

Scary Contracting Stories!

Presented by the Development Contractual Services Division
Of Global Affairs Canada

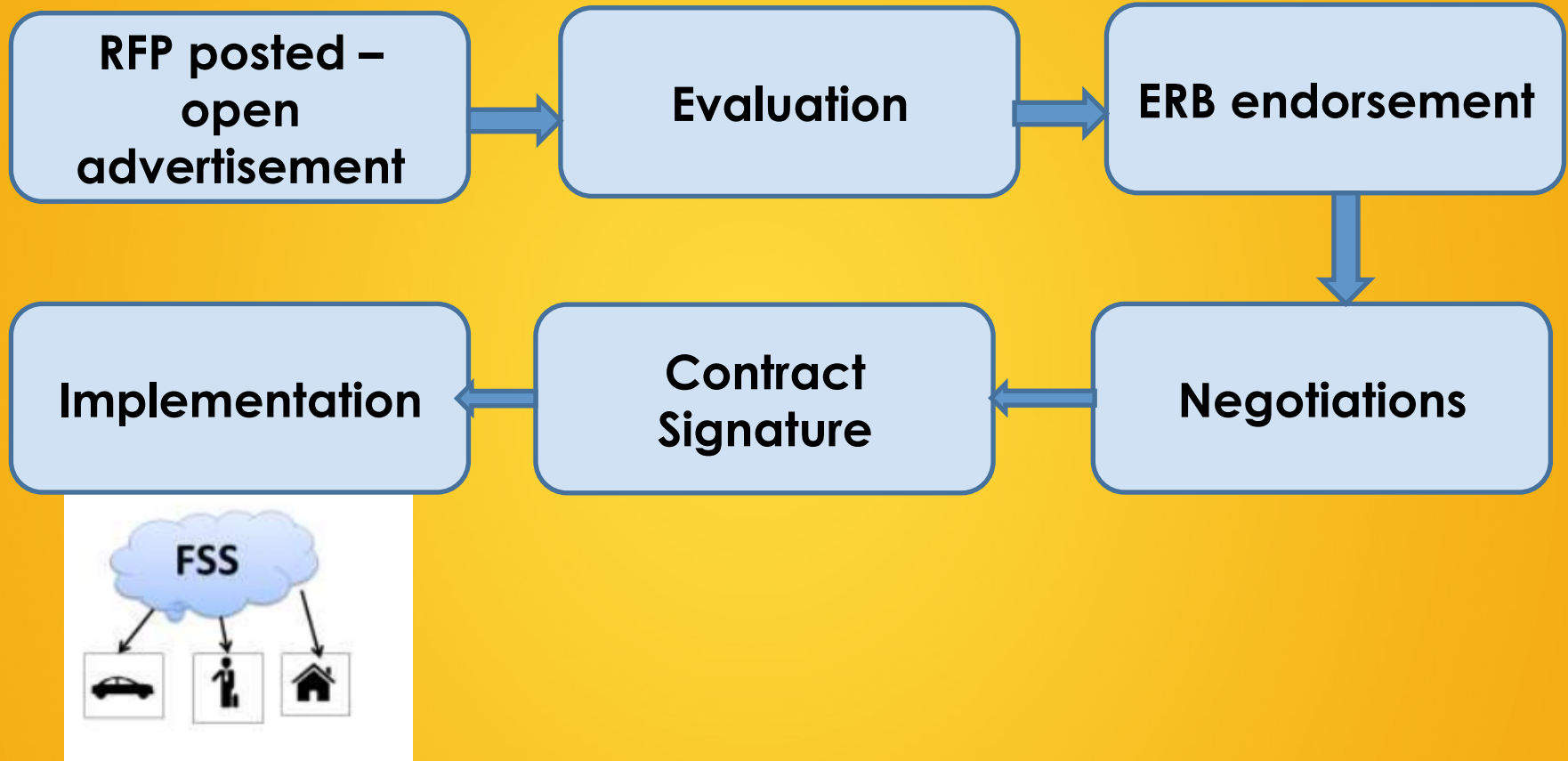
CIPMM May 29th and 30th 2018



Session's objectives

- To allow participants to familiarize themselves with the challenges that may be associated with the management of an RFP.
- To share lessons learned and discuss winning strategies related to the management of evaluation and contractual issues.

Procurement Process



Spooky Story # 1

1. The bid included a CV of an individual previously involved in a project with GAC
2. CV included information that did not reflect the reality:
 - Title is correct, but duties performed are overstated
 - Duration of assignment is overstated

Procurement Stage: Evaluation

What Would YOU Do?

What Really Happened

- GAC invoked its right to verify any information provided by Bidders as per the clause 12. Clarifications of Proposals.
- GAC accessed the previous file for the proposed individual, including TOR for this past assignment to verify the information in the CV.
- Information was found false and misleading.

Proposal was rejected

WHY? Contracting & Legal Perspectives

- Clause 1.5.6 – Integrity Regime:

DFATD will declare non-responsive any Proposal in respect of which the information requested is incomplete or inaccurate, or in respect of which the information contained in a certification or declaration is found by DFATD to be false or misleading in any respect

- Certifications are mandatory procedural requirements (Certification 2 – Code of Conduct)
- Duty to reject for non compliance
- Duty to bid in an honest manner

Spooky Story # 2

- An international bidder was invited to enter into a contract with GAC. It was the first contract with the Canadian Government for this company.
- The Bidder has attended negotiations in person.
- During negotiations it became apparent that the Bidder:
 - misunderstood the requirement and did not price certain elements
 - assumed that they can negotiate terms and conditions of the contract after the proposal submission
 - ***Procurement Stage: Contract Negotiations***

What Would YOU Do?

What Really Happened

- GAC explained:
 - that the terms and conditions of the proposed contract are not negotiable as they have been disclosed to the bidders through the form of contract included in the RFP and the bidders had equal opportunities to familiarize themselves with it and bid accordingly.
 - at this stage price cannot be changed.
- The Bidder was asked to sign a certification stating that it understood the resultant contract and are voluntary willing to enter into contract on the proposed terms.

The contract was signed.

WHY? Legal & Contracting Perspective

- GAC could not unilaterally exit from the contract negotiations if the bidder confirms its intent to enter into a contract based on the terms of the contract stated in the RFP.
- Paradigm of contract A

Spooky Story # 3

- The bidder was selected for contract award, however during the negotiations the bidder raised an issue that they might be required to pay a higher amount of the local taxes than they anticipated.
- The bidder asked GAC to facilitate the tax exemption with the Recipient Country as stated in the MoU signed 20 years ago.
- The Bidder indicated they will not be able to enter into contract without tax exemption.

Procurement Stage: Contract Negotiations

What Would YOU Do?

What Really Happened

- It was the Bidder's responsibility to make themselves familiar with the local taxation requirements at the time of the bidding and include all the taxes, including but not limited to the local taxes, and include it in its price.
- The bidder withdrew from negotiations and contract award was extended to the next highest-ranked bidder.

WHY? Legal Perspective

WHY? Legal & Contracting Perspective

- Given the statement in the RFP that

All other taxes, including but not limited to Local Taxes, must be included by the Bidders in the price.

It was bidder's responsibility to account for the local taxes in its price.

- GAC is not liable to provide any assistance in regards to the related MoU.
- GAC could force the bidder to enter into a contract, but decided not to.
- Bidder declining to enter into a contract does not preclude the bidder from bidding and being successful on other RFPs.
- Paradigm of contract A -> Bidder is obliged to respect its bid, but it did not.

Spooky Story # 4

- Under the contract, the Consultant is required to provide GAC with the office space located within 5 km from the High Commission in country Z.
- The Consultant invited the Head of Aid to inspect the premises and received a verbal ok.
- The Program Officer in charge of the day-to-day management of the contract discovers that the office is located within 6 km from the High Commission.
- Upon request, the Consultant clarifies that the contract does not prescribe the measure of the distance, i.e. by road or by “bird’s fly”. It argues that 5 km requirement was met using the “bird’s fly” approach.

Procurement Stage: Contract Implementation

What Would YOU Do?

What Really Happened

- The office was accepted as proposed by the Consultant.

WHY? Legal Perspective

- Verbal communication could engage responsibilities of the Crown
- Ambiguity in the requirement definition in the contract – “contract preferendum rule” – contract will be interpreted against the author

Spooky Story # 5

- The Consultant requested replacement of the key personnel citing the reason that the person is relocating to the company's headquarters in another country.
 - The personnel was evaluated
 - The request for replacement has come after the contract award
 - Upon further investigation, it was confirmed that the office the person is relocating to is a different legal entity than the Consultant

Procurement Stage: Contract Implementation

What Would YOU Do?

What Really Happened

- The unavailability of the personnel was deemed to be for the reasons beyond the control of the Consultant.
- The proposed replacement was scored against the original evaluation grid to make sure they had equal or higher qualifications than the original personnel.
- The proposed replacement scored higher than the original person.

WHY? Contracting Perspective

Personnel Replacement is regulated in the contract:

- *The Consultant must ensure that the Personnel assigned to an existing position provides the Services associated with that position unless the Consultant is unable to do so for reasons beyond its control and that the Consultant's performance of the Services under the Contract will not be affected.*
- *The following reasons are considered as beyond the Consultant's control: long-term/permanent illness; death; retirement; resignation; maternity, paternity and parental leave; dismissal for cause; or termination of an agreement for default or any other reason acceptable to DFATD.*

WHY? Contracting Perspective


(cont'd)

Personnel Replacement is regulated in the contract:

- *If such a replacement is contemplated, the Consultant must submit to DFATD for its approval a detailed curriculum vitae of the proposed individual. The proposed substitute should have equivalent or better qualifications and experience than the original individual.*
- *However, in the event where the Consultant is unable to replace a member of its Personnel with an individual with equivalent or better qualifications than the original individual, DFATD may, at its sole discretion, accept an individual with lower qualifications. In this case, Fees will be negotiated.*

Winning strategies for risk management



- Recognize that the  is in the details.
- Consider multiple perspectives (legal, programs, contract).
- Do not be afraid of legal services.
- Ensure horizontal coordination.
- Consider the 10 day rule.
- Consider both the bidders' and potential bidders' perspectives.

Thank you !

