

Conflict of Interest

Bidders Beware

A fundamental cornerstone of federal government procurement is that all bidders will be treated fairly and equally. The obligation to treat bidders fairly and equally includes the duty to avoid conflicts of interest. The underlying policy rationale is to promote economic efficiency and to discourage corrupt tendering practices.

The need to run a procurement process free of conflicts of interest is often explicitly included in procurement processes by various “Standard Instructions and Conditions” as set out by the federal government’s Standard Acquisition Clauses and Conditions. For instance, Section 17 of the “Standard Instructions – Goods or Services – Competitive Requirements” reads:

1. In order to protect the integrity of the procurement process, bidders are advised that Canada may reject a bid in the following circumstances:

- a) if the Bidder, any of its subcontractors, any of their respective employees or former employees was involved in any manner in the preparation of the bid solicitation;
- b) if the Bidder, any of its subcontractors, any of their respective employees or former employees had access to information related to the bid solicitation that was not available to other bidders and that would, in Canada’s opinion, give the Bidder an unfair advantage.

A recent complaint before the CITT (Canadian International Trade Tribunal) demonstrates the importance of avoiding conflicts of interest. On September 25, 2008, the CITT released its decision in *Bluedrop Performance Learning v. Public Works and Government Services (PWGSC)*. In that case, a conflict of interest arose when the commanding officer of the G7 branch of DND’s Combat Training Centre retired and began working with a company called Acron. While he was the commanding officer, his subordinates had a direct role in drafting a Request for Proposal (RFP) for a learning management system. Shortly after the commanding officer left DND for the private sector, Acron bid on that RFP.

After Acron was awarded the contract for the learning management system, one

of the unsuccessful bidders filed a complaint with the CITT alleging that Acron should have been excluded from the procurement process because of a conflict of interest. In the course of the complaint, PWGSC acknowledged that Acron should have been excluded from the procurement. PWGSC went on to claim that: “the former commanding officer kept an arm’s length from document preparation and was not involved in drafting the solicitation documents.” PWGSC’s written record reveals that the former commanding officer did not play an active role in the Solicitation.

The CITT rejected these assertions as “unconvincing” and further found that the former commanding officer “must be taken to have been privy to inside information that would have proven advantageous to a prospective bidder.” In concluding that Acron should have been excluded from the procurement, the CITT recognized the obligation at common law on the part of a procuring entity to consider whether such a conflict of interest or unfair advantage exists and to act accordingly. According to the Tribunal, it remained incumbent upon PWGSC to protect the integrity of the procurement system by rejecting any bidder determined to be in a conflict of interest position or enjoying an unfair advantage.

This case underscores the need for companies to remain vigilant in identifying and managing conflicts of interest to the greatest extent possible.

There are, generally speaking, three broad categories of conflicts of interest. The first is where a bidder has “unequal access to information” because of its performance of another government contract. Where that information is not publicly available, a conflict of interest arises because the bidder has insider knowledge that could provide an unfair competitive advantage.

The second situation is where a bidder, as part of its performance of a previous government contract, has in some sense set the ground rules for the competition. For instance, where the bidder writes the statement of work, a conflict of interest arises because it had the opportunity, whether intentionally or not, to skew the resulting procurement in favour of itself.

Finally, a conflict of interest may arise where a bidder’s work under one government contract would entail having to evaluate itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals.

If a conflict of interest is not immediately identified and managed, it will likely

result in exclusion from the bidding process. However, if managed proactively, a potential conflict of interest might not result in your exclusion from subsequent procurements.

What steps can you take to lower the likelihood that you will be excluded from bidding on a subsequent procurement?

First, and foremost, you must proactively identify potential conflicts of interest within your company. Once identified, you must consider whether a mitigation plan can be developed to neutralize the potential conflict of interest.

Potential steps to mitigate a conflict of interest normally include developing a “firewall” system. This eliminates the flow of confidential information between various business units and personnel. In so doing, it ensures that the business unit preparing to bid on an upcoming potential contract does not, and cannot, have access to non-public information obtained in the performance of previous contracts. Normally, a firewall system includes:

- a) A written policy on conflicts of interest and the company’s firewall system;
- b) Document control strategies, including physical or virtual separation of information within your IT servers, and security measures over hardcopy documentation;
- c) Written non-disclosure agreements that prevent the transfer of information between business units. These must be executed before undertaking any work;
- d) Physical separation of the different business units’ office space;
- e) On-going education programs for personnel that addresses conflicts of interest and reinforces their obligations under the firewall plan;
- f) Internal or external audits to ensure compliance with all of the above measures.

It is absolutely essential that, once established, the firewall system remain fully respected and enforced. The credibility of such systems will be vital in resisting allegations that a procurement was improperly won.

Failing to address potential conflicts of interest will leave you vulnerable to being excluded from future government contracts because of an actual or perceived conflict of interest. Once you are excluded, it will be too late to manage that conflict of interest. For this reason, take the time to proactively manage your potential conflicts of interest today. **FL**

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