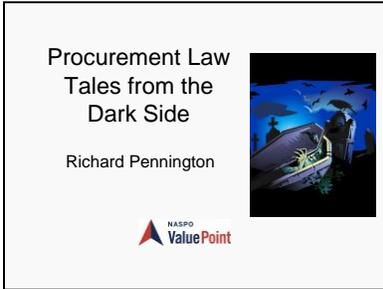
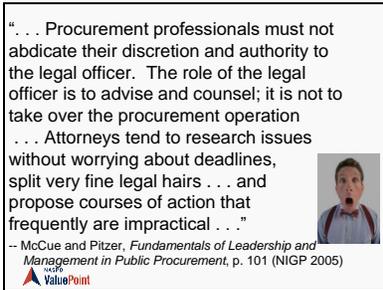


## Procurement Law Tales from the Dark Side

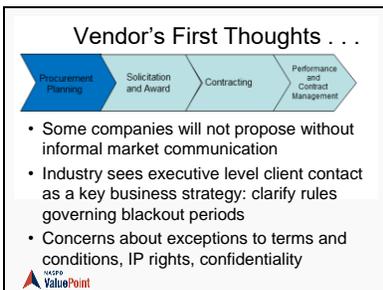
Wisconsin Association of Public Procurement/VALUE



The purpose of this presentation was to share insights about how public procurement professionals can lower the risk of a successful bid protest. I was in private practice from 2006-2010, advising on protests and contract claims. There are two overarching take-a-ways. Courts do not want to second guess procurement decisions. And the procurement file is central evidence in a bid protest. Make them professional.



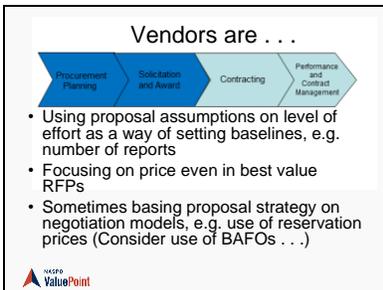
As I said in the presentation, I don't practice law in Wisconsin. Most of these "lessons" I gained from private practice apply generally in a state having a procurement code based on the ABA Model Procurement Code. But make sure you ask you own attorney for legal advice and don't rely on these discussions that were in a learning environment, colleague-to-colleague.



This presentation was organized by procurement phases and focused mostly on bid protests. Informal market communications are governed by varying laws and policies. Some vendors think that if the first time they hear about a complex RFP is when it is published, they don't have a chance to win. And it may be a good practice to clearly specify the constraints on informal communications after RFP issuance or at another time defined by your law. Some states, for example, have legal "blackout" periods with explicit limits on what can be communicated.



The Sarbanes-Oxley Act was passed in 2002 in response to widely-publicized company failures (like Enron and WorldCom) caused in part by bad accounting practices. It seems like lawyers have gotten more involved in contracting. Limitation of liability provisions, for example, are in wider use. And these issues aren't just in government procurement and contracts. Commercial contractors and subcontractors aggressively negotiate these provisions also.



Suppliers frame their pricing using proposal assumptions. If assumptions are included in a contract, they can be the basis for a later change if the requirements differ.

In my experience, suppliers think price is very important even in a best-value procurement whose price weight appears otherwise. If your law permits discussions and proposal revisions in RFPs, use them. Offerors often will “sharpen their pencil.”

**Should you disclose the budget in the request for proposals?**

There were a wide range of opinions on this question. I shared a story where a good company asked for a rough-order-of-magnitude of budget available, but the request was denied. They tried to infer from the public budget and the long list of desired requirements what funding must be available. They spent six figures on a proposal team, submitted an excellent proposal, but didn't make the “competitive range” because their proposal was too expensive! What is the real risk from giving suppliers an idea of the available funding?

**Confidential Information**

Typical general advice to vendors

- Follow solicitation instructions, i.e. segregate confidential information
- Be judicious: governments have transparency obligations, e.g. price/scope of work disclosure
- In a dispute: consider offering to indemnify for litigation costs



This is a slide I used to train suppliers with the Colorado Procurement Technical Assistance Center, a nonprofit partially funded by the State of Colorado and the United States Defense Logistics Agency. The PTAC program purpose: building the supplier base and increasing competition. The lesson here for suppliers? Be careful about broad claims of confidentiality. Follow proposal instructions!

“A broad discretion in the selection among bidders is included within a reasonable construction of the statute as to ‘responsible’ bidders. The word ‘responsible’ is not limited to the meaning of pecuniary liability or responsibility, but includes as well skill, experience, and integrity...”  
 – Colorado Court of Appeals (1913)!



As shown in this 1913 Colorado Court of Appeals quote, the concept of responsibility in public procurement has been around over 100 years. The story I told was about a company who was found non-responsible for performance issues that existed over 8 years before the current solicitation. The agency procurement director reversed the non-responsibility determination after the protest pointed out that even debarments typically only last three years. The federal government uses “present responsibility” as the touchstone so actions can be taken to fix past performance problems.

**Protests and Debriefings**

The value of protests

- Protests will happen: would you rather they be political?
- They affirm the validity of your process

To debrief or not to debrief?

- Careers can be on the line when companies lose awards
- Do you owe it to them to explain why?
- Be professional and prepared!



Protest processes validate an agency’s procurement processes. And a “political protest” often exists that the formal protest process insulates an agency from. We also discussed the value of protest bonds and their impact on companies’ participation in procurements. They may chill insight into how your procurement processes can be improved. In my experience, companies carefully thought about whether to file protests.

I’m a proponent of debriefing. Some laws require them. But be prepared. Count me as one who believes that the procurement professional should lead the debriefing, even if technical experts are present. Set ground rules, i.e. a debriefing is not the time to do a line-by-line comparison with the winning proposal.

Past Experience/Demonstrated capability	
Evaluator 1	5
Evaluator 2	4
Evaluator 3	0
Evaluator 4	4
Evaluator 5	3



There is room for evaluator differences. But what should be the role of the procurement official when there are widely ranging differences that can't be explained by the procurement file?

The story here involved my sitting in a conference room with a client, reviewing the procurement file, and seeing numbers like this in the evaluation spreadsheet. What do you think the client concludes?

- "... the pivotal issue before the trial court and in this appeal is whether the [agency] can treat the RFP process as little more than a ranking tool to determine a preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal of that preferred provider."  
-- *Florida Department of Lottery v. GTECH*, 816 So.2d 648 (Fla. App. 1 Dist. 2001)



Laws differ in this regard, but in jurisdictions permitting proposal revisions, there can be an issue if post-award negotiations with the winning offeror materially change the RFP provisions. The other offerors argue that, "I should have that opportunity also before the final evaluation. I could have improved my proposal."

**Rules of Evidence and You**

"The documents speak for themselves"  
-- U.S. District Court Judge in 1994

Business records: "A memorandum, report, record . . . if kept in the course of a regularly conducted business activity . . ."

Habit: Evidence of the . . . the routine practice of an organization . . . is relevant to prove that the conduct was in conformity . . ."

Admission: "Statement offered against a party and is the party's own statement in either an individual or a representative capacity . . ."



Procurement officials should have a familiarity with the rules of evidence that often govern in administrative hearings and courts. What you say can be an "admission." Your records are evidence. There often isn't a chance to testify in bid protests, and your procurement files have to tell the story. Make them professional and ensure they contain what is required by law and regulation.

. . . [we] must afford a presumption of correctness to the State's decision. . . [To hold otherwise] "would place the Judiciary in the position of litigating the award of every state and municipal contract and would place public officials in charge of awarding such contracts in the 'legalistic straightjacket'." – *Blue Cross & Blue Shield of Rhode Island v. Najarian*, 865 A.2d 1074 (R.I. Supreme Court, 2005)



This Rhode Island court opinion language illustrates the deference to public procurement officials' decisions where the process appears rational. This came from an [article in \*Government Procurement\* magazine, \*Untying the Legalistic Straightjacket\*](#).

We had a good discussion about whether companies can file bid protest lawsuits in court. This is a complicated question that involves a concept of *standing to sue*. In many jurisdictions, disappointed bidders may have no right to file a court action. Check with your legal counsel, especially when writing RFP clauses that talk about bid protests.

My Smoking Gun . . .



This story kind of embarrassed me so I won't tell it again in writing! It had something to do with an evaluation memorandum being dated before the receipt of best and final offers. Get the picture?

Suffice it to say, judges don't want to be procurement agents. In most cases they are not familiar with public procurement processes.



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