Conflicts of Interest in Procurement

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Procurement Law Blog

The term “conflict of interest” is used in many discussions around procurement. However, its exact meaning is often obscure. This results from the fact that the same phrase is used in two quite different ways - to deal with conflicts of interest, and to deal with conflicts between bidders with unequal access to information.

Conflict of interest in the evaluation team

A true conflict of interest arises where an individual who is part of the team on the government body side and who has the ability to influence the decision-making process, is also involved in some way in a bid team or has some other interest that means that his or her decision-making might be affected. For example, the member of the evaluation team might have a close relative who is a member of the bidding team and is therefore more liable to make a decision in favour of that bidding team. Where external consultants are used as part of the evaluation team, they may have other commercial relationships with bidders, which again could lead them to be biased in favour of one bidder over another.

Perceived conflicts of interest

Government bodies need to be careful not only that there are no actual conflicts of interest, but also need to avoid a perceived conflict of interest. In other words, the individual in question might act fairly and not allow the other interest to influence their decision-making, but to the outside world the mere perception of the conflict would be problematic. One way of minimizing the risk of the perception of conflicts in large scale procurement projects is to appoint a conflict of interest adjudicator. This is an independent third party who rules on whether or not a conflict exists and, if it does, advises on the appropriate steps to be taken.

Dealing with conflicts of interest

Depending on the nature of the conflict, it may be necessary for the individual to not take part in the evaluation process. Otherwise mitigating the risk may be possible. For example, where an external member of the evaluation team has an unconnected business relationship with one bidder, that person should ensure that he or she has no contact with the bidder during the evaluation process. If the business relationship were critical to the evaluation team member’s own business, they may need to take no part in the evaluation process.

Unfair advantage

The concept of unfair advantage arises where one bidder has access to information that is not available to other bidders. This is not strictly a conflict of interest, although it is often described as such. One example of where is may arise is an individual who has left work for a government body and started work with a private enterprise and therefore has access to information about the government body that might be of use to the private enterprise. Another common situation is where a consultant has been used in the early stages of the bid process, for example, in designing the specifications, and then is hired by a potential bidder. The individual or the consultant may only not be subject to specific obligations of confidentiality, but in any event it is seen as unfair for one bidder to have access to inside information.

Avoiding unfair advantage
When acting for a public authority, it is important to avoid this situation arising. This can be done in a number of ways. Where consultants are hired in relation to an early stage of the procurement, they should be informed at that stage that they will not be entitled to take part in a bid or a start of a bid team. In addition, bidders can be warned that certain persons are restricted and therefore not available for their use. If the public body wants to allow an otherwise restricted person to take part in a bid team, the risk of unfair advantage can be minimized by ensuring that all relevant information is made available to all bidders, possibly allowing a longer bid process than would otherwise be the case in order to enable the other bidders to assess the information properly.

Applying conflict of interest rules in a procurement process

In a straightforward contract A/contract B analysis, the rules on conflict of interest and unfair advantage would form part of the implied term discussed in Procurement Law Basics - Part 3 - the duty to treat bidders fairly and consistently. Allowing one bidder to have access to information denied to others or having a member of the evaluation team with the potential for bias would contradict this implied term.

Interestingly, however, the Canadian International Trade Tribunal has ruled that if the Federal government wants to be able to disqualify potential bidders on the grounds of a conflict of interest, it must state this clearly in the procurement document. For example, in the CITT decision *Dolico Printing* (File No. PR-2003-016) the government disqualified a bidder on the grounds that one of their employees had helped to draft the RFP. The CITT ruled that because there was no express reference to conflict of interest in the RFP documents and therefore no clarity as to what might be considered a conflict of interest, the government was not entitled to invoke this rule and disqualify the bidder.

Best practice

Best practice is therefore to include specific reference to both conflicts of interest and unfair advantage in your procurement documents:

- set out what is allowed and what is prohibited
- provide a process for bidders to confirm whether a particular relationship may give rise to problems
- require bidders to declare any potential conflicts with their bids