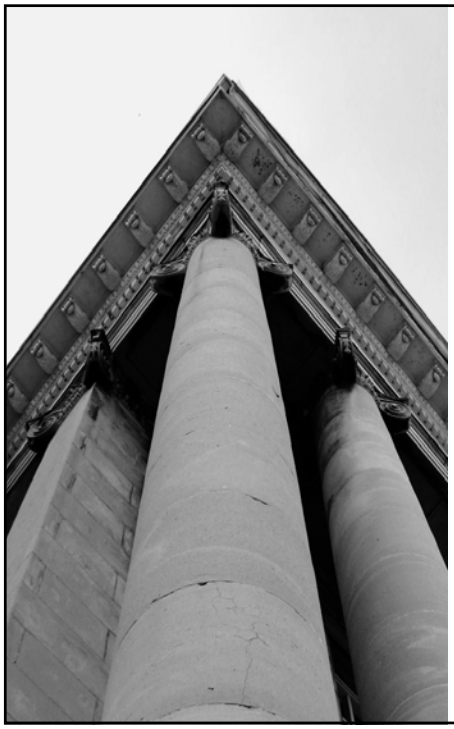
Proponent 1
Proponent 2
Proponent 3
Leveraging Reverse Auctions for Price Competition
Best and Final Offers
Final Ranking With Consecutive Negotiations (Time Limited)
Proponent 2
Proponent 3
Proponent 1
Contract Performance
Contract Award



Implementing Bidder Barring Protocols

Treaty Compliance

Debarment Protocols

Debarment: Article 507 permits, subject to supporting evidence, the exclusion of suppliers based on past conduct and expressly permits the exclusion of suppliers due to bankruptcy or insolvency, false statements, poor past performance, final judgements of serious crimes or other offences, professional misconduct and the failure to pay taxes.

Banning Bad Suppliers

If you owned a company and one of your suppliers sued you, would you invite that supplier to bid on your next tendered contract? This is highly unlikely. However, in many purchasing institutions, there is a widespread reluctance to bar litigious bidders or apply other systemic solutions to deal with problematic suppliers. Purchasing institutions should implement a bidder barring protocol to deal with suppliers who launch frivolous lawsuits, who undermine the integrity of the bidding process or who perform poorly after contract award.

This article by Paul Emanuelli is extracted from the *Accelerating the Tendering Cycle* handbook.

Banning Bad Suppliers

Litigious Bidders

As noted above, there is a widespread reluctance to bar litigious bidders. Part of that reluctance is well placed since a barring process should not be used to add insult to injury after a supplier launches a legitimate claim. In such instances, the courts have criticized heavy-handed bureaucracies who attempt to “get even” for past disputes. However, a proper balance needs to be struck. Frivolous claims drain resources from the purchasing operation.

Banning Bad Suppliers

Litigious Bidders

Institutional policies and procedures should be established to help differentiate between meritorious claims, which should be settled in an expeditious and reasonable fashion, and frivolous ones, which should be streamed towards a barring sanction. Such guidelines can help reduce the resources squandered on protracted legal battles and at the same time help increase supplier confidence in the integrity of the institution's procurement practices.

Banning Bad Suppliers

Bidding Abuses

Many purchasing institutions rely on bid security as their primary deterrent against bidder improprieties. However, this remedy has serious flaws. Firstly, using bid security draws the institution into the high-risk Contract A tendering process. This gives the bidders a number of common law rights which have translated into an avalanche of lawsuits. By requiring bid security, the institution increases its litigation risk and diminishes its ability to utilize more flexible, low-risk tendering formats.

Banning Bad Suppliers
Bidding Abuses

Secondly, bid security is an overly broad remedy since it punishes all bidders by tying up their liquidity during the bidding process in order to sanction the few bad players who do not honour their bids. In its procurement review of Samoa, the World Bank recognized this problem and recommended bidder barring as a substitute remedy:

Although securities can be provided by local banks…this restricts the liquidity of firms in their cash transactions. In place of bid security…the Tenders Board may wish to consider allowing bidders to sign a declaration accepting that if they withdraw or modify their bids during the period of validity…the bidder will be suspended by the Tenders Board for a period of time from being eligible for any bidding involving Government funds.…

Banning Bad Suppliers
Bidding Abuses

[T]his would help the liquidity of the firms, while at the same time ensuring that frivolous bids are not submitted.

Canadian institutions can implement similar approaches, which would free them up to use lower-risk non-Contract A formats while still maintaining a credible deterrent against frivolous bids.

Banning Bad Suppliers

Bidding Abuses

Finally, bid security fails to provide a practical remedy against corrupt tendering practices such as bid rigging and bribery. Lawmakers in a number of international jurisdictions have passed bidder barring legislation to deal with these types of bidding abuses. For example, Kenya's *Public Procurement and Disposal Act 2005* established a maximum five-year ban for bidders who engage in corrupt tendering practices. Purchasing institutions in Canada should leverage these international legal developments to create their own policies and procedures for implementing bidder barring protocols as deterrents against tendering abuses.

Banning Bad Suppliers

Poor Performers

When an institution receives a low bid from a poorly performing contractor, its natural instinct may be to rely on its reserved right to "reject any and all tenders" and select a different bidder. However, since the decision to bypass a low bidder is typically subject to legal challenge, purchasers should proceed with caution in these situations. The ability to safely sidestep a poorly performing low bidder is directly related to the evidence available to prove poor past performance and to the relevance of that poor past performance to the evaluation of the current tender.

Banning Bad Suppliers

Poor Performers

While good record keeping can help in these situations, the low-bid bypass remains subject to costly and lengthy litigation and to lost profit awards if the court decides that the bypass was improper. To avoid risky and resource-draining legal entanglements, institutions should bolster their contract management recordkeeping and conduct post-performance assessments of their contractors.

Bidder Barring

Fair Game if Properly Applied

While the courts have in some instances upheld a purchaser's right to bar problematic suppliers, purchasers should ensure that these practices are developed and implemented in a reasonable and measured fashion.

This article by Paul Emanuelli is extracted from the *Accelerating the Tendering Cycle* handbook.

Bidder Barring

Fair Game if Properly Applied

In its 2007 judgment in *Advanced Ergonomics Inc. v. British Columbia (Workers' Compensation Board)*, the British Columbia Supreme Court dismissed an unsuccessful proponent's claim of bias and conspiracy and upheld the purchaser's right to refuse subsequent proposals from the litigious supplier.

Bidder Barring

Fair Game if Properly Applied

The case dealt with an RFP for ergonomics consulting services. The plaintiff responded to the RFP but was unsuccessful. It brought an action alleging bias and conspiracy, claiming that although it had been invited to bid, the purchaser had decided in advance that it would not win. The plaintiff claimed that it had incurred $100,000 in bidding costs.

Bidder Barring

Fair Game if Properly Applied

The court found no basis for the plaintiff's claims and dismissed the action. Furthermore, the court recognized a purchaser's right to deny a supplier the opportunity to bid on contracts due to ongoing lawsuits. As this case illustrates, barring litigious bidders can be a useful remedy for purchasers in appropriate circumstances.

Bidder Barring

Fair Game if Properly Applied

Conversely, in its April 2005 decision in *Soo Logging Co. v. British Columbia (Minister of Forests)*, the British Columbia Supreme Court found that the government improperly blacklisted a contractor due to alleged past-performance problems. The Ministry had previously terminated the contractor due to the alleged performance problems. When the contractor sued, the Ministry unofficially blacklisted the contractor from subsequent tendering opportunities. The contractor challenged those actions. The court was critical of the Ministry's conduct, noting its unreasonable and intransigent approach in the course of the litigation.

Bidder Barring

Fair Game if Properly Applied

The court found "conduct deserving of rebuke on the part of the Ministry representatives who were instructing counsel." As this case illustrates, purchasers should be careful not to use subsequent tendering processes as an opportunity to "get even" with past performance disputes, particularly in instances where there may have been shared responsibility for prior performance problems.

Bidder Barring

Governing Concepts for Bidder-Barring Protocol

When establishing a bidder barring protocol, public institutions should consider the following key points:

- The protocol should be integrated to form part of the institution's overall procurement policies and procedures
- The protocol should confirm that suppliers may be disqualified from being eligible to participate in bidding opportunities for a prescribed period of time

Bidder Barring

Governing Concepts for Bidder-Barring Protocol

- The protocol should establish grounds for barring, including where:
  - The supplier has prior or ongoing litigation against the institution
  - The supplier failed to honour a bid submitted in one of the institution's bidding processes
  - The supplier failed to disclose conflicts of interest in connection with the institution's procurement opportunities

Bidder Barring

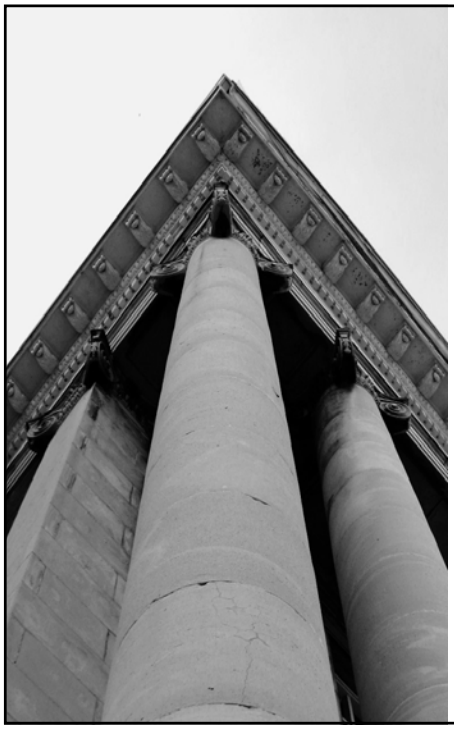
Governing Concepts for Bidder-Barring Protocol

- The supplier was convicted of bid-rigging, price-fixing or collusion or other procurement-related statutory offenses
- The supplier engaged in unethical bidding practices
- The supplier had significant performance issues on a contract with the institution

Bidder Barring

Governing Concepts for Bidder-Barring Protocol

- The protocol should establish a clear bidder-barring process supported by a written business case that uses the factors identified above and recommends a length of disqualification
- The length of the disqualification period should be proportionate to the reasons for the disqualification
- The protocol should also include internal procedures for formalizing the barring decision, maintaining a barring list and reinstating barred suppliers



CETA Comparative Notes

Treaty Compliance

Comparative Notes on the CETA - Background

In February 2017, after prior ratification by its constituent members, the European Parliament ratified the Canada-Europe *Comprehensive Economic and Trade Agreement* ("CETA"), with the ratification and implementation date within Canada scheduled for July 1, 2017, the same effective date as the new *Canadian Free Trade Agreement* ("CFTA"). After the terms of the CETA were negotiated, and while that treaty was undergoing its complex ratification process across Europe, the governments across Canada negotiated the terms of the new CFTA to replace the prior *Agreement on Internal Trade* ("AIT").

Treaty Compliance

Comparative Notes on the CETA – Minimal Impact

The day-to-day impact of the CETA on government procurement operations across Canada will be minimal since the rules under the two treaties are substantially similar and are triggered first under the CFTA, since that treaty has far lower thresholds for publicly tendering government contracts. In other words, once public institutions perform the necessary updates to their government procurement policies, protocols and procedures to ensure compliance with their new CFTA duties, those measures will, for the most part, also address their obligations under the CETA.

Treaty Compliance

Comparative Notes on the CETA – Larger Scope

The key procurement obligations contained in the CETA are substantially the same or similar as those contained in the somewhat more detailed CFTA rules. The key differentiating factor of the CETA, when compared to Canada's other international trade treaties, such as the *North American Free Trade Agreement* ("NAFTA"), is that the benefits of reciprocal non-discrimination (or "national treatment") given to suppliers across the trading blocks are much more expansive in scope. Unlike the *North American Free Trade Agreement*, the CETA obligations apply beyond federal government procurement to also include sub-federal entities.

Treaty Compliance

Comparative Notes on the CETA – Scope Key Difference

In other words, the CETA obligations apply to government entities at all levels of government across Canada and Europe and open bidding opportunities to suppliers at a much deeper level across the trading blocks. Like the CFTA, the CETA also contains far more robust enforcement mechanisms at all levels of government, when compared to the former AIT. Turning to the details of the CETA, the key provisions are as follows:

Treaty Compliance

Comparative Notes on the CETA

Public Tendering: The obligations to publicly tender a contract apply at much higher contract value thresholds under the CETA which, like the CFTA, are indexed to inflation for future adjustments. The CETA contract value threshold, which as noted above are subject to future adjustments, were established for goods and services as: federal government $205,000, provincial and territorial governments and MASH sector (municipalities, academia, school boards and hospitals) $315,000, arm's-length and crown entities $560,000, utility sector $630,000, and for all construction at all levels of government at $7.8 million.

Treaty Compliance

Comparative Notes on the CETA

Security Exemptions: The CETA rules include additional exemptions for national security and military procurement.

Quantification: The contract quantification rules for determining contract value are largely harmonized, although the CETA provisions are somewhat more detailed.

Disclosure: The CETA rules contain somewhat more detailed requirements regarding the duty to publish general information and rulings relating to government procurement disputes and enforcement mechanisms.

Treaty Compliance

Comparative Notes on the CETA

Central Posting: The CETA protocols contemplate a five-year grace period before all entities must be posting their bid opportunities electronically at single point of access. This is consistent with the CFTA provisions recognizing the Canadian federal government's role in creating this central access point in Article 506 of the CFTA.

Posting Information: The standard content requirements in the CETA for the information required in a tender call are largely harmonized with the CFTA requirements.

Treaty Compliance

Comparative Notes on the CETA

Restrictive Conditions: The prohibitions against using unnecessarily restrictive pre-conditions to competition, such as prior supplier experience, as well as the debarment protocols, are harmonized with the CFTA rules.

Prequalification Protocols: The provisions regarding the use of prequalification processes and supplier lists are similar to the CFTA rules, but the CETA rules appear to create stricter standards regarding the ongoing obligation to allow new suppliers onto suppliers lists while those lists remain in use.

Treaty Compliance

Comparative Notes on the CETA

Technical Specifications: The protocols around technical specifications are largely harmonized with the CFTA protocols.

Posting Times: The timelines for public posting are potentially more onerous under the CETA rules, since they expressly require a minimum of 40 days as default, whereas the CFTA protocols are more ambiguous in requiring a “reasonable” amount of time. However, the CETA rules are more detailed in allowing for much shorter bidding periods where advanced notices and electronic tendering are used.

Treaty Compliance

Comparative Notes on the CETA

Negotiated RFPs: The protocols for using negotiations in procurement processes are largely harmonized with the CFTA rules, although the CFTA rules are more detailed in the use of concurrent and consecutive negotiation processes.

Electronic Auctions: The CETA protocols surrounding the use of electronic auction provisions are harmonized with the CFTA provisions.

Treaty Compliance

Comparative Notes on the CETA

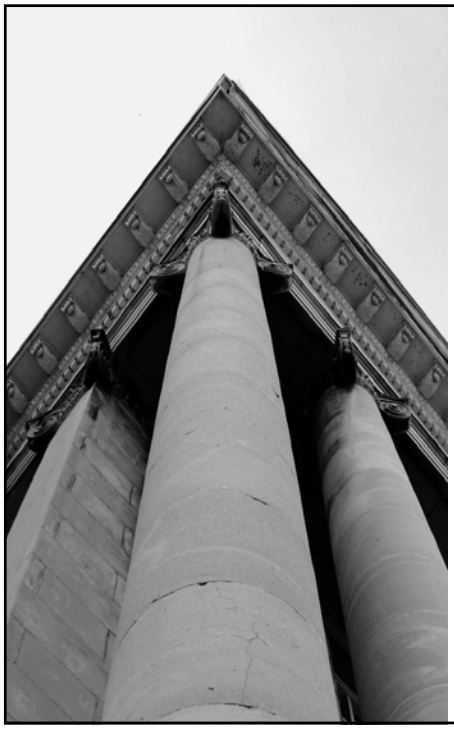
Process Protocols: The CETA tendering process protocols, including the rectification of unintentional errors in bid submissions, the duty to run a fair process and the duty to award to the best bid are largely harmonized with the CFTA protocols; however, the CETA rules include express obligations to prevent conflict of interest and corrupt practices not present in the CFTA rules.

Treaty Compliance

Comparative Notes on the CETA

Limited Tendering: The limited tendering and "sole sourcing" direct award protocols are largely harmonized, although the CFTA provisions are more detailed and include areas which may no longer apply at the higher contract value thresholds contained in the CETA.

Bid Dispute: The CETA administrative or judicial review protocols for formal bid dispute processes are largely harmonized with the CFTA provisions and contemplate a far more rigorous enforcement regime than that which existed at sub-federal levels in Canada under the prior AIT.



Anti-Avoidance Rules and Exemptions

Treaty Compliance

Anti-Avoidance Rules and Exemptions

Distilling the main anti-avoidance protocols contained in the *Canadian Free Trade Agreement*, this module covers: (i) valuation and contract splitting; (ii) local preference and Canadian content; (iii) prohibited practices including biased specifications, unfair requirements, restrictive criteria and conflict of interest; (iv) standard exemptions including confidentiality, security, and urgency.

Treaty Compliance

Valuation and Contract Splitting

Anti-Avoidance Rules: Article 503 includes the traditional anti-avoidance restriction, including:

Valuation: Article 503.1 includes the traditional anti-avoidance restrictions that expressly prohibit attempts to avoiding the rules by methods including contract splitting, diverting funds to institutions not covered by open procurement obligations, or diverting procurements to purchasing groups.

Treaty Compliance

Valuation and Contract Splitting

Extensions and Changes: Article 503.2 prohibits the use of extension options, cancellations or post-award changes to undermine the open procurement obligations.

Treaty Compliance

Valuation and Contract Splitting

Valuation: Article 505 regulates the valuation method used to determine whether the contract exceeds the threshold for open public procurement and maintains that the estimated value should be based on anticipated total cost as of the date of the tender notice publication. This Article maintains that the quantification should be based on the maximum total value of the procurement (including awards to different suppliers) and now clarifies that these should also include any extension options.

Treaty Compliance

Local Preference and Canadian Content

Local Preference: Article 503.3 prohibits the use of local preference or economic benefits criteria that are designed to favour the goods, services or suppliers of another province or region. This restriction now expressly includes construction contracts.

Treaty Compliance

Local Preference and Canadian Content

Canadian Content: Article 503.4 carries forward the express permission to favour Canadian value-adds or to limit procurements to Canadian goods, services or suppliers; however, this Article is expressly subject to Canada's international trade treaty obligations and would therefore be restricted in practice to those procurements that fall under the applicable thresholds of any applicable international trade treaties.

Treaty Compliance

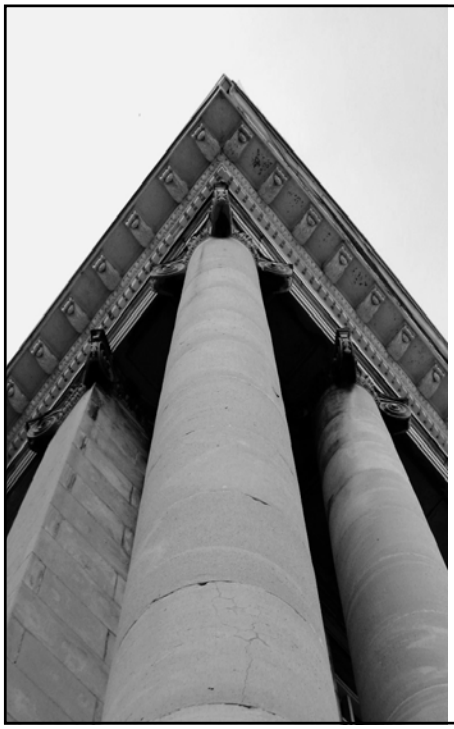
Prohibited Practices

Prohibited Practices: Article 503.5 provides a number of expressly prohibited practices that conflict with the open procurement obligations. These include the traditional prohibitions against preference to local goods, services or suppliers; to scheduling events in the tendering process or specifying requirements or delivery schedules that limit the participation of suppliers; to providing selective information to suppliers to create an unfair advantage; or to using registration or qualification systems that create unnecessary obstacles to participating in a procurement process.

Treaty Compliance

Prohibited Practices

These protocols now also include new express prohibitions against limiting participation in a procurement process to those suppliers who have supplied the institution in the past or to requiring prior experience that is not essential to meeting the requirements of the procurement.



Unfair Barriers to Competition

Treaty Compliance

Prohibited Practices

Unnecessarily Restrictive Conditions: Article 507 contains prohibitions against imposing unnecessarily restrictive conditions on supplier participation in a procurement process and now expressly prohibits the condition of prior experience with the specific procuring entity or prior experience within the territory of the specific entity.

Past Performance Used as Unfair Competition Barrier

Xtreme Concepts Inc
U.S. Government Accountability Office

In its December 2016 decision in *Extreme Concepts Inc,* the GAO ordered a re-evaluation after deciding that the Army had unfairly evaluated the complainant's lack of past government experience. As the GAO noted, the relevant federal acquisition regulations and RFP rules called for a neutral evaluation score when a bidder had no record of relevant past performance with the government. However, the GAO found that the complainant was improperly rejected on past performance grounds even though it offered the lowest cost and its overall score was higher than an accepted competing bidder. The GAO therefore ordered a re-evaluation of the unfair contract award process.

Fair Evaluations – Past Performance

Bidder Falls Short on Length of Past Experience

Samson & Associates v. Canada
Canadian International Trade Tribunal

In its October 2012 determination in *Samson & Associates v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the government's decision to reject a non-compliant bid for failing to meet mandatory past experience requirements. The case dealt with Department of Indian Affairs and Northern Development RFP for the provision of internal audit and information technology and systems audit services.

Tender Compliance – Technical Non-Compliance

Bidder Falls Short on Length of Past Experience

Samson & Associates v. Canada
Canadian International Trade Tribunal

The complainant's proposal was rejected since one of its proposed personnel failed to meet the required minimum experience threshold. It subsequently challenged that decision:

On July 18, 2012, PWGSC advised Samson that its proposal did not comply with mandatory technical criterion MT1 and, therefore, its proposal was deemed non-compliant. More specifically, it informed Samson that one of its proposed resources for Project Manager/Leader only demonstrated 69 months of audit experience when 72 months (*i.e.* six years) were required. In the same correspondence, PWGSC indicated that five contracts had been awarded.

Tender Compliance – Technical Non-Compliance

Bidder Falls Short on Length of Past Experience

Samson & Associates v. Canada
Canadian International Trade Tribunal

After engaging in a detailed analysis of the relevant past experience requirements and of the government's assessment of the information provided by the rejected proponent, the Tribunal ultimately concluded that the proponent failed to establish that its proposed resource met the minimum requirements.

Tender Compliance – Technical Non-Compliance

Bidder Falls Short on Length of Past Experience

Samson & Associates v. Canada
Canadian International Trade Tribunal

Since the Tribunal found that the government evaluators would have to draw inferences that were not necessarily supported by the information in the proposal, it determined that the government was reasonable in rejecting the proposed resource and disqualifying the proponent. The complaint was therefore dismissed. As this case demonstrates, the assessment of past experience continues to attract a disproportionate number of bid compliance protest challenges.

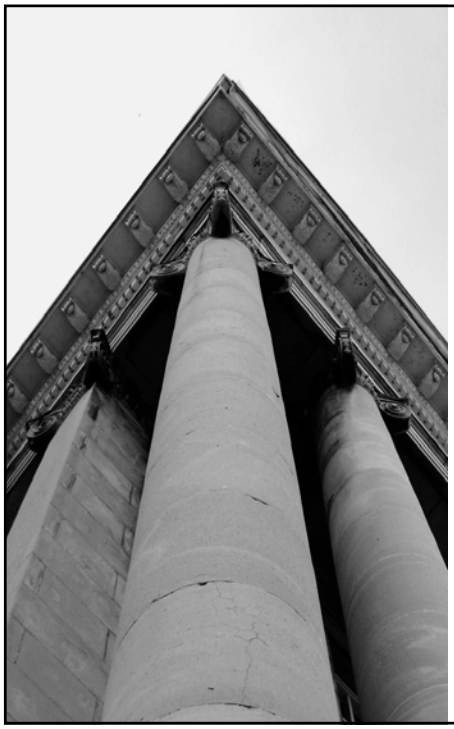
Tender Compliance – Technical Non-Compliance

Bidder Falls Short on Length of Past Experience

Samson & Associates v. Canada
Canadian International Trade Tribunal

Purchasers would therefore be wise to ensure that their screening methods are sound and transparently disclosed in their solicitations. Wherever possible, they should also ensure that such evaluations are conducted by way of pre-qualifications that permit the clarification and rectification of factual discrepancies rather than during a formal bidding process where such discrepancies can prove fatal to otherwise viable proposals.

Tender Compliance – Technical Non-Compliance



Restrictive Specifications and Downstream Conflict of Interest

Treaty Compliance

Prohibited Practices

Restrictive Specifications: The provisions of Articles 509.1 through 509.6 carry forward the traditional regulations against restrictive specifications and call for technical specifications to be stated in accordance with performance and functional requirements, rather than according to design or descriptive characteristics. These Articles contains express restrictions against, amongst other things, the use of trademarks, trade names, patents, or specific origins or suppliers and require that procuring entities expressly accept "equivalent" offerings when using restrictive specifications.

Treaty Compliance

Prohibited Practices

This Article now also contains a new provision that expressly precludes the receipt of advice in the preparation of technical specifications from those who may have a commercial interest in the procurement.

Case Study

Downstream Conflict of Interest

Two recently submitted proposals have created potential conflict of interest issues. The first proposal was submitted by a team that included the technical consultant previously hired by your organization to draft the RFP specifications. The second proposal was submitted by a strategic consulting firm previously retained by your organization to assist with preliminary planning for a program area. The RFP that they just bid on falls within that same strategic portfolio. Do you see any issues with either proposal?

Bidder Relationship With Spec Writer Leads to Conflict

Re Spacesaver Corp.
Canadian International Trade Tribunal

In its January 1999 determination in *Re Spacesaver Corp.*, the Tribunal considered a case of conflict of interest involving a consultant. The government had retained the individual to assist in drafting specifications for a Department of Transport tender call for a mobile shelving system. After the contract was awarded it was discovered that the consultant had had a past relationship with the successful bidder. The complainant alleged that there was a potential conflict of interest. The Department acknowledged the potential problem:

Bidder Relationship With Spec Writer Leads to Conflict

Re Spacesaver Corp.
Canadian International Trade Tribunal

The Department submitted that a consultant was retained by Transport Canada to assist with the preparation of technical specifications for the customized mobile shelving system to be procured in this solicitation. The consultant's mandate was to prepare a generic specification in order to ensure that the procurement process would be as open and competitive as possible. This, the Department submitted, was achieved. However, the Department submitted that it is concerned about the consultant's past relationship with the successful bidder and its implication for the procurement process, particularly, the appearance of independence of those involved in the government's conduct of the procurement process and the appearance of fairness in the process.

Bidder Relationship With Spec Writer Leads to Conflict

Re Spacesaver Corp.
Canadian International Trade Tribunal

The Tribunal agreed that this conflict of interest compromised the procurement process and breached the *North American Free Trade Agreement*:

Article 1008(1)(a) of *NAFTA* provides that each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner. In the Tribunal's view, the Department failed to apply its tendering procedures in a non-discriminatory manner by using, in the preparation of the technical specifications, a consultant who, at the time, had a relationship with the successful bidder.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Bidder Relationship With Spec Writer Leads to Conflict

Re Spacesaver Corp.
Canadian International Trade Tribunal

The Tribunal found that the complainant was entitled to its lost profit damages on account of being denied a fair opportunity to compete for the tendered contract.

Spec Drafter Breaches No Bid Rules in Military Tender

Averna Technologies Inc. v. Canada
Canadian International Trade Tribunal

In its March 2006 determination in *Averna Technologies Inc. v. Canada (Department of Public Works and Government Services)*, the Tribunal ordered the cancellation of a contract award due to conflict of interest. The case involved a Department of National Defence procurement to update acquisition and control systems at an experimental military complex. The complainant alleged that the contract was awarded contrary to the RFP's conflict of interest rules, which prohibited awarding a contract to a party who had previously assisted in the preparation of the RFP.

Spec Drafter Breaches No Bid Rules in Military Tender

Averna Technologies Inc. v. Canada
Canadian International Trade Tribunal

The relevant conflict of interest provision read as follows:

Canada may have engaged the assistance of private sector contractors in the preparation of this solicitation. Responses to this solicitation from any such contractor…will be deemed to be in conflict of interest (real or perceived) and will not be considered. The Bidder represents and certifies that it has not received, nor requested, any information or advice from any such contractor or from any other company or individual in any way involved in the preparation of this solicitation or in the definition of the technical requirement. The Bidder further warrants and certifies that there is no conflict of interest as stated above.

Spec Drafter Breaches No Bid Rules in Military Tender

Averna Technologies Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal found that the government breached this rule when it awarded the contract to a supplier who had previously been retained to prepare a report that helped inform the preparation of the RFP:

The clause in question in this case provides that a contractor whose assistance Canada has engaged in the preparation of the RFP will be deemed to be in conflict of interest if it files a proposal. The clause also states that proposals submitted by such contractors will not be considered.

Spec Drafter Breaches No Bid Rules in Military Tender

Averna Technologies Inc. v. Canada
Canadian International Trade Tribunal

According to the Tribunal, after reviewing the RFP documents, there is no doubt that the report prepared by Néosoft was absolutely necessary to the preparation of a proposal in response to the RFP. The Tribunal is of the view that, without the report, a bidder would not have known the nature of the work required or the technical specifications to follow.

Thus, in the Tribunal's opinion, Néosoft's report was essential to the RFP. This means that Canada did indeed engage the assistance of Néosoft for preparing the RFP. Néosoft should therefore have been deemed to be in conflict of interest and its proposal should not have been considered.

Spec Drafter Breaches No Bid Rules in Military Tender

Averna Technologies Inc. v. Canada
Canadian International Trade Tribunal

The Tribunal ordered the government to cancel the contract award and to award the contract to the complainant or compensate the complainant for its lost profits. As this case illustrates, retaining external advisors to assist in a procurement process can create concerns over inside advantage and prevent those advisors from competing for downstream work. To maintain a fair and open process, purchasers need to carefully manage their external advisors and establish and enforce clear rules to deal with conflict of interest situations.

Advising on RFP Precludes Eligibility to Bid

Re Consortium Genivar-M3E-Université d'Ottawa
Canadian International Trade Tribunal

In its August 2003 determination in *Re Consortium Genivar-M3E-Université d'Ottawa*, the Tribunal considered allegations of unfair advantage arising out of a Canadian International Development Agency foreign support project procurement. The case focused on the association between a consultant who had been retained to advise the government on the procurement and one of the bidders who had responded to that procurement.

Advising on RFP Precludes Eligibility to Bid

Re Consortium Genivar-M3E-Université d'Ottawa
Canadian International Trade Tribunal

As the Tribunal noted, the outcome revolved around the application of a clause in the RFP that was intended to guard against any insider advantage:

> The dispute centres primarily on the effect of clause 2.3 of the RFP. This key clause states, in part, the following:
>
> The Consultant, including EACH member of a consortium, [...] its personnel and subcontractors, must not have been involved, jointly or individually, in the planning (e.g. conceptualization, feasibility studies, specifications, or design) of this project, nor have been assisted in the preparation of the proposal by any third party who has been involved in the planning of this project.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Advising on RFP Precludes Eligibility to Bid

Re Consortium Genivar-M3E-Université d'Ottawa
Canadian International Trade Tribunal

The Tribunal found that the consultant, who was associated with the bidder in question, "had an impact on the planning of the support project in question" and that the information she obtained through that process gave that bidder an improper advantage:

Advising on RFP Precludes Eligibility to Bid

Re Consortium Genivar-M3E-Université d'Ottawa
Canadian International Trade Tribunal

The fact that CIDA chose to negotiate with CAC with a view to granting it the contract knowing that the Associated Consultant had not only helped prepare and draft the Institutional Study, which was subsequently reproduced in part in the terms of reference of the RFP, but had also in effect acted as resource person for the various design and planning teams of the support project in question, is, according to the Tribunal, unacceptable under clause 2.3 of the RFP and contrary to the provisions of the *AIT* given, among other things, the privileged access granted to the Associated Consultant.

Unfair Advantage – Conflict of Interest, Unfair Advantage and Bias

Advising on RFP Precludes Eligibility to Bid

Re Consortium Genivar-M3E-Université d'Ottawa
Canadian International Trade Tribunal

After concluding that the complaint was valid, the Tribunal directed the government to enter into negotiations with the complainant with a view to awarding it the tendered contract.

Tribunal Prohibits Advisors From Downstream Bidding

Bureau d'études stratégiques et techniques en économique v. C.I.D.A.
Canadian International Trade Tribunal

In its September 2007 determination in *Bureau d'études stratégiques et techniques en économique v. Canadian International Development Agency*, the Tribunal considered allegations of conflict of interest and bias in connection with the procurement of consulting services for an international local governance project.

Tribunal Prohibits Advisors From Downstream Bidding

Bureau d'études stratégiques et techniques en économique v. C.I.D.A.
Canadian International Trade Tribunal

The complainant claimed that its competitor had an inside advantage because of access to government information obtained during its involvement in the planning stages of the project and that the government's prior relationship with the competitor, during those planning stages, biased the subsequent evaluation process.

Tribunal Prohibits Advisors From Downstream Bidding

Bureau d'études stratégiques et techniques en économique v. C.I.D.A.
Canadian International Trade Tribunal

With respect to the first allegation, the Tribunal agreed that the complainant's competitor had access to information that was not available to other bidders. The Tribunal also noted that this access to inside information translated into a clear advantage during the evaluation process.

Tribunal Prohibits Advisors From Downstream Bidding

Bureau d'études stratégiques et techniques en économique v. C.I.D.A.
Canadian International Trade Tribunal

The Tribunal concluded that this prior relationship tainted the government's contract award process and cast "doubt on the impartiality of the evaluating committee in evaluating all the proposals of the bidders with regard to all the requirements". As this case illustrates, a finding of reasonable apprehension of bias can seriously undermine the defensibility of the government's evaluation process.

Tribunal Prohibits Advisors From Downstream Bidding

Bureau d'études stratégiques et techniques en économique v. C.I.D.A.
Canadian International Trade Tribunal

As a remedy the Tribunal gave the government the option of either cancelling the awarded contract, or of conducting a re-evaluation with a new team of evaluators who were not involved in any way with the procurement process, and then compensating the complainant if its proposal turned out to be the highest score after that new evaluation.

Case Study

Biased Specifications

Your operations department is looking to purchase new high-tech equipment and is having trouble drafting the specifications. One project team member has proposed copying the specifications from a preferred supplier's product manual or simply referring to that particular product type and brand in the RFP. Do you see any issues with this plan?

Biased Specifications Breach Trade Treaties

Re Waters Chromatography
Procurement Review Board

In its October 1991 determination in *Re Waters Chromatography*, the Procurement Review Board found that the government had run a market investigation process, had pre-determined its preferred supplier, and had then run a biased competition based on its predetermined preference. The case involved the acquisition of high pressure liquid chromatographic equipment for Agriculture Canada. The complainant challenged the tender call requirements, alleging that Agriculture Canada had conducted a "lock-out" competition which only one supplier could win.

Incumbent Advantage and Biased Specifications

Biased Specifications Breach Trade Treaties

Re Waters Chromatography
Procurement Review Board

The Board agreed, observing that Agriculture Canada had predetermined the winner:

This case discloses ample proof that what actually went on in this procurement was a pre-competition, held by Agriculture Canada in private, in the course of assessing what the market had to offer that might meet their needs. These were knowledgeable people with much more than a passing acquaintance with the technical details of the instruments they wanted to acquire. Knowing their needs intimately, they assessed the market with a critical eye and went straight to the conclusion that they had found the product that best met those needs. They got a price quotation and then they instructed DSS to acquire it.

Incumbent Advantage and Biased Specifications

Biased Specifications Breach Trade Treaties

Re Waters Chromatography
Procurement Review Board

The Board found that the tender call had been drafted with restrictive specifications that supported the predetermined outcome:

When faced with the incidental requirements of the law to conduct an open competition, they went along with that. But they didn't intend to risk "losing" in that competition, so they prepared a specification with 13 mandatory requirements for the pump, 5 more for the autosampler and 2 for the overall system, which are set up mainly in terms of particular product features — but which, as the above analysis shows, were open to a series of criticisms that go straight to the issue of fairness to those potential suppliers who would be invited to bid.

Incumbent Advantage and Biased Specifications

Biased Specifications Breach Trade Treaties

Re Waters Chromatography
Procurement Review Board

The Board also found that the use of biased specifications contravened the applicable trade treaties:

Unfortunately for Agriculture Canada, the preliminary, or private, competition of the sort they actually conducted here is prohibited under the GATT Code and Free Trade Agreement, and is not allowed either, under the general rules of policy and procedure that DSS works to, even when the procurement is not under FTA.

Biased Specifications Breach Trade Treaties

Re Waters Chromatography
Procurement Review Board

Competitions are required to be fair and open with all the terms and conditions transparent. They are not to be conducted in private, which is virtually what happened here, and the actual competition, when it occurs, is not to be a mere formality with the true expression of actual needs, and the justifications for mandatory requirements prepared later on, only after it becomes apparent that a complaint has been filed.

The Board therefore ordered the government to correct its specifications, run a new competition and compensate the complainant for its bid preparation and complaint costs.

Tribunal Orders Military to Use Neutral Specifications

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

In its March 1999 determination in *Re Polaris Inflatable Boats (Canada) Ltd.*, the Tribunal found that the Department of National Defence had for ten years relied on improper supplier-specific specifications for its inflatable boat acquisitions. The complainant was a supplier who offered an alternate product which it claimed could meet the Department's requirements. The Tribunal found that the Department should have employed generic specifications:

Tribunal Orders Military to Use Neutral Specifications

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

As early as November 1987, DND had generic specifications that it could have used repeatedly to satisfy its requirements for RHIBs. DND chose not to do so, and instead, relied on a particular design, that of the Zodiac Model RIB PC. On that basis, DND proceeded to procure its requirements exclusively from Zodiac. This, in the Tribunal's opinion, is tantamount to a brand name or trademark type of specification and does not meet the requirements of Article 504(3)(b) of the *AIT* that technical specifications not be biased in favour of or against particular products.

Tribunal Orders Military to Use Neutral Specifications

Re Polaris Inflatable Boats (Canada) Ltd.
Canadian International Trade Tribunal

The Tribunal rejected the Department's assertion that restrictive practices were compelled by the incumbent's proprietary rights and concluded that "DND decided to rely on a particular design, that of the Zodiac Model RIB PC, for the past 10 years without any outside constraints to do so". The Tribunal ordered that future procurements be conducted based on neutral specifications.

Incumbent Advantage and Biased Specifications

Design-Based Specifications Breach Trade Treaty Rules

Halkin Tool Ltd. v. Canada
Canadian International Trade Tribunal

In its May 2010 determination in *Halkin Tool Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal determined that the government used biased specifications in a hydraulic press brake RFP. The Tribunal ordered the government to cancel its procurement process and redraft its RFP using specifications that complied with the applicable treaty rules.

Incumbent Advantage and Biased Specifications

Design-Based Specifications Breach Trade Treaty Rules

Halkin Tool Ltd. v. Canada
Canadian International Trade Tribunal

In its determination, the Tribunal considered the technical details of the challenged specification and ultimately determined that they breached the relevant requirements by referring to a particular design or type, rather than referring to generic functionalities:

Halkin submitted that the mandatory requirements for the solicitation at issue were not specified in terms of performance criteria, but rather made reference to a particular design or type, namely, clevis-mounted hydraulic cylinders and centreline loading construction.

Incumbent Advantage and Biased Specifications

Design-Based Specifications Breach Trade Treaty Rules

Halkin Tool Ltd. v. Canada
Canadian International Trade Tribunal

PWSGC, on the other hand, submitted that the mandatory requirements support DND's legitimate operational requirements and are generic in nature and not specific to any particular design.

In the Tribunal's opinion, the requirements set out in mandatory technical specifications 2.1.2 and 2.1.17 refer to a particular design or type and cannot be construed as being generic in nature. It is clear to the Tribunal that, in making reference to clevis-mounted hydraulic cylinders and centreline loading construction, PWGSC was making reference to a design or to descriptive characteristics for the product that it was procuring rather than specifying the performance that it was seeking to achieve through the particular design, even if this type of design is well known in the industry.

Incumbent Advantage and Biased Specifications

Design-Based Specifications Breach Trade Treaty Rules

Halkin Tool Ltd. v. Canada
Canadian International Trade Tribunal

In light of the above, the Tribunal determined that "not framing requirements in accordance with the applicable trade agreements represents a serious deficiency in the procurement process." As this case illustrates, determining whether specifications are biased will often be a complex assessment of facts requiring a close understanding of the relevant technical details. In these situations, qualified technical subject matters experts should be responsible for preparing defensible neutral specifications.

Tribunal Recognizes Implied "Or Equivalent" Rule

Re Panavidéo Inc.
Canadian International Trade Tribunal

The May 2003 determination of the Tribunal in *Re Panavidéo Inc.* involved a Department of National Defence tender call for closed-circuit television equipment. While the tender call specified a particular brand name, the Tribunal held that the purchaser was within its rights to accept a tender with an equivalent product. The Tribunal determined that acceptability of equivalent specifications could be read into the stated requirements:

Tribunal Recognizes Implied "Or Equivalent" Rule

Re Panavidéo Inc.
Canadian International Trade Tribunal

…the specifications provided sufficiently detailed technical descriptions of the products so that bidders could infer that equivalent products would be accepted. If only one product such as Panasonic had been requested, the product number would have sufficed. It would not have been necessary to add a technical description.

The Tribunal therefore determined that the selected tender was compliant and capable of acceptance by the government and dismissed the complaint.

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

In its March 2004 decision in *John Chandioux Experts-Conseils Inc. v. Canada (Department of Public Works and Government Services)*, the Federal Court of Appeal upheld the Tribunal's finding that the government had properly accepted a tender with a product that was functionally equivalent to the product named in the tender call. The case involved a tender call for a turnkey system that could operate in Environment Canada's computer network and translate meteorological bulletins between English and French.

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

The tender call specifications required the solution to operate "on personal computers devoted exclusively to this use in a Windows environment". A competitor, who had bid a Windows-based system, challenged the contract award on the basis that the competition was limited to Windows solutions and that the contract had been awarded to a non-compliant bidder.

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

Both the Canadian International Trade Tribunal and the Federal Court of Appeal rejected this argument and upheld the federal government's contract award to the LINUX-based solution. Since the relevant trade treaties prohibit tender calls with product-based specifications that unnecessarily restrict competition, the government relied on these principles to support an interpretation of the specifications that permitted an award to a LINUX solution that was compatible with the existing government network.

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

In its defence the government maintained that it required a system that could operate in and be compatible with a Windows environment. However, this did not restrict the tender call to Microsoft Windows solutions since this "would have imposed a technical restriction contrary to the provisions of the trade agreements, which require performance- based specifications". The Tribunal agreed. It held that the requirement in question called for "any system, Microsoft Windows or any other, that will operate in a Windows environment".

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

The Federal Court of Appeal also backed the contract award decision, reiterating the government's view that a narrow interpretation of the specifications that limited the field to Windows solutions would "create an unnecessary obstacle to trade contrary to paragraph 107(1) of the *NAFTA*, infringe subsection 107(3) which prohibits requiring a supplier to use or provide a product with a specific trade mark, and favour Microsoft Windows products contrary to paragraph 504(3)(b) of the *AIT*". The appeal was therefore dismissed and the government's contract award to the LINUX solution was preserved.

Court of Appeal Recognizes Implied "Or Equivalent" Rule

John Chandioux Experts-Conseils Inc. v. Canada
Federal Court of Appeal

As this case reflects, the federal government's duty to comply with its treaty obligations by fostering fair competition between alternative products based on underlying functionality rather than products names can have a significant impact on how tender call specifications are interpreted.

Incumbent Advantage and Biased Specifications

Tribunal Strikes Down Timing for Alternate Product Testing

Springcrest Inc. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

In its November 2016 determination in *Springcrest Inc. v. Department of Public Works and Government Services*, a dispute over a frigate pump RFP, the Canadian International Trade Tribunal issued a redraft order after finding that the Department of National Defence had imposed unfair timing requirements for alternate product certifications. The Tribunal found that the timing requirements were unfair since they required the testing of alternate products prior to bid closing. It therefore ordered the Department to redraft the solicitation to remove the testing requirement or to permit more time to obtain the required certifications.

Open Competition – Unnecessarily Restrictive Requirements

Branding Saved When Legitimate Operational Requirement

Canada (Attorney General) v. Trust Business Systems
Federal Court of Appeal

In its March 2007 decision in *Canada (Attorney General) v. Trust Business Systems*, the Federal Court of Appeal considered an application for judicial review of a Tribunal determination. The case involved the use of brand-specific requirements in a tender call for replacement components for the Information System on Marine Navigation (INNAV), the maritime equivalent of an air traffic control system. A supplier challenged the use of the brand-specific requirements.

Branding Saved When Legitimate Operational Requirement

Canada (Attorney General) v. Trust Business Systems
Federal Court of Appeal

In its defence, the government claimed that it required readily compatible components in order to avoid system down-time and provided detailed technical evidence to support that position. The Federal Court of Appeal agreed that the product-specific branding was a legitimate operational requirement and overturned the Tribunal's prior finding against the government. As this case illustrates, treaty prohibitions against the use of branded specifications are not absolute and are subject to where the government can justify the use of the branded specification in the specific circumstances.

Challenged Specs Ruled Legitimate Operational Requirement

Almon Equipment Ltd. v. Canada
Canadian International Trade Tribunal

In its two related January 2012 determinations in *Almon Equipment Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected an unsuccessful bidder's unfair advantage complaints. In the first complaint, which involved a Department of National Defence procurement for aircraft de-icing glycol recovery services at Canadian Forces Base Trenton, the complainant claimed that the past experience requirements unfairly favoured the incumbent.

Challenged Specs Ruled Legitimate Operational Requirement

Almon Equipment Ltd. v. Canada
Canadian International Trade Tribunal

However, the Department of National Defence maintained that the past experience criteria constituted legitimate operational requirements since challenging weather conditions did not allow contractors to get "on the job training" in order to perform the work. The Tribunal determined that the past experience criteria fell within the meaning of "legitimate operational requirements" and dismissed the complaint.

Challenged Specs Ruled Legitimate Operational Requirement

Almon Equipment Ltd. v. Canada
Canadian International Trade Tribunal

As this determination illustrates, incorporating strict past experience criteria does not constitute a breach of the trade treaty open competition rules if those standards can be justified as legitimate operational requirements. That said, this determination also illustrates the scrutiny that can be placed on past experience requirements and underscores the importance of properly balancing operational needs with open competition duties.

Challenged Specs Ruled Legitimate Operational Requirement

Almon Equipment Ltd. v. Canada
Canadian International Trade Tribunal

In the second complaint, the complainant alleged that the government required an unreasonably short response time for bid submissions and that the solicitation included biased performance specifications that were overly restrictive and constituted a restraint of trade. However, the Tribunal rejected these assertions, finding that the government's vehicle requirements were not unreasonable given the nature of the services in question.

Challenged Specs Ruled Legitimate Operational Requirement

Almon Equipment Ltd. v. Canada
Canadian International Trade Tribunal

The Tribunal also rejected the complainant's arguments regarding the length of the bidding period, finding that the 30-day period was sufficient, particularly given the complainant's past knowledge and experience in providing these services, which should have allowed it to anticipate that the solicitation would be forthcoming. The Tribunal therefore rejected the complaint and awarded costs against the complainant. The complainant appealed both determinations, but they were subsequently upheld by the Federal Court of Appeal in December 2012.

Incumbent Advantage and Biased Specifications

Court Considers Biased Specification Challenge

Airbus Helicopters Canada Ltd. v. Canada (Attorney General)
Federal Court of Canada

In its February 2015 decision in *Airbus Helicopters Canada Ltd. v. Canada (Attorney General)*, the Federal Court of Canada rejected the legal challenge of a supplier who alleged that the government's specifications were biased in favour of a competing supplier. The case dealt with a federal government tender call for a $172 million light-lift helicopter purchase. The applicant, Airbus Helicopter Canada Ltd., brought a judicial review application after it engaged in pre-bid consultations with the government but then refused to bid due to what it alleged were biased specifications.

Incumbent Advantage and Biased Specifications

Court Considers Biased Specification Challenge

Airbus Helicopters Canada Ltd. v. Canada (Attorney General)
Federal Court of Canada

The court found that the government was under a duty to develop fair and unbiased specifications. It also found that the government's market outreach created legitimate expectations that all consulted suppliers would be treated fairly during the consultation process. The court determined that the failure to accept a supplier's request to change specifications in a solicitation document does not automatically equate to an unfair or biased process.

Court Considers Biased Specification Challenge

Airbus Helicopters Canada Ltd. v. Canada (Attorney General)
Federal Court of Canada

In fact, in this case the court found no evidence that the government had overstated its technical requirements to bias the process in favour of the complainant's competitor. Rather, the court found that the government provided ample evidence as to the fairness and reasonableness of its technical requirements. The court also concluded that the government met is fairness duties in administering the consultation process leading up to the creation of its specifications by treating all participants in the consultation process equally.

Court Considers Biased Specification Challenge

Airbus Helicopters Canada Ltd. v. Canada (Attorney General)
Federal Court of Canada

In this case the government opened the doors to a judicial review challenge involving allegations of bias and unfairness by initiating a pre-bid consultation process to help it establish its technical specifications. While the complainant ultimately failed to prove its bias allegations, this case could serve as a significant precedent in the future for suppliers who seek to impugn the specifications established by public bodies in their bid solicitation documents.

Incumbent Advantage and Biased Specifications

Case Study

Incumbent Advantage

A long-term contract is coming up for renewal. The program area wants to know whether they can align their specifications to their existing infrastructure. They also want to know whether they can factor transition and retraining costs into the evaluation of non-incumbent proposals. They are also running out of time to retender and have decided not to disclose past work volume information to competing proponents. How do you advise?

Unfair Incumbent Advantage in DOJ Evaluation

Arctic Slope Missions Services, LLC
U.S. Government Accountability Office

In its January 2016 decision in *Arctic Slope Missions Services, LLC*, the GAO found that the Department of Justice gave preferential treatment to a professional support services incumbent and placed unfair emphasis on past corporate experience. As the GAO stated, the government "must treat all offerors equally and evaluate their proposals even-handedly against the solicitation's requirements and evaluation criteria." The GAO found that the evaluators gave past experience marks outside of the relevant evaluation category and gave the benefit of the doubt to the incumbent while scoring other proposals more narrowly and strictly. It ordered a re-evaluation due to the resulting unfair advantage.

Unfair Evaluations – Incumbent Advantage

Tribunal Allows Alignment of Specs to Existing Technology

Re Tactical Technologies Inc.
Canadian International Trade Tribunal

In its April 1998 determination in *Re Tactical Technologies Inc.*, the Tribunal found that the government is allowed to state its technological requirements based on existing infrastructural technology but that all bidders should be on the same footing as the incumbent in relation to the disclosure of information in a tender call. The case involved the procurement of services for the Department of National Defence Advanced Anti-Ship Missile Defence Simulation Project. The complainant alleged that the procurement was biased in favour of the incumbent.

Incumbent Advantage and Biased Specifications

Tribunal Allows Alignment of Specs to Existing Technology

Re Tactical Technologies Inc.
Canadian International Trade Tribunal

The Tribunal found that it was acceptable for the Department to state its requirements in relation to its existing technological framework:

On the matter of a bias existing in favour of the Incumbent, the Tribunal observes first that it sees nothing objectionable in the fact that the requirements, as set out in the RFP, put some emphasis on the maintenance of the Framework as opposed to the development of models. Since the Framework already exists, it is not abnormal, in the opinion of the Tribunal, that the evaluation be weighed toward the maintenance, servicing and improvement of the existing Framework.

Tribunal Allows Alignment of Specs to Existing Technology

Re Tactical Technologies Inc.
Canadian International Trade Tribunal

However, while it found it permissible to frame evaluation criteria relative to incumbent technologies and processes, the Tribunal noted that the Department was under the obligation to ensure a level playing field by providing competing bidders with access to the critical project-related information that was held by the incumbent supplier:

Tribunal Allows Alignment of Specs to Existing Technology

Re Tactical Technologies Inc.
Canadian International Trade Tribunal

The Tribunal is of the view that, as much as possible, all bidders are entitled to receive any information that could reduce the natural advantage of an incumbent in this respect. The Tribunal is not satisfied that the Department did achieve this goal in this instance. Indeed, the Tribunal believes that the Incumbent had available to it certain information that was not available to the other bidders. When conducting competitive procurements in the field of research and development, where new developments are conditioned by recent advances, it is critical that the latter be reasonably documented and made equally available to all potential suppliers.

Tribunal Allows Alignment of Specs to Existing Technology

Re Tactical Technologies Inc.
Canadian International Trade Tribunal

… The Tribunal is of the opinion that the scheduling of a competitive procurement, such as the one here, should not be arranged to take place immediately before the production of the final report by the Incumbent, thus depriving potential bidders from benefiting from the same information. This is particularly important when the Incumbent, the author of the information, is also in the running.

The Tribunal therefore ordered the Department to disclose to all bidders the incumbent's pending final report since that report would include critical material information regarding the future course of the contemplated project.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

In the October 1998 determination in *Re Corel Corp.*, the Tribunal found that the government had given an unfair advantage to suppliers offering incumbent Microsoft software. The case involved the acquisition of an office automation software suite for the Department of National Revenue. The complainant alleged that the evaluation process was biased in favour of the incumbent technology.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

The government argued that an absolutely level playing field that ignored transition costs would undermine value-for-money considerations by requiring the government to repeatedly bear software installation, training and file conversion costs. As a general rule, the Tribunal agreed that the government: (a) was not required to offset the natural incumbent advantage flowing from acquired knowledge and experience; and (b) was entitled to factor transition costs into its evaluations:

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

The Tribunal is of the view that, in principle, the government is entitled to state its requirements fully and completely, including the possibility that this may result in conversion cost considerations for bidders other than the incumbent. The Tribunal is also of the view that, in principle, an incumbent should not be penalized because of the experience and knowledge that it has acquired in that capacity. Indeed, where goods and/or services have been acquired in an appropriate manner over a period of time, there is no obligation to offset the effect of incumbency in the formulation of solicitations and, subsequently, in the evaluation of proposals.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

However, the Tribunal held that the government could only do this if the incumbency in question was competitively established in the first place. The Tribunal found that this condition was not met in the particular case. Rather, the incumbent technology had become the *de facto* standard without that standard having been made the subject of an open competitive process. The Tribunal held that in the absence of a competitively established incumbency, the government was not entitled to factor transition costs into subsequent competitions.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

Furthermore, the Tribunal found that the conversion costs that the government factored into the deemed cost of the complainant's proposal were arbitrarily applied:

… the Department offers no coherent rationale for establishing the file conversion and training costs at 50 percent of their value in the evaluation process. It is simply not clear why this percentage was chosen and how specifically the risks to bidders and the risks to the government and taxpayers were balanced within the context of effective competition.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

The Tribunal also found that the process was run in a hurried fashion with incomplete disclosure of material information and that this prejudiced the complainant's right to equal opportunity:

… the hurried initiation of this solicitation when critical information had not been developed resulted in unnecessarily tight time frames which created unreasonable difficulty for bidders...

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

...The failure to communicate in the solicitation documents the number and type of licences/upgrades purchased by Revenue Canada after August 28, 1997, and their cost, so as to assist bidders to discount their prices as they may deem appropriate, and the refusal to extend the bidding period also point to measures having been taken by the Department and Revenue Canada which had a significantly different impact on bidders proposing Microsoft products as opposed to bidders offering alternative products, such as Corel products.

Tribunal Restricts Transition Costs for De Facto Incumbents

Re Corel Corp.
Canadian International Trade Tribunal

Accordingly, the Tribunal found that bidders who offered alternative software products has been discriminated against in contravention of the applicable procurement requirements under the *North American Free Trade Agreement* and the *Agreement on Internal Trade.* The Tribunal ordered that the tender call be cancelled and reissued or that the complainant be compensated for its lost profits. The Federal Court of Appeal upheld this determination in its April 1999 decision.

Tribunal Rules on Permissible Transition Costs

Re AT&T Canada Corp.
Canadian International Trade Tribunal

In its November 2000 determination in *Re AT&T Canada Corp.*, the Tribunal recognized that conversion costs could be factored into tender evaluations as a legitimate incumbent advantage. However, it also found that the contract cancellation costs that were negotiated with the incumbent after the close of the prior tendering process could not be applied as conversion costs since the post-bidding negotiation of those additional cancellation costs violated the transparency and equal access obligation contained in the *Agreement on Internal Trade.*

Tribunal Rules on Permissible Transition Costs

Re AT&T Canada Corp.
Canadian International Trade Tribunal

The Tribunal distinguished between these improper transition costs and legitimate transition costs:

…the Tribunal stated that potential suppliers, offering products or services different from those already possessed by the requisitioning entity, could be required to absorb certain costs in an attempt to offset the impact on their bids of material advantages gained by government entities through the previous acquisitions of such goods and services, advantages which government entities value and can elect to consider as part of their statement of requirements and evaluation criteria.

Tribunal Rules on Permissible Transition Costs

Re AT&T Canada Corp.
Canadian International Trade Tribunal

These references demonstrate the fact that in public procurements, government entities often proceed with their acquisitions from an existing goods and/or services base commonly referred to as the "installed base" that has value to them. They need not and frequently choose not to ignore that installed base in formulating their requirements and the criteria to identify a successful proposal. Awarding a contract to a non-incumbent bidder would mean a departure from that "installed base" that could give rise to additional costs that the buying department is under no obligation to absorb and may wish to pass on to the non-incumbent supplier. The Tribunal has characterized these costs as "transition costs" and has acknowledged their validity.

Tribunal Rules on Permissible Transition Costs

Re AT&T Canada Corp.
Canadian International Trade Tribunal

In the Tribunal's opinion, the cancellation costs referred to in Article 23.8.2a of the RFP are not "transitions costs". In this instance, Industry Canada does not want to maintain the system that it already possesses, but wants to do away with the incumbent's outdated and inefficient Frame Relay and DS-1 leased line services. Furthermore, the early date for the initiation of the present contract was the choice of Industry Canada and, as such, is not, in the view of the Tribunal, a legitimate transition cost to be borne by non-incumbent suppliers. Consequently, in the Tribunal's opinion, the cancellation costs described in Article 23.8.2a of the RFP are not transition costs. Because these costs are discriminatory, they constitute a breach of Article 504(2) of the *AIT*.

Tribunal Rules on Permissible Transition Costs

Re AT&T Canada Corp.
Canadian International Trade Tribunal

As this case illustrates, even where treaty obligations apply, the government can take legitimate transition costs into account when comparing the tenders of incumbents and other bidders. However, improper charges, such as improperly negotiated contract cancellation fees, may be contrary to and prohibited by those treaties.

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS Allstream Inc.
Canadian International Trade Tribunal

In its August 2005 determination in *Re MTS Allstream Inc.*, the Tribunal considered the issue of incumbent advantage and biased specifications. The case involved a federal government tender call for telecommunications services in the National Capital Area. The complainants alleged that the government had established requirements that precluded any bidders, other than the incumbent, from submitting a compliant proposal.

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS Allstream Inc.
Canadian International Trade Tribunal

More specifically, the complainants challenged the government's requirement of a mandatory dialing plan that required approximately 177,000 directory numbers to be transitioned to the new supplier's network within an unreasonably short timeframe. The solicitation was initially issued in February 2005 and required this transition to be complete by December of the same year. The complainants alleged that this was one of several requirements that biased the procurement in favour of the incumbent.

Incumbent Advantage and Biased Specifications

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS Allstream Inc.
Canadian International Trade Tribunal

In its analysis, the Tribunal was careful to distinguish between legitimate requirements that favoured a natural incumbent advantage and requirements that unfairly biased the competitive process by establishing standards that were impossible to meet by other bidders. Given the incumbent's technological entrenchment, the Tribunal found that the situation fell within the latter category. For example, the Tribunal found that the requirement to maintain the existing dialing plan at all times during the transition biased the technical specifications.

Incumbent Advantage and Biased Specifications

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS Allstream Inc.
Canadian International Trade Tribunal

On the second ground of complaint, the complainants alleged that the aggressive transition timeframe also created an unfair incumbent advantage. After engaging in an analysis of the complexity of the requirement and the government's prescribed timeframe, the Tribunal agreed that the implementation period also prevented fair competition:

Incumbent Advantage and Biased Specifications

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS Allstream Inc.
Canadian International Trade Tribunal

The Tribunal is of the view that the four-month implementation period set by PWGSC prevented potential suppliers from meeting the requirements of the solicitation. While there may have not existed, at the outset, a deliberate strategy by PWGSC to make it difficult for other suppliers to provide responsive bids, it is the Tribunal's opinion that PWGSC, being fully aware of all the circumstances surrounding this procurement, knowingly imposed an implementation deadline that other potential suppliers were not capable of meeting, contrary to Article 504(3)(d) of the *AIT*. Thus, the Tribunal finds the complaint valid on the second ground.

Incumbent Advantage and Biased Specifications

Transition Requirements Trigger Unfair Incumbent Advantage

Re MTS AIIstream Inc.
Canadian International Trade Tribunal

The Tribunal then concluded that the third ground of complaint, which took issue over the proposed location for technical testing, was also valid. After finding that there were multiple factors giving rise to improper incumbent advantage, the Tribunal ordered the government to cancel and reissue the RFP or, in the alternative, compensate the complainants for their lost opportunity.

Mounties Busted for Unfair Incumbent Advantage

Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police
Canadian International Trade Tribunal

In its April 2014 determination in *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police*, the Tribunal found that the Royal Canadian Mounted Police breached its open and fair competition duties under the trade treaties by failing to provide historical volume usage information to competing bidders and creating an unfair advantage for the incumbent supplier. The dispute involved a Request for Standing Offer issued by the RCMP for the supply of ethyl alcohol to detachments across Canada.

Mounties Busted for Unfair Incumbent Advantage

Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police
Canadian International Trade Tribunal

The complainant challenged the process, alleging that the pricing structure unfairly favoured the incumbent by requiring bidders to include freight charges in their financial offers without specifying the location and volume of required shipments. The RCMP argued that bidders were on a level playing field in determining the cost of the shipping since the location and quantities were equally unknown to all bidders at the time of bidding. The Tribunal did not accept the RCMP's position since historical usage information was material to predicting future usage across the various RCMP detachments.

Mounties Busted for Unfair Incumbent Advantage

Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police
Canadian International Trade Tribunal

While the Tribunal acknowledged that all potential suppliers assume an element of risk when preparing bids, the procuring entity is under a duty to disclose the material contract information over which it has control. In this case the historical usage information withheld by the RCMP would have assisted bidders in making future use projections and more accurately calculating the cost of shipping the goods.

Mounties Busted for Unfair Incumbent Advantage

Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police
Canadian International Trade Tribunal

The failure to provide this information to competing bidders gave the incumbent, who was already privy to this information, an unfair advantage. As a remedy, the Tribunal ordered that the contract awarded pursuant to the unfair tendering process be cancelled and retendered with the required information provided to all prospective bidders.

Contract Voided Due to Hidden Incumbent Advantage

Rapiscan Systems Inc. v. Canada (Attorney General)
Federal Court of Appeal

In its April 2015 ruling in *Rapiscan Systems Inc. v. Canada (Attorney General)*, the Federal Court of Appeal upheld a February 2014 Federal Court trial decision that set aside a contract awarded by the Canadian Air Transport Security Authority ("CATSA") after finding that the contract was unlawfully awarded pursuant to an unfair bidding process. The dispute arose over the procurement of airport security screening equipment.

Contract Voided Due to Hidden Incumbent Advantage

Rapiscan Systems Inc. v. Canada (Attorney General)
Federal Court of Appeal

The contract was awarded to the incumbent equipment provider, Smiths Detection Montreal Inc. A competing supplier, Rapiscan Systems Inc., brought the legal challenge after submitting an unsuccessful bid. Rapiscan alleged that the process was unfairly biased in favour of the incumbent since CATSA had relied on hidden evaluation criteria that unfairly favoured Smiths.

Contract Voided Due to Hidden Incumbent Advantage

Rapiscan Systems Inc. v. Canada (Attorney General)
Federal Court of Appeal

After determining that CATSA's contract award decision was unfair, unreasonable, arbitrary, made in bad faith and procedurally illegal for its failure to consider relevant factors, the Federal Court ruled that the contract award should be declared unlawful and set aside. CATSA appealed the decision. While the Federal Court of Appeal reversed some of the Federal Court's findings, including the Federal Court's finding of bad faith on the part of CATSA, its April 2015 ruling ultimately upheld the trial decision to strike down the contract award.

Treaty Compliance
Standard Exemptions

Legitimate Objectives: Article 501 contains a "notwithstanding clause" that allows the senior level governments that signed the treaty (the "Parties") to override the open procurement commitments contained in the treaty in pursuit of "legitimate objectives" governed by specific implementation standards for such programs.

Treaty Compliance
Standard Exemptions

Small Business Set-Asides: Article 504.13 recognizes a new express exemption for small business set-aside programs, so long as those programs do not discriminate based on place of origin or location within Canada.

Treaty Compliance
Standard Exemptions

General Exemptions: Article 504.11 carries forward a series of traditional exemptions for non-application of the open procurement obligations to certain types of contracts, including grants and land transactions, certain types of financial services, all legal and notary services, goods and services financed primarily through donations that contain specific contradicting procurement conditions, procurements with non-profits, international aid, and government-to-government procurement.

Treaty Compliance
Standard Exemptions

Limited Tendering: Article 513 carries forward the traditional exceptions for limited tendering in situations where no tenders or no compliant tenders were received. It also contains a new provision for limited tendering where a procurement was the subject of collusion.

Treaty Compliance
Standard Exemptions

This Article also contains exceptions for the traditional "sole source" procurements involving works of art, restrictions created by intellectual property rights, the absence of competition for technical reasons, statutory monopolies, compatibility, interoperability, warranties, subscriptions, unforeseeable urgency, commodity markets, prototype purchases, bankruptcy purchases, design contests and sensitive information.

Treaty Compliance
Standard Exemptions

New Exception for Entrenched Incumbents: Article 513.1(c) creates a new exemption for procurements with existing suppliers involving technical or interoperability restrictions with existing equipment, software, or services even if the procurement goes beyond the original scope of the contract if retendering would cause significant inconvenience or substantial duplication of costs to the procuring entity.

Treaty Compliance

Standard Exemptions

Confidentiality: Article 517 includes confidentiality protocols that expressly recognize that the open procurement obligations do not require the disclosure of information that would impede law enforcement, prejudice fair competition between suppliers or third party rights (including intellectual property rights) or be contrary to law or to the public interest.

Treaty Compliance

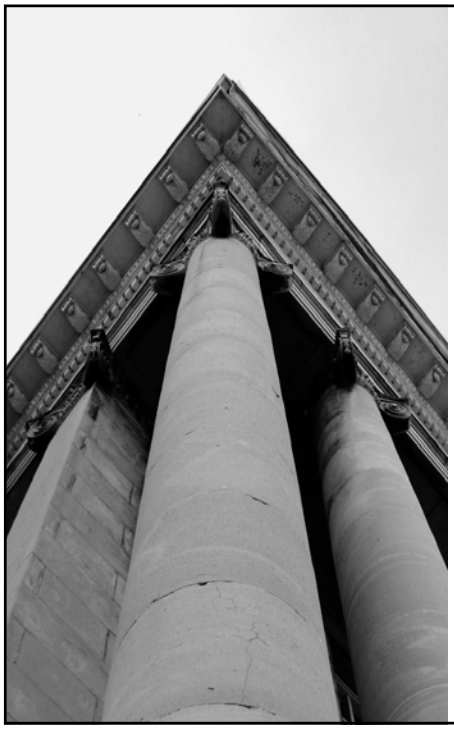
Standard Exemptions

Modifications/Exclusions: Article 519 contains protocols for future modifications to the procurement obligations under the Chapter and Article 520 includes a series of express jurisdiction-by-jurisdiction exclusions for institutions and types of procurements that are not covered by the treaty;

Treaty Compliance

Standard Exemptions

however, unlike the AIT, which included express inclusions, for the most part the CFTA exclusions are now made by way of a “negative list” that expressly states the exclusions so that entities that were not previously expressly included under the former AIT “positive list” enumeration method would now be covered under the CFTA, unless they are expressly exempted by the new 520 Annex.



Sole Sourcing

California Court of Appeal Upholds Sole-Source Decision

Michael Weinstein v. County of Los Angeles
California Court of Appeal

In its June 2015 decision in *Michael Weinstein v. County of Los Angeles,* the California Court of Appeal reversed a trial decision that had struck down a municipal sole-source contract award for health care support services. The Court of Appeal found that the trial court failed to apply appropriate deference to the sole-source decision since government procurement decisions should only be reversed where they are "arbitrary, capricious or entirely lacking in evidentiary support" or where they are "contrary to established public policy or unlawful or procedurally unfair." The Court of Appeal found that the municipality had adequately documented the reasons behind its sole-source decision and upheld the award.

Judicial Review – Standard of Review – Open Competition – Sole Source

Case Study

Software Sole Source Plan

Your project team wants to sole-source the acquisition of a revenue management software system. They plan to procure the activation key for the relevant software module from an existing software provider and want to justify their sole-source on the basis of technical compatibility and the associated costs of competing technologies. Discuss how you would advise the project team and whether your advice would differ if you were in the public or private sector.

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

In its February 2012 determination in *FreeBalance Inc. v. Canada Revenue Agency*, the Canadian International Trade Tribunal found that the Canada Revenue Agency ("CRA") was in breach of the applicable trade treaty rules when it attempted to sole-source the acquisition of revenue management system software. The CRA had posted an Advance Contract Award Notice ("ACAN") which provided notice of intention to sole-source to SAP Canada Inc. and procure the activation key for the relevant software module from its existing software provider.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

The complainant, a competing software provider, challenged the attempted sole-source. The Tribunal agreed with the complainant. Its explanation provides instructive guidance to those government bodies that seek to justify their sole-sourcing activities on the basis of technical compatibility and the associated costs of competing technologies:

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

> In the present case, the CRA has not directly addressed how the exceptions cited in the ACAN apply. However, the CRA has stated that, whereas the SAP PSCD module is compatible with the existing SAP software used on the network and presents no risks, FreeBalance's proposed product is not an integrated, compatible and seamless solution and presents unacceptable risks. Specifically, the CRA submitted that FreeBalance's solution would require the use of two parallel systems that entail a loss of productivity, increased user training costs, delays in the transfer of information with the SAP system and a software program that is not standardized across all federal government institutions.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

> In other words, the CRA's position seems to be that the limited tendering process is justified because (i) for technical reasons, including the need to ensure compatibility, FreeBalance does not have an alternative or substitute product to the SAP solution and (ii) using FreeBalance's solution would entail non-technical risks, such as the risk of added cost.
>
> The Tribunal will first deal with the second of these justifications. The Tribunal acknowledges that operational risks, such as extra transition costs to train personnel to use new software, constitute valid considerations which should not be ignored in a procurement process.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

> However, under no circumstances and in no conditions should assumed considerations which are essentially cost-based support a case for the use of limited tendering procedures; as a matter of law, the trade agreements do not allow such a practice. Potential bidders may absorb certain transition costs inherent in proposing an alternative or substitute product in order to gain access to a customer heretofore controlled by another supplier, but this is part of the normal requirements definition of a competitive procurement process. In the present case, it may well be the case that FreeBalance—or a third party—could offer a competitively priced product that meets all of the CRA's needs. Without open competition, one would never know.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

> This does not mean that the CRA must compromise its requirements; however, it does mean that it should examine what the supplier community has to offer. As the Tribunal has previously stated, it is hard to fathom how a properly conducted competitive procurement that reflects the true operational (and technical) requirements of a government institution could result in compelling the government institution to procure equipment or services that do not meet its needs. Turning to the technical reasons, including the need to ensure compatibility, that the CRA has cited to justify a directed contract to SAP, the Tribunal acknowledges that it is not in a position to fully assess the technical merits of FreeBalance's proposed solution. Yet, it is not satisfied that SAP is the only supplier able to meet the CRA's mandatory technical requirements.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

In defence of its actions, the CRA basically relied upon its assessment that FreeBalance's statement of capabilities is partly unresponsive to the requirements stated in the ACAN. However, as the Tribunal has previously stated, putting a procurement process to the test of an ACAN does not, in itself, constitute a valid justification for invoking limited tendering procedures under the trade agreements, and the failure of a complainant to submit a statement of capabilities that meets all the mandatory requirements of an ACAN is not necessarily fatal to its challenge to a limited tendering process.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

An ACAN is, by its nature, an instrument that often provides only a short description of the specific requirements for which a solution is being sought; therefore, a challenge to an ACAN by a potential supplier that views its alternative product as being viable cannot be expected to contain the same level of detail as would its response to a competitive Request for Proposal (RFP). In other words, the threshold to proceed to a competitive process should be very low.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

The Tribunal determined that the government should not rely on speculation regarding whether other products can meet its requirements in a cost-effective manner as the justification for not engaging in an open competitive procurement process. It also noted that an ACAN should not be used as an expedient shortcut around an open competition:

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

By failing to put this belief to the test of a competitive procurement, the CRA leaves the Tribunal with the impression that the overriding reason for a directed contract with SAP was expediency or administrative convenience. The evidence discloses that the CRA had predetermined that SAP's product was a risk-free solution which would meet its needs, and there are indications that, by the time the long overdue decision was taken to make the upgrade, the CRA was eager to proceed with SAP's contract as expeditiously as possible. In this regard, the Tribunal reiterates that an ACAN process should not be treated as a shortcut that skirts the requirement for open competition. Indeed there are provisions in the trade agreements that allow for shorter than normal periods for bidding when time is a crucial factor.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Software Sole-Source Scheme Struck Down by Tribunal

FreeBalance Inc. v. Canada Revenue Agency
Canadian International Trade Tribunal

The Tribunal therefore upheld the complaint and ordered the government to conduct a competitive procurement process or compensate the complainant for its lost opportunity. As this case illustrates, the trade treaties establish strict protocols in favour of competition as the default method of procurement and government institutions should ensure that they have the proper justification before they rely on the technical compatibility exceptions to open competition.

Direct Awards – Technical Compatibility Exception – Government Bears Onus of Proving Exception

Tribunal Strikes Down National Security Bypass

M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services
Canadian International Trade Tribunal

In its August 2016 determination in *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services,* the Canadian International Trade Tribunal found that the Royal Canadian Mounted Police improperly used a national security exemption in an attempt to directly purchase night-vision binoculars with biased specifications. The Tribunal found that the RCMP's attempt to bypass a competitive bidding process and circumvent the Tribunal's review mechanism was not warranted by confidentiality concerns over the technical specifications since those concerns could have been addressed within the framework of a competitive bidding process.

Open Competition – National Security Exemption

Case Study

Emergency Training Services

As a stop-gap measure, your project team wants to extend a number of standing offer agreements for French language training services until head office establishes a new national master standing offer. The team plans to use the urgency and unforeseen circumstances exceptions under the trade treaties to justify the out-of-scope extensions. Discuss how you would advise the project team and whether your advice would differ if you were in the public or private sector.

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

In its January 2014 determination in *Knowledge Circle Learning Services Inc. v. Department of Health*, the Canadian International Trade Tribunal found that the extension of standing offers beyond the originally contemplated term constituted an inappropriate sole source in contravention of the relevant trade treaties.

Direct Awards – Unsuccessful Claim of Emergency and Unforeseen Circumstances Exemptions

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

In this case, the Department of Health extended a number of standing offer agreements as a stop-gap measure while it waited for the Department of Public Works and Government Services to establish a new national master standing offer for the required French language training services. The complainant was one of the original standing offer contractors but its contract was not extended.

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

The Tribunal found that the extension of the standing offer for eighteen months beyond its valid expiry date constituted a new procurement that breached the trade treaties since the circumstances did not validly fall within the urgency and unforeseen circumstances exceptions under the trade treaties. The Tribunal rejected those sole source exceptions in the circumstances since the services were not required in an extreme urgency and since it was entirely foreseeable that the services would be required prior to the creation of a new national standing offer by Public Works.

Direct Awards – Unsuccessful Claim of Emergency and Unforeseen Circumstances Exemptions

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

As the Tribunal noted, the procurement in question was plagued with significant deficiencies:

The Tribunal agrees with Knowledge Circle that the case at hand was plagued with serious deficiencies and breached the applicable trade agreements in a number of respects. By attempting to improperly extend the SOAs in issue beyond their mandated expiry dates, Health Canada bypassed the required procurement process altogether. Competition, transparency and fairness were thus undermined and, Knowledge Circle was seriously prejudiced in that it was denied the opportunity to bid on the subsequent opportunities.

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

The Tribunal also noted that, "its behaviour shows a troubling degree of carelessness and disregard for its obligations under the relevant trade agreements." While there is not guarantee of work under standing arrangements, The Tribunal recommended damages for the complainant's lost opportunity to earn a profit, since the work in question had already been performed and ordering the termination of the sole-sourced contracts would at that point be meaningless.

Direct Awards – Unsuccessful Claim of Emergency and Unforeseen Circumstances Exemptions

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

After the parties were unable to agree on the amount of compensation, the Tribunal released a follow-up determination in June 2014.

After being denied the opportunity to compete for what amounted to a total of $1,541,544 worth of work during the improper extension period, the complainant sought $555,516 in damages.

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

This figure represented 36.04 percent of that total amount of untendered work, a percentage that reflected the proportion of work that had been awarded to the complainant in the last year of its standing offer. However, the Tribunal noted that the percentage of total work awarded to the complainant had fluctuated from 17.47 to 36.04 percent during the term of the standing offer from 2007 to 2011.

Direct Awards – Unsuccessful Claim of Emergency and Unforeseen Circumstances Exemptions

Tribunal Narrows Use of Urgency Exception

Knowledge Circle Learning Services Inc. v. Department of Health
Canadian International Trade Tribunal

It ultimately set the total amount of lost opportunity at $171,282.67, which represented an equal portion of the total work divided by the nine original standing offer suppliers who had performed that work prior to the improper sole source extension. Notwithstanding the government's position that the maximum allowable profit margin for calculating lost profits should be 20 percent, the Tribunal accepted the complainant's position that it had enjoyed a 45.2 percent profit margin on the work in question and therefore calculated lost profits on the lost opportunity at $77,419.77.

Direct Awards – Unsuccessful Claim of Emergency and Unforeseen Circumstances Exemptions

Post-Award Scope Change an Improper Sole Source

Colley Motorships Ltd. v. Canada
Canadian International Trade Tribunal, August 2008

In its August 2008 determination in *Colley Motorships Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal awarded the complainant lost profits and ordered the government to compete future work after finding that a post-award contract amendment constituted an improper sole source. The case involved a contract amendment which expanded the scope of an existing personal household goods relocation services contract to include the provision of private motor vehicle relocation services.

Post-Award Scope Change an Improper Sole Source

Colley Motorships Ltd. v. Canada
Canadian International Trade Tribunal, August 2008

The complainant, an existing provider of private motor vehicle relocation services, challenged the contract amendment. The government acknowledged that the complaint had merit and asked the Tribunal to recommend reasonable compensation. In considering a remedy, the Tribunal noted that "Colley's PMV relocation business with DND represented a significant part of the company's revenue base and that unfairly depriving it of this business would likely be seriously prejudicial to the company's financial interests". The Tribunal therefore awarded the complainant one-third of its lost profits.

Contract Amendment Constitutes Sole Source

Bell Mobility v. Canada
Canadian International Trade Tribunal

In its July 2008 determination in *Bell Mobility* v. *Department of Public Works and Government Services*, the Canadian International Trade Tribunal determined that the government's contract amendments constituted improper sole sourcing that contravened the applicable treaty obligations regarding open public procurement. The case involved a federal government amendment of two mobile products and services contracts. The complainant alleged that the government's contract amendments improperly expanded the scope of contracts originally awarded pursuant to an RFP process. The complainant argued that the post-awarded amendments precluded competition.

Contract Amendment Constitutes Sole Source

Bell Mobility v. Canada
Canadian International Trade Tribunal

The Tribunal agreed, finding that the addition of a 1-GB-based service for heavy users to the 30-MB-based service plan contemplated under the original RFP was a substantial change which was not permitted under the "service enhancement" clause in the contract. The Tribunal determined that the amendment constituted a new non-competed procurement that breached the Agreement on Internal Trade:

…the Tribunal finds that, by proceeding in the manner in which it did, PWGSC effectively conducted a new procurement without competition. Accordingly, the Tribunal finds that PWGSC breached the *AIT* by not following the procedures for procurement contained in Article 506.

In-Scope Purchase Not a Sole Source

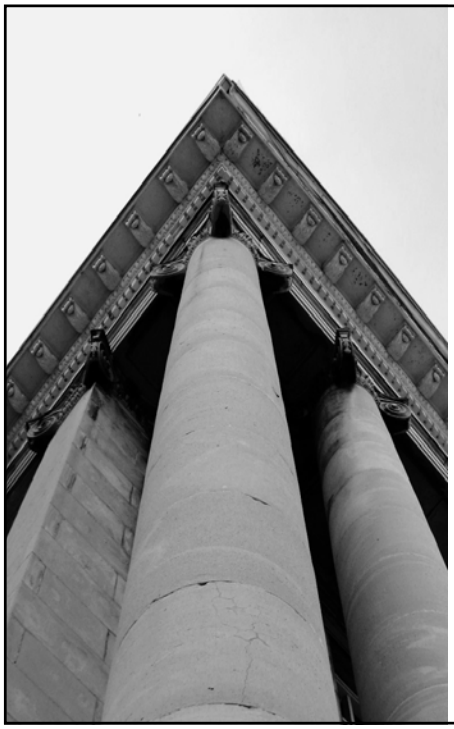
Microsoft Canada Co. v. Canada
Canadian International Trade Tribunal

In its March 2010 determination in *Microsoft Canada Co.* v. *Department of Public Works and Government Service*s, the Canadian International Trade Tribunal rejected a sole source challenge launched by Microsoft Canada. The case dealt with the acquisition of a new unified portal software solution by Health Canada under an existing contract with Sierra Systems Group. Microsoft claimed that the acquisition fell outside of the scope of the previously tendered contract and was therefore an improper direct award.

In-Scope Purchase Not a Sole Source

Microsoft Canada Co. v. Canada
Canadian International Trade Tribunal

After engaging in a detailed analysis of the new software and of the software licensing and maintenance terms in the original solicitation, the Tribunal determined that the acquisition fell within the scope of the existing contract. As this case illustrates, institutions should carefully craft the scope of tendered contracts to ensure that they are able to procure successor technologies. Failing to do so can fetter the downstream acquisition of related technologies from an incumbent supplier and compel an institution to prematurely engage in a new tendering process.



The New Bid Dispute Regime

Treaty Compliance

The New Bid Dispute Regime

Distilling the main bid dispute protocols contained in the *Canadian Free Trade Agreement*, this module covers: (i) the duty to create dispute resolution protocols; (ii) administrative review process timelines; (iii) initial review appeals; (iv) judicial review oversight of administrative review; (v) remedies; (vi) local bid complaint consultations; (vii) relevance of Canadian International Trade Tribunal case law.

Treaty Compliance

Dispute Resolution

Dispute Resolution: Article 518 includes new protocols for dispute resolution that call for the Parties (the senior level governments that signed the treaty) to establish administrative or judicial review authorities and procedures for supplier challenges.

Treaty Compliance

Administrative Review Processes

Administrative Review Processes: Where administrative review processes are established, those processes will require that findings be made within 90 days of a complaint (with extensions of up to 135 days allowable in exceptional circumstances), that the procedural rules be put in writing and be made generally available and that those rules contain complaint limitation periods of no less than 10 days from the supplier's discovery of the reason for the dispute.

Treaty Compliance

Initial Reviews Subject to Appeal

Initial Reviews: Where a body other than an independent administrative or judicial review authority initially reviews a complaint, that initial decision will be subject to appeal to an independent administrative or juridical review body.

Treaty Compliance

Bid Dispute Tribunals Subject to Judicial Review

Judicial Review: Furthermore, this Article maintains that where an administrative body other than a court is established to hear complaints, its decisions must be subject to judicial review unless the administrative body contains formal trial-like process rules, including document disclosure and discovery protocols, the right to make live submissions to the tribunal, the right to representation, the right to open public proceedings and the right to a timely written decision.

Treaty Compliance

New Remedy Regime

Remedies: Article 518 also requires that each Party establish a new remedy regime that includes rapid interim measures, including the postponement or suspension of a procurement process, along with orders for corrective action or compensation for the loss or damages suffered, which may be limited to bid or complaint costs or both.

Treaty Compliance

Bid Complaint Consultations

Bid Complaint Consultations: Article 518.4 also includes new protocols requiring procuring entities to respond to supplier complaints through impartial and timely complaint consultations. These procurement-entity-level consultations are in addition to the administrative or judicial review processes noted more generally in Article 518.

Treaty Compliance

Comprehensive Economic and Trade Agreement

CETA Harmonized With CFTA: The *CETA* administrative or judicial review protocols for formal bid dispute processes are largely harmonized with the *CFTA* provisions and contemplate a far more rigorous enforcement regime than that which existed at sub-federal levels in Canada under the prior *AIT*.

Treaty Compliance

Canadian International Trade Tribunal Case Law

Deep Body of Treaty Interpretation: As noted above, like the *CFTA*, the *CETA* will introduce a more robust bid dispute regime when compared to the past protocols contained under the former domestic trade treaty, the *Agreement on Internal Trade*. This will ultimately bring the rest of the Canadian public sector up to, and potentially beyond, the enforcement standards that have historically been in effect for decades at the federal level under the Canadian International Trade Tribunal.

Treaty Compliance

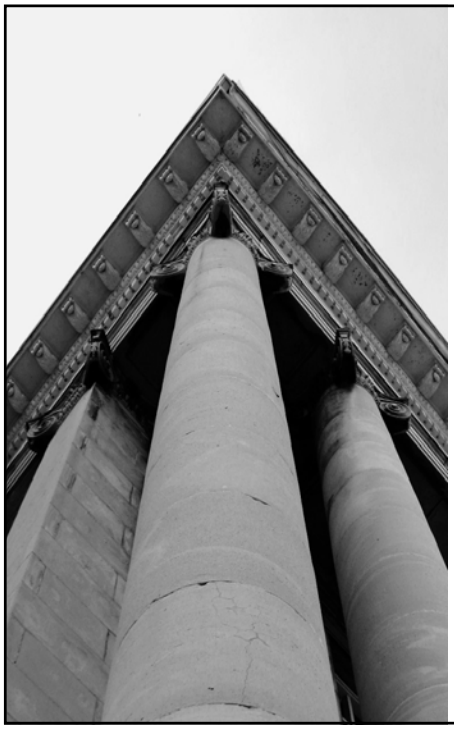
Canadian International Trade Tribunal Case Law

Thus, the decades-deep body of fair competition case law under the federal Tribunal will have an expanding relevance across Canada in the years to come. Public institutions at all levels will be interpreting and navigating their new trade treaty duties under an enhanced enforceability regime, where not only domestic suppliers but also international suppliers will have the right to challenge the trade treaty compliance of government procurement decisions in formal legal proceedings.

Treaty Compliance

Canadian International Trade Tribunal Case Law

The prior rulings of the Canadian International Trade Tribunal will likely bear a more significant weight than ever before with government institutions at all levels across Canada and will likely have a significant impact in informing future decisions under the new enforcement regimes.



The CITT's Role and Jurisdiction

Treaty Compliance

The New Bid Dispute Regime

Summarizing the role and jurisdiction of the Canadian International Trade Tribunal, this module covers: (i) the role of the Tribunal; (ii) Tribunal remedies; (iii) the Tribunal's jurisdiction; (iv) threshold considerations for complainant remedies; and (v) the regulation of direct contract awards.

Treaty Compliance

The Canadian International Trade Tribunal

Role of the Tribunal: The Canadian International Trade Tribunal ("Tribunal") is the forum where suppliers can challenge the federal government's procurement practices and seek the enforcement of the federal government's procurement obligations under applicable trade treaties.

Treaty Compliance

The Canadian International Trade Tribunal

As noted on its Web site, the Canadian International Trade Tribunal is an "administrative tribunal operating within Canada's trade remedies system. It is an independent quasi-judicial body that carries out its statutory responsibilities in an autonomous and impartial manner and reports to Parliament through the Minister of Finance."

Treaty Compliance

The Canadian International Trade Tribunal

The Canadian International Trade Tribunal is part of the regime that legally binds the Canadian federal government to the public procurement commitments contained in various international trade treaties.

The tribunal system gives suppliers a relatively prompt and accessible method to hold the federal government accountable for any breaches of its trade treaty obligations.

Treaty Compliance

The Canadian International Trade Tribunal

The speed and accessibility of this regime inevitably subjects federal public sector procurement to a higher degree of scrutiny than that applied to those public institutions that operate outside of the Canadian International Trade Tribunal's jurisdiction.

Treaty Compliance

The Canadian International Trade Tribunal

Through its Web site, the Tribunal maintains a high degree of transparency and accessibility, providing, among other things, links to relevant statutory authorities and regulations, guides to assist suppliers in challenging the federal government's procurement practices, and a number of other publications that provide useful background information.

Treaty Compliance

The Canadian International Trade Tribunal

Additionally, the full catalogue of procurement determinations, including those of its predecessor, the Procurement Review Board of Canada, are readily available online at the Tribunal's Web site: <http://www.citt-tcce.gc.ca>.

Treaty Compliance

The Canadian International Trade Tribunal

Tribunal Remedies: The Tribunal is empowered to hear complaints arising out of the federal government's procurement practices and to order remedies when it finds that the particular complaint is valid. As subsection 30.15(2) of the *Canadian International Trade Tribunal Act* states, those powers include recommending any one or more of the following remedies:

Treaty Compliance

The Canadian International Trade Tribunal

a) that a new solicitation for the designated contract be issued;
b) that the bids be re-evaluated;
c) that the designated contract be terminated;
d) that the designated contract be awarded to the complainant; or
e) that the complainant be compensated by an amount specified by the Tribunal.

Treaty Compliance

The Canadian International Trade Tribunal

Like the courts, the Tribunal can and has awarded lost profit damages in appropriate circumstances. However, while the courts generally tend to limit tendering remedies to damages for lost profits, the Tribunal more readily intervenes mid-stream during a procurement process to compel the government to rectify any improper procurement practices.

Treaty Compliance

The Canadian International Trade Tribunal

Hence, those government procurement practices that fall within the Tribunal's jurisdiction tend to be subject to a more in-depth and immediate degree of scrutiny than do those government procurement activities that are conducted beyond the scope of that jurisdiction.

Treaty Compliance

The Canadian International Trade Tribunal

Scope of Jurisdiction: There are three main ways in which the Tribunal's jurisdiction is restricted:

- the contract value threshold analysis that triggers the Tribunal's jurisdiction to hear a complaint;
- the exclusion of certain classes of procurement and the exemption of certain institutions from the Tribunal's jurisdiction; and
- the distinction between the contract award phase of the procurement process, which falls within the Tribunal's jurisdiction, and the contract performance phase, which falls outside that jurisdiction.

Treaty Compliance

The Canadian International Trade Tribunal

Threshold Considerations: As the decided cases have illustrated, the following threshold issues can prevent a complainant from obtaining a remedy before the Tribunal:

(1) Standing: The complainant's standing. These cases focus on whether the complainant has the right bring a complaint to the Tribunal on account of country of origin or its inability to meet the technical specifications contained in the relevant tender call document.

Treaty Compliance

The Canadian International Trade Tribunal

(2)Timeliness: The complainant's failure to launch its complaint within the strict timeframes required by the Tribunal's procedural rules. These cases consider the complainant's failure to meet the filing deadline, the Tribunal's discretion to waive that deadline and the risk of launching premature complaints.

(3) Burden of Proof: The complainant's failure to prove its allegations. These cases consider the complainant's burden of proof and illustrate how its complaints will fail where it fails to make its case and meet that burden.

Treaty Compliance

The Canadian International Trade Tribunal

(4) Duty to Clarify: The complainant's duty to seek pre-bidding clarification. These cases recognize the bidder's positive duty to raise issues with the government prior to bidding rather than waiting until after the process is over to challenge the process.

(5) Deference to Evaluators: The Tribunal's deference to government evaluation teams. These cases illustrate how the Tribunal will typically defer to the evaluation decisions made by the government's evaluators, but also illustrate how that deference has its limits.

Treaty Compliance

The Canadian International Trade Tribunal

Direct Contract Awards: While competition for contract awards is the norm in government procurement, there are situations that are recognized as being exempt from that general rule. In some circumstances, the direct award of government contracts without any competition is a recognized and legitimate practice. Where a public institution falls within the jurisdiction of the Canadian International Trade Tribunal, its direct contract awards are subject to legal challenge.

Treaty Compliance

The Canadian International Trade Tribunal

When it intends to award a contract directly, the Canadian federal government typically issues an Advanced Contract Award Notice ("ACAN"). An ACAN is a document issued by the federal government to notify prospective suppliers of the intention to bypass an open competitive process in favour of a direct contract award.

Treaty Compliance

The Canadian International Trade Tribunal

The numerous Tribunal determinations involving challenges to the federal government's use of ACANs provide some guidance in assessing the validity of a contemplated direct contract award. As these cases illustrate, apart from cases dealing with the use of exclusive intellectual property rights, the federal government's attempts to utilize direct contract awards have been largely unsuccessful. Furthermore, the Tribunal determinations illustrate how the restrictions against direct awards also impact the post-tendering contract administration phase of the procurement cycle.

CITT Recognized as Expert Tribunal by FCA

Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

In its July 2001 decision in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, the Federal Court of Appeal considered the appropriate standard of review for the review of Canadian International Trade Tribunal procurement determinations. The Tribunal's determination dealt with a complaint arising out of the award of a $35 million services contract for 16 Canadian frigates and destroyers. The appellant was originally awarded the contract and had commenced performance. A competitor challenged the government's award decision.

CITT Recognized as Expert Tribunal by FCA

Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

The Tribunal overturned the contract award and ordered its termination since it found that the selected proposal was non-compliant. The terminated supplier appealed to the Federal Court of Appeal. In upholding the Tribunal's determination, the Court of Appeal illustrated the deference afforded to the Tribunal for procurement issues and trade treaty considerations on account of its specialization and expertise:

CITT Recognized as Expert Tribunal by FCA

Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

In this case, the legal issues being reviewed are squarely within the Tribunal's area of expertise. They are not "pure questions of law that require the application of principles of statutory interpretation and other concepts which are intrinsic to commercial law". Rather, they are complex legal and factual issues that demand specialized expertise in the fields of economics, business and procurement practices. The detailed criteria in the RFP and the second evaluation handbook have to be interpreted in addition to intricate contractual and legislative provisions. In other words, in this case the CITT had to decide whether the tender documents properly identified the requirements and evaluation criteria in the RFP and whether the procurement was conducted according to them and the applicable contracts, trade agreements and legislation. This complex exercise demands unique expertise and experience and is the everyday work of the Tribunal.

CITT Recognized as Expert Tribunal by FCA

Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

The Court of Appeal also noted the Tribunal's scope, history, legislative and treaty framework and experience in relation to federal government procurement matters:

The expertise of the CITT in these matters is undoubted. Since 1995, it has dealt with more than 375 procurement complaints. The CITT became Canada's bid challenge authority pursuant to Article 1017 of the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America...[T]he CITT also became the bid challenge authority for the Agreement on Internal Trade (AIT) on July 1, 1995 and for the World Trade Organization Agreement on Government Procurement …[o]n January 1, 1996.

CITT Recognized as Expert Tribunal by FCA

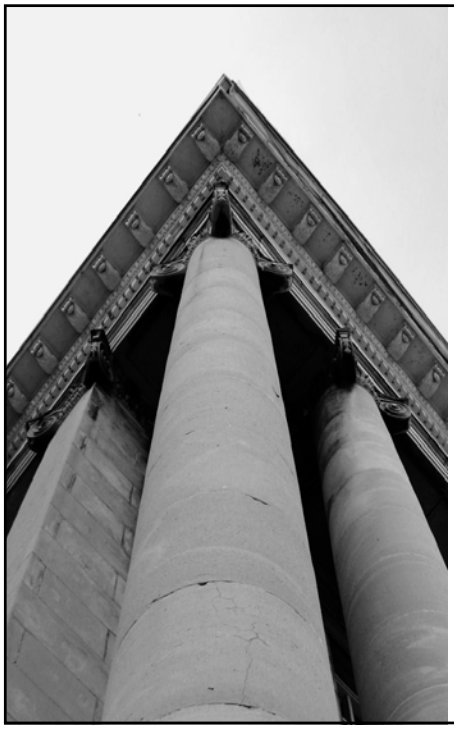
Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

The Court of Appeal concluded that the Tribunal should be subject to a correctness standard of review for issues going to its jurisdiction but that it should be subject to a more deferential standard of review for matters falling within its jurisdiction. After failing to overturn the Tribunal's determination, the appellant appealed to the Supreme Court of Canada but leave to appeal was denied. The Tribunal's order to cancel the multi-million dollar contract award was therefore upheld.

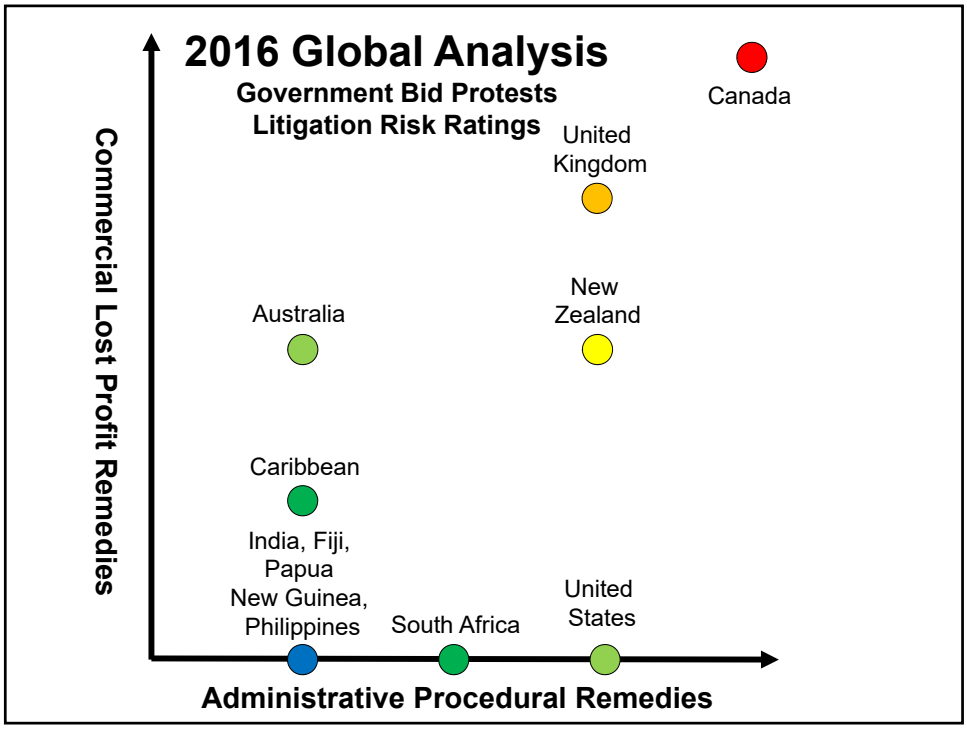
CITT Recognized as Expert Tribunal by FCA

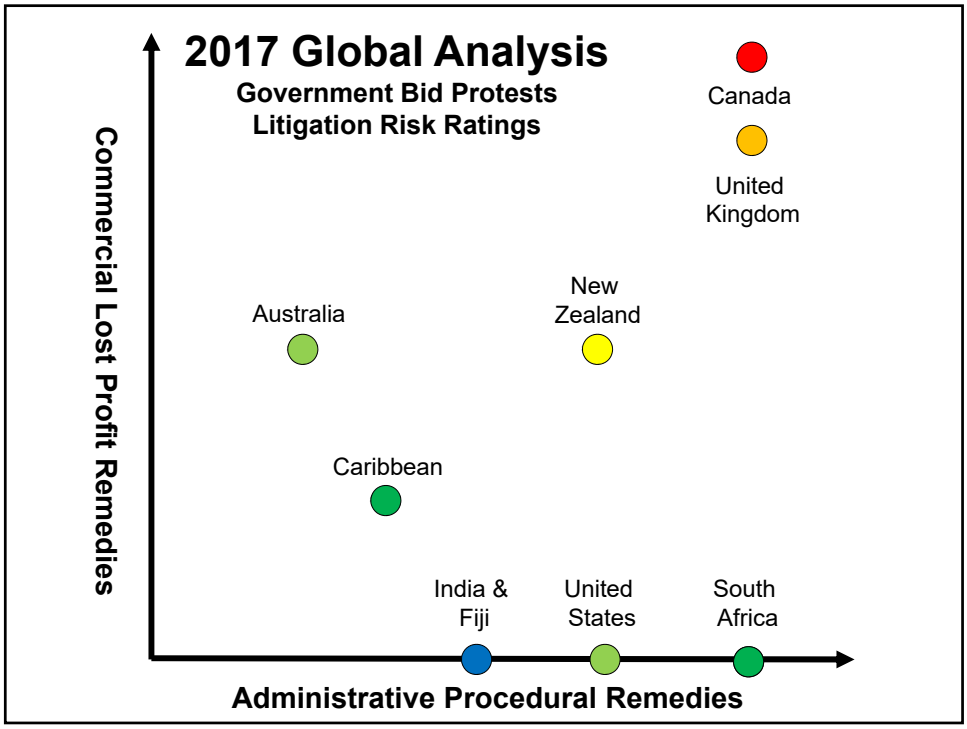
Siemens Westinghouse Inc. v. Canada
Federal Court of Appeal,

As this case illustrates, the Tribunal enjoys a high degree of judicial deference with respect to procurement matters on account of its recognized expertise. While its jurisdiction is limited to federal government procurements, its determinations provide useful guidance for procurement professionals operating at all levels of government across Canada.



Administrative Law and Judicial Review





2016 Bid Protest Global Risk Ranking and Rating Guide

Global Litigation Risk Ranking	Global Litigation Risk Rating	Commercial Lost Profit Remedy Risk Score	Criteria	Administrative Procedural Remedy Risk Score	Criteria
1. Canada	**8.0**	4.0	Extreme Volume Lost Profit Claims	4.0	Courts Highly Interventionist
2. United Kingdom	**6.0**	3.0	High Volume Lost Profit Claims	3.0	Courts Medium Interventionist
3. New Zealand	**5.0**	2.0	Medium Volume Lost Profit Claims	3.0	Courts Medium Interventionist
4. Australia	**3.0**	2.0	Medium Volume Lost Profit Claims	1.0	Courts Non-Interventionist
5. United States	**3.0**	0	Lost Profits Generally Not Available	3.0	Courts Medium Interventionist
6. Caribbean	**2.0**	1.0	Low Volume Lost Profit Claims	1.0	Courts Non-Interventionist
7. South Africa	**2.0**	0	Lost Profits Generally Not Available	2.0	Courts Low Interventionist
8. India, Papua New Guinea, Fiji, Philippines	**1.0**	0	Lost Profits Generally Not Available	1.0	Courts Non-Interventionist

2017 Bid Protest Global Risk Ranking and Rating Guide

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2. United Kingdom	**7.0** (+1)	3.0	High Volume Lost Profit Claims	4.0 (+1)	Courts Highly Interventionist
3. New Zealand	**5.0**	2.0	Medium Volume Lost Profit Claims	3.0	Courts Medium Interventionist
4. South Africa (+3)	**4.0** (+2)	0	Lost Profits Generally Not Available	4.0 (+2)	Courts Highly Interventionist
5. Australia (-1)	**3.0**	2.0	Medium Volume Lost Profit Claims	1.0	Courts Non-Interventionist
6. United States (-1)	**3.0**	0	Lost Profits Generally Not Available	3.0	Courts Medium Interventionist
7. Caribbean (-1)	**2.5**	1.0	Low Volume Lost Profit Claims	1.5	Courts Low/Non-Interventionist
8. India, Fiji	**2.0** (+1)	0	Lost Profits Generally Not Available	2.0 (+1)	Courts Low Interventionist

South African Selections

South African Court Strikes Down Government Contract Award

Sanyathi Civil Engineering & Construction v. Thekwini Municipality
September 30, 2011

In a September 2011 judgment the Kwazulu-Natal High Court in South Africa struck down a government contract award for the construction of a 50 kilometre pipeline after determining that the tendering process was tainted by irregularities in the tender evaluation weightings. The court found that the evaluation scheme was inconsistent with the governing statutory framework and legally invalid. As the court explained, "procurement law is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation." It ordered the government to cancel the contract award.

Court Orders Re-Evaluation But Declines Substitute Order

Afri-Infra (Pty) Ltd v. City of Tshwane Metropolitan Municipality
High Court of South Africa

In its April 2016 decision in *Afri-Infra (Pty) Ltd v. City of Tshwane Metropolitan Municipality,* the High Court of South Africa set aside a contract award for civil engineering services after finding serious flaws in the initial stages of the bid evaluation process. While the complainant requested that the court conduct is own re-evaluation and then grant a substitute order replacing the original contract award with an award to the complainant, the court rejected the request. The court cited the technically complex nature of some of the later stages of the government's evaluation process as a reason for directing a government re-evaluation rather than granting the substitute order.

South African Court Grants Substitute Order

Cape Book and College Supplies t/a University Bookshop v. Northlink TVET College
High Court of South Africa

In its December 2015 decision in *Cape Book and College Supplies t/a University Bookshop v. Northlink TVET College,* the High Court of South Africa granted a substitute order and directed that a college bookstore contract be awarded to the complainant since the original contract was improperly awarded to a non-compliant bidder. While the court expressed reluctance in granting a substitute order that replaced the public institution's evaluation decision with its own decision, it found that in the circumstances that remedy was appropriate, given that the original contract to the non-complaint bidder was invalid and the complainant had submitted the best compliant bid.

Judicial Review of Government Contracting

Court Grants Two Injunctions Against Public Tenders

Down Touch Investments (Pty) Ltd v. Matjhabeng Local Municipality
Dimension Data (Pty) Ltd v. State Information Technology Agency (SOC) Ltd
High Court of South Africa

The High Court of South Africa granted two injunctions against public tendering processes after finding serious bid evaluation irregularities. In April 2016 in *Down Touch Investments (Pty) Ltd v. Matjhabeng Local Municipality* the court granted an injunction against a construction tender and in May 2016 in *Dimension Data (Pty) Ltd v. State Information Technology Agency (SOC) Ltd* it granted an injunction against a IT services tender. In both cases, the court found both that the complaining bidders could suffer irreparable harm if the awards proceeded and that that the government would not be unduly inconvenienced by the resulting delays.

Injunctions

Standstill Period Creates U.K. Contracting Chaos

U.K. Court Lifts Standstill Period Injunction

OpenView Security Solutions Limited v. London Borough of Merton Council
High Court of Justice – Queen's Bench Division Technology and Construction Court

In its September 2015 judgment in *OpenView Security Solutions Limited v. London Borough of Merton Council*, the High Court of Justice of England and Wales lifted an interim injunction obtained by a losing bidder on a municipal CCTV traffic system tender. The losing bidder had obtained an automatic injunction under the U.K. procurement regulations during the statutorily mandated pre-award standstill period. The municipality applied to have the injunction lifted so that it could proceed with the contract award. The court granted the application and lifted the injunction after concluding that the ultimate recovery of damages would be an adequate remedy if the losing bidder could prove its case at trial.

Injunctions – Standstill Period

Irish Court Lifts Injunction on Transmission Line Tender

Powerteam Electrical Services Limited v. The Electricity Supply Board
High Court of Ireland

In its February 2016 judgment in *Powerteam Electrical Services Limited v. The Electricity Supply Board*, the High Court of Ireland lifted a stop-award order on a transmission line services tender after finding that further contract award delays would result in significant operational risks to the agency and the public. While the court recognized that the complainant's claim may not be compensable with damages since it risked losing highly trained staff if it lost the award, on balance the court found that an ongoing stop-award would have a greater negative impact on the public who relied on the services to provide emergency repairs after winter storm power interruptions.

Injunctions – Standstill Period – Irreparable Harm

U.K. Court Maintains Injunction in Conflict of Interest Dispute

Counted4 Community Interest Company v. Sunderland City Council
High Court of Justice – Queen's Bench Division Technology and Construction Court

In its December 2015 judgment in *Counted4 Community Interest Company v. Sunderland City Council*, the High Court of Justice of England and Wales maintained a stop-award order on a substance abuse services tender. The losing non-profit incumbent claimed conflict of interest due to its troubled relationship with the municipal contract manager who had served on the evaluation committee. The municipality argued against the injunction since the incumbent could be compensated with lost profits if it proved its case at trial. The court disagreed since the incumbent would lose its entire business and its specialized staff by the time of trial if the municipality was allowed to award the contract to a competitor.

Injunctions – Standstill Period – Irreparable Harm

U.K. Court Maintains Injunction in Group Scoring Controversy

Bristol Missing Link Limited v. Bristol City Council

High Court of Justice – Queen's Bench Division Technology and Construction Court

In its April 2015 judgment in *Bristol Missing Link Limited v. Bristol City Council*, the High Court of Justice of England and Wales maintained a stop-award order on a domestic violence and abuse support services tender. The losing incumbent obtained an automatic interim injunction after claiming that the municipality had applied unfair group scoring procedures. The municipality moved to lift the injunction, arguing that the incumbent could be compensated with lost profit damages if it won at trial. However, the court disagreed since lost profits would be an inadequate remedy for the non-profit incumbent, who stood to lose a third of its operations if the potentially unfair award was allowed to proceed.

Injunctions – Standstill Period – Irreparable Harm

U.K. Court Rejects Non-Profit's Injunction Argument

Perinatal Institute v. Healthcare Quality Improvement Partnership

High Court of Justice – Queen's Bench Division Technology and Construction Court

In its October 2016 judgment in *Perinatal Institute v. Healthcare Quality Improvement Partnership*, the High Court of Justice of England and Wales lifted the automatic statutory suspension of a health research services contract award. The losing non-profit bidder relied on the prior *Bristol Missing Link Limited v. Bristol City Council* decision to support the argument that a non-profit cannot be adequately compensated with damages and is entitled to a permanent injunction until trial. However, the court disagreed since, unlike the prior case, the complainant was not an incumbent and would not suffer a loss of current business, but rather could be adequately compensated with damages if it won at trial.

Injunctions – Standstill Period – Irreparable Harm

Scottish Court Upholds Injunction in Sheriff Services Tender

Scott & Co (Scotland) LLP v. Aberdeenshire Council
Scottish Court of Sessions

In its April 2016 judgment in *Scott & Co (Scotland) LLP v. Aberdeenshire Council*, the Scottish Court of Sessions maintained a stop-award order on a sheriff services tender. The court found that there was a significant issue to be tried regarding an evaluation site visit and that it was in the public interest to prevent a potentially improper award. It also determined that the complainant would suffer an adverse impact on its operations if the contract was unfairly awarded since it would have no other opportunity to bid for six years. On balance, the court found that the potentially adverse impact on the bidder was greater than the inconvenience of delaying the award for a few weeks until trial.

Injunctions – Standstill Period – Irreparable Harm

Administrative Law and Judicial Review

Overview

Summarizing the application of the administrative law judicial review remedy to government procurement, this module covers: (i) the rise of judicial review; and (ii) the four-part legal analysis: (a) the reviewability of the decision; (b) the standard of review; (c) the fairness of the decision; and (d) the appropriate remedy.

Administrative Law and Judicial Review

The Rise of Judicial Review

Until relatively recently, the role of administrative law in regulating government procurement in Canada has been predominantly limited to the determinations of the Canadian International Trade Tribunal in the federal procurement system. With its legacy of three decades of case law interpreting the federal government's trade treaty duties, the Tribunal has played a major role in serving as a check-and-balance on the federal procurement system and in interpreting the duties owed to competing suppliers vying for federal government contract awards.

Administrative Law and Judicial Review

The Rise of Judicial Review

In the federal government procurement system, the regulatory role played by the courts in enforcing administrative law principles has largely been limited to the Federal Court of Appeal's oversight role in hearing appeals from Tribunal determinations. More generally, the regulatory role of the courts in applying administrative law principles to procurement at other levels of government across Canada has historically been even more limited.

Administrative Law and Judicial Review

The Rise of Judicial Review

However, in recent years the courts have started playing a for more active and interventionist role in reviewing the procurement decisions made by public bodies at all levels of government across Canada. This increasing interventionism represents one of the most significant recent legal developments in the Canadian procurement system, and has significantly increased the significance of administrative law principles as a source of checks-and-balances in the Canadian government procurement systems.

Administrative Law and Judicial Review

The Rise of Judicial Review

Judicial review has supplemented the more traditional enforcement of tendering rules under commercial law principles and may ultimately supersede those commercial law principles as the main source of regulatory checks-and-balances in the government procurement system.

Administrative Law and Judicial Review

The Rise of Judicial Review

The judicial review remedy has a long jurisprudential history. Its origins can be traced back to the 1600s when King James claimed special royal prerogatives which purportedly gave him unfettered decision-making power. However, the courts took a different view. In 1611, England's Chief Justice, Sir Edward Coke, famously declared in the *Proclamations' Case*, that "the King hath no prerogative but that which the law of the land allows him." In finding that even the King was not above the law, Sir Edward Coke set a precedent that laid the foundation for responsible government.

Administrative Law and Judicial Review

The Rise of Judicial Review

As Barnett observes in *Constitutional and Administrative Law*, in modern times the courts maintain this rule of law tradition by serving as a check on the exercise of government powers:

Judicial review represents the means by which the courts control the exercise of governmental power. Government departments, local authorities, tribunals, state agencies and agencies exercising powers, which are governmental in nature must exercise their powers in a lawful manner. Judicial review has developed to ensure that public bodies which exercise law making power or adjudicatory powers are kept within the confines of the power conferred.

Administrative Law and Judicial Review

The Four-Part Analysis

While the judicial review of other areas of government administration may have a long history in Canada, its regular application to government procurement decisions is more recent within the Canadian legal system. The evolving judicial review analysis for government procurement decisions can be summarized in the following four-part test which synthesizes recent case law developments specific to government procurement with more general administrative law principles:

Administrative Law and Judicial Review

The Rise of Judicial Review

(1) Is the procurement decision reviewable?

(2) What is the standard of review?

(3) Was the procurement decision fair?

(4) What is the appropriate remedy?

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

(1) Is the procurement decision reviewable?

(a) Did the decision involve a public body or exercise of public powers?

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

In contrast to the administrative law based judicial review analysis, the threshold test for regulating a government tendering process under commercial law turns on the Supreme Court of Canada's Contract A analysis and focuses on the intention of the purchasing institution.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

The question in that analysis is whether the institution intended that the parties to the tendering process be governed by the Contract A process contract, which implies a duty to award to the best compliant bid, or whether the institution intended that the parties be governed by traditional contract law, which treats the tendering process as a means of evaluating and ranking respondents to identify a negotiating party for the potential negotiation and award of a contract.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

In this contractual analysis, the intention of the parties is paramount. Contract A can apply irrespective of the nature of the institution, meaning that it can and has been applied to both public and private purchasing institutions, as long as the purchaser and bidder bargained into that paradigm as a matter of contract law. Equally so, a purchasing institution can elect to be governed by traditional contract law and, with the appropriate tender call terms, avoid creating Contract A altogether and govern its pre-contractual relations according to the traditional law of offer and acceptance.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

By contrast, the first step of the threshold reviewability analysis for the potential application of a judicial review remedy does not turn on the intention of the parties, but on the nature of the purchasing institution and the nature of the decision. The purchasing institution does not contract into or out of this regulatory system. Rather, it falls within the potential scope of judicial review remedies because it is a public body or exercising public powers and is thereby governed by public law and by the administrative law principles falling within public law.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

The potential application of this regulatory paradigm is non-negotiable since it is entrenched within our public law system based on the inherent powers held by the courts to regulate government decision-making. As Guy Régimbald observes in *Canadian Administrative Law*, administrative law, like its close cousin, constitutional law, serves as part of the public law system that sees the courts regulating government conduct. While constitutional law focuses on the validity of a statutory framework, administrative law focuses on whether the powers delegated under those frameworks are being properly exercised:

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

Constitutional law and administrative law are closely related. They are both subsets of public law. Where administrative law deals with the implementation of laws by public officials to whom the authority to act has been granted by an enabling statute, constitutional law deals with the constitutional validity or legality of those laws. Both are concerned with the legal framework within which government agencies are created and the limits within which they must operate. Both are also concerned with the allocation of governmental powers, functions and duties.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

Since they fall within public law, judicial review remedies do not apply to a purely private body engaged in purely private activities. Rather, their scope is limited to public bodies or, as is discussed below, to activities falling under the powers of public bodies.

Administrative Law and Judicial Review

1. Reviewability (a) Public Body or Public Power?

However, the fact that a challenged decision involves a core government body, or involved the exercise of government powers by a quasi-public sector entity, does not make that decision automatically reviewable since reviewability also turns on additional threshold factors, as discussed further below, including whether the decision was a statutory decision, whether it is protected by a statutory privative clause, whether the applicant has standing, and whether the decision raises significant public interest considerations.

Administrative Law and Judicial Review

1. Reviewability 1. Reviewability (b) Statutory Power?

(b) Was the decision a reviewable exercise of a statutory power or was the decision the exercise of residual Crown prerogative powers falling outside the scope of judicial review? If the decision was the exercise of statutory power, was it protected by a statutory privative clause?

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

The second question in the threshold reviewability analysis is whether the decision was the exercise of statutory power, as opposed to the exercise of non-statutory residual Crown prerogative powers falling outside of the scope of judicial review. Furthermore, if the decision was the exercise of a statutory power, consideration must then also be given to whether that decision is protected by a statutory privative clause.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

As Jones and De Villars note in *Principles of Administrative Law*, while most government powers are now exercised under statute, government Ministers may continue to enjoy certain decision-making powers that exist outside of any statutory framework under a residual body of constitutionally inherent executive prerogative powers. However, as a matter of constitutional law, those prerogative powers can be extinguished through legislation:

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

…[R]oyal Prerogative, which historically permits the Crown in certain circumstances to perform certain acts (such as declaring war, prohibiting entry of aliens into the realm, dismissing the government or dissolving Parliament) independently of Parliament and without its consent. Parliament, being as sovereign over the executive as it is over the courts, may abolish any of the prerogative powers of the Crown.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

With respect to government procurement decisions at the federal and provincial levels of government, these commercial activities were, at least historically, often seen to fall within these residual executive powers of government, where Ministers contracted on behalf of the Crown exercising their inherent constitutional powers, rather than through the exercise of any specific statutory power.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

The current reality is that Ministerial prerogative powers have become increasingly eroded over the years through the introduction of legislation that has occupied the field and thereby extinguished these residual powers.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

Since government contracting, or perhaps more accurately, areas of administration around which government contracting occurs, were less legislated in the past, Ministers of the Crown may have historically been more likely to engage in commercial decisions pursuant to their residual prerogative powers.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

However, the expansion of government contracting activities, and the integration of those activities within broader areas of government administration that are regulated by general statutory frameworks, has resulted in the erosion of most if not all traditional prerogative protections against the judicial review of government procurement decisions.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

In any event, to the extent that any prerogative powers remain in the areas of government contracting, the immunity they offer from judicial review would only apply to decisions made by Ministers of the Crown.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

The historic use of prerogative powers for the purposes of government contracting, and the traditional immunity of those decisions from judicial review, may explain the origins of the expanded commercial immunity doctrine, which took the non-reviewability principle and expanded it to all contracting decisions made by public bodies. Under this doctrine, the contract decisions of public bodies were dismissed as merely commercial matters that were not subject to judicial review.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

While some older Canadian cases recognized a general commercial immunity doctrine, recent case law developments have clearly illustrated that a general immunity from judicial review for government contracting decisions is no longer recognized under Canadian law. Rather, the case must be decided on its merits to determine, as discussed further below, whether there is a sufficient public interest element to review the commercial decision.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

Thus, while not automatically reviewable, the commercial decision of a government is not automatically non-reviewable either. This aligns the Canadian approach to the judicial review of government procurement with many other jurisdictions around the world. Like those other jurisdictions, in recent years the Canadian courts have adopted a more interventionist approach to the judicial review of government contracting decisions. Those decisions are no longer immune from judicial review simply because they are commercial in nature.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

Once a decision is found to have been made pursuant to the exercise of a statutory power, rather than pursuant to a residual prerogative power, consideration should then be given to whether that decision is protected by a statutory privative clause.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

While the specific statute under which a challenged government procurement decision is made may contain a privative clause that purports to shield that decision from judicial review, given the role of the courts in serving as a check against the inappropriate exercise of its statutory powers, there are significant limits to the protections afforded by such provisions.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

As Guy Régimbald notes in *Canadian Administrative Law:*

A breach of procedural fairness, or the duty to be fair, may render the decision *ultra vires*, and thus voidable. Moreover, given that the tribunal or decision-maker has exceeded its jurisdiction, the error cannot be shielded by a privative clause. This consequence may be explained by the fact that the decision-makers must have jurisdiction before engaging into an inquiry. However, they may subsequently lose their jurisdiction by breaching procedural fairness.

Administrative Law and Judicial Review

1. Reviewability (b) Statutory Power?

In other words, to enjoy the protections afforded by a statutory privative clause, that decision must, at minimum, fall within the legitimate powers granted by that legislation. Furthermore, if the challenged decision is found to be flawed, it can be characterized as falling outside of the powers granted by the specific statute since decision-makers cannot have it both ways and exceed their statutory powers while at the same time enjoying the statutory protections against judicial review granted by those statutory powers.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

(c) Does the complainant have standing as established by:

(i) showing that it has a legitimate interest in the challenged decision; and

(ii) (demonstrating that it has clean hands and has exhausted all other appropriate remedies before applying to the court for judicial review?

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

A losing bidder in a government bidding process would be in a strong position to establish that it has a legitimate interest in the government's contract award decision, as would a potential supplier that was denied a fair opportunity to compete for the award of a government contract, or a supplier that had its contract terminated by a government institution. In these types of situations, the first part of the standing analysis that considers the issue of legitimate interest would not likely present much of an obstacle to a complainant.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

The Canadian International Trade Tribunal has applied a relatively low threshold test when granting standing to a "potential supplier" as defined within its statutory framework. In fact, in past cases, the Tribunal has granted standing to suppliers who never directly participated in the bidding process but have taken issue with direct contract awards or allegedly biased specifications.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

A similarly expansive approach to standing was also recently applied by the Federal Court of Canada in its February 2015 decision in *Airbus Helicopters Canada Ltd. v. Canada (Attorney General)*. In this case the Federal Court gave standing to a complainant that challenged a government procurement process notwithstanding the fact that the complainant never submitted a bid in that process.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

Since the applicant had participated in pre-bid consultations and provided feedback on the government's draft specifications, the court determined that the complainant had standing to challenge the final RFP requirements based on allegations that the specifications were biased and denied the applicant a fair opportunity to compete. As noted above, this finding was consistent with similar reasoning applied by the Tribunal in past complaints that have allowed potential suppliers to challenge the validity of government specifications.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

In fact, the standing granted by the courts to challenge government procurement decisions can go beyond the standing granted by the Tribunal to potential suppliers since the courts can also grant standing to non-suppliers who have a legitimate interest in a public institution's contract award decisions.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

As Jones and De Villars note in *Principles of Administrative Law*, it remains open for the courts to grant public interest standing to parties who do not have a direct interest in a government decision but who nonetheless can establish having a genuine interest in the validity of the decision:

Courts may consider granting public interest standing if three criteria are satisfied: the applicant must be raising a serious issue as to the invalidity of the decision complained of; the applicant must demonstrate genuine interest in the matter; and another reasonable and effective way to bring the issue before the court must not be available.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

Public interest standing may be difficult to predict in the context of government procurement decisions since those decisions are often tied to major contract awards that, in addition to having a direct financial consequence on the suppliers who compete for those contracts, can have broader consequences for members of the public who may be impacted by those decisions.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

By way of example, in *Friends of Lansdowne Inc. v. Ottawa (City)*, the Ontario Superior Court of Justice granted standing to a community group that was established in opposition to the city's decision to directly award a contract for the redevelopment of Landsdowne Park in Ottawa, Ontario.

Administrative Law and Judicial Review

1. Reviewability (c) Complainant Standing?

While that community group had no direct commercial interest as a potential supplier, it was nonetheless granted standing to challenge the municipal sole source decision. As this case illustrates, the scope of potential complainants who may be granted standing to challenge a government procurement decision may be greater than the scope of potential suppliers with a direct financial interest who have been traditionally granted standing under Tribunal determinations.

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

(d) Does the decision attract a sufficient public interest element to justify judicial review?

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

The fourth and final step in the reviewability analysis is determining whether the procurement decision in question attracts a sufficient public interest element to be judicially reviewable. Stated another way, the decision may have been made by a public body pursuant to a statutory power and the applicant challenging the process may be able to establish that it should be granted standing to challenge the decision, but the subject matter of that decision may not be of sufficient importance to warrant a judicial review.

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

As discussed further above, this is different from saying that the decision is merely commercial in nature and should therefore automatically be rejected from judicial reviewability. However, while government procurement decisions may not enjoy automatic immunity because they are commercial or business decisions, some government contracting decisions may have an insufficient public interest element to warrant a judicial review.

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

For example, in its May 2011 decision in *2169205 Ontario Inc. (c.o.b. Lefroy Freshmart) v. Ontario (Liquor Control Board)*, the Ontario Divisional Court addressed this issue and determined that the procurement process in question was not subject to judicial review since: (i) the RFP in question was not significant enough to meet the "public interest" test in that it involved the award of a concession contract for a small agency store where there were no existing LCBO outlets; (ii) the LCBO was not required to run an open competition under the relevant government directive, rendering the process a commercial rather than statutory decision; and

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

(iii) any dispute with respect to the RFP process should have been brought as a contract claim pursuant to the Contract A tendering rules that applied to that RFP.

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

The reviewability of government procurement decisions remains an open and evolving question of the law. As the cases illustrate, the greater the expenditure, and the more significant the impact of the contract in question to the public at large, the greater the likelihood that the courts will find a sufficient public interest element to determine that the contract decision is judicially reviewable.

Administrative Law and Judicial Review

1. Reviewability (d) Sufficient Public Interest?

However, cost and significance to the public are only two factors that have been relied on by the courts to tip the public interest balance towards reviewability. It will be left to future cases to further define the public interest elements that inform the scope of reviewability of government procurement decisions.

Administrative Law and Judicial Review

2. Standard of Review

2. What is the Standard of Review?

Given the nature of that decision, is it reviewable on a more deferential reasonableness standard or on a less deferential correctness standard?

Administrative Law and Judicial Review

2. Standard of Review

Where the applicant satisfies the first part of the judicial review analysis and establishes that the government procurement decision is reviewable, the second step in the analysis is determining, given the nature of that decision, whether it is reviewable on a more deferential reasonableness standard or on a less deferential correctness standard.

Administrative Law and Judicial Review

2. Standard of Review

In its March 2008 decision in *Dunsmuir*, the Supreme Court of Canada revisited and refined the standards for review applicable under administrative law from three standards that included correctness, reasonableness and patent unreasonableness down to the two standards of correctness and reasonableness. As the Supreme Court stated in this decision, the reasonableness standard recognizes a degree of judicial deference to the government decision-making process when compared to the less deferential correctness standard.

Administrative Law and Judicial Review

2. Standard of Review

It should be noted that the administrative law principles relating to the standard of review are largely influenced and informed by the relationship between the courts and administrative tribunals and the need for the former to provide a check and balance against the decisions made by the latter. This was the specific context in which the Supreme Court updated the standards of review in its *Dunsmuir* decision.

Administrative Law and Judicial Review

2. Standard of Review

That the same principles that regulate the judicial review of tribunal decisions, which are inherently formal and legalistic proceedings, are then applied to government procurement decisions, underscores the rigour that the courts will apply to government procurement decisions under either standard of review. That said, there remains a material distinction between the two standards of review since the application of a correctness standard will subject a government procurement decision to a higher level of scrutiny.

Administrative Law and Judicial Review

2. Standard of Review

The open question for government procurement decisions is whether the courts will apply the more deferential reasonableness standard or the less deferential correctness standard. The law is not settled on this point.

Administrative Law and Judicial Review

2. Standard of Review

While the early decisions in the post-*Dunsmuir* era, like prior Canadian International Trade Tribunal determinations, appeared to settle on a reasonableness standard of review for government procurement decisions, more recent cases have begun to erode this deferential approach and have found that, at least for certain types of government procurement decisions, the standard of review should be correctness.

Administrative Law and Judicial Review

3. Fair Decision?

3. Was the Procurement Decision Fair?

Was the decision fair or was it was tainted with illegality or otherwise procedurally flawed?

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

A government procurement decision can be tainted with illegality where the decision-makers: (i) were lacking the legal authority to make the decision; (ii) were acting in bad faith or in an irrational, arbitrary or capricious manner, or relied on inappropriate or irrelevant information; (iii) were biased, in a conflict of interest, or otherwise lacking the necessary independence to make a fair decision; or (iv) failed to ensure a demonstrable fair process by properly documenting their decision in a reviewable record.

Administrative Law and Judicial Review

3. Fair Decision? (b) Procedural Irregularity?

Furthermore, a government procurement decision can be compromised by procedural irregularities when pre-established process rules are not properly followed or where those process rules were inherently flawed due to unlawful or hidden requirements, conditions, criteria or procedures.

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(a) Was the Decision Tainted with Illegality?

Questions surrounding the legality of the decision focus on the decision-makers, whether they had the authority to make their decision and whether they exercised those powers appropriately to arrive at a legally defensible decision. A government procurement decision can be tainted with illegality where the decision-makers:

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(i) were lacking the legal authority to make the decision; (ii) were acting in bad faith or in an irrational, arbitrary or capricious manner, or relied on inappropriate or irrelevant information; (iii) were biased, in a conflict of interest, or otherwise lacking the necessary independence to make a fair decision; or (iv) failed to ensure a demonstrable fair process by properly documenting their decision in a reviewable record.

These different aspects of illegality are discussed below.

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(i) Lacking Legal Authority

A government procurement decision runs the risk of being tainted with illegality if the decision-makers lacked the legal authority to make their decision. In the procurement context, this risk is most likely to manifest itself in situations where improper delegation has taken place and the decision-makers exceeded their legal authority.

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(ii) Bad Faith and Irrational, Arbitrary or Capricious Decisions

A government procurement decision may be found to be tainted with illegality where decision-makers were acting in bad faith or in an irrational, arbitrary or capricious manner, or relied on inappropriate or irrelevant information. In other words, if the decision-maker breached the minimum standards of due process and natural justice and acted improperly in the exercise of statutory power, then the decision can be voided as an illegal and unfair decision.

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(iii) Bias, Conflict of Interest and Lack of Independence

A procurement decision may also be found to be void due to illegality where the decision-maker was biased, in a conflict of interest, or otherwise lacked the necessary independence to make a fair decision.

Administrative Law and Judicial Review

3. Fair Decision? (a) Illegality?

(iv) Inadequate Records

Finally, a government procurement decision can be found to be tainted with illegality where the decision-makers failed to run a demonstrably fair process by properly documenting their decisions in a reviewable record. As Jones and De Villars observe in Principles of Administrative Law,

As errors of law must be apparent upon the face of the record, the extent of the record is a key consideration.

Administrative Law and Judicial Review

3. Fair Decision? (b) Procedural Irregularity?

(b) Was the Decision Compromised by Procedural Irregularities?

While the above questions of legality focused on the powers of the decision-makers and on whether those powers were exercised in a fair, non-arbitrary, impartial and transparent manner, a government procurement decision can also be challenged based on procedural unfairness where the process is inherently unfair or is administered in an unfair manner.

Administrative Law and Judicial Review

3. Fair Decision? (b) Procedural Irregularity?

As the cases have shown, a government procurement decision can be compromised by procedural irregularities when pre-established process rules are not properly followed or where those process rules were inherently flawed due to unlawful or hidden requirements, conditions, criteria or procedures.

Administrative Law and Judicial Review

4. Remedy

4. What is the Appropriate Remedy?

If the decision was unfair, does the unfairness warrant a judicial review remedy based on the following considerations?

a) Did the unfairness compromise the outcome or was there no causal connection between the unfairness and the ultimate decision?

Administrative Law and Judicial Review

4. Remedy

b) If the unfairness had a causal impact on the outcome of the decision, is a prerogative remedy appropriate in the circumstances and, if so, what remedy should be granted to the applicant?

Administrative Law and Judicial Review

4. Remedy (a) Causal Connection?

(a) The Causal Connection Analysis

Even if the statutory exercise of power by a public institution is found to be unfair, this will not automatically result in a remedy being granted to the applicant. As a general principle of procurement law, to obtain a remedy, a complainant must typically show a causal connection between the unfairness in question and the ultimate contracting decision.

Administrative Law and Judicial Review

4. Remedy (a) Causal Connection?

This principle has long been applied by the courts in the Contract A analysis as a prerequisite to granting a lost profit commercial remedy, as well as by the Canadian International Trade Tribunal in determining whether to order a remedy when there has been a breach of the procurement rules. The principle of causal connection was also recently applied to deny a judicial review remedy in a case involving a challenged government tendering process.

Administrative Law and Judicial Review

4. Remedy (b) Appropriate Remedy?

(b) What Prerogative Remedy Should be Granted?

While specific statutory codes may prescribe statutory remedies, as they do within the Canadian International Trade Tribunal's treaty enforcement regime, as discussed above, the courts also wield inherent constitutional powers that enable them to grant judicial review remedies as a check against unfair government decisions. In *Principles of Administrative Law,* Jones and De Villars explain these inherent prerogative remedies as follows:

Administrative Law and Judicial Review

4. Remedy (b) Appropriate Remedy?

The prerogative remedies have an ancient history, and are the primary vehicles through which the superior courts review the legality of government actions. The five prerogative remedies in use today are *habeaus corpus*, *certiorari*, prohibition, *mandamus* and *quo warranto*. Each is used for a specific purpose. *Habeas corpus* requires a person to identify some lawful authority for detaining an applicant. *Certiorari* permits the courts to review the legality of the decision of the delegate and to quash it if defective. Prohibition is used anticipatorily to prevent a delegate from committing certain kinds of errors. *Mandamus* compels a delegate to perform statutory duties imposed upon it. Finally, *quo warranto* is used to determine the right of the respondent to occupy a public office.

Administrative Law and Judicial Review

4. Remedy (b) Appropriate Remedy?

While the remedies of *habeas corpus* and *quo warranto* appear to have limited application in the government procurement context, the remedies of *certiorari*, prohibition and *mandamus* have been sought and granted in recent judicial review challenges involving government procurement decisions. As the authors above explain, *certiorari* and prohibition are "reverse faces of each other" since the former deals with a decision that can be retroactively quashed as unlawful whereas the latter proactively prevents a future error.

Administrative Law and Judicial Review

4. Remedy (b) Appropriate Remedy?

In *Constitutional and Administrative Law* Barnett refers to *certiorari* as a "quashing order" and to prohibition as a "prohibition order". Barnett explains the overlapping nature of these remedies since a quashing order is one which "quashes", or sets aside as a nullity, the original decision, whereas prohibition is an order which prevents a body from making a decision which, if made, would be capable of being quashed by *certiorari*. The former remedy is therefore reactive in nature, whereas the latter is proactive.

Administrative Law and Judicial Review

Conclusion

As recent cases illustrate, judicial review applications have become increasingly common in recent years as a means of successfully challenging an unfair government procurement decision. In court-based challenges, judicial review is now supplementing the more traditional enforcement mechanisms that have historically been based on the commercial law principles.

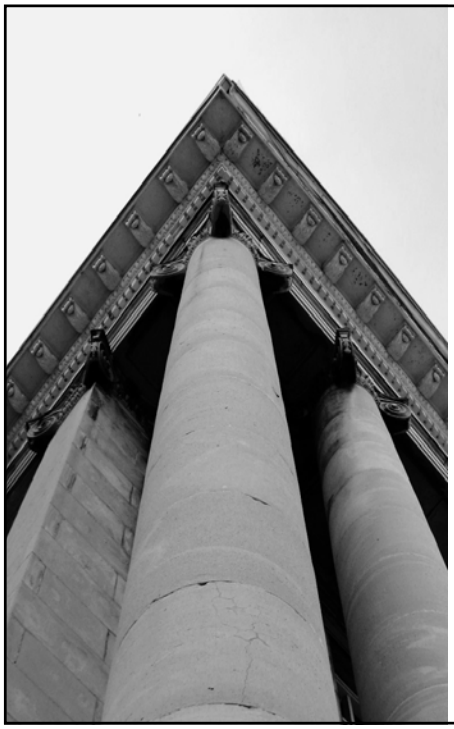
Administrative Law and Judicial Review

Conclusion

Given their increasing prominence and their broader potential application to all stages of the procurement cycle, these judicial review remedies may ultimately supersede commercial law remedies as the main check-and-balance in the government procurement system.

Procurement Duties Dashboard

	Contract A All Fixed-Bids Public & Private	**Contract Law** All Bid Contracts Public & Private	**Admin Law** Public Sector Only	**Trade Treaty** Public Sector Only	**Public Audit** Public Sector Only
Duty to Compete	No	No	Yes	Yes	Yes
Material Disclosures	Yes	Yes	Yes	Yes	Yes
Evaluation Disclosures	Yes	No	Yes	Yes	Yes
Duty to Reject For Non-Compliance	Yes Privilege Clause Ineffective	No	Flexible Transparent Rectifications	Flexible Transparent Rectifications	Flexible Transparent Rectifications
Fair Process	Yes	No	Yes	Yes	Yes
Duty to Award to Best Bid	Yes Bid Shopping Cancellation Risk	No Generally No Cancellation Risk	Flexible Generally Low Cancellation Risk	Flexible Generally Low Cancellation Risk	Flexible Generally Low Cancellation Risk
Duty to Award as Tendered (No Changes)	Yes No Safe Negotiations	No Format Permits Negotiations	Flexible Negotiation Protocols	Flexible Negotiation Protocols	Flexible Negotiation Protocols
Remedy & Risk	Monetary	Monetary Contract Extras	Admin	Admin & Monetary	Reputational
Bidder Duty to Honour Bids	Yes Bid Bonds Secure Bids	No Bids Binding on Award	No DQ and Barring as Remedies	No Remedies for Suppliers Only	No Audits on Government Only



Containing Bid Disputes

Containing Bid Disputes

Developing Your Institutional Strategy

Whether its Contract A lost profit lawsuits, tort based extra costs claims, the judicial review of evaluation decisions or treaty-based sole sourcing and biased specification challenges, bid disputes are bearing down on purchasing institutions from all directions. Should your organization be taking a wait-and-see approach or should you be developing a proactive bid dispute strategy?

Procurement Protest Protocol

Containing Bid Disputes

Given the increasing exposure faced from treaty-based procurement challenges, public institutions should proactively establish a Procurement Protest Protocol that complies with trade treaty requirements and contains the following elements:

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- The protocol should set out the process for suppliers to formally challenge a procurement process through a procurement protest procedure.
- Questions on the procurement protest procedure should be directed to the procurement department.
- Any supplier should be able to access the procurement protest procedure under the protocol.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- Suppliers should be able to use the procurement protest procedure to raise concerns with the use of a direct award.
- Before a bidder can formally challenge a procurement process, it should be required to first participate in a debriefing.
- A supplier that brings formal legal proceedings against the institutions should be precluded from availing itself of the procurement protest procedure.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- A supplier that wishes to challenge a procurement process should be required to submit a written request for a review. The correspondence should be directed to the procurement department. A request for a review should contain the following:
  - A clear statement as to which process the supplier wishes to challenge;
  - A clear explanation of the supplier's concerns with the process, including specifics as to why it disagrees with the process or outcome.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- Once a supplier's request for a review has been received, it should be initially reviewed by the business unit in charge of the procurement process.
- The institution should send an acknowledgement of receipt of the supplier's concerns within five business days of receipt of the supplier's request for review. The acknowledgement should set out a date by which the institution anticipates contacting the supplier with a response. This date should be within twenty business days of receipt of the supplier's concerns.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- The business unit should prepare an internal memorandum outlining the background and history of the procurement process at issue.
- Once finalized, the memorandum, together with the supplier's correspondence, should be submitted to the institution's procurement review committee which should include the head of procurement, legal services and the business unit that was responsible for the procurement process.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- The procurement review committee should convene a meeting and, as a group, review the correspondence outlining the supplier's concerns, together with the internal memorandum setting out details of the procurement process.
- If necessary, the procurement review committee should invite the supplier to give an in-person or teleconference presentation of its concerns.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- If the procurement review committee chooses to conduct such a meeting, then it must be communicated to the supplier in the invitation to same that the purpose of the meeting is solely for the supplier to present their concerns and that no decision will be made during the course of the session.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

- If the procurement review committee is satisfied that the supplier's challenge does not have merit, it should write to the supplier and indicate that it has reviewed the supplier's concerns and has found that the process was conducted properly; or
- If the procurement review committee finds that the supplier's concerns have some merit, it should seek further legal advice and, as appropriate, make any subsequent correspondence on a "without prejudice" basis.

Procurement Protest Protocol

Key Points for Creating a Dispute Protocol

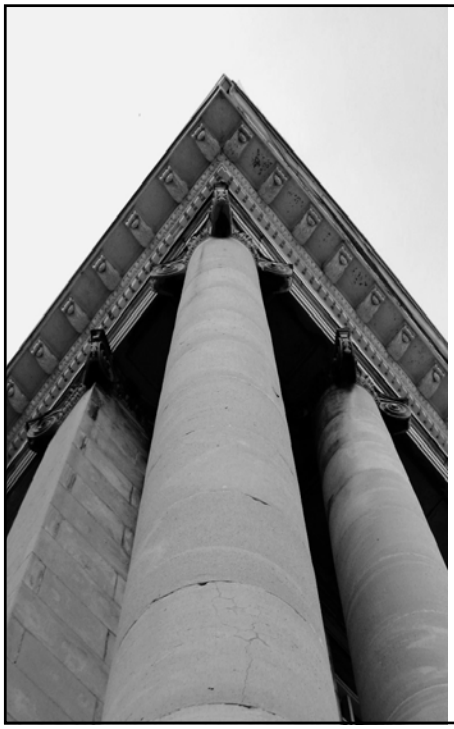
- The procurement dispute protocol should state that, if the supplier is not satisfied with the result of the procurement dispute process, then the supplier may, at that point, consider its other options, including challenges under the applicable trade treaties or other legal avenues of challenge.

Utah Court of Appeals Upholds Procurement Board Dismissal

FirstDigital Telecom, LLC v. Procurement Policy Board and Board of Regents
Utah Court of Appeals

In its February 2015 decision in *FirstDigital Telecom, LLC v. Procurement Policy Board and Board of Regents,* the Utah Court of Appeals upheld a decision to reject a bid protest challenge after the complainant failed to properly file a required bid protest bond. The relevant statutory provisions require a complainant to file its challenge within seven days of the disputed contract award and to post a security deposit in the amount of 5% of the low bid. In dismissing the appeal, the Court of Appeal noted that the complainant had only paid a $500 deposit instead of the required $15,000 and had submitted those insufficient funds two days after the complaint filing deadline.

Bid Protest – Protest Security



Institutional Governance

Institutional Governance

Overview

Surveying institutional winning conditions, this module explains how organizations can achieve compliance with current legal requirements through the implementation of institutional policies and procedures and the adoption of advanced document drafting and bid evaluation protocols, systems and tools.

Institutional Governance

Overview

The challenges of supplier competition, the ever-present threat of litigation, the increasing pressure to get value-for-money, the growing complexities of a round-the-clock interconnected global marketplace and the demand for faster and faster turnaround times have made government procurement a dynamic and challenging area full of risk and opportunity. In the wake of recent high-profile controversies and a steady stream of litigation, this once obscure area has gone front page, prime time and mainstream.

Institutional Governance

Overview

Today, public institutions that are serious about bolstering their procurement practices and building winning conditions have a broad range of options at their disposal. Those options call for proactive leadership that creates sound governance frameworks, fosters a culture of ethics, implements independent oversight and empowers innovation.

Institutional Governance

Overview

Right across Canada there are literally thousands of public institutions spending billions of dollars annually on public projects of all shapes and sizes. The question is, will they step up and accept the challenges of modern procurement? This module offers some practical suggestions to assist public institutions in meeting those challenges.

Institutional Governance

Governing the Institution

No procurement team can perform to its full potential unless its management helps establish winning conditions. Proper macro-procurement planning calls for proactive leadership at the senior levels of a public institution. The failure to create and maintain winning conditions can undermine prudent spending practices, can have an adverse impact on the reputation of public institutions and can undermine public confidence in those institutions.

Institutional Governance

Governing the Institution

While recent events should cast no shadow on decades of work performed by the procurement professionals who have quietly and steadily built a top-tier public procurement system in Canada, there is an increasing dissonance between that hard-earned reputation and general public perceptions fuelled by the steady stream of public inquiries, audit reports and media reports focusing on government procurement failures and by the voluminous body of case law dealing with legal challenges to the government procurement process.

Institutional Governance

Governing the Institution

If Canadian public sector institutions want to maintain the good reputation of their procurement practices, this credibility gap needs to be addressed and confidence in public sector spending reinforced. The following section provides an overview of some principles for empowered procurement that can assist public institutions in improving their procurement practices and in bolstering public confidence in those practices.

Institutional Governance

Governing the Institution

As discussed in this section, meeting modern challenges in an increasingly complex environment calls for a coherently organized progressive approach to procurement. Public institutions need to establish winning conditions for their procurement professionals by implementing a governing framework that includes the following six pillars:

Institutional Governance

Governing the Institution

1) Common Centralized Rules and Practices: A procurement organization should create consistency and remove duplication through the implementation of common centralized governing rules and practices.

Institutional Governance

Governing the Institution

2) **Clearly Defined Roles and Responsibilities:** A procurement organization should promote accountability and clarity by establishing a clear and comprehensive set of roles and responsibilities within the institution including a clear division of roles between: (i) elected officials; (ii) senior management officials responsible for establishing and enforcing compliance with procurement rules; and (iii) front-line procurement professionals responsible for specific procurement processes.

Institutional Governance

Governing the Institution

3) **External Oversight:** A procurement organization should establish transparent practices which include: (i) external oversight mechanisms that provide checks-and-balances to guard against inefficiencies and abuses; and (ii) clear rules aimed at protecting the integrity of the procurement process by addressing issues such as conflict of interest, unfair advantage and the lobbying of public officials to influence contract award decisions.

Institutional Governance

Governing the Institution

4) Values-based Procurement and Internal Checks and Balances: A procurement organization should encourage values-based procurement by promoting a culture of ethics within the institution which includes: (i) mechanisms for internal regulation, reporting and self-governance; and (ii) measures to protect the security of tenure of employees responsible for enforcing internal governance rules.

Institutional Governance

Governing the Institution

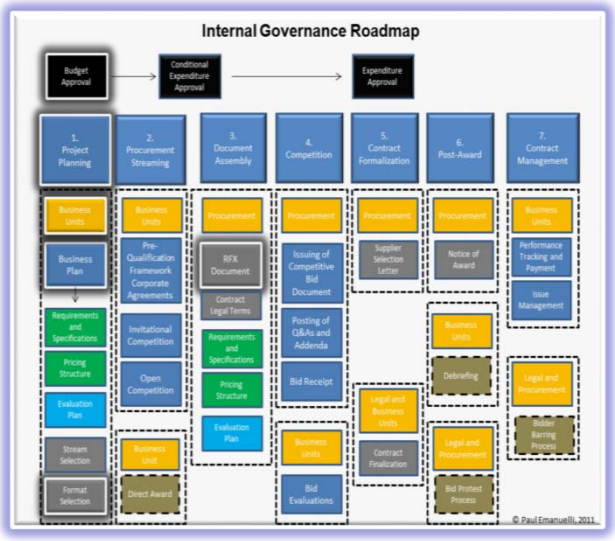
5) Empowered Innovation: A procurement organization should empower a culture of innovation and improvement ensuring: (i) adequate staffing and resources to properly manage all phases of the procurement cycle; (ii) adequate training for all levels of procurement staff; and (iii) sufficient discretion to enable procurement staff to exercise independent judgment in decision-making.

Institutional Governance

Governing the Institution

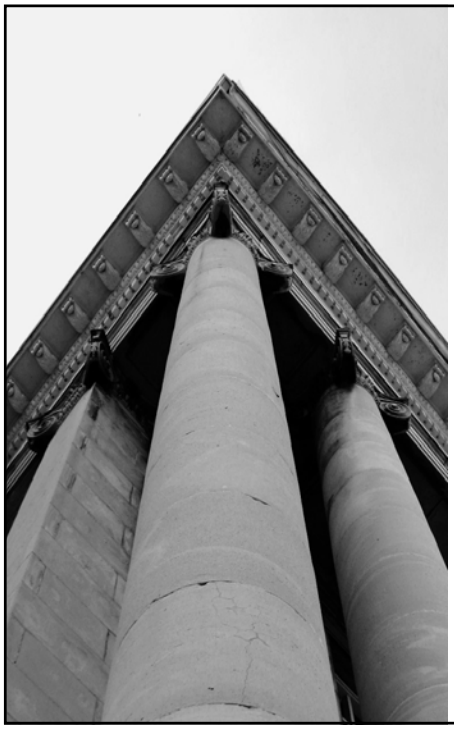
6) **Flexible Procurement Tools:** A procurement organization should enable tactical flexibility by establishing a diverse and varied framework of procurement tools and options and by providing procurement staff with the flexibility to determine which approach best meets the specific objectives.

Tendering Protocols



Tendering Protocols

- ❑ Internal Procurement Checklists
- ❑ Format Selection Protocol
- ❑ Document Drafting Protocol
- ❑ Evaluation Methodology Development Protocol
- ❑ Pricing Model Development Protocol
- ❑ Competitive Phase Protocol
- ❑ Evaluation Process Protocol
- ❑ Debriefing Protocol
- ❑ Bid Protest Protocol
- ❑ Contract Management/Vendor Tracking Procedures
- ❑ Bidder Barring Protocol



Future Considerations

Future Considerations

Overview

Public sector procurement is a complex interplay of rapidly evolving technological, commercial, administrative and legal trends. Drawing from Canadian and international developments, this final module focuses on the following critical challenges and opportunities that will play a significant role in shaping future developments in government procurement in the coming decade:

Future Considerations

Overview

1) the expansion of open public procurement practices within Canada and around the world;

2) the need to balance accountability and efficiency within the public procurement process; and

3) the need to implement a preventative and proactive approach to legal issues in public procurement.

Future Considerations

Going Global With Open Public Procurement

The significant intergovernmental initiatives that are expanding open public procurement within Canada are a reflection of broader international currents driving unprecedented transformations in the way that governments do business worldwide. As discussed below, two interrelated trends are driving this development: (1) the expanded breadth and depth of public policy reforms aimed at opening up international public procurement practices; and (2) the internationalization of suppliers providing goods and services to governments worldwide.

Future Considerations

Going Global With Open Public Procurement

Looking first at the domestic context, the recent expanded application of open procurement standards is one of the most significant trends since the *Agreement on Internal Trade* first came into effect in the mid-1990s. Recent trade treaty reforms within Canada are reflective of broader ongoing international developments impacting government procurement worldwide and the need to entrench standards of fairness, transparency and ethics within the public sector procurement cycle.

Future Considerations

Going Global With Open Public Procurement

For example, the 2003 United Nations Convention against Corruption focuses on the need to establish appropriate procurement processes to better ensure the transparent management of public finances worldwide. The UN Convention provides one of many examples of how international organizations play a critical role in promoting the adoption of open government procurement standards worldwide.

Future Considerations

Going Global With Open Public Procurement

By way of another example, the World Bank approved its new Procurement Framework in July 2015 which prescribes detailed procedures for procurements funded by related development loans. These reforms bring the World Bank standards into closer alignment with leading international standards worldwide. The World Bank has also historically conducted extensive Country Procurement Assessment Reports which assess the procurement practices of its borrower nations and provide recommendations for enhancing open procurement practices.

Future Considerations

Going Global With Open Public Procurement

In 2013 the World Bank also initiated its Benchmarking Public Procurement initiative, which measures a number of legal and regulatory factors impacting a supplier's ability to conduct business with government. While the initial 2015 report only covered 10 countries, the World Bank quickly expanded the scope of the initiative, covering 77 jurisdictions in its 2016 report and 180 jurisdictions in its 2017 report.

Future Considerations

Going Global With Open Public Procurement

This World Bank initiative focuses on overall procurement processes and bid dispute complaint review mechanisms at the jurisdictional level and provides scorecards to measure each assessed jurisdiction against global standards, which helps to inform future systemic enhancements within each jurisdiction.

Future Considerations

Going Global With Open Public Procurement

Turning back to the Canadian context, regular federal, provincial and municipal Auditor General reports play a similar role within Canada. Like World Bank reviews, these reports drive the expansion of open procurement by reviewing the procurement practices of federal and provincial departments and ministries, Crown corporations, government agencies and broader public sector institutions (municipalities, universities, colleges, school boards and health sector entities) and by making recommendations to expand open procurement standards across the Canadian public sector.

Future Considerations

Balancing Accountability and Efficiency

While the domestic and international expansion of open government procurement represents a tremendous opportunity for both governments and suppliers, public institutions within Canada and around the world face a significant challenge in trying to balance accountability and efficiency in their procurement practices.

Future Considerations

Balancing Accountability and Efficiency

Recent high-profile public purchasing scandals in Canada have left little doubt that our government institutions need effective oversight to help promote transparency and accountability and to help ensure the proper spending of public funds. However, these critical policy objectives must be balanced against the need to produce timely and cost-effective results. With an ever-expanding line-up of reviewers, regulators and rejecters shining a spotlight on public purchasers, and with the ever-present risk of legal challenge, a critical question must be asked: Is red tape paralyzing public purchasing in Canada?

Future Considerations

Balancing Accountability and Efficiency

Recent scandals have spawned an increase in statutory and administrative rules aimed at imposing greater internal and external controls. In an era of increasingly stretched public resources, we should ask ourselves whether government institutions have achieved the proper balance between oversight measures on the one hand and efficient business practices on the other.

Future Considerations

Balancing Accountability and Efficiency

Of course, since the answer depends on the specific institution, it is impossible to make a single conclusive generalization in this regard. Furthermore, the need to balance accountability and efficiency presupposes that the institution in question has obtained acceptable minimum standards of both accountability and efficiency.

Future Considerations

Balancing Accountability and Efficiency

In certain instances, the procurement practices of an institution may be lacking in both respects. In this regard, the situation within Canada serves as a microcosm for the global state of procurement. Public institutions worldwide face a similar challenge in both attempting to establish acceptable minimum standards and, once those minimum standards are obtained, in attempting to balance accountability with efficiency.

Future Considerations

Balancing Accountability and Efficiency

For example, while some argue that the federal government may have applied too many oversight and control measures over its procurement processes, certain parts of the broader public sector have only begun to implement the open procurement procedures contemplated under the trade treaties.

Future Considerations

Balancing Accountability and Efficiency

In such situations, the choice between accountability and efficiency presents a false dichotomy since certain minimum standards of accountability, such as open competition to help promote value for money, are typically required to establish basic efficiencies in a procurement system. However, at a certain point, additional layers of oversight and control can serve to undermine, rather than enhance, efficiencies in the procurement process.

Future Considerations

Implementing a Proactive Approach to Legal Issues

As the old adage goes, “an ounce of prevention is worth a pound of cure”. The concept of preventative medicine is firmly entrenched in health circles because medical resources are scarce and illness is harder to treat than it is to prevent. Yet, the preventative approach used to apply medical knowledge in a proactive, systemic fashion is sadly lacking when it comes to using legal knowledge to proactively bolster our procurement operations. This has to change.

Future Considerations

Implementing a Proactive Approach to Legal Issues

To better serve the public interest, government institutions need to apply preventative law to their procurement practices. This calls for an evolution beyond the “lawyer as litigator” or “lawyer as solicitor” models of legal service delivery towards a new paradigm that utilizes the lawyer in the role of process developer and professional trainer.

Future Considerations

Implementing a Proactive Approach to Legal Issues

In the lawyer as litigator model, lawyers are typically used to either launch lawsuits on behalf of private sector suppliers or to defend lawsuits on behalf of public institutions. This is a highly inefficient use of legal resources, since an inordinate amount of energy is devoted to dealing with and resolving isolated disputes. This drains critical resources from the core business of the procurement operation: buying the goods and services needed to properly run our public institutions. In the litigation model there may be successful plaintiffs or successful defendants, but in the broader sense there are rarely any winners.

Future Considerations

Implementing a Proactive Approach to Legal Issues

In the lawyer as solicitor model, greater efficiencies are created, since the lawyer helps to facilitate the institution's purchasing activities while helping to avoid or limit associated legal risks. The same amount of time that would typically be taken in defending a single legal action can be translated into assisting an institution in successfully concluding dozens of contracts. The lawyer as solicitor model works in a semi-proactive fashion by helping the institution succeed on a transaction-by-transaction basis.

Future Considerations

Implementing a Proactive Approach to Legal Issues

However, the delivery of legal services is narrowly focused on the specific procurement with little broader benefit. Typically, advice is repeated again and again with no resulting systemic improvements to the institution's procurement practices. To make a medical analogy, the lawyer is only treating one person (or transaction) at a time.

Future Considerations

Implementing a Proactive Approach to Legal Issues

What is required is a broader application of proactive legal measures. To better serve the procurement system within each institution and across the public sector, scarce legal resources need to be deployed in the most efficient fashion possible. Rather than focusing on the boardroom and the courthouse, legal services should be redirected to the drawing room and the workshop.

Future Considerations

Implementing a Proactive Approach to Legal Issues

They should be directed to designing more legally sound processes and formats and to training procurement professionals in order to enhance the knowledge and skills needed to employ legally defensible purchasing procedures. Such measures would serve as a striking contrast to the prevailing remedial measures currently in vogue, which appear to favour layering more and more oversight and control measures onto procurement professionals. Three specific examples of the proactive and preventative approach to legal service delivery are provided below.

Future Considerations

Implementing a Proactive Approach to Legal Issues

First of all, with respect to institutional governance, practical steps can be taken to improve the procurement practices of public institutions. With the assistance of their lawyers, public institutions should review and implement procurement policies, procedures and protocols. A legion of post-process auditors could be rendered obsolete by the introduction of targeted preventative measures aimed at properly supporting procurement professionals in the performance of their public duties.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Secondly, with respect to procurement formats, the UN's 2011 Model Procurement Law recognizes a broad range of procurement formats, many of which are far more flexible and have lower risks than the traditional Invitation to Tender and Request for Proposal formats that lead to most of the tendering litigation in Canada.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Yet, many public institutions in Canada appear trapped in time, utilizing entrenched procurement formats that have remained essentially unchanged for decades notwithstanding the legal developments which have exponentially increased the risks that are now inherent in their use. Public institutions should direct legal resources to developing and implementing internationally recognized low-risk flexible formats that allow procurement professionals to select the most appropriate strategy for the specific project. The art of procurement requires a full palette if we hope to achieve a much needed renaissance in public purchasing.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Finally, with respect to case law developments, the last three decades have witnessed hundreds of reported decisions from across Canada dealing with disputes in public procurement. Reviewing these cases can help identify litigation hotspots and inform the development of better procurement practices. To promote prudent and defensible purchasing, public institutions should implement training programs that focus on lessons learned from these case law developments. This would help public institutions reap some long-term rewards from the shared experiences of public sector purchasers across Canada.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Historically, the role of the lawyer in public procurement has been limited to the litigation context or to the transaction-by-transaction work of the solicitor. In the grand scheme of things, this is a relatively marginal role when one considers that legal considerations lie at the heart of the public procurement process. There remains a vast amount of untapped legal knowledge that can be leveraged to help develop preventative processes, design safer, faster and more flexible procurement tools and train purchasing professionals in the latest legal developments.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Yet, how many procurement operations direct even a fraction of their legal resources towards such proactive measures? Government institutions should choose the right prescription and start focusing on a preventative approach to procurement law. With the luxury of hindsight, we are now in a position to build on past lessons learned to better serve the public interest. By properly leveraging this legal knowledge, public institutions can achieve compliance with their open procurement obligations while also accelerating their tendering cycles.

Future Considerations

Implementing a Proactive Approach to Legal Issues

Rather than waiting to be the subject of the next auditor's report or lawsuit, institutions should proactively assess their procurement practices in the areas of institutional governance, project governance, forms and formats, drafting processes, bidding procedures, contract management, institutional training and technological innovation. By assessing their existing practices and identifying strengths and weaknesses in these key areas, institutions can enhance their procurement practices and implement the following due diligence measures:

Future Considerations

Implementing a Proactive Approach to Legal Issues

1) aligning the budget approval process with the procurement cycle to create an effective early warning system for proper procurement planning;

2) establishing clear and accessible procurement policies that address ethical considerations while identifying roles, responsibilities and accountabilities within the institution for the project planning, document drafting, tender posting, bid receipt, bid evaluation, contract award and contract management phases of the procurement process;

Future Considerations

Implementing a Proactive Approach to Legal Issues

3) developing a broad range of procurement templates and related procurement protocols to help establish consistent standards within the procurement cycle; and

4) implementing a practical training program that increases institutional awareness of proper procurement procedures across the entire organization.

Future Considerations

Implementing a Proactive Approach to Legal Issues

The purchasing process is integral to the proper functioning of an institution. It must be properly calibrated to strike the right balance between accountability and efficiency. In the coming years, the institutions that proactively implement systemic enhancements and put a premium on accelerating the tendering cycle by deploying advanced procurement technologies will be the ones that lead the way in serving the public interest.