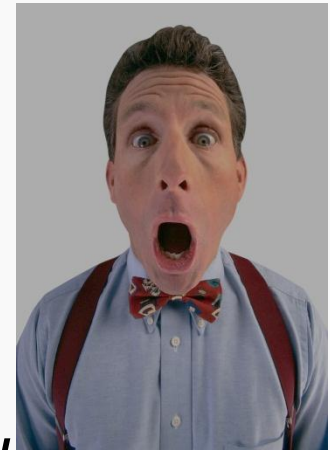


# Procurement Tales from the Dark Side

Richard Pennington

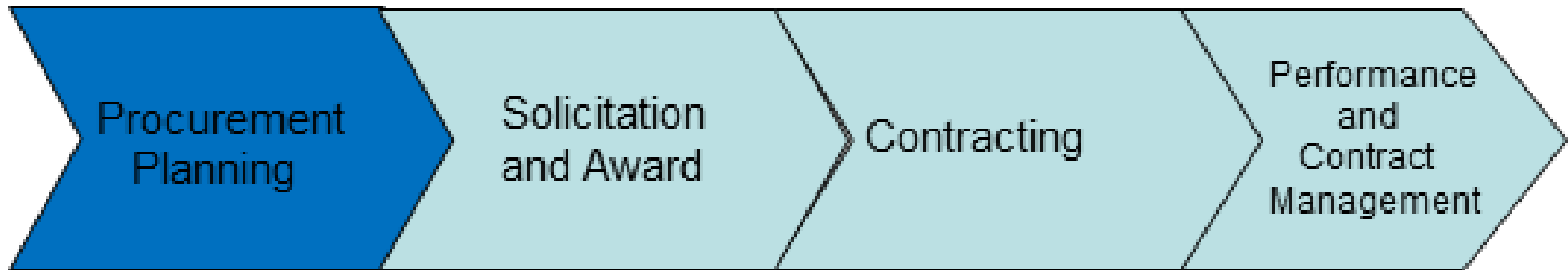


“ . . . Procurement professionals must not abdicate their discretion and authority to the legal officer. The role of the legal officer is to advise and counsel; it is not to take over the procurement operation . . . Attorneys tend to research issues without worrying about deadlines, split very fine legal hairs . . . and propose courses of action that frequently are impractical . . . ”



-- McCue and Pitzer, *Fundamentals of Leadership and Management in Public Procurement*, p. 101 (NIGP 2005)

# Vendor's First Thoughts . . .



- Some companies will not propose without informal market communication
- Industry sees executive level client contact as a key business strategy: clarify rules governing blackout periods
- Concerns about exceptions to terms and conditions, IP rights, confidentiality

# Vendor Risks in Contracting

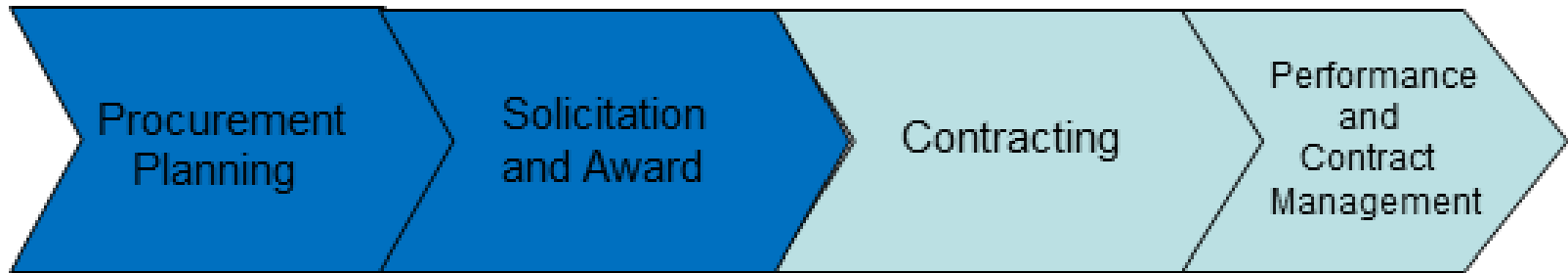
Contract  
changes

Changes in law:  
Price and  
schedule  
adjustments

Intellectual  
property rights

Liability  
allocation

# Vendors are . . .



- Using proposal assumptions on level of effort as a way of setting baselines, e.g. number of reports
- Focusing on price even in best value RFPs
- Sometimes basing proposal strategy on negotiation models, e.g. use of reservation prices (Consider use of BAFOs . . .)

Should you disclose  
the budget in the  
request for proposals?

# 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

“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)!



# 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!

# Past Experience/Demonstrated capability

Evaluator 1	5
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Evaluator 2	4
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Evaluator 3	0
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Evaluator 4	4
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Evaluator 5	3
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# Bid Protests and Appeals



Vendors' attorneys often start with open records/freedom of information act requests: make files professional!

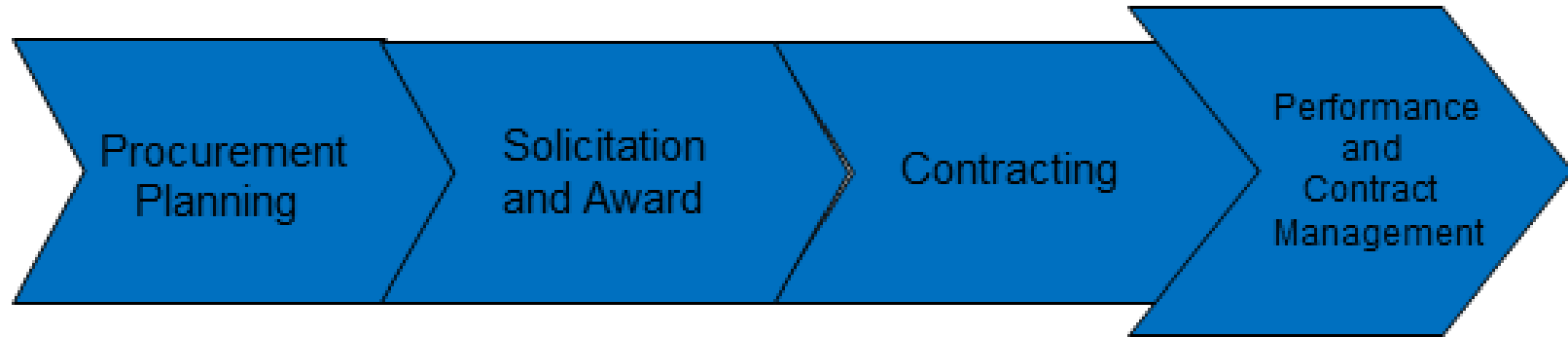


Some possible issues:

- Grossly disparate nature of discussions with vendors
- Intemperate evaluator comments
- Widely varying/wrong evaluation scores
- References required: not checked
- Significant post-award negotiation or changes to bids/offers

- “. . . 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)

# 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
- Contractor accommodation of client requests sets early expectations/blurs scope boundaries
- Not adequately defining performance requirements, e.g. “desirable” features: “we can” versus “we shall”


“Project schedule has been the only real issue. What if any informal project communications were provided to subcontractor regarding the effect of project delays?”

Notice of changes was not provided as required by the contract.”


# 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 . . .”



. . . [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)



# My Smoking Gun . . .





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