

Advancing the Art of Tendering: A Global Guide to Public Procurement

Program Overview

Public institutions worldwide are facing unprecedented pressure to properly manage their procurement processes. *Advancing the Art of Tendering: A Global Guide to Public Procurement* is an innovative course designed to help purchasing practitioners navigate the tendering cycle and better ensure the success of their procurement initiatives. This three-day symposium will survey leading institutional governance and project governance standards and cover the key ethics and accountability principles that help shape government procurement practices. It will also provide practical guidance on how to properly plan, design and draft solicitation documents to better ensure that project objectives are met on time, on budget and according to the rules.

Drawing on highlights from Paul Emanuelli's *Government Procurement* textbook, his *Accelerating the Tendering Cycle* and *Precision Drafting* handbooks, and his *Procurement Law Update* newsletter, this symposium will cover case studies and source materials selected from across the Caribbean and from a broad range of other jurisdictions including the United Kingdom, the United States, Canada, Australia, New Zealand, Africa and India.

Day One: Governance and Ethics in Public Procurement

Day One: Institutional Governance and Ethical Considerations will survey the key institutional governance and project governance standards that apply to public procurement. It will also cover the leading ethics and accountability case studies dealing with political interference, conflict of interest, lobbying, bid rigging, unfair advantage and bias in the bidding process.

Day One Agenda:

Institutional Governance and Project Governance

This introductory session will provide a survey of leading due diligence indicators within the institutional governance and project governance areas of the procurement cycle with a focus on the following topics:

Institutional Governance

Recent procurement scandals have increased scrutiny over institutional governance. Drawing from the latest lawsuits, auditor reports and headline news stories, this segment will cover the following topics:

Accountability Controls: Does your organization have the proper internal governance policies and procedures in place to keep pace with emerging due diligence standards?

Integrity Indicators: Does your organization have the necessary safeguards in place to address procedural improprieties, including unfair advantage, conflict of interest and evaluation bias?

Open Competition Requirements: Does your organization have the appropriate policies and procedures in place to comply with its open competition obligations and tendering complaints based on inappropriate sole-sourcing, unauthorized branding and biased specifications?

MORNING BREAK

Project Management

Discussion Draft

Many organizations lack the policies and procedures necessary to properly manage their major projects. Drawing from numerous case studies and a broad range of good governance standards, this segment will cover the following topics:

Approval and Review Process Flow: Does your organization's project process flow avoid approval bottlenecks and effectively integrate key subject matter experts into the early stages of project planning?

Proper Roles and Responsibilities: Does your organization's project governance process establish a project governance framework that clearly documents roles and responsibilities in order to avoid role overlaps and accountability gaps?

Clear Requirements and Formats: Do your organization's project planning protocols mandate the preparation of clear requirements and the selection of appropriate tendering formats?

LUNCH BREAK

Ethics and Accountability Workshop

Drawing from a broad range of cases studies, these modules will highlight the legal and reputational risks faced by institutions when navigating the danger zones of political interference, conflict of interest, lobbying, bid rigging, and unfair advantage and bias.

Ethics Part 1: Political Interference, Bid Rigging, Lobbying, and Conflict of Interest

Political interference, bid rigging, lobbying and conflict of interest expose the procurement cycle to significant risks that need to be effectively managed, mitigated and remediated. This module will consider case studies dealing with the following topics:

- The recognition by the courts that elected officials owe common law fiduciary duties that place the public interest above personal interest when making contract award decisions
- Where personal interest can compromise the exercise of independent decision-making and taint the legality of a contract award
- Where entrenched conflict of interest makes disclosure an insufficient mitigation measure and creates the need for strict recusal protocols
- When lobbying can undermine the integrity of the procurement process and why institutions need to distinguish between legitimate lobbying and inappropriate bid manipulation

Discussion Draft

- How the courts are interpreting conflict of interest codes and sanctioning elected officials and senior government officers who breach their ethical duties
- Why some institutions are now under a statutorily mandated duty to establish bid rigging awareness training to protect against anti-competitive practices
- How public institutions can establish clear protocols to deal with ethical issues

AFTERNOON BREAK

Ethics Part 2: Bias and Unfair Advantage

The integrity of the tendering process can be compromised when decision makers allow contract award decisions to be tainted by unfair inside advantage or bias. The case studies in this module will consider the following issues:

- The establishment by the courts of the reasonable apprehension of bias test and its application to the public procurement process
- Why the statements made by evaluators and external advisors can give rise to allegations of bias and result in legal claims from losing bidders
- When personal relationships between bidders and evaluators, including spousal relationships, create apparent or actual bias
- How side-switching by former employees and consultants can give bidders an unfair advantage and undermine the integrity of the bidding process, and how you can protect against these situations
- Why “branded” specifications undermine open competition and should only be used in exceptional circumstances
- How narrow technical requirements can lead to bias claims and the reasons why these types of legal challenges are likely to increase in the future
- Why hidden evaluation factors can expose a public institution to unfair advantage claims and what evaluation committees should do to guard against these risks
- How institutions can create clear and transparent fairness rules to protect the integrity of the bidding process

Day 2: The Legal Foundations of Competitive Bidding

Day Two: The Legal Foundations of Competitive Bidding will cover the key case law developments impacting the government procurement process and survey the international standard-setting developments that help inform the use of different tendering formats in the public procurement process.

Day Two Agenda:

Commercial Cases in Context

This overview will survey the case law highlights that set the leading commercial law precedents in the public procurement process across the Commonwealth. Topics covered will include:

- the legal elements that create the tendering “process contract”
- supplier lost profit claims
- privilege clause cases
- the legal analysis that applies to liability disclaimers
- disclosure duties, negligent misrepresentation and omission
- tender compliance disputes including bid rejection and bid repair
- hidden evaluation criteria
- unfair evaluation procedures
- low-bid bypass
- bid shopping

MORNING BREAK

Administrative Law and the Rise of Judicial Review

While much of the tendering terrain has historically been occupied by commercial lost profit claims, there has been a steady increase in administrative law judicial review challenges in

Discussion Draft

recent years. This segment surveys the leading administrative case law developments impacting the public procurement across the Commonwealth, including recent cases where the courts have enforced compliance with procurement statutes, policies, directives and process rules.

Topics covered will include:

- injunctions
- sole-source challenges
- unfair process and biased specifications
- the standard of review for government evaluation panels
- re-evaluation orders
- flawed processes and voided contract awards

LUNCH BREAK

Surveying the Procurement Playbook

With reference to leading international practices and standards, this module will provide an overview of the broad range of different procurement formats used in competitive bidding in the public sector. Formats covered will include:

- low bid Invitation to Tender and Request for Quotation formats
- the three main Request for Proposal formats, including negotiated RFPs
- Pre-Qualification procedures and Framework Agreements
- the Request for Information and other market research procedures

Using a series of recent case studies, this module will also provide a broad overview of the specific industry conditions in the construction sector that led to the use of the Invitation to Tender and No Negotiation RFP formats. It will also analyze the risks and restrictions inherent in these fixed-bid tendering formats and explain why traditional contract law and flexible formats are proving to be a more efficient operating system for institutions engaged in open competitive bidding.

AFTERNOON BREAK

Discussion Draft

Deploying Flexible Formats

With reference to recent case studies, this session will explain the main advantages of using negotiated RFP formats instead of the Invitation to Tender/No-Negotiation RFP formats. In particular, it will focus on how to mitigate tender compliance disputes using defensible rectification processes, how to implement transparent, flexible and low-risk evaluation and award protocols, how to identify situations for assessing and accepting creative supplier solutions and how to build flexibility into your process to allow for the improvement of contract award terms.

Consecutive “Rank-and-Run” NRFPs vs. Concurrent “BAFO” Dialogue NRFPs

With reference to international best practices and established industry guidelines, this session will explain the main differences between consecutive negotiated RFPs and concurrent negotiated RFPs, covering the key factors to help you decide when to go to market with a one-stage scored evaluation under the consecutive “rank-and-run” NRFP and when to use a two-stage evaluation process under a concurrent “best-and-final offers” Dialogue NRFP. This session will also provide guidelines for balancing transparency obligations and confidentiality duties when using NRFPs, and how to integrate electronic reverse auctions into your NRFPs.

Day 3: Designing and Drafting Tender Call Documents

Day 3: Designing and Drafting Tender Call Documents will cover the critical concepts for properly preparing bid solicitation documents with a particular focus on: (i) scoping clear requirements; (ii) aligning pricing structures; (iii) creating defensible evaluation plans; (iv) incorporating appropriate contract terms; and (v) selecting the right tendering format. Day 3 will also include practical workshops to help attendees fine-tune their drafting techniques and improve the precision of their tender call requirements.

Day 3 Agenda:

The Art of Design: The Five-Step Design Planning Process

This module will provide an overview of the tender call design planning process. Topics covered will include:

1. What Are We Buying? Defining Your Project Requirements

This segment will discuss how a properly designed initial scoping statement should serve as the framework for your project specifications and pricing structures. It will also show you how to address your material disclosure duties to help you avoid performance delays and cost overruns and how to address scope and budget estimates to avoid dead-ending your project in over-budget bid battles.

2. What Is the Pricing Format? Aligning Pricing With Requirements

The early identification of an appropriate pricing format is critical to fast-tracking your procurement planning and giving your project the direction it needs to steer clear of bid challenges and performance disputes. This segment will illustrate how initial design planning can help you develop a pricing grid that aligns with your project requirements and price evaluations to provide a clear foundation for post-award contract management.

3. What Is the Evaluation Plan?

Managing Mandatories and Choosing Low-Bid or High-Score Ranking

This segment will focus on mitigating tender compliance challenges through the selection of clear and streamlined mandatory evaluation requirements. It will also focus on the factors that will help your team choose between low-bid and high-score

Discussion Draft

evaluations while developing clear price calculation formulas and integrating transparent non-price criteria.

4. How Do We Assemble the Contract? Prefabrication or Post-Bid Dialogue

This segment will explore the turning points for proper contract design and help your project team pick between pre-fabrication or post-bid dialogue as the preferred method for building your contract with properly aligned project specifications and pricing grids and appropriately tailored legal terms and conditions. This segment will identify common legal agreement issues relevant to major projects that typically require project teams to engage in more in-depth dialogues with prospective suppliers.

5. What Is the Right Tendering Format? The Procurement Playbook

This segment will cover the key factors for helping you select the appropriate tendering format for your specific project and explain how those factors are connected to the first four steps of design planning.

MORNING BREAK

Precision Drafting Overview

This overview session will explain the three underlying principles that drive the precision drafting process: (i) clear thinking, (ii) plain language, and (iii) legal interpretation. It will also explain the precision drafting process with reference to the seven categories of project-specific tender call content:

- i. The initial mapping statement
- ii. Detailing requirements
- iii. Making material disclosures
- iv. Establishing eligibility requirements
- v. Creating ranking and selection criteria
- vi. Developing the Rate Bid Form
- vii. Drafting the Form of Agreement

LUNCH BREAK

Discussion Draft

Scoping the Initial Mapping Statement and Ensuring Document Alignment

The initial mapping statement is a key element of a successful drafting process. This segment will explore the following critical concepts aimed at assisting the drafting team in staying focused on their objectives:

- Preparing a clear, thorough and concise initial mapping statement
- Coordinating your drafting team to work within the structure of your procurement document
- Drafting from a reader-focused perspective
- Achieving horizontal integration by ensuring proper alignment of the pricing structure in the pricing form with the Initial Mapping Statement
- Achieving vertical integration by aligning the various components of your tender call with your Form of Agreement

Detailing Requirements and Plain Drafting

This module will explain the importance of avoiding unnecessarily complicated legalistic writing habits and how to use plain drafting in your tender call documents to incorporate complex technical concepts and content. The following topics will be covered to help you achieve greater precision in your procurement documents:

- Avoiding legal loops and other fancy tricks
- Dealing with dysfunctional definitions, perilous punctuation, artificial acronyms and cross-referencing chaos
- Using plain language in the main body of your contract documents
- Structuring your documents to organize and incorporate complex technical content

Plain Drafting Workshop

In this interactive workshop, attendees will break into small groups to review a draft Initial Mapping Statement and identify drafting defects and ambiguities. This exercise will help underscore the importance of framing the entire drafting process with a clear and concise scoping statement that defines the institution's needs and maps out the overall structure of the procurement document with the underlying pricing structure.

AFTERNOON BREAK

The Laws of Interpretation: Shaping Your Content

Using illustrative case studies, this session will explain how the seven laws of interpretation can help you shape your content when drafting solicitation documents:

1. The Entire Document Rule: Why specific terms are interpreted in the context of the entire document
2. The Ellipsis Rule (Express & Implied Terms): What goes without saying? What needs to be stated? Distinguishing the obvious from the not so obvious
3. The *Expressio Unius* Rule: How stating one thing implies the exclusion of another
4. The Class Rule: Why general terms are restricted by listed sub-categories
5. The Association Rule: How broad words are narrowed by the company they keep
6. The Ranking Rule: When detailed lists can limit your contractual coverage
7. The *Contra Proferentem* Rule: Why the benefit of the doubt often works against the purchasing institution

The Clear Requirements Workshop

One of the leading causes of tendering litigation is the failure of purchasing institutions to clearly distinguish between tender compliance requirements, ranking criteria, process rules and contract performance requirements. This workshop exercise will help drafters make their documents clearer and more defensible by taking them through a step-by-step process that filters and organizes requirements by category and then fine-tunes terminology to reduce the risk of interpretive dispute.