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The Danger Of Bias In Bid Procurements And Contract Awards

Dr. Gleb Tsipursky Contributor 

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Two lawyers discussing a bid protest © 2022 BLOOMBERG FINANCE LP

Bid protests against a procurement process often center around claims of bias that result in flawed selection decisions. For example, the Government Accountability Office (GAO) [put out a report in](#)

2017, which found that a “flawed selection decision” was one of the top four reasons for successful bid protests - and over 22% of bid protests succeeded that year.

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As a result, it’s critically important to protect the procurement process from bias. Yet efforts to do so often fall short, leaving a contract award vulnerable to a bid protest. As an example, let’s consider a bid protest against a Medicaid management contract award of over \$20 billion. I have personal knowledge of the case, as I had the privilege of participating as an [expert witness on bias in procurement bid protests](#), given my expertise as a behavioral scientist and consultant in addressing bias in decision making such as government procurement.

What Is Bias in the Procurement Process?

Let’s start by defining bias. Bias refers to using inappropriate criteria or information in decision making that leads to irrational, arbitrary, and capricious decisions. That might mean deliberate bias, meaning a preconceived, prejudiced perspective intended to weigh for or against certain choices.

However, bias is often implicit. That’s where the decision maker does not take steps to protect the process from bias, and then unwittingly makes biased judgments. In fact, they might be trying their best to make the most accurate possible decision. But, because they failed to take steps to protect the structure of the decision-making process from bias, the process leads to undeniably biased conclusions. To prevent bias, any process must be structured to address both deliberate and unintentional bias.

The specific patterns that lead to irrational decisions are called [cognitive biases](#) by behavioral and cognitive scientists like myself. As I describe in [my books](#), cognitive biases refer to dangerous

judgment errors that stem from our [evolutionary background](#) and the structure of our minds. Our brains are adapted for the savanna environment, not the modern environment, and thus our mental processes tend to make systematic errors in the modern world.

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Fortunately, scientists have recently found effective techniques to overcome such biases using the practice of [debiasing](#). Any procurement process can be protected from bias by integrating such techniques.

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Common Biases in a Procurement Process

You won't be surprised that the first step to addressing bias in procurement involves learning about cognitive biases. After all, without knowing about the specific ways that our minds lead us astray, procurement officials will be unable to prevent biased decisions.

One of the biggest cognitive biases in procurement is known as the **confirmation bias**. This mental blindspot causes procurement officials to look for information about applicants that confirms their initial beliefs and assumptions, and ignore information that does not. The problem is obvious: the initial beliefs and assumptions might turn out to be wrong. If procurement officials could just rely on their initial intuitions, we wouldn't need a procurement process at all.

A related mental blindspot is known as the **belief bias**, which causes us to evaluate arguments - or applicants - based on our pre-existing beliefs about their quality rather than the facts. Thus, a procurement official who likes an applicant - or dislikes an applicant - may award a contract based on that initial judgment without considering the details of the application.

Another dangerous judgment error, the **anchoring bias**, causes our minds to be anchored to the initial information we have about a topic. That's why it's critical to arrange the procurement process in such a way that initial information about applicants does not favor any specific applicant. Likewise, the belief bias would cause procurement officials evaluating bidders to treat the first application as a baseline when considering all other applications. That's why it's so important for different evaluators to assess applicants in a different order.

The **availability bias** causes us to look for information that is most easily available in our memory. Having clear criteria that reminds us of additional information that we need to address offers one way to help mitigate this problem.

The **halo effect and horns effect** pose particular dangers for non-blinded procurement, in other words, when the evaluators know the identity of each applicant. The halo effect refers to the fact that

when we like a certain characteristic of an option, we will tend to have too-favorable views of the option as a whole without realizing it; the horns effect refers to how when we have a negative perception of one characteristic of an option, we will tend to have too-negative views of the option as a whole. If we know the identity of certain applicants, we will then let our impressions of their characteristics sway the outcomes.

Biases Affecting Group Decision-Making in a Procurement Process

A particular danger for group-based decision-making in procurement, such as [consensus scoring](#), is the phenomenon known as [groupthink](#). This concept refers to the opinions of people in a group coalescing around the perspective of the most powerful person in the group. Groupthink is driven by a desire for consensus among a group of people, where there are some people with more power and some with less. It often leads to a biased outcome due to unintentional (or sometimes intentional) peer pressure effects, where some evaluators may have hesitations about the beliefs of those with more power but agree for the sake of keeping the peace.

A related problem is called the [authority bias](#), people's tendency to submit to those they perceive as having authority. If there is a source of authority in a consensus meeting, such as an evaluator who is also a high-level executive, or the facilitator of a consensus meeting, this authority may powerfully sway the evaluators and lead to a biased outcome.

Many Procurement Officials Are Deliberately Indifferent to Bias

If you [Google](#) “[cognitive biases](#),” you'll find over 75 million results. Despite the extensive information widely available about cognitive

biases, the procurement officials, in the case of the over \$20 billion Medicaid contract award, failed to take even the most basic steps to address them, such as learning about these cognitive biases.

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The state Department of Medicaid hired a well-known consulting company as experts to facilitate the procurement process. Two staffers from the consulting company, Jane and Doe, served as the key facilitators.

Jane, who led the consensus meeting and served as the lead principal on the contract, was asked about her expertise in a deposition. She described herself as an expert with substantial experience in “working on evaluation committees and different processes in which we have to deal with identifying bias.” Yet when asked whether she had any formal training in procurement evaluation, she said she did not. When asked what is “confirmation bias” – perhaps the most famous cognitive bias – she said, “I do not know what you mean by that.” When asked whether she had any training in the area of bias, she indicated that she did not. Given her self-acknowledged lack of understanding of training in bias or even a basic understanding of fundamental concepts such as “confirmation bias,” how could she effectively protect the procurement process from either intentional or unintentional bias?

Perhaps her collaborator on the consensus meeting, Doe, had more expertise in addressing bias? Unfortunately not. In her testimony, she indicated that she neither consulted experts in bias, nor had she taken bias training. When she was asked about what anchoring bias refers to, she indicated she does not know, despite anchoring bias being one of the most dangerous threats to successful procurement. Similarly, asked about other cognitive biases, she indicated she could not define any of the ones she heard. Moreover, she indicated

that her consulting company has no policy of going back to the procurement process and checking it to see for any potential bias.

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Making the Procurement Process Free of Bias Is a Requisite to Prevent Bid Protests

Now, it's not that the procurement officials completely ignored bias. One evaluator, who also served as Medical Director for the State, testified that, for awarding \$20 billion in Medicaid funding, "removing bias would be another thing that's important"; and that the contract award "process was designed to be as objective as possible." A separate state employee who headed up the procurement process testified that "the entire [procurement] process was designed to prevent bias."

What they did was asking evaluators to sign a paper saying they weren't biased. They also asked evaluators not to have outside communication during the period of evaluation.

However, the lack of education about bias is a fatal flaw. If evaluators, facilitators, and other procurement officials don't know what they need to be protecting against, how can they protect against it?

Indeed, the bid protest lawsuit uncovered extensive bias in the procurement process - which could have been prevented with some education and interventions based on that education. The lack of concern with addressing bias cost the state Department of Medicaid dearly in the lawsuit that followed the contract award.

Conclusion

A "flawed selection decision" is among the top four reasons for sustaining procurement bid protests filed with the Government Accountability Office (GAO), yet the efforts of procurement officials

to protect procurement from bias are inadequate. Despite the intention of officials to make an optimum judgment, the outcome suffers from deliberate and unintentional bias, more specifically, cognitive biases. Recognizing these mental blindspots is the first step to preventing biased decisions. This list includes confirmation bias, belief bias, anchoring bias, availability bias, halo effect, and horns effect, among others. Likewise, consensus scoring and authority bias can lead to a biased outcome in group decision-making in a procurement process. Despite this information being readily available, even consultants hired by states to facilitate the procurement of contracts, such as Medicaid, often lack awareness and formal training in evaluating and identifying bias in procurement. Undoubtedly, this lack of understanding on the part of officials makes procurement contracting susceptible to biases, which could otherwise have been prevented.

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Prevent Costly Procurement Disasters: 6 Science-Backed Techniques For Bias-Free Decision Making

Dr. Gleb Tsipursky Contributor 

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A biased bid selection process represents one of the biggest threats for procurement officials. Such bias leads to a bad selection decision for a government contract, wasting taxpayer money.

Moreover, it may lead to a procurement bid protest. The Government Accountability Office (GAO) [put out a report](#) in 2017, which found that a “flawed selection decision” was one of the top four reasons for successful bid protests - and over 22% of bid protests succeeded that year.

So how should procurement officials protect their procurement selection process from bias? Doing so requires a basic grasp of behavioral science research on [cognitive biases](#) and how to [defeat them](#).

What Do Lawyers Working on Bid Protests Say About Bias?

In 2021, the US Congress [commissioned](#) a bid protest study at the Defense Department [referencing](#) the work of [Dr. Christopher Yukins](#), a professor of procurement law at the George Washington University Law School. When I interviewed Dr. Yukins about the future of procurement and bid protests, he told me that “governments clearly benefit from a shift to risk mitigation” so as to address bias, including treating bid protestors as whistleblowers bringing attention to procurement risks. Yet, he also told me that “government lawyers don’t want to shift” to this mindset and legal strategy, because “it will result in more protests.” However, given the push by Congress, that shift may be inevitable.

That’s the perspective of a highly-respected academic deeply involved in formulating policy and advising Congress. What about practitioners in the trenches?

[Jason Richey, Partner, K&L Gates LLP](#), has a particular perspective due to his extensive experience in state and local bid protests, which differs from lawyers focusing on federal-level bid protests. He told me that in his experience, there’s a common bias by

evaluators in favor of the incumbent whom they know well and are predisposed to like. In other cases, he sees biases by bidders who wined and dined the evaluators, creating a favorite going into the event that manifests in the scoring. Another problem comes due to groupthink in the scoring process, when some powerful individual or individuals among the evaluators pushes the group of evaluators toward or away from a certain bidder. In fact, he says he saw biased procurement so much that it “make me sick as an American,” because the same thing goes on in state after state and locality after locality. To fix the system, Richey argues that we need much more transparency and clarity about the RFP and the scoring in the bid process. He also calls for having procurement be handled by professional procurement evaluators instead of the agency issuing the RFP; having professionals handle it reduces the opportunities for cognitive biases coming from the agency’s pre-existing relationships with bidders and unconscious prejudgments of various bidders. He says that a big problem is government officials in charge of procurement being hired by companies who bid on government contracts, and highlights the benefit of a cooling-off period to not allow companies who made such hires to bid on government contracts for a year after the hire.

At the federal level of the Government Accountability Office (GAO) or the Court of Federal Claims, the situation is more tricky. According to [Kevin Barnett, Co-Chair of Government Contract Claims & Appeals Team, PilieroMazza LLP](#), “the discussion of bias” is best used to “amplify other protest arguments. For example, it may bolster an argument that the Agency overlooked information or may provide the necessary nudge to show that the Agency favored one proposal’s benefit more favorably than another proposal’s benefit.” But just an accusation of bias by itself would not be effect: “the bias argument would need to be complementary to another viable protest argument to make a difference.” That’s

because, according to Mr. Barnett, the “deferential standards used by GAO and the Court of Federal Claims are inconsistent with examining the unintended biases that may have influenced the decision and attempting to untangle those biases.”

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According to [John R. Herin, Jr., Partner, Fox Rothschild LLP](#), the key to making a case for bias in bid protest involves a complete and detailed review of the request for proposals, which may reveal “that the way the government staff put together that particular procurement was inherently (unconsciously) or purposely intended to generate a predetermined or ‘biased’ result.” As part of this assessment, it’s important, according to Mr. Herin, to involve an “expert witness in the above described review and analysis process to assist in the identification of subtle and not so subtle ways that the government agency staff at issue may have drafted the procurement vehicle in such a way to seek a particular outcome (unconsciously or consciously).” The increased recognition of the danger of cognitive biases for procurement provides a precedent: “the more there are reported cases where courts determine the presence of cognitive bias in procurement disputes the more widespread the use and reliance of expert witnesses in this area will become.” As a result, “more government agencies are likely to move away from ‘loosie goosey’ procurement standards to more objective standards thereby – hopefully – reducing the number of bid protests that assert cognitive bias.”

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To prove the presence of bias requires “a methodical review of record, especially the proposals, to establish that the procurement team scored/rated the proposals differently for substantially similar features,” according to [Tara D. Hopkins, Government Contracts Attorney, K&L Gates LLP](#). To make the case for bias, it helps to have a [litigation consultant with a PhD level analysis](#) that would work with the plaintiff’s attorney “to establish the problem in the procurement, such as bias, not only occurred, but that the problem changed the outcome, to their clients detriment.” Ms. Hopkins highlights how, until government agencies require “training for cognitive biases for their procurement officials, bid protest allegations for failure to remain impartial will continue to be a regular occurrence at GAO and the U.S. Court of Federal Claims.”

The structure of the RFP is crucial to determining the success of bid protests and accusations of bias, according to [Trent Cotney, Partner & Construction Team Leader, Adams and Reese LLP](#). That’s because “Bid standards are normally delineated in advance including the process and procedures for selection. By participating in the process, bidders tacitly agree to the selection criteria.” This makes it really important to assess the RFP and challenge it before engaging in the bid process. Regarding bias, a “standard used to determine if a bid award is improper is if the agency acted in an “arbitrary and capricious” manner,” which can result from bias. But

if “the procurement officials adhered to the stated selection criteria, a court would be hard-pressed to overturn a decision absent some overt evidence of fraud, pecuniary bias, or similar egregious conduct.”

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To prove the personal bias of a former agency official with inside information regarding the procurement who joins one of the competing teams, [John Chierichella, Founder, Chierichella Procurement Strategies LLC](#) describes the need to “prove his prior agency role, his access to non-public procurement sensitive information, his participation on his new employer’s RFP team.” To prove bias in the development of the requirements for the RFP, “you will need to show the comparison of the RFP requirements to the competitor’s product/system and what it is that makes it difficult if not impossible for anyone else to compete realistically. You will also need to show that the exclusionary factor is not necessary.” In such cases, you’ll need to use expert witnesses “to demonstrate, e.g., how non-public information could afford an advantage to the recipient, how it might have influenced the proposal, where it can be detected in the proposal,” and so on.

[Nicole Pottroff, Equity Partner, Koprince McCall Pottroff LLC](#) says that “the ever-developing field of psychology has the ability to shine some light on bias in the procurement process. This is where litigation consultants and expert witnesses can provide substantial benefit.” As she notes, “when it comes to bid protest, we generally tell clients we like to take the shotgun approach: throw all reasonable grounds of protest at the reviewing body or court, and see what sticks.” As a result, “utilizing a litigation consultant or expert witness to make the case for bias—while I focus on other arguments—is a solid gameplan. It is one that puts the client in the best position for success in a bid protest world where the majority of protests do end in dismissal.” Given “the standard of review

being such a high bar for bias, it would be incredibly supportive to a plaintiff's case to have scientific support for such a protest ground."

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From the perspective of [Cy Alba, Partner, PilieroMazza, PLLC](#), there's a problem currently in the procurement and bid protest system of the GAO: "federal government employees are afforded a presumption that they always act in good faith (i.e., free from bias)." That helps explain why "many protesters eschew GAO and go to the US Court of Federal Claims as there you are more likely to get documentation to get to the truth of the matter and not simply have GAO run interference for an agency to cover up bias and impropriety." However, in Mr. Alba's view, "given what we now know of inherent biases," he "would strongly recommend that the 'presumption of good faith' be eliminated as a relic of a more naïve era and allow reasonable investigation into the biases and motivation into bid protests, especially where expert testimony indicates a likely problem of bias in the evaluation."

The trick with proving bias is tying bias to some failure in the process itself, in the opinion of [Danny Cook, Government Contracts Partner at DLA Piper LLP](#). It's important for a bid protest attorney to identify and read between the lines about bias to tie it to specific laws that were violated by government officials. In some cases, bias is evident when the RFP is issued, and it's important to spot this issue at the pre-bid protest if possible, since a pre-bid protest is an easier case to make and requires less of a burden on the lawyer to prove bias. Mr. Cook says that "the more companies feel that government decision making is plagued by bias, the more they will retreat from the system," which makes it especially important to address bias within the system for the sake of high-ROI procurement outcomes.

Tom Craig, Managing Partner, FH+H and Marlana Ewald, Partner, FH+H aligned with Mr. Cook's perspective on pre-award bid protests, as it's much easier to make the argument for bias in bid protests about the criteria of the RFP. For example, they often find that the amount of experience described as necessary is narrowly tailored as a requirement to fit only one firm. That's especially the case for sole-source justification bids. More broadly, they find that there are two kinds of bias frequently present: a bias for incumbents and a bias for big brands.

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The crucial thing to do in a bid protest is to show where government officials failed in their evaluation – either because the source selection authority was biased or for some other reason, in the perspective of Jonathan Perrone, Attorney, Whitcomb, Selinsky, P.C. Given that, “experts that understand bias could lend credence to attorney arguments by showing why/how source selection officials err in their evaluations based on those officials’ stated rationales.” That’s why Mr. Perrone says that “government agencies should train their source selection teams to understand and mitigate the negative effects of these kinds of biases.”

Dave Johnson, Partner at Vinson & Elkins LLP told me that “the general standard for being successful in a bid protest is proving that the agency decision makers made an unreasonable or irrational decision,” and thus “if a bid protest lawyer can demonstrate bias in this context she/he can have success in a bid protest.” On a related note, “sometimes you can see that agency personnel seem to want a result and in order to document/validate that, they bolster their decision with considerations that they did not inform the competitors about,” which “can lead to unequal treatment or the use of unstated criteria, both of which are possible winning arguments.” He says that the Court of Federal Claims and the GAO “will always give agency employees the benefit of the doubt, so the

key will be how compelling a case can be made for cognitive bias that overcomes the deference and demonstrates unreasonableness or irrationality.”

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Congress has recently taken action to address the deference, fortunately. [Jim McCullough, Head of Government Contracts Practice at Fried, Frank, Harris, Shriver & Jacobson LLP](#), pointed me to Congress passing at the end of 2022 the “[Preventing Organizational Conflicts of Interest in Federal Acquisition Act](#)”, P.L. 117-324. This act requires revisions to the Federal Acquisition Regulations concerning such conflicts of interest over the next 18 months, which currently address areas of bias such as “impaired objectivity” conflicts and “biased ground rules.”

Other lawyers, who preferred to be off the record due to ongoing cases where going on the record might impact proceedings, shared similar sentiments. One said “Your article points out a blind spot in government procurement. I think that government employees, like anyone else, are susceptible to implicit biases and cognitive bias.” And another highlights the importance of training in addressing cognitive biases: “I think more work would need to be done on the front end to educate agencies about cognitive bias and the need to correct for it. Once some agencies have taken steps to do that in acquisition planning, it will be easier for protesters to make the case that it is unreasonable not to.”

Medicaid Bid Procurement Process Protests Threaten Many Billions of Dollars

As an example of what to do and what not to do, let’s take a recent bid protest against a Medicaid insurance management contract award of over \$20 billion in a large state. I have personal knowledge of the case, as I had the privilege of participating as an [expert witness on bias in procurement bid protests](#) due to my

expertise as a behavioral scientist and consultant in debiasing procurement bias.

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While I will keep my client and role confidential, we have plenty of publicly-available information about the danger of bias in state Medicaid procurement awards. Such biased decision-making procurement processes scuttled billion-dollar awards and many months of effort on the part of procurement officials, along with many millions of dollars in legal costs.

For instance, in October 2020 a judge in Kentucky [overturned](#) its \$8 billion Medicaid contract award due to factors such as an award process that was “‘arbitrary’ and poorly documented,” with “multiple irregularities of the scoring and evaluations process.” Texas [had to redo](#) its own \$10 billion Medicaid award because “the scoring process was arbitrary and inconsistent.”

Six Key Debiasing Techniques to Protect the Procurement Process From Bias

One debiasing technique is having clearly-established, thoroughly-defined criteria for evaluation that are made available in advance to the applicants. After all, if you want a process that is transparent, unbiased, and fair, and gets the best possible applications, you will want to help applicants do their best to address the criteria.

Unfortunately, in the case of the Medicaid procurement where I ended up participating in the bid protest lawsuit, the criteria were very broad and vague, namely “methods of approach,” “capability,” and “experience.” They’re not simply confusing for the bidders: they’re confusing for internal stakeholders in the procurement process as well. For example, the Director of the Medicaid Department in the state said that the criteria of “experience” favors incumbent bidders in the state. By contrast, the official in charge of

Medicaid Procurement claimed that “experience” refers to having provided similar services, whether in the state or outside of it. And another evaluator indicated he would give more points to providers who had experience outside the state - directly opposed to the idea of incumbency. This confusion is the very definition of failing to protect from bias.

Another debiasing technique is having a blinded process where the evaluators don't know the identity of those they are evaluating. This does not mean that the applicants need to hide their capabilities, just not mention their name in the applications.

Given everyone in the Medicaid procurement process knew who the applicants were, anyone could sway the process based on bias. It would have been prudent for procurement officials to reduce their legal liability by having a blinded process. After all, they were not supposed to consider the identity of the bidding insurance companies, just their capacity based on what they submitted in the proposal.

A third debiasing method involves implementing “[enhanced consensus scoring](#).” After individual evaluators rate each bid, there needs to be some way of integrating the scores. Simply adding them up removes the possibility of addressing potential bias by individual evaluators.

To address this, some procurement officials like to hold a [consensus scoring](#) meeting where all the evaluators discuss their scores and are encouraged to reach a consensus. This method works poorly, as it is vulnerable to the phenomenon known as [groupthink](#). This concept refers to the opinions of people in a group coalescing around the perspective of the most powerful person in the group. Groupthink is driven by a desire for consensus among a group of people, where there are some people with more power and

some with less. It often leads to a biased outcome due to unintentional (or sometimes intentional) peer pressure effects, where some evaluators may have hesitations about the beliefs of those with more power but agree for the sake of keeping the peace. We had clear evidence that the Medicaid procurement process consensus meeting suffered from groupthink.

Much better is the **enhanced consensus scoring** approach. In this technique, only outliers - especially high or low scores - are discussed. Importantly, evaluators are not pressured to come to a consensus and necessarily change their scores. Instead, the enhanced consensus scoring meeting is an opportunity for all to share their opinions, and then evaluators can change their scores or not, as they wish. This type of scoring process balances reducing bias due to individual variance between evaluators and minimizing the problem of groupthink.

A fourth debiasing technique is having clear evaluation records. That includes individual evaluators justifying thoroughly the reasons for giving a score on the individual assessment component. Having written justifications forces evaluators to thoroughly consider their own reasoning and defend it against potential observers, which helps minimize the biases described above. That also includes a thorough recording of the deliberations at a consensus meeting. Again, such recording leads both evaluators and facilitators to consider potential external observers and thus minimize biases.

Unfortunately, the Medicaid procurement officials failed to keep records, making them more vulnerable to legal action. Recall that failing to keep clear records constituted one of the reasons for overturning the Kentucky Medicaid award.

A fifth basic protection is having diverse external evaluators, rather than evaluators who: 1) belong to the same organization; 2) especially not those who belong to the organization making the request for applications; 3) and you want to avoid at all costs evaluators who were involved in formulating the questions. However, the Medicaid procurement process failed on all three counts.

A sixth basic protection is ensuring that no key stakeholders have any material conflicts of interest with any of the applicants. The potential for self-serving bias and belief bias are evident.

Yet the state's Director of the Department of Medicaid held stock in some of the insurance companies that bid for the award. And the consulting company hired to facilitate the bid had business dealings with some of the bidding insurance companies. Ironically, this very circumstance had led to successful bid protests against Medicaid awards in other states that hired this consulting company.

Conclusion

Don't repeat the mistakes of the state Medicaid procurement officials that put an over \$20 billion award and a year-long procurement effort under legal jeopardy. Protect yourself in advance from the kind of contract award debacles that scuttled the Kentucky and Texas Medicaid awards. The small effort required to put in the six debiasing techniques will help protect you against the calamity of a successful bid protest. These protections will also minimize the likelihood that any bidder will even try to launch a protest, because you can demonstrate how you followed evidence-based, science-based best practices to address any potential source of bias.

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