

Government of Newfoundland and Labrador

# Guide to Public Procurement for Public Bodies

Public Procurement Agency

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# INTRODUCTION

## PURPOSE OF GUIDE

This document provides guidance to public procurement activities of Public Bodies in Newfoundland and Labrador covered under the Public Procurement Framework, including an overview of related responsibilities and the tools and methods that can be used to procure for best value. The Guide to Public Procurement for Public Bodies (the “Guide”) is derived from the Public Procurement Framework, which includes:

- (a) The Public Procurement Act (the “Act”)
- (b) Public Procurement Regulations (the “Regulations”)
- (c) Public Procurement Policy (the “Policy”)

## ROLE OF PUBLIC PROCUREMENT AGENCY

The mandate of the Public Procurement Agency (PPA) is to provide oversight and guidance for the procurement activities of all Public Bodies. In addition, the Agency leads operational procurement activities on behalf of Government Departments.

The Chief Procurement Officer (CPO) is responsible for administering the agency, supervising the acquisition of commodities, developing and publishing general policies for the procurement of commodities, maintaining oversight of the procurement activities of Public Bodies, and a number of other duties outlined in the Act.

## PROCUREMENT RESPONSIBILITIES OF PUBLIC BODIES AND OFFICIALS

### CODE OF ETHICS

All public officials involved with or responsible for procurement must adhere to the following Code of Ethics as outlined in the Public Procurement Policy:

- (a) **Honesty/Integrity**  
Maintain a high standard of integrity in all business relationships. Honesty, care and due diligence must be integral to all procurement activities. Public officials must, in the discharge of their duties, act in a professional manner and make decisions with the best interests of the organization in mind without consideration of personal gain.

- (b) **Equality**  
Provide fair and equitable treatment to all suppliers. All suppliers must be provided with the same information and public officials must not impose any personal bias or prejudices in their decisions. All actions taken will be impartial and based on the merits of the matter. Purchasing documents must not contain any unnecessary bias in specifications, terms and conditions or evaluation criteria.
- (c) **Professionalism**  
Foster the highest standards of professional conduct. Respect must be demonstrated to each other. Individuals must not engage in any activity that may create a conflict of interest, such as accepting gifts or favors, providing preferential treatment or publicly endorsing suppliers or products. Public officials must maintain strict confidentiality in their procurement activities and should continuously work to improve their procurement knowledge and skills to promote leading edge procurement practices.
- (d) **Accountability/Transparency**  
Ensure procurement activities are open, transparent and accountable. Purchasing activities must be conducted in a fair, consistent, and transparent manner with a view to obtaining the best value for public money. Public sector resources must be used in a responsible, efficient and effective manner. Public officials must act in such a manner that will bear the closest of public scrutiny.
- (e) **Compliance/Conformity**  
Comply with all applicable laws, regulations, trade agreements, policies and procedures and not engage in any activity to circumvent the clear intention of the law. All activities should respect the principles of ethical business practices. All duties and responsibilities must be performed in an independent manner without any undue pressure or interference.

## COMPLIANCE WITH PUBLIC PROCUREMENT FRAMEWORK AND TRADE AGREEMENTS

The procurement activities of Public Bodies in Newfoundland and Labrador must comply with a number of national and international trade agreements, including the Canadian Free Trade Agreement (CFTA), the EU-Canada Comprehensive Economic Trade Agreement (CETA), and the Canada-United States-Mexico Agreement (CUSMA), among others. Accordingly, the Public Procurement Framework is largely reflective of these commitments and responsibilities, most notably in its presentation of estimated value of procurement thresholds above which an open call for bids is required.

## DOCUMENTING AND REPORTING PROCUREMENT ACTIVITIES

Public Bodies in Newfoundland and Labrador are required by legislation to document and retain records for all phases of the procurement process. This includes records pertaining to each phase of the procurement, including requirements gathering, solicitations, amendments, submissions, evaluations and awards. The procurement record creation and retention process will assist a Public Body in the pursuit of best value procurement and increase the transparency and accountability of procurement decisions.

The Public Procurement Framework also prescribes certain reporting responsibilities to Public Bodies related to procurement activities. Although the specific requirements vary for each type of procurement activity, generally Public Bodies are responsible for reporting open call notices, significant awards pursuant to open calls or limited calls, situational exceptions excusing the otherwise requirement for an open call, significant change orders and delegations of purchasing authority.

## OBTAINING BEST VALUE

The Public Procurement Framework requires a ‘best value’ approach to procurement. This requires Public Bodies to identify and consider all factors that may contribute to determining to a best value solution, rather than simply the up-front price. This guide will describe best-value procurement and provide a stepwise approach for a Public Body to integrate best value concepts into its procurement activities.

## WHAT IS BEST VALUE?

The Public Procurement Act defines best value as the best balance of cost, quality, performance and support, as achieved through a transparent, efficient and competitive procurement process using clear and fair evaluation and selection criteria. While up-front price will always remain a fundamental component of any public procurement, a best value approach requires consideration of other contributing factors (i.e., total lifecycle costs, warranty, qualitative factors, etc.) when evaluating supplier submissions.

### *Understanding Procurement Needs*

The Public Procurement Framework both requires Public Bodies to pursue best value and provides the flexibility to define best value in light of each procurement separately, according to operational needs. Accordingly, the first step in defining ‘best value’ is to understand the issue identified to be resolved by procurement activity. Understanding the issue requires consultation with subject matter experts, typically those persons within the organization closest to the issue at hand. Consultations with parties outside the organization or supplemental research may also be required.

### *Understanding Context*

Best value can also be defined, in part, by the situational conditions and constraints to which the procurement is subject. Organizational constraints pertaining to deadlines, finances, and human resources can all legitimately contribute to a Public Body's definition of best value. Similarly, all Public Bodies existing within a broader set of constraints pertaining to legislative, regulatory, policy and trade agreement requirements.

### *Focusing on Outcomes*

A Public Body's operational definition of best value can also be focused on designing a results-based procurement. In situations where the Public Body is unclear of the 'how', best value might best be realized through procurements that encourage innovation and flexibility and judge suppliers' submissions at the outcome-level. Rather than pre-defining and procuring for a specific solution, Public Bodies can instead define the issue to be resolved or desired end state, allowing suppliers to submit innovative solutions.

### *Efficiency in Procurement*

Another aspect of best value includes exploring opportunities to participate in group purchasing with other Public Bodies or jurisdictions. In Newfoundland and Labrador, a Public Body, with the approval of the Lieutenant-Governor in Council, may establish public-private partnerships; use buying groups or adopt another alternative procurement approach to acquire commodities.

Efficiency can also contribute to best-value through a Public Body selecting the procurement tool that will most easily and efficiently complete the procurement. The procurement of a simple commodity is not necessarily best served by the same procurement tools used for more complex commodities and/or evaluations.

### *Lifecycle Costs*

Historically, public procurement has been focused on initial purchase price as the primary measure of cost-effectiveness. A best-value approach to procurement may include analyses of total lifecycle costs. Lifecycle costing is a cost-effectiveness analysis that considers not only the initial purchase price of an acquisition, but all costs related to that acquisition through its lifecycle, including maintenance costs, operating costs, disposal costs and residual value.

## WHAT DOES BEST VALUE LOOK LIKE?

A procurement is undertaken to satisfy a need. A best value procurement approach identifies the optimal solution to meet that procurement need. In theory, the factors above would contribute to each procurement having its own operational definition of best value. In practice, some common factors that contribute to the definition of best value for many procurements include:



- quality and characteristics of the goods and services required;
- sustainability of potential solutions to procurement needs;
- efficiency and timeliness of procurement processes;
- degree of innovation and creativity sought/permitted by the solicitation;
- fairness and reasonableness of required specifications;
- fairness and validity of evaluation processes;
- organizational timelines and contextual constraints;
- supplier experience and performance history;
- quality of supplier personnel assigned to project teams; and
- risk management and safety-related factors.

# PART ONE: PROCUREMENT DESIGN AND EVALUATION

## ACHIEVING BEST VALUE IN PROCUREMENT DESIGN AND EVALUATION:

1. Identify and Document Need
2. Plan Procurement
3. Choose Procurement Tool
4. Build Evaluation
5. Write Solicitation
6. Issue and Manage Solicitation
7. Conduct Evaluations

The following sections provide an overview of each of these steps with references to where you can find further details within the guide.

## STEP 1: IDENTIFY AND DOCUMENT NEED

The first step in any procurement process involves a discussion between the procurement lead and the business lead (i.e., the procurement team) to define the scope and characteristics of the commodity to be procured. The Public Procurement Act defines commodities as goods, services, public works and lease of space. The business lead is responsible for defining the need, including description of the commodity sought and its intended purpose or function within the Public Body. From there the business and procurement leads work together to build the required specifications, including what is the need, why is it needed.

### WHAT IS THE PROCUREMENT NEED

Often the procurement official is not the end user of the commodity being procured. More frequently, a Public Body seeks to procure a commodity that is required to fulfill its mandate, such as sustaining a public program or providing a public service. As a result, procurement officials must work closely with, and respond to the needs of, their colleagues who work in other parts of the organization. Effective collaboration and exchange of information between procurement officials and end-users of a commodity is essential to successful procurement.

Often, the end users of a commodity are best able to describe the intent of the procurement, or precisely what need the pending procurement will satisfy. End users' first-hand experience and knowledge will be critical to developing solicitation documents, in particular the development of specifications.

### DEFINING AND DOCUMENTING SPECIFICATIONS

It is critical that care is taken to clearly define and document the operational needs behind a procurement. Any errors or omissions at this stage will impact the success of the procurement, including the price and quality of the proposals received. PPA is available to provide guidance to Public Bodies on how to ensure procurement requirements accurately reflect their needs.

#### *Technical Specifications*

Some commodities sought by purchasing organizations can be precisely described by set of characteristics or features that define it and differentiate it from other commodities. The characteristics that collectively describe "what a commodity is" are typically referred to as technical specifications. Technical specifications are most commonly presented in solicitations for simple goods and service and can be either qualitative (i.e., red, blue, etc.) or quantitative (i.e., 1500kg weight, 20L capacity, etc.).

### *Functional Specifications*

In most cases, best value procurement is better served by specifications that describe the capabilities of a commodity to fulfill a true business need or objective. This type of specification, often referred to as a functional specification, describes “what a commodity can do”. Like technical specifications, functional specifications can also be either qualitative (i.e., can be paired with a smartphone) or quantitative (i.e., Bluetooth connectivity to 50m).

### *Performance Specifications*

Less often but no less importantly, a purchasing organization may be tasked with procuring a complex commodity that cannot be sufficiently defined by “what a commodity” is or “what it can do”. In these situations, technical specification and functional specifications fall short of defining the business need, if the procurement team is able to create specifications to begin with.

In these situations, purchasing organizations often rely on performance specifications. Performance specifications described the outputs or outcomes required of the commodity. Performance specifications are most often associated with procurement of services and public works where the purchasing organization aims to limit restrictions on the types of supplier-proposed approaches, insofar as the procurement objectives are clearly communicated and completed.

### *Combining Types of Specifications*

Procuring entities may also wish to use a combination of technical, functional and performance specifications. This approach allows suppliers to showcase innovative approaches and solutions while ensuring that desired outcomes are achieved. PPA is available to assist Public Bodies in determining the best approach given the need to be addressed.

As projects become larger and more complex, PPA recommends that procuring entities identify the need they are seeking to address and then leave the potential solution more open-ended. In these instances, if procuring entities impose strictly defined solutions, then the risk of the outcome being unsuitable rests with the Public Body. Increasing the potential range and flexibility of solutions results in suppliers assuming a reasonable level of risk while increasing the likelihood that the solution will be effective.

## CRITICAL ANALYSIS OF SPECIFICATIONS

The key to choosing effective specifications is a balancing exercise to determine the optimal level or degree of precision. Including too many specifications, or specifications that are too precise, will narrow the scope of suppliers capable of satisfying those specifications. Normally, this approach will result in decreased competition and higher than optimal costs. In contrast, a Public Body that prescribes too few specifications, or prescribes specifications that are too vague, casts the net too wide. In doing so, the scope of compliant products may be unintentionally expanded to include those that do not meet the real needs of the organization.

When finalizing the set of required specifications, the procurement team must carefully consider the impact of each on the outcome of the procurement. This analysis can be as simple as a want vs. needs analysis applied to a list of product features or as complex as multi-year financial modelling to establish fuel-efficiency performance floors for fleet vehicles. Generally, as the set of specifications becomes larger and more specific, the set of suppliers capable of submitting a compliant submission decreases.

### *Technical versus Functional Specifications*

Most solicitations present a combination of both technical and functional specifications; however, some specifications can be expressed both ways. In those situations, it is recommended that the purchasing organization defer to expressing the specification as functional. In most cases, functional specifications are superior as they are more clearly supported by business needs and, in many cases technical specifications are best guess attempts at quantifying functional business needs.

To illustrate, consider the procurement of a pickup truck intended to pull a 500kg cargo trailer. This business need could be represented by quantitative technical specification, such 300 horsepower, as horsepower is a widely recognized and easily evaluated specification. Further, the horsepower and towing capacity of a vehicle are understood to be related. Nevertheless, purchasing organizations should avoid choosing technical specifications that are indirect (proxy) measures of a functional requirement when alternative true functional requirements (i.e., towing capacity of >500kg) exist. The same shortcomings apply to setting specifications for fuel tank capacity as a proxy for driving distance per tank. The capacity of a fuel tank proves little about a vehicle's functional capabilities because the functional derivatives of fuel tank capacity are impacted by many other variables.

### *Brand Names and Related Issues*

Brand names are a special type of qualitative technical specification and their use as specifications should be limited and avoided completely, wherever possible. In the same way inferior technical specifications are chosen over true functional specifications, brand name specifications are sometimes chosen over more valid alternatives such as technical and/or functional specifications.

In many, but not all, cases, brand names are chosen by procurement teams as a simple and expedient alternative to taking the time to identify and document a commodity's true specifications. This shortcut comes at a cost to both fairness for the supplier community and price competitiveness yielded by the purchasing organization.

When brand names are unnecessarily substituted for specifications, it can decrease the pool of suppliers eligible to make a submission. If a purchasing organization seek to procure a can of cola, specifying a brand name, especially a brand name that may be influenced by personal preference, can have a significant impact on the depth of the supplier pool.

Further, specifying brand names can negatively impact price competitiveness. Products offered by top-branded manufacturers are typically more expensive than lesser-known or generic branded-manufacturers. Unnecessarily substituting brand names for specifications can also result in a fairness issue between potential suppliers where manufacturers have established sole distributor contracts for geographic regions.

In the rare case where brand names must be deployed as part of, or in lieu of, superior technical specifications, Public Bodies should attempt to mitigate any negative impacts to the ensuing competitive bidding process. For example, Public Bodies may specify that equivalencies may be considered for brand name specifications – insofar that a fair and consistent process for establishing the evaluation of equivalencies is set out in the solicitation.

## STEP 2: PLAN PROCUREMENT

### CONSIDER POTENTIAL SOURCES / SUPPLIERS

Documenting specifications precisely will help the procurement team and end users better understand the existing procurement need. When stakeholders have a clear understanding of procurement needs, they are better positioned to consider potential sources from which the commodity can be acquired.

Before any new solicitation activities are undertaken, the purchasing organizations must determine if a supplier has already been contracted to provide the commodity in question. Particularly in larger organizations, it is possible that not all business units are aware of the procurement activities and contracted responsibilities undertaken by other business units. Similarly, a purchasing organization may have collaborated with another organization to meet its procurement needs. In the context of Newfoundland and Labrador, a Public Body may have delegated its purchasing authority to another Public Body through participation in a group purchasing Standing Offer Agreement (SOA).

If a Public Body determines that it is not under contract for a given commodity or contracted via group purchasing SOA, it must next identify the internal protocols and approvals required to set a procurement in motion. All required approvals should be sought and confirmed as granted prior to proceeding with any procurement. A purchasing organization that proceeds to market without the required approvals in place (i.e., executive greenlighting, adequate financial resources/encumbrances) adds unnecessary risk to the procurement process.

#### *Standing Offer Agreements*

Standing Offer Agreements are contracts with suppliers that cover the supply of a particular commodity for a set period of time. The solicitation that gives rise to an SOA will details the specifications for the commodity and seek bids from suppliers that cover the period of the agreement.

In most cases within the NL jurisdiction, group purchasing SOAs are prepared and implemented by PPA staff. Typically, PPA will formally invite other Public Bodies to participate through a delegation of purchasing authority agreement. As the name suggests, a delegation agreement permits a Public Body to delegate its procurement authorities and responsibilities to another Public Body.

### *Delegation of Purchasing Authority*

Any Public Body is eligible to delegate its procurement authority and responsibilities to any other Public Body. Through the delegation process, it is possible for Public Bodies to collaborate on procurements such as SOAs to consolidate their purchasing power.

Delegation is formal process requiring formal invitation and acceptance through a Delegation of Purchasing Authority Form, available through the PPA website. Given the timelines and deadlines associated with the procurement process required to stand up a SOA, it is important that officials in receipt of an invitation to delegate respond by returning the complete form in a timely manner.

As noted above, delegations of purchasing authority typically consolidate the commodity demands of a group of Public Bodies. A Public Body in receipt of delegations is responsible for calculating the estimated value of the ensuing contract, including the requirements of all the other participating Public Bodies. Similarly, a solicitation seeking to procure on behalf of a group of Public Bodies must reflect the true scope of work or estimated quantities required. For these reasons, the deadline for formal acceptance of an invitation to delegate normally precedes the original posting date.

In certain circumstances, a Public Body may receive an invitation to participate in a group procurement while it is under contract to another supplier for that commodity. In such cases, it is prudent to review the available commodities and agreement to identify whether it might better meet organizational needs in the future- during a subsequent open call.

Public Bodies are encouraged to participate in solicitations for SOAs for which they have received invitations. The economies of scale realized through group purchasing yield better pricing and create process efficiencies that contribute to achieving better value for money.

### EARLY SUPPLIER ENGAGEMENT AND CONSULTATION

If, after reviewing existing obligations and opportunities, a Public Body determines that it must go to market for a commodity, the importance of engaging the supplier community cannot be ignored, particularly for high-value procurements. The supplier community may offer insights into marketplace, including identifying new product and service solutions of which the Public Body may not be aware.

Supplier engagement activities can vary in their degree of formality, from publicly posted formal Requests for Information (RFI) to informal supplier engagement activities taking the form of group or individual discussion sessions. Choosing the optimal engagement forum will depend on the commodity and the supplier community. Formal RFI processes are most effective when little is known about the commodity or the potential supplier pool. Discussions groups are most effective where the supplier community is finite and well defined.

A Public Body should align its degree of pre-solicitation supplier engagement with the estimated value of the pertinent procurement. As estimated value increases, so does the optimal degree of supplier engagement.



### *Responsible Engagement*

The Code of Ethics requires Public Bodies to conduct procurement activities with honesty, integrity and equality and these responsibilities extend to supplier engagement and consultations. Accordingly, Public Bodies must ensure that any information gathered or exchanged during a supplier engagement activity are consistent with these values. Public Bodies can demonstrate these values though ensuring the same information is sought from and communicated to all suppliers; providing ample notice and equal opportunity to participate, including accommodations; and ensuring the information gathered through engagement is used in an impartial manner (i.e., maintaining competitive specifications).

This collaborative approach is a two-way street. To reciprocate the goodwill of suppliers that participate in engagement activities, Public Bodies be mindful of suppliers' required time and efforts. The engagement process is meant to be focused at a high-level and not meant to be used to obtain detailed solutions or proposals or to absolve a Public Body from its requirements gathering responsibilities.

### ESTIMATED VALUE

All the previous steps addressed in the procurement planning phase led to estimating the value of a potential procurement. In many ways, estimating value is the most important step in the procurement planning phase because a procurement's estimated value governs the responsibilities and procedures a Public Body must satisfy going forward.

#### *What is Estimated Value?*

Estimated value is an estimate of the contractual value of a commodity being procured, based on current market information and includes all forms of remuneration and costs expected to be incurred such as premiums, fees, commissions, interest and delivery charges, but exclusive of HST. In addition, where the procurement of a commodity results in a term contract, the estimated value includes the remuneration and cost incurred for the entire term of the contract, including potential extension years.

#### *How does Estimated Value Impact Public Procurement?*

Estimated value determines the applicability of certain procurement rules outlined under the Public Procurement Framework, as well as certain trade agreements to which Newfoundland and Labrador is responsible, such as CETA and CFTA. The Public Procurement Framework specifies certain thresholds for the estimated value of commodities, above which Public Bodies are obligated to perform an open call for bids.

### *Determining Estimated Value*

The estimated value of a procurement must be based on current market information. Procurement officials may use any reasonable and available means to determine a legitimate estimate, including performing research online, obtaining pricing information from suppliers in the marketplace, or through reference to a recent similar purchase, preferably through a competitive process. For more complex commodities, estimated value may be informed through Requests for Information or through professional consultation.

### *Requirements Splitting*

A Public Body is not permitted to split or underestimate requirements in order to avoid issuing an open call for bids. Once a legitimate estimate has been determined for a requirement officials must not divide quantities into smaller portions. If a procurement official identifies multiple requests for the same commodity, the requirements should be combined to take advantage of volume purchasing and achieve better value and ensure the appropriate process is followed.

## DETERMINING APPLICABLE THRESHOLDS

The Public Procurement Framework identifies four categories of commodities (goods, services, public works and leases of space) and a value threshold for each commodity type. The particular value for each threshold also varies according to the category of Public Body undertaking the procurement. Any specific confluence of commodity category type and Public Body type will yield a single dollar value threshold. If the estimated value of the procurement exceeds that threshold, the requirement to perform an open call for bids will be triggered.

If a Public Body's legitimate estimated value is close to the applicable threshold, Public Procurement Agency recommends performing an open call for bids. Despite a Public Body's best efforts to estimate the value of procurement, in certain situations it may not be possible. In those cases, the Public Body is required to perform an open call for bids in the same way as if the threshold had been exceeded.

Some commodities include a combination of goods and services, such as the supply and delivery of cleaning products. If a single procurement includes a combination of goods and services, the Public Body must first determine the relative proportion of estimated value attributable to each - before the applicable threshold can be identified. The applicable threshold will be defined by which commodity category is contributes the greater proportion of the total estimated value.

To continue the example above, a procurement for the supply and delivery of cleaning products might be broken down as goods: palette of oven cleaner (\$1,000) + services: freight for palette (\$100) for a total estimated value of \$1100. At this point, the Public Body would know the total estimated value and what proportion is attributable to each of the goods and services commodity categories. Accordingly, the estimated value of \$1100 would be applied against the goods threshold.

## FRAMEWORK RESPONSIBILITIES TRIGGERED BY THRESHOLDS

When, as a result of the estimated value of the commodity, an open call for bids is required of a Public Body, the Public Procurement Regulations set out several downstream procedural requirements for the Public Body, including:

- rules related to the posting and content of the Notice of Open Call for Bids;
- mandatory content for Open Calls for Bids;
- procedures to carry out public openings of bids; and
- procedures to carry out the supplier debriefing and compliant processes.

## CHOOSING THE OPTIMAL PROCUREMENT METHOD

The Public Procurement Framework requires that Public Bodies achieve best-value in the procurement of commodities through either open calls for bids or limited calls for bids. As presented above, the estimated value of the procurement governs if a Public Body has choice between procurement methods or if an open call for bids is required.

### *Open Call for Bids*

An open call for bids is a procurement method with two defining features, a public posting and a public opening. A public posting, or Notice of Open Call for Bids, is an open invitation from a Public Body for suppliers to submit bids to satisfy a procurement need. The Notice also describes the specifics of the commodity sought, the application and evaluation processes and any other terms and conditions.

The public opening is an open invitation to witness the opening of bids, the naming of respondents and, in some cases, the values of those bids. These two features make the open call for bids distinct from other procurement methods. As discussed above, performing an open call for bids is a requirement where the estimated value exceeds one or more applicable thresholds that trigger this responsibility. A Public Body, however, may choose to perform an open for bids for any procurement, even when the estimated value does not exceed a triggering threshold.

### *Limited Call for Bids*

If the requirement for an open call for bids is not triggered and a Public Body does not choose to proceed with an elective open call for bids, the Public Body is responsible to execute a limited call for bids to ensure best value. The Public Procurement Framework sets out two methods to satisfy a limited call for bids, obtaining three quotations or determining fair and reasonable price.

### *Obtaining Three Quotations*

Obtaining three quotations is the most common method to satisfy a limited call for bids and is self-explanatory. By soliciting and receiving compliant quotations from at least three different suppliers, Public Bodies are engaging in a competitive process to uphold best-value. Please note that *obtaining* quotations from three different suppliers is not the same as *soliciting* quotations from three different suppliers. To satisfy a limited call for bids in this way, the Public Body must be in receipt of compliant quotations from at least three different suppliers.

### *Valid Quotations*

Obtaining three quotations yields a fair competition only when those quotes represent the cost the same commodity. The commodity specifics must be held constant to ensure the price comparison is valid. Accordingly, in order for a quotation to be valid and contribute, at least in part, to satisfying the requirements for limited calls for bids, the quotation must be fully compliant.

Quotations that fail to meet procedural requirements (i.e. submitted past deadline), change the stated scope of commodities sought (i.e. quoted an unsolicited product, quoted some but not all products, quoted substitute products), change terms or conditions (i.e. cannot deliver by required date) or contain unexpected additional supplier conditions are not valid because they undermine a fair price comparison between suppliers.

### *Determining Fair and Reasonable Pricing*

In some cases, obtaining three quotations is not the most practical or efficient way to satisfy a limited call for bids. Purchasing coffee cream for the office kitchenette, a snow shovel from the local hardware store or a replacement charging cord for a smartphone are all examples where the value of efforts expended to seek and obtain three quotes likely outweigh the cost saving yielded through that competitive approach.

Accordingly, with respect to satisfying a limited call for bids, the Framework provides an alternative to obtaining three quotations – where the Public Body obtains determines fair and reasonable price based on obtaining one or two quotations supplemented by other information or procedures. For example, fair and reasonable may be determined by obtaining one quote when combined with a rotational approach to subsequent purchases or by comparing a single quotation to current catalogue or website advertised prices. The Public Procurement Policy pertaining to fair and reasonable price provides a more comprehensive set of methods that can be used to make a determination of fair and reasonable price.

### *PPA Preferred Approach*

For procurements where the estimated value falls below applicable threshold triggering the requirement for an open call for bids, yet remains significant (goods  $\geq$  \$10k, services  $\geq$  \$10k and Public Works  $\geq$  \$20k), it is preferred that Public Body attempt to obtain quotations from three different suppliers. This means that for commodities within this applicable range of estimated value, Public Bodies should attempt to obtain three quotations before considering any determination of fair and reasonable price. Further, for procurements that fall in this range of estimated value, a Public Body must document why obtaining quotations from three different suppliers was not feasible before moving forward with consideration of fair and reasonable price. If the Public Body determines that fair and reasonable price is satisfied, it must ensure the process for arriving at that decision is included in the procurement documentation.

## STEP 3: CHOOSE A TOOL

Choosing the optimal procurement tool is a critical step in the procurement planning process. Several factors will contribute to the decision, including the type of commodity sought; the type of contract desired, the type of evaluation required, the risks associated with the acquisition, and marketplace considerations. Public Procurement Regulations require Public Bodies to determine the appropriate procurement tool to ensure best value is received. PPA is available to advise procuring entities on the optimal approach to use given the needs and requirements of the project. Further PPA can provide procurement templates to Public Bodies that best match their planned approach.

### PROCUREMENT TOOLS

*Procurement tools are solicitations prepared by a purchasing organization and shared with suppliers for the purpose of receiving and evaluating submissions, making an award, and contracting to acquire a commodity. It is important to note that the list of procurement tools presented below is not exhaustive and there is no single governing taxonomy for these tools. Even more importantly, it is the content of a procurement tool that determines the ensuing obligations and prerogatives of suppliers and purchasing organizations, not the title of that procurement tool.*

#### *Invitation to Tender (ITT)*

For the period leading up to 2018, the ITT was the most common procurement tool used by Public Bodies to acquire commodities in Newfoundland and Labrador. Traditionally, ITTs have been used extensively for procurements where the evaluation of the commodity is limited to consideration of specifications set and price only. In contrast from the other procurement tools discussed in this section, the distinguishing feature of an ITT is its effecting (intentional or otherwise) of a transitional contract with all responsive suppliers which obliges the purchasing organization to award to the lowest-priced compliant bidder.

Accordingly, the determination of compliance for each bid received is of paramount importance to the ITT process. A purchasing organization that fails to award to the lowest compliant bidder, violates the unique transitional contract established on receipt of bids through an ITT process and may be subject to litigation.

As this transitional contractual relationship is established at the point of submission, the asks (ITT) and the offers (bids) are final and cannot be changed. Even minor deviations in a submission's form or content from the strictest interpretation of instructions provided in the ITT results in non-compliance. Any attempts by a purchasing organization to assist a bid into compliance during an ITT procurement could be deemed bid repair and create litigation liabilities.

Another defining feature of the ITT is its inherent limitations during evaluation. As discussed above, a purchasing organization is required to award an ITT based on the lowest-priced compliant bid, or more simply, the cheapest product that meets specifications. It is important to note that criteria other than specifications and requirements cannot be part of the evaluation process for an ITT, precluding any criterion where an evaluation team would provide a score. Some commonly used evaluation criteria that are incompatible with ITT include, evaluating suppliers' project team experience or the quality of a proposed project plan.

Otherwise, the ITT shares many characteristics with other procurement tools, including presenting a detailed description of the commodity sought and its set minimum requirements as well as defining the procedures and conditions for preparing and submitting bids and explaining how pricing will be evaluated.

A Public Body should consider using an ITT as the procurement tool when:

- the evaluation process is dependent on price and specifications only;
- the specifications, terms and conditions are 100% known and fit for purpose;
- the procurement requires suppliers to submit irrevocable bids;
- a bid bond is sought to secure the irrevocability of bids; and
- there are a large number of suppliers.

### *Request for Quotations (RFQ)*

The Request for Quotations is the procurement tool most similar to an ITT, however it differs in a single substantial way - namely the RFQ is a non-binding procurement tool. In contrast to the ITT, no contractual relationship is formed on receipt of submissions from suppliers. Instead, a contract is formed only when a contract is signed by the purchasing organization and supplier.

The increased flexibility of non-binding procurement is achieved by removing those elements of the ITT solicitation that could be interpreted as the purchasing organization creating obligations through the solicitation process, such as a bid irrevocability period and the accompanying bid bond.

As noted above, it is the content, rather than the title, of a solicitation that determines obligations and prerogative for both parties. If a purchasing organization issues an RFQ that contains binding obligations on responsive suppliers, the same contractual obligations will be triggered as if an ITT template had been used.

RFQs are best suited to the same types of procurements for which ITTs have been used. Generally, if the procurement of a commodity is best served by an evaluation of price and specifications only, an RFQ is the preferred procurement tool.

A Public Body should consider using an RFQ as the procurement tool when:

- the evaluation process is dependent on price and specifications only;
- a commodity has previously been procured via ITT; and
- bid irrevocability and bid bonds are not required (most cases).

### *Request for Proposals (RFP)*

The procurement tools listed above are recommended for procurements where a best value can be identified through an evaluation based on price and specifications only. For many commodities, however, best value simply cannot be identified through an evaluation process that is limited in this way. Procurements that seek to consider factors other than strictly specifications and price should use a Request for Proposals.

An RFP is typically chosen for procuring more complex services or public works projects. When the potential scope of evaluation is expanded, an accompanying responsibility to articulate the factors to be considered and procedures to be applied follows. At a macro-level, this usually begins with a relative weighting of price versus other factors, and then a subsequent enumeration of those other factors and a breakdown of the specific weight for each.

Many RFP formats also prescribe a contract negotiation period during which the purchasing organization and selected supplier can engage in dialogue about the final contract language in advance of signatures, or even subsequent stages of solicitation, submission and evaluation.

A Public Body should consider using an RFP as the procurement tool when:

- procuring complex goods and/or services;
- procuring more complex construction or public works projects;
- factors other than price and specifications will be evaluated; and
- negotiations will be part of the award process.

## PLANNING TOOLS

Planning tools are documents prepared by a purchasing organization and shared with suppliers for the purpose of gathering or conveying information only. They do not present an evaluation methodology and do not contemplate the purchasing organization making an award or contracting with a supplier. In most cases, a planning tool is used to exchange information pertaining to a future procurement.



### *Advance Contract Award Notice (ACAN)*

An ACAN is a public notice to the supplier community that a Public Body intends to award a commodity to a pre-identified supplier through direct award without a competitive procurement process. ACANs enhance the transparency of potential sole source / direct award procurements and aim to identify alternative sources of supply. The ACAN public notice presents the Public Body's rationale for the pending sole source, but also invites potentially unknown suppliers in the marketplace to suggest alternatives and to identify themselves and their capabilities.

A Public Body should consider issuing an ACAN when:

- only one supplier of a commodity is known to the purchasing organization; and
- the purchasing organization is less than 100% certain that no other suppliers exist for that commodity; and
- the purchasing organization is contemplating a sole source or direct award procurement.

No award can be made through an ACAN. Further, ACANs cannot be used to avoid conducting a competition via open call for bids where it is clear that more than one source of supply exists. If a qualified alternative supplier is identified through an ACAN process, a procurement process must take place.

### *Request for Information (RFI)*

A RFI is an information-gathering tool. A Public Body may issue an RFI to learn about the marketplace in advance of issuing a procurement solicitation, including new marketplace developments, product evolution, depth of potential supplier pools, technological change, or simply to gauge supplier interest in pending procurements.

A Public Body should consider issuing an RFI when it:

- suspects a significant change has occurred in the marketplace;
- is uncertain of capacity/interest of the supplier community;
- is uncertain of what commodity characteristics will meet its needs; and/or
- is unable to specify the requirements clearly enough for a solicitation.

No award can be made through an RFI as it does solicit bids or proposals. Accordingly, the language of an RFI cannot contemplate evaluations, awards, or pre-qualification for future procurements.

## STEP 4: BUILD EVALUATION

### PLANNING AN EVALUATION APPROACH

One of the biggest contributing factors in choosing a procurement tool is the type of evaluation identified as most likely to yield best value. As noted above, some procurement tools limit the types of factors that can be considered during evaluation. Best value is defined in the Public Procurement Act best balance of cost, quality, performance and support, as achieved through a transparent, efficient and competitive procurement process using clear and fair evaluation and selection criteria. It is the responsibility of the Public Body to consider each procurement separately when balancing these factors, identifying an evaluation plan and choosing the right procurement tool.

#### *Lowest-price Evaluations*

Lowest-price evaluations are relatively straightforward. The award is made to the supplier with the lowest-cost compliant submission. During such an evaluation, the procurement official is required to evaluate each submission's compliance with any process requirements and specifications presented in the solicitation. If the procurement official determines that a submission fails to follow these procedures or meet these specifications, the submission must be deemed non-compliant. Depending on the procurement tool chosen for a lowest-price evaluation (and its content) and the type of non-compliance(s) identified, the purchasing organization may have some flexibility to gain a rectification process to identify and remediate the submission.

#### *Multi-criteria Evaluations*

Multi-criteria evaluations involve significantly more planning and analysis than lowest-price evaluations. When factors other than price and specifications are required to identify best-value, the procurement team must clearly present in the solicitation exactly how these other factors will be used in the evaluation. These factors other than price and specifications are commonly referred to as rated criteria because the evaluation team is required to assign a score to each submission for each criterion.

In planning a procurement with a multi-criteria evaluation, the procurement team must first identify a set of criteria expected to be most predictive of best-value and assess the relative estimated contribution of each criterion. This exercise should yield a weighted set of rated criteria that informs proponents what will be measured and how important each criterion is compared to another.

Procedurally, a multi-criteria evaluation shares some of the steps of a lowest-cost evaluation. For instance, most multi-criteria evaluations also include an initial first-step review of submissions' compliance to process and specification requirements. After this point, however, the methodologies for lowest-cost and multi-criteria evaluations diverge. Rather than moving directly from compliance evaluation to rank-ordering submissions based on price, multi-criteria evaluations require an intermediate step where the procurement team completes an assessment of rated criteria before moving on to pricing.

### *Procurement Teams vs. Evaluation Teams*

To this point, the treatment of the procurement process has been limited to representatives of the procurement team, normally consisting of the procurement lead and the business lead. A discussion of multi-criteria evaluations necessitates the introduction of the evaluation team. An evaluation team is a set of individuals that represent the purchasing organization in evaluating rated criteria. The evaluation of rated criteria for complex commodities often requires subject matter expertise across many areas. Frequently, the business lead does not have subject matter expertise coverage for all rated criteria, so an evaluation team must be convened.

Generally, the business lead is best able, and most often responsible to, identify the optimal set of evaluators. Invitation to, and participation in, an evaluation team is governed by necessity not preference. As part of the Procurement Team, the business lead is responsible for identifying a team of evaluators who are capable of developing, deploying and interpreting the instruments chosen to assess rated criteria. Invitations should be issued judiciously, to the smallest number of people most qualified and willing to perform a valid evaluation. Invitations should not be extended to persons who do not bring essential evaluative capacity to the team.

Accountabilities exist within the evaluation team itself. It is the responsibility of the business lead to ensure that evaluators participate in only those parts of the evaluation for which they are qualified and prevent evaluators from participating or influencing criteria outside their scope of expertise.

## DESIGNING EVALUATIONS

The Public Procurement Framework sets expectations for the evaluations designed and conducted by Public Bodies, including fair and equitable treatment of respondents; implementation of objective criteria and evaluations that are free of bias and conflicting interests; and accountable decision-making that is transparent to all stakeholders. The Framework does not, however, provide or advocate a single stepwise process to design and execute evaluations.

Each evaluation must be designed to match the commodity sought and one single approach cannot yield best value for all procurements. Nevertheless, it may be helpful for purchasing organizations to structure their evaluation conceptually before putting pen to paper to draft any specific language around the processes that follow. A simple and recommended evaluation design that can be applied to a wide variety of multi-criteria procurements includes three sequential phases: mandatory requirements, rated criteria and pricing.

### *Mandatory Requirements*

Plainly, mandatory requirements are the must-do, must-have and must-show elements of the solicitations that communicate minimum expectations for submissions. As the name suggest, a mandatory requirement is non-negotiable and evaluated as pass or fail. Accordingly, it makes sense to evaluate mandatory requirements first, before any other phase of the evaluation.

For the procurement of goods, a solicitation's mandatory requirements may include minimum product specifications that define expectations for capabilities, size or warranty; and/or minimum service standards to govern processes such as ordering, delivering and invoicing those goods.

For the procurement of services, the mandatory requirements might relate to the expected processes and procedures used to fulfill a service; the responsiveness of contracted suppliers to perform the service; what types of activities are within the scope of the service; and/or what qualifications, certifications or insurance coverages are required by the supplier before performing the service.

For the procurement of public works and leases of space, mandatory requirements can be set to ensure suppliers' compliance to building and accessibility codes and legislation, the certified completion of training for worksite supplier employees, and/or project timelines and milestones.

Earlier in the procurement planning process, the procurement team would have identified all the required specifications for a procurement and applied a critical cost-benefit analysis to each requirement. That analysis would have already considered how the presence or absence of each specification could affect the competitiveness of supplier pricing and depth of potential supplier pools versus the suitability of the commodity eligible for award.

Little is required in terms of the evaluation design for mandatory requirements. They are yes/no, pass/fail by design. A submission that satisfies all of the mandatory requirements presented in a solicitation is often described "compliant", while a submission fails to satisfy even one mandatory requirement is described as "non-compliant". In most cases, non-compliant submissions are not eligible for award. Exactly how a supplier's submission would evidence compliance with mandatory requirements and how a purchasing organization intends to evaluate such compliance is less a matter of evaluation design than solicitation writing - to be covered in a later section.

As mandatory requirements are derived from specifications, they give rise to the same risks presented previously. In this way, a solicitation that presents too many mandatory requirements may inadvertently compete, while a solicitation that presents too few mandatory requirements may not yield a commodity that fulfills its intended purpose. Public Bodies should review mandatory requirements to distinguish needs and wants.

### *Rated Criteria*

A criterion is a standard against which a judgment or evaluation can be made. A rating is a judgment given to a subject according to a pre-determined scale. In the context of procurement, rated criteria are the ways (capabilities, approach, performance, etc. - CAP) in which suppliers' submissions are expected to differ and that purchasing organizations seek to compare and evaluate against business needs. Common examples of rated criteria used in procurement include supplier experience and project team qualifications.

Rated criteria differ from mandatory requirements in one significant way, a rated criterion contemplates a spectrum of potential supplier performance and a corresponding scale for its evaluation. As discussed above, evaluation of mandatory requirements is simply a sequential test of compliance floors. There can be no real "rating" of performance because no pre-determined scale of performance exists, just two outcomes: pass or fail.

### *Complementary Design*

Well-developed evaluation designs often combine mandatory requirements with a rated criterion within a single CAP element. A mandatory requirement specifies the minimum acceptable level of performance or capability during the first phase of evaluation for which all suppliers have to be deemed compliant. Then later, the suppliers deemed compliant are assessed through a rated criterion according to their respective capacities to deliver beyond the minimum acceptable level of performance in that area.

### *Identifying Rated Criteria*

Sets of rated criteria identified of a procurement will vary widely, according to the type of commodity and the business needs of the purchasing organization. One size does not fit all. Nevertheless, a purchasing organization can proceed through the following questions as a guide for rated criteria development:

1. In what ways (criteria) are suppliers' submissions CAP (capabilities, approach, performance, etc.) expected to vary.
2. Of those, which are expected to make significant contributions to the success (or failure) of the procurement.

As the rated criteria are derived directly from business needs, the business lead should play a significant role in identifying rated criteria.

#### *Critical Analysis / Validation of Rated Criteria*

After identifying a preliminary set of rated criteria, it is important for the procurement team to engage in some critical analysis to ensure the set is optimal. The set should be reviewed for the following:

1. Completeness. The set should contain all criteria deemed significant predictors of meeting business objectives.
2. Validity. The set should only contain criteria deemed significant predictors of meeting business objectives.
3. Measurability. The set should only contain criteria that can be assessed by the evaluation team through the processes described in the solicitation.
4. Fairness. The set should not include criteria that would inherently advantage or disadvantage a single supplier or group of suppliers.

#### DESIGNING EVALUATION INSTRUMENTS

After finalizing the set of rated criteria, the project team must determine a method for objective and effective measurement of each criterion - usually referred to as an instrument. Evaluation instruments are the procedures and tools used by the purchasing organization to measure rated criteria. A single evaluation design could include several types of instruments, including targeted questions, more general proposal content, presentations and references - depending on the criterion being measured.

#### *Instrument – Criterion Matching*

The Public Procurement Framework requires Public Bodies to be transparent with respect to evaluation procedures. Part of this responsible transparency includes identifying to suppliers how each rated criterion will be measured. Suppliers who are aware of what will be measured and how it will be measured are best positioned to create and submit competitive proposals congruent with the expectations of the purchasing organization. Purchasing organizations can fulfill this responsibility by matching evaluation instruments to rated criteria within the solicitation.

### *Considerations for Evaluation Instruments*

When developing evaluation instruments, purchasing organization should keep the following points in mind:

- Coverage. The instruments matched to a criterion should measure all aspects within the scope of that criterion, not just a part thereof.
- Contamination. The instruments assigned to a criterion should not measure aspects outside the scope of the criterion.

To illustrate, consider an evaluation team that has developed a rated criterion labelled “Shipping Service” and seeks to create an instrument to measure that criterion. The evaluation team convenes, and the following instruments are proposed to measure “Shipping Service”:

- A. Please detail the geographic areas covered by your delivery service. (destinations)
- B. Please provide your current average delivery times (speed)
- C. Please detail what options, if any, you provide for shipping (choice of method)
- D. Please detail the surcharges applicable to shipping options (fees)

Assuming that destinations, speed, method and fees are all valid considerations in light of the defined procurement need, none of these instruments alone provide adequate coverage of “Shipping Service” which has turned out to be a multi-faceted criterion. A fair evaluation of “Shipping Service” as a criterion requires the evaluation team to identify the pertinent components that contribute to the concept of “Shipping Service” and ensure that instruments are created and deployed to adequately measure the criterion as a whole.

Continuing the example above, as the meeting progresses some other proposed instruments are brought forward:

- E. Please detail explain the incident resolution process for lost orders.
- F. What is the average callback time for enquiries?

These instruments differ from those above. Instruments A through D are directly related to the criterion to be measured. For Instruments E and F, that relationship is much less clear and direct.

Does Instrument E measure “Shipping Services” or does it really measure some other variable such as “Quality Assurance Program” which may or may not be an in-scope criterion. In most cases, a quality assurance program will have a scope that exceeds shipping service and as such stands on its own as is applicable to shipping only in certain circumstances. Similarly, measuring a customer callback time may be a valid instrument for many kinds of supplier services, including, but not limited to, shipping.

To summarize, the Evaluation Team should exercise caution to ensure instruments measure the intended criterion directly, provide adequate coverage of that criterion, and do not concurrently measure anything other than the intended criterion.

## EVALUATION WEIGHTING

After the set of rated criteria is finalized and the corresponding set of instruments have been matched to each criterion, the procurement team can approach weighting the evaluation. This usually occurs in two steps, macro-level weighting (between price and rated criteria) and micro-level weighting (between individual rated criteria).

### *Weighting Rated Criteria vs. Pricing (macro-level weighting)*

Before individual rated criteria can be weighted, the procurement team must first decide how many points (or what proportion of overall points) will be assigned to rated criteria as a whole. In most cases, this is a zero-sum game between pricing and rated criteria where the procurement team decides on a percentage for each and an arbitrary number of total points.

For example, if a procurement team decides that pricing should be worth 60% of the evaluation, then, by definition, rated criteria would be worth 40% of the evaluation. Then, the procurement team selects an arbitrary number of total points available (100 points) and applies the decided percentages to both pricing (60 points) and rated criteria (40 points) accordingly.

### *Weighting Individual Rated Criteria (micro-level weighting)*

After the procurement team has finalized the total number of point available for rated criteria, it is responsible to divide those available points amongst the set of rated criteria. The weighting assigned to each criterion should correspond to:

- the relative importance of that criterion to the success of the procurement, compared to other criteria;
- the number of instruments assigned to that criterion compared to other criteria; and
- the proportionate effort required of suppliers to respond to those instruments.



### *Minimum Performance Thresholds*

As the name suggests, a minimum performance threshold is an expectation held by a purchasing organization with respect to the lowest-acceptable quality of response in relation the assessment of a rated criterion.

Assigning minimum performance thresholds is optional, not required. The procurement team may choose to set a minimum performance threshold for some, all, or none of the individual rated criteria. Alternatively, the procurement team may choose to assign a minimum performance threshold across all rated criteria.

To illustrate, consider an example rated criterion named “Delivery Service” that has been assigned a micro-level weighting of 100 points. A purchasing organization may determine, and communicate through the solicitation, a minimum performance threshold for this criterion of 50 points. In this situation, a supplier who fails to achieve this minimum performance threshold assigned to “Delivery Service” is not eligible to move forward in the evaluation process.

There are advantages and disadvantages to assigning minimum performance thresholds to rated criteria. The obvious advantage is that minimum performance thresholds afford to the evaluation team sufficient discretion to eliminate a supplier who has met all mandatory requirements but failed to adequately demonstrate a rated criterion. The disadvantage is that minimum performance thresholds require the evaluation team to eliminate a supplier who has demonstrated all mandatory requirements but failed to adequately demonstrate a rated criterion.

The scope of material that is permissible for an evaluation team to consider is defined by the solicitation. In most cases, that scope is limited to the content of a supplier’s submission, however many factors can affect the quality of that content. Submissions could fall short of evaluator expectations for a variety of reasons, including competing organizational priorities, time constraints, misinterpretation of content expectations, poor written communication skills and numerous other factors. Plainly, sometimes a supplier’s submission does not truly reflect its capabilities. In such cases, the presence of minimum performance thresholds may negatively impact the depth and competitiveness of the remaining supplier pool.

### SCORING SCALES AND RUBRICS

In accordance with the principles of transparency and accountability, Public Bodies are encouraged to establish scoring scales and scoring rubrics to enhance the objectivity and validity of their evaluations.

### *Function of Scoring Scales*

If the evaluation instrument is a ruler, the scoring scale is provided by its hash marks. In contrast to the pass/fail evaluation of mandatory requirements, rated criteria evaluations require a scale to reflect the differences in the degree to which supplier submissions meet expectations for a rated criterion. A scale also reveals the potential range of performance outcomes and links these outcomes to the weightings assigned to each rated criterion. To enhance the transparency of procurement evaluations, Public Bodies are encouraged to present the scoring scales to be used during evaluation in the solicitation.

### *Types of Scoring Scales*

The following types of scales may be applied to procurement evaluation processes.

- Nominal (pass, fail)

Nominal scales are used in the evaluation of mandatory requirements and feature categorical scale options that are not ordered (i.e., blue, yellow, red, etc.).

- Ordinal (good, better, best)
- Scalar (5- or 7-point anchored scales)
- Ratio (scale that include zero)

Ordinal, scalar and ratio scales are used in the evaluation of rated criteria.

### *Scoring Rubrics*

A rubric is a set of guidelines that describe how an activity should be carried out. In the context of procurement evaluations, a scoring rubric is a tool used by evaluation teams to improve the consistency, accuracy and objectivity of their evaluations.

Scoring rubrics often take a parallel form, matching pre-defined content expectations (input - supplier submission) to pre-defined performance levels (output – criterion score). The specific mechanism for matching submission content to criterion score will vary based on the type of scoring scale used and the commodity under evaluation.

Scoring rubrics are effective at mitigating several evaluation team biases, a topic discussed in a later section. During the course of an Evaluation, evaluators can continually reference the rubric to recalibrate their expectations and standardize scoring across submissions.

## PRICING EVALUATION STRATEGIES

Pricing is a fundamental consideration for most procurements. For many procurements, it is the only factor required to identify the best-value supplier. Even in those procurements where the evaluation considers factors other than price, the price-competitiveness of a submission is always significant contributor to multi-criteria evaluations.

### *Relative Pricing Formulae*

After finalizing a standard mechanism to evaluate pricing information, the evaluation team. For procurement evaluations that do not consider factors other than price, the exercise is straightforward. Compliant submissions are ranked in descending order according to price, and the lowest-priced compliant submission is selected for award. For procurement evaluations that consider factors other than price, another step is required to integrate the results from price and rated criteria into a single score before final ranking.

As noted above, evaluations of rated criteria involve scoring scales that transform the contents of a submission into a score. When pricing is not the only factor, it too requires the evaluation team to render a pricing score from the submitted pricing information. The relative pricing formula is the most commonly used, and widely applicable, method to accomplish this.

The core premise of a relative pricing formula is simple. The lowest-priced compliant submission receives the full allotment of potential points allocated to pricing. Each other compliant submission receives pricing points relative to its price competitiveness relative to the lowest-priced compliant submission.

This premise can be expressed mathematically as:

$$\text{Pricing Criteria Points}_{(\text{Proponent})} = \text{Total Available Pricing Points} * \left( \frac{x}{y} \right)$$

Where:         $x$  =     Proposed Price <sub>(Lowest-priced Proponent)</sub>  
                  $y$  =     Proposed Price <sub>(Proponent)</sub>

To illustrate, consider the procurement of engineering services where:

1.            the evaluation considers factors other than price;
2.            total available pricing points are 100;
3.            Firm ABC bid \$50 CAD;
4.            Firm XYZ bid \$40 CAD.

Firm XYZ is the lowest bidder. The evaluation team allocates to Firm XYZ the maximum potential pricing points (100), as follows:

$$\text{Pricing Criteria Points}_{(\text{Firm XYZ})} = 100 * \left( \frac{40}{40} \right) = 100 \text{ pricing points}$$

Firm ABC is not the lowest bidder and does not receive a full allocation of pricing points. The pricing points assigned a proportionate to its bid's competitiveness relative to Firm XYZ, as follows:

$$\text{Pricing Criteria Points}_{(\text{Firm ABC})} = 100 * \left( \frac{40}{50} \right) = 80 \text{ pricing points}$$

### *Extended Pricing Structure*

The example above considers a single, indivisible commodity. Many procurements undertaken by public bodies, most notably those that give rise to standing offer agreements, contemplate the procurement of many items simultaneously within a broader commodity category. For instance, a purchasing organization may go to market for the commodity "office supplies", recognizing the commodity consists of dozens or even hundreds of constituent products (i.e., pens, staplers, paperclips, etc.).

Pricing strategies for commodities that contain constituent products often rely on an extended pricing structure. An extended price of a product purchased is simply the unit price of the product multiplied by the quantities anticipated to be purchased:

$$\text{Unit Price}_{(\text{product A})} \times \text{Estimated Quantities}_{(\text{product A})} = \text{Extended Price}_{(\text{product A})}$$

Normally, an extended pricing structure would be evaluated and awarded at the commodity-, rather than product level. In the case of office supplies, most purchasing organizations would not want to make separate awards of pens and pencils to different suppliers. Accordingly, each product is not evaluated separately, but the extended prices for each product are added together to yield a single commodity price that can be compared between suppliers. This technique can be expressed as:

$$\sum (\text{Extended Price}_{(\text{product A})} + \text{Extended Price}_{(\text{product B})} + \text{Extended Price}_{(\text{product C})} \dots)$$

### *Price Instability*

When making choices about a pricing evaluation strategy, purchasing organizations should be mindful of the time horizon of the procurement. Some procurements are initiated and fulfilled over the course of a few days. Others, by virtue of the type of commodity being procured (public works) or the type of contract sought (standing offer agreement) contemplate longer time horizons. Often, the potential length of the time horizon may challenge suppliers' ability to guarantee set prices as bid, over that period. A purchasing organization planning a procurement with an expected time horizon any longer than a few weeks should consider what flexibility it has, if any, to respond to legitimate market-driven price changes that impede suppliers' ability to maintain prices within signed procurement contracts.

### *Pricing Adjustment Mechanisms*

Purchasing organizations may mitigate some of the risk imparted by price instability through use of pricing adjustment mechanisms. Pricing adjustment mechanisms are provisions presented in the solicitation, which declare the purchasing organization's tolerance for adjusting prices (typically accepting requests from the contracted supplier for price increases) throughout the term of the contract and any pertinent procedures.

The best pricing adjustment mechanisms relieve purchasing organizations of the responsibility of adjudicating evidence brought to bear by suppliers seeking increases. Frequently, purchasing organizations' procurement staff do not have sufficient subject matter expertise to provide critical analysis of this type of request.

In contrast, more effective pricing adjustment mechanisms often rely on third party, or otherwise independent and publicly available reference information. Purchasing organizations in Canada are able to create pricing adjustment mechanisms tied to one or more of dozens of monthly and quarterly price indices published by Statistics Canada.

## CONSIDER EVIDENTIARY REQUIREMENTS AND PROCESSES

Earlier sections described the process for identifying procurement specifications and defining mandatory requirements for a given commodity. Solicitations may contain sets of mandatory requirements that could number in the hundreds and, while all of the requirements are by definition mandatory, some may be more important than others. Some mandatory requirements may be of such importance, or give rise to such risk, to the purchasing organization that evidence is required to confirm certain qualifications, capabilities or characteristics of the supplier. Where mandatory requirements are required to be evidenced, a purchasing organization must determine and communicate in the solicitation both when and how this evidence will be submitted.

### *Pre-submission*

The purchasing organizations may decide to ask for evidentiary items up front listing the document requirements as part of the requirements of a supplier's initial submission (i.e., Mandatory Submission Requirements, to be discussed in a later section). This approach is best suited to procurements where:

- a limited number of documents are required;
- the documents are industry-standards and familiar to the supplier group;
- acquiring the documents does not involve significant preparation or waiting time;
- the documents do not contain sensitive or personal information; and
- acquiring the documents does not involve costs to the supplier.

### *Pre-award*

Some requests for evidence may be burdensome or unnecessary at the initial submission stage. Other documents may contain sensitive or personal information, where its custody represents an information management risk to the purchasing organization. Further, in the vast majority of procurements, it is only the qualifications, capabilities or characteristics Contracted Supplier that need to be validated.

Accordingly, in most cases, the purchasing organization is best served to ensure the solicitation presents a process the places evidentiary requirements only on the Contracted Supplier and only at the end of the evaluation process, just before award.

### *Complementary Design*

A third approach to pre-submission, pre-ward choice framed above is for the purchasing organization to do both. A solicitation can be authored to require a supplier to declare its ability to meet the requirements as part of its submission and evidence that declaration later in the process, should that supplier be identified as the Contracted Supplier.

## CONSIDER CONTRACTING APPROACH

In the same way a purchasing organization is obliged to plan its intended evaluation approach, it retains similar responsibilities pertaining to the contracting phase of the procurement.

### *Purchase Orders*

Many one-time purchases of simple goods and services are contracted by way of the purchase orders. The purchase order represents the most basic type of procurement contract and contains a summary of what the purchasing organization intends to buy from the supplier. Generally, the purchase order will specify things like quantity and descriptions of the items, prices, date of purchase, payment terms and delivery dates. Even the most basic purchase orders are binding agreements and offer both parties a source of truth about the requested transaction.

### *Fixed-Price / Fixed-Delivery Contracts*

As suggested above, some procurements require contracts that reflect a greater degree of complexity than those of one-time purchases. Procurements that involve the delivery of commodities sequentially or over a period time (such as a construction of a road) may require a contract that reflects time as a factor in the acquisition. When time is introduced as factor and the transaction is no longer instantaneous, the purchasing organization may need to account for potential complications related to the passage of time.

Such complications may include partial or disputed completion of work, contract cancellations, payment structures and change orders. Contracts for such commodities often require detail beyond standard purchase order, including provisions to ensure these new contingencies are sufficiently addressed.

### *Standing Offer Agreements (SOA)*

A SOA is special type of fixed-price contract, where a supplier agrees to provide a set of commodities on an if-and-when required basis, at a fixed price, in accordance with prescribed terms and conditions for a specific period of time. As party to an SOA, a purchasing organization is free to make repeat acquisitions without guaranteeing future orders or minimum purchase volumes.

This type of contract is usually awarded through an open call for bids to procure low-cost, frequently used consumables. For these types of commodities, SOAs offer several advantages over serial low-value procurements, including increased price competitiveness resulting from economies of scale and increased administrative efficiency by reducing unnecessary open and limited calls for bids.

In the solicitations that give rise to standing offer agreements, purchasing organizations may choose to award the commodity set in whole to one supplier or to divide the commodities in categories and make award to one or more suppliers at the category level. Accordingly, a purchasing organization must carefully consider the desired outcome and communicate its intent to suppliers.

### *Direct Awards*

A direct award is a contract that is awarded directly to a supplier without a competitive process. This type of award is normally made where the purchasing organization is certain that only one reasonable source exists for the commodity sought, commonly referred to as a sole-source procurement. While sole-source is a frequently reason for executing a direct award, other situations, such as emergencies, may also require procurement via direct award.

Where a direct award is required, Public Bodies are encouraged to document and communicate their specifications and requirements, negotiate a detailed contract with the supplier, and engage in as competitive a process as the situation permits. With the exception of true sole source situations, Public Bodies should make every effort to determine fair and reasonable price ensure the direct award is best value.

### CONSIDER PAYMENT REGIMEN

Certain procurements have standard or predictable payment schedules, others less so. A purchasing organization should consider how and when it intends to pay for the commodity procured as well as how suppliers might expect or desire to be paid in return for the commodity. Processes, procedures, timing and other expectation related to payments should be included in the solicitation so that suppliers can make an informed decision about participating in the procurement.

### *Single Transactions*

This is the most simple payment regimen and is typical for single transaction procurements. After award, the purchasing organization issues a purchase order to the vendor for the bid price. The vendor provides the commodity and sends an invoice which triggers payment due, in full according to a specified payment term (i.e., net 30 days).

### *Lump Sum Completion Payment*

A lump sum payment regimen contemplates the execution or delivery of the commodity over a period of time, rather than an instantaneous transaction. The supplier is free to invoice the purchasing organization for the entire bid price when the commodity has been executed or delivered in full.



### *Progress Payment / Milestone Schedule*

Progress payment regimen also contemplates a time horizon before the commodity is fully executed delivered but allows specified payments to occur before execution or delivery in full. Where payment will be triggered by factors other than execution or delivery in full, the amounts, timing and/or triggers for payments should be specified in the solicitation.

## STEP 5: PREPARE SOLICITATION

The solicitation transforms the procurement needs of the purchasing organization into a set of procedures that define, systematically, how the best-value solution will be identified. For the purpose of introduction, solicitations can be broken down into three main parts according to the function, commodity language, process language, evaluation/award language and terms & conditions.

Before setting out to write a solicitation, the procurement team must consider and communicate the degree of structure expected of responsive submissions.

### STRUCTURED VS. UNSTRUCTURED SUBMISSIONS

The purpose of a solicitation is to invite a set of submissions from which the Evaluation Team can make a valid, efficient and defensible identification of the best-value supplier to engage in contracting. For a solicitation to achieve its purpose, its process and evaluation language must clearly communicate to potential suppliers the optimal content and structure that would permit a valid, efficient and defensible evaluation. The degree to which a solicitation clearly prescribes structural expectations for prospective suppliers' submissions is at the discretion of the procurement team.

For example, a solicitation with lower structural expectations may:

1. allow submission format and content to be largely determined by the supplier;
2. present mandatory requirements without specifying how or when those requirements will be assessed for compliance or how a supplier might demonstrate compliance; or
3. present rated criteria without specifying how the evaluation team will measure supplier performance for those criteria.

Conversely, a solicitation requiring highly structured submissions might:

1. present a list of mandatory submission requirements;
2. require submissions to declare acknowledgment of mandatory requirements;
3. present rated criteria that are matched to specific instruments;
4. present specific questions for a supplier to answer in its submission; and/or
5. request certain evidentiary documents at specified intervals.

When solicitations specify fewer structural requirements, suppliers have more control over the organization and appearance of their submissions' content. For commodities offered by suppliers operating in the creative sectors (arts, advertising, etc.), flexibility may be an industry norm that is unconsciously transferred to the public procurement process. This flexibility provides an opportunity for suppliers to think outside of the box and provide submissions that are more creative.

In reality, for most procurements, the degree of structure required of submission is negatively correlated with risk (i.e., as submission structure increases, procurement risk decreases). It is clear that structure improves the validity, efficiency and defensibility of an evaluation. A structured format ensures:

- suppliers know what materials must be submitted and what requirements must be acknowledged for their submission to be compliant (validity, defensibility);
- suppliers are aware of what criteria will be evaluated and how their submissions will be evaluated in light of those criteria (defensibility);
- evaluation teams are presented with content that is standardized and easily comparable to expectations (efficiency, validity); and
- evaluation team know where to find all the submission content pertinent to the evaluation of a given criterion (efficiency, validity).

## COMMODITY LANGUAGE

Commodity language describes the commodity as well as the context in which the procurement will take place. The purpose of commodity language is to characterize the procurement need so that suppliers understand what is required of the contracted supplier. The types of information needed to provide this context will vary widely by commodity but may include the following sections:

### *Organizational Profile and Background*

A public purchasing organization may find it beneficial to communicate information about its mandate, strategic plan or organizational structure to provide an understanding to prospective suppliers that might be helpful in the development of submissions.

### *Project Profile and Background*

Many procurements are one-time transactions, but other procurements have time horizons or deliverables with inter-dependencies on other, simultaneous or sequential, procurements. Where the execution of a pending procurement is related to or dependent on to a past, ongoing or future procurement, it may be helpful for purchasing organizations to provide context for

suppliers to better understand the larger picture. Even without such dependencies, providing context to a serial procurement may be helpful.

### *Overview of Expected Deliverables*

While the mandatory requirements may provide more granular mandatory requirements commodity language can include a higher-level description of the commodity sought and provide supporting contextual information such as anticipated project or delivery schedules, project milestones and intended payment schedules.

## PROCESS LANGUAGE

Process language explains how a supplier is expected to respond to the solicitation, most importantly how a supplier can make a submission. Normally, process language also includes:

### *Submission Instructions*

This language indicates to suppliers where (on-site drop-off, e-procurement application, website upload, etc.), before when (submission deadline, time and date) and in what format (hardcopy, electronic files, etc.) the response must be submitted.

### *Submission Requirements*

This language present what information and documentation is required to be included in a submission. Submission requirements range in complexity from a simple price quotation to long lists of certification or licensing documentation.

### *Procurement Process Requirements*

Normally, process language includes an overview of the steps in the procurement process and an accompanying timeline. This helps to manage supplier expectations and keep procurement activity efficient and on-track.

### *Questions, Answers and Amendments*

Most solicitations outline a process for suppliers to ask questions about the solicitation to the purchasing organization during the posting period. Questions can arise from many sources, but most typically arise from specifications. Even the most diligent procurement officials can make mistakes in preparing the solicitation documents that result in ambiguous, superfluous or mutually exclusive specifications. The question-and-answer process provides a forum for potential respondent to raise issues to the purchasing organization's consideration and response.

Sometimes, issues raised during the question-and-answer process may be deemed by the purchasing organization to be legitimate flaws in the solicitation. When solicitation documents contain a flaw, it must be corrected by way of amendment, a formal repeal and correction of the original solicitation documents.

In order to take advantage of the benefits offered by the question-and-answer process, the purchasing organization must specify procedures in the solicitation original document for creating and issuing amendments. Normally, this language would indicate how and when an amendment could be issued as well as the responsibilities of both the purchasing organization and potential respondents when an amendment is issued.

### *Rectification / Ability to Remedy*

As noted above, certain provisions (i.e., bid irrevocability) found more frequently in some type of procurement tools (Invitation to Tender) give rise to contractual obligations at the point of issue (for the purchasing organization) and response (for the vendor). These contractual obligations require purchasing organizations to perform a rigid and rigorous evaluation of each submission's compliance. In general, a submission that contains any instance of non-compliance, error or omission must be disqualified.

Alternatively, solicitations that avoid such provisions (i.e., non-binding procurements) offer purchasing organizations some flexibility with respect to assessing compliance. Within solicitations for non-binding procurements, purchasing organizations may choose to prescribe a fair and transparent bid remedy process, whereby non-compliances can be identified and communicated to the supplier who is then afforded an opportunity to revise and resubmit for consideration. This process is often referred to as rectification.

A procurement program that carefully and successfully migrates toward non-binding procurement regimes and implements rectification processes will realize the benefits of fewer disqualifications and increased competition.

## EVALUATION LANGUAGE

Evaluation language describes the procedures the purchasing organization will use to determine best-value. Public Bodies are required to clearly articulate all steps, procedures and considerations that will be used in the evaluation. For lowest-price evaluations, this will be a more straight-forward exercise of presenting the specifications and describing how price will be evaluated. Alternatively, the evaluation language required for complex multi-criteria evaluations can be extensive and detailed.

### *Evaluation Language Overview*

The Public Procurement Framework sets expectations for the evaluations designed and conducted by Public Bodies, including fair and equitable treatment of respondents; objective

criteria and evaluations that are free of bias and conflicting interests; and accountable decision-making that is transparent to all stakeholders. The Framework does not, however, provide or advocate a single stepwise process to design and execute evaluations. The reason for this is simple, each evaluation must be designed to match the commodity sought and one single approach cannot yield best value for all procurements.

Nevertheless, it may be helpful for purchasing organizations to structure their evaluation conceptually before putting pen to paper to draft any specific language around the processes that follow. A simple and recommended evaluation design that can be applied to a wide variety of best-value procurements includes three sequential phases; mandatory requirements, rated criteria and pricing.

### *Writing Mandatory Requirements*

As discussed in a previous section, mandatory requirements are the must-do, must-have and must-show elements of a supplier's response to a solicitation. When writing mandatory requirements, the purchasing organization should be mindful its audience. Generally, a supplier will have skills and subject matter expertise related to its offered commodities, but in many cases, this expertise does not extend to writing responses to solicitations. Therefore, it is important that purchasing organization give due attention and care to ensure understandable requirements and avoid common pitfalls.

### *Subject of Requirements*

When writing requirements, it is important to identify who bears the responsibility of the fulfilling the mandatory requirement, and when. Most requirements are intended by the purchasing organization to be satisfied by the successful supplier who is awarded a contract (Contracted Supplier). For instance, a solicitation issued to give rise to standing offer for landscaping services may intend a requirement for the employees of the contracted supplier to have first aid training.

The subject of the requirement has a significant impact on how that requirement is evaluated. Consider the sample requirements below, simplified for illustrative purposes:

1. The Proponent's employees must possess valid first aid training certificates.
2. The Contracted Supplier's employees must possess valid first aid training certificates.

The subject in Requirement 1 is the Proponent. This implies the requirement applies to all Proponents – before any one of those Proponents are awarded the contract. Conversely, the subject in Requirement 2 is the Contracted Supplier. This implies the requirement applies to only the Contracted Supplier.

Accordingly, a Proponent who intends to certify his employees at a training session that occurs after the submission deadline but before the anticipated contract award date would not fulfill Requirement 1 as written but could fulfill Requirement 2 as written. This example illustrates how the subject phrasing could impact a supplier's compliance with published requirements.

As noted above, purchasing organizations use mandatory requirements to communicate the most basic expectations of the Contracted Supplier. In most cases, the solicitation-response cycle seeks suppliers' acknowledgement of these requirements, either directly or indirectly. This creates a conundrum. As written, Requirement 1 seeks a commitment from all Proponents – including those who will never be required to deliver on that requirement as a Contracted Supplier. Requirement 2 seeks a commitment from the Contracted Supplier - a party that has yet to be specifically identified.

### *Value-based Requirements and Tolerances*

Technical and functional specifications frequently refer to quantitative thresholds of acceptability. Mandatory requirements for a bar of soap may include a weight to characterize the amount of product expected, such as 100g. Setting absolute measurements as products specifications may cause unintended outcomes for purchasing organizations. In the examples above, if a potential supplier has access only to bars of soap that weigh 99g, that supplier would not be able to prepare a compliant submission. Purchasing organizations can mitigate this type of risk by exercising care when wording mandatory requirements.

First, procurement teams should consider setting minimum/maximum (min/max) value thresholds rather than absolute values for quantitative requirements. Continuing the example above, rather than specifying a precise acceptance measurable requirement (i.e., 100g per bar), unnecessary restriction can be avoided by specifying a minimum acceptable weight (i.e., >95g per bar). This approach will set the minimum amount of product expected without setting a specific, and potentially arbitrary, weight as the only acceptable value.

For certain commodities, setting a range of acceptable values within a single requirement is more appropriate. Consider the procurement of a box of paper clips where it is known to the procurement team that the absolute number of paper clips per box can be expected to vary by manufacturer. In this situation, the procurement team can specify a range tolerance for the product such "between 990 and 1010 paper clips per box".

For other commodities, the mandatory requirements may include a mix of absolute, ranged and min/max requirements. To illustrate, consider the procurement of office paper for a purchasing organization that has an occupational health and safety policy in-force restricting the maximum weight an employee can be expected to lift at 40lbs. Requirements for this type of commodity might include the following:

1. page dimensions 8.5" X 13" (absolute)
2. Between 400-600 sheets per package; (ranged)
3. Between 10-20 packages per box; (ranged)
4. 40 lbs. maximum weight per box. (min/max)

### *Presenting Rated Criteria*

When preparing a solicitation to satisfy an open call for bids, Public Bodies in Newfoundland and Labrador are required to present to potential suppliers all evaluation criteria and processes that will be used to identify the best-value supplier. For solicitations with evaluations that consider factors other than price, this means listing all of the rated criteria.

Presenting all of the rated criteria in one place alongside each criterion's respective weighting or point allowance allows potential suppliers to understand the relative importance of each criterion compared to others as well as the overall importance of rated criteria compared with pricing. In addition to presenting a fulsome list of weighted evaluation criteria, Public Bodies are encouraged to specify the instruments that will be used to measure each criterion as well as any minimum performance floors.

### *Standardization of pricing*

In order for a price evaluation to be valid, the manner in which pricing information is solicited from suppliers must be standardized. Typically, this means a purchasing organization must ensure:

- 1.) a consistent understanding among suppliers of what the pricing information does and does not include;
- 2.) a consistent structure for suppliers to submit the pricing information; and
- 3.) a consistent method for evaluating pricing information.

The procurement team can enhance the standardization of the pricing at several decision points.

### *Controlling Pricing Incidentals*

In addition to the actual price of the commodity being procured, procurement teams often encounter a number of other price-adjacent factors. These price-adjacent factors can, if left unaddressed, undermine an otherwise standardized pricing evaluation. For instance, suppliers may variously choose to include or exclude sales taxes from their submitted prices. Some common pricing incidentals that purchasing organizations should address within the solicitation as being included or excluded with submitted pricing are:



- |                                    |                                    |
|------------------------------------|------------------------------------|
| 1.) sales tax and other taxes;     | 5.) overhead and storage costs;    |
| 2.) pick-up and delivery charges;  | 6.) duties and import charges; and |
| 3.) environmental fees and levies; | 7.) fuel surcharges.               |
| 4.) operating fees;                |                                    |

### *Use of Pricing Forms*

Another way that a purchasing organization can encourage the submission of standardized pricing information, capable of yielding a valid comparison, is to provide format structure to suppliers. In the context of pricing information, this usually means designing a form within the solicitation that a supplier can use to submit its pricing information (i.e., pricing form). Using a pricing form helps to ensure that suppliers' pricing information is submitted in a more organized, complete, consistent and comparable format.

### *Two-envelope Methodology*

For solicitations that contemplate evaluation factors other than price, procurement teams can further ensure valid comparisons of pricing information by using a two-envelope methodology. A two-envelope methodology is a process requirement that obliges suppliers to provide submissions in two separate and sealed envelopes. One envelope contains the submission materials necessary to evaluate submission requirements, mandatory requirements and rated criteria (technical envelope) and the other contains the submission materials necessary to evaluate pricing (pricing envelope). A two-envelope methodology ensures that subjective process of evaluating rated criteria remains uninfluenced by pricing evaluation - which is typically an exclusively objective exercise.

## TERMS AND CONDITIONS LANGUAGE

The solicitation language that governs the rules of solicitation and award process is collectively called the solicitation's terms and conditions. Terms and conditions express the expectations and responsibilities of the purchasing organization and the suppliers who respond to the solicitation.

### *Confidentiality*

Public Bodies in Newfoundland and Labrador are required by regulation to declare within their solicitations that public procurements are subject to the Access to Information and Protection of Privacy Act. Accordingly, interpretation of this statute will govern decisions related to granting or withholding information related to public procurement, including such information as bid prices and other sensitive business information.

### *Trade Agreements*

Public Bodies in Newfoundland and Labrador are required by regulation to inform prospective suppliers that a solicitation is subject to the trade agreements, where applicable.

### *Value of Award*

Public Procurement Regulations require Public Bodies in Newfoundland and Labrador to inform prospective suppliers that the financial value of any contract pursuant to the solicitation will be released publicly as a part of the award notification.

### *Reserved Rights*

Frequently, solicitations issued by purchasing organizations present one or more reserved rights in the terms and conditions section. In the context of a procurement solicitation, a reserved right is a declaration of a privileged action or decision under future circumstances. In certain cases, reserved rights clauses published in a solicitation may conflict with a purchasing organization's superseding duties to conduct fair procurements in good faith.

For example, a purchasing organization may intend to reserve for itself the right to avoid awarding in accordance with the published evaluation process (i.e., lowest-priced, highest-ranking, etc.), however its duty of fairness may preclude that reserved right. Purchasing organizations should ensure that any drafted reserved rights or privilege clauses are reviewed by legal counsel before publishing.

### *Conflict of Interest and Prohibited Conduct*

Effective public program procurement programs in Newfoundland and Labrador cannot be realized without public officials carrying out their duties according to the principles of honesty, integrity, transparency and accountability. Effective procurement also requires suppliers to reciprocate these same values to prevent the human element from undermining the objectives of the program. For this reason, the terms and conditions language of many solicitations issued by public bodies proscribe the types of stakeholder behaviour that could be reasonably expected to compromise the real, or perceived, objectivity and validity of the award process.

For Public Bodies in Newfoundland and Labrador, conflict of interest refers to a conflict between the official duties and private interests of a public office holder or a Crown agent or a situation where a public office holder or Crown agent leverages their position for personal gain. Terms and conditions often include provisions requiring public officials in conflict of interest to disclose the conflict and to recuse themselves from the pertinent procurement and its activities.

Similar expectations for integrity and transparency may be prescribed to the responsive suppliers through terms and conditions requiring suppliers to immediately disclose such things as unfair advantage, role conflict, lobbying, collusion and other unethical behaviours detrimental to fair and open competition.

## PROCUREMENT TOOL TEMPLATES

Public Procurement Agency is pleased to be able to share procurement tool templates with Public Bodies in Newfoundland and Labrador at no cost. Please direct enquiries to the Agency.

## STEP 6: ISSUE SOLICITATION

After a solicitation is issued, the focus of the procurement team shifts from procurement documents to managing interactions with prospective suppliers.

### SUPPLIER ENQUIRIES AND RESPONSES

#### *Accepting Questions from Suppliers*

Solicitations have a higher likelihood of identifying best value when suppliers are afforded the opportunity to ask questions to the procurement team. Even the most carefully worded solicitations may inadvertently contain ambiguities or errors that, if clarified or corrected, would increase the ability of suppliers to prepare optimal submissions.

Public Bodies are encouraged to include processes within their solicitations that provide an opportunity to ask such questions. Generally, this function is facilitated by purchasing organizations' procurement applications, or in the absence of such an application through email correspondence invited by the procurement lead.

#### *Public vs. Private Responses*

Depending on the commodity, suppliers, and issue at hand, a supplier's question may contain confidential or organizationally identifying information. In such cases, the procurement lead must determine if the public interest is best served by a public or private response.

In the vast majority of cases, public interest is best served when the purchasing organization publicly shares both the question and answer. Doing so is most consistent with the principles of transparency (openness of information) and fairness (all parties have access to the same information).

#### *Editing Confidentiality and Anonymity*

Occasionally, a procurement team will receive a specific enquiry, where the enquiry itself or required response thereto, has the potential to compromise the anonymity of the enquiring party or the confidential information related to its pending bid.

In such cases, the procurement team should analyze the enquiry to determine if the enquiry or response can be reworded such that the intent of the questions can be replicated and answered without revealing compromising information. Consider the following examples of questions that might be received from supplier ConstructiCo. In response to a solicitation for construction services:

Question 1.

Original wording: Can the project completion date be pushed out for three weeks? ConstructiCo. is very busy. We are in negotiations for several other concurrent projects and we are experiencing labour shortages because ConstructiCo. wages are too low to retain staff.

Sanitized Re-wording: Can the project completion date be changed from January 1, 2023 to January 21, 2023?

Response: No. The project completion date cannot be changed.

Question 2.

Original wording: With respect to the paint colour mandatory requirement presented for vehicle category #4 – sedans: none of the major vehicle manufacturers are producing vehicles in Midnight Blue this year. All of the manufacturers are offering Cobalt Blue instead. Is Cobalt Blue ok?

Sanitized Re-wording: With respect to the paint colour mandatory requirement presented for vehicle category #4 – sedans: is Cobalt Blue an acceptable equivalent to Midnight Blue?

Response: Yes. Cobalt Blue is an acceptable equivalent for Midnight Blue.

Question 3.

Original wording: A global raw materials shortage began 12 months ago and nobody can get any of the type-2 paper in 11"X17", we can only find 8.5"X11", is that ok to substitute?

Sanitized Re-wording: With respect to the size requirements for type-2 paper, are sheet sizes other than 11"X17" acceptable? If so, which other sizes are acceptable to substitute?

Response: No. No other sizes are acceptable for type-2 paper.

### *Change Requests and Reasonableness*

When considering suppliers' requests to modify a requirement or to consider equivalencies, the procurement team should be mindful of its responsibility to make reasonable decisions. While a purchasing organization is free to identify its business needs and specifications, it must ensure published mandatory requirements are fair to suppliers and not unnecessarily restrictive. Public Bodies are encouraged to apply due consideration and diligence to all change requests such that, in cases where those requests are denied, the purchasing organization is able to provide legitimate business-driven reasons to support the decision.

## AMENDMENTS

In the context of a procurement, an amendment is public notice issued by a purchasing organization, which describes a formal change to the solicitation. This type of change could be related to submission procedures, dates and schedules, mandatory requirements, evaluation methodology or terms and conditions and may be initiated by the purchasing organization proactively or through supplier enquiries.

Purchasing organizations are required to issue an amendment whenever a change is made to a posted solicitation. The purpose of the amendment is to ensure fairness in the procurement, more specifically to ensure that all prospective suppliers have access to the same information.

### *Amendments and Deadlines*

When issuing an amendment purchasing organizations must consider the scope of the change and how the amendment may affect prospective suppliers. A significant change to requirements may force suppliers to source new products or providers. A significant change to evaluation processes may require prospective suppliers to make significant changes to their drafted submissions. Changes to project schedules or timelines may change the composition of the pool of suppliers capable of responding.

When issuing significant amendments, Public Bodies are encouraged to make corresponding changes to process language, particularly with respect to the published submission deadline. The submission deadline should be adjusted to provide suppliers with ample time to make to required adjustments to their business processes, upstream sources or draft submissions.

## SUBMISSION DEADLINES, RECEIPT OF SUBMISSIONS AND PUBLIC OPENINGS

The procedural language in solicitation governs the receipt and acceptance of submissions and a purchasing organization is required to manage and document its receipt of submissions rigorously.

### *Submission Deadlines*

A submission deadline is a time and date decided by the purchasing organization and communicated in the solicitation, beyond which all submissions received are deemed non-compliant. Like other procedural requirements (i.e., delivery location, etc.) purchasing organizations cannot deviate from the submission deadline presented in the solicitation.

### *Receipting procedures*

Submission deadlines play a primary and definitive role in procurement teams' assessment of submissions compliance, and thus eligibility for award. Given the importance of submission compliance with submission deadlines, it is critical for purchasing organizations to implement reliable information management process that accurately document solicitations' precise submission times.

### *Public Openings*

Public Bodies in Newfoundland and Labrador are required to undertake public openings for all open calls for bids. A public opening is a public event scheduled for a time following the submission deadline where officials of the purchasing organization reveal the names of the suppliers who submitted a submission and, for Invitations to Tender (ITT) only – the bids' prices.

## STEP 7: CONDUCT EVALUATIONS

Public Bodies in Newfoundland and Labrador are responsible to carry out the evaluation of submissions in accordance with the evaluation processes described in the solicitation. This means that, after a solicitation closes, so too does the opportunity to make changes to that evaluation process. More specifically, after the submission deadline, Public Bodies are not permitted to add or remove submission requirements, mandatory requirements or modify the published processes for evaluating rated criteria, pricing, ranking or negotiations.

### PROCESS REQUIREMENTS

Evaluation of process requirement is the most straightforward step in the evaluation process, during which the procurement team must evaluate each submission's compliance to the solicitation's process language. Typically, this might involve confirming compliance to such things as:

- A. Was the submission received to the correct location?
- B. Was the submission sent using an acceptable medium (email, e-procurement system, hand delivery, etc.)?
- C. Was the submission received before the submission deadline?

### SUBMISSION REQUIREMENTS

Evaluation of submission requirements is equally straightforward. During the evaluation of submission requirements, the procurement team tests each submission to ensure it contains all of the required content and materials, prepared and submitted in the manner prescribed by the solicitation. Typically, this might involve confirming compliance to such things as:

- A. Did the submission contain all of the required forms and documents?
- B. Did the required forms and documents contain all of the required content?
- C. Was that content prepared in accordance with the requirements presented in the solicitation?

If a Public Body receives a submission that is not compliant with submission requirements, the submission must be deemed non-complaint and excluded from consideration – subject to any applicable rectification procedures.



## RECTIFICATION

If the procurement tool chosen for the solicitation and its published evaluation language includes procedures for rectification and does not include provisions that preclude rectification, a purchasing organization may engage suppliers to remedy their respective non-compliances related to submission requirements.

It is critical that rectification processes are presented in the solicitation with the same degree of detail and rigor as other evaluation process. Public Bodies must follow published rectification procedures as closely as those for other elements of the evaluation process. Accordingly, solicitations that contemplate rectification should present the intended scope of rectification, when and how a supplier's opportunity for rectification will be triggered, and how rectification procedures will be communicated to suppliers.

When applicable rectification procedures are complete, the procurement team can divide the submissions into two categories complaint submissions and non-compliant submissions, the same categories as if rectification has not been contemplated in the solicitation. For price-only evaluations, the complaint submissions move forward to pricing evaluation. For evaluations that consider factors others than price, the compliant submissions move forward to the evaluation of rated criteria.

## RATED CRITERIA

Rated Criteria are the ways (above and beyond mandatory requirements) in which suppliers' submissions are expected to differ (capabilities, approach, service quality, product performance, etc.) - which purchasing organizations seek to compare and evaluate against business needs. During planning phase, a procurement team determines the optimal set of rated criteria for a given to the procurement, if any. Next, the procurement decides how those criteria will be measured (instruments) and communicates this information through the solicitation. In addition to specifying how each criterion will be measured, the solicitation also communicates the degree of structure required of submissions.

The variance in applicable rated criteria, rating instruments, rating scales and degree of structure required of submissions preclude any stepwise instructions for completing rated criteria evaluations. Evaluation teams are responsible to follow the evaluation procedures exactly as presented in the solicitation.

### *Evaluation Record Keeping*

Public Bodies in Newfoundland and Labrador are required to maintain complete records for all phases of the process of procurement of commodities, including evaluation documentation. The final record set for a public procurement should include:

- documentation to evidence how each criterion was evaluated (criteria, instrument, rating scale, etc.);
- evaluation rubric presenting response element examples or anchors to guide and standardize;
- evaluation notes to support rating conclusions;
- documentation to capture each submission's rating for each criterion;
- documentation to demonstrate how each rating was transposed into points, if applicable; and
- documentation to demonstrate how each criterion was weighted, and how points accumulated into an overall rated criteria score.

### *Common Evaluation Errors*

This section presents evaluation errors that, although seemingly minor, may undermine the validity of the evaluation and convey liability to the purchasing organizations. After the submission deadlines, purchasing organizations should avoid:

- changing the set of published rated criteria by adding or removing criteria;
- changing the published relative weighting of rated criteria;
- changing the published instruments assigned to evaluate rated criteria;
- engaging a supplier to change or improve the rated criteria content of its submission;
- permitting an evaluator to participate in evaluating a criterion they are not qualified to evaluate;
- overlooking inconsistencies and omissions within the rated criteria content, particularly rated criteria content that conflicts with mandatory requirements;
- crediting omitted content that is assumed by the supplier or an evaluator to be understood;
- failing to ensure that evaluators are free from conflict of interest; and
- failing to create and maintain detailed evaluation notes supporting evaluation decisions.

### PRICING

For most solicitations, the evaluation of pricing is mechanical and does not involve the subjective interpretation required of evaluation teams assessing rated criteria. The specific mechanics of the pricing evaluation, usually expressed as formulae, are prescribed by the solicitation. It remains the responsibility of the evaluation team to ensure the evaluation remains faithful to the published procedures.

## RANKING OF SUBMISSIONS

The ranking of submissions represents the final stage of the evaluation process and, as with the other steps that lead to this conclusion, purchasing organizations are required to finalize the ranking of submissions exactly according to the process described in the solicitation.

### *Ranking for Price-only Evaluations*

For price-only evaluations, ranking procedures are simple. All compliant submissions ranked in ascending order, with the lowest-priced compliant submission being recognized as best-value.

### *Ranking for Rated Criteria Evaluations*

The process for evaluations that consider factors other than price are similar. Here, instead of ranking in ascending order by price, the submissions are ranked in descending order by total points with the highest-scoring submission being recognized as best-value. The exact procedures for arriving at the final score of a submission would have been presented in the solicitation and carried out by the evaluation team.

### *Tie breaking procedures*

Albeit unlikely, both price-only evaluations and evaluations that consider factors other than price, carry the risk of a tie in ranking between two suppliers' submissions, either by sharing the same bid price or the same overall score.

Public Bodies are encouraged to mitigate this risk by acknowledging that risk within their solicitations and describing tie-breaking procedures that will be implemented should such a situation arise.

## PART TWO: NEGOTIATION AND AWARDS

The purpose of the evaluation identifies which, if any, of the suppliers' submissions are qualified and eligible for award. Where multiple submissions are qualified, the evaluation presents a ranking of submissions – according to best value. Whereas the purpose of any a subsequent negotiation process is to enable a purchasing organization to yield maximum value from contracting with the top-ranked supplier.

### WHAT IS A PROCUREMENT NEGOTIATION?

A procurement negotiation is a process contemplated by, and pursuant to, a solicitation whereby the purchasing organization and supplier agree to exchange information in support of finalizing a contract to fulfill a procurement need.

### WHAT IS THE PURPOSE OF PROCUREMENT NEGOTIATIONS?

Procurement negotiations begin where the solicitation-response cycle ends, bridging any gaps to a final contract and generating value for the purchasing organization through:

- seeking improvement or enhancements to the proposal from the supplier;
- clarifying and/or refining any elements of the scope for which the solicitation and response were silent or not sufficiently precise;
- ensuring a mutual understanding of the work to be undertaken, thereby avoiding delays and conflict during the execution of the contract;
- establishing key performance indicators, beyond those that may have been articulated in the solicitation; and
- agreeing on language to formalize expectations around variables unique to the proposed approach and, therefore, unable to have been articulated in the solicitation.

Procurement negotiations pursue practical modifications and refinements to existing proposals within the context and scope of a published solicitation. Significant changes or modifications proposed during negotiations should be reviewed by purchasing organizations' legal counsel.

## ACHIEVING BEST VALUE IN NEGOTIATION AND AWARD:

1. Reviewing Award Structure
2. Preparing for Negotiations
3. Conducting Negotiations
4. Building a Contract
5. Reporting Awards
6. Supplier Engagement

## STEP 1: REVIEW AWARD STRUCTURE

The first step in the award and negotiation process should be a review of the award structure published in the solicitation. The award structure should provide clarity on the number of anticipated awards and how each will be determined.

### ANTICIPATED AWARDS

Solicitations provide guidance to prospective bidders regarding the number of expected awards pursuant to the solicitation. In many cases, the award structure specifies a single contract to the highest-ranking supplier. In other cases, a solicitation's award structure might contemplate multiple awards, based on the highest-ranking supplier within defined geographic regions or product categories. Awards may also be structured to give rise to "order of call" contracts where suppliers are approached sequentially in order of evaluation results. In the case of Requests for Supplier Qualification solicitations, the award is the eligibility to participate in subsequent, derivative procurements.

It is important to note that the anticipated awards are dependent on the award structure which must be published in the solicitation. A purchasing organization cannot decide on, or make changes to, the award structure after the solicitation closes.

### DUTY TO AWARD

Generally, purchasing organizations should expect to make an award to the supplier whose bid demonstrates best value – as set out in the published evaluation process. If all suppliers understand that the best value bid will result in award, then those suppliers will be motivated to submit more competitive bids. More broadly, if more of the supplier community recognize that submitting more competitive bids will more often lead to award and competition prevails, improving the value of public money spent.

## STEP 2: PREPARING FOR NEGOTIATIONS

### ARE NEGOTIATIONS PERMITTED?

Before preparing for negotiations, a Public Body must determine if the negotiations are permitted for the procurement in question. In order for a Public Body to engage in negotiations with respect to a particular procurement, the solicitation in question must:

- (a) contain sufficient and transparent process language such that, before submitting a bid, prospective bidders will expect and understand the negotiation process that will precede any award; and
- (b) not contain language that would give rise to obligations on the Public Body that preclude its ability to enter negotiations with suppliers.

#### *Process Language Enabling Negotiations*

A solicitation's process language regarding negotiations should answer the following questions.

- (a) When will the negotiations phase of the procurement begin and end?
- (b) How will eligibility for negotiations be established and communicated?
- (c) What will be expected of suppliers during the negotiations and when?
- (d) How will the Public Body use the negotiation process to determine award?

A Public Body is responsible to describe in its solicitations all the processes and procedures that lead to award. This includes providing full transparency around the presence or absence of negotiations with suppliers. Public Bodies should follow exactly the procedures set out in the solicitation and avoiding making changes to the evaluation and award process. As a result, when and how negotiations happen will not be a surprise.

#### *Process Language Precluding Negotiations*

A Public Body may, despite its intentions, follow the recommendations above yet still undermine its ability to negotiate. If, for example, a solicitation gives rise to bid irrevocability for suppliers. As previously noted, binding solicitations can give rise to Contract A obligations for purchasing organizations and bidders at point of bid submission. Under these circumstances, the terms to comprise the final contract (Contract B) are assumed to be complete and finalized. A purchasing organization that attempts to negotiate with a supplier under Contract A obligations is increasing its risk exposure.

## NEGOTIATING CONTRACTS FROM LIMITED CALLS AND DIRECT AWARDS

If goods or services are being purchased without an open call for bids, the contract is negotiated directly with the supplier. While a solicitation document is not required, Public Bodies should prepare detailed requirements and specifications as part of the planning process in order to ensure that the goods and services received meet the needs of the Public Body. The requirements and specifications circulated to communicate the procurement needs of the purchasing organization then act as the entry point for negotiations with the supplier. The Public Body may also provide the requirements and specifications to the supplier and request a written proposal or quotation for the goods or services before opening negotiations. When using this approach, the supplier's proposal acts as the starting point for negotiations.

## NEGOTIATING CONTRACTS FROM OPEN CALLS FOR BIDS

In the context of an open call for bids, negotiations can only occur when the language of solicitation specifically prescribes negotiation as part of the award process, creating a negotiated RFP process. There are two distinct types of negotiated RFP processes: the consecutive negotiation process and the concurrent negotiations process. General descriptions of these processes are set out below, but it is critical that the negotiation process for a particular procurement project be conducted in accordance with the process described in the negotiated RFP document that is issued for that procurement project.

### *Consecutive Negotiations*

The consecutive negotiations model follows a single linear path, like a one-way street with several bus stops. Typically, the purchasing organization first engages with the top ranked supplier and attempts to finalize a contract via negotiations. If for some reason the parties are unable to finalize a contract, the purchasing organization terminates negotiations and begins negotiations with the next highest-ranked candidate. The procedures for engaging and terminating negotiations, as well as the procedures and triggers for moving on to another supplier must be clearly specified in the solicitation.

### *Concurrent Negotiations*

During concurrent negotiations, a purchasing organization engages with several suppliers simultaneously. Instead of driving down a one-way street with many stops, concurrent negotiations model drives down several streets all at the same time, each with a single stop at the end. Typically, concurrent negotiations are undertaken as part of a two-phased evaluation approach where initial submissions are collected and evaluated to create a short-listed set of suppliers to negotiate with. The precise terms of engagement during concurrent negotiations are governed by the language published in the solicitation but typically includes provisions for engaging with short-listed suppliers and providing an opportunity for each to improve their respective bids (i.e., best and final offer, BAFO) before final evaluation.



## NEGOTIATIONS TEAM AND ROLES

Before beginning negotiations with proponents, purchasing organizations should identify the official or set of officials who will represent that organization during negotiations. It is important for the purchasing organization to establish the responsibilities and authorities for each identified role on the negotiations team.

## SCOPE OF NEGOTIATIONS

In the context of procurements by Public Bodies that include consecutive or concurrent negotiations, it is important for the negotiation team to understand the allowable scope of negotiations. While the allowable scope is influenced by the process language presented in the negotiations section of the solicitation, generally Public Bodies can seek the following concessions during negotiations:

- Improved pricing;
- Improved terms;
- Refined understanding of the language used in either solicitation or response; and
- Clarification or incorporation of any element of the execution of deliverables for which both the solicitation and response were silent.

Negotiations cannot undermine or contravene the evaluation results.

## LIMITATIONS OF NEGOTIATIONS

It is important that purchasing organizations also understand, and avoid, the ways in which negotiations can inadvertently undermine the fairness of the procurement process.

### *Changing scope of award*

Changing the scope of the award undermines the evaluation process upon which the top-ranking supplier (consecutive negotiations) or the set of shortlisted suppliers (concurrent negotiations) have earned the opportunity to negotiate for a contract award. In advance any negotiations, for both consecutive and concurrent negotiation formats, the suppliers eligible to negotiate have committed to executing deliverables for a certain price. Any post-solicitation change in scope could be viewed by a supplier as undermining its initial competitive advantage or increasing the competitive advantage of a competitor.

In addition, a change in scope during award may be perceived as unfair by suppliers who elected not to submit a bid based on the original published scope of work. A reduction in scope, if communicated during the posting period, might have encouraged increased participation from small suppliers. Increases in scope, if published, may have attracted the attention of additional larger firms. In either case, changes to scope can impact the perceived fairness of the procurement process to stakeholders.

#### *Increasing scope*

If a purchasing organization increases the published scope of award, it could impact a supplier's ability, availability, or willingness to execute the revised deliverables at its proposed price. In the context of consecutive negotiations, the purchasing organization is not permitted to increase scope and invite a corresponding increase in price from the top-ranked supplier because the evaluation process that identified that top-ranked supplier was based, at least in part, on bid price. Similarly, in most concurrent negotiation formats, original bid price is factored into the initial evaluation that determines which suppliers are shortlisted for best and final offer.

#### *Decreasing or shifting scope*

While more nuanced, decreasing or shifting the scope also undermines fairness, primarily with suppliers who were not deemed eligible to participate in negotiations. In both consecutive formats, any supplier other than the top-ranked supplier could reasonably argue that a reduction in scope would have permitted its submission of a more competitive price. Alternatively, a decrease or shift in scope may have permitted that supplier to submit different or superior products, services, ideas or methodologies that could have led to improved evaluation results for non-price factors.

#### *Rescinding mandatory requirements*

Purchasing organizations should avoid rescinding mandatory requirements published in the original solicitation. Taken together as a set, a solicitation's mandatory requirements become the necessary foundation of any proposed solution that could satisfy the purchasing organization's procurement need. Removing even one mandatory requirement could change the set of potential solutions that each proponent could offer.

Any proponent uninvited to negotiations, under either format, could argue they were unfairly disadvantaged by a process that conferred requirements upon it that were later dropped for its competitors. Further, dropping mandatory requirements during negotiations may be considered unfair by conscientious suppliers who read the solicitation's requirements, recognized their inability to satisfy those deliverables, and elected not to participate.

### *Permitting a supplier to rescind part of its proposal*

Non-price factors play an important part of the evaluation of solicitations that include consecutive or concurrent negotiation methodologies. Accordingly, there is typically a direct relationship between the quality of proposal and evaluation results for non-price factors. For evaluations that emphasize non-price factors, high quality proposals should more often be invited to enter negotiations (following published procedures). If, during negotiations, the Proponent of a high-quality proposal were permitted to rescind or degrade some or all of the higher quality elements of that proposal – then its original evaluation results would no longer be accurate and its eligibility to participate in negotiations undermined.

### *Permitting proponents to decrease financial competitiveness*

Financial competitiveness is a significant factor in the evaluation process for best value procurements. In most cases, financial competitiveness is represented by a proponent's bid price, representing the amount that the proponent would charge a purchasing organization to perform the scope of work.

For most consecutive negotiations solicitations, bid price is part of the evaluation methodology for determining the highest-ranked supplier – who will be invited to enter negotiations to finalize a contract. Allowing the top-ranked supplier to increase its price, or otherwise decrease its financial competitiveness, during negotiations invalidates the conclusion of the published evaluation process. Doing so would also trigger procedural fairness concerns for the purchasing organization: the same process would not have been applied to all proponents, as only the top ranked proponent would have been provided an opportunity to change its bid.

Similar concerns exist for solicitations that follow a concurrent negotiations model. Bid price normally impacts which proponents are eligible for shortlisting and thus eligible to participate in the BAFO process. Later, proponents' BAFO prices, in part, determine which proponent enters final negotiations with the purchasing organization. Permitting a proponent to roll back the financial competitiveness of its proposal would undermine both the pre- and post-BAFO evaluations.

## STEP 3: CONDUCTING FINAL NEGOTIATIONS

The preceding sections articulates what is in-scope and outside-scope for both concurrent and consecutive negotiations during a public procurement, effectively the boundaries for what is possible. After identifying that set of potential negotiation outcomes, a purchasing organization should identify a subset of both desirable and realistic outcomes (negotiation objectives) and develop a strategy to realize those objectives.

### NEGOTIATION PLANNING

#### *Negotiation Objectives vs. Negotiation Strategy*

In a procurement context, negotiation objectives are specific desirable goals or end-results, typically concessions formalized through language in the final contract. Alternatively, a negotiation strategy is the plan, approach and tactics used by a negotiating party to achieve its objectives.

#### *Anticipate Negotiation Objectives of Proponents*

As a purchasing organization is required to publish its intention to negotiate in the solicitation, proponents are afforded adequate opportunity to prepare. Proponent's previous experience with public sector negotiations will vary according to commodity, market sector and procuring entity. Proponents with extensive procurement experience with large public sector entities may enter negotiations with pre-established objectives of their own. Reviewing organizational information from past procurements involving that supplier or, with other suppliers in that market sector, may be helpful in anticipating suppliers' objectives entering negotiations. Initial assessments of suppliers' negotiation positions prior to first contact, can contribute to developing a purchasing organization's objectives and strategy.

#### *Finalize Negotiation Objectives*

Entering final negotiations with unrealistic negotiation objectives is not helpful. Accordingly, a purchasing organization benefits from testing, and potentially revising, its negotiation objectives in light of any anticipated supplier objectives. Negotiation objectives that are deemed realistic and achievable should be recorded before first contact for future reference by negotiating team members. It is important to note that entering negotiations with documented and realistic objectives does not preclude an aggressive negotiations strategy, where a purchasing organization might choose to present an initial position likely to be viewed by the supplier as unrealistic.

## FIRST CONTACT AND MANAGING EXPECTATIONS

After negotiation planning is complete, the purchasing organization must establish first contact with the top-ranked proponent. It is recommended that Public Bodies use first contact to set clear expectations for the negotiations period. First contact can be written or verbal, but it is recommended that any expectations expressed verbally are also communicated in writing.

### *Process Expectations*

The following are some examples of process expectations that a purchasing organization may choose include as part of first contact. Any process expectations communicated as part of first contact would need to align with the negotiation processes previously established by the solicitation. Examples of process expectation include:

- No contractual obligations are created until a final written agreement is signed by both parties.
- No work shall begin before a final contract has been signed by both parties.
- Entering negotiations does not imply obligations on either party to finalize an agreement.
- Information provided to the purchasing organization will not be revealed to other parties unless compelled by law or permission granted by the supplier.
- The negotiation period has a defined start and end period.
- Negotiations will be documented for transparency.
- Purchasing organization's procedures for closing negotiations and making award.
- Purchasing organization's procedures for terminating negotiations.

### *Communications Expectations*

The following are some examples of communications expectations that a purchasing organization may choose include as part of first contact.

- Professional conduct for engagement during negotiations (i.e., no verbal or written abuse, harassment, etc.).
- Timeliness for acknowledgement of proposals and requests for clarifications.
- Timeliness for replies to proposals and requests for clarifications.
- Processes for recording meeting minutes.
- Processes for recording/tracking negotiation process (i.e., points of agreement, acceptance/rejection of propositions, etc.).

## EXPLORATORY DISCUSSIONS

After first contact has been made and both parties have shared expectations for procedures and communications that will make up negotiations, work toward finalizing an agreement begins. Finalizing an agreement generally happens piecewise, through the sequential resolution of individual clarifications and propositions.

### *Clarifications*

In the context of public procurement, a clarification is a point of agreement and mutual understanding between parties resulting from refinement, interpretation, exposition of language contained within either the solicitation, the proposal or both. Clarifications are typically required when negotiations reveal that contract language would benefit from a degree of specificity greater than what was published in the solicitation or submitted in the proposal, or both. Some examples follow.

1. Solicitation requires supplier to provide a green truck.
2. Supplier's submission proposes a green truck.
3. Supplier seeks clarification: I believe a lime green truck is a green truck.
4. Purchasing Organization: I agree.
5. Clarification for contracting: A lime green truck is a green truck and acceptable.

1. Solicitation requires supplier to vacuum carpets.
2. Supplier's submission proposes to vacuum carpets.
3. Purchasing organization makes clarification: I believe vacuuming carpets includes moving furniture to vacuum the carpet located underneath furniture.
4. Supplier makes counter-clarification: I believe vacuuming carpets includes moving furniture that is easily moveable such as chairs and tables but does not include moving furniture that is difficult to move such as refrigerators and filing cabinets.
5. Purchasing organization: I agree.
6. Clarification for contracting: As part of vacuuming carpets, supplier will move, and vacuum under, chairs, tables and other easily moveable furniture - but not under refrigerators and filing cabinets.

### *Propositions*

In the context of public procurement, a proposition is a point of agreement and mutual understanding between parties to add supplemental contract language to address circumstances, within the scope of the procurement, for which the solicitation and proposal are silent. Propositions are typically required when negotiations reveal that additional language is needed to address circumstances that were not identified, or could not be addressed, until the negotiations phase. Some examples follow.

1. Solicitation requires supplier to pave a driveway but does not provide specifications for subsurface materials.
  2. Supplier's submission proposes to pay driveway.
  3. Purchasing organization prefers 6" mattress of crushed stone.
  4. Purchasing organization makes proposition to supplier: I want 6" mattress of crushed stone.
  5. Supplier makes counterproposition to purchasing organization: I will offer 4" mattress of sand.
  6. Purchasing organization makes counterproposition to supplier: I will concede to 4" mattress of crushed stone.
  7. Supplier: I agree.
  8. Proposition for contracting: Supplier will ensure 4" mattress of crushed stone.
- 
1. Solicitation requires supplier to deliver packages within a 7-day window and, as part of the technical evaluation, requests suppliers to propose their best delivery times.
  2. Supplier's submission indicates intended compliance with 7-day window and proposes a 6-day window as their best delivery time.
  3. Purchasing organization prefers a supplier with a 5-day window.
  4. Purchasing organization makes proposition to Proponent: I want a 4-day window.
  5. Proponent makes counterproposition to purchasing organization: I will concede to a 5-day window.
  6. Purchasing organization: I agree.
  7. Proposition for contracting: Supplier will deliver packages within a 5-day window.

## CLOSING NEGOTIATIONS

When negotiation dialogue has resolved all the clarifications and propositions put forward by the supplier and purchasing organization, the parties can begin building a contract.

## TERMINATING NEGOTIATIONS

A purchasing organization should ensure that its solicitations that contemplate consecutive or concurrent negotiations contain transparent process language for terminating final negotiation with a top-ranked proponent. Respecting the termination of negotiations, such solicitations should prescribe:

- a trigger for the assessment of negotiations (i.e., end of negotiation period);
- an indicator for failure of negotiations (i.e., no contract finalized);
- procedures for terminating negotiations with that proponent; and
- post-termination procedures (i.e., move on to the next highest-ranking proponent).



## STEP 4: BUILDING A CONTRACT

### OVERVIEW OF PROCUREMENT CONTRACTS

A procurement contract finalizes a relationship between the purchasing and the supplier for the acquisition of a commodity. Writing a procurement contract requires some knowledge of the current procurement contracting landscape in Canada, including applicable laws, regulations, policies, trade agreements, jurisprudence and procurement best practices. As a result, it is recommended that Public Bodies engage legal and procurement expertise during the contracting process.

### TYPES OF PROCUREMENT CONTRACTS

Solicitations can give rise to several distinct types of procurement contracts. Some common contract types are listed below.

#### *Transactional Contracts (fixed total price, fixed scope, single transaction)*

- The solicitation specifies fixed quantities or a fixed scope / set of deliverables.
- The response offers to fulfill the scope for a fixed price.
- The scope is fulfilled in a single transaction.
- Buying a lawnmower requires a transactional contract.

#### *Term Contracts (fixed total price, fixed scope, fixed term)*

- The solicitation specifies a fixed scope or set of deliverables.
- The response offers to fulfill the scope the scope for a fixed price.
- The scope is fulfilled over a period of time.
- Hiring a company to replace the shingles on a building requires a term contract.

#### *Standing Offer Agreement (fixed unit price, variable scope, fixed term)*

- The solicitation specifies a variable scope or unknown/estimated quantities.
- The response offers to fulfill the scope for a fixed rate.
- The fixed rate offered by the supplier applies to a fixed term.
- Hiring a company to provide certain office supplies for a three-year period requires a standing offer agreement.

## CONTRACT FORMATS

Procurement contracts are usually framed within one of two common formats: purchase orders and formal contracts.

### *Purchase Orders*

In a public procurement setting, purchase orders are the most common transactional procurement contract. Typically, purchase orders are used in place of more formal contracts to finalize low-complexity procurements. As purchase orders typically include only the most essential information necessary to describe the transaction, they are most often used to formalize one-time acquisitions of goods. The brevity and simplicity of purchase order format is less appropriate for formalizing complex procurements (i.e., building construction) or more complex procurement contract types (standing offer agreements).

### *Formal Contracts*

Formal contracts are required when the statement of work or terms and conditions related to the delivery thereof are too complex or lengthy to be presented in the context of a purchase order.

## CONTRACT CONTENT

Some common content areas for procurement contracts are presented below.

### *Title and Parties*

Procurement contracts should begin with a descriptive title, such that the reader of the contract can quickly identify the parties to the contract (the legal names the purchasing organization and supplier) as well as the purpose of the contract (the name of the commodity awarded). From an administrative perspective, it can be helpful to mirror the title of the contract to the title of the solicitation that gave rise to the contract (i.e., “Request for Proposals to Repair Highway 123” becomes “Contract to Repair Highway 123”).

### *Recital*

Recital is a preamble following the identification of parties which describes the purpose of establishing the contract. In the context of procurement contracts, the preamble typically documents a purchasing organization’s intent to acquire a commodity from a supplier, according to the solicitation-response cycle.

### *Definitions*

Depending on the complexity or degree of technicality of commodity being contracted, it may be helpful for both parties to make use of defined terms throughout the contract to reduce ambiguity and ensure mutual understanding. Defined terms can be helpful in bridging the language used by the purchasing organization in the solicitation with language used by the supplier in its response, including any variance in terminology describing scope of work, deliverables, requirements or any other aspect of the procurement.

### *Term of Agreement*

A formal contract should clearly specify its term. It may also be useful to include reference to potential extensions permitted by the published solicitation and any process and/or timelines to effect such extensions.

### *Payment Terms:*

A purchasing organization should ensure that its contracts set out provisions for payment terms and related expectations which may include the following:

- expected payment regimen and/or related milestone triggers for payments;
- process for supplier to submit invoices;
- documentation required to accompany invoices;
- eligible payment methods and any related procedural requirements;
- financial penalties for late delivery or substandard supplier performance; and
- consequences for overdue payment by the purchasing organization.

### *Amendments and Change Management:*

A contract should contain provisions for managing future changes. Agreed processes and timelines for requesting and approving amendments, change orders and extensions should be documented.

### *Confidentiality and Intellectual Property*

Depending on the commodity being procured, it may be necessary to document each party's definition of its own confidential information, as well as any expectations held for the other party respecting the usage and storage of that information. Suppliers and/or purchasing organizations may also seek recognition of rights regarding intellectual property brought into, or derived from, the project.

### *Dispute Resolution*

In the event of a dispute during the life of a contract, it would be beneficial for both parties to have agreed upon and formalized expectations and procedures to resolve disputes. This language may provide escalation process for the parties to follow, from negotiations through mediation before consideration of legal action.

### *Contract Termination*

Both parties benefit when there is shared understanding of the circumstances under which a contract can be terminated. The language governing termination should include:

- eligibility to terminate;
- circumstances permitting termination;
- notice of termination requirements (procedures, timelines, etc.);
- circumstances to override notice; and
- residual responsibilities of each party, post-termination.

### *Governing Law and Jurisdiction:*

Identify the applicable governing laws of the contract (i.e., laws in force in the Province of Newfoundland and Labrador).

### *Signatures and Execution:*

Include signature blocks for authorized representatives of both parties to sign the contract, indicating their agreement and acceptance of its terms.

In addition to those sections suggested above, a purchasing organization may wish to incorporate by reference, or restate entirely, all critical elements of the solicitation-response cycle and/or any results of negotiation processes. Such elements might include any or all of the following:

### *Scope of Work:*

Detail the work to be performed by the supplier under the contract or contractor. Specify the goods, services, or construction work to be provided, including quantities, specifications, quality standards, delivery schedules, and any other requirements.

### *Pricing:*

Specify the price for the goods, services, or construction work, including any applicable escalators or pricing adjustment mechanisms applicable to the contract or any potential extensions.

### *Quality Assurance and Performance Securities*

Depending on the nature and value of the procurement, a purchasing organization may seek to establish quality assurance prerogatives throughout the life of the contract to ensure contractual obligations are satisfied by the supplier. Such periodic quality assurance activities may include:

- validation of products' technical specifications;
- site inspections; and
- confirmation of insurance coverages or personnel qualifications.

Further, the risk profile of certain commodities may oblige the purchasing organization to seek performance security from the supplier before making an award. The contract would outline the terms and triggers for both the surrender by, and reimbursement to, the supplier.

### *Compliance Reporting:*

Specify the obligations of the supplier to report its compliance with all relevant laws, regulations, and standards, including those related to health and safety, environmental protection, and employment practices.

## QUALITY CONTROL AND EXECUTING CONTRACTS

### *Scope Validation*

It is possible that, through the negotiation and contracting processes, the parties lose sight of the structure provided by the solicitation-response cycle. This can lead to the purchasing organization inadvertently expanding the scope of award or the supplier walking back commitments proffered by its submission. Before finalizing a contract, a purchasing organization should ensure that the scope of work pending award remains congruent with the scope of work articulated in the solicitation and response.

### *Review by Legal Counsel:*

Before finalizing a contract, purchasing organizations should consider having it reviewed by legal counsel to ensure compliance with relevant laws, regulations, and best practices in contracting.

## STEP 5: AWARD REPORTING

Public Bodies are required to publish award notifications pursuant to open calls for bids and limited calls for bids where the value of the award exceeds the applicable threshold specified under Public Procurement Policy 20. Summary of Reporting. Similarly, Public Bodies are also required to publish award notifications pursuant to any direct awards.

### *Award notifications*

A Public Body must publish award notifications on its website within 30 days of award. If a Public Body does not have a website, it must send the information to Public Procurement Agency to post on its behalf within 15 days of award.

### AWARD NOTIFICATION DETAILS - LIMITED AND OPEN CALLS FOR BIDS

Award notifications pursuant to open and limited call for bids must include the following details:

- the name of successful bidder;
- a description of the commodity awarded;
- the date of the award;
- financial value of the award; and
- the term of the contract and any renewal options (where applicable).

### AWARD NOTIFICATION DETAILS – DIRECT AWARDS

In addition to all of the above details required for an award notification pursuant to limited and open call for bids, award notifications pursuant to direct awards, or exceptions to an open call, must also:

- cite the relevant exception clause;
- provide the reason why an open call for bids was not invited;
- present the name of the public official who approved the direct award and reasoning; and
- present the date the exception was approved.

## STEP 6: SUPPLIER ENGAGEMENT

### SUPPLIER DEBRIEFING OVERVIEW

If requested, Public Bodies are required to provide debriefings to unsuccessful bidders to an open call for bids. A supplier debriefing session is a discussion between a Public Body and a supplier, pertaining to a supplier's participation in an open call for bids. During the session, the supplier has an opportunity to ask questions about the procurement and the decisions made throughout the process. Supplier debriefings are critical to the public procurement process because it is the primary mechanism through which a Public Body can demonstrate accountability for its procurements.

#### *Purpose of supplier debriefings*

Supplier debriefings build public confidence in, and understanding of, best value public procurement and provides information to assist suppliers in improving their submissions the next time they participate in an open call process.

- The public procurement process can sometimes be complex. If a procurement procedure is unclear, predicting its outcome will be difficult. When process outcomes are viewed as unpredictable, they can easily be misinterpreted as being unfair. For this reason, it is important that Public Bodies leverage the supplier debriefing process to ensure the full transparency that permits unsuccessful suppliers to understand the procedures used to arrive at the award. Understanding the procurement procedures used by the Public Body is the foundational element of the supplier debriefing.
- Only after an unsuccessful supplier understands how a procurement actually worked from a procedural perspective, is that supplier adequately positioned to question those procedures to ensure its submission was treated fairly. Most important among the procedures subject to explanation is the evaluation process. An unsuccessful supplier who fully understands how its submission was evaluated and how that evaluation process led to a valid outcome, walks away from the procurement of process better prepared for future opportunities.
- Broadly, a public procurement system that supports consistent, effective supplier debriefing sessions cultivates a supplier base better informed by its past experiences and better able to leverage the feedback for more positive outcomes in future procurements. The Public Bodies participating in that system reap the benefits of continuously improving quality of submissions and greater acceptance of a best value procurement system – for both successful and unsuccessful suppliers.

## SUPPLIER DEBRIEFING TIMELINES AND PROCEDURES

### *Timelines for Supplier Debriefings*

After a contract has been executed with the successful bidder, any unsuccessful bidder may request a debriefing session from the pertinent Public Body. Requests for debriefings must be made in writing by the unsuccessful bidder to the Public Body within 10 business days of the posting of award on the Public Body's website or the Agency's electronic notification system. Granting a request for debriefing outside this timeframe remain at the discretion of the Public Body. A Public Body in receipt of a written request within the prescribed timeframe must perform the debriefing within 10 business days of request.

### *Procedures for Arranging Supplier Debriefings*

On receipt of written request, the official responsible for the procurement is responsible for making the arrangements required to carry out the debriefing session. This normally includes:

- determining the optimal medium for the session (in-person, telephone, videoconference, etc.);
- determining which officials are required to represent the Public Body at the debriefing (procurement official, evaluation team, etc.);
- coordinating to determine a mutually acceptable date and time for the debriefing and collecting contact information for representatives of the unsuccessful bidder; and
- issuing invitations.

## PREPARING CONTENT FOR SUPPLIER DEBRIEFINGS

The officials representing the Public Bodies should prepare for debriefing sessions.

### *Recommended Content*

Public Bodies must provide relevant feedback to suppliers on their submissions based on evaluation criteria while at the same time respecting any confidentiality requirements which may be owed to other suppliers. In that light, the following is a list of recommended content that is in-scope for supplier debriefing sessions performed by Public Bodies.



- Overview of the entire procurement process, including:
  - reviewing the scope or statement of work;
  - review the mandatory requirements;
  - review the technical evaluation procedures, including:
    - reviewing the technical criteria and their respective weighting; and
    - reviewing the instruments used to measure each criterion;
  - reviewing the pricing evaluation procedures; and
  - reviewing award procedures (i.e., how technical and pricing evaluations are combined to identify the Preferred Supplier).
  
- Overview of the unsuccessful bidder's submission, including:
  - reviewing the scoring results for each technical criterion, which may include specifying its score and/or a rating;
  - summarizing technical performance, usually by presenting technical score achieved in light of technical score available;
  - reviewing the scoring results for each pricing segment, where applicable (multiple awards, multiple price segments, etc.); and
  - summarizing pricing performance, usually by presenting pricing score achieved in light of pricing score available.
  
- Overview of relative standing of unsuccessful bidder, including:
  - presenting total combined score;
  - presenting final ranking;
  - presenting the relative strengths and weakness of the submission; and
  - explaining why the bidder was unsuccessful.

#### *Content to avoid*

Public Bodies should not include any of the following types of information as part of the supplier debriefing session:

- information related to the content of another supplier's submission; and
- evaluation results (i.e., scores) of another supplier.

### *Preparation Session*

Accordingly, the debriefing team should be prepared to speak to any of the above areas in detail. In advance of any debriefing sessions, the official responsible for the debriefing should convene a meeting to discuss the respective responsibilities for each debriefing team member, including:

- leading / moderating the session on behalf on the Public Body;
- each team member's debriefing content responsibilities:
  - who will present what information?
  - who will take questions on what topic?
- advising on the supplier complaint and review process; and
- completing the Supplier Debriefing Record.

## CONDUCTING DEBRIEFING SESSIONS

### *Manage Expectations*

A successful debriefing session is predicated on mutual understanding. From the outset, the unsuccessful supplier should be aware of the purpose of the debriefing session – as presented above. Similarly, the Public Body should be equally transparent when it comes to the limitations of the debriefing session, including:

- A debriefing session is not an opportunity for, and does not provide any future opportunity for, an unsuccessful supplier to change or improve upon its submission or otherwise alter the outcome of the procurement. Rather, a debriefing session describes the (final) results of a procurement, and, more importantly, how the Public Body arrived at those results because, chronologically, debriefings occur after an award has been finalized and a contract signed.
- A debriefing session is not adversarial process. Its purpose mutually benefits both Public Bodies and Suppliers. While the debriefing session can serve as an opportunity for an unsuccessful supplier to question the procurement process, it is not an opportunity to contest procurement results. The Supplier Complaint and Review process, among other options available to unsuccessful suppliers, is more suitable for an adversarial style of engagement.

### *Provide Opportunity for Questions*

After providing the debriefing, it is recommended to provide an opportunity for the unsuccessful supplier to ask questions. The debriefing team should be prepared to elaborate on any of the recommended content items listed above. Recognizing certain boundaries established by confidentiality and privacy provisions, answering questions to satisfaction is essential to legitimizing the (unfortunate) results from the perspective of an unsuccessful supplier.

### *Provide Overview of the Supplier Complaint and Review Process*

Further to Public Procurement Policy 23, and as part of concluding the supplier debriefing session, Public Bodies are required to advise unsuccessful bidders of the Supplier Complaint and Review Process.

## SUPPLIER COMPLAINT AND REVIEW PROCESS

Section 25 of the Public Procurement Regulations requires Public Bodies in Newfoundland and Labrador to receive and respond to procurement-related complaints from suppliers. The supplier complaint and review process provides an opportunity for suppliers to voice complaints related to an open call for bids for which they submitted a bid. The process also assists public bodies in identifying and responding to potential problem areas in the application of public procurement policy, procedures and legislation.

### *Eligibility to Register*

Suppliers can register a complaint with a Public Body pertaining to a procurement where it:

- participated in an open call for bids by that Public Body;
- received a supplier debriefing from that Public Body; and
- feels aggrieved by the procurement.

### *Grounds for Dismissal*

After a preliminary review, the Head of a Public Body may dismiss a complaint received from a supplier for reasons that include:

- a supplier debriefing session with the complainant pertaining to that procurement has not yet taken place;
- the complaint was not registered within 15 business days of the supplier debriefing;
- the complainant was not a participant in the procurement related to the complaint; or

- the complainant has initiated legal action or has addressed the issue in another manner.

### *Responsibilities of a Public Body*

Where a complaint is dismissed, the Head of the Public Body must provide the reasons for dismissal in writing to the complainant and copy the Chief Procurement Officer. Where a complaint is reviewed, the Head of the Public Body must:

- review the complaint and procurement file in detail;
- discuss the issues with officials involved in the procurement;
- seek further information and clarification from the supplier where required;
- conclude the investigation and respond to the complainant in writing within 15 business days of the complaint being registered;
- copy the Chief Procurement Officer on the response to the complainant;
- maintain a copy of the results and the response to the complainant in the procurement file.