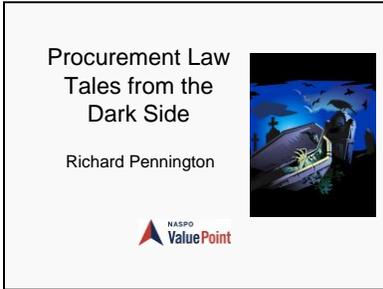
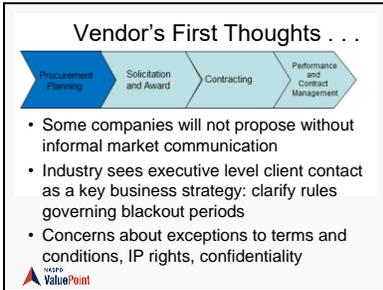


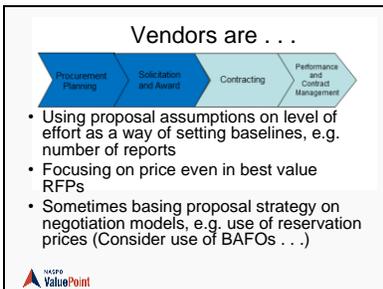
Procurement Law Tales from the Dark Side



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.



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.



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 as 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?

Risk to Vendors from . . .



- Low estimates of numbers of tailored reports & scope of end-user “discovery” meetings in IT contracts
- Governance boards that delay decisions
- Not adequately defining performance requirements, e.g. “desirable” features: “we can” versus “we shall”
- Contractor accommodation of client requests sets early expectations/blurs scope boundaries



I once had a contract dispute where the RFP required “reports as requested,” and the number of requested reports quadrupled from the number disclosed in the RFP and priced by the supplier. This led to a contract claim. Delayed decisions on changes by governing boards can also have a cost impact on suppliers. Moreover, allowing due dates to pass without managing the schedule, and informal scope tradeoffs, can lead to waiver and claims in troubled projects. For a good study about contract administration issues, see the [State of California Task Force on Reengineering IT Procurement](#). About waiver, see this [Government Procurement article](#).

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*](#).

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.



Richard Pennington
General Counsel
NASPO ValuePoint
RPennington@NASPOValuePoint.org

