Review of Government's Procurement Legislation, Policies and Processes

Final Report to the Government Purchasing Agency

Government of Newfoundland and Labrador

March 25, 2008

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EXECUTIVE SUMMARY

MANDATE

The Government Purchasing Agency ('GPA'), Government of Newfoundland and Labrador, contracted for this Review:

- to *evaluate* the government's procurement legislation, trade agreement practices, and policies and procedures against public and private sector best practices;
- to *identify* issues of concern; and
- to *make recommendations* for improvements in how government departments and the GPA acquire goods and services and major capital works in a competitive, timely, fair and transparent manner while achieving value for money.

ASSESSMENT

Purchasing by and for the departments of the government of Newfoundland and Labrador appears to be working adequately. The strengths of the existing approach to procurement include:

- a broad commitment to openness – essentially, for procurements over specified dollar thresholds, any supplier from anywhere can bid on anything;
- clarity of the core legislation, the Public Tender Act ('PTA, or 'the Act') and its Regulations ('Regulations');
- a purchasing process that focuses on buying what the government needs, without adding other objectives (which other objectives, if in place, could conflict with the requirements of the procurement system);
- application of the legislation to all Government-funded Bodies ('GFBs') in the province, extended recently to the House of Assembly, providing a degree of consistency whenever public money is being spent;
- a procedural and guidance framework that is short, considered by most to be easy to understand, and applied with great rigor;
- strong central purchasing services in the GPA and Central Purchasing Authority (CPA);
- the current project to obtain and install a new operational, management and data system to support purchasing activities;
- a relative lack of negative observations by the Auditor General:
  - it would be unrealistic to expect that negative observations about procurement would never be made by the Auditor General: reassuring are (i) the relatively small number of such observations, and (ii) the fact that they apply to specific procurement actions, rather than the higher-level functioning of the procurement system; and
- the current project to update standard construction documents, in collaboration between the government and the construction industry.

ISSUES OF CONCERN

At the same time, we have identified a number of issues of concern. Elements of the existing approach to procurement are inflexible, uneven, fragmented, inconsistent, and causing problems within departments and for suppliers:

- you are the only province that covers *all* of your diverse public bodies, under *one* statute, that *prescribes* how to buy, for *everything* that those public bodies acquire:
  - this is inherently inflexible and unsuited to meeting the diverse range of requirements;

- your approach results in operational and administrative inefficiencies within the government:
    - people are spending too much time on administrative procedures and processes that do not appear to produce commensurate results;
- suppliers feel that they do not have fair access to contract opportunities:
    - they do not see a level playing field;
- government and suppliers experience significant difficulties due to actual or perceived problems in contractor selection and contract management:
    - both feel powerless to deal with the problems;
- responsibility and accountability for procurement is fragmented across the government;
- the PTA and Regulations are problematic:
    - the PTA is in some parts highly regimented and prescriptive, and in others open to interpretation;
    - every major provision causes problems of some import and consequence;
    - there is conflict with Canadian contract law;
    - processes in place seeking to ensure effective oversight and control are uneven; reporting is not always present or adequate to the purpose;
    - the Act only covers a portion of the overall procurement process - with the areas not covered widely known to be potentially problematic; and
- the overall focus appears to be on complying with the Act - not achieving best results and best value for the government and suppliers.

INTERIM ACTION ITEMS

We have identified numerous changes that should be made to and **within the existing legislative and regulatory framework**. We believe that you need to:

- amend the Public Tender Act, to permit the use of all forms of calls for bids without the need for special approvals;
- define clearly more flexible situations where a call for bids is not required;
- place limits on supplier contacts with the government, once a call for bids is issued;
- introduce more control over and better information about change orders;
- improve transparency by making more information about all aspects of procurement available on the Internet; and
- improve oversight and the general management of procurement.

BEST PRACTICES

We call our Action Items 'interim' because while implementing them would produce significant benefits, it would leave you with an approach to public procurement that would still be based on rules rather than results. It would leave your procurement being managed from the bottom up – transaction by transaction – rather than through a coordinated approach that recognizes the potential benefits to be gained from some careful stewardship of 25% of the annual provincial government spending.

Even with the Action Items implemented, we believe that the province would likely find itself operating a less than ideal procurement system, subject to continuing challenge, and falling behind the leading edge of procurement practices in Canada and internationally. You would have a legal framework adequate for today, but less well suited to the future. It would remain a framework based on process, rather than results, responsibilities and accountability – when best practices for procurement by government, in Canada and internationally, and in the private sector, increasingly reflect these latter attributes.

In brief, you would have ‘good practices’ – but not ‘best practices’.

RECOMMENDATIONS

Most public statements about government procurement refer to the paramount status of fairness, openness, transparency and competition (terms that are event usually either poorly defined or misunderstood). We suggest that the citizens of Newfoundland and Labrador – many of whom do not think about public procurement, let alone understand its complexities - are probably not interested in such high level generalized statements. Rather, they want to see tangible evidence that their money is being well spent, to advance their interests and the interests of the province.

We believe that you can best meet these expectations by introducing a new approach to procurement, based on new legislation that focuses on principles and results. This should then be supported by policies that set how those results will be achieved, and that provide the needed flexibility to ensure the ongoing effectiveness and efficiency of provincial procurement.

Our recommendations are that you:

- repeal the current Act, with its emphasis on finding suppliers, and replace it with one that will provide effective guidance to the public service - and relevant information to the supplier community – covering all of the various aspects of procurement;
- replace your current process-based approach to procurement legislation with a new Act that is built and focused on Results, Roles, Responsibilities and Accountability;
- replace the detailed procedural measures now included in the PTA and its Regulations, with a range of policies that provide the equivalent direction, but that leave you flexibility to adapt quickly to changing conditions and requirements;
- when the various policies are developed, it should be made clear that their procedural requirements apply to all GFBs included within their scope: to the extent possible the various new policies should be consistent across the broad range of public organizations now subject to the PTA;
- designate the Chief Operating Officer (COO) of the Government Purchasing Agency as the Chief Procurement Officer for Newfoundland and Labrador, with broad responsibility and accountability to direct, manage and oversee all public procurement activities across the province; and
- broaden and define the mandate of the Citizens' Representative to include the procurement activities of all provincial departments, agencies and Government-funded Bodies; that it be clear that the Representative may inquire into procurement-related complaints by any supplier (not just those from within the province); and that the Citizens' Representative and the COO of the GPA work together to develop rules of procedure to ensure that an effective procurement recourse mechanism is in place.

Implementing these Recommendations would indeed be a bold move by the government - in our view, that move would be reflective of and fully consistent with the 2007 policy blueprint, "***Proud. Strong. Determined. The Future is Ours***". We believe that, if implemented, these suggestions would ensure that Newfoundland and Labrador retains its historical position of leadership in the Canadian procurement community.

MANDATE AND METHODOLOGY

MANDATE

In its 2007 policy blueprint, "*Proud. Strong. Determined. The Future is Ours*" (also known as the Blue Book), the government made a commitment to the people of the province that it would "through the Government Purchasing Agency, implement revisions to reform procurement and capital works tendering policies". In order to implement that commitment, on October 20, 2007 the Government Purchasing Agency (GPA) published on its official web site a Request for Proposal for a three-part mandate:

- to *evaluate* the government's procurement legislation, trade agreement practices, and policies and procedures against public and private sector best practices;

- to *identify* issues of concern; and

- to *make recommendations* for improvements in how government departments and the GPA acquire goods and services and major capital works in a competitive, timely, fair and transparent manner while achieving value for money.

We were particularly struck by the *Blue Book* use of the word 'reform'. To us, it implies a desire for and willingness to change that extends well beyond seeking incremental changes at the margin. Interestingly, though, virtually every dictionary or Internet definition of 'reform' contains a reference to improvement in order to remove abuse and injustices, or similar - but we have not found in our review such abuses or malpractices to deal with. Broadly speaking, as was emphasized to us during our review, the GPA on the government's behalf was expecting us to look for **Best Practices in public procurement**, to be applied within Newfoundland and Labrador.

METHODOLOGY

RFP Solutions Inc., of Ottawa, was the successful bidder. Subsequently, and with the approval of the GPA, the contract was formally assigned to the lead consultant who had been proposed by RFP Solutions, Mr. John Read. He and the review team members who had also been proposed by RFP Solutions – Mr. R.J. (Bob) Kelly, and Mr. Robert C. Worthington – have carried out the review process as it had been proposed by RFP Solutions. In this Report, this study team is generally referred to as 'we'" or 'us'

In preparing the RFP Solutions bid for this contract, we ensured that we were familiar with the PTA and its Regulations. We also commenced gathering procurement best practices from Canada and around the world that might have possible application in Newfoundland and Labrador.

In early January 2007 we carried out a week of preliminary research in St. John's, interviewing a number of senior staff in the GPA and major departments. Our interview approach used free-ranging discussions with the participants, seeking to give them every opportunity to provide us with relevant information and experiences. This work permitted us to submit to the GPA an interim report in which we gave our preliminary assessment of the state of procurement in the province, and indicated possible suggestions for change that we *might* make. The report was circulated to a number of people inside the government, and we received some very useful feedback.

We then initiated a series of contacts with procurement official in other provinces and federal authorities, to obtain information that would allow us to put the Newfoundland and Labrador situation in a broader context. Concurrently we continued our gathering of relevant best practices information, and we continued to assess the possible implications of our interview findings.

In early February, we returned to St. John's to examine more than 100 purchasing files, seeking to establish whether they demonstrate that current purchasing policies and processes are appropriate, and to determine whether they indicated any specific issues that need to be addressed. We also continued our interviews with senior government personnel, and with a number of supplier community members and representatives.

We assessed all of the information we had received and presented our Preliminary Report on February 29, 2008. We then returned to St. John's in early March for discussions of that Report, including its findings and recommendations, with government staff. Based on the considerable feedback received, we developed this Final Report.

Throughout this review, we have been mindful of the adage that one should not attempt to fix what is not broken. We have sought to identify areas where improvements appear necessary, feasible and of sufficient likely benefit to warrant consideration. We have been guided by what people interviewed have told us; what has taken and is taking place in other Canadian and international jurisdictions; and what our professional experience has suggested to us.

PRESENTATION OF FINDINGS

After considering content and implications of the early reports we presented, and the observations and comments we received, we present our findings in two ways.

First, after analysis of specific questions and issues, we present **Action Items** – specific actions that we recommend the government take to deal with specific issues and concerns. These items are highlighted throughout the Report in text boxes, and are numbered consecutively, as A-1, A-2 etc. For ease of reference, the Action items are also consolidated in Annex M.

Second, having looked at those specific issues, we stood back to assess the overall situation, to see whether the Action Items as a group, if implemented, would achieve the results you are seeking from this study. In our view, they would not: you would have good practices, but not best practices: you would have a procurement framework that might be adequate for today, but would be insufficient for tomorrow. Based on that assessment, we have developed higher level and longer term **Recommendations**, which appear together in the final section of this Report.

CAVEAT: GOVERNMENT-FUNDED BODIES

The PTA applies to a broad range of public organizations in Newfoundland and Labrador. The Act defines 'government-funded bodies' broadly, to include departments and agencies of the government itself, and a broad range of other institutions such as municipalities, school boards and hospitals. In this Report, we use 'government-funded body', or GFB, to include all of these covered organizations EXCEPT the departments of the provincial government.

The Request for Proposals was specific in stating that this review is to '…identify issues of concern and recommend improvements in how *Government departments and the Government Purchasing Agency* (GPA) acquire goods and services…' (emphasis added). Therefore, the procurement activities of the other Government-funded Bodies also subject to the PTA have not been specifically examined, and we have not consulted with any such Bodies. We do, however, make references to them in this Report: first, because their activities were mentioned frequently during the course of our interviews as an issue; and

second, because any changes to the PTA and its Regulations will have a direct impact on their procurement activities.

With that broad legislative application, we ask the government to note that Action Items and Recommendations should not be considered without first involving the GFBs in the review/consultation process.

CONTEXT

In this Section, we set out the information we gathered and obtained through interviews to serve as the basis for our analysis, conclusions and recommendations.

THE MAHONEY REPORT

The Public Tender Act owes its existence, philosophy and approach to the work of the Hon. John. W. Mahoney, who in March 1981 presented to the government of the day his "Report of the Commission of Inquiry into the Purchasing Procedures of the Department of Public Works and Services."[1]

Mr. Justice Mahoney's recommendations led the government to introduce major changes and additions to the then-existing Public Tender Act, 1974. Principal among them:

- the Act, which had applied only to public works, was extended to include goods, services and leasing (but with a specific exclusion for a range of professional services);
- the coverage of the Act was extended: *from* departments of government, Crown Corporations and agencies or authorities of the province, *to* include a broad range of government-funded bodies, including municipalities, schools boards, hospitals, and boards, commissions, corporations, Royal commissions or other bodies listed in a Schedule to the Act;
- the possibility of not issuing a call for tenders based on the dollar value of the requirement was changed: from $15,000 for public works, to (i) $10,000 for goods and services, (ii) $20,000 for public works, and (iii) $10,000 annual cost for lease space; and
- a number of new approval and reporting requirements were added.

THE GREEN REPORT

The 2006 reports of the Auditor General relating to the House of Assembly led to the Review Commission on Constituency Allowances and Related Matters, Hon. J. Derek Green, Commissioner, which reported in May 2007 (known as the Green Report). With respect to purchasing/procurement, Mr. Justice Green (a sitting member of the provincial Supreme Court) noted that:

> "no policy existed to require a review of the purchases of the legislature to ensure they were in compliance with the government policies and procedures **as issued by the Government Purchasing Agency**"[2] (emphasis added).

Acting on his recommendations, the House of Assembly passed the House of Assembly Accountability, Integrity and Administration Act.

LEGISLATION

Although it appears that to many the 'procurement legislation' in the province is the PTA and its Regulations, there are in fact numerous Acts that have or could have an effect on public procurement::

- the Public Tender Act and Regulations;

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[1] *Report of the Commission of Inquiry into the Purchasing Procedures of the Department of Public Works and Services*: Hon John W. Mahoney, Commissioner: March 31, 1981: pages 3 & 4

[2] *Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters*: Hon. J. Derek Green, Commissioner, May 2007, page 7-31

- the Government Purchasing Agency Act;
- the Financial Administration Act;
- the Transparency and Accountability Act;
- the House of Assembly Accountability, Integrity and Administration Act;
- the Corporations Act;
- the Electronic Commerce Act;
- the Sale of Goods Act; and
- the Citizens' Representative Act.

As it is the cornerstone legislation we summarize the PTA and its Regulations here. Annex A details the major provisions and requirements of the other Acts: the full text of the PTA and Regulations, required for our later analysis, are Annex G.

The Public Tender Act (PTA)

The Public Tender Act developed based on the recommendations of Mr. Justice Mahoney was highly prescriptive, and continues so to this day. It is the dominant legislation governing public procurement in Newfoundland and Labrador. Its key provisions are:

- applies to the procurement of all goods and services, public works, and leases, with the exception of a number of services defined in s. 2(g);
- applies to all government departments including the GPA; Crown corporations; municipalities; school boards; agencies or authorities of the province; hospitals included in the Schedule to the hospitals Act; and boards, commissions, corporations, Royal Commissions or other bodies listed in the Schedule to the Act or added to the Schedule by order of the Lieutenant-Governor in Council (collectively known as 'government-funded bodies' (GFB));
- requires that goods, services, public works or leases be acquired through an invitation to tender;
- provides specific exceptions to the requirement to call for tenders:
  - most important, provides that a call for tenders is not required: for goods and services valued at less than $10,000; for public works valued at less than $20,000, and for leases with an annual rental value of less than $10,000; and
  - requires that in *most* of the exception cases, a report must be tabled in the House of Assembly;
- provides that a Request for Proposals may be used instead of a tender, with the prior approval of the Lieutenant-Governor in Council;
- sets limits for the issuing of change orders within or in addition to a contract, with the provisos that deputy head approval must be obtained in advance, and that above specified dollar or % of contract limits the change order must be reported to the Treasury Board;
- provides for certain delegations of authority to approve change orders within departments and government-funded bodies;
- provides for contract award to other than the preferred bidder, with prior approval of the Treasury Board or as provided for in the Regulations; and with the proviso that such awards must be reported to the House of Assembly;
- provides that where no tender is called due to the value of the proposed procurement, either (a) three quotations must be obtained, or (b) it must be established that the proposed price is fair and reasonable;
- describes actions to be carried out when a call for tenders does not produce bids;
- requires that government-funded bodies inform the Chief Operating Officer (COO) of the GPA whenever they have (i) called for tenders, or (ii) awarded a contract; further requirement that the

head of the government funded body confirm to the COO that a contract was awarded in compliance with the PTA;
- authorizes the COO to release information about such tender notices and contract awards;
- requires that all tenders called under the Act shall be opened in public; and
- authorizes the Lieutenant-Governor in Council to make Regulations for specific purposes and generally to give effect to the purpose of the Act.[3]

The Public Tender Regulations

Issued under the authority of the PTA, the principal provisions are:

- specifying how calls for tenders shall be made;
- setting out the information that must be included in a call for tenders;
- providing that a tender may include as a pre-qualifier reference to a bidder's past performance;
- setting requirements for public tender openings;
- providing specific instruction for the delegation of authority by a Deputy Head to approve change orders;
- providing for the award of a contract, after a competitive process, to other than the preferred bidder, when a delay in completing the tender process would result in or compound a pressing emergency;
- requiring the head of a government-funded body to inform the Minister of Works, Services and Transportation when (i) a contract has been awarded to other than the preferred bidder, or (ii) when a specified exception to the requirement to call for tenders was invoked;
- specifying how a Request for Proposal process will be carried out;
- specifying authorities to act if a Request for Proposals results in no bids – with a requirement to report through the COO to the House of Assembly; and
- providing for and setting out the procedures to use a registry of products manufactured in the province, to be maintained by the Minister of Industry, Trade and Technology.

TRADE AGREEMENTS

Newfoundland and Labrador has signed two major inter-provincial agreements setting out government procurement obligations and consequences.

The Agreement on Internal Trade

"The Agreement provides for: general rules which prevent governments from erecting new trade barriers and which require the reduction of existing ones in areas covered under the Agreement; specific obligations in 10 economic sectors — such as **government purchasing**, labour mobility and investment — which cover a significant amount of economic activity in Canada; the streamlining and harmonization of regulations and standards (e.g. transportation, consumer protection); a formal dispute resolution mechanism that is accessible to individuals and businesses as well as governments; and commitments to further liberalize trade through continuing negotiations and specified work programs."[4] (emphasis added)

Chapter 5 of the Agreement (the AIT) deals with government procurement. It requires the signatories to comply with its provisions where the procurement value is:

- $25,000 or greater, in cases where the largest portion of the procurement is for goods;

[3] Note that the Act does not contain a Purpose section or provision.
[4] From the Industry Canada web site: see http://www.ic.gc.ca/epic/site/ait-aci.nsf/en/Home

- $100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B[5]; or
- $100,000 or greater, in the case of construction.

Additional information about the procurement requirements of this Agreement is in Annex B.

The Atlantic Procurement Agreement

The Atlantic Procurement Agreement (APA) is a four Atlantic provinces trade agreement, intended to reduce inter-provincial trade barriers in public procurement**.** Its most recent version was signed In January of 2008, the latest in a series of updates to the original APA of the early 1990's.

- the APA as signed applied to government departments, agencies, commissions and Crown corporations, to academic institutions, schools and health and social services; in January 2008 it was amended to apply to municipalities (starting in 2009);
- the thresholds for coverage by the APA are: $10,000 for goods (reduced from $25,000 in January 2008); $50,000 for services; and $100,000 for construction;
- the AIT requirements for open tendering are applied: the APA provides for 'tendering process in accordance with the rules of the AIT', and notes that procurements solicited by "Request for Proposal" shall also be subject to the APA.

Additional information on this Agreement is in Annex B.

POLICIES AND PROCEDURES

Atlantic Provinces Standard Terms and Conditions Goods and Services

Pursuant to the APA, the Atlantic provinces agreed on a standard set of terms and conditions to be applied to the procurement of goods and services. This provides an important measure of consistency to all government procurement in the four provinces. Standardization is particularly important for potential suppliers, who can rely on known content and consistency, thereby avoiding the need to relearn the rules each time they want to bid. The Standard Terms and Conditions cover 30 different aspects of bidding for public sector contracts: they also permit individual provinces to add their own particular requirements or approaches. Under its specific Terms and Conditions, Newfoundland and Labrador:

- commits to advertising all goods and services requirements valued at more than $2,500 on its official web site;
- requires that an extra-provincial corporation be registered under the Corporations Act of Newfoundland and Labrador before it begins or carries on business in the province (this includes performing a contract with a department or GFB); and
- provides for payment to suppliers net 30 days.

Guidelines Covering the Hiring of External Consultants

Issued under an Order-in-Council, the Guidelines are to be followed in all circumstances where a government department directly engages the services of an external consultant. They apply to the various professional services that are specifically excluded from the application of the PTA.

[5] Annex 502.1B

The Guidelines are internal to government, and the only document detailed in this Context section that is not easily (i.e. through Internet) available to the public: we were informed that the Guidelines are available to the public on an "as requested" basis.

We found the Guidelines to contain many features that offer considerably more management oversight and operational flexibility than the PTA. Details are in Annex B. At time of writing this Report, the Guidelines were under review: we presume that our Report will be taken into consideration in that process.

Central Purchasing Authority (CPA)

Although not strictly a 'policy', the role of the CPA warrants inclusion here. According to its Annual Report 2004-05: "The role of the C.P.A. is to coordinate and administer a system of high volume procurement on behalf of all government-funded bodies. This system operates under the concept of cooperative purchasing whereby specific commodities are identified for consolidation into tender invitations, government-funded bodies are solicited for purchasing requirements, and contracts are awarded to preferred bidders. Each government-funded body is then responsible for the remaining procurement functions including issuing purchase orders and/or establishing user contracts, expediting, receiving, inspection, warehousing and processing of payment."

As of February 2008, the CPA had in place some 64 standing offers, for a range of commodities from office supplies and lamps to plumbing supplies: almost all are for goods.

DATA

A review of government procurement is lacking if it cannot present data on the type and level of activities. When the Request for Proposals for this Review was issued, the following data were included:

Approximate $ value goods and services procured annually:	$320 million
Approximate # of public tenders for goods and services issued by GPA:	2,000
Approximate # of acquisitions through the Oracle purchasing system[6]:	55,000
Approximate $ value of capital works:	$160 million
# of tenders for capital works:	510
# change orders for goods and services contracts:	50
Approximate $ value of change orders for goods and services contracts:	$3 million

This information is incomplete and, to some, confusing. We sought to clarify and confirm the numbers, and to obtain other data that would assist in our analysis, but were told that there are no comprehensive government-wide data in these categories available for procurement. Therefore we did not seek to complete the data series, e.g. by finding information on one of the likely significant missing items - the number and value of change orders for capital works.

The categories above represent procurement transactions entered into or modified. An alternative way to determine the 'size' of procurement is the 'spend' – how much money the government paid out. When we examined the government's Consolidated Revenue Fund expenditures, we were able to conclude that procurement spending by departments is in the order of $660 million per year.

[6] In general use across the government.

Consolidated Revenue Fund Expenditures: By Category, Years Ended 31 March
($ Millions) [7]

Category	2001	2002	2003	2004	2005	2006	2007
TOTAL EXPENDITURES	**3,990**	**4,141**	**4,426**	**4,733**	**4,775**	**4,874**	**4,963**
Transportation and Communications	36	37	38	38	31	35	40
Supplies	57	54	58	57	56	70	84
Professional Services	194	198	204	248	258	285	304
Purchased Services	240	250	218	135	135	197	216
Property, Furnishings and Equipment	44	49	15	32	9	48	17
Information Technology	26	26	26	21	19	-	-
TOTAL PROCUREMENT-RELATED EXPENDITURES	**597**	**614**	**559**	**531**	**508**	**635**	**661**
Procurement as % of Total	**14.96**	**14.65**	**12.63**	**11.12**	**10.64**	**13.02**	**13.32**

It is likely that money spent under the head Grants and Subsidies (some $2.6 billion per year) is subsequently spent by Government-funded bodies for procurement. Were even one-third of that money spent by GFBs for procurement, there would be an annual procurement spend by public bodies in the province of more than $1.2 billion – more than 25% of total provincial government expenditures.

Note that the complete accuracy of these data is less important than the overall conclusion. Our objective was to develop an order of magnitude assessment of the situation.

The current lack of data should start to be remedied later in 2008, when the GPA installs a new information system. Currently (as of March 15, 2008) awaiting Cabinet approval, because payment to the supplier would extend into the next fiscal year (a Financial Administration Act requirement), the new system will provide important new abilities to capture procurement data from all departments and GFBs, analyze it, and publish relevant information to the Internet for immediate review by stakeholders.

FILE REVIEW

In this contract, we were given three specific tasks requiring the review of files.

1. *Review a representative sample of recent tenders and related purchasing files, specifications and documentation issued by Government Departments and GPA and advise with respect to any issues identified:* we reviewed 93 files: 87 from the GPA for goods and services, and 6 from the Department of Transportation and Works, for highway and general construction.

2. *Review a representative sample of change orders and related purchasing files, specifications and documents reported to Treasury Board and advise with respect to any issues identified:* we reviewed 17 files, being all of the change order files reported to the Treasury Board by the GPA for fiscal 2006-07, where the files were immediately available.

3. *Review exception reports and related purchasing files, specifications and documentation for the past year to public tender by government departments and GPA and assess whether or not the current policies*

[7] Source: Auditor General of Newfoundland and Labrador, Chapter 2, Part 2.6, January 2008

and processes are appropriate: we reviewed 22 such files found in the GPA office that receives these reports from GFBs for subsequent reporting to the House of Assembly.

Our reviews were at a high level; we read the files from start to finish to see whether there were any obvious deficiencies in the process – but more importantly, to see whether there were instances where existing legislation and processes might have resulted in a less than ideal procurement approach and result.

With our broad experience in the federal government, where the use of tenders is the exception rather than the rule (being limited in most cases to construction requirements), we had expected to find more cases where:

- in the case of the procurement of a new requirement, a Request for Proposal would likely have produced a better-value result; or
- in the case of the use of exceptions, it seemed apparent that a department had worked around the exception rules, rather than with them.

We found few such cases. Files appeared to have been carried out in general compliance with the requirements of the PTA. We found no obvious cases where the legislation or Regulations appeared to have been contravened. We found some cases where the calling for tenders, the core requirement of the PTA, appeared to have been a second-best approach.

However, we did find significant issues that deserve attention. Our detailed findings are Annex C: we encourage readers of this Report to take the time to review the material before proceeding further as it is a foundation for much of our analysis.[8]

Case Study: Writing a Request for Proposals

This Review specifically did not cover the Guidelines, and therefore we did not review any files for procurements carried out under their provisions. We did note while we were in St. John's publication in the Globe and Mail of a Request for Proposals that appeared to be issued pursuant to the Guidelines, for the Provision of Consulting Services and Job Evaluation System, issued by the Public Service Secretariat. We thought it might be instructive to assess how this particular RFP conforms to established norms.

To do this, we sought the assistance of RFP Solutions Inc. The company found that overall this particular RFP was performance oriented, and that by seeking innovative proposals from bidders it could contribute to a valuable competitive process and enable bidders to propose solutions to the 'problem' set out in the RFP that the government may not have anticipated. It also found that the RFP contains reasonable protections for the government in relation to both the competitive bidding process and the resulting contract. It did, though, suggest some areas for improvement. The full text of the RFP Solutions review and analysis is at Annex D: we commend it to readers who may be asked in future to prepare a Request for Proposal.

If we can presume (although a sample of one is obviously not probative) that this one RFP, chosen at random, represents the quality norm for RFPs used by the government, it would appear that the ability to produce effective RFPs is in place.

[8] We cannot move past this point without highlighting our 'favourite' file: the requisition for winter clothing received by the GPA on December 5, with a note from the client department that the clothing was required on an urgent basis because it was getting cold…..

Throughput Times

In our experience in other jurisdictions, one of the most frequent complaints that clients of procurement services have is that the process takes too long to produce results. Throughout our interviews we heard repeatedly of departmental satisfaction with the services of the GPA. During our file review, we were able to test this. For the GPA files reviewed, we calculated the days between requisition receipt by the GPA, and the issuing to the supplier of a purchase order (completions the same day as receipt being one day).

Type of file	# of files reviewed	Avg. calendar days to completion	Comments
$50,000 and greater – public tender	9	19.5	The longest took 36 days
$10,000-$50,000 – public tender	4	56	
Urgent - Over $50,000 - public tender	4	16.75	One file in this category took 158 days: it was for the move of an individual, which was delayed by the client department: we removed it from this calculation.
$2,500-$10,000 – call for quotes	29	7.48	17 were completed in 5 days or less
Urgent - $2,500-$10,000 – call for quotes	27	9.7	14 were completed in 7 days or less
Marine	3	24	Two took 2 days or less
Standing offers	4	25	
Total Files Reviewed	**80**	**15**	

We believe that these results speak for themselves: in our experience, this is ***fast*** service.

OTHER CANADIAN JURISDICTIONS

As a further foundation for our observations and recommendations, we sought information as to how the current approach to procurement in Newfoundland and Labrador compares to other senior level jurisdictions in Canada – the other provinces, and the federal government. While our research was not exhaustive, we believe that the following provides a suitable context for comment.

Legislation

We considered first how the legislative framework for procurement in this province compares. What we were looking for is other jurisdictions where the general approach to procurement is set out in one or more individual statutes, or in regulations/policy; and if there is legislation, what the general approach of any such legislation is.

We found that (i) Newfoundland and Labrador is the only province that covers *all* of its diverse public bodies, under *one* statute, that *prescribes* how to buy, for *everything* that those public bodies acquire; and (ii) the majority of jurisdictions do not deal with procurement through legislation.

Detail is in Annex E.

Competition

We then considered competition – the level at which jurisdictions by law or policy (i) are prepared to procure without calling for any bids; (ii) call for bids on a limited basis, or (iii) issue open calls for bids. We looked at only goods and services as there is simply no general standard approach across the country for construction or leases. We found that the thresholds for calling for bids for goods and services in Newfoundland and Labrador are *generally* in line with those across the country. There are, however, some significant differences:

- in Newfoundland and Labrador, while all requirements over $2,500 are posted for public bids, and under that value the option exists in law to deal with a single supplier, in practice the requirement to seek quotes from suppliers applies to any value; the effective threshold to seek bids is $0;
- this does not exist elsewhere: e.g. in several jurisdictions (federal; NB for goods; PEI for goods; NS ; Quebec) it is clear that no bids are required under the minimum thresholds for bidding;
- in other jurisdictions, (BC; NS; SK) it appears accepted that while requests for bids are *encouraged* according to circumstances, they are not always required; and
- while most provinces emphasize the need or desirability to *seek* bids, they do not specify how many bids must be *received*.

Again, detail is in Annex E.

INTERNATIONAL BEST PRACTICES

The Organization for Economic Cooperation and Development (OECD) comprises 30 member countries (including Canada). It "monitors trends, analyses and forecasts economic developments and researches social changes or evolving patterns in trade, environment, agriculture, technology, taxation and more. The Organisation provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies."[9]

In its 2007 publication 'Integrity in Public Procurement: Good Practice from A to *Z*[10]', the OECD identifies a large number of Best Practices, reported by OECD member countries. Because those countries work in quite different contexts from Newfoundland and Labrador, it is difficult to apply all of them to the provincial environment. We have however identified a number of best practices that we do believe would be of value: these are Annex F, with the specific items being reproduced where appropriate in our Analysis.

THE PUBLIC TENDER ACT AND REGULATIONS

Early in our interview process we started hearing of operational problems with individual sections of the Act and Regulations. We thought it would be useful to consolidate those comments against the Act, and to include observations derived from our experience.

The major issues include:

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[9] From the OECD web site: see http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html

[10] *Integrity in Public Procurement: Good Practice from A to Z*, © OECD 2007: quotations used in this report are reproduced with the permission of the OECD. See http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html

- lack of definition of key terms;
- lack of flexibility to deal with operational requirements;
- lack of consistency in reporting requirements;
- lack of apparent control over major areas; and
- provisions that are in conflict with Canadian contract law.

This detailed review is Annex G. We encourage readers of this Report to take the time to review the material before proceeding further: it is a foundation for much of our analysis.

What we conclude is that virtually every significant provision of the PTA and its Regulations is either causing significant operational issues to the government, or is in some other way requires re-examination.

SPECIFIC CASES

In support of this general work on the legislation, we present five cases that illustrate some of the problems being encountered.

Loaders

The Department of Transportation and Works has an extensive fleet of heavy equipment, much of which requires replacement due to age and wear. A dealer had a number of used loaders available for sale, at a very good price. Under the PTA, the Department had no way to buy those loaders directly. Instead, seeking to obtain the value offered by this used equipment, it asked the GPA to issue a call for tenders.

The Auditor General reviewed the file, found that the specifications were tailored to that particular supplier and available stock, and commented that the government had clearly not complied with the spirit of the PTA.[11]

We use this case to start our analysis of the legislation and Regulations, because we see three key issues arising from it.

First, the AG noted that: "The Department is not able to determine its equipment requirements and/or which equipment should be replaced first. Furthermore, annual funding for equipment replacement is based primarily on judgment. As a result, the Department is not able to effectively manage the replacement of its heavy equipment." The Auditor General went on to say: "Our review indicated that the process used to determine which vehicles to replace through available funding each year is primarily judgmental rather than a structured approach on a fleet-wide basis." Seeking to purchase equipment because it is known to be available at a good price appears to illustrate this issue.

We remark on this because it deals with effective procurement planning.

Second, the AG concluded that: "The Department did not comply with the spirit of the Public Tender Act when it purchased 15 used loaders. The terms and conditions of the tender were so specific that only the eventual supplier would be in a position to be awarded the tender. In particular, the Department set a maximum required bid of $2.5 million, which effectively limited the tender award to the eventual supplier. The terms and conditions were also amended to reduce the quantity from 16 loaders to 15, again suggesting that the tender specifications were amended to ensure the tender was awarded to the eventual supplier."

[11] *Report of the Auditor General to the House of Assembly on Reviews of Departments and Crown Agencies*: Auditor General of Newfoundland and Labrador, 31 March 2007: Chapter 2 part 2-18

Under the AIT, it would have been possible to buy this equipment without calling for bids. The AIT has a specific exception that such an approach may be used: "for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;…" Given that the AG also commented in his Report that "Funding inadequate to upgrade heavy equipment fleet", it is not unreasonable to think that the unexpected finding of appropriate equipment on a used equipment dealer's lot would constitute such exceptionally advantageous circumstances.

The AG said nothing about whether the result of the actions had been good value for the government and the people of the province. On the other hand, he did note that "The eventual supplier submitted a bid for equipment at a unit price of $156,250 which equates to the maximum bid amount of $2.5 million divided by the original 16 units required. The other supplier tendered for equipment at a unit price of $237,400, which totalled $3.5 million and therefore exceeded the required bid limit of $2.5 million." This raises the questions: (i) does used equipment at a unit price of $156,000 represent better value than new equipment at a unit price of $237,000; and (ii) if the government was prepared to consider both new and used equipment, why was a Request for Proposals not used to permit a proper assessment of the relative benefits of the two approaches?

This specific AG observation therefore appears to emphasize process rather than value. We were reminded here of the words of Mr. Justice Mahoney. Commenting on the processes used to pay contractor invoices, he said:

"I have to say that I was a little amused by the apparent seriousness with which the five-step certification stamp was treated and acted upon by officials of the Department. I received assurances that no invoices were authorized for payment unless the requisite certifications had been placed on the invoice in question. No doubt that was true, but it is obvious that **the sole emphasis was placed on form, not substance**: as long as the requisite initials were placed on the invoice (regardless of whether they should justifiably have been there) the requisite authorizations for payment were made without any further thought being given to the matter."[12] (emphasis added)

We remark on this because it emphasizes the need to understand, not just 'how' procurement is to be carried out, but 'why' – what it is designed to achieve.

Third, the AG referred to compliance "with the **spirit** of the Act" (emphasis added). We have already noted that the PTA has no *Purpose* section: the House of Assembly has not specifically said what it intends the Act to do. This leaves the public service with the challenge of determining what the 'spirit' of the Act is – a process inherently risky, because different people or organizations could come to different conclusions. The Auditor General did not define what he considers the 'spirit' to be: one Director we interviewed said that it is to 'allow as many proponents as possible to bid on goods and services for government on a level playing field'. Were they talking about the same thing?[13]

We remark on this because if the government and the House of Assembly want to be certain that their wishes are carried out, they should communicate what they want clearly and unequivocally to the public service.

[12] Mahoney Report, page 145

[13] There is another question raised by the Director's answer: is the goal to have as many bids as possible – or the best bids, regardless of how many there are? There is a balance to be achieved.

Ferries

A ferry was put into dry dock on an emergency basis, because of malfunctioning manoeuvring thrusters: it was determined that the repairs would take 4-5 weeks. Someone decided that since the ferry would be out of service anyway, it would be practical to use the time to undertake maintenance on and make other repairs to the vessel: the benefit would be that it would not be necessary to take the ferry out of service again, some time in the future, to make those repairs. The problem arose – how to contract for that additional work? It would not be appropriate to simply add it to the original emergency contract for the thrusters – for there was neither an emergency, not a legitimate increase to the scope of the thruster contract. On the other hand, calling for tenders could have produced an impossible result. Were another shipyard to win, the ferry could not be moved there until after the thrusters were repaired – which would have defeated the intent to make concurrent repairs. There was no ready solution possible within the strict requirements of the PTA.

It could have been argued that since the repair work required the provision of services, and those services clearly required technical expertise, the work was excluded from the PTA and could have been carried out under the Guidelines. Had the additional work been valued at less than $50,000, the department could have authorized the contract on its own – had it exceeded $50,000 (which it did), it would have required Treasury Board approval, which would take too long.

We reference this case because it demonstrates the lack of flexibility in the PTA.

Health Supplies

A number of provincial health institutions (GFBs, subject to the PTA) wanted to explore joining together to have their procurement of health supplies carried out by an outside organization. The purpose was to use consolidated buying to achieve economies of scale – to save money. The organization proposed to do this, which was NOT a GFB, would have carried out competitive processes to put in place suppliers for all of the required supplies: the health institutions would then have bought directly from those suppliers, or from the organization.

It was determined that the health organizations, as GFBs, had the authority under the PTA to carry out their own acquisitions, but that this authority could not be delegated to another organization that was not a GFB. Had the health organizations continued with the plan, they would have been in effect making purchases from either the buying organization, or directly from suppliers, without calling for tenders – contrary to the requirements of the PTA. There is no exception to the requirement to call for tenders that would have applied (other than the one for low value, which would not have been practical because the whole idea was to buy in large quantities).

We use this case because it demonstrates that the PTA can make it simply impossible to make sensible business arrangements that would benefit both the buying GFBs, and the people of the province. We are not, however, taking or suggesting a position generally on buying groups or other joint purchasing initiatives.

Product 'X'[14]

A supplier told us that it had bid on a competitive tender for product 'X': its price was higher than the winner by approximately $100 (10%) per unit. The winning bidder had to provide the buying organization with a mock-up of the product it would supply: the mock-up indicated compliance with the tender requirements. The products actually delivered, however, were of neither the design nor (apparently) the quality of materials called for. The supplier who told us of this case said that had they known that these 'as delivered' products were what the buyer wanted or was prepared to accept, they could have submitted a bid at a price that would have won the contract.

That supplier also told us that in their experience there is an uneven level of practice across departments and GFBs in terms of verifying that goods bid and delivered actually meet the published specifications. They said that while the GPA is rigorous in ensuring that products bid and supplied to meet specifications, other organizations are less strict. They said that all too often the government response to complaints about this sort of situation is 'there is nothing we can do about it'.

We use this case because implementation of the rules is as important as the rules themselves. If a product has to meet a specification, then it has to – bids that do not should be rejected, and a bidder who tries to supply goods or services that do not meet the specification should be stopped, required to perform as per the contract, and if necessary the contract should be cancelled. As presented to us, this procurement complied with the requirements of the PTA: it met process, but clearly not results.

Product 'Y'

A department called for tenders for a major piece of heavy equipment in summer 2007; a supplier for a new piece of equipment that had to be manufactured overseas won the contract. By February 2008 the equipment had, in spite of numerous follow-ups by the department, not been delivered. In the meantime, the department had issued another call for tenders for the same type of equipment in approximately November - which equipment had been delivered before February 2008. The departmental manager involved felt that he had no choice but to leave the unfulfilled contract in place and wait for delivery – that the processes required to cancel the contract were simply too onerous, and the ramifications of cancelling the contract with the local supplier too serious.

We use this case cause it illustrates the need to have a usable process in place to get out of contracts that are clearly not going to meet government operational requirements.

Product 'Z'

A federal agency issued a call for proposals in February 2008, for a major overseas consulting project: bid closing was just before the end of March 2008. Several apparently well qualified consultants who were interested in submitting bids were precluded from doing so, because preparing such a bid is time-consuming, and they were already committed fully to other clients under contractual obligations that had to be met by March 31 (the end of the federal fiscal year).

We use this case because even the timing of a call for bids can result in less competition, and potentially less value to the client.

[14] We do not identify this product to protect the identity of the supplier who provided the information. That is also why this Report does not include a list of the people we interviewed generally. We have provided that list in confidence to the COO of the GPA.

Change Orders

We end this presentation of Specific Cases with Change Orders, because this one subject brings together many of the problems we have identified in this review.

While the PTA covers 'change orders', they are not defined. It seems that the concept is well understood in the province: a change order is an amendment to a contract. However, elsewhere a change order is a concept usually limited to construction and public works. Even in this province, what the PTA calls a 'change order' is referred to in the Guidelines as an 'overrun'. Legislation based on 'understanding' is certainly more vulnerable to poor decisions than when it is based on clear and specific concepts.

There are essentially two provisions in the PTA governing change orders: they must be approved in advance by a Deputy Minister, and where they exceed a specified dollar value, they must be reported to the Treasury Board. This means that one approach covers many different situations, e.g.:

- unforeseen work (whether poor planning or legitimate unknowns);
- planned extensions (intent included in the original call for bids); and
- consequential work/work arising,

This is a highly inflexible approach that does not reflect the different risks and management approaches to those different situations. As just one case, where a call for bids has been issued on the basis that the government wants to buy 'X' units, and including the proviso that the government may buy up to 'Y' more: if the initial contract is signed for only the initial 'X' units, then when the government does want to buy the additional 'Y' units, depending on the cost of those additional units Treasury Board approval may be required.

The provisions in the PTA for reporting after the fact to the Treasury Board deal only with increase in dollar value. This means that the Board can be completely unaware of other changes to contracts that could be just as significant, such as:

- scope reductions (e.g. a contract is amended so that the government gets less for its money than was originally anticipated);
- substitutions (e.g. the government gets lesser quality for its money);
- timeline changes (e.g. what was supposed to take X months ends up taking 'Y');
- changes in contract conditions (e.g. length of warranty reduced, or change of ownership of intellectual property).

There are no external controls on the use of change orders: the authority to approve them lies entirely within the department concerned. While we have been assured that there are often intensive discussions surrounding the need to issue significant change orders, the lack of any form of independent review can pose significant risk that a problem will remain 'hidden' within a department.

For External Consultants, Treasury Board approval in advance is required when a department believes it has due cause to exceed 110% of the original contract price: we are left to wonder why other projects tendered under the PTA have no similar control outside a department.

There is also highly uneven reporting of the use of change orders:

- departments report annually to the Treasury Board (which therefore could in theory find out about a problem file months after the problem has occurred);
- so the Treasury Board knows after the fact what is happening in departments – but not in GFBs:

    - GBFs report the use of high value change orders to their internal boards of management, but there is no subsequent reporting to the government;
    - when a GFB wants to delegate the authority to approve change orders internally, it requires the approval of the Lieutenant-Governor in Council;
        - we would have thought that the Lieutenant-Governor in Council might want to know how such delegations are being managed);
- there is no reporting on the use or value of to the House of Assembly:
    - this information appears no less relevant and important to the oversight mandate of the House than information about situations when tenders have not been called under the PTA for the specified exception cases; and
- the COO of the GPA does not receive information about the use of change orders; even if he did, he has no mandate to release information about their use to public:
    - he is mandated to release information about tenders called and contracts awarded by departments and GFBs;
    - information about the use of change orders seems less important and deserving of public access.

ANALYSIS

In addition to our general mandate, we were asked to provide advice with respect to (5) specific issues.

- *advise* whether government's requirement for prime contractors to utilize the Newfoundland-Labrador Bid depository achieves government's goal of maintaining competitiveness in the bid process and ensures Government is receiving value for money when contracting for skilled trades people;

- *assess* the impact to the Province of participating in the Atlantic Procurement Agreement and Agreement on Internal Trade;

- *assess* whether government's current policies may be inadvertently limiting competition and thus creating potentially higher costs;

- *assess* whether processes ensure fair and equal access to local companies; and

- *advise* whether government's current processes provide for adequate transparency and accountability.

We deal with these five (5) specific issues first, and then move on to the other areas of our analysis.

BID DEPOSITORIES

Background

In the 1950's, the Canadian Construction Associations and key trade contractor associations (mechanical, electrical, masonry etc.) set up a process – known commonly as a bid depository – whereby Sub-Trade Contractors and Vendors could put in bids to Prime Contractors, in a controlled and predictable manner, for portions of a construction project.

The process involves a Prime Contractor (or more often an Owner[15]) making it publicly known that Sub-Trades were required to bid for portions of a project. Full project plans are provided to the bid depository. Interested Sub-Trades can consult the plans, identify their work requirements, and submit their bids to the bid depository several days prior to the close of an Owner's competition. All Prime Contractors who intend to bid for the full project review the Sub-Trade bids, choose the one they want for each Sub-Trade and list that Sub-Trade Bidder as their chosen Sub-Trade in their bid to the Owner (a process called 'nominating a Sub-Trade'). If the Prime Contractor is the successful bidder in the Owner's competition, then the Sub-Trades nominated are also successful and perform the Sub-Trade work.

The goals of the Construction Associations in establishing the bid depository system were to create a level playing field for all Sub-Trades to bid, and to bring certainty and a modicum of fair play into a chaotic system. With the exception of Quebec, the use of bid depositories is voluntary: an owner must specify their use for a particular construction project.

[15] in the construction industry, the Owner is the client for whom a construction project is being carried out: it can be e.g. an individual, a corporation, or a government department.

Status

Unfortunately, things have not worked out as was hoped. All of the problems have continued, primarily because the organizations that run such systems (local construction associations) have not made them legally binding upon the participants. They were not successful in creating robust processes that would ensure fair play - and as a result, fewer Sub-Trades and Prime Contractors have wanted to participate.

We understand from discussions with federal government contacts that Bid Depositories in Manitoba and Alberta have been suspended due to lack of use, and the Ottawa Valley operation has been reduced to a voice mail system and use of shared space. Further, the federal government has been working with the construction industry for more than a year, seeking to determine whether and on what terms its use of did depositories should continue. The core federal position appears to be that it will only continue if the bid depositories operate under rules that are acceptable to the government.

The Law

Perhaps the most salient point regarding government use of bid depositories, which has been to a significant extent ignored by all concerned, is that the laws of Canada have changed radically from when the bid depository approach was created. Due to the laws of Canadian competitive bidding, Bid depository systems for Sub-Trade bidding have created legal problems for Owners. The anomalous result has been that Owners have become legally bound and legally liable for how the depository system works or does not work, while both Prime and Sub-Trade Bidders have avoided being liable for their own actions.

Given the increased potential liabilities, the absence of cost savings and the absence of any Owner control over how the bid depository system operates, what its rules are and whether it is operated properly, many public sector Owners are no longer using such processes. We also understand that the private sector is reducing or eliminating their use. Issues of increased legal risk and liability for no justifiable reason are overriding the purported need to create a level playing field for Sub-Trade Contractors and Vendors.

Government Approach

We note that the government has an uneven approach to the use of Bid Depositories. Current negotiations with the Newfoundland and Labrador Construction Association (NLCA) include provisions that even if a department starts a project through the Bid depository, it reserves the right to not accept the results of the Bid depository process. This seems to introduce subjectivity into a process that should be objective: we suggest that either you use an approach, with clear results, or you do not.

Additional information on bid depositories is in Annex H.

Conclusions

We highlight the need for the province to maintain effective working relationships with the construction industry. Even if the significant legal issues relating to government use of bid depositories can be resolved, whether or not this use results in cost savings or other operational benefits may be secondary to keeping that relationship strong and positive.

From that perspective, if the NLCA sees benefits to continuing the bid depository system, the government should seek ways to make this happen – with the proviso that the government needs to approve the rules under which the depository works, AND the NLCA must accept all legal responsibility for the operations and consequences of the bid depository.

Action Items

A-1. The government should continue to use the bid depository system IF it can negotiate appropriate rules with the NLCA that meet government requirements, AND making it clear that once a public sector construction project is given over to the bid depository system, the government has no further legal involvement or liability.

A-2. The government should adopt the policy that once a project is given over to the Bid depository, the government will complete it using the Bid depository results. If the government is not prepared to do this, then the use of the Bid depository system should be terminated.

A-3. The government should adopt the policy that for all publicly funded construction projects, copies of plan sets will be provided to the NLCA Plans Rooms for use by the industry.

Plans Rooms

Balanced against this, we want to highlight what in our view are the significant benefits of the Plans Rooms operated by local construction associations. A Plans Room is a location where the Owner of a construction project can place full copies of the plans and specifications for a project. Potential sub-contractors and suppliers for the various elements of the project (concrete work, plumbing, electrical, hardware etc.) can examine the plans on site (and usually borrow them over night), to identify what work would be available to them within the project, and then approach potential bidders for the main project to propose their services and pricing. Plans rooms can function even if they are not part of a bid depository. The NLCA has a member service: if it is informed by an Owner as to which potential prime contractors have taken full bid sets for a project, it will communicate these names to its members, so that those members (Sub-Trades) know which prime contractor to approach to seek Sub-Trade business.

Without these Plans Room services, sub-contractors have to (i) acquire a full set of plans from the government, and then (ii) rely on word of mouth or individual contact with Prime Contractors to identify which companies might be interested in receiving their sub-trade bids. Proper publicity of available projects through the NLCA would stimulate competition among sub-trades - a level of competition not usually considered by Owners who focus their attention on finding the best Prime Contractor.

We were informed by the NLCA that not all GFBs in the province are providing copies of project plans and specifications to the Plans Rooms, or informing the NLCA of which potential Prime contractors have taken the full plans for individual projects.

Conclusions

In our view, an effective way to stimulate and support competition within the construction industry, and therefore to produce the best possible bids for department and GFP construction projects, is to ensure that all departments and GFBs provide copies of their construction documents and lists of prime contractors who have ordered the full project plans, to the local Plans Rooms.

Action Items

A-4. Require all departments and GFBs to provide both copies of construction project plans, and lists of potential prime contractors (who have ordered the full bid packages) to local plans rooms, for consultation by sub-trades:

This would increase competition, by ensuring that potential bidders know all of the jobs they might bid on.

A small digression here: the task we were given was to establish whether the government is receiving 'value for money". While we think that we understood the basic question, procurement is encumbered with 'value' terms – best value, good value – most of which have difficulty defining what 'value' means in the first place. 'Value' is not simply monetary: it can include other factors such as facilitating small business access to contract opportunities. One of the core questions for the government, arising from this Review, is how to define 'value' in the context of the province's public procurement – and then to decide what level of value it wants to achieve.

TRADE AGREEMENTS

We were asked to assess the impact to the Province of participating in the Atlantic Procurement Agreement and Agreement on Internal Trade.

The Atlantic Procurement Agreement and the procurement provisions of the Agreement on Internal Trade are less demanding than the PTA. Their cornerstones are commitments to removing barriers to government procurement opportunities for suppliers from other jurisdictions. When Newfoundland and Labrador signed them, the PTA had been in place for years – and it requires open tendering of contract opportunities at lower values than the two agreements mentioned above. The only place where there is parity is goods, where the APA now (January 2008 version) requires open advertising of opportunities at a threshold of $10,000, and the PTA requires calling for tenders at the same value. Until January 2008 its threshold for goods was $25,000: this was a graphic demonstration of how Newfoundland and Labrador could agree to a significant change – more openness – because it simply brought the Agreement to a Newfoundland and Labrador standard.

The Provincial Preferences Act that used to be in place in the province was contrary to the spirit of these agreements. Its existence was recognized as a non-conforming measure when both agreements were signed: the legislation was subsequently repealed.

The agreements also bring significant policy benefits. Through the various negotiating sessions professional procurement staff from the province have the opportunity for regular interaction with their counterparts in the other provinces, territories and the federal government. The knowledge gained and information exchanged are invaluable to ensure that the province remains fully informed of developments in the general procurement community: the contacts maintained ensure that when issues or problems arise, there are known people with other experiences who can be consulted.

The reason to include government procurement in such an agreement is to ensure that there are no barriers to trade between the signatories. The rules are designed to ensure that geographic location does not preclude a supplier from bidding for a government contract. 'Success' can be measured in three ways: (i) examination of the rules to see whether they have removed all such geographic limitations; (ii) the extent to which suppliers from within a jurisdiction are bidding on contract opportunities in other jurisdictions; and (iii) the extent to which bidders from other jurisdictions are bidding on opportunities within the

province. It is *not* appropriate to measure only the extent to which contracts are being won, because that is based on the ability of bidders to develop strong bids and therefore to win contracts, and procurement rules cannot influence that directly.

Assessing whether the AIT has resulted in increased and increasingly successful inter-provincial bidding - whether provincial suppliers to other jurisdictions, or outside suppliers into the province - is outside the scope of this review. We would be surprised to find that many government data systems include such information: Newfoundland and Labrador's systems certainly do not. We note however that the GPA has an in-depth manual file analysis under way that will determine for procurements carried out by the GPA such information as where the successful bidder was from; and where Newfoundland and Labrador suppliers were not the successful bidders because their price was too high, what that price differential was.

Canada at the federal level has signed two major international trade agreements with government procurement obligations: the North American Free Trade Agreement (NAFTA) with the U.S. and Mexico, and the World Trade Organization – Agreement on Government Procurement (WTO-AGP), signed by 28 member countries from the 146 member WTO. While neither of these applies to Newfoundland and Labrador, our reason to reference them is that they embody basically the same principles and approaches to government procurement as the AIT. When the three agreements are considered together, we see the common elements:

- no discrimination between the suppliers of goods or services of one country, or province in the case of the AIT, and those of any other country or province;
- no imposition of conditions that are based on the location of a supplier or where the goods or services are produced;
- no unjustified technical bias in the specifications;
- the timing of events in the bidding process must not be such to prevent suppliers from submitting bids;
- requirements must be described in generic and non-discriminatory fashion;
- selection criteria must be made public in advance;
- call for bids published on electronic sites;
- time periods for bidding apply; and
- winning bids must be chosen using pre-determined criteria known to bidders.

Conclusions

We found no indications that the government does not meet its general obligations under the Atlantic Procurement Agreement and the Agreement on Internal Trade. We did find a lack of consistency between the requirements of the PTA and the trade agreements; and provisions in the PTA, the use of which would likely put the government into contravention of the Agreements (and perhaps more important, at risk under Canadian contract law).

The PTA and Regulations, APA and AIT require different standards of performance from the public procurement community in Newfoundland and Labrador. Being held to such different standards of performance is inefficient and offers inherent risk.

In our view, Canadian courts may be close to finding that the required standard for government procurement is set by these agreements as 'best international practices', and requiring as a consequence that governments comply fully with their procurement obligation as set out in the agreements.

When the three major trade agreements (AIT, NAFTA and WTO-AGP) are considered together, they

represent the collective judgment of many jurisdictions as to what the 'best' approaches to government procurement are. In that sense, they may be considered to represent international 'best practices'. Newfoundland and Labrador, having already accepted that its high-value procurements will be carried out according to those best practices, may wish to consider moving its complete procurement regime to that level.

Action Items

A-5. The PTA should be amended to bring its provisions and requirements into line with the trade agreements. Specifically, to avoid possible inconsistencies or contradictions between the Act and trade agreements, replace the list of exceptions in s. 3(2) with the equivalent exceptions in the AIT.

This should include AIT sections 506 (11) & (12) (specific circumstances in which a full open call for bids are not required); 508 (Regional and Economic development; and AIT Annex 502.1B (Services Covered).

Special attention needs to be given to the current PTA 'ferry exception', s. 3(2)(h.1), to ensure that its intent is maintained: legal advice is required as to whether the existing AIT exception for use 'where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists' would be appropriate.

A-6. The GPA should seek legal advice as to how the use of buying groups can be better accommodated within the AIT exceptions and other procedural requirements

A-7. The GPA, with legal counsel, should review the other existing exceptions in the PTA, to ensure that they can be retained within the AIT framework of exceptions.

COMPETITION AND HIGHER COSTS

We were asked to assess whether government's current policies may be inadvertently limiting competition and thus creating potentially higher costs. This led us into a more general examination of the concept of competition in public procurement.

Public procurement in the province, founded on the PTA and Regulations, is clearly based on competition by the supplier community for government contract opportunities. Over specified dollar thresholds, you issue public call for bids: under those thresholds, you call for quotes – and even where the legislation permits the sole sourcing of smaller-value requirements, the practice is to call for quotes. In our interview, we heard repeatedly that these requirements are applied with great rigour.

From that perspective, it is difficult to see how one could reasonably take measures to have a *general approach* that is more open to supplier competition. The only obvious possibility would be to lower the thresholds at which an open call for tenders is required. That possibility would however introduce time delays and costs into the system:

- it takes time and costs money (internal government resources) to develop the documents required to call for tenders;
- it takes time and resources to evaluate tenders and award a contract;
- it takes time and resources for suppliers to prepare their bids; and
- it would open the government up further to the application of competitive bidding law liability, that does not exist with sole-source or three informal quotation approaches.

We suggest that those effects, for procurements of relatively small value, would outweigh any perceived benefits. Further, it would take the province out of the main stream approach to public procurement in place in other jurisdictions, where there is broad recognition that some requirements are of such small value that the cost implications of a full call for bids are simply too great.

The federal government changed its approach to low dollar value procurement in mid-2007. Its Government Contracts Regulations provide that for all requirements over $25,000 there must be a call for bids. Until September 2007, the federal contracting policy provided that under this threshold, bids should nonetheless be called for when it would be cost-beneficial to do so. However, Contracting Policy Notice 2007-04 - Non-Competitive Contracting, issued September 20, 2007[16], says that:

"From the perspective of value for money, the high cost of awarding a Crown procurement contract far outweighs any economic advantage associated with competing goods and services contracts **under $25,000** - low dollar value buys, whether or not the requirement is subject to open bidding or otherwise competed." (emphasis added).

Requests for Quotations

The PTA provides that for requirements under dollar thresholds, it is acceptable to obtain at least three price quotations. To many inside the government, these thresholds are already too low and restrictive – they suggest that the threshold for calling for bids should be higher than e.g. $10,000 for goods. With the new APA, that is not easily possible. In addition, however, the government has committed itself, in the Standard Terms and Conditions Goods and Services to issue an open call for bids for all goods and services requirements over $2,500.

Consequently, requests or price quotations are used for goods and services value at less than $2,500. The requirement in the PTA to obtain at least three (3) bids for such low dollar value requirements is likely not cost effective and in some cases operationally impossible. While there are other reasons for opening up such low value requirements to competition, government needs to be aware of the possible costs.

The PTA does in fact permit dealing with a single supplier based on the dollar value of the requirement alone. What we are told is that even though this 'either-or' approach is in the Act (s. 9), in practice the sole-source option is so open to criticism that it is rarely used.

Practically, while it may be relatively easy to obtain three bids in some geographical areas for some commodities, there are also areas where there are simply not three suppliers to seek bids from – let alone three who will bid. We cite here the example of your ferries, where many of the ships are very old, and were built in other countries. It is difficult enough (and can take large amounts of time) to find one supplier who can provide an obsolete part, much less three who are willing to quote a price.

Overall, this means that government employees, at significant cost (salaries, benefits, accommodation costs etc.) are obtaining three bids on requirements where the likely savings from competition *cannot* be more than the cost of seeking those savings. To the extent that government requires competition to achieve lower costs, this is counterproductive. One also has to consider the impact on suppliers, who are being asked to spend their time and money responding to these requests for quotations.[17]

[16] http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0920_e.asp

[17] Although no-one suggested this to us, we suspect that in some if not many cases suppliers would rather refuse to provide quotations – but feel that they must respond so that they do not go onto some 'black list'.

You do not have to have two or more bids to achieve competition. The federal government defines a competitive contract as one where, in a traditional call for bids (i.e. no Internet advertising, and including competitive requests for quotations):

- in the case of a call for bids, the lowest bid or the bid that offered **best value**, as set out in the evaluation criteria in the bid solicitation and determined by the contracting authority, was accepted; or
- in the case that only one bid, compliant with the mandatory criteria set out in the bid solicitation was received, **fair value** to the Crown, as determined by the contracting authority, was obtained.

We suggest that the difference in the highlighted wording is important and relevant: you can have only one actual bidder and still have had a proper competition.

We also note the difficulties created by the wording in the Act, which purports to provide the ability to seek a price from one source only. It says that in such a case there must be a 'fair and reasonable' price – but provides no guidance as to what those terms mean. There is considerable risk that different organizations subject to the Act will interpret it differently. It is also highly subjective. In one case, there was a standing offer in place for computer screens. A department found a better screen on the open market, for a lower price. We leave it to readers to consider: did this mean that the standing offer price, arrived at after a competitive process, was not 'fair and reasonable, and therefore the standing offer should not be used? Should the department have refused to buy the less expensive screen, because doing so would have nullified the benefit to the standing offer holder of the standing offer it had competed for? Might the supplier of the less expensive screen have competed for the standing offer, and lost – and then reduced its price so that it would et the government business anyway?

Conclusions

The government is using significant resources to obtaining three quotations. Other jurisdictions across the country either specify a dollar limit below which bids need not be called for, or provide that for lower value requirements bids should be sought but are not absolutely required. Suppliers are clearly not enthusiastic about being asked to quote on low value requirements.

The PTA already provides, for lower value procurements, the option of either seeking quotes or dealing with one supplier on a 'fair and reasonable price' basis. It has fallen into disuse. The result is spending too much in internal costs, and imposing costs on the supplier community, for unknown benefit.

Competition is the accepted way for governments around the world to meet their procurement requirements. It is not, however, the only way; there are many circumstances where a non-competitive approach is more appropriate. What is important, then, is the effective use of competition. We found too much emphasis on – inefficient and likely ineffective - competition in low dollar value procurements.

Action Items

A-8. Amend the PTA to provide clearly that for procurement less than an amount to be set in the Regulations it is not required to call for any form of bid.

Consequently, amend the Regulations to add a section providing for the setting of limits/thresholds

A-9. Amend the PTA to provide that above that value, but below the threshold to issue a full call for bids, departments must seek *at least three quotes, rather than* obtain *those quotes.*

We **do not** recommend a specific value for this purpose. Rather we suggest a test project to establish the costs and benefits of calling for bids at low value – to determine at what price point(s) it does save money to call for bids (this could be different for different commodities). One possible approach would be to:

- delegate to departments purchasing authority without calling for bids up to perhaps $500;
- carefully measure costs and savings from calls for bids from $500 up to $1K;
- then increase the delegation to departments up to $1K, and extend the test to requirements up to $2,500 (the current value at which the government has made a commitment in the Standard Terms and Conditions to call for bids, although it is not required by the Act).

This could lead to possible extension to much higher values - e.g. $10K at which the APA requires (for goods) a call for bids. It would require Newfoundland and Labrador to remove from the Standard Terms and Conditions Goods and Services the statement that the province will issue a call for bids for all requirements over $2,500.

This flexible approach only works if dollar thresholds are removed from the Act, and preferably from any Regulations under the Act – so that if/when there is proof of the benefits of a change, that change can be made easily. It would ensure that if lowering costs is the rationale for calling for bids, then bids are only called when they have been shown to lower prices paid. Alternatively, if government wishes to call for bids because it increases transparency and supplier access to government business opportunities, the cost of doing that will be known.

A-10. Amend the PTA to remove the specific thresholds at which there must be a call for bids: replace it with a provision that 'a public body must make a public call for bids for any contract involving an expenditure equal to or above the threshold specified in an intergovernmental agreement applicable to the procurement' (Quebec model).

Since leases are not covered by such agreements, add a reference to leases but specify that the threshold value will be set out in the Regulations.

Note, however, that later in this Report we will be suggesting an Action Item that you remove the special treatment in the Act for leases.

Higher Costs

This brings us to exploring the second element of this issue: – what are 'higher costs' we were asked to consider? There are two major dimensions to this: which costs are potentially 'higher', and to whom do those costs accrue.

For the government, the 'cost' of a procurement is never the contract price alone. Most obviously, it also includes:

- the cost of developing the statement of what is required (normally incurred by the program manager);
- the cost of calling suppliers to obtain quotations (either someone in the program, or someone in the GPA);
- the cost of preparing and issuing a call for bids, and evaluating bids received;
- the cost of receiving and accounting for goods and services received (normally in the program);
- the cost of dealing with performance issues (normally the program – although it should include the contracting authority);
- the costs of training, ongoing maintenance and repairs (paid for by the program; may require issuing additional contracts);
- the net cost of disposal of products (program and the GPA); and
- the costs of transitioning to a new supplier after a contract ends.

Cost is not only a factor for the government. It is important to consider as well the costs to the supplier community, which include:

- the cost of marketing its products and services to the government;
- the cost of responding to government requests for quotations (according to some suppliers, they are contacted by government people who do not really know what they are asking for – making it very time-consuming to prepare a quotation; one vendor of office supplies received 19 e-mails in one day from departments asking for quotes);
- the cost of preparing bids (keeping in mind that the cost of every lost bid is 'lost');
- the costs of maintaining stocks and delivery to clients (one provider of office supplies in St. John's noted that it costs $20-$25 to simply have a delivery truck go to the Confederation Building: if deliveries are being requested for small value orders, it is obvious that the supplier will all too often 'lose money');
- the costs of changing performance in response to changing client requirements;
- the opportunity costs of accepting a government contract (in terms of other business that the supplier may not be able to accommodate).

So, 'higher cost' is a complex issue for both the government and the supplier community.

Pre-Qualification

We heard frequently, from both government and suppliers, of dissatisfaction with the quality of bidders, and frustration that too often the winners of calls for bids are not well qualified to meet their obligations.

Pre-qualification of bidders – if done carefully – can reduce disagreements, ensure that only acceptable contractors are invited to bid, and speed up the entire procurement process. It is widely and effectively used in private industry to reduce the time, costs and risks of finding contractors and vendors.

As an example, to be a supplier for the United Nations registration is required. We presume that this recognizes that fact that when one's doors are open to bids from suppliers from dispersed geographic regions, most of which one probably have never dealt with before, it is time-consuming and expensive during a procurement process to make sure each bidder is properly qualified. An open registration process means that this work can be done at a more convenient time, and without risk to the success of an individual procurement action. It would also mean that all suppliers are dealt with on an equal and objective basis.

The use of pre-qualification processes, with pre-qualified bidders being placed on source lists to be used for later calls for quotations or bids, can achieve both quality and efficiency improvements. A robust pre-qualification process can ensure for example that all potential bidders have Worker Compensation coverage, proper safety and environmental training, adequate stocks of replacement parts, and many other of the minor but important details required for effective procurement BEFORE they submit bids. Pre-qualified bidders could even become legally bound by the government's Standard Terms and Conditions as part of a pre-qualification process, thereby removing any issues of non-compliance and speeding up the entire process of bid evaluation, contract award and contract execution – allowing all parties to focus their attention on the work to be performed and reducing (potentially significantly) the possibility that the successful bidder will raise issues of disagreement or non-compliance at award.

We note that under Canadian contract law, fairness in bidding is required – but there is no similar requirement for a pre-qualification process. There is therefore reduced (if not no) legal risk of being sued for bidder non-compliance issues that arise during pre-qualification.

Under pre-qualification, the person responsible for the process clearly needs to know the rules. The eventual users of those lists – the people who actually call for bids – do not. This facilitates the delegation of contracting authority across departments: it reduces the risk that an unqualified buyer will miss an issue of significance. The person responsible for the pre-qualification process also becomes responsible for downstream problems – e.g. a supposedly qualified bidder who is not. For departments and other GFBs that have urgent requirements, the mandatory use of pre-qualified lists of suppliers reduces the risk of the inappropriate identification of preferred or unqualified suppliers – they must only deal with those that are 'on the list'.

For the pre-qualification process to work, there needs to be an onus on suppliers to keep their information up to date. Failure to do so could in itself become grounds for removal from the list.

There also has to be an equitable way of choosing which suppliers will be selected from the lists to be invited to bid. One way is to simply choose the 'next three' in line on the list. Another – and one that encourages good supplier performance – is to invite the previous contractor for the same commodity (providing their performance met government expectations) and the 'next three'.

We are reminded here that the PTA and Regulations require a call for tenders, and specify how it is to be carried out – but do not specify 'who' is eligible to bid. The various trade agreements are based on open competition, but do provide for more limited competition between qualified suppliers, provided that the limitation is not used to limit competition. The PTA makes no such provision.

Conclusions

The introduction of pre-qualification would achieve quality improvements. It would also ensure that if our Action Items relating to reducing the need for open calls for bids for lower value procurements are accepted, there would be an open mechanism in place to ensure that all interested suppliers would have a fair chance of being offered government contract opportunities.

Action Items

A-11. Introduce the concept of pre-qualified supplier lists: any supplier may apply for pre-qualification at any time; where bids are to be solicited directly from suppliers, the list would be used to identify them.

A-12. Amend the Regulations, to provide that where there is a sufficient list of qualified suppliers, a call for bids may be issued to only those suppliers; ensure that notice of this general practice appears on the GPA web site.

A-13. Review the bid documents in common use, to determine whether they can be re-structured so that suppliers on pre-qualified lists obtain the benefit of having to do less work in order to submit bids.

Note that this last will produce limited or no benefit in the current environment, where you rely almost exclusively on tenders. It would produce benefits, however, when you make increased use of Request for Proposals.

Advance Notice

We noted established practice in the GPA, when a significant call for bids is issued, to notify known potential bidders directly – after posting an opportunity on the web site – that the opportunity is available. This practice seeks to ensure that there are in fact bids received for specific requirements: to the extent that they alert potential bidders to opportunities that those bidders might otherwise have missed, they increase competition.

This deals with specific opportunities. In many countries, there is a more long-term approach, where governments develop and publish annual procurement plans.

We note the OECD report already referenced: "In a third of countries potential bidders and other stakeholders, in particular end-users have an opportunity to be associated with the drafting of specifications for the object to be procured." Doing this allows the organization seeking bids to harness the knowledge and creativity of the supplier community, provided of course that the opportunity to provide input is not provided only to one or a small group of 'preferred' suppliers. It is a way to ensure that when a call for bids is issued it uses meaningful evaluation criteria that will produce the best supplier – and that it does not unfairly and unreasonably exclude suppliers who have a different but equally valid and valuable way of providing a solution to a government requirement.

Conclusions

The more advance notice that potential bidders have of upcoming procurement, the better they can prepare their bidding strategies and balance government opportunities against other (private sector) business.

Action Items

A-14. Require that all departments and GFBs publish on the GPA web site advance notice of upcoming procurement opportunities that are planned on a recurring basis (e.g. annual renewals).

A-15. For those notices, and other requirements as appropriate, the government should seek supplier input to the development of specifications and appropriate bid evaluation criteria, so that when a call for bids is issued it will result in bids that produce best value.

TRANSPARENCY AND ACCOUNTABLITY

We were asked to advise whether government's current processes provide for adequate transparency and accountability.

There are no generally accepted definitions of these two terms, in common use in the procurement community. We therefore need to be very careful in defining what they mean, so that we can separate our observations accordingly.

Transparency

Interestingly, a search for a definition of transparency in public procurement reveals basically nothing. It produces a list of documents that talk about, but never define, 'transparency'.

We found a definition developed by the OECD. In its already-referenced report *Integrity in Public Procurement: Good Practice From A to Z*, it described transparency in public procurement as the need to provide:

- transparent and readily accessible information on general laws, regulations, judicial decisions, administrative rulings, procedures and policies on public procurement; and

- equal opportunities for participation of bidders through a competitive procedure, and the provision of consistent information to all bidders on the procurement opportunity, in particular on the method for bidding, specifications, as well as selection and award criteria.

With two qualifications, we will start with this definition in our analysis:

- the first is that that transparency does not inevitably mean or require 'equal opportunities for participation of bidders through a competitive process': in some cases procurement requirements will be best met through non-competitive approaches, which can nonetheless be transparent if they are well communicated in a timely manner;

- the second is that not 'all bidders' should be dealt with – it is only 'all ***qualified*** bidders'. One of the main complaints of your supplier community is that not enough government attention is focused on ensuring that bidders and suppliers are in fact properly qualified.

Before moving on, readers who look at this OECD Report will see its strong emphasis on preventing corruption in public procurement, and may ask why we would use it as a reference when we are not suggesting that there is any level of corruption in public procurement in the province. It is because our experience in public procurement, coupled with our experience in anti-corruption files, has persuaded us that while preventing corruption and seeking improvement are two very different starting points, the

measures that they lead to, and the results that they seek to achieve, are the same.

Legislation, Regulations and Policies

The legislation and regulations governing public procurement in Newfoundland and Labrador are readily available through the government's web site, as are the trade agreements; the Standard Conditions Goods and Services; and the relevant construction documents. As long as interested parties know that the GPA exists (and it is clearly named on the main provincial list of departments and agencies), and that the Department of Transportation and Works handles most construction and public works (a link that should be apparent from its name), the documents will be found.

Interested parties are less likely perhaps to know that the Financial Administration Act exists and has provisions relating to procurement. They are also less likely to find the House of Assembly Accountability, Integrity and Administration Act.

They will not find the Guidelines: this document is only publicly available on specific request. Considering that the Guidelines apply to procurement that is worth an apparent $27 million per year[18], this is in our view a significant deficiency. Were the Guidelines to be published on the Comptroller General's web site, while an improvement, in our view that would be a second-best solution: suppliers and others interested in the government's procurement framework should be able to access all relevant information through one portal.

Since our mandate did not include GFBs, we have not verified what information is available through their web sites. We have noted, however, that the GPA web site provides links to the web sites of many GFBs, which does increase transparency. We also note that the GPA web site provides links to the procurement sites of the three other Atlantic provinces – arguably a strong transparency measure (although it does not 'fit' the OECD definition), and also one that clearly facilitates supplier access to other government contract opportunities.

We also found information on judicial decisions, albeit with some difficulty. An interested party can find the way through the Department of Justice web site, to the web site of the provincial Supreme Court – where under the Trial Division there is a link to the Canadian Legal Information Institute (that on February 24 did not work). On direct access to the Institute, we confirmed the availability of decisions of the Supreme Court, as well as other courts across the country.

In our view, however, this is not a significant shortcoming. For a non-lawyer, decisions of the courts are often difficult to understand – both in their specific content, and in how they might apply to other situations or in other jurisdictions. The problem for any provincial government interested in making such information available is that it would have to devote resources to preparing case summaries that are useful. Further, court decisions take place across the country, meaning an extensive workload IF a government decides to do this. Therefore, people interested in the outcomes and consequences of legal actions relating to procurement should either consult a lawyer, or subscribe to one of the commercial services that provide such interpretations.[19]

While the above-referenced information provides the context for public procurement in Newfoundland

[18] Results of a Comptroller General survey of departments for the 12 month period ending November 2006, for four major categories of professional services: IM/IT; Engineering and Architectural Services; Advertising, and Other.

[19] Note that one of our review team members offers such a service. He did not suggest or write this observation.

and Labrador, it is singularly lacking in providing information about what is actually happening. There is no single place where people can find all opportunities to bid – and equally no generally available information about who won which contracts, for which department, to supply what, and at what price. This means that suppliers cannot easily get information on which to base their marketing and bidding strategies – and the general public cannot get the information they need to verify that government procurement is functioning in a fair, open and transparent way.

The only after-the-fact information that is generally disseminated is the various reports sent by the Government to the House of Assembly. We find the scope of reporting to be inadequate – too many important subjects (e.g. change orders) are simply not reported. Also, it may take too long for the information to reach the members of the House – and once received, they may have other issues of pressing importance that require their attention.

Conclusions

We found that: there is a lack of information about the general framework for government procurement available to the general supplier community and the public; information is not available quickly; and there are too many sources that interested parties must seek out to obtain information.

A-16. Amend the Act to require that all departments and GFBs must post their calls for bids on one web site (preferably the GPA).

A-17. Add a new provision to the Regulations, to require that all contract awards by departments and GFBs be published on the web. We suggest qualifying this, that publication be mandatory for contracts valued at more than $5,000. The information published should include: (i) winning bidder, (ii) what the good or service is; (iii) the client the good or service was bought for; and (iv) the total contract value.

A-18. For greatest transparency, there should be one site where all public contracts are posted: this measure would assist suppliers in identifying business opportunities.

We understand that the new information system being acquired for the GPA will provide much-improved capability to do this.

A-19. The GPA should verify with its proposed contractor that the new system will provide the capabilities referenced above.

A-20. The GPA should publish the information currently sent to the House of Assembly on its web site.

Provision of Consistent Information to all Potential Bidders

(a) Calls for Bids

In our review of files we found no issues in this regard. Potential suppliers can access bidding opportunities through the Internet; they are provided with required information; and amendments are issued concurrently to all known potential bidders. The GPA web site provides the capability for potential bidders to be informed automatically whenever an amendment to a call for bids is issued.

We have already noted the established practice in the GPA, when a significant call for bids is issued, to notify known potential bidders directly – after posting an opportunity on the web site – that the opportunity is available. These messages, sent by facsimile, were all issued on the same day for any

given opportunity.

We note that while the PTA does not specify what information must be provided to potential bidders, the Regulations do – for tenders, lease requirements and requests for proposals. The Guidelines suggest the information that should be provided. A key element missing from the current approach – with the exception of leasing – is the full text of the contract that the government intends to sign with the winning bidder.

In its review of the Request for Proposals for the required new Job Evaluation system already referenced, RFP Solutions concluded that this RFP contained almost all of the elements found in a federal RFP[20]. The exception is that it did not contain the proposed contract, leaving the government vulnerable when it negotiates the full contract with the successful bidder, to claims that the resulting contract is significantly different in scope to what was disclosed in the original RFP. The company suggests that including the proposed contract would avoid subsequent misunderstandings; reduce the administrative workload of transforming the RFP, successful bid and negotiations into the eventual contract; and potentially enhance the government's ability to enforce the contract.

Note that we are not taking a position here on the quality of federal RFPs, or whether they should serve as a model for Newfoundland and Labrador. We note, however, that the federal government has many years' experience of having its procurements reviewed and commented on by the Canadian International Trade Tribunal with respect to compliance with Canada's federal trade agreement obligations – and therefore considerable experience in making its RFPs 'bullet-proof'.

In leasing, the Regulations require that in a call for bids for leasing, potential bidders shall be provided with 'a proposed lease'. This requirement does not exist for goods and services, or for professional services under the auspices of the Guidelines. As we have noted above, presumably the information that is in a call for bids is the information that the government would want to see in the ensuing contract. If one does not provide in the call for bids the full text of the content that the government proposes to sign with the winning bidder, you are at risk: requirements that you subsequently include in the contract could be significant to the winning bidder, and might well cause that bidder to decline the contract (and perhaps to launch legal action).

In our detailed review of the PTA and Regulations (Annex G) we noted in Regulations 9(6) the apparent contradiction, that a detailed contract with a winning bidder must be 'substantially' the terms of the Bidder's proposal – and not what the government wants.

RFP Solutions also proposed areas where there would be benefits from a greater level of clarity, document restructuring and information disclosure:

- including specific terms of any negotiations that may be carried out;
- structuring an RFP so that it serves the dual purposes of (i) inviting and evaluating bids, and (ii) presenting the resulting work and contract;
- setting out clearly any requirements for bidder certifications (e.g. security certifications);
- ensuring that the RFP is structured so that its various elements – particularly descriptions of the work, specific deliverables required, and evaluation criteria – are separate and distinct;
- ensuring that what is essential is clearly distinguished from what is desirable;
- providing more precision as to how bids will be evaluated; and
- by ensuring clarity throughout, supporting bidders in proposing fixed price offers for the known work that may minimize cost inflation due to contingency costs related to potential 'unknowns' in

[20].Detail in Annex D.

the work and contract.

Conclusions

We have found the level of transparency to be acceptable in terms of how procurement opportunities are advertised and what information is provided to potential bidders. Risk to the government of unsuccessful procurement processes, and ensuing legal action, would be reduced were all calls for bids – under the PTA or the Guidelines – to include the full text of the contract that the government intends to sign, as is already the case for leases.

Action Items

A-21. Amend the Regulations and the Guidelines to require that in any call for bids, the full text of the government-proposed contract be included.

(b) Disclosure of Information During the Bidding Period

There is always the possibility that potential bidders will seek information not contained in a call for bids from various contacts inside the government. There is also the possibility that others outside the direct buyer-potential supplier relationship will attempt to influence the process. The more people who are involved in this communications arena, the greater the prospect that there will be an uneven provision of information to potential bidders, thereby creating an unfair bidding situation. Further, the provision of information to one bidder in preference to others – or even in advance of to others – is contrary to Canadian contract law.

The OECD observed that "In order to ensure that interaction between officials and bidders does not lead to bias…measures have been set to define clear restrictions for procurement officials in their interaction with bidders at different stages of the procurement, in particular during negotiations".

Conclusions

Measures must be in place to ensure that all potential bidders receive the same information at the same time.

Action Items

A-22. Add a new provision to the Newfoundland and Labrador Supplement to the Atlantic Standard Terms and Conditions; to bid documents provided to External Consultants; and to construction and lease packages, that once a call for bids is launched, and until the contract has been awarded, all contact by potential suppliers must be only with the identified contracting officer.

We had a comment that one department would not like to see such a provision reduce or prohibit communication between potential bidders and the 'Consultant of Record' for a project. A 'Consultant of Record' is usually found in the construction industry, and is a consultant retained to plan and manage activities as required to develop and deliver Construction Contract Documents required to Bid and Construct a Project. While we understand that in this role there should be a good flow of information between the Consultant of Record and potential bidders, it is essential that that flow be carefully controlled. In particular there must be no direct two –way communication between the Consultant of Record and any particular potential bidder, until the bidding period is over and the contract awarded. Rather, every question asked and answered must be communicated at the same time to all potential

bidders.

If a department wanted to maintain a Consultant of Record as its principal point of contact with potential bidders on a project, it could do so – provided that the Consultant of Record is the ONLY person who may deal with those potential bidders. In addition, the department would have to ensure that the consultant (i) is fully aware of the procurement requirements of provincial and Canadian law, (ii) carries adequate liability insurance in the event that his/her actions result in legal action against the government due to contravention of those legal requirements, and (iii) fully indemnifies the government against the financial consequences of any such legal actions.

(c) Public Openings

The PTA provides that tenders must be opened in public. Neither the Act nor the Regulations set out what 'public opening' means. We note that the specific requirement in the Act can be met by a public body slitting open the bid envelope (and perhaps removing the contents). Although this would appear to be a singularly useless approach, it would comply with the strict wording of the Act. It is an example of where strict compliance with the Act – the dominant approach in the province – does not necessarily produce best value.

In our experience, the information that is *usually* provided to bidders at a public opening is: the name of each bidder; the total bid price (or, when more than one contract may be awarded for different line items in the requirement, the prices for each line item[21]); and when some form of security was required, whether that security was provided. We have been told that the approach is different between departments, and particularly between departments and GFBs.

This is particularly the case for construction projects, where bidders have for years used the information they get at public openings to gauge their likelihood of success. Construction is 'special' in this regard, because calls for tenders almost always require bidders to submit bid and contract security. The issue is that every construction company has a limit on how much security it can obtain from the financial market. When it submits a bid, that security is 'locked up' until the results of the call for tenders are known.

Some readers may not understand this practice at all, so we will explain. A company decides (and is permitted by the rules) to use irrevocable letters of credit to meet bid security requirements. Its bank agrees to issue such letters, to a total value of $10,000. The company bids on one job, and provides an irrevocable letter of credit for $5,000. It then bids on another, and provides another letter for $3,000. The company then has a total of $8,000 of its available $10,000 tied up – $2,000 left -- and if another contract opportunity comes along, that requires bid security of $5,000, it cannot bid. That is why bidders like fast bid evaluations and contract awards: as soon as they know they have not won, they cancel their (in this case) irrevocable letter of credit, and can then use that money to bid on other opportunities.

It is quite possible, then, that a construction company that bids on several jobs will have all of its security capacity locked up for projects where the results are not known – and until results start to come out, that company is effectively precluded from bidding for other jobs.

Therefore, construction companies use the public opening to gauge their likelihood of success. Knowing

[21] This is jargon. To explain: if a department needs to buy 10 pieces of equipment (e.g. spare parts for a machine), it can: invite bids where one supplier will win the total package based on an overall bid price; or it can seek bids for the individual pieces – called line items – and then award one or more contracts to the bidder(s) who have the lowest price for each individual item. In the latter case, one bidder could win the whole order – but equally, there could be 10 resulting contracts, one for each item, with 10 bidders.

their competition, and what the competing bid prices are, they can make a decision as to whether to stay in the running while the full bid review process takes place – or to 'give up' on a job, cancel their security, and develop new bids elsewhere.

What they need is consistent information, and as much information as they can get. Disclosure of who bid, what the bid price is, and whether the required security has been provided, is adequate for their needs. The problem is that all public bodies in the province do not provide information consistently.

The situation is different when the bid call is for proposals rather than tenders. In a tender, when you know your competitors' bid prices, you can judge reasonably well whether you have a chance of winning the contract. For proposals, however, the award decision will be based on factors including but not limited to price – and knowing a competitor's bid price essentially tells you nothing about what your chance of winning is. In fact, even knowing who your competitors are is often of little value. In addition, many companies consider their bid price in a request for proposals to be proprietary and confidential information – part of their competitive business strategy.

Conclusions

This is a case where defining in the Act what a specific term means (in this case, 'public opening') would benefit the supplier community, at no cost to the government.

Action Items

A-23. Add a new provision (3) to s. 4 of the Regulations, to provide that 'At a public opening, the following information shall be read out or otherwise communicated to bidders: (i) in the case of a call for tenders, the name of the bidder, the bid price, and if appropriate whether required bid or contract security has been provided; (ii) in the case of a Request for Proposals, the name of the bidder, and if appropriate whether required bid or contract security has been provided.

A-24. Amend s. 11 of the PTA to provide that while tenders shall *be opened publicly, requests for proposal* may *at the discretion of the contracting authority (to be based on the nature of the procurement) be opened in public.*

(d) Debriefing

The Act and Regulations are silent on the issue of Debriefings – the ability of an unsuccessful bidder to find out why they were not successful. This information can be very useful to those bidders: it could revel an area where they were inadvertently non-compliant with the tender requirements (a mistake not to repeated), and may identify areas where they need to change their bidding approach if they are to succeed in future competitions. These debriefings provide an important accountability requirement for the government buyer, requiring that they explain how they came to their decision on a particular bid: a good debriefing can therefore satisfy a bidder that its bid was in fact evaluated according to the published criteria.

In the OECD document already referenced extensively, we found very strong wording about the U.K. view of debriefings. "Debriefing provides a valuable opportunity for both parties to gain benefit from the process, and thus it is considered a useful learning tool for the parties. Debriefing is also useful for the buyer department or agency because it may:

- Identify ways of improving processes in the future;

- Suggest ways of improving communications;
- Make sure that good practice and existing guidance are updated to reflect any relevant issue that have been highlighted;
- Encourage better bids from those suppliers in future;
- Get closer to how that segment of the market is thinking (enhancing the intelligent customer role);
- Help establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in the future."[22]

Conclusions

The provision of vendor debriefings is an important transparency measure.

Action items

A-25. Add a new provision to the Regulations, to ensure that bidders have the right to a debriefing after contract award.

The effectiveness of debriefings would be increased – more and better information could be exchanged - if they were carried out under non-disclosure agreements, such that neither party could use information given or received in a de-briefing for other purposes (e.g. in a subsequent legal action).

Accountability

Again we need to start with a definition. The most recent statute in the province that might have been a good source is the House of Assembly Accountability, Integrity and Administration Act. Unfortunately, it provides no definition for 'accountability', and neither does the Federal Accountability Act of 2006.

Therefore we turned to an Internet search, and found such a definition on the web site of the Canadian Food Inspection Agency:

"In government, accountability can be thought of as enforcing or explaining responsibility. It is often used as a synonym for "responsibility" because both are defined by the office holder's authority; they cover the same ground. Accountability involves rendering an account to someone such as Parliament or a superior, on how and how well one's responsibilities are being met, on actions taken to correct problems and to ensure they do not reoccur. *(From: A Strong Foundation: Report of the task force on public service values and ethics.)"*[23]

Responsibility and accountability for procurement in the government rests in many places.

Operationally:

- the GPA is responsible for the procurement of goods and services;
- individual departments are responsible for the procurement of external consultants, and for low dollar value procurements of goods and services where there is a delegation from the GPA;
- Transportation and Works is responsible for leases;
- individual departments are responsible for the acquisition of construction; and

[22] *Integrity in Public Procurement: Good Practice from A to Z*, © OECD 2007, page 39: reproduced with the permission of the OECD.
[23] See http://www.inspection.gc.ca/english/corpaffr/publications/riscomm/riscomm_appe.shtml

- GFBs are responsible for procurements in all categories to meet their needs.

From a Policy perspective:

- the Treasury Board is responsible for general administrative and financial policy;
- the Chief Operating Officer of the GPA *appears* to be responsible for policy relating to goods and services – although he has no mandate for this in the GPA Act, and arguably therefore all policy power rests with the Treasury Board:
    - however, we are told that when the office of the Auditor General receives questions about the PTA and procurement in general from GFBs, it refers them to the GPA – and when the OAG is conducting its audits, it will consult the GPA for interpretations;
- the Comptroller General is responsible for policy relating to the hiring of external consultants;
- the Minister of Transportation and Public Works appears to have de facto responsibility for policy relating to construction and leasing:
    - the Minister has an exclusive mandate to administer all government leases;
    - the Minister is responsible for the bulk of construction required by the government and its departments;
    - the Minister of Government Services, to whom the COO of the GPA reports, is responsible for the PTA and Regulations, and the GPA would seem to be the logical place for him to receive policy support for any and all aspects of the PTA:
        - but the GPA has no specific mandate in its legislation relating to either construction or leasing; and
        - we note that in the ongoing negotiations between the government and the NLCA, the GPA has no role;
- GFBs are able to set their own 'policies', acting as they see fit under the provisions of the PTA:
    - the COO of the GPA has indirect policy influence here, as he receives various reports from GFBs and is authorized under the PTA to make comments to those bodies in the key areas of (i) use of exceptions to tendering, and (ii) cases where a contract is awarded to ether than the preferred bidder.

In brief, there is no one individual – whether Minister or senior public servant – who is responsible and accountable for *government procurement in general*.

The government's annual expenditure for and on procurement is more than 25% of total expenditures. We suspect that that is more than the budget of any one department or organization. With its fragmented approach, the government has no global perspective at all. It cannot 'managing' procurement. Rather, procurement is seen from the bottom up – at best the sum of thousands of individual transactions. The government does not know who is buying what, for how much, from whom. More important, it has no idea whether procurement as a whole could be better managed, to produce better result for the same expenditure.

Were the public sector in the province to be faced with a serious procurement-related problem (as we believe you soon may be, as the construction industry may choose increasingly to meet to private sector requirements), the government has no way of responding. In fact, unless there is more coordination and oversight, the timing and magnitude of the problem will not be evident in its early stages

We see this as a significant deficiency.

More practically, if a procurement decision is made by the Treasury Board or the Lieutenant-Governor in Council, and it turns out to be in some way 'wrong' – who is ultimately accountable – the Ministers who made the decision; the Ministers' advisory staff who passed on the file for decision; the Minister who

approved the submission for approval; the Deputy Head; the Assistant Deputy Minister; the program Director?

The fragmentation of responsibility and accountability is almost certainly reducing the overall quality and performance of the government procurement community. Expertise for the acquisition of 'normal' services, and goods, rests in the GPA. The Office of the Comptroller General provides advice to departments on the Professional Services Guidelines. Construction expertise rests primarily with Transportation and Works, as does Leasing of space. Individual departments have extensive expertise for the procurement of specific commodities (e.g. Education *knows* school buses.)

Each of these centres of expertise has knowledge that could usefully be shared with the others – but when it rests in so many places there is significant likelihood that it will not be. That risks inefficient purchasing activities, when people simply do not know any different. It also means that 'lessons learned by one organization are not likely to be shared. Interestingly, the main developments in Canadian contract law have almost always resulted from legal actions relating to the construction industry. We have not asked, but presuming that information about such legal cases is analyzed and disseminated to the appropriate people within the departments that carry out construction contracting, we would find it very surprising to see that information also disseminated across the broad procurement community.

Conclusions

It is difficult to expect the highest possible level of performance from the overall system, when no one is in a position to know what is going on – much less in a position to do something about potential or actual problem areas – and where there is no effective oversight. We found a government approach to procurement where responsibility and accountability are dispersed. Improved definition of roles and responsibilities could achieve significant improvements.

Action Items

This issue of fragmented responsibility and accountability is inherent to the existing legislative and government management approach. We do not believe that significant improvement is possible within that framework. Therefore we deal with this issue in our Recommendations.

FAIR AND EQUAL ACCESS FOR LOCAL COMPANIES

We were asked to assess whether processes ensure fair and equal access to local companies.

We have loosely interpreted 'local companies' as being companies based or with permanent facilities in Newfoundland and Labrador. That may not be sufficient: there is significant difference between e.g. (i) a company that is owned by provincial residents and manufactures all of its products within the province, and (ii) a multinational company that maintains a sales office in the province, employing provincial residents, and imports all of its products from outside the province or country. Both are 'local suppliers'. We note, however, the definition of a 'Canadian supplier' in the AIT: "a supplier that has a place of business in Canada".

We have dealt with many dimensions of this question in the section on Competition. We found little if anything here that would be unfair to the local supplier community, broadly defined. We do believe that there are measures that could be taken to assist local suppliers more narrowly defined – based on their location within the province.

Geographic Distribution

We noted that in the awarding of standing offers, the CPA/GPA often awards only one, to cover the entire province. The basis for this is the view that the result will be economies of scale. It is not evident, however, that supplying commercially–available products to Labrador City from St. John's provides either best prices or adequate access to the market for smaller local suppliers, who cannot supply province-wide. We note specifically the measure in the Quebec *Act respecting contracting by public bodies* that "10. A public body must consider making a **regionalized public call for tenders** for any contract not subject to an intergovernmental agreement." (emphasis added)

Suppliers outside St. John's could probably be helped to compete more effectively for government contracts. Many governments seem to end up – no matter how 'accessible' they say their procurement processes are – with an apparent over-reliance on suppliers in the capital area. To some extent, this is a natural result of cost factors – the further away from their client/delivery point a supplier is, the more they have to factor transportation costs into their bids. In other cases, there are perceptions that suppliers in more distant areas simply do not know what the opportunities are.

Direct measures can be taken to distribute government contracts more broadly. They tend to be problematic – among other things, because government is then asking procurement to accomplish multiple and sometimes conflicting objectives. If one tries to direct business to one area, suppliers in other areas will complain that they are being shut out unfairly.

What can be done with little effort is ensuring that *all* suppliers know (i) what government is buying and has bought, and (ii) who is actually getting the contracts. Additionally, continued simplification of bidding processes, that reduce the time and cost to suppliers of understanding the purchasing process and actually preparing good bids, should produce strong results.

We note that 'local companies' in the province are likely to be small businesses – if not micro businesses. Their interest in obtaining government contracts may be high: their capacity to find those opportunities less so. What they need is a fast way to find what opportunities are available – and here they are hampered by the fact that different departments and GFBs advertise their calls for bids in different places. As of March 17, 2008 the GPA web site listed 42 GFBs, some of which have web sites of their own, and some that advertise their requirements only in newspapers.

It is a widely held opinion that small businesses tend to be where new jobs are created – and that once those jobs exist, they are more stable (while a larger company may have the resources and flexibility to deal with an economic downturn by e.g. outsourcing production to lower-cost countries and eliminating local jobs, smaller firms lack that flexibility and tend to find other ways of maintaining employment: perhaps a shorter work week is better than no job at all.)

It is a commonly held view that smaller businesses are where you *tend* to find innovation, as these suppliers seek to differentiate themselves from their competitors in order to establish and build their businesses. A tender approach as applied by the government tends to mean that these suppliers will simply not be able to bid, because their innovation is not recognized.

We deal with the issue of 'tenders' in a later section of this Report.

Finally, we note that for a small supplier interested in doing business with any level of public authority in the province, it is not possible to identify potential markets because there is no information available as to which body has bought what.

There may also be good 'local' suppliers who are not yet prepared and willing to do business with the government, for a variety of reasons. Where that is the case, not only is the government missing out on what those suppliers can offer, but those suppliers cannot either take advantage of Newfoundland and Labrador procurement opportunities to develop and hone their ability to compete for significant contracts in other jurisdictions.

Increased supplier involvement – more and better bidders - needs simplified processes, which in turn can make it faster and easier for suppliers to become to bidders. There are opportunities for such measures to be taken – ranging from increased use of standing offers with multiple suppliers, through faster payment of invoices, to more pre-qualification of suppliers which permits much cut-down bidding processes.

Left unsaid in the Act is from which suppliers quotations will be sought. If suppliers have no way to ensure that their readiness and qualifications to supply are known to potential government purchasers, and if they cannot see that at some point their name 'will come up', they end up with no ability to compete.

A final issue we identified from our file review is the question of how far a department or GFB should go in seeking suppliers from which to seek quotes. The PTA and Regulations provide no direction n this regard. In a number of files, the rationale for dealing with only one supplier was 'the only supplier in the area' – but it was not clear how widely the area was defined. This is not unique to the province: for example, at the federal level, the Government Contracts Regulations require a call for bids, but specify that this is not required if there is 'only one supplier capable'. There is no definition in those Regulations as to how far a contracting organization must go in seeking confirming that there is only one supplier.

Equipping Newfoundland and Labrador Suppliers to Compete

Part of assisting the provincial supplier community to take advantage of the access to contracts in other jurisdictions that the trade agreements provide, is to help them to develop the competitive bidding skills required to compete effectively in those jurisdictions. Most other jurisdictions use the Request for Proposal approach far more than does this province. Reliance on tenders may therefore be contributing less than it could to creating and maintaining a supplier community that has the skills and experience to compete effectively outside the province. It would seem appropriate for Newfoundland and Labrador to provide more opportunities for those suppliers to learn and practice the RFP approach.

Conclusion

We see nothing in provincial processes that obviously place local companies at a disadvantage. If anything, the new APA's clear preference for Newfoundland and Labrador suppliers appears to give local companies a clear advantage. However, the province is not going as far as it could to help its supplier community, with its fragmented advertising of opportunities, lack of advertising of contract awards, and its reliance on tenders against rigid specifications.

We have already set out some Action Items that would help deal with this, in the section above on Transparency.

In addition:

A-26. Add an item to the Regulations, that for the purposes of exception 3(2)(e) of the PTA ("the only source of that work or acquisition") departments and GFBs are to consider the nature of the procurement and establish geographical limits accordingly.

We do not believe that this will be a sufficient response to the existing difficulties, but see no way to resolve the issue within the existing legislative framework. Therefore we deal with this more fully in our Recommendations.

THE LEGISLATION AND ITS CONSEQUENCES

Having dealt with the five specific issues we were asked to examine, we move now to a more general level.

Tenders

We start here because the core legislation is called the Public Tender Act, and the default approach to meeting public procurement needs is the call for tenders.

The Act does not define what a 'tender' is. As we noted in our clause by clause review of the Act (see Annex G), 'tender' is a word that has many meanings in the public procurement environment: as used in Newfoundland in the PTA and Regulations, it is different from e.g. the Agreement on Internal Trade.

For probably centuries, 'tender' has been interpreted as meaning 'offer', and so an invitation to tender is an invitation to make an offer. Newfoundland and Labrador, in contrast, gives 'tender' at least three meanings: (i) it is a call for offers; (ii) it is the name of the document the bidder then submits; and (iii) it is then the actual contract that is signed. So, the series of events is (i) issue a tender, (ii) receive and evaluate tenders, and then (iii) award the tender. We suggest more clarity is required: (i) call for bids, (ii) receive and evaluate bids, and (iii) award a contract.

Newfoundland and Labrador has, however, gone further than that question of working terminology. Before the Act was amended in the late 1990's, it required a call for 'tenders' – and it could have been interpreted to mean a call for offers of any sort. You could have had the flexibility to use any process for calling for bids, in full compliance with the PTA.

The amendment, however, established an implicit definition. By adding the concept of the Request for Proposal in s. 3(2)(j), you said that a 'tender' is clearly not a Request for Proposal (noting that 'request for proposal' is also not defined). Further, in the January 2008 update of the Atlantic Procurement Agreement, it was agreed that "5 i) …procurements covered by provisions of this Agreement shall be conducted by the public tendering process in accordance with the rules and procedures established by the Agreement on Internal Trade and by this Agreement. Procurements solicited by 'Request For Proposal' shall also be subject to all provisions of this Agreement". So, a request for proposal is something 'different' – and by extension cannot be a 'tender' as this province under the PTA applies the concept.

As a comparison, Public Works and Government Services Canada defines an 'invitation to tender' as "A bid solicitation document used by PWGSC when the estimated value of the requirement exceeds $25,000; two or more sources are considered capable of supplying the requirement; the requirement is adequately defined in all respects to permit the evaluation of tenders against clearly stated criteria; tenders can be submitted on a common pricing basis; and *it is intended to accept the lowest-priced responsive tender* without negotiations."; and 'request for proposal' as "An RFP, while generally used for requirements of $25,000 or more, is often employed for requirements where the selection of a supplier cannot be made solely on the basis of the lowest price. AN RFP is *used to procure the most cost-effective solution* based upon evaluation criteria identified in the RFP." (emphasis added)

The practical result is a working definition of 'tender' – a call for bids where, once one or more suppliers meet a statement of specification, a contract is awarded based on low price. This is an approach that can

and should clearly be improved on, because it poses four risks:

- in order to win the contract, bidders may reduce their prices to the point where they really cannot perform the contract well, and as a result will be tempted or forced to cut corners in order to avoid a financial loss;
- the person who develops the specification may have imperfect knowledge of the marketplace, and may therefore preclude suppliers of perfectly satisfactory goods or services from bidding; there are no opportunities to benefit from different and innovative ways of achieving the desired result;
- unless the specification package is very well thought out and developed, although a low price may be paid for the initial acquisition, there is the possibility if not the likelihood of high subsequent costs for e.g. maintenance, replacement parts, follow-on work; and
- the potential benefit of a 'better' offer is lost, taking away from suppliers the basis on which they have chosen to compete in the marketplace; low price eliminates e.g. suppliers that have chosen to offer higher prices supported by better service. (For greater clarity: if Supplier A bids $100 for a product, and offers a 30 day warranty; and Supplier B bids $101 with a 3 year warranty, the tender approach will give up that additional warranty coverage to save $1.)

The PTA does permit the use of the Request for Proposal, but only with prior approval of the Lieutenant-Governor in Council. Obtaining that approval is seen within the government as onerous and time-consuming: it was suggested to us that this causes departments to use the tender approach when a call for proposals would have been more advantageous. We understand the frustrations: consider that if a department wants to buy a $15,000 machine with delivery within 90 days, it can readily use a tender – but if it wants that same machine, but is seeking faster delivery even if there is an additional cost, it requires Lieutenant-Governor in Council Approval (because in order to balance off considerations of price and other characteristics, you need to use a request for proposal.)

When the Act was amended to add the possibility of using a Request for Proposal, there had been public consultations that indicated that the supplier community did not trust the government to award contracts based on criteria other than price; there was a fear of too much subjectivity in the process. We suggest that solving the 'trust' issue by limiting the use of the most effective procurement approach is counterproductive. Rather, trust should be built through demonstrated effective performance.

The APA deals in the language of 'procurement' and 'bids', not tender as this province uses it. The province uses the Atlantic Provinces Standard Terms and Conditions Goods and Services, which also deals in the language of 'bids', not tender (defining 'bid' as "Bidder's written offer to provide the required goods or services at a given price or rate, or any similar document issued in reply to an invitation. May also be referred to as a Proposal, Tender, Quotation, submission, Response or similar name").

Conclusions

Across Canada, the use of Requests for Proposal is generic in the public sector. Private industry has largely moved to the concept of one document – the call for bids: subsequently, document clauses make it clear whether what is being called for is a tender, request for proposal etc.

The world of procurement is dynamic: new approaches are introduced from time to time, and while we are not saying that the province should necessarily adopt them (e.g. reverse auctions have had some bad press. With your emphasis on low price, we might have been somewhat surprised that you have not tried to introduce them – but the PTA would not let you. We believe that the flexibility to do so should exist, where new approaches would be of benefit. The current PTA simply does not do that.

Action Items

*A-27. Add a 'Definitions' section to the PTA, to include a**ll** procurement terms used in the Act, including but not limited to: Tender, Request for Proposal; Quotations and Change Order.*

A-28. Permit the procurement community to use any appropriate procurement method to meet government requirements, by replacing all references in s. 3, s.4, s.9, s. 10, s. 10.1 (including section titles) to 'tender' or 'invitation to tender' with 'call for bids'.

In some cases, more sophisticated replacement of wording would be required (e.g. s.3(3) 'where they are tendered…').

Consequentially, repeal s. 3(2)(j), which permits the use of Request for Proposals: these would now be included in the general authority to 'call for bids'.

Consequentially, add a new definition of 'call for bids' which includes tenders, requests for proposals, standing offers, notices of intent to award a contract without calling for bids.

Consequentially, add a new definition of a 'notice of intent to not call for bids' – follow the federal approach for the Advance Contract Award notice (ACAN).

We provide a description of the federal ACAN at Annex J.

Specifications

We saw a number of procurement files where tenders were called for to meet highly detailed technical specifications – from office desks, to road construction equipment.

Such specifications clearly have an important place in procurement. The obvious example is in construction – where once an architect has completed detailed plans and specifications, the goal is to contract with a firm that will build the building as specified. Construction below those specifications is not accepted; construction above them is neither needed nor valued.

Use of detailed specifications should ensure that the government gets exactly what it needs (subject, though, to the possibility that the supplier will supply something else – see our case example of Product 'X'). The risk, however, is that the government may get the specification wrong – and if it then accepts delivery of the specified product or service, that turns out to *not* meet the government need, the supplier has no responsibility. By using detailed specifications, the government assumes all of the risks.

For many required goods and services, however, telling potential bidders exactly what government wants clearly inhibits competition. There may be ways to achieve what the government wants that fall outside the specifications – or even use a completely different approach. Unless the government is prepared to consider requests from suppliers offering such alternatives to make changes while the period for bids is still open (a process fraught with risk – there may be allegations that the specifications were changed to favour a particular supplier), some suppliers will simply be unable to bid.

The effectiveness of the use of specifications is dependent on the expertise and approach of the person designing the procurement. Using specifications that have not kept up to date with technical advancements in an industry will likely not produce the best value bids.

Note that this problem is not limited to using specifications. In one of the files we reviewed, a department asked the GPA to issue a tender for a particular product, because one of their experts had field tested a number of machines and concluded that this one was the best. What if he did not know about, much less test, the 'best' units? What if the unit he tested was 'better', but at a high unit cost? What if another expert dong the same testing had come to another result?

Changing such a specification during an actual call for bids can be problematic. If an individual supplier suggests that changes be made, so that that supplier can bid, and if the government agrees, it could be seen as favouring that particular supplier. If the government does not agree, that supplier can complain that its offerings are being unfairly excluded – and the government may lose out a potentially advantageous offering.

In procurement, 'access' means that any qualified supplier has the opportunity to obtain government contracts. Without access, there cannot be competition. The procurement approach in place in Newfoundland and Labrador is effective in providing access. The question, is, access to what? If a procurement has been designed in such a way as to preclude suppliers from bidding (e.g. if its qualification criteria are overly restrictive) then access is diminished.

Conclusions

Specifications can be used effectively to ensure that the government gets what it needs. Care must be taken, though, to ensure that specifications will actually result in the government need being met, and will permit the broadest possible range of qualified suppliers to bid.

Action Items

A-29. Require that whenever generic or standardized specifications are used repeatedly for acquisitions, those specifications be posted on the web site, and that potential suppliers have the right to make comments and suggest changes or improvements at any time.

A-30. Encourage the use of Letters of Interest, Requests for Qualifications, publication of DRAFT calls for bids and other processes that involve the supplier community in the development of specific procurements.

Vendor Performance

Suppliers are frustrated that there appears to be no level playing field. Those who see themselves as high quality providers of value added products and services are being asked to compete for contracts against other suppliers who some might characterize as 'fly by night'. For example, the supplier who maintains a well-stocked warehouse with product always on hand is competing against another who has no facilities and no supply contracts with manufacturers, but who may win a contract because of low price (and then run around furiously trying to make arrangements to comply with the contract – failing which that supplier may simply walk away from the contract without apparent penalty). Facing the almost-certain result that they will not win contracts where the award is based solely on price, those high quality suppliers may chose to not compete.

Vendor performance approaches can work, to the extent that a government can publish a list of suppliers who have been excluded from further government contracts[24]. In Prince Edward Island, where much of

[24] See e.g. the U.S. government's General Services Administration data base: http://www.epls.gov/

goods procurement is based on the use of vendor lists, the General Regulations under the Public Purchasing Act provide that:

> "(2) The Division may remove the name of a vendor from a vendors' list for cause; the following constitute cause:
> (a) non-performance on a current contract;
> (b) a history of failure to respond to invitations to tender;
> (c) failure to meet quality standards and specifications established by the Division;
> (d) failure to follow the conditions respecting the registering of agents;
> (e) failure to meet delivery commitments;
> (f) a history of failure to submit competitive prices;
> (g) failure to comply with the Act or these regulations.
>
> (3) A history of failure in clauses (2)(b) and (f) shall be determined on the basis of not less than three consecutive tenders.
> (4) When a vendor is removed from the vendors' list the vendor shall be notified in writing by the Division of the removal and the reason for the removal."

Vendor performance measures can be extremely difficult to apply; there is too often staff concern that even if they try to apply vendor performance corrective measures, they will not be supported by their department, and political problems may ensue.[25]

Often, vendor performance measures are based on criminal activity. We note s. 418 of the Criminal Code of Canada, which provides that '(1) Every one who knowingly sells or delivers defective stores to Her Majesty or commits fraud in connection with the sale, lease or delivery of stores to Her Majesty or the manufacture of stores for Her Majesty is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." We also note that a supplier convicted under this section loses the right to contract with the government. There is also s. 380 of the Criminal Code, which provides for offences "(1) ….by deceit, falsehood or other fraudulent means…"

Conclusions

Departments want to stop dealing with poor suppliers, and good suppliers want to not have to compete against poor suppliers. We suggest that developing an effective process to stop or avoid dealing with non-performing suppliers will never succeed without a very strong statement of support from the government. The province may not wish to enforce supplier performance through criminal prosecutions – but where it is evident that a supplier is simply not performing as required by a contract, decisive measures should be taken.

Doing so would respond to the concerns of departments, who feel powerless to deal with problem suppliers; it would also respond to the supplier community, who see as unfair too many situations where a poor supplier is allowed to perform a contract badly or, having failed to perform under one contract, can return to bid on another.

Further, we believe that to ensure that there is no doubt of the will of the province in this regard, this should be embedded in the legislation, so that the commitment is clear to all involved – from the House of Assembly, through the public sector, to the supplier community.

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[25] Public Works and Government Services Canada, the largest government procurement organization in the country, has had a Vendor Performance Policy since 1994, but to our knowledge has never been able to apply it as written.

Action Items

A-31. Add a new section to the Act, taken from the Regulations and augmented, to make it clear that the government will deal only with qualified suppliers, and that vendor performance on a current or previous contract will be taken into consideration in the awarding of new contracts (even including refusal to accept a bid from egregious offenders).

Acquisition Cards

An increasing number of jurisdictions in Canada are placing growing reliance on the use of acquisition cards (which may be known as purchasing cards, p-cards or similar). Newfoundland, we understand, has repeatedly chosen to not introduce them.

The federal government actively promotes the use of these cards: "Departments/ agencies are encouraged to use departmental acquisition cards for the purchase of low dollar value goods and services and to use the acquisition cards as methods of payment in contracts when appropriate. The use of acquisition cards provides the government with a volume discount rebate that is returned to user departments. The acquisition card also serves to decentralize acquisition card purchases throughout the department, reduces inventory costs and **increases the access of local suppliers to federal procurement**."[26] (emphasis added)

While we did not check all provinces, we have found that: Manitoba permits use of such cards for goods up to $2,500; Nova Scotia for purchases up to $1,000; British Columbia has just renewed its contract for purchasing and travel cards to 2012; in Alberta, "The government Procurement Card (P-Card) enables government purchasers to directly and cost effectively acquire those goods and services that are required to sustain operations and meet program objectives up to a maximum of $10,000.00 per transaction"[27];and Saskatchewan authorizes their use for goods and services up to $5,000.

One of the drivers behind the adoption of acquisition cards is the need or desire to reduce government transaction costs. While the cost of processing individual invoices and issuing cheques to suppliers will vary by organization, in the Canadian federal government estimates have ranged from $70 per transaction to more than $300. According to Summit Magazine in 2004[28], U.S. officials estimated that the use of acquisition cards saved the government between US$53-117 per transaction.

The use of such cards carries risks. According to the Nova Scotia Financial Management Capacity Building Committee, there are sixteen internal controls that [governments] should consider when implementing a purchasing card program[29], including restrictions placed on purchasing certain items, internal monitoring mechanisms, and random audits.

Clearly, implementing such measures carries its own costs, and we appreciate that the introduction of

[26] Treasury Board of Canada: Contracting Policy Notice 2007-04 - Non-Competitive Contracting, September 20, 2007
[27] Service Alberta: http://servicealberta.gov.ab.ca/742.cfm
[28] SUMMIT Magazine, February 2004, page 16
[29] The Nova Scotia Municipal Finance Corporation and the Association of Municipal Administrators of Nova Scotia (AMA) formed a joint committee with the goal of developing financial management best practices for use by municipalities in Nova Scotia: the resulting best practice on the use of acquisition cards is at http://gov.ns.ca/nsmfc/documents/PurchasingCards1.pdf

acquisition cards also carries other complications, such as how to record payments under the government's principal financial system. We have not attempted to estimate what the supplier community might save were it able to move to acquisition cards for payment of government accounts in Newfoundland and Labrador – but clearly, being paid immediately (through use of an acquisition card) is of greater benefit to a supplier than waiting 'net 30 from invoice'.

Conclusions

We recognize the risk of suggesting the increased use of acquisition cards and we are simply not in a position to provide any form of cost-benefit analysis. Nevertheless, the widespread use of acquisition cards in other jurisdictions appears to indicate that the benefits outweigh the costs – and that this is a 'best practice'. The Newfoundland and Labrador Government needs to be aware of this should it continue not to permit their use.

Action Items

A-32. Increase the use of acquisition cards for at least payment of supplier invoices, and preferably for use as an instrument of purchase.

Payment

We have already noted that the Standard Terms and Conditions that apply to goods and services procurement under the PTA provide for payment 'net 30' (the Guidelines are silent: we have *assumed* that there is a standard provincial 'net 30' policy). We have not checked files to see how long it actually takes the province to pay its suppliers.

There are some suppliers who are reluctant – or even refuse – to deal with government because payment is too slow. While any supplier is naturally eager to be paid, the situation can be particularly difficult for a small supplier, who needs the money to pay suppliers and staff.

Slow payments can be due to a number of factors, the most obvious of which is that to ensure proper financial control supplier invoices usually go through a number of review and approval processes. Each such process takes time – and delay is inevitable if the people responsible for review, approval and processing do not give due priority to moving invoices through the system.

A major Canadian corporation was receiving complaints from its supplier that they were not being paid in a timely manner. The CEO issued a directive: any staff member who delayed payments would have their own pay cheque delayed by a similar amount. Not surprisingly, the supplier complaints stopped.

Conclusion

We have no information to suggest that the government does not met its 'net 30' payment commitment. Our only direct knowledge is that we electronically submitted our first invoice under this contract quite late in the day on January 18, 2008 (a Friday): the cheque issue date was February 18. Our second invoice was submitted March 3, and we had not received the payment on March 21. We might conclude that it takes between 3 and 4 weeks for a supplier to be paid – which is completely reasonable.

We suggest, however, that a review would be beneficial, to confirm that slow payment is not a disincentive to potentially good suppliers who are otherwise prepared to do business with the province.

Suppliers who have been reluctant to seek government contracts because they fear slow payment might be encouraged to enter the government market if the government could provide assurances as to when payment will be made.

Acquisition cards can be used only as a payment tool, as an alternative to receiving individual invoices and issuing cheques (e.g. for a call-up against a standing offer, or progress payment against a contract.).

Action Items

A-33. Review the time that it takes to pay suppliers, to confirm that 'net 30' is being observed.

Adopting the use of acquisition cards for payments under any circumstances would do much to ensure that good suppliers are not turned away by slow government payment practices.

A-34. Assess the feasibility and cost of publishing payment times on the Internet.

This would be especially interesting if the date were by department (e.g. invoices submitted to department 'X' are being paid in an average of X days; invoices submitted to department Y are being paid in an average of Y days.)

Standing Offers

We have already noted that there are a number of standing offers in place for government use, issued by the Central Purchasing Authority, and mainly for goods.

Standing offers are an effective way for government departments to obtain goods and services quickly and easily. When they are well used (depending on what they are for, how they are established, and the rules for their use) they can be both efficient and economical.

To this point, Newfoundland and Labrador has seen perhaps a limited requirement for such procurement instruments – largely because the speed of acquisition through the GPA is so great. Also, due to the requirement in the PTA for competitive quotations or tenders, their use may be limited – because the legislation does not specifically provide for direct dealings with standing offer holders.

A further inhibitor is also quite possibly the reliance of the government – including the GPA – on tenders rather than Requests for Proposals: standing offers are difficult to put in place (particularly for services) using a tender/low price approach, because the key element of the PTA – selection based on low price – is not a usual characteristic of the selection process for standing offers for over-threshold values.

We note that where a standing offer is put in place by the government, it will normally comply with the perceived requirement in the PTA, that each call for tenders have only one successful bidder. This precludes the awarding of multiple standing offers, within which suppliers can compete knowing who their competition is.

We note that your standing offers are based on prices that are fixed for the duration of the standing offer. On the one hand, this protects both government and supplier against significant price fluctuations; on the other, it means that departments may resist using a standing offer if its prices are higher than those available in the open marketplace.

Further, standing offer prices are usually based on small quantity orders, with perhaps some discounts if

more than a few items are bought. In the perhaps rare cases where a department needs a significantly larger quantity, it is beneficial to ask all holders of that standing offer to quote on the larger number. The standing offer holders would effectively become pre-qualified bidders, with future calls for bids being issued to them only.

Your approach of using tenders rather than standing offers may be resulting in higher than needed costs (particularly when all elements of cost are considered – see the section in this Report on Higher Costs). A specific element of competition that is likely being lost is the day-to-day marketing of goods and services based on supplier values added.

Conclusion

Increasing the use of standing offers, with a concurrent commitment by the government that they will be used, would provide the suppliers involved with assurances of business volumes – based on which they may well offer better pricing. It would also reduce the need for departments to initiate individual procurements for smaller value items that are purchased repetitively.

Action Items

A-35. Expand the use of Standing Offers to standard services, using requests for proposals.

A-36. Add an exception to the Act, that a call for tenders is not required where a procurement will be carried out by using a standing offer that was put in place following an open competitive process.

A-37. Introduce dynamic pricing to standing offers: permit suppliers to adjust their prices according to changing market conditions.

A-38. Amend the Regulations, to provide that where a procurement is in the form of a call for standing offers, the government may decide how many standing offers will be put into place as a result.

A-39. Introduce Request for Volume discounts, when the move to multiple standing offers has been made.

Approvals and Reporting

Approvals

The PTA and Guidelines provide for several levels of approvals. They include:

- Lieutenant-Governor in Council approval of:
    - the use of a Request for Proposals rather than a tender under the PTA;
    - exempting particular leasing needs from the requirements of the PTA;
    - the renewal or extension of leases that were not originally publicly tendered, or where provision for renewal was not included in the original call for tenders;
    - approving the award of a contract, after a call for tenders, to other than the preferred bidder;
    - (the Cabinet) selects external consultants for projects valued at more than $100,000; and
    - entering into a contract that would require payments to the contractor in a subsequent fiscal year.

- Treasury Board approval of:

    - the renewal or extension of leases where the original call for tenders provided for that renewal;
    - expenditures from block funding for professional services, where the work is expected to exceed $50,000;
    - contracts for professional services, where the consultant will receive per diem fees, and the time frame of the proposed agreement exceeds one year;
    - professional services cost overruns of more than 110% of the original contract value;
    - suspension of a request for proposals where the process is deemed impractical by departments;
    - suspension of the requirement to call for limited or open proposals, where (i) requirements are valued at more than $50,000 and where there is an insufficient number of consultants (usually three); or where there is a high degree of confidentiality; and
    - situations where two or more external consultants are deemed equal after proposal evaluation; or the selection of an external consultant does not comply with the Guidelines.

We note that these responsibilities can be divided into two major groups:

- first, those that are primarily operational in nature – essentially, those based on dollar values; and
- those where there is a significant element of risk because established rules may be worked around for cause.

We heard repeatedly in our interviews that the processes required to obtain approvals are lengthy and difficult – in some situations potentially leading public servants to take other than best practice actions because of the administrative consequences.

The approval requirements were put into place years ago, in many cases based on the Mahoney Report. As we have noted in our detailed commentary on the PTA and Regulations, there are some approval requirements that in our view should not exist.

We suggest that in the interest of increasing operational efficiency and effectiveness the requirements for approvals by the Treasury Board and Lieutenant-Governor in Council should be revisited. We believe that responsibility and accountability across the government would be increased were operational decisions placed in the hands of Deputy Heads - permitting the Treasury Board and Lieutenant–Governor in Council to concentrate on issues of strategy and policy.

Multi-Year Contracts

We believe that one area where this transfer from the Treasury Board and Lieutenant-Governor in Council can be done is multi-year contracts.

Under the Financial Administration Act, any contract that will require payment to the contractor in subsequent fiscal years requires approval by the Treasury Board. This is a prudent measure, since such contracts require committing to an expenditure when the House of Assembly has not yet approved the funds. That said, we believe that the Transparency and Accountability Act, with its requirement for three-year plans, provides the Treasury Board and Lieutenant-Governor in Council with the information they need for effective decision making before procurement actions are undertaken. Once a decision to undertake a multi-year procurement program has be approved, and House concurrence obtained through its review of those multi-year plans, there would appear to be much less need for a subsequent approval at the political level.

An obvious concern is that such multi-year projects might spiral out of control. In that respect, we have provided information on the U.K. Gateway™ project review process in Annex F. Gateway™ requires significant projects (some based on dollar value, others on complexity and risk) to pass through a series of reviews, by internal or external (independent) reviewers. It ensures that projects are well defined, well managed, and produce the desired results for which public funds have been allocated. Introduction of that process in the province would provide strong independent review of major projects – including multi-year ones – and contribute to their successful completion on time and within budget. It can be particularly effective in identifying projects that, for whatever reason, simply should not proceed.

Conclusions

If the three-year plan of a department, submitted to and approved by the House of Assembly, proposes an acquisition program for a particular project that is to extend over several years, it should not be necessary for specific contracts extending over more than one fiscal year to be approved 'again' by Ministers solely because of that timing. We believe that such provision would encourage departments and GFBs to plan their procurement requirements effectively. We further believe that a strong program of independent review of such projects would ensure that expenditures remain within plans approved by the Treasury Board and House of Assembly.

Action Items

A-40. Add a provision to the PTA, that notwithstanding s. 26 (4) of the Financial Administration Act, departments, agencies and other GFBs the COO of the GPA may enter into a contract where the payment resulting from the contract is due in a subsequent fiscal year, AND when a procurement is consistent with specific plans that have been included in the approved three year plans of the department for which the procurement is being carried out.

Providing that the processes used by the GPA continue to be as rapid as they are now, we believe that this would result in system efficiencies. We recognize, however, that there would have to be close cooperation between the COO and the Comptroller General, to ensure that such multi-year commitments are properly documented in the government's financial system.

A-41. Study the possible benefits of adopting the U.K. Gateway™ approach to the oversight of major procurement projects.

Appropriate Political Involvement

Public procurement is constantly subject to suggestions that politicians have exerted undue and unfair/preferential influence over contract award decisions. Political direction of the public service is one of the cornerstones of a parliamentary democracy: issues generally arise when politicians are seen to become too 'hands on', moving from strategic and policy direction, to direct involvement in operational decisions.

In public procurement, the potential risk has been increased by the requirement that when a decision to carry out a competitive process is made, the criteria by which the successful bidder will be chosen must be fully disclosed to potential bidders in advance of the close of the competition. What this means is that once the call for bids issued, the path to completion has been determined – and at its conclusion, there are really only two outcomes; the 'successful' bidder (i.e. the best-ranked according to the disclosed criteria only) is awarded a contract, or the process is cancelled. In the latter, there is always the possibility that a

decision to cancel (whatever the real reason) will be seen as a decision to not award according to the criteria because another bidder would have been 'preferred'.

An issue that requires special care in the province is that politicians and public servants are physically very close (in contrast, e.g. with the federal government). In our visits to St. John's, this was not only talked about, but physically obvious: it seems that 'everyone knows everyone', and in such an environment it is difficult at best to ensure that politician-public servant interactions are not leading to actual or perceived situations of improper influence. The same close relationship exists between politicians and public servants, and the supplier community.

One of the OECD findings already referenced was the need to "…ensure the protection of officials involved in procurement from any pressure and influence, including political influence, in order to ensure the impartiality of decision making…" Suggested measures include "Working independence for procurement officials, where procurement officials are solely responsible for decisions."

The best approach to avoid this is to ensure a clear division of roles. Politicians establish broad policy direction, and are deeply involved in decisions as to what money will be spent and when, to achieve specific government objectives. The decision then passes to the public service for implementation, with politicians being informed of progress and completion. When so informed politicians should clearly have no role that might be seen to direct the process or its result, thereby reducing the political and legal risk for all concerned.

Measures we have already included as Action Items in this Report will contribute to this. A strong approach to vendor performance would be effective, as would increased public dissemination of information about procurement activities and particularly on the awarding of contracts. Simply making information available quickly can help to demonstrate that nothing is being 'hidden'.

We have also noted that the GPA is physically located in a building away from the main government Confederation Building complex. This lessens the possibility of physical contacts that could result in – or be seen to result in – improper discussions.

Conclusions

Political involvement in procurement, at any level of government, is an ever-present source of complaint about the process being subjected to undue and unfair influence.

Action Items

A-42. Remove all requirements for political approvals after a call for bids has been issued, to ensure that contract awards are, and are seen to be, based solely on the published bid evaluation and supplier selection criteria.

Reporting

Here we deal with the element of accountability that includes 'rendering an account to someone such as Parliament or a superior, on how and how well one's responsibilities are being met, on actions taken to correct problems and to ensure they do not reoccur'.

The PTA sets out reporting requirements:

- to the Treasury Board, where change orders by departments to contracts have exceeded specified dollar amounts;
- to the House of Assembly, via the COO of the GPA, when contracts have been awarded to other than the preferred bidder;
- to the House of Assembly, via the COO of the GPA, when specific exceptions to the requirement to call for tenders have been invoked;
- by GFBs to the COO of the GPA when tenders have been called and contracts have been awarded; and
- public reporting to anyone who asks of information about tenders that have been called and contracts that have been awarded.

We find these all to be legitimate topics for reporting. Our concerns are with the audiences, the timing, and the approach.

The government, through the COO of the GPA, already provides reports on various procurement issues to the House of Assembly, in its capacity as the representative of the public. While it is clearly appropriate that members of the House know about significant procurement activities, the current process, with reporting required either within 30 days of an action taking place, or if the House is not sitting within 30 days from the opening of the next session of the House, means that they may not find out until months after the event. We also believe that while the members of the House as the representatives of the public need to be informed, the explosion in use of the Internet has made it much easier to report to the public directly.

Conclusions

In this age of broadly available Internet-based information, it is feasible and desirable to use that capacity to disseminate information about government procurement. The government can talk directly, and quickly, with its constituents.

Consequent to the point just made, interested parties should not have to ask government for relevant information: it can and should easily be made routinely available to them.

Action Items

We have already proposed Action Items that would respond to this, relating to the Internet publication of information about calls for bids and contract awards, and will not repeat them here.

Meeting Government Requirements

Many observers of and commentators on public procurement seem to lose sight of the fact that the reason for public procurement is to meet the operational requirements of government. Too often, meeting operational requirements seems to take a back seat to 'fair, open and transparent'.

We heard throughout our interviews the frustrations of public servants. While they find the procedural requirements of the PTA to be generally good, they too often encounter situations where the PTA is simply too inflexible to permit operational needs to be met efficiently and effectively. There is:

- no effective provision for meeting low value requirements without some form of competition;
- frustration in government and the supplier community with the mandatory requirement for three quotes;
- a lack of exception provisions that meet the realities of the wide range of government operations;

- dissatisfaction that the results of a tendering process often produce suppliers who are unable to perform at the level needed by the government.

Disrupted Contracts

One of the often-difficult operational problems is what to do when it is obvious that a contract in place is not going to achieve the desired results (we have called this a disrupted contract). Often, this is due to a performance problem on the part of the supplier. There are three basic choices: wait things out (e.g. in the case of a late delivery); continue to work with that contractor and try to resolve the problems; or cancel the contract and start again. Neither of the first two choices provides good value. What we heard, though, is that departments will accept either of them, because the decision to cancel the contract will likely be challenged; the time it takes to carry out a new call for bids is too long; and there is no provision in the PTA to permit rapid dealing with a single supplier.

Emergency vs Urgent

Another area of operational frustration is the exception in the Act to the effect that tenders do not have to be called in a situation of emergency. The problem is that there is a perceived difference between 'emergency' and 'urgency' – and neither recognizes the core issue of maintaining public services.

The PTA exception actually refers to a 'pressing emergency'. The AIT does not reference 'emergency' – instead it refers to when 'an unforeseeable situation of urgency exists': what is the difference between the three terms? The federal government defines 'emergency' as: A pressing emergency for the department/agency where delay would be injurious to the public interest may involve: (1) actual/imminent life-threatening situation; (2) disaster endangering quality of life or safety of Canadians; (3) disaster resulting in the loss of life; (4) disaster resulting in significant loss/damage to Crown Property[30]. Saskatchewan defines 'emergency' as "a case of emergency exists: (a) if an act of nature causes the need for an immediate acquisition of supplies; or (b) if supplies vital to the continuation of a program of a public agency: (i) are needed immediately; and (ii) the program is necessary for public safety or public health."[31]

Not all urgent situations are 'emergencies'. For example, how do you handle a road that needs repairs, and has to be closed – when that closure will force traffic to detour 50 km ? Is it an 'emergency'? If a ferry, on its last run of the night, is found to need repairs – and if the repairs need to be made so that the ferry can start its morning run at 7 am – does that qualify for the use of this exception? It would seem clearly to meet the public interest test – but not most commonly accepted definitions of an 'emergency'.

We note that many public authorities have 'painted themselves into a corner' with the emergency provision (including the AIT). Not only do they require that an 'emergency' be life threatening or property-destroying: they require that the situation not be foreseeable. In reality, there are real emergencies that could have been foreseen – but were not – or, if they were, action was not taken. One can criticize this as a lack of foresight, or whatever other appropriate attack – but to the public servant now faced with the need for pressing action, such theoretical discussions are of little support.

That said, unfettered authority to invoke the 'public interest' is not appropriate; it is too subject to interpretation and possible abuse. In this case, we agree with the OECD finding that the 'four eyes principle needs to be applied – with the second set of eyes independent of the first. We also believe that

[30] Federal Treasury Board Contracting Policy Notice 2007-04 - Non-Competitive Contracting: Sept. 20, 2007.
[31] Purchasing Act Regulations, s. 12.1.

the use of this authority needs public reporting as soon as possible, so that the public does not at a later date conclude that something has been 'hidden'.

Transportation Services

This brings us to the issue of transportation services in general. Your province is heavily reliant on a number of transportation services, from ferries, to highways, to air ambulance services: in many cases, disruption of one such service leaves your citizens with no option. We suggest that it is neither feasible nor appropriate to try to deal with procurement in these areas using the same processes in place for e.g. office supplies – as is the case now.

We believe that you need to provide more flexibility to deal with the needs of your transportation sector. We deal with that primarily in our Recommendations section, since we do not believe that a complete solution is possible within the existing legislative approach. That said, we suggest that the transportation sector will benefit from measures already included in our Action items, or added below:

- providing an exception to the application of the requirements of the Act, when applying the provisions of the Act would interfere with the government's ability to maintain security or order or to protect human, animal or plant life or health; and
- the addition of a public interest test.

These would complement the existing 'emergency' exception.

Conclusions

In order to meet operational requirements and ensure the uninterrupted delivery of services to the province, the government needs a quick and effective way to deal with disrupted contracts. The Act makes insufficient provision for urgent operational requirements. We suggest that the federal approach be adopted: providing for immediate action without calling for bids when a call for bids would not be in the public interest.

Action Items

A-43. Add a provision to the PTA, that when for whatever reason a contract cannot be completed by a contractor, and where failure to continue the contract as scheduled would place a government program in jeopardy, the government may approach the other bidders in order of ranking and seek to negotiate continuation of the contract at the bidder's original price – failing which, a new call for bids is required:

Consequentially, add a clause to this effect to all calls for bids.

A-44. Add a new exception to the PTA, providing that the requirement to call for bids does not apply to instances where it is not in the public interest to do so.

Consequential change: provide that this exception may only be used with the prior approval of either the Deputy Head or the COO of the GPA.

A-45. Add a provision to the Act, that the use of this exception and the reasons for its use (i.e. what was the public interest involved) shall be reported publicly as decisions are made.

The federal Advance Contract Award Notice (ACAN – see Annex J) was developed in the late 1980's as a transparency measure, in response to a recommendation of the Procurement Review Board, which at the time was responsible for dealing with complaints about federal procurement subject to international trade agreements. Recognizing that there were times when awarding a contract without calling for bids was necessary and legitimate, the Board nonetheless recommended that as a transparency measure the government should publish a notice of intent to award such contracts. We believe that awarding such contracts and informing the public immediately is more consistent with effective accountability.

The Guidelines

The Guidelines require more front-end rigor than 'normal' goods and services. Departments require Treasury Board approval for any such contract, to be paid for from block funds, where the expenditure will be greater than $50,000: no such requirement exists elsewhere. We note also that professional services contracts valued at more than $100,000 require Cabinet approval after the procurement process has identified the preferred contractor – again not required for other services or goods.

In fact, many of the observations we have made about possible improvements to procurements carried out subject to the PTA do not apply to the Guidelines, at least in part. Whatever the reasons, the Guidelines are in a number of areas more versatile, flexible and practical than the PTA and its Regulations.

There is therefore an open question: given that in most jurisdictions all forms of contracting for services are handled in the same or very similar manner, why should Newfoundland and Labrador be any different? If the Guidelines in fact provide a 'better' context for acquisition, should they not be extended to other forms of purchasing?

We note that the AIT excludes specified service from its coverage: Article 502.1B provides that all services are covered except the following:

- services that in the Province issuing the tender may, by legislation or regulation, be provided only by any of the following licensed professionals : medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, chartered accountants, lawyers and notaries;
- transportation services provided by locally-owned trucks for hauling aggregate on highway construction projects;
- services for sporting events procured by organizations whose main purpose is to organize such events;
- services of financial analysts or the management of investments by organizations who have such functions as a primary purpose;
- financial services respecting the management of government financial assets and liabilities (i.e. treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;.
- health services and social services; and
- advertising and public relation services.

This is clearly not the same as the PTA list of exclusions, which is: legal, engineering, architectural, accounting, land surveying, banking or insurance services, voice telephone services, or other services that require the giving of an opinion, creativity, the preparation of a design, or technical expertise.

Conclusions

We have found no reason to support why the broad range of 'professional services' currently excluded from the PTA should be treated differently than standard services. We are concerned that having different exclusions in the PTA and the AIT will create confusion and errors of non-compliance. We have also found that the Guidelines, if applied to all procurement, would offer important advantages in terms of flexibility and oversight.

Action Items

A-46. Ensure that the Act applies to all public procurement, by removing the exception 2(g) to the definition of 'service':

Consequentially, move responsibility for the Guidelines from the Comptroller General to the COO of the GPA.

Consequentially, expand the existing s. 9 of the Regulations, which deal with Requests for Proposals, to include the elements of the Guidelines, and ensuring that the provisions apply to all procurements.

Establishing Purpose

We use here the potential for confusion with respect to the application of the APA to illustrate the point that for government procurement to be effective, it must establish clearly what it is seeking to achieve: it must make clear its Purpose.

We carried out an extensive assessment of the APA and the AIT (see Annex K), that led us to the conclusion that it is not clear how the two agreements are supposed to work together, and more important what the purposes of the signatories of the APA – including this province - were and are. Where there is no clear purpose, there will inevitably be confusion.

Eliminating such potential confusion is however not the only reason to have a strong sense of purpose.

To the extent that risk aversion permeates government procurement initiatives, it stymies and stifles creativity and innovation. The web of often-contradictory objectives and rules – real or perceived – confuses both buyers and vendors, while adding little if anything of measurable value to either the process or the result of a procurement initiative. Ritual observation with creating reports, studies and position papers is both misguided and of little real lasting value if such advice is ignored, politically motivated or half-heartedly implemented.

At the same time, over-concern with stakeholder consultation and unanimous stakeholder satisfaction creates excessive and harmful delay, dilutes outcomes and does not achieve success in the objectives of either consultation or the individual procurement initiative. As one example, over-emphasis on initial bid pricing, and under-emphasis on prices and scope changes during a contract's performance, can lead to perverse results.

When purposes and objectives are not clear, the lack of personal responsibility and consequences for failure or poor performance on the part of a procurement organization and its suppliers alike impedes all initiatives, discourages the good performers and encourages a culture of entitlement and irresponsible behaviour. Multi-tiered approval processes and 'groupthink' decision-making diffuses responsibility for

decisions, delays outcomes and increases costs without adding any additional real value to a procurement initiative.

Conclusions

Without clear statements of purpose, the apparent difficulty in most governments to enforce regulations, rules and choices (upon not only the public service, but also politicians, suppliers and critics) risks quite inappropriate spending of public money, and the possible betrayal of the public trust.

Action Items

A-47. Provide effective direction to all departments, agencies and GFBs as to what they are to achieve through public procurement, by adding a Purpose section to the Act:

This section should be as focused as possible – not opening up the risk that it will set conflicting objectives or priorities.

A-48. Include in the new Purpose section a statement that information will be made public according to the size of contracts (proportionality).

Ensuring Prudence and Probity

Prudence is the mental attitude of persons who, considering the scope and consequences of their acts, make arrangements to avoid errors or possible mishaps, and refrain from anything they believe can be a source of damage. *Probity* is absolute honesty and integrity.

It is important to consider the context in which government expects prudence and probity. When public servants are told what to do, and not why, they lose the ability to exercise judgment and make effective decisions. Prudence and probity tend to transform into compliance with rules: in fact, the need for prudence becomes devalued when the only 'prudent' thing to do is follow the rules regardless of the consequences.

Delegation

An essential element of providing people with flexibility is providing them with the delegated authority to take action. Delegation, in addition to meeting requirements under legislation (e.g. the GPA Act, the Financial Administration Act) offers important opportunities to improve the performance of the purchasing system. The legal 'delegator' can establish terms and conditions under which delegation will be given – to whom, and for how much. Equally, there can be clarity as to what conditions will lead to a reduction or withdrawal of a delegation. Used together well, these can provide an effective 'carrot and stick' approach to system improvements.

Our view is that delegations within the GPA are too low: the senior purchasing officers are limited to $50,000. The issue is, what would it take (training etc.) to increase these limits, and what would the benefits be. Concurrently, though, we have noted that the COO of the GPA has delegated full purchasing authority to the Director of Purchasing – in our view, a good approach.

In departments, while delegations for specific purchasing actions should also be reviewed, the more important areas of delegation are (i) initiating a purchase, and (ii) managing the resulting contract. These are areas not currently covered by the PTA. We find it interesting that the PTA deals specifically with

delegation of authority for change orders, but in no other areas. It would seem natural that if the House of Assembly is concerned about proper delegation of the authority to approve a change order, it should also be concerned about the authority to initiate a major project requiring procurement or to enter into a contract. Actually, our view is the contrary – we suggest that delegation of authority within departments is a matter for the Treasury Board and the public service, not politicians.

When we reviewed the RFP issued for the Provision of Consulting Services and Job Evaluation System, we noted that it called for bidders to 'provide a new job evaluation system and related consulting services'. Further, proponents were asked to 'show that the job evaluation system is being used or has been used successfully within a public service setting…' In our federal experience, this means a likely software package solution – and software federally is classified as a good. That being the case, this requirement should perhaps have been met under the provisions of the PTA – and as a good, the procurement should have been carried out by or with appropriate delegation from the GPA. We indicated our concern to the GPA.

Were it determined that in fact the major portion of the procurement is professional services of the type excluded from the PTA, this raises the fact that neither the Act and its Regulations, nor the Guidelines, specifies how to deal with such a 'mixed' requirement. Where a department used the Guidelines for a procurement, it does not require a delegation from the COO of the GPA – but if the resulting contract includes the acquisition of goods, we suggest that such a delegation is required. If a Request for Proposals is issued under the PTA, the same should apply – whoever is approving the procurement or contract requires the appropriate delegation to do so.

Conclusions

We found a system where people charged with operational responsibilities do not have the flexibility to make effective operational judgments, because in too many cases their ability to act is limited by the PTA. In order for procurement to be carried out effectively and efficiently, it is important that all involved in the process have the appropriate level of delegated authority to act. It is equally important that all those with delegated authorities have the appropriate knowledge and training.

Action items

A-49. Ensure that all staff involved with procurement have adequate training in the field, so that they understand their roles, responsibilities, and the legal framework within which they must work

A-50. Review delegations of authority for procurement-related activities; seek to push delegated authority as far down into departments as possible

A-51. Repeal s. 7 of the Act and s. 6 of the Regulations providing for delegation of authority for change orders; this should be covered by the general delegation framework of the government.

A-52. Amend the Regulations to provide specific guidance to all departments, as who how procurements that mix goods, services, services under the Guidelines, construction and/or leases will be treated.

A-53. Where departments have unique specialized needs and enough volume to maintain professional expertise, the COO of the GPA, under the authority of the Government Purchasing Agency Act, should have the capacity to extend high levels of delegation - subject to demonstration to the COO of the GPA that those departments have the management capability and technical expertise (including procurement training) to exercise this authority properly.

Note that we have no basis to conclude that people are not adequately trained: what we want to reinforce is that people do have to be trained, and their knowledge needs to be updated. We are also not suggesting that delegation within departments is not appropriate; departments should however review regularly their internal delegations of authority to ensure that people have the authority they need to do their jobs efficiently and effectively.

Change Orders

Issuing a change order is not just an operational decision. Such changes to a contract – which effectively create a new contract – are subject to the procurement requirements of the AIT. If an original contract is issued following public tender, and if there is a subsequent change order for more than the threshold at which the PTA requires a call for bids, then it would appear that the PTA has been contravened: the change order should have in fact been treated as a new requirement to call for bids.

From a practical perspective, it is universally recognized and accepted that contracts will need to be amended. The Quebec *Act respecting contracting by public bodies* does so explicitly: s. 17 says that "A contract may be amended if the amendment is accessory and does not change the nature of the contract".

Issuing change orders can be seen as an indication that the management of a project is not well controlled. It can also be used or seen to be used to circumvent the requirements in the PTA, that higher-value requirements be opened to supplier competition. Also, it can be seen as a way of directing more business to preferred suppliers. Effective dissemination of information about the use of change orders can contribute to public perceptions that they are being used appropriately.

There are a number of ways to deal with the possibility that costs of a contract will escalate unacceptably through the use of change orders. The simplest (albeit perhaps naive) is to ensure that when a call for bids is being designed, every reasonable effort is made to foresee all possible subsequent events that might take place (e.g. discovery of unknown problems, need for scope changes, possibility of follow-on work) and built into the initial call for bids.

Another relatively simple way is to ensure that when bids are called for, they include a statement of the desired result. If you hire a contractor to repair a roof, you cannot then amend the contract so that the contractor can also repair the inside walls – but if you hire the contractor for the purpose of bringing a building up to a state of acceptable repair, with the first phase being roof repair, and extending to other work as required to achieve the stated purpose, then subsequent amendments will be within the scope of the original call for bids.

Conclusions

The PTA appropriately places accountability for operational decisions relating to the need for change orders decisions with Deputy Heads. However, those Deputy Heads cannot be expected to have the expert knowledge of procurement required to ensure that there is an appropriate balancing of operational requirements with the requirements of the procurement system.

We see again here the need for the four eyes approach – with someone outside the operational department taking a second look at the need for a significant change order, to ensure that it will not 'change the nature of the contract'.

Action Items

We have already said that requests for proposals should be used more frequently: that will help deal with the issue of change orders that take a contract out of original scope. We have also already suggested that you consider examining the U.K. Gateway™ approach, to ensure proper project planning, management and oversight.

A-54. Amend the PTA to provide that where change orders exceed dollar limits to be set out in Regulations, a GFB shall seek the prior approval of the COO of the GPA before approving such change orders.

This could be the federal approach, where change orders not requiring COO approval would be limited to either specific dollar values, or % of original contract.

Consequentially, add a new provision to the Regulations setting out these dollar limits.

A-55. Add a provision to the Act, that the COO shall make information about the use of change orders public.

A-56. Repeal s. 5(2) of the PTA, which requires reporting of high value change orders to the Treasury Board.

Leasing

The process to put a new lease in place is long; once a lease is in place, there is very little or no discretion to change even minor parameters of a signed lease without Lieutenant-Governor in Council approval.

Changes often involve construction. While the PTA provide for change orders for construction, the existing legal opinion is that with the definition of 'lease' in the Act, construction change order authorities during the course of initial fit-up cannot be used

The threshold to call for bids is very low (annual cost of $10,000): this means that even very small

requirements require public bids. We were told that with annual lease rates of approx. $25/square foot in St. John's today, this threshold represents only 400 sq. feet. At the same time, because the Act requires that a lease value be calculated on an annual basis, short term and relatively low value leases require a call for bids. This produces an interesting result: a 20 year lease for $9,500 per year (total value $190,000) requires no call for bids – but a 6 month lease for a total of $6,000 does (because the annual value would be $12,000).

The PTA provides for urgent requirements, but only when the urgency is that a department has to vacate premises. There is no provision for urgent new requirements. When there is an urgent need to vacate, a department can enter into a lease for a maximum of 6 months, following which tenders must be called. There are two issues here: first, it often takes more than 6 months to develop the tender package for new accommodation; and second there is somewhat strange wording. The Act says that there can be an emergency lease that "…shall not exceed 6 months at which time an invitation to tender shall be issued". Strict compliance with the Act therefore results in an impossible situation; you have a lease for a maximum of 6 months: at the time that it ends you have to issue a call for tenders, which can take months to produce a new lease – what is the department in those premises supposed to do in the meantime, since its emergency lease will have expired?. We can only assume that the intent of the legislative drafters was to say "…shall not exceed 6 months *during which* time an invitation to tender shall be issued" – but even that would have been inadequate given the time it can take to develop, issue and complete the call for bids.

Conclusions

The leasing provisions of the Act need at least a complete re-write. It would likely be easier to remove all of the special requirements relating to leasing, and treat them in the same way as any good or services[32]. The exception to this would be to have a different threshold in the Act, at which a call for bids must be issued. This should be based on the total cost of the lease.

Action Items

A-57. Repeal s. 4 of the PTA regarding leasing: treat leasing as a good or service as already covered by the Act.

A-58. Amend s. 3(1)(a) of the Act, which sets the basic threshold at which bids must be called, to reference the total lease amount.

We do not have the expertise to suggest what the appropriate total lease value should be. It might be appropriate to start, not with value, but with space – and then calculate the appropriate value. For example, you might decide that there should be no call for bids for (i) office space of less than 50 square metres, or (ii) warehouse/storage space of less than 40 square metres.

Inconsistency with Legislation, Law and Agreements

We have found a number of instances where the existing procurement framework is inconsistent.

[32] There is along-standing debate federally: if you buy a piece of equipment, that is clearly acquisition of a good – but if you lease that same piece of equipment, is it still a good – or, since someone is 'lending" it to you but retaining ownership, is it a service? If the legislation calls for a call for bids at a dollar threshold, the distinction is not important: it is, however, crucial for delegation purposes.

Inconsistencies with Canadian Contract Law

S. 8 of the Act and s. 7 of the Regulations provide for the award of contracts to other than the apparent winner of a competitive bidding process. They are inconsistent with Canadian contract law, which requires that the winner shall be determined using pre-disclosed criteria. Were either of these provisions used, the government would be at risk of legal action.

S. 7 of the Regulations provides authority for a department to award a contract to other than the preferred bidder, where this is required by emergency. This provision has no obvious use: if there is an emergency to be dealt with, we would have expected the government to invoke exception 3(2)(d) and not call for bids at all. If the emergency arises during the bidding and contract award process, we would expect that the government would work with the successful bidder to have the work carried out on an emergency basis.

The authority to award to other than the preferred bidder does not reference how the 'other than preferred bidder' supplier will be chosen. As worded, the government could award to a supplier that had not even bid.

S. 9(5) of the Regulations authorizes departments to request additional information from bidders after closing: specifically, it says from 'a proponent' (another term for a bidder). Note the use of 'a' proponent: this could potentially offend the "equal treatment" requirements of competitive bidding law. Fundamentally, even if "authorized under the legislation," it is unfair to those proponents from whom Newfoundland and Labrador *does not* request the additional information. It harms the integrity of the competitive process as some proponents are being allowed to submit additional information to their bid after the close of bidding, when that event is supposed to be the end of bidder submissions. This could be used unfairly to change prices (commonly known as "bid shopping") after close of bidding as the subsection does not refer to or define what "additional information" is. Overall, this subsection essentially allows for the "curing of a Proponent's non-compliance" as well as having the potential for undisclosed preferences or biases to creep into what is supposed to be a fair, open, and transparent process.

As provided for in s. 9(6) of the Regulations, the power to negotiate with the highest ranked Proponent the details of a final contract is allowable in competitive bidding law if it is disclosed in the RFP that such negotiation may occur. However, the "serial negotiation" power that follows, if "contract terms cannot be agreed upon," is problematic in law. As written, this serial negotiation power is arguably too wide open to be acceptable to Canadian Courts, as it turns a competition on known terms into an auction on undisclosed terms.

Section 9(6) of the Regulations is actually quite perplexing. It is difficult to see how negotiation of "a detailed contract" could result in much change if "the resultant contract with the proponent shall contain substantially the terms of the proposal." We also wonder why any "detailed contract" would not have to contain "substantially the terms" of the RFP, since this is the Newfoundland and Labrador Government's document that presumably the government would want substantial compliance with in any resultant Contract.

As written, the detailed Contract must be "substantially" the terms of the **bidder's** proposal, which in effect allows the bidder to write terms of the Contract indirectly. We presume that this was snot the intent.

The Act and Regulations use the concept of 'preferred bidder'. While the concept is well-defined ('the bidder submitting the lowest qualified bid'), there are two issues:

- 'preferred' carries the connotation of a subjective decision, not consistent with Canadian contract law; and
- where a Request for Proposals is used, the definition cannot be used, because the decision to award after a Request for Proposals is not made on the basis of low price.

There is also in the PTA a definition of 'qualified bid' – one that meets the specifications of the tender. We believe that 'Qualified', although well defined here, sets the province on an opposite course to the rest of the country. Elsewhere in the procurement world, in terms of a *BID*, it is used to describe a bid where the bidder has attached qualifications (e.g. proposed changes to terms and conditions) to the bidder. Usually, when used in that sense a 'qualified bid' is deemed to be not compliant, and cannot be considered for contract award. When used in the context of a *BIDDER*, 'qualified refers to whether the bidder has the qualifications to do the job. In mixing the two ideas together, we believe that the legislation has created a definition that a court might well find confusing and not capable of application.

Action Items

A-59. Repeal s. 8 of the Act and s. 7 of the Regulations providing for awarding of contracts to other than the preferred bidder.

A-60. Repeal s. 9(5) of the Regulations, the authority to request additional information from bidders after bid closing.

A-61. Repeal s. 9(6) of the Regulations, the authority to negotiate with bidders in descending order.

A-62. Delete the definition of 'preferred bidder': replace with 'best value bidder' or similar, to reflect the idea of the bidder who has best met the evaluation criteria set out in the call for bids.

A-63. Delete the definition of 'qualified bidder'; include with the new definition of 'best value bidder'.

Inconsistencies within the PTA and Regulations

S. 9(1)(1) of the Act provides that after a public tender call, if there are no bids received, the department shall issue a second call for bids (unless delay would be injurious to the public interest, in which case a contract may be awarded on a sole-source basis. S. 10(1) of the Regulations provides that where a Request for proposals has been used, and there are no bids, the department may proceed immediately to negotiate a contract with sources identified as having the capability to perform.

The Agreement on Internal Trade provides that measures other than an open call for bids may be taken where an initial competitive process has produced no winner[33].

We see no reason why there should be two approaches to deal with a situation where there are no bids in response to a call.

[33] AIT 506 (11)(f): "…in the absence of a receipt of any bids in response to a call for tenders made in accordance with the procedures set out in this Chapter."

Action items

A-64. Resolve the inconsistency between s. 9(1)(1) of the Act (no responses to a call for tenders) and s. 10(1) of the Regulations (no proposals received following a call for Proposals): we suggest that in such cases the department should issue a second call for bids to the bidders who responded to the first call, having made changes to the requirement based on information gained from the first call.

We say 'should' in the above Action Item because it is possible that the evaluation of the initially-received bids will have demonstrated that none of the bidders is likely to be able to produce an acceptable bid under any reasonable circumstances. In that case, a new cal for bids is required.

We note that the likelihood of such situations arising would be decreased by adoption of our Action Item to make increased use of supplier community consultation and input before the call for bids is issued. The more consultation with the supplier community takes place before a call for bids is issued, the greater the likelihood that there will be bidders. If suppliers suggest that the government not issue a call for bids presented in a certain way, but the government goes ahead anyway, the government should not then be surprised if it gets no bids.

Inconsistencies with Trade Agreements

The Corporations Act requires that extra-provincial corporations register with the province before carrying out business in the province.

While the registration requirement is seen as a straight-forward administrative process, it could dissuade out-of-province bidders, who (i) would perhaps have to increase their bid price in order to recover this fee, (ii) might have or foresee difficulties in finding the 'right' person to have the Power of Attorney, or (iii) simply not want to take the time required to complete the registration process.

The same requirement does not extend to individuals/sole proprietorships wishing to bid. If it leads out-of-province corporations to chose to not bid, while individuals/sole proprietorships may be able to offer lower bid prices than a corporation (e.g. lower overhead costs), other benefits of dealing with a corporation (e.g. possibly better administrative systems, insurance) could be lost.

Other partners in the Atlantic Procurement Agreement do not require a similar registration process. New Brunswick requires vendor registration, but not legal corporate registration. Nova Scotia requires that "Bidders located outside Nova Scotia (which are not otherwise carrying on business in Nova Scotia) be registered in an equivalent manner in their respective jurisdictions." In Prince Edward Island, "Bidders must be in good standing under the Public Purchasing Act" – which standing is based on a supplier's ability to perform, and past performance – not where they are from.

Conclusions

This requirement of the Corporations Act is not consistent with the province's general commitment in the Atlantic Procurement Agreement, to "eliminate all forms of discrimination among the participating governments and public entities within their jurisdictions…"[34]

[34] Atlantic Procurement Agreement: section 1 – Purpose of the Agreement.

Action Items

A-65. Remove the requirement that extra-provincial corporations register in order to win a provincial contract.

Note: we recognize that the Corporations Act may have reasons for registering extra-provincial corporations that go beyond procurement. Therefore, we do not suggest amending the Corporations Act itself: rather, an amended PTA would provide that "Notwithstanding the requirements of the Corporations Act, extra-provincial corporations do not have to register for the sole purpose of winning or carrying out a provincial contract."

OTHER FINDINGS

We believe that the following Action Items are self-explanatory.

A-66. To reflect the results of reform, and also to make the title more accurate in view of the Action Items included in this Report, rename the Act to the Public Procurement Act.

A-67. Amend s. 3(1)(a) and (b) of the Regulations, to make it clear that electronic (Internet) publication of notices of calls for bids is the preferred approach. (as written, 3(10(a) says that electronic advertising, if approved by the Minister, is acceptable until '…an alternative method has been approved by the Minister' – which can be interpreted to mean that the permanent process must be something other than electronic.)

A-68. Continue and expand work under way to move to electronic procurement.

For example, Transportation and Works is working to make increased use of electronic documents, and to reduce the need for newspaper advertising; the GPA with its new system will be able to accommodate electronic bid receipt.

A-69. Add a new section to the PTA, that notwithstanding the provisions of the Electronic Commerce Act, a GFB may limit the distribution of bid documents to electronic means, and may require the submission of bids only in electronic form.

A-70. Amend s. 8 of the Regulations to replace 'Minister of Works, Services and Transportation' with 'Chief Operating Officer of the Government Purchasing Agency.

The Regulation requires that 'where the head of a government funded body is required to inform the Minister of Works, Services and Transportation…" in accordance with s 8(3) or 10 of the PTA. However, the PTA requires no such reporting to any Minister: rather, the required reporting is to the COO of the GPA.

A-71. Amend s. 3(2)(i) of the PTA, and Regulations s. 11(1), to replace 'Minister of Industry, Trade and Technology' with 'Minister of Innovation Trade and Rural Development'.

A-72. Implement the proposed new GPA information/reporting system as soon as possible, to put some good system-wide reporting in place.

A-73. The GPA should issue a government-wide reminder, that authority to use an RFP under the PTA does not automatically include authority to issue the RFP: there must be an appropriate delegation from the COO of the GPA.

A-74. The GPA should issue a government-wide reminder to all staff associated with a procurement of the need to ensure that all relevant information is on file.

This can provide important reference material in future for similar transactions; it can permit seamless transfer of a file from one officer to another when required; and it provides the information necessary to explain to auditors why the file was handled as it was.

Organizational Change

Readers will note that we are NOT proposing any specific organizational action items. To this point, we have not seen or heard anything that would lead us to such a recommendation. Further, when a set of recommendations does include organizational change, our experience is that attention focuses immediately on those issues, to the detriment of all other aspects.

RISKS

Change is inherently risky. More specifically, any change is going to create a new problem of some magnitude. The key is to ensure that the benefit of a change is greater than the negative aspects of the problem one can create.

In considering the risks of making improvements to the purchasing approaches and processes of the government of Newfoundland and Labrador, the following general risks must be considered:

- proposing legislative changes offers the opportunity to other parties to propose their own amendments – which may not meet the policy objectives of the government;

- any move away from a closely regimented approach may be seen as giving too much discretion to bureaucrats or politicians, threatening a move to partisan or preferential awarding of contracts;

- the staff who must implement the desired changes may face conflicting work pressures: maintaining their current operational obligations and developing/adapting to change at the same time;

- staff may not be ready or willing to accept and implement change;

- where change requires training, there may be a lack of time to provide that training, or a lack of funds to pay for it; also, in some jurisdictions an initial commitment to pay for training may be limited later by budget restrictions;

- what appears to be an improved approach for the government may be seen otherwise by suppliers (e.g. the introduction of more flexibility could be seen as opening the door to bureaucratic discretion or political direction) – and if suppliers are not on-side, desired benefits may not accrue;

- what appears in the case of government departments to be a worthwhile change may be seen otherwise by other government-funded bodies subject to the same legal and regulatory structure; and

- finally, we would be remiss in not recording concerns that we have heard (but not confirmed), that the recruitment/promotion system used by the government may make it difficult to ensure that, when Action Items are implemented, departments can ensure that they have fully qualified staff in place for effective implementation.

We suggest that the benefits of reforming procurement (again, the *Blue Book* term) are such that it is well worth accepting and managing effectively these risks.

RECOMMENDATIONS

Recognizing the Mahoney Report

The analytical process through which Mr. Justice Mahoney arrived at and supported his conclusions and recommendations that led to the Act was rigorous and supported by his position and experience as a Judge. The world of public procurement – within the province, within Canada, and internationally - has changed significantly since his work:

- Canadian courts have handed down numerous decisions that have provided Canada with a comprehensive body of contract law which sets out clear rules by which public procurement authorities must operate;

- he inquired into an apparently-significant scandal: government procurement in Newfoundland and Labrador since that time – particularly since the most recent changes to the PTA in 1999 – have demonstrated that the context for review is no longer the existence, or even the perception, of, similar public service or political behaviour;

- in dealing with public works activities – construction and building maintenance - Mr. Justice Mahoney gave little attention to the general world of the procurement of goods and services – but the effective procurement of goods and services is clearly not the world of public works;

- in 1981, Newfoundland and Labrador was subject to no inter-jurisdictional trade agreements; today, it works within the context of the Agreement on Internal Trade (1995) and the subsequent Atlantic Procurement Agreement (1996): compliance with trade agreements obligations requires governments to be far more open and transparent than was the case in 1981;

- he could not have foreseen the explosion in the public availability of information through the Internet – and consequently, how public access to information could be achieved through means other than the House of Assembly;

- while the oversight measures that Mr. Justice Mahoney espoused so strongly are clearly an integral and essential part of an effective public procurement system, they need to be tempered with the understanding that every such measure has the potential to introduce delays into the process; and

- he based his recommendations – particularly those relating to the need for legislation – on legal frameworks for public procurement elsewhere in Canada. Those legal frameworks have since changed, and it would seem appropriate and timely for Newfoundland and Labrador to change also.

Were our various Action Items implemented, we believe that the province would have a statutory and management base for its procurement that would be up to date, and that would produce significant operational improvements. We believe, however, that this is not enough. Newfoundland and Labrador should have an approach to procurement that prepares it to meet the challenges of tomorrow.

We suggest that this can be achieved by taking six new inter-related directions for the management and direction of public procurement in the province:

- enact new legislation that covers the entire life cycle of a procurement, rather than just the

bidding/supplier selection process;
- focus the legislation on results, roles and accountabilities, rather than process;
- introduce more flexible policies that can be tailored to the operational requirements of different departments and GFB sectors, to replace the 'one size fits all' approach of the current PTA;
- increase standardization across all departments and GFBs, to replace the current fragmentation;
- create a new accountability framework that allows procurement to be managed for the government as a whole; and
- mandate an independent recourse system.

We do not suggest that you do away with the idea of specific procurement legislation. Any effort by the government to remove the legislation completely could be all too easily seen as opening the door to a return to days past, when it was apparently all too easy to subvert the process. We see no need for that: to the contrary, there are important elements that we believe should be made law.

Broaden the Coverage of the Legislation

We have already referenced the work of the OECD, and its comments that procurement is far broader than the 'tendering' aspects. The OECD notes[35] many areas in which government may take action that could be, or be seen to be, 'unfair'':

- before bids are even called for:
  - inadequate needs assessment, planning and budgeting;
  - requirements that are not adequately or objectively defined;
  - inadequate or irregular choice of the procurement process to be used;
  - choice of a timeframe for the preparation of bids that is insufficient or not consistently applied across bidders;

- in the bidding phase:
  - inconsistent access to information for bidders in the invitation to bid;
  - lack of competition or in some cases collusive bidding resulting in inadequate prices;
  - conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process;
  - lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision;

- in the post-bidding phase:
  - insufficient monitoring of the contractor;
  - the non-transparent choice or lack of accountability of subcontractors and partners;
  - lack of supervision of public officials;
  - the deficient separation of financial duties, especially for payment.

We found:
- a complete lack of provisions in the PTA and Regulations for the pre-bidding phase;
- an almost complete lack of provisions in the post-bidding phase (the exception being the provisions for change orders);
- significant dissatisfaction in the supplier community – presented as a lack of fairness – with the way in which the government treats non-performing or poor quality suppliers.

[35] Integrity in Public Procurement: Good Practice from A to Z, © OECD 2007, pages 21, 24 and 25: reproduced with the permission of the OECD.

Continuing to work within the existing legislative framework – even with the Action Items we have suggested acted on – will continue to leave unaddressed too many areas where government actions can be criticized – as inflexible, unfair, inefficient and ineffective.

Therefore we recommend that you repeal the current Act, with its emphasis on finding suppliers, and replace it with one that will provide effective guidance to the public service - and relevant information to the supplier community – covering all of the various aspects of procurement.

Focus on Results, Roles and Accountabilities

Trying to develop such end-to-end legislation using the process-driven approach of the current PTA would inevitably results in more issues than there are today. Every effort to proscribe would likely produce another operational issue, which would decrease the efficiency and effectiveness of the procurement activities. Here is another approach – the framework for a complete new Act.

1. Title: We would propose the Public Procurement Act for Newfoundland and Labrador

2. Effective Date: To be determined

3. Application: Provide that a separate government policy will establish the departments and other GFBs covered by the new legislation: exclusions would be a rare event and only done for truly justifiable reasons.

4. Context: A high level statement of why the legislation exists.

5. Definitions: To be determined

6. Policy Statement: This would be the Purpose section that we have recommended in concept for the current PTA.

7. Policy Requirements: This would be the key section, providing that Deputy Heads including the heads of all GFBs have broad responsibility and accountability for all aspects of procurement, including:

    - high standards and values on the part of all officials;
    - transparency in management, decision-making and reporting;
    - implementing an effective approach to procurement planning and analysis;
    - appropriate selection of procurement processes;
    - management processes and controls that reflect risk and sensitivities;
    - effective contract administration;
    - ensuring that all staff involved in procurement have demonstrated capacity, knowledge and skills;
    - an effective approach to procurement management and oversight.

8. Code of Ethics – the basic values that the House expects everyone involved in public procurement to respect. There are various examples of such codes,[36], including:

[36] At Annex L is one fairly complete and concise example, taken from the draft procurement policy of the East African Community. We are not saying that this is what the province should adopt – we simply have

- the federal Values and Ethics Code for the Public Service***: http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve_e.asp***
- the federal Code of Conduct for Procurement : (***http://www.pwgsc.gc.ca/acquisitions/text/cndt-cndct/cca-ccp-e.html)***
- elements of the Purpose and Scope section of the Quebec *Act respecting contracting by public bodies*;
- provisions in the United States Federal Acquisition Regulation (FAR), ss 3.101-1&2: *(http://acquisition.gov/far/current/html/Subpart%203_1.html#wp1139245)*
- the Australian government's *Guidance on Ethics and Probity in Government Procurement: (http://www.finance.gov.au/procurement/ep_govt_policy.html)*

9. Consequences – review and audit, disciplinary measures.

10. Additional roles and responsibilities (note: these would be government-wide):

- we see this highlighting the role of the GPA;
- it could also include other departments that have special responsibilities – e.g. perhaps Justice for legal services;
- it *could* be a place for the House to require**:**
  a. that the government have appropriate policies in place
  b. that they be publicly available (web site)
  c. that the public have the right to provide input - and
  d. that there be a formal consultation process when there is a need to make changes.

We note parenthetically here that what we have identified as the core of this approach already exists in the Guidelines for the Hiring of External Consultants, where Deputy Heads are required to ensure that the Guidelines are followed. We have found no similar responsibility/accountability statement for procurements that are subject to the PTA.

We recommend that you replace your current process-based approach to procurement legislation with a new Act that is built and focused on Results, Roles, Responsibilities and Accountability.

Adopt More Flexible Policies

Mr. Justice Mahoney did not support procurement under the authority of Regulations, much less policies – he felt they were too vulnerable to unwarranted change. That said, numerous jurisdictions in Canada are managing their procurement by policy rather than by law without undue harm or controversy.

Mr. Justice Green recognized the need for flexibility in government procurement approaches. He recommended that: "The Public Tender Act should generally apply to the House of Assembly administration and to the statutory offices, but the House of Assembly Management Commission should have the authority, by directive, to modify its application in particular cases where the differing circumstances of House administration may require modification. In such cases, however, the Commission should be required to put in place **alternate and more appropriate tendering and**

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it ready to hand, as one of the review team members is working with the Community to finalize its procurement policy and processes.

purchasing regimes (emphasis added) rather than simply declaring the Act's nonapplication.[37]"

If the House of Assembly can have procurement requirements that cannot be met through compliance with the PTA and Regulations, and that require alternate and more appropriate tendering and purchasing regimes, it seems to us that the benefits of that flexibility should be extended to all public bodies.

Therefore, we believe that Newfoundland support its new framework legislation with a series of policies, each put in place where required to govern procurement for a particular type of procurement or element of the public sector. Without wishing to be exhaustive, our work to date indicates that it might be appropriate to have separate core policies for:

- goods general;
- services general;
- construction;
- leasing; and
- transportation services.

Additional policies – or perhaps specific sections within the main policies set out above – could recognize the specific requirements of e.g. the health sector, or municipalities – in the same way as the House of Assembly Accountability, Integrity and Administration Act already permits the House to set its own rules when the general provisions of the PTA are not appropriate. In fact, with this policy structure, the rules developed for the House could become a part of the overall government policy structure – and the government could then state unequivocally that the House follows the same legislation as the government.

One of the issues we have found – the rigidity of thresholds – could be resolved this way; putting thresholds into policy would make it easier to adjust them (e.g. to account for inflation and loss of buying power over time).

We recommend that the detailed procedural measures now included in the PTA and its Regulations be replaced with a range of policies that provide the equivalent direction, therefore providing the flexibility to adapt quickly to changing conditions and requirements.

Increase Standardization

In suggesting a variety of policies to ensure needed operational flexibility we are NOT suggesting unfettered flexibility throughout the GFB community. While individual organizations may argue that they are 'special' – that they have to operate differently – such diversity is potentially very difficult for the supplier community to deal with. It is not easy to argue that procurement is open and transparent, when a supplier is faced with visiting multiple web sites to find out what opportunities are available; must understand different policies and approaches to determine what 'rules of the game' will apply to any given call for bids; and must adjust constantly to changing bidding requirements and contractual terms and conditions.

We recommend therefore that when the various policies are developed, it be clear that their procedural requirements apply to all GFBs included within their scope. To the extent possible the various policies should be consistent across the board.

[37] *Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters*: Hon. J. Derek Green, Commissioner, May 2007, page 7-31

Implement a New Accountability Framework

Public procurement is too important a file to disperse responsibility for it across the departments, agencies and other GFBs of the province of Newfoundland and Labrador.

Public procurement is a major economic activity of the government. It is an area where effective management can have a significant impact on the operations of government and the economic health of the supplier community. It is a role that, while not in the day-to-day consciousness of the public, is a lightening rod for public dissatisfaction when it is seen to be operating with less than perfect integrity.

Integrity is an important word here. In public procurement, integrity is ensuring that public monies are spent for the purpose for which they were approved by the legislature. More than that, it is ensuring that for every dollar spent, good value – if not best value – is achieved.

Procurement can also be a driver of government – more than a supporter of other program activities. It can be a profit centre: in 2003-2004 it was the Vice President responsible for procurement in a major Canadian corporation who made the unilateral decision to replace the myriad small photocopiers, desktop computer printers and fax machines with a standard multi-function printer, because it would save money. In manufacturing, it is effective procurement processes that make 'just in time' deliveries of parts a reality. In one South American country, the government moved its advertising of procurement opportunities to the Internet knowing that its small business community was not fully computer-literate – but having decided that this would be a powerful incentive for the business community to take the step of 'computerizing'. For government, it can result in program managers finding themselves with more resources to carry out program delivery, because procurement has found a better way to buy.

We suggest that in order to achieve this, the government of Newfoundland and Labrador should take steps to focus overall accountability for public procurement on one position: the Chief Operating Officer of the Government Purchasing Agency. The COO is already by virtue of the Government Purchasing Agency Act the leading source of procurement expertise in the province. We suggest that this role be expanded, by mandating the COO much as the Comptroller General of Finance is mandated: '…for the purpose of maintaining more complete control over the public procurement activities of the province of Newfoundland and Labrador'.[38]

Achieving this would require amendments to the Government Purchasing Agency Act (including a new name – perhaps the Government Procurement Agency); and included in such amendments would be a provision that 'notwithstanding section 6 of the Financial Administration Act, the Chief Operating Officer of the Government Procurement Agency shall act for the Executive Council on all matters relating to the management of procurement by all government-funded bodies in the province'.

We recommend that you designate the Chief Operating Officer of the Government Purchasing Agency as the Chief Procurement Officer for Newfoundland and Labrador, with broad responsibility and accountability to direct, manage and oversee all public procurement activities across the province.

Mandate an Independent Recourse System

There is no publicly visible process in place by which suppliers can complain about government purchasing/procurement activities – particularly, how the government conducts individual procurement initiatives.

[38] Adapted from s. 20(1) of the Financial Administration Act.

The only such processes now in place that most people would recognize are those for the AIT and APA. This is almost certainly ineffective for three reasons: first, they covers only a limited number of procurement files; second, they applies only to inter-provincial disputes; and third, unless Newfoundland and Labrador is quite unusual, most suppliers simply will not complain, because they fear that no matter how legitimate their complaint it, it will lead to being shut out of future opportunities.

It is difficult for a government to say that its procurement is transparent, and that it is prepared to be held accountable for its actions, if there is no basic recourse system in place. Where there is no such system, there can be no general testing of how well the government is performing: in fact, such performance review only comes from internal audits and reviews by the Auditor General, which can be too infrequent to provide the needed feedback.

As important as the ability to test the quality of performance is the issue of perception: a serious and effective offer to deal with complaints fairly is a key element of a transparent system.

Interestingly, there is already an appropriate mechanism in place, that appears to be virtually unknown (at least in the procurement environment). Readers of this Report may have wondered why we included in our list of applicable legislation the Citizens' Representative Act. Frankly we found it quite by accident. We did not find it when we searched for relevant provincial legislation, because there are no references in the Act that link it to standard procurement terminology. Also, no one that we interviewed in the course of our study had mentioned it. We are grateful, therefore, to the public servant (who shall remain nameless, but who knows who she is) who, hearing that we were proposing a new supplier recourse mechanism, asked why we were not proposing the Citizens' Representative to fill that role.

By law, the Citizens' Representative has two key characteristics relevant to our work: independence, and a mandate to inquire and make recommendations into any "decisions or recommendations made relating to a matter of administration in or by a department or agency of the government".

The powers of the Citizens' Representative are not fully satisfactory for public procurement purposes. The role is limited to 'departments and agencies"; time frames for action are not specified, and there could be improvements made as to what decisions and recommendations the Representative can make. Still, the foundation is in place: we recommend that you build on it.

We recommend that you broaden and define the mandate of the Citizens' Representative to include the procurement activities of all provincial departments, agencies and Government-funded Bodies; that it be clear that the Representative may inquire into procurement-related complaints by any supplier (not just those from within the province); and that the Citizens' Representative and the COO of the GPA work together to develop rules of procedure to ensure that an effective procurement recourse mechanism is in place.

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Implementing these Recommendations would be a bold move indeed by the government, in our view reflective of and fully consistent with its 2007 policy blueprint, "*Proud. Strong. Determined. The Future is Ours*". We believe that, if implemented, these suggestions would ensure that Newfoundland and Labrador retains its historical position of leadership in the Canadian procurement community.

ANNEXES

ANNEX A: LEGISLATION

The Government Purchasing Agency Act

This Act establishes and sets the mandate and authorities of the Government Purchasing Agency (GPA) and its Chief Operating Officer (COO). Major provisions include:

- independence of the COO, including (i) appointment by the Lieutenant-Governor in Council; direct reporting to the Minister named by the Executive Council as responsible for the Act (currently the Minister of Government Services); provisions that the House of Assembly must approve any reductions in salary; and may require the Lieutenant-Governor in Council to remove an incumbent;
- exclusive mandate to acquire goods and services required by departments in accordance with the Public Tender Act:
  - authority to delegate this responsibility to all or specified departments;
  - authority to delegate this responsibility or to an individual within the public service to acquire goods and services on behalf of the Agency;
  - with the proviso that where such a delegation has been given, the COO shall be notified as soon as practical;
- authority to acquire goods and services on behalf of a government-funded body;
- authority for the COO to constitute an advisory board to coordinate the procurement of goods and services for departments and government-funded bodies;
- requirement to make all records available to the Auditor General; and
- binding of the government to the actions of the GPA and COO, when those actions are within the scope of authority conferred by this Act.

The Financial Administration Act

In virtually all governments, the cornerstone for the management of public funds is some form of financial administration act. With the considerable sums of public money involved in public procurement, the provisions of such legislation can have a significant effect on public procurement activities. The Newfoundland and Labrador Financial Administration Act is no exception, with many provisions relevant to this Review. These include[39]:

- creation of the Treasury Board, a committee of members of the Executive Council, mandated inter alia to act on all matters relating to the financial management of the province and administrative policy in the public service *(in most jurisdictions, 'financial management' and 'administrative policy' are deemed to include procurement)*; the Treasury Board is also authorized to make regulations respecting the disbursement and administration of public money *(which includes payments to suppliers pursuant to contracts);*
- authority for Ministers, on recommendation of the Board, to negotiate the settlement of debts or claims against a department *(which could include the results of contractual disputes);*
- creation of the position of Comptroller General of Finance, with a statutory mandate to undertake a broad range of financial management-related responsibilities *(which include several directly relating to procurement, as will be shown below);*

[39] Where the linkage may not be clear, for clarity we include comments in *italics* to establish the relationship of the provisions of the Act to procurement

- no expenditure of public money may be made except under authority of the Legislature *(meaning that a department cannot originate procurement action, and expect the supplier to be paid on completion, unless the House of Assembly has authorized the expenditure in some manner);*
- it is a condition of every contract that payment under that contract is subject to there being an appropriation of funds for that purpose;
- in support of the preceding, all estimates of all expenditures submitted to the House of Assembly for approval shall include all goods and services;
- appropriations approved by the House of Assembly for a specific fiscal year shall lapse at the end of that year *(a department that does not spend its full financial allotment loses those funds; this can lead to what is known as 'March Madness', where departments apparently in a rush seek to acquire goods and services before year-end: this can result in suggestions that departments are initiating procurements both to consume available funds, and to avoid a budget cut in the coming year because 'you did not spend your money last year – obviously, you had too much');*
- the Comptroller General directs all payments of public money, and may not make any payments in excess of the budgets approved by the House of Assembly;
- every deputy head or person responsible for a particular budget shall notify the Comptroller General whenever a commitment against that budget is made *(a commitment includes initiating a procurement action or signing a contract: this provision ensures that when a contract is entered into there will be sufficient funds set aside to ensure that the supplier is paid)*;
- the Lieutenant-Governor in Council may, on recommendation of the Treasury Board, approve an agreement that includes payments for goods or services to be made in a subsequent fiscal year, provided that the appropriate minister or deputy head confirms that the agreement must be made at that time: such approvals must be reported to the House of Assembly, and included in the spending estimates for the future year(s) *(this ties back to the requirement for Assembly-approved budgets on a fiscal year basis: the Lieutenant-Governor in Council must approve contracts that commit the government to pay a supplier in future using funds that the Assembly has not yet approved);*
- the Comptroller General will provide to each deputy head on a schedule that the deputy head 'shall reasonably require' a statement of the budget position *(budget less expenses and commitments – how much money the deputy head still has available to spend);*
- the Comptroller General must ensure that no payments of money pursuant to a contract are made unless there is an appropriate certification by a deputy head or other authorized person that the goods or services have been received; that the price charged is in accordance with the contract or is reasonable, or that where payment is to be made before completion of a contract, that the payment is in accordance with the contract:
    - should an improper payment be made pursuant to the preceding, the deputy head must provide satisfactory information that the expenditure was necessary in the public interest, and absent such explanation the Treasury Board may hold the deputy head accountable to make good the amount irregularly expended;
    - where there is a disagreement between the Comptroller General and the deputy head, the Treasury Board shall be the judge; and
    - the Comptroller General shall prepare a statement including all issues made over his/her objection and of all expenditures made in consequence of those issues; he shall deliver it to the minister, who shall present the statement to the House of Assembly;
- where there is a legal dispute between the government and a supplier, the Lieutenant-Governor in Council may order that the amount claimed by the Crown be withheld from any amounts owing to the supplier;
- the government must prepare the Public Accounts – a consolidated statement of government revenues and expenditures for a fiscal year – to submit to the House of Assembly before February 1 of the following year *(provided that there is sufficient detail, this permits the House to determine how the funds that it approved for a fiscal year were actually spent);*

- public servants who receive a reward for the performance of an official duty, not prescribed by law; who conspire with a person to defraud the Crown; who sign false documents; or who demand, accept or attempt to collect directly or indirectly a sum or money or anything of value in return for improper actions shall be dismissed and is liable to a fine and imprisonment; and
- any person who offers or accepts a bribe is guilty of an offence; is subject to a fine and imprisonment; and when convicted shall be 'forever disqualified from holding an office of trust, honour or profit under the Crown'.

The Transparency and Accountability Act

Officially proclaimed in December 2006, with full implementation scheduled for April 2008, the Act requires:

- extensive three year strategic, business or activity planning by all departments, with those plans being made public by the Minister, including submission to the House of Assembly and other methods (unspecified, but including electronic means);
- annual reports, comparing actual results for the previous fiscal year against the submitted strategic or business plans;
  - responsibility for individual ministers, where plans and reports are not made public as required, or do not include required information, to make a public written statement as to the reasons for non-compliance; and
- performance contracts between the ministers responsible for a department, and the deputy minister of that department, with the matters to be included in such contracts to be determined by the Lieutenant-Governor in Council.

The House of Assembly Accountability, Integrity and Administration Act

This is the most recent Act dealing with public procurement in the province. Assented to June 14, 2007, and deriving directly from the work of Mr. Justice Green referenced above, it provides in s. 48(2) that:

- "The Public Tender Act…shall apply to the House of Assembly and the statutory office except to the extent that the application may be modified by a directive of the commission[40] putting in place alternative and more appropriate requirements dealing with tendering processes…"

The Corporations Act

An extra-provincial company is required to register in Newfoundland if it is carrying on an undertaking/ business activity, which includes performance under a contract with the government (but registration is not required in order to submit a bid). Compliance with the Act requires an extra-provincial corporation to:

- register (with an initial fee, and annual renewals);
- have a business address in the province; and
- give a power of attorney to a resident of the province for the purpose of receiving service of process in all suits and proceedings against the company in the province.

[40] s. 2(f) of the Act: "commission", unless the context indicates otherwise, means the House of Assembly Management Commission continued under section 18

The Electronic Commerce Act

As its title suggests, this Act provides for the use of electronic documents:

- information cannot be denied legal effect only because it is electronic;
- the Act does not require people to use or accept electronic information;
- a public body must specifically indicate it willingness to accept electronic information, and can set out rules for its acceptance;
- a requirement in law to provide information in writing can be met by providing electronic information if the information is accessible and capable of being retained for subsequent reference (electronic information is NOT considered to be capable of being retained where the person providing it inhibits its printing or storage by the recipient);
- a requirement in law for signatures is satisfied by electronic signatures;
- payments to or by the province or a public body may be made electronically;
- contracts can be in electronic form;
- unless the originator and recipient agree otherwise, electronic information is sent when it enters an information system outside the control of the originator, or when it is capable of being retrieved and processed by the addressee.

The Intergovernmental Joint Purchasing Act

- under a joint purchasing agreement – an agreement by the province and one or more other governments to provide for the joint acquisition of goods and services – the province may acquire those goods and services under the agreement;
- the procurement is government by the terms of the agreement, not the provisions of the Public Tender Act.

The Sale of Goods Act

This Act governs the sale and purchase of all goods within the province by either public or private entities:;

- established a basic set of 'default' terms and conditions where parties do not address such issues in their contracts:
  - the Act is however easily excluded by either the seller or the buyer, expressly or impliedly;
  - it is also very old, and not altogether applicable to modern buying and selling of goods. Many buyers and sellers are even unaware that this law exists.

The Citizens' Representative Act

- establishes the Citizens' Representative as an independent officer of the House of Assembly; and
- authorizes the Representative to investigate decisions or recommendations made relating to a matter of administration in or by a department or agency of the government, and where there is evidence of improper practice to make recommendations to the appropriate minister and department concerned, including:
  - that an omission be rectified;
  - that a decision should be cancelled or varied;
  - that a practice should be altered or reviewed;
- does not require the minister or department to comply with the Representative's recommendations:
  - the Representative may report such matters to the Lieutenant-Governor in Council, and may reference the situation in the annual report to the House of Assembly.

ANNEX B: TRADE AGREEMENTS AND POLICIES

Agreement on Internal Trade

Where a proposed procurement is subject to the Agreement, the government has a number of obligations including:

- a prohibition of:
  - the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business or the place where the goods are produced or the services are provided or other like criteria;
  - the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;
  - the timing of events in the tender process so as to prevent suppliers from submitting bids;
  - the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement;
  - the division of required quantities or the diversion of budgetary funds to subsidiary agencies in a manner designed to avoid the obligations of this Chapter;
  - the use of price discounts or preferential margins in order to favour particular suppliers; and
  - the unjustifiable exclusion of a supplier from tendering;
- a prohibition of the imposition or consideration, in the evaluation of bids or the award of contracts, of local content or other economic benefits criteria that are designed to favour:
  - the goods and services of a particular Province or region, including those goods and services included in construction contracts; or
  - the suppliers of a particular Province or region of such goods or services;
- requirements to be described in generic and non-discriminatory fashion;
- selection criteria to be made public[41];
- calls for bids published on an electronic site;
- time period for submission of bids to be 'a reasonable period of time';
- winning bids chosen using pre-determined criteria
- the winner be announced publicly, in the same place(s) as the original call for bids;
- formal government to government complaint process

While the AIT requires open competition as a general rule, it does set out circumstances in which other approaches can be used.

506(11)

An entity of a Party may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances, provided that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of any other Party:

[41]Section 506(6): In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

- where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures;
- where goods or consulting services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, cause economic disruption or otherwise be contrary to the public interest;
- where a contract is to be awarded under a cooperation agreement that is financed, in whole or in part, by an international cooperation organization, only to the extent that the agreement between the Party and the organization includes rules for awarding contracts that differ from the obligations set out in this Chapter;
- where construction materials are to be purchased and it can be demonstrated that transportation costs and technical considerations impose geographic limits on the available supply base, specifically in the case of sand, stone, gravel, asphalt, compound and pre-mixed concrete for use in the construction or repair of roads;
- where compliance with the open tendering provisions set out in this Chapter would interfere with a Party's ability to maintain security or order or to protect human, animal or plant life or health; and
- in the absence of a receipt of any bids in response to a call for tenders made in accordance with the procedures set out in this Chapter.

506(12)

Where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances:

- to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;
- where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists;
- or the procurement of goods or services the supply of which is controlled by a supplier that is a statutory monopoly;
- he purchase of goods on a commodity market;
- or work to be performed on or about a leased building or portions thereof that may be performed only by the lessor;
- for work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
- for a contract to be awarded to the winner of a design contest;
- for the procurement of a prototype or a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases;
- for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;
- for the procurement of original works of art;
- for the procurement of subscriptions to newspapers, magazines or other periodicals; and
- for the procurement of real property.

Also, while the AIT applies to virtually all types of goods and construction, it has some exceptions for services.

Annex 502.1B Services Covered by Chapter Five

All services are covered except the following:

- services that in the Province issuing the tender may, by legislation or regulation, be provided only by any of the following licensed professionals : medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, chartered accountants, lawyers and notaries;
- transportation services provided by locally-owned trucks for hauling aggregate on highway construction projects;
- services for sporting events procured by organizations whose main purpose is to organize such events;
- services of financial analysts or the management of investments by organizations who have such functions as a primary purpose;
- financial services respecting the management of government financial assets and liabilities (i.e. treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;
- health services and social services; and
- advertising and public relation services.

The foregoing is an illustrative list. The Parties shall, before the date of entry into force of this Agreement, review the list and reduce it in accordance with the principle of open government procurement.

Atlantic Procurement Agreement

- no province shall require general contractors to favour subcontractors or suppliers from their own province;
- no discrimination between goods, services or suppliers based on their place of origin within the Atlantic provinces; a preference for Atlantic suppliers over those from other provinces is permitted[42];
- special procurements for economic development purposes, not carried out in compliance with the APA, used to be permitted, with prior (before contract award) reporting to the Atlantic Procurement Coordinating Committee[43]; this provision was dropped in January 2008, but is considered to still exist because it is provided for in the Agreement on Internal trade;
- a requirement in the original agreement for public tender openings was dropped in January 2008; also dropped was a provision that for procurements subject to the AIT and the APA, bidders will be allowed at least 15 days to submit bids;
- a provision permitting the use of standing offers was added in January 2008;
- a provision permitting regional reciprocity was added in January 2008, as was an order of preference for procurements below the trade agreement thresholds: Home province Manufacturing; Home province distributing; Other Atlantic manufacturing; other Atlantic distributing (there is no apparent provision for services).

Guidelines Covering the Hiring of External Consultants

Major elements of the Guidelines include:

[42] Newfoundland and Labrador was permitted to retain its existing provincial preference legislation, but the Provincial Preferences Act was subsequently repealed

[43] One procurement and one economic development representative from each province: the Chair and Vice-Chair are appointed annually by the Conference of Atlantic Premiers

- a requirement that Deputy Ministers ensure that the Guidelines are followed;
- a statement of intent;
- requirements for expenditure approvals before a department initiates action to call for proposals;
- a policy preference for Requests for Proposals (rather than tenders);
- where a public calling of proposals is not indicated, a requirement to seek proposals from at least three competent consultants;
- policy direction to encourage the growth of a local consulting community and encourage technology transfer;
- discretion to not call for proposals for requirements less than $50,000 (services on a fee-for-service basis, with charges on a per diem basis) or $100,000 (services relating to construction or major public works renovations): for other services, request limited proposals under $50,000;
- authority to not seek limited or open proposals when there are insufficient consultants (less than three) or a pressing requirement;
- Cabinet selection of the successful proponent for all requirements over $100,000;
- recommended (but not mandatory) selection considerations; and

recommended contract provisions.

ANNEX C : DETAILED FILE REVIEW

Purchasing Files

- a purchase of electric workstations with no delivery date specified in the tender call; respondents offered 'as required', 4-6 weeks, and 6-8 weeks: one must presume that the client did not care when delivery would take place, as the award was based on low price only; had delivery been important, a Request for Proposals might have been more appropriate, to balance price against delivery:

  - also in this file, we noted that the physical specifications for the product were very detailed, with no supporting rationale (e.g. must fit into a space X by Y): such detail can all too often lead to speculation that the requirement was being tailored for or against a particular supplier;

- a requirement for an aircraft charter, submitted to the GPA for tender; subsequently withdrawn with the note that it had been converted to a Request for Proposals and would apparently be handled by the originating office. There was however no indication that the GPA had handled that RFP – or that the GPA had delegated to the originating office the authority to carry out the procurement:

  We are concerned with, but have not confirmed, the possibility that departments may be under the impression that when they get Lieutenant-Governor approval to issue an RFP for goods or services as required by s. 3(2)(j) of the PTA, they automatically have the authority to issue such an RFP. We understand that the GPA pursuant to the Government Purchasing Agency Act must carry out any such RFP, unless the head of the GPA authorizes the other department to proceed.

- similarly, a requirement for a reception in a city in the U.S., valued at $3,000: the requisition was cancelled with a note that 'TB approval was obtained': it is not evident how such approval would mean that the GPA did not have to handle the resulting contract;

- a renewal of an annual publication, handled without calling for tenders: not an issue in itself, but we note that at some point the ordering office should review the market, to see whether there are competing publications that might provide equal or better value;

- an order for school books: a note on file says that 'most' have only one source – but the entire order was sole-sourced;

- another order for school books, to be sole-sourced to one supplier as the only source; after the purchase order was issued, the supplier indicated that it could not supply one of the five items, and the client department asked that that part of the order be cancelled: this raises the question, how was the requirement for that particular school reading material met? If another book was subsequently ordered, from another source, then the original justification for sole source comes into question;

- a requirement for the rental of meeting facilities, with one source specified for a sole-source contract: there was nothing on the file to indicate why the meeting had to take place in that particular geographical location;

- a requirement for jackets for a ministerial conference, to be sole-sourced to one supplier who was the only one capable of providing the jackets with required applied logo within the required time frame; that supplier had apparently been sent the logo previously, but no justification on file as to

why that supplier was selected;

- a procurement of clothing, with the tender call specifying that samples were required; no notes on the file as to what happened to any samples submitted; a file note re: one non-compliant bid was not signed;

- an order for promotional coasters of a particular type and design, to be sole-sourced – with no indication on file as to why those particular requirements were essential;

- an emergency requirement for the replacement of a bridge: quotes had been obtained from the (apparently) only two potential suppliers in the province; they had indicated delivery in 4-5 weeks, and '5 weeks, but might be accelerated': there was no apparent effort to either contact suppliers outside the province, or issue a public tender, to see whether an out-of-province supplier might have been able to respond more quickly to the emergency;

- a standing offer for antifreeze and windshield washer fluid to cover all departments in the entire province: no estimates of the geographical distribution or size of likely orders given to potential bidders, which presumably makes it more difficult for those suppliers to provide best prices;

- a requirement for paper; the client department provided three price quotations; the purchase order was issued to the low price offer – but no evidence of what the suppliers were asked to quote on, or even to confirm that they are legitimate suppliers: raises the question of what weight should be given when quotations are asked for from unknown sources by unknown persons in departments;

- a requirement for GPS units with one specific model specified: the client said that one of its experts had tested a number of machines, and recommended this one: the requirement was tendered, and the contract awarded to the low price bidder - begging the question, were there other units available, perhaps not tested by the department – and even if not, what weight should be given to an expert 'preference';

- a requirement that appeared to be a task authorization for a computerized pilot training program against an existing one year agreement – but no copy of that agreement on file;

- a requirement for police use vehicles, for sole-source award to one company: no justification on file: the contracting officer subsequently told us that this is the only company that can meet special police operational requirements, but there was nothing on the file to substantiate that;

- a requirement for night vision goggles – the department said 'no substitute', but no rationale on file;

- a requirement for shipping promotional literature; sole-sourced to the previous service provider, because 'inventory is located on their premises': we are left to wonder why the inventory was there, and why that supplier did not have a longer-term contract;

- a requisition for winter clothing, received by the GPA December 5 with a note that it was urgently needed because it was getting cold;

- a requirement for a digital media system: there was a call for tenders, with one received and the contract awarded: we noted that the requirement was marked 'urgent', with no rationale (other than perhaps it was for a minister's office);

- in the six Transportation and Highways files, we noted the Minister and Deputy Minister signing correspondence with the winning bidders: while a detailed review of delegations of authority is not part of this contract, this may be an area where operational efficiencies could be achieved by delegating authorities into the department;

- one file had six bidders, with four being found in compliance with the requirements; there was nothing on the file to indicate why the other two were non-compliant;

- another file had no note that any check was done to ensure that bidders had complied with all tender requirements;

- finally, a file that was reviewed in the Exceptions category, but where the observation seems more appropriate here (the actual exception raised no obvious issue): repair of an aircraft engine for an air ambulance: three quotes were sought, and the lowest accepted – but all bidders noted that they could not give a good price estimate without actually seeing the engine, so the 'low' price was potentially quite misleading. When this lack of precision is added to the indication that delivery dates, warranties and other service characteristics were not part of the award decision, we are left to wonder whether a tender/request for quotation was the best approach to meet this requirement. At the same time, using an RFP would have required Lieutenant-Governor in Council approval - which is potentially problematic in a real situation of urgency (emergency, and approval for an RFP, appear to be mutually exclusive approaches under the PTA).

Change Orders

The PTA Act provides that departments, with the prior approval of the Deputy Head, may issue change orders for contracts – either:

- within an existing contract (e.g. where a contract provided for an initial order of XX items, with a clearly-stated option to buy up to YY more from the same supplier); or

- to extend or add to an existing contract.

Where the change order falls within dollar or % of original contract limits, the department may proceed; where the change order exceeds those limits, the Treasury Board must be informed after the fact. The files we saw were those that had reports to the Treasury Board, and we found no issues with respect to either the rationales for the change orders, or the justification that was submitted to the Board.

However, we did find that:

- there appear to be at least two different approaches to that reporting. The GPA reports only the dollar value that exceeds the reporting threshold; while elements of the Department of Transportation and Works, if not the whole Department, report the entire change order value.

  To illustrate: consider a contract with original value of $99,000. Under the PTA, a department can issue a change order or series of change orders up to a cumulative value of $15,000, without reporting to the Treasury Board.

  If the total value of a series of change orders is $20,000 – that is, $5,000 above the threshold at which the Treasury Board must be notified:

  - the GPA will report a change order value of $5,000; but

- Transportation and Works will report $20,000

If the Ministers of the Treasury Board are not aware of this difference, they could easily misunderstand the information being presented to them.

- we were also informed that for a period of three years the Department of Transportation and Works submitted no such reports. When the Department prepared and submitted a report covering the missing years, it was reminded of the need to submit annual reports. We are left to wonder: if the absence of reports from a major purchasing department such as Transportation and Works can go un-remarked for three years, what is the actual value to Ministers?

Exception Reports

- a purchase of special vehicle equipment, sole-sourced to the only supplier in the urban area: while the PTA does provide for not calling for tenders or price quotations 'where the dealer, supplier or contractor providing the work or acquisition is the only source of that work or acquisition' (s. 3(2)(d)), this raises the question of geography in applying this exception: is the 'only supplier' within x kilometres; within the province; in Canada?

  Note that this contract was valued at $10,095. Had the recent amendment to the Atlantic Procurement Agreement been in place, and had the initial estimate of the cost of this requirement exceeded $10,000, the new threshold for goods coverage ($10,000) would have been exceeded, and the requirement to comply with the requirements of the APA and AIT would have applied. The AIT does provide for situations 'Where only one supplier is able to meet the requirements of a procurement…' – but again does not specifically address the question of geography. It could be argued, at least where these trade agreements apply, that 'only one supplier' should be in the Atlantic provinces, or in Canada, as appropriate. Where the agreements do not apply, the question remains: how far does one look;

- two purchases of fuel ($50,000 and $30,000) were similarly purchased from 'the only supplier in the area';

- there was a third example - a contract for a prosthesis, to be custom-fitted to an individual, from the 'only supplier in western Newfoundland';

- a purchase of software upgrades and additional licenses, from the only source of the product: it would appear that compatibility with existing installations might be a better rationale, but the PTA provides no such exception (although for a requirement of up to $30K, it could be covered by the discretion to not call for tenders 'due to the nature of the work');

- an advertising contract was awarded on the rational that 'in view of the nature of the work not advisable to call tenders' (PTA s. 3(2)b)): there is nothing obvious about the 'nature' of advertising that supports this – the rationale on file was that the sourcing was based on 'viewership …the supplier will reach the optimum number of viewers', and that is not the same thing: referring to an 'optimum number', which implies a trade-off between two or more factors, suggests that a Request for Proposals might have been more appropriate ;

- a contract for air services, awarded to 'the only available airline to do the trip within the required time frame' – but with no indication as to why the time frame was required, or how this sole availability had been determined; with the final contract valued at $12,000, there is a question as to why tenders were not called in the first place: if the original cost estimate had legitimately been

for less than $10,000, and if several potential suppliers had been contacted for quotes and in fact were not available, this brings into issue the requirement in the PTA that three quotes be obtained (s. 9) rather than e.g. three quotes *solicited* from qualified sources. Further, when s. 9 also provides for (as an alternative to obtaining three quotes) establishing 'for the circumstances a fair and reasonable price', the question arises – if there is only one supplier, and X is their price, what is 'fair and reasonable' - particularly if recent experience with other suppliers for other requirements is that better prices are available;

- a contract for a confidential police requirement, sole sourced with the rational that this vendor was needed to provide access to its own equipment: this is listed here not because it raised any issue, but because it was the first case we saw of different but not incompatible exceptions – if access to a particular vendor's equipment is necessary, then clearly there is only one supplier available – but for a confidential police requirement it would also appear that the nature of the work was such that it would not have been advisable to invite tenders;

- we saw a second such case – a requirement for paving services, where the selected contractor already had all provincial paving contracts on the peninsula, and would use its equipment already in place for the new requirement: 'only one source' may be valid, but 'nature of the work' might also apply;

- a contract for a subscription renewal service, with the only vendor who could supply all subscriptions and journals in one service: while that may well be true, such a restrictive requirement could be seen as an indication of setting a preference for one supplier;

- a contract to supply (build-parts-labour) videoconferencing units: this was claimed to be the only supplier, who had provided previous units – but there was nothing to support why the department needed those units (presumably there are other suppliers in the province who could have met the general need).

ANNEX D: RFP REVIEW

This review was carried out for us by RFP solutions Inc. The company is well qualified to provide such an assessment. It developed courses on How to Write Better RFP Statements of Work and RFP Bid Evaluation - The Rules and Tools for Government Managers, and delivers training sessions to individual Departments and Agencies and broader audiences of procurement professionals in partnership with the Canadian Materiel Management Institute, MMI (mmi-igm.ca). The courses are recognized by the Government of Canada's Professional Development and Certification Program for Procurement specialists. The SoW component is based on RFP Solutions' SoW Writing Guide, which is the #1 link under "Statement of Work" on Wikipedia.[44]

Purpose and Scope of Review

The purpose of this review is to provide an independent commentary of the content and structure of Request for Proposals (RFP) documents issued by the Government of Newfoundland and Labrador, in consideration of generally accepted best practices for the development of competitive RFPs within the Government of Canada (GoC).

It is recognized that the Government of Newfoundland and Labrador is subject to Contracting regulations and policies quite distinct from the federal government, and are expressly not subject to the majority of the legislative, regulatory and policy requirements that govern the GoC contracting process. As such, the elements of the RFP document discussed within this commentary that differ from federal practice are not necessarily non-compliant or inconsistent with Government of Newfoundland and Labrador contracting process requirements. The scope of this commentary is thus limited to areas of the RFP document and resulting contract that either are seen to align with generally accepted best practices, or those that have the potential to incur risk within the procurement process. This review does not examine the over all merit of the approach utilized within the Government of Newfoundland and Labrador's RFP document or its compliance, nor does it speak to the likelihood that any potential risk identified herein would in fact manifest itself within any procurement process in which the reviewed, or similar, RFP documents are utilized.

Any findings, conclusions and observations which may arise from this review in no part constitute a legal opinion, counsel or other form of legal advice. Prior to using the material within this document as an aid in developing or modifying any RFP document, readers are advised to consult with colleagues in Materiel, Contracting, Security, Facility Management and/or Legal Services to ensure the propriety of any findings, conclusions or observations that may arise here from, and to obtain further advice regarding Contracting policies and procedures within the Government of Newfoundland and Labrador.

It is also important to note that, outside of requirements for compliance with international agreements (such as the trade agreements), GoC legislation, regulations and policy, and incremental lessons learned applied from previous tribunal and court findings, no true government-wide standard for RFP development exists currently within the GoC. Where inter-departmental standards or guidelines are implemented within federal departments and agencies (for example, the Public Works and Government Services Canada (PWGSC) *Standard Acquisition Clauses and Conditions Manual* plain language templates and *Supply Manual* Policy Notices governing PWGSC procurement activities and those it undertakes on behalf of other government departments), these standards traditionally focus on issues related to drafting conventions, terminology utilized within the RFP, and formatting (PWGSC 2007a; 2007b; 2007c). Further, implementation of these standards within departments, where they exist, is not always uniform, and practice often varies between corporate and regional offices, or, in some agencies, from Contracting Officer to Contracting Officer.

As such, the body of knowledge related to the development of sound procurement documents and execution of related contracts is inherently rooted in a solid understanding of the requirements of the government contracting process, as established by legislation, regulation and policy, and an approach aimed at enhancing performance of the work under the resulting contracts while mitigating risks to the government in its procurement activities.

[44] as of February 28, 2008.

Review Approach

The RFP document discussed herein is "Provision of Consulting Services and Job Evaluation System;" an RFP issued by the Public Service Secretariat on February 5, 2008 for the procurement of goods and services related to human resource-related requirements (specifically job classification and valuation systems and related services) for the Government of Newfoundland and Labrador.

This RFP was selected through a convenience sample as an example of a current document, indicative of the Government of Newfoundland and Labrador's general approach to the content and structure of RFPs. While the dollar value of the requirement is not specified within the document, it would appear, to the reviewer, that the dollar value and scope of the resulting contract sought via this RFP is relatively limited, and is assumed would be considered by the Government of Newfoundland and Labrador to be a relatively low risk procurement activity. In general, in any government procurement, higher dollar value, higher risk (real or perceived), or higher complexity of goods and/or services RFP requirements, such as outsourcing contracts or multi-year, multi-vendor arrangements typically utilize a more fulsome set of clauses and conditions within the RFP document than those observed within the sample RFP. Given the nature of the goods and services and structure of the resulting contract sought via the reviewed RFP, the extent to which the RFP document is representative of larger RFPs issued by the Government of Newfoundland and Labrador is not apparent. For the purpose of this review, it is thus assumed that "mid-size" Government of Newfoundland and Labrador RFP documents do not typically include elements other than those contained within the sample document.

In conducting this review, the contents and structure of the sample RFP were compared to templates utilized by mid and large-size federal entities to issue competitive RFPs for similar goods and services requirements (DIAND 2004; HC 2004; PWGSC 2007c), in addition to generally recognized principles of sound RFP development.

This approach emphasizes the development of RFP documents that provide for clarity of terms, enforceability of outcomes, mitigation of risk to the purchasing organization of both challenge in the RFP process and mitigation of risk of dispute under the resulting contract, fairness to the resulting contractor and to all potential suppliers within the preceding competition, and transparency of process.

Findings and Observations

Contents of a Request for Proposals (RFP)

Although the level of detail and the order in which elements of an RFP appear within the RFP document varies among federal entities, dependent upon the departmental template and the nature of the goods or services being procured, RFP documents typically consist of the following substantive components:

a) **A Letter of Invitation or Notice of Opportunity**, an element of the bidding process, this letter identifies the opportunity, and pertinent submission details such as submission deadlines, location, and where the prospective Bidders may seek additional information or clarification through a designated Contracting Authority or point of contact;

b) **Instructions to Bidders/Conditions of the Bidding Process** an element of the bidding process to support the development of responsive submissions, including elements such as number of copies and format required, any specials instructions such as the separation of technical and financial proposals (if required for the specific procurement), terms governing the submission of bids or the RFP tendering process, and may also include suggested proposal inclusions such as curriculum vitas, summaries of experience or other questions the Bidders' proposal are suggested to address;

c) **Selection and Evaluation Criteria and Methodology** an element of the bidding process which outline the organization's needs for the resulting contractor, including any combination of mandatory (required) and point-rated (desired) elements, and the process whereby Bidders will be assessed on these criteria. This section typically includes the manner in which the Bidders' evaluation outcomes will be tallied, including

the method in which technical merit and cost will be considered to determine the successful Bidder to be recommended for contract award;

d) **Statement of Work (SOW) or Statement of Requirement** an element of both the bidding process and resulting contract which describes the context, objectives, scope, requirements, deliverables and other pertinent details of the work the successful Contractor will be required to undertake. At the bidding stage the SOW provides information to Bidders to support scoping the work and making the 'bid or no bid' decision. In the contract stage, the SOW forms a part of the resulting contract, containing binding contractual obligations;

e) **Articles of Agreement and/or Contract Terms and Conditions** an element of the resulting contract which form the basis of the resulting agreement, and include provisions covering areas such as work commencement and termination, directions, legal requirements, dispute resolution and other, typically legislative or policy requirements that govern the resulting contract and the Contractor's work. These items are often included at the bidding stage within the RFP document for transparency in order to disclose the conditions under which any contractor selected would be required to complete the work; and

f) **Terms of Payment** which identify how much, when and in what manner the Contractor will be paid for its services and deliverables. An element of the resulting contract, these items are often included within the RFP document for transparency in order to disclose the conditions under which any contractor would be paid, and may also be used in the bidding process as a format for the Bidders' financial offers.

The majority of the traditional components of an RFP (specifically, items a-d and f above, although the latter without a financial pricing table) were present in varying degrees within the reviewed sample Government of Newfoundland and Labrador RFP. Table 1.0 below identifies the sections of the Sample RFP that were determined to correspond to the above components.

Table 1.0 Comparison of RFP Contents

GoC Traditional RFP Component	Corresponding Government of Newfoundland and Labrador RFP Component
A Letter of Invitation or Notice of Opportunity	Section 1.0 Introduction (1.1); Section 2.0 Basic Requirements (2.2)
Instructions to Bidders or Conditions of the Bidding Process	Section 2.0 Timelines (2.1); Section 3.0 General Conditions; Section 7.0 Proposal Submissions
Selection and Evaluation Criteria and Methodology	Section 2.0 Scope of Work/General Requirements (2.3); Section 5.0 Award of Contract; Section 6.0 Evaluation of Submissions; Section 7.0 Proposal Submissions
Statement of Work (SOW) or Statement of Requirement	Section 2.0 Scope of Work/General Requirements (2.3)
Articles of Agreement and/or Contract Terms and Conditions	Section 3.0 General Conditions; Section 4.0 Resulting Contract
Terms of Payment	Section 3.0 General Conditions

The one element not expressly included within the Government of Newfoundland and Labrador RFP was the specific terms and conditions that will comprise the resulting contract (item e, from the above list). Section 4.0 of the sample RFP notes that the resulting contract "will contain such reasonable terms as Government may require". In addition, it is noted that Section 3.3 of the sample RFP identifies that a "custom contract will be negotiated". Within federal RFPs, in accordance with requirements for transparency that govern most procurements, the terms and conditions and form of the resulting contract are included within the RFP documents, or made available to Bidders upon request during the bidding period, in order to provide full disclosure of terms. This approach is intended to enhance the quality and clarity of Bidder proposals through enabling a full understanding of the nature

of the work required and the resulting contract, and may also mitigate cost inflation in Bidder price proposals that could be included by Bidders to provide contingency costs to cover the unknowns. Further, unlike many private sector contracts, in federal procurements, the buyer, rather than the seller dictates the terms, as is reflected by their inclusion within the RFP document.

While negotiation is permitted under the federal procurement process, and has been utilized in numerous procurement activities, such as design-build, or long-term service delivery mechanisms; it can present a risk to the buying organization both prior to and following contract award. The right to negotiation has the potential to result in substantive changes to the work under the contract, including approach and costs, and, dependent upon the scope of the negotiation, could impact previously determined outcomes of the evaluation process, such that the nature of the negotiated change to the work or contract with a successful Bidder pre-award, could inadvertently alter the ranking of Bidders based on new or differing technical or cost elements introduced. In such an event there is the potential that an unsuccessful Bidder may challenge the award decision claiming to be more qualified to complete the work than the selected contractor, on the basis that had the full nature of the work and contract been disclosed the unsuccessful Bidder would have developed a Proposal that responded specifically to those elements, and would have achieved a better outcome in the evaluation process. Thus, where the nature of the work/contract suggests that negotiation provisions could be included within federal RFPs, it is always recommended that these provisions clearly define the terms of the negotiation, including what may be negotiated, who is authorized to negotiate for each party, when and how the process will occur, and how it is determined that negotiation is completed and either successful, or the award process terminated (Worthington, 2004).

The Government of Newfoundland and Labrador RFP appears to be written from a future looking perspective, such that the RFP document, although addressing the future contract, appears to deal solely with the solicitation and evaluation phase (the bidding stage), with the resulting contract typically customized at the end of and as a result of this process.

In contrast, many federal RFP documents serve a dual purpose – both to invite and evaluate Bidder submissions to undertake the work, and, to present the resulting work (SOW) and contract. In addition to enhanced transparency to Bidders and the potential to mitigate risk of unfairness in the competitive process, or non-award due to failed negotiations, this approach can also serve to reduce administrative burden on the government Contracting Authority; as the resulting Contract is almost fully developed (save the Bidder's proposal information) at the time the RFP is posted or distributed.

Additional (Optional) RFP Components

As required for specific goods and/or services requirements, RFP documents may optionally also include the following components:

i) **Certifications** (where required) are individual items that the Bidder or resulting Contractor is required to specifically sign to confirm its compliance with particular terms and conditions or unique requirements of the resulting contract. Examples of typical certifications include availability of resources, compliance with employment equity conditions, or confirmation of language capabilities. A binding component of the resulting contract, these are typically included within the RFP document at the bidding stage to support full disclosure of terms, and to ensure that the successful Bidder is able to meet these requirements (as indicated by its signature within the proposal); and/or

ii) **Annexes** (where required) may provide additional background information, reference documents, or other pertinent details that Bidders would require at the RFP stage to support developing a quality Proposal and that the resulting Contractor would require in order to complete the work under the resulting contract.

The sample RFP reviewed did not include Certifications or Annexes, and for the purpose of this review it is assumed neither were required. It is noted, however, that Section 4.0 identifies the successful Bidder will be required to sign confidentiality, privacy and security undertakings, as part of the contract, although these specific undertakings are not included within the RFP document.

Discreteness of RFP Component Sections

As noted previously, while the level of detail and the order in which the RFP components appear in a document tend to be a function of organizational preference, each component traditionally comprises a discrete section within the RFP document. This approach is aimed at minimizing redundancy and duplication throughout the document, and mitigating the risk of contradiction in the resulting contract or clauses that could be open for interpretation or have the potential to lead to dispute. Clear separation of components can also function to simplify the competitive bidding process for prospective Bidders by presenting a clear 'checklist' of items the Bidder needs to address at the bidding stage that separates proposal requirements and experience/ qualification requirements that must or should be demonstrated via various inclusions within the Bidders' Proposal, from the work and outcomes required to be achieved under the Contract.

At the end of the competitive bidding process, under federal RFPs, the selection and evaluation criteria used to select the 'winner' do not form a part of the resulting contract, whereas the SOW is incorporated within the contract as enforceable obligations on the contractor. Due to this fact, the separation of these two (2) elements, combined with the nature of the SOW provides for a clear, unambiguous and enforceable contract outcome for the government buyer.

While each substantive component noted (items a-d and f above) was included within the sample Government of Newfoundland and Labrador RFP, the components themselves do not follow the structure of discrete sections typically found within federal RFP documents.

For example, elements that may be classified as selection and evaluation criteria (e.g. Section 2.3(3), page 4 "The proponent must show that the job evaluation system is being used or has been used successfully within a public service setting") would traditionally, in federal RFPs, be separated from the requirements of the work within the RFP document. Although the selection and evaluation criteria must be drawn from corresponding SOW requirements, meeting the test of fairness by demonstrating clear relevancy to the work (for example, the preceding selection criterion would not be included in an RFP for an unrelated work requirement such as Financial Auditing Services, but may be linked to a germane contract work requirement such as the following: "the Contractor shall provide a system to the Government of Newfoundland and Labrador that evaluates all (25,000) public service job positions in a timely and effective manner"); in including both selection and contract work items together within a single section of the RFP document (Scope of Work/General Requirements), there may be the potential for confusion in both the items Bidders must or should include within their proposals, and the actual work the resulting contractor is required to complete.

Thus, in federal practice, the SOW and Selection and Evaluation Criteria function as two complementary pieces, the first describing the work requirements in enforceable contractual terms, and the second identifying the corresponding element that a Bidder would need to demonstrate in its proposal in order to be considered qualified to under take the formerly described work.

Enforceability of Contract Requirements

In the structure of federal RFPs, not only the discreteness of the SOW, but also the language used in the SOW differs from other areas of the RFP document, to create enforceable obligations on the Contractor in undertaking the work. For example, federal RFPs make use of terminology such as "shall", vs. "may" to denote binding obligations on the Contractor (Worthington 2004; PWGSC 2007b, c). Within the language utilized in the Government of Newfoundland and Labrador RFP some of the work elements of the resulting contract appear to be open to interpretation or proposal from Bidders as to whether they become enforceable obligations of the work (for example "It is expected that all aspects of how the proposed system operates must be transparent"). This approach could allow for a Proposal to be accepted by the government that may not necessarily deliver on this requirement (if it is in fact a requirement), as the language used to describe how the system is to operate may not allow for a strict binding interpretation.

What is interesting is that the approach within the Government of Newfoundland and Labrador RFP, which incorporates the Bidders' proposal into the resulting contract appears to allow for some flexibility in the structure

and obligations under the resulting contract, based on the commitments made within the successful Bidder's proposal (see Sample RFP Section 3.2). While federal RFPs also incorporate the successful Bidder's proposal by reference within the resulting contract, the RFP document also sets out specific enforceable contractual terms and work requirements that would govern the work of any resulting contractor. An "Order of Precedence" within the Articles of Agreement (contract form) traditionally gives priority to the standard government Terms and Conditions, the SOW, and the RFP document, in order, over the successful Bidder's Proposal). It is noted that the Government of Newfoundland and Labrador sample RFP does give priority to the RFP document over the Bidder's Proposal. While the GoC approach may minimally limit some of the Bidders' and resulting Contractors' creativity by dictating certain aspects of the manner in which the Contractor must carry out the work (e.g. in compliance with professional standards, lawfulness, etc.), it can function to ensure a common understanding between the buying organization and all potential Bidders as to the requirements of the resulting contract, and minimize the risk of dispute under the contract where the Bidder's proposal may not correspond to the government's intentions for the contract's work outcomes.

Government Protections in the Resulting Contract

RFP documents are drafted in a manner designed to achieve both a quality contract outcome with a qualified contractor, and to mitigate risk to the government in both the competitive process and the resulting contract. While some note that the recent climate within government procurement circles may have placed greater emphasis on risk mitigation, such that even the smallest contract may be weighed down with legal clauses and protections, best practice suggests that some manner of protection of the government's investment in the contract is valid.

The Government of Newfoundland and Labrador RFP includes some sound protections similar to those included within federal RFPs. For example, Section 3.2 gives precedent to the written text of the agreement over any other understanding, and Section 3.3 explicitly identifies that all components of the Bidder's Proposal become enforceable within the resulting contract. These sections (impacting both bidding and contract stage) both serve to provide for clarity of terms and enforceability of the contract.

Similarly, the Government of Newfoundland and Labrador RFP includes detailed and sound "Instructions to Bidders", providing clear guidance on the content requirements of proposals, under Sections 3.6 to 3.10, including compliance with legislation and policy requirements (e.g. requirements for good standing Workplace Health, Safety and Compensation Commission, business license within the province, etc.), to ensure the successful Bidder will be eligible to complete a binding contractual agreement and do business with the government.

As noted previously, where the Government of Newfoundland and Labrador RFP is written from a future-looking perspective (i.e. the contract will include these items, or the successful proponent will be responsible for compliance with this requirement), adopting the traditional federal approach of including similar terms and conditions written from a contractual stance, may support the reduction of administrative burden in transforming the Government of Newfoundland and Labrador RFP to the resulting contract, and may enhance the ability to enforce any such text as binding obligations.

Evaluation Criteria and Contractor Selection Procedures

Selection and Evaluation processes within competitive RFPs are typically comprised of a combination of Mandatory (requirements) and Point-Rated (preferred elements) Criteria, followed by consideration of the Bidders' proposed cost for the work, which may be combined with a technical evaluation score for an over all assessment of best value to determine the successful Bidder to be recommended for Contract Award, or which following technical assessment, may be used as the final determination of Contract Award (selection methodology). The types of criteria and the selection methodology naturally varies dependent upon the nature of the goods and/or services being procured.

The structure of the evaluation process within the Government of Newfoundland and Labrador RFP, requiring Bidder compliance with the Mandatory Requirements prior to consideration on technical merit and cost (point-rated) is consistent with federal practice for similar requirements. As noted in the discussion of the "Discreteness of RFP Component Sections" above, to support Bidders in preparing their proposals, and in facilitating the evaluation by the

government of these proposals, it is suggested that separating the Mandatory Requirements that will be used to evaluate Bidder proposals from the contractual terms of the work may add clarity to the process.

In federal RFPs, Mandatory Requirements are traditionally objective factors that can be assessed on a clear 'meets' or 'does not meet basis'. For example: "The proposal must contain up to three current references…where the system has been implemented". The requirement identified within this Mandatory Requirement is for the experience related to the Bidder's system; thus a Bidder providing one (1) or a Bidder providing three (3) references where its system had been implemented would both be compliant with the Mandatory Requirements. The quality of these references would be evaluated on the basis of the Point-Rated Criteria, where more qualitative factors may be utilized to distinguish between Bidders' proposals.

Where more subjective terms may be utilized within Mandatory Requirements, there is risk that the openness of the criterion to interpretation may be grounds for successful challenge of the process by an unsuccessful Bidder. For example: "The proposal must show that the system has been used successfully…" where the interpretation of success is not defined, if this is used as a Mandatory Requirement, a committee could find either a system that worked once and subsequently failed, or, a system that worked consistently over a two (2) year period with no more than five (5) instances of downtime, or a system that worked consistently over a five (5) year period with no instances of downtime would be compliant. Where the standard applied by the government evaluation committee in the assessment of compliance with Mandatory Requirements may be undefined, and, may potentially vary with industry's or a 'reasonable person's' interpretation of the requirement, there is the potential that the application of the criteria within the RFP process, where a Bidder is eliminated from consideration due to its non-compliance with this requirement may put the government at risk for a successful process challenge. It is noted that the Government of Newfoundland and Labrador RFP reserves the right not to debrief unsuccessful Bidders, however, whether any challenge or appeal mechanism exists for these Bidders that may pose a risk to the government, is beyond the scope of this review. Thus, best practice suggests that Mandatory Requirements be clearly defined within the RFP document and be unambiguous in their interpretation.

Due to federal obligations under the trade agreements, most federal RFPs include broad disclosure of the criteria, weightings and process by which Bidders will be evaluated to determine the successful contractor. While practice may vary across departments and agencies from minimal disclosure (e.g. "Experience – 20 points") to full disclosure (see Figure 1.0 below), recent tribunal and court determinations have led to increased disclosure of the factors which comprise the selection and evaluation criteria. While to ensure fairness of process and transparency in the competitive bidding process, disclosure of the criteria and weightings is recommended, there is a risk that in over-prescribing the evaluation methodology within the RFP document that it may remove the creativity from the bidding process, such that the RFP may effectively 'write Bidders' proposals for them', and bind the evaluation committee into a detailed process that fails to meaningfully differentiate Bidders on their technical merit, and may result in an inability to evaluate innovative approaches that go beyond the strict text of the criteria disclosed within the RFP. Best practice in federal RFPs suggests a balance between over-specification and minimal disclosure, that provides transparency to Bidders on the evaluation process, but does not 'tie the committees' hands', may be obtained. Figure 2.0 below provides an example of this approach.

Figure 1.0 **Sample Point-Rated Evaluation Criterion – Full Disclosure**
(Adapted from DFAIT 2005 – *Note: for illustration purposes, only one (1) Factor is broken-out in the left hand column***)**

Point-Rated Criterion	**Weight**	**Evaluation Factors**	**Factor Break-out**
R2 - Evaluation of Project Summaries The five (5) project summaries submitted as evidence of compliance with Mandatory Requirement **M2** will be evaluated on the basis of their relevance to the Department's requirements for Evaluation Services in breadth, nature, size, scope, and complexity.	Up to 75 pts (out of a total possible 259 points)	Up to fifteen (15) points per cited project summary, (to a maximum of seventy-five (75) points) based on the extent to which each cited Project Summary is relevant to the Evaluation environment within the Department. The following elements will be considered in determining the relevance of each Project Summary: 2.1 Relevance of the nature of service, topical subject matter, client organization and work location of service delivery of the cited project relative to the Department's requirements as described in the RFP (up to 5 points/project); [*factors removed for illustration only, for full criterion see Figure 2.0 below*] For each of the five (5) project summaries, each of the above factors will be evaluated on the following scale: [*scale removed for illustration only, for full criterion see Figure 2.0 below*]	**2.1 Relevance of the: (Max. 5 points/Project)** The Bidders total points for this Factor will be the sum of points received under A-D below: ***A. Nature of the service (2 points/Project)*** Relevant nature of the service includes more than one (1) of: • Evaluation • Performance Measurement • Management Consultation or • Economic Analysis Bidder demonstrates evidence of a project encompassing three (3) of the services above (= 2 points) Bidder demonstrates evidence of a project encompassing two (2) of the services above (= 1 point) Bidder demonstrates evidence of only one (1) of the services above (= 0 points) **B. *Topical subject matter (1 point/Project)*** Relevant topical subject matter includes: • international relations • trade • investments • science and technology • human security • counterterrorism or • international travel Bidder demonstrates evidence of a project in any of the topical subject matter areas listed above (= 1 point) Bidder does not demonstrate evidence of a project in any of the topical subject matter areas listed above (= 0 points) ***C. Client organization (1 point/Project)*** Relevant Client organization includes: • DFAIT • CIDA or

			• A comparable organization with a similar mandate Bidder demonstrates evidence of a project for a relevant client listed above (= 1 point) Bidder does not demonstrate evidence of a project for a relevant client listed above (= 0 points) ***D. Work location of service delivery (1 point/Project)*** Relevant Work location of service delivery includes: • A remote location within Canada (e.g. North) or • A location outside of Canada Bidder demonstrates evidence of a project for a relevant work location listed above (= 1 point) Bidder does not demonstrate evidence of a project located in any of the relevant work locations listed above (= 0 points)

Figure 2.0 Sample Point-Rated Evaluation Criterion – Balanced Disclosure (Extract from DFAIT 2005)

Point-Rated Criterion	Weight	Evaluation Factors
R2 - Evaluation of Project Summaries The five (5) project summaries submitted as evidence of compliance with Mandatory Requirement **M2** will be evaluated on the basis of their relevance to the Department's requirements for Evaluation Services in breadth, nature, size, scope, complexity and approach.	Up to 75 pts (out of a total possible 259 points)	Up to fifteen (15) points per cited project summary, (to a maximum of seventy-five (75) points) based on the extent to which each cited Project Summary is relevant to the Evaluation environment within the Department. The following elements will be considered in determining the relevance of each Project Summary: 2.1 Relevance of the nature of service, topical subject matter, client organization and work location of service delivery of the cited project relative to the Department's requirements as described in the RFP (up to 5 points/project); 2.2 Relevance of the size, scale and complexity of the cited project relative to the Department's requirements as described in the RFP. This includes but is not limited to the Bidder's ability to manage multiple project(s) and projects of multiple dimensions, including the coordination of multiple teams and management of logistics. (i.e. complexity is defined as one or more of the following): multiple programs, policies, initiatives, organizations, work locations, or the coordination of multiple levels of analysis (up to 5 points/project); and 2.3 Extent of the Bidder's involvement in the project, including methodology(ies), approaches and activities, utilized in the cited project, relevant roles and responsibilities in the project, together with the project outcome and results, relative to the Department's requirements as described in the RFP (up to 5 points/project). For each of the five (5) project summaries, each of the above factors will be evaluated on the following scale: 5/5 points = Excellent - The project clearly and fully addresses all of the areas of the factor and is entirely consistent with the Department's requirements. 4/5 points = Very High - The project clearly address most of the areas of the factor and is entirely consistent with the Department's requirements. 3/5 points = Moderate - The project clearly addresses some of the areas of the factor and is mostly consistent with the Department's requirements. 2/5 points = Minimal - The project minimally addresses some of the areas of the factor and is somewhat consistent with the Department's requirements. 1/5 points = Poor - The project minimally addresses one of the areas of the factor and it differs greatly from the Department's requirements. 0/5 points = The project is not at all relevant, or consistent with the Department's requirements/Not addressed.

The Government of Newfoundland and Labrador RFP included both Mandatory Requirements and Point-Rated Criteria, and utilized a selection methodology aimed at achieving best value, through the combination of cost and technical merit, weighted at 25% and 75% of Bidders' Proposals respectively. In contrast to a relatively simple goods procurement, where, following demonstration of compliance with a technical specification, the "lowest cost compliant" proposal will be recommended for Contract Award, this "best value" approach is recognized as a best practice in the procurement of services or combinations of goods and services where the qualitative difference among proposals and Bidders' qualifications and experience contributes to the value of the work to the government.

Within the Government of Newfoundland and Labrador RFP Bidders were requested to provide both a total cost for the life of the engagement, broken out by cost component, in addition to a cost per hour to

enable the establishment of any amendments to the resulting contract. In addition to supporting Bidders in preparing Proposals, to enable consistency of evaluation across Bidders in relation to Proposal cost, best practice within federal RFPs suggests the inclusion of a price form or costing table may be beneficial. Finally, as noted above, enhanced clarity in relation to the requirements of the work, including specific deliverables to be provided under the contract would support Bidders in proposing fixed price offers for the known work, that may minimize cost inflation due to contingency costs related to the potential unknowns in the work and contract.

Concluding Remarks

This RFP Review is intended to provide information and context on the nature of alignment with generally accepted best practices for RFP development, and on the potential areas where common procurement risks could manifest within the Government of Newfoundland and Labrador's RFP process and resulting Contract, based on an independent, third-party assessment of a sample RFP document. RFP Solutions was not involved in the development of the Statement of Work, Evaluation Procedures or RFP components for the Government of Newfoundland and Labrador RFP under the scope of this review.

Overall, the RFP document developed by the Government of Newfoundland and Labrador is performance oriented, seeking innovative proposals from industry, which can facilitate a valuable competitive process, and enable industry to propose solutions to the 'problem' outlined in the RFP that the government may not have anticipated. The Government of Newfoundland and Labrador RFP document also includes reasonable protections for the government in relation to both the conduct of the bidding process and the resulting contract. Other review findings have focused on areas that it is suggested may benefit from a greater level of disclosure or clarity within the RFP document. Noting again that the requirements of the Government of Newfoundland and Labrador procurement process and appeal mechanisms for Bidders differ from the federal requirements and mechanisms, the foregoing has provided suggestions which may further facilitate the achievement of defensible evaluation processes and enforceable and manageable contracts following Award. The foregoing is not exhaustive, but is designed to frame discussions on the structure and content of RFP documents to support the conduct of an open, transparent, fair and meaningful evaluation processes for the Award of clear and enforceable contracts that meet the government's objectives.

In closing, 75% of work for procurement takes place in the pre-contract phase of strategy development, requirements definition, and solicitation planning and drafting. The majority of risks to project success occur in the post-contract award phase. This RFP Review is designed to provide an assessment of current practices for the purpose of facilitating the completion of the RFP development, posting, evaluation and contract award stage of the competitive procurement process in a manner that establishes effective and timely mechanisms that will provide quality goods and services to fulfil the Government of Newfoundland and Labrador's requirements and maximize the opportunities for project success.

RFP Solutions is a company of Request-for-Proposal (RFP) and government contracting specialists. We develop RFP's for government clients with complex and/or high-$-value requirements.

In developing RFP's, we work directly for government contracting groups, as well as for their internal clients within the Program areas of the departments, agencies, ministries and crown corporations of government.

In keeping with the ethical standards of the procurement and contracting profession to which we belong, RFP Solutions operates in full compliance with the codes of ethics and conduct for purchasing practitioners established by both the MMI and PMAC.

In addition, we maintain absolute confidentiality concerning all client and bidder information related to RFP's, divulge nothing to outside parties before, during or after the RFP process, and maintain valid government security clearances. It is also our strict policy to fully exempt ourselves as potential bidders from all RFP's to which we have contributed. We are an independent firm. We work only for government clients, and we have no affiliations with any other businesses (government suppliers or otherwise).

References

2008, February 5; Government of Newfoundland and Labrador, Public Service Secretariat, "Request for Proposals (RFP) "Provision of Consulting Services and Job Evaluation System".

2007a, Public Works and Government Services Canada (PWGSC), PN-83: "Departmental Standard Procurement Documents for Higher Complexity Requirements for Goods, Services or Both".

2007b, PWGSC "Statement of Work Rules for Informatics Procurements".

2007c, PWGSC "Medium-Complexity Bid Solicitation and Resulting Contract Template – Goods, Services or Both", available online at: http://www.tpsgc-pwgsc.gc.ca/acquisitions/text/plain/plainpm-e.html#a16.

2007, RFP Solutions "Statement of Work Writing Guide", available online at: www.rfpsolutions.ca/sowwritingguide.htm.

2005, Department of Foreign Affairs and International Trade (DFAIT), "Request for Proposals – Evaluation, Performance Measurement, Management Consultation and Economic Analysis Services". *Figure 1.0 Adapted from for illustration purposes only.*

2004, Department of Indian Affairs and Northern Development (DIAND), "Request for Proposals Template".

2004, Health Canada (HC), "Request for Proposals Template".

2004, Worthington, Robert C. *The Public Purchasing Law Handbook.* Markham: Lexis-Nexis.

ANNEX E: OTHER JURISDICTIONS

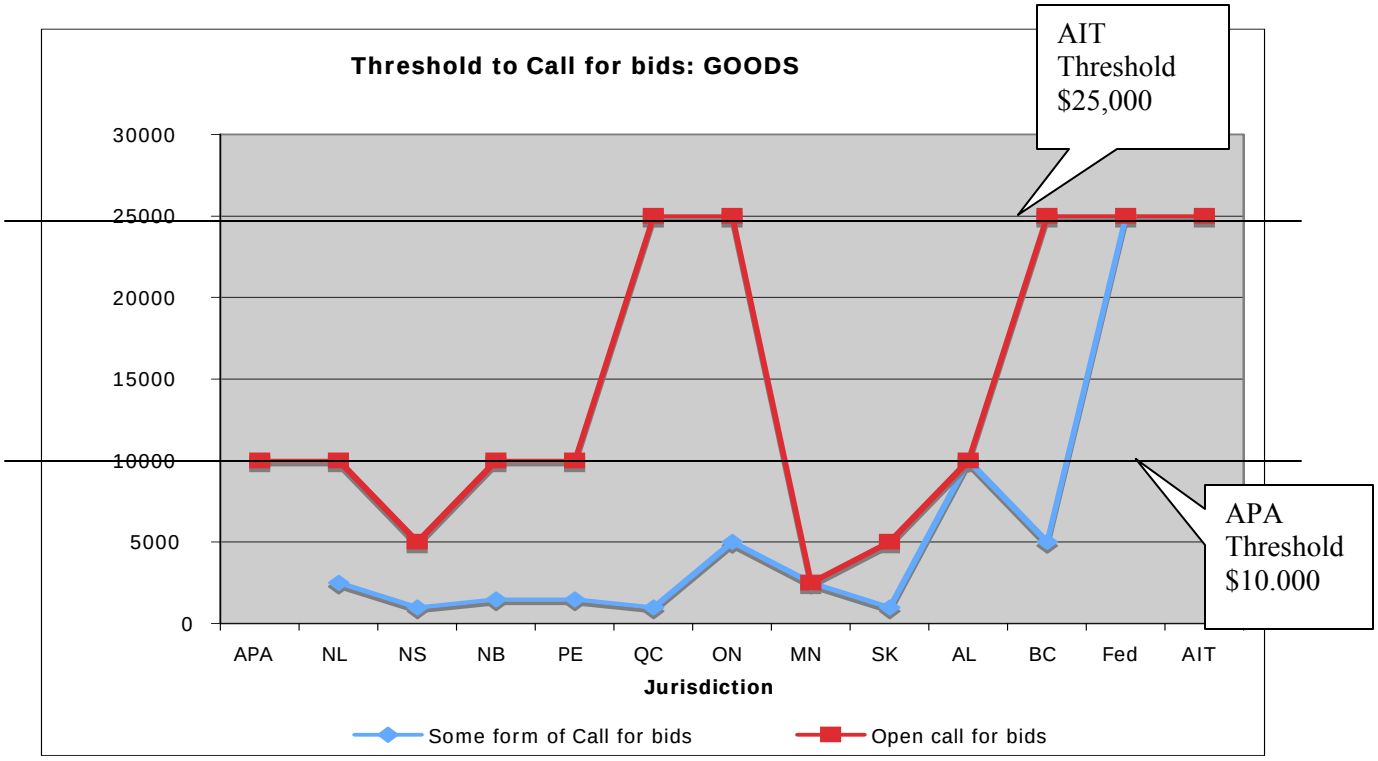
Legislative Approaches

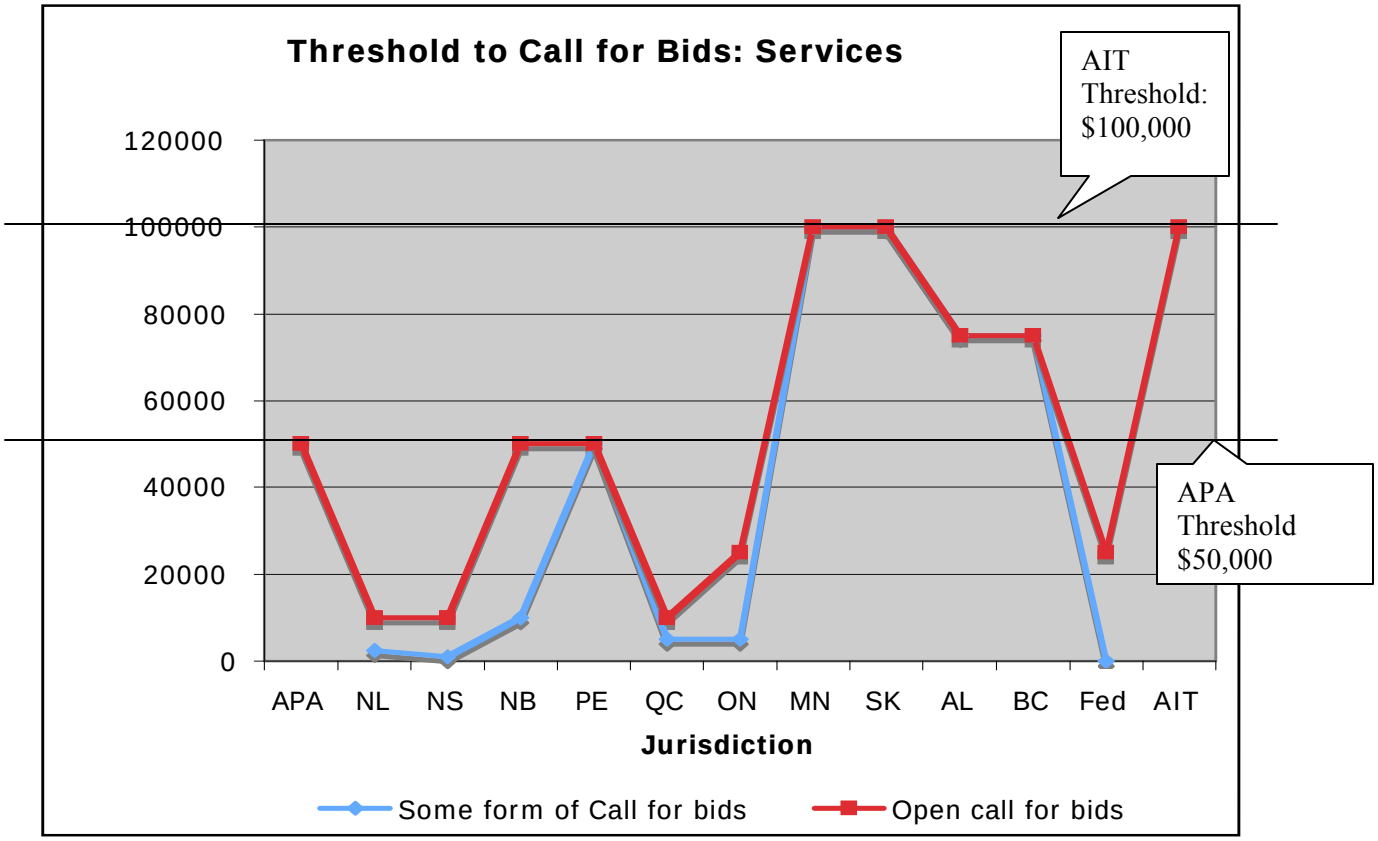
Jurisdiction	Legislation	Regulation/Policy	*Comments*
Newfoundland and Labrador	Yes – PTA: goods, services, public works, leasing	PTA Regulations External Consultants	*Specific processes*
Nova Scotia	No		
New Brunswick	Yes: Public Purchasing Act – goods and services;	Public Purchasing Act Regulations Crown Construction Contracts Act Regulations	*Specific processes* *Crown Construction Contracts Act does not set out how contracting is to be done: but authorizes the Minister to make Regulations for that purpose*
Prince Edward Island	Yes: Public Purchasing Act – goods only		*Specific processes*
Quebec	Yes – An Act Respecting contracting by Public bodies – goods, services, construction, public-private partnerships	Quebec has a multitude of regulations, including but not limited to: - for all public procurement; - for departments - for health and social service organizations; - for the education sector; - for municipalities Within e.g. the "departments' category there are: - a framework regulation; and - a regulation for goods, construction and services; and - a regulation for leasing	*Specific processes*
Ontario	No	Cabinet Directives	
Manitoba	Government Purchases Act – no construction		Act focuses on results, roles and responsibilities
Saskatchewan	Purchasing Act	Purchasing Act Regulations	*Neither the Act nor Regulations set out processes required or thresholds (other than for Saskatchewan Preference)*

Jurisdiction	Legislation	Regulation/Policy	*Comments*
Alberta	No	Direct Purchase Regulations	*The Regulations do not set out processes or thresholds*
British Columbia	No	Core Policy and Procedures Manual	*Specific processes*
Federal	No	Government Contracts Regulations (GCR) Treasury Board Contracting Policy PWGSC Supply Manual	*The GCRs cover require calling for bids except in prescribed situations, and deal with bid and contract security. Specific processes are in the Contracting Policy and the Manual (while use of the latter is not mandatory across government, it is commonly used as a reference tool)*

Note: we were asked how it is that some jurisdictions have Regulations, when the table shows that there is no legislation: normally, Regulations are issued under the authority of a statute. The fine point we made is that in those cases there was some form of legislation in place to permit the Regulations: that legislation, though, as not specifically 'procurement' legislation (e.g. the federal Government Contracts Regulations are issued under the authority of the Financial Administration Act).

Thresholds for Calling for Bids




Threshold to Call for Bids: Services
AIT Threshold: $100,000
APA Threshold $50,000
120000
100000
80000
60000
40000
20000
0
APA
NL
NS
NB
PE
QC
ON
MN
SK
AL
BC
Fed
AIT
Jurisdiction
Some form of Call for bids
Open call for bids

ANNEX F: INTERNATIONAL BEST PRACTICES

General OECD Findings[45]

"In a third of countries potential bidders and other stakeholders, in particular end-users have an opportunity to be associated with the drafting of specifications for the object to be procured."[46].

"Public procurement systems in countries have moved increasingly from a situation where procurement officers are expected to comply with rules to a context where they are given more flexibility to achieve the wider goal value for money…. Furthermore, most governments have provided increasing responsibility for procurement, daily management being passed to individual public sector entities, while overall oversight and co-ordination of public procurement activities has been concentrated in the central public procurement body.[47]

"More centralised procurement can contribute to efficiency in public procurement by improving management information through aggregation of demand, lowering prices through reduced production costs and transaction costs and enhancing the efficiency of the supply chain. It may also reinforce the **integrity and neutrality** of the public procurement system since:

- The central public procurement body often has a "firewall" position that avoids direct contact between the contractors and end-users;
- Promoting integrity and auditing actual practices is easier in a single entity than hundreds of government entities, and contributes to more uniform and professional working methods;
- Transparency and openness are often a key factor for the credibility of the public procurement body to achieve good results for end-users of the contract, in particular government agencies, in their negotiations with bidders."[48]

"There is growing recognition that organisations need to provide managers with the opportunity to acquire the necessary skills – such as negotiation, project and risk management skills - and personal attributes to adapt to this changing environment."[49]

"In order to ensure that **interaction between officials and bidders** does not lead to bias and more generally corruption, measures have been set up to define clear restrictions for procurement officials in their interaction with bidders at different stages of the procurement, in particular during negotiations."[50]

"Another commonly used method for controlling risk internally is the application of the **four-eyes principle** which ensures the joint responsibility of several persons in the decision making - in particular through separation of various functions, double signatures, and crosschecking."[51]

"A more detailed description of the **standards of conduct** expected for procurement officials, in particular specific restrictions and prohibitions, helps ensure that officials' private interests do not

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[45] *Integrity in Public Procurement: Good Practice from A to Z*, © OECD 2007: reproduced with the permission of the OECD
[46] ibid, page 34
[47] ibid, page 60
[48] ibid, page 61
[49] ibid, page 61
[50] ibid, page 73
[51] ibid, page 75

improperly influence the performance of their duties and responsibilities."[52]

"A key challenge across countries is to find solutions to ensure the **protection** of officials involved in procurement **from any pressure and influence**, including political influence, in order to ensure the impartiality of decision making and to promote a level playing field for procurement officers. Key conditions for protection from political influence include:

- Clear ethical standards for procurement officials;
- An adequate institutional framework, budgetary autonomy, human resource management based on merit (e.g. appointment, selection and career development); as well as
- Working independence for procurement officials, where procurement officials are solely responsible for decisions."[53]

"Recourse systems, like audit systems, fundamentally serve a procurement oversight function. They provide a means of monitoring the activities of government procurement officials, enforcing their compliance with procurement laws and regulations, and correcting improper actions. Furthermore, they provide an opportunity for bidders and other stakeholders to contest the process and verify the integrity of the award. For instance, in the United States, any interested party − actual or potential bidder − can file a protest with the Government Accountability Office. There is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies."[54]

United Nations

"Based on a review of internal procurement procedures, the United Nations' Procurement Task Force of the Office of Internal Oversight Services developed a number of recommendations to help prevent corruption in the relationship with bidders, including:

- **Registration**: To be a supplier for the United Nations (UN), registration is required and based upon identified factors, including proven expertise in providing the goods or services, financial stability and capacity to undertake the particular project. However, the declaration is not sufficient if it is not followed by a thorough verification of the information provided by the prospective bidder and its comparison with other sources of information to verify its capacity to participate in the procurement process.
- **The periodic review of vendor status***:* A periodical review of bidders' status helps track whether circumstances have changed after the registration.
- **Assistance to the Investigation Office**: The bidder should be obliged to co-operate or risk breaching the contract or to be suspended if it fails to co-operate (e.g. through the inclusion of a specific clause in the contract of the UN).
- **Performance bond***:* It is a common feature of procurement contracts to lodge or pledge a substantial sum in the event of default in the execution of the contract. In the event of fraud, corruption or significant irregularity on the part of the bidder the performance bond should be automatically forfeited to the UN.
- **Financial disclosure***:* Financial disclosure obligations imposed on officials dealing with procurement should promote a culture of openness in the organisation, supported by a regular verification of the reliability and completeness of the information.
- **Black listing***:* Systems to ensure that adverse findings in relation to a bidder in one mission or

[52] ibid, page 76
[53] ibid, page 79
[54] ibid, page 106

duty station should be automatically disseminated widely among United Nation's agencies.
- **Commercial responsibility**: The UN should join proceedings more systematically when the integrity of a supplier is challenged by competitors, in cases when the organisation is a victim of corrupt acts and could therefore obtain damages.[55]

"Accurate written records of the different stages of the procedure are essential to maintain transparency, provide an audit trail of procurement decisions for controls, serve as the official record in cases of administrative or judicial challenge and provide an opportunity for citizens to monitor the use of public funds. Agencies need procedures in place to ensure that procurement decisions are well documented, justifiable and substantiated in accordance with relevant laws and policies in order to promote accountability."[56]

France

France[57] applies the legal principle of proportionality: administrative actions must be proportionate in a reliable and predictable way to the objectives pursued by the government. In procurement it does so by requiring that information be made public according to the size of contracts.:

- the highest value requirements are published in a broad range of specified international and domestic venues;
- another level of requirements must be published in the French official venue, and may be published elsewhere;
- a third tranche will be published according to the size and importance of the contract; and finally;
- requirements below a specified value are exempt from mandatory publication.

United Kingdom

In the U.K., bidder debriefings are either required or strongly recommended. "Debriefing provides a valuable opportunity for both parties to gain benefit from the process, and thus it is considered a useful learning tool for the parties. Debriefing is also useful for the buyer department or agency because it may:

- Identify ways of improving processes in the future;
- Suggest ways of improving communications;
- Make sure that good practice and existing guidance are updated to reflect any
- relevant issue that have been highlighted;
- Encourage better bids from those suppliers in future;
- Get closer to how that segment of the market is thinking (enhancing the intelligent
- customer role);
- Help establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in the future."[58]

"A Gateway[59] Review is an examination of an acquisition project carried out at key decision points by **a team of experienced people, who are independent of the acquisition team**. There are five types of

[55] ibid, page 84
[56] ibid, page 89
[57] Synthesized from the OECD Report
[58] *Integrity in Public Procurement: Good Practice from A to Z*, © OECD 2007, page 39: reproduced with the permission of the OECD.
[59] Although the OECD material does not show it, Gateway is a trademark: all references should be Gateway™

Gateway Reviews designed by the Office of Government Commerce (OGC) during the lifecycle of a project:

- Up to and including contract award: Gateway Reviews one to three (business justification, procurement strategy, and investment decision);
- Post contract award: Gateway Reviews four to five (readiness for service, and benefits evaluation).

"The review is conducted on a confidential basis for the person who takes personal responsibility for the successful outcome of the project (the Senior Responsible Owner). This approach promotes an open and honest exchange between the acquisition team and the review team. The Gateway reports are frankly written and deal with the strategic, business and personnel aspects of the project, including instances of good practice that may be transferable to other projects.

"Acquisition programmes and procurement projects in central civil government may be subject to the OGC Gateway Process without any minimum financial limits. However, the financial value is one factor to consider when deciding on the level of risk faced by a project, and it is recognized within the Risk Potential Assessment (RPA), which must be completed for each procurement project. The composition of the review team reflects the assessed potential risk of the project, namely in case of:

- **High risk projects**, RPA Score 41 or more: The Gateway Review is undertaken by an independent Review Team Leader (RTL who is independent from the department that carried out the project) with an independent Operations Team;
- **Medium risk projects**, RPA Score 31-40: The Review Team Leader is still independent from the department but the team members are provided by the department (independent from the project);
- **Low risk programmes**, RPA Score less than 31: All the team and the leader are resourced from the sponsoring department but all are independent from the project.

"Each review takes about three or four days. At the end of their investigations, the review team produces a report summarising their findings and recommendations, together with an assessment of the project's status as Red, Amber or Green.

- "Red" status means that remedial action must be taken immediately; but not necessarily stop the project.
- "Amber" status indicates that the project should go forward with recommendations for actions to be carried out.
- "Green" status shows that the project is on target to succeed but may benefit from the uptake of recommendations.

"The Gateway Review Process provides assurance and support for Senior Responsible Owners in discharging their responsibilities to achieve their business aims by ensuring that the best available skills and experience are deployed on the projects; all stakeholders are covered by the project; and the project can progress to the next stage of development or implementation.

"From 2001 to the end of 2004, OGC Gateway Teams conducted over 800 OGC Gateway Reviews covering over 500 projects. The feedback from Senior Responsible Owners has been very supportive."[60]

[60] ibid, page 94

ANNEX G: DETAILED EXAMINATION OF THE PTA AND ITS REGULATIONS

During our interviews, we received considerable information about where people see significant operational issues arising form the provisions of the PTA and its Regulations. In the two tables following, we provide the full text of both documents, together with the comments received. We also provide review team observations.

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
Short title	
1. This Act may be cited as the *Public Tender Act.*	*There is no Purpose clause.* *Of the other three Atlantic provinces: Nova Scotia has no similar legislation; the New Brunswick legislation also has no purpose clause; Prince Edward Island provides in its Public Purchasing Act that:* *"The object of this Act is to provide for the procurement of supplies in the public sector in accordance with the following principles:* *(a) suppliers have equal access to opportunities;* *(b) fair and open competition among suppliers is maintained;* *(c) the best quality, service and price for supplies is obtained."*
Definitions	
2. In this Act	
(a) "goods or services" means goods or services provided to government funded bodies;	Need better definition of 'good' and 'service' – perhaps tie to definitions in the GPA Act *(which also could be improved). While there could be a reference to the definition in the Sale of Goods Act, we find that definition does not add clarify: it says that "goods includes personal property other than things in action and money and includes natural products of the land, industrial growing crops, and things attached to or forming part of the land which are greed to be severed before sale or under the contract of sale". There is no standard definition of "services'*
(b) "government funded body" includes	Can this be clarified and simplified?
(i) a department of the government of the province, or in the case where goods or services are acquired on behalf of a department of the government of the province by the Government Purchasing Agency, the Government Purchasing Agency,	
(ii) a company in which not less than 90% of the issued common shares are owned by the Crown,	
(iii) a corporation established by an Act under which the corporation is made an agent of the Crown,	
(iv) a municipality or local service district under the *Municipalities Act*, the City of Mount Pearl as established by the *City of Mount Pearl Act*, the City of St. John's as established by the *City of St. John's*	

TEXT OF THE ACT	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
Act and the City of Corner Brook as established by the *City of Corner Brook Act*,	
(v) a school board established under the *Schools Act*,	
(vi) an agency or authority of the province,	
(vii) a hospital included in the Schedule to the *Hospitals Act*, and	
(viii) a board, commission, corporation, Royal Commission or other body listed in the Schedule to this Act or added to the Schedule by order of the Lieutenant-Governor in Council,	
(c) "head of the government funded body" means	
(i) in the case of a department of the government, the deputy minister of the department, and	
(ii) in the case of a government funded body other than a department of the government, the person responsible for the administration of the government funded body;	
(c.1) "lease" means a transfer of the possession of leased space for a fixed period of time at a specified rent and for the purpose of this Act includes a renewal of a lease;	
d) "person responsible for the administration of the government funded body" means the chief executive officer, or in the absence of a chief executive officer the person who has the duties and functions of that position, except that in the case of a government funded body described in subparagraph (b)(iv) it means the council or local service district committee;	*Other statutes refer to Deputy Ministers*
(e) "preferred bidder" means the bidder submitting the lowest qualified bid;	*'Preferred', although well defined here, carries the connotation of subjective decisions.* *There are some indications that as a result of this definition, any given tender process can only result in one contract being awarded (or several contracts, each for distinct portions of a multi-item tender). If this is the case, it could inhibit effective procurement – e.g. where a series of contracts for one commodity would provide better value than standing offers.*
(f) "public work" means the construction, extension, enlargement, repair, maintenance or improvement at the expense of a government funded body of a building, structure, road or other work, whether of the preceding kind or not, in, under or over real property and includes the acquisition by a government funded body by purchase, lease or otherwise of a public work specifically constructed for the purpose of that acquisition;	Can this be simplified and clarified? *The inclusion of 'lease' in this section risks possible confusion. If a supplier constructs a building specifically for lease to the government, but without having a specific lease in mind, when the government seeks to lease that building, is it covered by the public works rules, or the leasing rules? Further, why would the lease in the two cases be dealt with differently by the Act?*
(f.1) "qualified bid" means a bid that meets the specifications of the tender;	*'Qualified', although well defined here, is used elsewhere in procurement, and we believe sets the province on an*

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	opposite course to the rest of the country. In terms of a BID, it is used to describe a bid where the bidder has attached qualifications (e.g. proposed changes to terms and conditions) to the bidder: usually, when used in that sense, a 'qualified bid' is deemed to be not compliant, and cannot be considered for contract award. When used in the context of a BIDDER, 'qualified refers to whether the bidder has the qualifications to do the job. In mixing the two ideas together, we believe that the legislation has created a definition that a court might well find confusing and not capable of application.
(g) "services" does not include legal, engineering, architectural, accounting, land surveying, banking or insurance services, voice telephone services, or other services that require the giving of an opinion, creativity, the preparation of a design, or technical expertise; and	Definitions should be positive/inclusive, not negative/exclusive. 'Voice telephone services' is not clear, and is likely outdated due to constant change in telecommunications *(e.g. we understand that with a Cabinet decision in 1998-99 the province does not include mobile telephone services in this definition, and as the world moves to voice communication over the Internet additional issues may arise).* *The inclusion of 'technical expertise' makes this definition quite unclear: virtually any 'other service' may require some degree of technical expertise.* *The inclusion of 'creativity' also creates difficulties: virtually any contract for services can be found to require at least some degree of creativity – making it possible to interpret this definition as excluding virtually all services from the requirements of the PTA.*
(h) "tender" means a call for public tender as prescribed by the regulations.	The Regulations do not provide a useful definition. 'Tender' is a word that has many meanings in the public procurement environment: as used in Newfoundland, it is different from e.g. the Agreement on Internal Trade. *For probably centuries, 'tender' has been interpreted as meaning 'offer', and so an invitation to tender is an invitation to make an offer. Newfoundland and Labrador, in contrast, gives 'tender' at least three meanings: (i) it is a call for offers; (ii) it is the name of the document the bidder then submits; and (iii) it is then the actual contract that is signed. So, the series of events is (i) issue a tender, (ii) receive and evaluate tenders, and then (iii) award the tender. We suggest more clarity is required: (i) call for bids, (ii) receive and evaluate bids, and (iii) award a contract.* *Private industry has largely moved to the concept of one document – the call for bids: subsequently, clauses in the document makes it clear whether what is being called for is a tender, request for proposal etc.*
Labrador Inuit rights	
2.1 This Act shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act* and, where a provision of this Act is inconsistent or conflicts with a provision, term or	

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
condition of the *Labrador Inuit Land Claims Agreement Act,* the provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act.	
Tenders required	There is considerable concern that the tender approach applied in the province – decisions based on low price – does not give sufficient weight to quality and other factors, and results in poor products or performance. People are afraid of tenders because of the quality and potential losses consequences; they may use a tender where an RFP would be more appropriate, due to the onerous process required to obtain approval to issue an RFP. Suppliers are frustrated by the tender - based on low price - approach: they feel that it does not allow them to showcase their value-added services – the very services that they use to compete with each other in the non-government marketplace.
3. (1) Where a public work is to be executed under the direction of a government funded body or goods or services are to be acquired by a government funded body, the government funded body shall invite tenders for the execution or acquisition.	The various thresholds to call for tenders do not appear to have any rationale: $10K total contract value for goods and services, $20K total value for public works, $10K annual cost for leases,; the head of a government-fended body may dispense with a call for tenders in view of the nature of the work for a 'work or acquisition' up to $25K, but for leases to an annual cost of $30K.
(2) Notwithstanding subsection (1), the government funded body is not required to invite tenders	When the dollar thresholds were set, they may have represented a lot of money – but with inflation the result has been putting handcuffs on operational staff. *The most recent amendments to the PTA were in 1999. According to the Bank of Canada inflation calculator, $10,000 in 1999 is equivalent to approx. $12,218 today. Put another way, a threshold of $10,000 in 1999 represents an actual threshold of $8,184 today – a decrease of 18%.*
(a) where the estimated cost, in the case of goods or services is not more than $10,000, and in the case of a public work is not more than $20,000, exclusive of goods and services tax imposable under Part IX of the *Excise Tax Act* (Canada) and retail sales imposable under the *Retail Sales Tax Act;*	An approach that relies on estimated costs is at risk if there is no direction as to how costs are to be estimated. What constitutes a legitimate estimate, and who is responsible for arriving at it? If estimated value is based on historical information (e.g. previous purchase), is there a limit on the time? There has to be a requirement that all value estimates are good and valid estimates.
(b) where the estimated cost of the work or acquisition is not more than $25,000, exclusive of tax imposable under Part IX of the *Excise Tax Act* (Canada) and tax imposable under the *Retail Sales Tax Act,* and it appears to the head of the government funded body that in view of the nature of the work or acquisition it is not advisable to invite tenders;	Difficult to understand and interpret 'nature of the work'. *'Appears to the head…' is vague and could be interpreted differently by not only different departments and agencies, but also successor agency heads.* Does not permit situations where higher value requirements should not be subject to full public disclosure (*e.g. perhaps plans for a new penitentiary)* *What does "acquisition' mean? It is not a defined term under the Act; previous section 3(2)(a) references goods and services but not acquisition*

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
(c) where the work can be more expeditiously or economically executed by the employees of the government funded body or, with the prior approval of the Treasury Board, the employees of another government funded body,	*Should perhaps be expanded to include the provision of goods and services.* *Why is Treasury Board approval required in order to have public servants carry out work?* *There is an interesting sequence: the default action when a need is identified is to call for tenders (s.3(1)), with using public sector resources an exception: we would have expected the reverse, which is that the initial decision is whether the government will 'make or* buy' – and when the decision is to buy, then the procurement rules apply.
(d) in the case of a pressing emergency where the delay resulting from inviting tenders would be injurious to the public interest;	It is not clear what 'injurious to the public interest' means. When coupled with the undefined requirement for 'emergency', this exception becomes very unclear. *How does a 'pressing emergency' differ from an 'emergency'? The AIT does not reference 'emergency – instead it refers to when 'an unforeseeable situation of urgency exists': what is the difference between the three terms?* Not all urgent situations are 'emergencies' – e.g. if a road needs repairs, and has to be closed – and the closure will force traffic to detour 50 km – how do you handle that? Is it an 'emergency'? *If a ferry, on its last run of the night, is found to need repairs – and if the repairs need to be made so that the ferry can start its morning run at 7 am – does that qualify for the use of this exception? It would seem clearly to meet the public interest test – but not most commonly accepted definitions of an 'emergency' (e.g. the federal government defines 'emergency' as* *A pressing emergency for the department/agency where delay would be injurious to the public interest may involve:* *1. actual/imminent life-threatening situation;* *2. disaster endangering quality of life or safety of Canadians;* *3. disaster resulting in the loss of life;* *4. disaster resulting in significant loss/damage to Crown Property.* *(Source: Federal Treasury Board Contracting Policy Notice 2007-04 - Non-Competitive Contracting: Sept. 20, 2007* *Saskatchewan defines 'emergency' as "a case of emergency exists: (a) if an act of nature causes the need for an immediate acquisition of supplies; or (b) if supplies vital to the continuation of a program of a public agency: (i) are needed immediately; and (ii) the program is necessary for public safety or public health." Purchasing Act Regulations, s. 12.1*

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
(e) where the dealer, supplier or contractor providing the work or acquisition is the only source of that work or acquisition;	Geographical issue of how broad the definition of 'only one supplier' is – and whether such a definition should be linked to the value of a procurement. *Effectiveness of this provision depends on the quality of the decision to acquire a particular product or service. It is possible to define virtually any requirement in such a way that there is 'only one supplier'. The Regulations could be used to clarify – but do not.*
(f) where the government funded body has, in writing, delegated its authority to invite a tender to another government funded body which has invited a tender on behalf of the 1st government funded body and has awarded the contract in accordance with the Act;	This provision, while clear, is restrictive, and may preclude a GFB from using effective procurement techniques (e.g. if a group of GFBs wish to have a common agent procure on their behalf, and that agent is not a government-funded body.)
(g) where an acquisition is for the purpose of resale or is incorporated into a product for resale by a government funded body named by regulation;	*What is the meaning of this? What regulation is referenced (e.g. there are no such names in the PTA Regulations)? To the extent that other exceptions are subject to reporting, why is this one not?*
(h) where set rates have been established by the board acting under the *Public Utilities Act* ;	*We have not attempted to examine whether this exception is still valid or required. We note, however, that with telecommunications regulated under the Public Utilities Act, and given the many rapid changes in the telecommunications industry, this provision could at some point become problematic if there is market competition between regulated and non-regulated suppliers.*
(h.1) where the work involves emergency acquisition of parts, repairs or maintenance, or unknown work identified during refit, or where a lease is required on an emergency basis, in relation to ferry vessels operated by the government;	This exception is not broad enough to meet the operational requirements of the ferry service; *it may not be broad enough for other requirements in the general transportation sector (e.g. highway equipment, air ambulance services).*
(i) where, in the opinion of the Minister of Industry, Trade and Technology. and subject to the approval of the Lieutenant-Governor in Council, the work or acquisition is for an economic development purpose; or	The department has been renamed. *We assume that there is an Interpretation Act or similar in the province, that has transferred this authority to another minister.* *The recent changes to the Atlantic Procurement Agreement removed the provision for economic development initiatives. Since such economic development initiatives are likely to involve significant value they will likely be subject to the Agreement on Internal Trade, which provisions should be referenced to ensure no conflict.*
(j) where, in the opinion of the head of the government funded body, inviting a tender would not achieve the best value and the government funded body has, through the minister responsible for it, obtained the approval of the Lieutenant-Governor in Council to carry out a request for proposals, as prescribed by the regulations, instead of a tender call.	*Most other jurisdictions do not impose such a rigid requirement for approval. To the contrary, most jurisdictions permit procurement to be carried out under virtually any accepted method. In New Brunswick, the Public Purchasing Act requires calling for tenders – but the Regulations provide for 'the evaluation of tenders where price is the main criterion' (i.e. a traditional tender) AND 'the evaluation of tenders where criteria other than price is used' (i.e. a request for proposals).*
(3) In relation to the prescribed goods and services that are of a nature that they are tendered for not	*There are no such references in the Regulations. Since the PTA already authorizes the making of Regulations, it is not*

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
more than $10,000, exclusive of goods and services tax imposable under Part IX of the *Excise Tax Act* (Canada) and retail sales tax imposable under the *Retail Sales Tax Act,* the Lieutenant-Governor in Council may prescribe that this Act does apply and tenders are required, notwithstanding paragraph (2)(a).	*clear why this specific provision exists separately.*
Tenders when leasing	The first approach is to use tenders as required by the Act. The general problem is that the Act does not provide adequately for special circumstances. Working in Labrador is an issue, due to short construction season, lack of qualified tradespeople, and difficulties in obtaining land. Other issues include; low value leases; situations of urgency; changes of client programs and accommodation requirements during construction; renewals of leases, and change orders within a lease project. The general lack of flexibility makes it difficult to respond to rapidly-changing situations. It is likely costing the government considerable money, and approval/requirements are consuming perhaps 40% of staff time when they already have more operational work than can reasonably be handled by leasing officers (officers who might reasonably handle 6 per year are being asked to do 30). Option: provide greater flexibility throughout the process, with more discretion within the department.
4. (1) Where a government funded body requires space and intends to lease the space, the government funded body shall in the prescribed manner invite tenders for the leasing of the space required unless	There are few problems getting into original leases – it is after that where issues arise. The process of actually issuing a tender is long: - client determines operational need: sometimes (e.g. new operation) does not know; - leasing experts and client work together to develop requirements and develop actual statement of needs that potential bidders can respond to; - assemble full tender documentation and obtain client approval; - issue call for tenders – usually approx. 3 weeks to receive bids; - close and identify low bid; examine property to determine all relevant factors e.g. zoning compliance, ownership, conditions of property, adequacy of offered space; - develop actual floor plan: landlord and architects lay out the building; - send design proposal to client for approval (invariably need 2 or 3 iterations to arrive at acceptable design); - carry out required construction – can take 3-6 months or more to complete; - then move the client in, and fit up with telephones, IT services etc.; - may take 6 months – 9 months is likely average – and can take a year to complete the whole process.

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
	General issue with s.4: there is very little or no discretion to do anything: can't change even minor parameters of a signed lease without Lieutenant-Governor in Council approval. One problem is that such changes usually involve construction – and while the PTA provide for change orders for construction, legal opinion is that with the definition of 'lease' in the Act, construction change order authorities during the course of initial fit-up cannot be used. Possible work-around would be to enter into a new lease, hoping that it is under the thresholds to call for tenders and therefore can be sole-sourced to existing landlord *(this is an example of where additional flexibility within the Act should be put in place)* *Option: amend the Act to provide that once a lease has been signed, any construction-related issues relating to the initial fit-up will be treated as public works/construction projects, not leases.* *Note that s.4(6) does provide that 'leasehold improvements shall be considered a public work: we understand that legal advice is that this does not apply to construction issues during initial fit-up.*
(a) the estimated rental value of the space is not more than $10,000, exclusive of goods and services tax imposable under Part IX of the *Excise Tax Act* (Canada) and retail sales tax imposable under the *Retail Sales Tax Act;*	$10K threshold is very low – when originally put in the Act it 'bought' a lot more: in St. John's today, with annual lease rates of approx. $25/square foot, it represents only 400 sq. feet. To tender for small values, can take a week to assemble tender documents, then bid and award time – can take 4 weeks for a very small transaction. Options: give discretion to Deputy Head – or put $ limit in Regulations, where it can be changed more easily than an Act. *Goods, services and construction procurements are valued at their total cost – leases is annual cost only: gives the anomaly that one can lease for relatively large amounts over several years, without calling for tenders.*
(b) the estimated rental value of the space is not more than $30,000 exclusive of goods and services tax imposable under Part IX of the *Excise Tax Act* (Canada)and retail sales tax imposable under the *Retail Sales Tax Act* , and it appears to the head of the government funded body, in view of the nature of the lease, that it is not advisable to invite tenders;	*In leasing, what does 'nature of the lease' mean? Is this supposed to be a reference to what the leased facilities are to be used for – i.e. the nature of the program?*
(c) the space is acquired from another government funded body at fair market value; or	*What is 'fair market value' for an acquisition from another GFB? Are there rules, which specify how GFBs must set their prices?*
(d) there is an urgent need for the government funded body	Urgency can only be applied in two specific circumstances: all others require call for tenders. E.g. what if the Premier wants to create a new organization or office and have it working immediately – and space is needed?

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
	How does 'urgent need' used here relate to the 'pressing emergency"? *It is interesting that the driver is the need to vacate, not associated with a consequent need to find other premises.*
(i) to vacate existing space and insufficient time is available to invite tenders, or	Urgent/emergency situations can be more than a requirement to 'vacate'. A building burned in Goose Bay: used emergency authority to accommodate client – have been asking the client for new definition of program requirements, still not received – emergency lease is not 2 months over the PTA-prescribed limit of emergency lease.
(ii) to vacate existing space because the continued use of that space is potentially injurious to the health or safety of employees of that government funded body or of the public,	
and a lease entered into because of conditions referred to in subparagraphs (i) and (ii) shall not exceed 6 months at which time an invitation to tender shall be issued.	Problem is that it can take months (up to a year) to prepare a tender package for issue. Can also seek Lieutenant-Governor in Council approval to extend the emergency lease – but that takes considerable time *(and what if that approval is denied?)* Options: amend the Act to permit emergency leases for perhaps up to one year: government can then enter into quick lease, e.g. 4 months, with option to renew on a monthly basis as required until new facilities available *(would require amendment to change order provisions of the PTA, to remove requirement for Treasury Board approval each time an extension is made)* Alternative: amend the Act to permit emergency/urgency related actions 'as soon as practicable under the circumstances'. *Wording of the Act is strange: implies a tender call shall be issued after 6 months (and not before?) – at which time the authority for the emergency lease would have expired.*
(2) The Lieutenant-Governor in Council may exempt particular leasing situations from the application of this section where, in his or her opinion, the government funded body reasonably requires a particular space.	*Highly restrictive – reference to 'a particular space' – what if the determination is that the government simply requires new space (e.g. creation of a new office or function)?* *Also subjective – what does 'in his or her opinion' mean?*
(3) For the purpose of this section "estimated rental value" means the annual rental value of the space to be leased estimated on the basis of the market rental value.	*Would this better be presented in the 'definitions' section? Should perhaps look at the entire spectrum of public procurement (goods, services, construction, leasing) and ensure that proper definitions ensure complete coverage.* If a short-term lease is required – e.g. 6 months, total cost $8,000 – the Act says that this has to be costed at its annual rate, which brings the total to $16,000 – and a public tender is required – but the total cost of the lease is significantly less than the core provision, s. 4(1)(a), which requires public tenders for lease value greater than $10K. Option: define the value to be the actual value; provide that the Act applies to the total value of a lease.
(4) A lease for space that was originally publicly tendered and that contains a provision for a renewal option may, where the area of the renewed space is	Highly limiting, because of requirement to remain within terms of the original lease; those terms include the price, which is highly unlikely to remain the same or decrease after

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
less than or the same as the space leased in the original lease, be renewed with the approval of the Treasury Board, or the area of space held under a lease may be reduced with the approval of the Treasury Board,	a multi-year period. Option: amend the Act to provide that the government may 'remain within the terms of the original lease, with the exception of price'.
(a) in accordance with the terms of the original lease; or	Federal government has an over holding provision: when a lease ends, if neither party 'says anything', the lease can simply continue open-ended with same terms and conditions, rental rates etc. *It would seem likely that for any such extension, some refit/renovation will be required – how is that to be addressed?*
(b) on terms more favourable to the government funded body where, in the opinion of the head of that government funded body those terms do not exceed the fair market value for that leased space.	'More favourable to government' rarely if ever happens.
(5) A lease for space that was not originally publicly tendered or that was originally publicly tendered without a provision for a renewal option and a lease for an increase of the area of leased space may be renewed or entered into with the approval of the Lieutenant-Governor in Council	If there is a 5 year lease in place for one million square feet; the occupant department changes its operations and needs an additional 200 sq. feet , Lieutenant-Governor in Council approval is required – an administrative nightmare. If the provision for renewal was included in the original leasing process, and the client department has the required funds available, why is TB approval required? Wording of s.5 is difficult to apply to leasehold requirements. Option: give more discretion to the Deputy Head
(a) in accordance with the original terms of the lease; or	
(b) on terms more favourable to the government funded body where, in the opinion of the head of the government funded body, those terms do not exceed the fair market value for that leased space.	More favourable to government rarely if ever happens.
6) Leasehold improvements made by a government funded body shall be considered to be a public work.	
Change orders and extensions	This section might be improved if there was more clarity as to who has the authority to do what – specially to deal with contingencies.
	Contracts for professional services arrived at after a Request for Proposals are often more vulnerable to changes in scope, duration and price than contracts arrived at after a tender process. Under the Guidelines, departments can incur cost overruns up to 110% of initial contract value, above which Treasury Board approval is required.
5. (1) A government funded body may authorize change orders within the requirements of a contract or authorize extensions of the contract so long as	*The general approach places little control over potentially significant change orders. For change orders over proscribed limits, the Treasury Board must be informed by departments after the fact (for departments), but obtains no information from other government-funded bodies. There are significant risks of (i) procurements with poor original*

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
	cost estimates increasing significantly in value, or (ii) contracts being amended to include work significantly outside scope, with no one at the government level knowing what is going on in sufficient time to possibly take preventive or corrective measures.
(a) in the case of a contract up to the value of $100,000 a change order, extension or the cumulative value of them does not exceed the value of $15,000;	This provision permits an original contract of $5,000 – even $1.00, with subsequent amendments of $15,000 – to a total value that if established at the start of the process would have required a public call for bids under the PTA *(or the new Atlantic Procurement Agreement, if goods).* Option: tie change order levels to the value of the original contract.
(b) in the case of a contract of a value equal to or greater than $100,000 but less than $500,000, a change order, extension or the cumulative value of them does not exceed the value of $15,000 or 10% of the value of the original contract, whichever is greater; and	*The mathematics in sections (b) and (c) are interesting. A contract for $999,999 can be amended without reporting for $50,000: a contract for $1,000,001 amended for the same amount must be reported. That said, where such limits are used, cases like this will always arise.*
(c) in the case of a contract of a value equal to or greater than $500,000, a change order, extension or the cumulative value of them does not exceed the value of $50,000 or 5% of the value of the original contract, whichever is greater,	
subject to the prior approval of the head of the government funded body.	The readiness of deputy heads to make appropriate decisions can depend on what department they are in. Getting DM approval in advance can be a problem – the DM may not have a lot of choice, so what is the value-added benefit of the time and effort to obtain 'approval'?
(2) A government funded body may authorize change orders within the requirements of a contract or authorize extensions of the contract, where the value exceeds the limit under subsection (1), with the prior approval	
(a) in the case of a department of the government, of the deputy minister and those changes shall be reported to the Treasury Board annually; and	The reporting requirement does not provide sufficient flexibility – the administrative consequence in terms of proper reporting of reasonable operational decisions is too great. *Annual reporting poses a significant risk that very large change orders will be approved – and possibly become known to the public – long before the Treasury Board is made aware of them.*
(b) in the case of a government funded body other than a department of the government, of the board of directors, the school board or the council or local service district committee of the government funded body.	Since this is all under the same legislation, why do government-funded bodies other than departments not have to notify the Treasury Board? *Without such a requirement, the TB has no overview of all activities under the Act.*
Delegation of approval	
7. (1) A deputy minister of a department of the government may delegate to a senior official in the department, appointed by the deputy minister,	

TEXT OF THE ACT	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
power to approve change orders, extensions or increased cost under section 5.	
(2) In relation to a government funded body other than a government department,	
(a) the head of the government funded body may delegate, subject to the approval of the government funded body, power to approve change orders or extensions under subsection 5(1); and	
(b) the government funded body may delegate, subject to the approval of the Lieutenant-Governor in Council, power to approve change orders or extensions under subsection 5(2).	
Tender not awarded to preferred bidder	
8. (1) Where tenders are invited in accordance with this Act and it appears to the government funded body inviting the tender not to be expedient to award the contract to the preferred bidder, the head of the government funded body shall report to and obtain the authority of the Lieutenant-Governor in Council before awarding the contract to a person other than the preferred bidder.	We were told that this provision has not been used by the GPA for the past approx. 15 years. *In the context of Canadian contract law, this process if applied would be clearly contrary to accepted practice, and would leave the government vulnerable to legal action. Once a competitive selection process is launched, the government commits to follow it to its conclusion (a contract to the winner), or may choose to cancel the process – but NOT simply award to someone else.* *Note that with this wording, the possibility exists that the supplier that does get the contract would not even have had to bid.* *This section as written may be too wide, as the use of the word "person" could be seen to include non-Bidders. It would be perfectly lawful under competitive bidding law for an Owner to decline to award to the lowest priced Bidder (i.e., the "preferred Bidder" under the P.T.A.) if there were valid reasons why another Bidder offered better value. However, it would not be lawful for any Owner to skip over the lowest priced Bidder and award to another Bidder unless the other Bidder scored higher in evaluation on the disclosed criteria. It would also be unlawful for any Owner to award to a non-Bidder without the prior cancellation of the competition.*
(2) Notwithstanding subsection (1), a head of a government funded body may, where authorized by the regulations to do so and as prescribed, reject the preferred bidder and award the contract to a person other than the preferred bidder.	*In the context of Canadian contract law, this process, if applied, would be clearly contrary to accepted practice, and would leave the government vulnerable to legal action. Once a competitive selection process is launched, the government commits to follow it to its conclusion (a contract to the winner), or may choose to cancel the process – but NOT simply award to someone else.* *Note that with this wording, the possibility exists that the supplier that does get the contract would not even have had to bid.*

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
(3) Where a contract is awarded under this Act by a government funded body to a person other than a preferred bidder, the head of the government funded body shall inform the Chief Operating Officer of the Government Purchasing Agency, who shall send a summary of the successful tender together with a report including the reasons why the tender was so awarded, to the Speaker of the House of Assembly for tabling,	*In the context of Canadian contract law, this process, if applied, would be clearly contrary to accepted practice, and would leave the government vulnerable to legal action. Once a competitive selection process is launched, the government commits to follow it to its conclusion (a contract to the winner), or may choose to cancel the process – but NOT simply award to someone else.* *Note that with this wording, the possibility exists that the supplier that does get the contract would not even have had to bid.*
(a) if the House of Assembly is then in session, within 30 days after receipt of notification of the awarding of the contract by the government funded body; or	
(b) if the House of Assembly is not then in session, within 30 days from the opening of the next session.	*This risks considerable delay in making information 'public'. We understand that as of February 2008 the Assembly had not been in session for some seven months. Certainly by the time it opens March 10, 2008, it will not have sat for 5months since the election of October 9, 2007. When the Assembly reconvenes, it may have sufficient matters of pressing importance to deal with, that any report on procurement activities will receive scant attention.*
(4) This section does not apply where a tender has been invited but in relation to which no contract is awarded.	*It is not clear what this means, or what its purpose is.*
(5) The Chief Operating Officer of the Government Purchasing Agency may review the grounds on which a government funded body awarded a contract to a person other than a preferred bidder, including past practices of the government funded body in making such an award, and may express his or her opinion to the head of the government funded body with respect to the sufficiency of the grounds for awarding the contract to a person other than a preferred bidder.	*If the COO finds problems with a procurement, this process inform/comment provision may produce benefits, in terms of changing the performance of the GFB – but there is no requirement that comments of the COO be acted on – and no one other than the COO and the GFB knows that the comments have been made.*
Where no tender called	
9. Where a tender is not required to be invited because of paragraph 3(2)(a) or (b) or paragraph 4(1)(a) or (b), the government funded body shall, before a public work is to be executed under the direction of the head of a government funded body, or goods or services are to be acquired by a government funded body, or space is to be leased by a government funded body,	
(a) obtain quotations from at least 3 legitimate dealers, suppliers, contractors or lessors by direct quotation; or	In rural areas, it can be hard to find one supplier, let alone 3 who will quote. We heard several stories of public servants spending what appeared to be inordinate amounts of time trying to get three quotations. Suppliers are frustrated by the time and cost of providing

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
	quotes – and with public servants seeking quotes who do not seem to know what they are asking for. The quote system also exposes suppliers to proportionally high delivery costs. The requirement to obtain three quotes is too onerous – there should be e.g. a dollar value below which departments can just go out and buy. Option: provide that department must *seek* quotes from at least three legitimate sources, and if only one is received may issue a contract where the government will receive good value.
(b) establish for the circumstance a fair and reasonable price for the public work, the goods or services or the leased space through direct quotation substantiated by reference to trade catalogues, price lists or in a manner that the government funded body considers advisable.	What constitutes a 'fair and reasonable' price? There is considerable possibility that different organizations, or even different people within one organization, will apply different interpretations. *We were told that as a result of observations by the Auditor General, use of this section has fallen off significantly, and people are getting three quotes for very small amounts. We were also told that legal advice is that the structure of this provision establishes a hierarchy – departments must try to obtain three quotes, and only if they cannot, can they then use provision (b). In our experience, a provision that one may do (a) or (b) means just that – a clear choice between equal provisions.*
Absence of bids	
9.1 (1) Where no bids are received following a public tender call, the head of the government funded body shall issue a 2nd public call for bids unless the delay resulting from inviting tenders a 2nd time would be injurious to the public interest, in which case the head of the government funded body may execute the public work or acquire the goods or services or lease the leased space in accordance with paragraphs 9(a) and (b).	*What does 'no bids are received' mean? If bids are received, but all are found to be non-compliant, does this provision apply? In law, if there are 'bids' that do not meet the mandatory requirements of a call for bids, then there are in fact no bids – but how many people know this?* *What is 'injurious to the public interest'?*
(2) Where no bids are received following 2 successive public tender calls, the head of the government funded body may execute the public work or acquire the goods or services or lease the leased space in accordance with paragraphs 9(a) and (b).	Under the PTA, this poses the risk that the GFB could approach anyone to negotiate a sole-source contract – there are no criteria in the Act or Regulations.
No tender situations to be tabled	
10. (1) Where a public work is executed or goods or services are acquired or space is leased by a government funded body and a tender is not required to be invited because of paragraph 3(2)(b), (d) or (e), (i) or (j), 4(1)(b) or (d) or subsection 4(4) or (5), the head of the government funded body shall inform the Chief Operating Officer of the	

TEXT OF THE ACT	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
Government Purchasing Agency of the public work or goods or services or lease and the Chief Operating Officer shall send a report indicating the public works so executed or the goods or services so acquired or the space so leased and the reasons why the tender was not invited, to the Speaker of the House of Assembly for tabling,	
(a) if the House of Assembly is then in session, within 30 days after receipt of notification of the awarding of the contract by the government funded body; or	
(b) if the House of Assembly is not then in session, within 30 days from the opening of the next session.	*This risks considerable delay in making information 'public'. We understand that as of February 2008 the Assembly had not been in session for some seven months. Certainly by the time it opens March 10, 2008, it will not have sat for 5 months since the election of October 9, 2007. When the Assembly reconvenes, it may have sufficient matters of import to deal with, that any report on procurement activities will receive scant attention.*
(2) The Chief Operating Officer of the Government Purchasing Agency may review the grounds on which a government funded body determined that a tender was not required to be invited, including past practices of the government funded body in making such a determination, and may express his or her opinion to the head of the government funded body with respect to the sufficiency of the grounds for not inviting a tender.	
Information respecting a tender	
10.1 (1) Where a tender is invited by a government funded body, the government funded body shall, at the time the tender is invited, provide the Chief Operating Officer of the Government Purchasing Agency	
(a) with information respecting the tender invitation in the form required by the chief operating officer; and	Why is this requirement apparently immediate (although no time frame is specified), while 9(b) following has a time frame?
(b) within 30 days of awarding a tender, with information respecting the award of the tender including the name of the successful bidder and the amount of the contract.	Is monthly reporting required? It is clearly different from the reporting requirement to the House of Assembly under s. 10(1), where no timeframe for reporting of exceptions by GFBs to the COO of the GPA is specified Why is similar reporting not required for contracts with External Consultants?
(2) The Chief Operating Officer of the Government Purchasing Agency shall make available, upon request, the information submitted under subsection (1).	Make available to whom?
Confirmation of compliance	

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
10.2 The head of a government funded body shall, with respect to an award of a contract arising out of an invitation to tender, provide a confirmation to the Chief Operating Officer of the Government Purchasing Agency, in the form he or she may require, that the contract was awarded in accordance with this Act.	*Why is there no similar requirement for contracts with External Consultants?*
Tenders public	
11. Tenders for public works, goods or services and leases called under this Act shall be opened in public at the prescribed time and place.	*The modern trend of procurement legislation is to place such requirements into policy where there can be more flexibility in particular cases.* There is no statement either here or in the Regulations of what constitutes 'public opening'. Practices are uneven across government-funded bodies, frustrating suppliers. This is a particular problem for the construction industry. In it, bidders need to know as soon as possible what their chances of winning any given contract are – because when they bid, they must have available contract security and any given company only has access to so much contract security. This means that every time a construction company bids for a particular job, it limits its ability to bid for other work until the contract for the particular job has been awarded. When a public bid opening includes reading out the various tender prices, a company can determine right away whether it has a chance for that job, and adjust its bidding strategy for other opportunities accordingly. When bid prices are not read out, the bidders are left in limbo.
Regulations	
12. (1) The Lieutenant-Governor in Council may make regulations	
(a) defining terms used in this Act;	*What is the relationship between a term defined in the Act itself, and one defined in the Regulations?*
(b) for naming a government funded body under paragraph 3(2)(g);	
(c) for the purpose of paragraph 3(2)(j);	
(d) respecting the terms under which a deputy minister may delegate his or her power under section 7;	
(e) respecting the establishment and use of a registry of products manufactured in the province; and	
(f) generally to give effect to the purpose of this Act.	
(2) The Lieutenant-Governor in Council may by order add a body to the Schedule to this Act for the purpose of subparagraph 2(b)(viii).	

TEXT OF THE ACT	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
Schedule	
Agricultural Products Marketing Board	*We were told, but have not sought to confirm, that this list is significantly out of date. It needs to be updated – but perhaps it would be better – easier and faster to update – if moved to the Regulations?* *A way should perhaps be found to add the House of Assembly to the list, since it is now subject to the PTA. Potential suppliers to the government should not be expected to search multiple statutes to find out what rules apply to whom.* *In fact, it must be clear somewhere in the AIT that it applies to ALL public organizations, people etc. The AIT, for example, does not apply to the Premier of a province, although it does apply to the Premier's Office.*
Alcohol and Drug Dependency Commission	
B.L.C. Building Corporation Limited	
Bell Island Hospital Building Corporation Limited	
Board of Governors of the Avalon Community College	
Board of Governors of the Cabot Institute of Applied Arts and Technology	
Board of Governors of the Central Community College	
Board of Governors of the Eastern Community College	
Board of Governors of the Fisher Institute of Applied Arts and Technology	
Board of Governors of the Labrador Community College	
Board of Governors of the Newfoundland and Labrador Institute of Fisheries and Marine Technology	
Board of Governors of the Western Community College	
C.A. Pippy Park Commission	
Children's Hospital Corporation	
Corner Brook Hospital Buildings Corporation Limited	
Fisheries Loan Board of Newfoundland and Labrador	
Grace Hospital Extension Corporation Limited	
Health Sciences Complex	
Hotel Buildings Limited	
Memorial University of Newfoundland	
Newfoundland Hardwoods Limited	
Newfoundland Hospital and Nursing Home Association	
Newfoundland and Labrador Housing Corporation	
Newfoundland and Labrador Liquor Corporation	
Newfoundland Medical Care Commission	

TEXT OF THE ACT	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
Newfoundland and Labrador Municipal Financing Corporation	
Northern Hospitals Buildings Corporation Limited	
Pepperrell Hospital Reconstruction Corporation Limited	
Public Libraries Board	
St. John's Home Care Program	
St. John's Infirmary Building Corporation Limited	
Workers' Compensation Commission	
The college established under the *College Act, 1996*	

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
Short title	
1. These regulations may be cited as the Public Tender Regulations, 1998.	*The Act or Regulations should build in differences between departments – reflect their flavour, and permit different approaches to procurement according top operational requirements.* *The House of Assembly Accountability, Integrity and Administration Act already recognizes by statute the need for such differences. If the House might have requirements that cannot be met under the PTA, it would seem reasonable that across the broad range of GFBs other requirements to be different will exist.*
Definition	
2. In these regulations "Act" means the Public Tender Act .	
Call for tenders	
3. (1) Where a tender is required to be invited under section 3 or 4 of the Act, the government funded body shall call for tenders	*This section largely mirrors the requirements of the Agreement on Internal Trade (AIT) – with the significant exception that the definition of 'tender' is not the same.*
(a) by a method of notice employing electronic or written media established by the government funded body, with the approval of the minister responsible for the government funded body, for consistent application until an alternative method has been approved by the minister; or	*These two provisions should be clarified, to ensure that there is no possibility of confusion – in particular to ensure that the public notification commitments of the government under the Atlantic Procurement Agreement and Agreement on Internal trade are respected*.
(b) where no method of notice is approved under paragraph (a), by publishing a call for tenders in at least one daily newspaper published and in general circulation in the province and in the other printed media that the government funded body considers appropriate to ensure adequate notice.	

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
(2) A call for tender shall include the following:	
(a) a brief description of the public work to be executed, the goods or services to be acquired or the space to be leased and the location of the execution, acquisition or space;	
(b) the place where a person may obtain information and documents necessary to tender;	
(c) the conditions for obtaining the documents to tender;	
(d) the place where the tenders are to be sent;	
(e) the date and time limit for submitting tenders; and	
(f) the time and place of the opening of the tenders.	
(3) Tenders submitted under the Act or these regulations shall be in writing.	What does 'in writing' mean? *The provincial Electronic Commerce Act provides for electronic communications (including facsimile) to be considered to be in writing. .*
(4) Where a tender is required to be invited under section 3 or 4 of the Act, a government-funded body may include in the tender, as a pre-qualifier, reference to a bidder's past performance.	What does 'as a pre-qualifier' mean? *The only place we have found any such process in place is in Transportation and Works – and it has had very limited use (perhaps one or two cases).* The supplier community would appear to welcome such a process – suppliers do not consider it 'fair' if suppliers who are unqualified to bid can do so, win contracts, and then walk away from them without penalty (either for that contract, or for eligibility to bid for future requirements). *An effective vendor performance program requires strong executive and political support. It also requires considerable government resources to monitor performance, follow up on problems etc.* There has to be a way to deal effectively with poor performers. There is a perception that efforts to apply vendor performance measures will be frustrated by senior management or political pressures.

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
Opening of tenders	*The modern trend of procurement legislation is to place such requirements into policy where there can be more flexibility in particular cases.*
4. (1) A government funded body inviting or causing to be invited tenders shall open the tenders in a place where the public is permitted to watch and at the time indicated in the call for tenders.	As noted for the Act, what 'public opening' means is not defined, and different government-funded bodies do it differently. As already noted, this is a particular problem for the construction industry.
(2) A tender may not be opened unless there are at least 2 witnesses present who are acceptable to the government funded body opening the tender.	*Are these two acceptable witnesses from within the government, or the supplier community?*
Particulars to be provided	
5. Where a government funded body intends to lease space, it shall provide the following to persons interested in tendering:	*There is no similar requirement for similar details relating to goods, services or construction.*
(a) a statement of all requirements respecting the space;	
(b) specification standards for the space;	
(c) an offer form;	
(d) a proposed lease; and	
(e) other information as the government funded body may think necessary to ensure tenderers have as much information as possible that is relevant to the lease proposal.	
Delegation of powers	
6. (1) A minister of a department of the government may delegate the power to approve change orders, extensions or increased costs under section 5 of the Act so long as the delegation	The Act s. 7(1) provides this authority to the Deputy Minister, not the Minister. *If delegation of authority for change orders is referenced, why is there no similar reference to authority to initiate expenditures or enter into contracts?*
(a) is in writing;	
(b) specifies the position title of the person to whom the power is delegated; and	
(c) specifies the monetary limit up to which the person may exercise the delegated power.	

TEXT OF THE REGULATIONS	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
(2) A head of a government funded body, other than a government department, may delegate power under subsection 7(2) of the Act so long as the delegation	*It is not clear why this delegation material is repeated – it is essentially the same as s 6(1), and elsewhere the heads of departments and other government-funded bodies have been treated as equivalent.*
(a) is in writing;	
(b) specifies the position title of the person to whom the power is delegated; and	
(c) specifies the monetary limit up to which the person may exercise the delegated power.	
Exception	
7. Under subsection 8(2) of the Act, notwithstanding that tenders are invited in accordance with the Act, the head of a government funded body may, without first obtaining the approval of the Lieutenant-Governor in Council, reject the preferred bidder and award the contract to a person other than the preferred bidder, when, in the opinion of the head of the government funded body, the delay resulting from proceeding in accordance with the Act and regulations would result in or compound a pressing emergency.	*Raises the question –if there is a situation of actual or potential emergency, why would tenders be called in the first place?* *The discretion to waive preferred Bidder entitlement is, arguably, too limited in scope. There could indeed be many other good and valid reasons why an Owner might want to waive preferred Bidder entitlement than merely a "pressing emergency." This is one more reason why we will recommend that Newfoundland and Labrador consider abandoning the whole concept of "preferred Bidder" and embrace the concept of "best value Bidder" (i.e., the Bidder that offers the best overall value to Newfoundland and Labrador).*
Information to be provided	
8. Where a head of a government funded body is required to inform the Minister of Works, Services and Transportation under subsection 8(3) of the Act or under section 10 of the Act, the head of the government funded body shall provide, within 30 days of the awarding of the contract or the execution of public work or the acquisition of goods or services or the space leased to the minister, the information required in the form prescribed by the minister or further information as the minister may request.	The Act requires this notification to the Chief Operating Officer of the GPA, not to a Minister
Request for proposal	
9. (1) Where the carrying out of a request for proposals has been authorized under paragraph 3(2)(j) of the Act, it shall be carried out as provided for in this section.	.
(2) Section 8 of the Act and sections 3 and 8 of these regulations shall, with the necessary	*What are or could be 'necessary changes'?*

TEXT OF THE REGULATIONS	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
changes, apply to a request for proposals.	*The section confirms that Section 8 of the P.T.A. applies to RFPs. This is somewhat confusing as at least part of Section 8 of the Act refers to the concept of a "preferred Bidder" (i.e., one who is lowest priced), which is not applicable to an RFP where there are more evaluation criteria at issue than merely whom is the lowest priced*
(3) Each request for proposals shall clearly state the work or acquisition requirement, or the problem to be addressed by the proponent.	
(4) Each request for proposals shall express the criteria, in addition to price, to be used in evaluating proposals and the methods to be used in weighing and evaluation of that criteria and no criterion shall be used that is not expressed in the request for proposals.	*For greater certainty, should include reference to the way in which the 'winner' will be chosen.*
(5) Where a request for proposals is carried out, a government funded body may, in the course of an evaluation, request and consider additional information from a proponent.	*Subsection 9 (5) is somewhat problematic. It purports to allow a Government Funded Body to "request and consider additional information from a proponent" after the close of proposals. However, unless Newfoundland and Labrador was to disclose this possibility in the RFP expressly, it could potentially offend the "equal treatment" requirements of competitive bidding law. Fundamentally, even if "authorized under the legislation," it is unfair to those Proponents from whom Newfoundland and Labrador did not request the additional information. It does harm the integrity of the competitive process as some Proponents are being allowed to submit additional information to their bid after the close of bidding, when that event is supposed to be the end of Bidder submissions. Potentially, it could be used unfairly to change prices (commonly known as "bid shopping") after close of bidding as the subsection does not refer to or define what "additional information" is. This subsection essentially allows for the "curing of a Proponent's non-compliance" as well as having the potential for undisclosed preferences or biases to creep into what is supposed to be a fair, open, and transparent process.* *Requests for Proposals are a legally binding method of competitive bid solicitation and do not, as such, have the flexibility envisioned by this subsection in practice. We would recommend Newfoundland and Labrador reconsider whether this subsection should remain in the Regulations or even in policy. If it is to remain, Newfoundland and Labrador ought to place clearer limitations upon what it may request as additional information, when it may request the information, and how Newfoundland and Labrador is to use the information in evaluation. For example, for Newfoundland and Labrador to clarify a proposal (i.e., to request a Proponent explain better what already exists in the proposal but not change or add additional information)*

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
	could be acceptable. As widely written as this subsection is, however, there are significant potential legal problems.
(6) A government funded body may negotiate a detailed contract with the proponent whose proposal ranks highest following the evaluation process, but the resultant contract shall contain substantially the terms of the proposal and, where contract terms cannot be agreed upon, the government funded body may reject that proposal and negotiate with successive proponents in order of evaluation ranking.	*Subsection 9 (6) also has potential problems from a Canadian competitive bidding law perspective. The power of the GFB to negotiate with the highest ranked Proponent the details of a final Contract is allowable in competitive bidding law if it is disclosed in the RFP that such negotiation may occur. However, the "serial negotiation" power that follows, if "contract terms cannot be agreed upon," is problematic in law.* *While no case has directly stated that such "serial negotiation" cannot lawfully occur, the Supreme Court of Canada is unanimously on record (in MJB Enterprises v. Defence Construction (1999) SCC) as stating the purpose of competitive bidding is to "replace" negotiation with competition. Further, no Canadian competitive bidding case has ever allowed an Owner (public or private) to use competitive bidding as a method of procurement and then allowed an Owner to negotiate until it finds a Bidder who is agreeable to its terms.* *As written, this serial negotiation power is arguably too wide open to be acceptable to Canadian Courts, as it turns a competition on known terms into an auction on undisclosed terms.* *It is also difficult to see how negotiation of "a detailed contract" could result in much change if "the resultant contract with the proponent shall contain substantially the terms of the proposal." We also wonder why any "detailed contract" would not have to contain "substantially the terms" of the RFP, since this is the Newfoundland and Labrador Government's document that presumably the government would want substantial compliance with in any resultant Contract. As written, the detailed Contract must be "substantially" the terms of the Bidder's proposal, which in effect allows the Bidder to write the terms of the Contract indirectly.* *We are reminded of the section earlier in this Report on Bid Depositories – which were created by the construction industry to prevent bid-shopping by general contractors. This provision appears to authorize GFBs to bid shop.*
No proposal received	
10. (1) Where no proposals or no proposals that are acceptable to the government funded body are received following a request for proposals, the head of the government funded body may negotiate with sources identified as having the capability to	*Why does this process not apply to tenders (where a second call is required)?* *Is the authority to negotiate delegatable by the head of the government-funded body? If the authority to authorize*

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
execute the public work or supply the acquisition and may, with the prior consent of the minister having responsibility for the government funded body, enter into a contract for the work or acquisition with the source considered by the head of the government funded body to offer the best value.	*change orders is delegatable through the Act, not having a delegation here (or in the Act) could be taken to imply that only the Deputy Head can so negotiate.* *Section 10 (1) also has potential problems in compliance with both Canadian competitive bidding law and the Agreement on Internal Trade. The part of subsection 10 (1) that deals with "no proposals" received following an RFP, and the head of the GFB thereafter negotiating a sole source Contract on the basis of overall best value from a capable Contractor is acceptable from an AIT point of view (and from a competitive bidding law perspective as well). However, the second ground of the subsection, "no proposals that are acceptable to the Government Funded Body are received…" and thereafter the head of the GFB may negotiate a sole source Contract with a capable Contractor is only lawfully possible if the RFP is first cancelled without any award. The subsection does not make that salient fact clear and it should.* *However, the greater potential problem concerns the AIT and the Newfoundland and Labrador Government's requirement that competition is mandatory for any Contract over the threshold limits of the AIT or MASH Annex to AIT. If "no proposals are acceptable", then this would justify cancellation without award. Thereafter, according to AIT (and implied in Newfoundland and Labrador Government policy) a new RFP should be issued. As the subsection is written, it would be a relatively simple matter for a Government-funded body to determine that no proposal is acceptable in a competition and then sole source a Contract to anyone, including a non-Bidder to the competition. Under the overly wide wording, this would be acceptable (and even lawful) but hardly ethical or in compliance with the general preference for competitive bidding of both AIT and government policy.*
(2) Subsection 8(3) of the Act respecting a report to the House of Assembly applies, with the necessary changes, where a contract is entered into under subsection (1).	*See comments under s. 8(1) of the Act*
Products registry	
11. (1) In this section, "registry" means the registry of products manufactured in the province, and the generic specifications of those products, maintained by the Minister of Industry, Trade and Technology.	It should be the Minister of Industry, Trade and Rural Development *Section 11 refers to a Product Registry for Newfoundland and Labrador manufacturers and to the use of generic specifications "to the extent that it is reasonably possible to do so." Such creation of a source list would be allowable under AIT if it were not limited to Newfoundland and Labrador manufacturers. However, as written, such a*

TEXT OF THE REGULATIONS	OBSERVATIONS (items in standard font from interviews; *items in quotes from the Review team*)
	preference for Newfoundland and Labrador manufacturers only would be considered non-compliance with the spirit and intent of AIT and the APA (if not the actual wording of AIT and APA as well). It is unlikely this could be justified under Article 508 (1), the regional economic development exception to AIT, as the subsection does not refer to a region or a single procurement but to a group of vendors. This section as written does discriminate against suppliers of another Party.
(2) The registry shall record the names of qualified product manufacturers and the generic specification for their products.	*There is no provision for services .*
(3) The generic specifications of products contained in the registry shall be provided by the manufacturers of the products.	*This is an apparent contradiction – a manufacturer's specifications are by definition unique to that manufacturer, not generic. Presumably the section was designed to mean that generic specifications are to be developed based on the various characteristics that are used within an industry to describe and distinguish its products.* *What happens if manufacturers cannot agree among themselves as to what the generic specifications should be? What happens if the government does not want to accept/use the generic specifications produced by the industry? Would that mean that even with direct government intent to proceed, listing particular products would be impossible?*
(4) Government funded bodies or a person acting on behalf of a government-funded body shall refer to the registry when preparing tenders and shall use generic specifications recorded in the registry which satisfy the procurement requirement to the extent that it is reasonably possible to do so.	*There is no definition of 'reasonably'.*
(5) Where the specifications of the tender include the provision of products not directly identified in the tender documents, the successful bidder shall, in the performance of the contract, to the extent that it is reasonably possible to do so, refer to the registry to identify a generic specification which satisfies the procurement requirement and allow registered manufacturers that meet this specification an opportunity to bid.	*It is unusual for legislation to seek to go so far into the internal management of suppliers. Note in particular that there is no requirement in Canadian law for a private sector entity to meet its internal requirements (e.g. subcontractors, subassembly manufacturers) through any form of competition. This section says that they MUST (albeit 'to the extent possible'), and it were it to come before a court it is likely that it would be struck down.* *The usual relationship in procurement is: Owner---(contract)---Contractor----(contract)---Sub-contractor. There is no contractual relationship between the Owner and a sub-contractor, and the sub-contractor cannot sue the Owner. In providing that a Contractor may be required to use specific sub-contractors, the province may be creating a contractual relationship between itself and a sub-contractor, AND potentially diluting full Contractor liability for successful performance. Including the work of sub-contractors.*

TEXT OF THE REGULATIONS	OBSERVATIONS **(items in standard font from interviews; *items in quotes from the Review team*)**
(6) The Minister of Works, Services and Transportation may require auditing and reporting that he or she considers necessary to ensure compliance with this section.	This is now the responsibility of the COO of the GPA
(7) The registry comes into effect on the date of its first publication.	*We understand that no such registry exists.*
	Of concern is what is not discussed at all in the P.T.A. Regulations. For example, there is no discussion of: • *when a Government department or a Government Funded Body should or could use an RFP rather than a Call for Bids;* • *the Request for Quotations process;* • *how compliant with mandatory requirements a Bidder must be; or* • *the Owner waiving non-essential Bidder non-compliance.*

ANNEX H: BID DEPOSITORIES

Background

At the time Bid Depository systems were created, there were significant problems between Prime and Sub-Trade Contractors. Prime Contractors were sole-sourcing their Sub-Trade work to their favourite Sub-Trades, leaving others with no work. Additionally, after a Prime Contractor won a competition, it would bid shop, seeking to extort price concessions from the Sub-Trades. Otherwise put, the successful Prime Contractor would return to the sub-Trades and ask them to rebid for their part of the job, until the lowest possible Sub-Trade prices were achieved. Keeping in mind that the Prime contractor then had a contract with a total price based on the original sub-Trade bids, this increased the profit margin of the Prime Contractor – but the Owner received no benefit from the lower Sub-Trade costs. For their part, Sub-Trade Contractors were not honouring their quotes to the Prime Contractors, and were seeking more money after the Prime Contractor was already legally bound to pricing to the Owner.

The Law

In the past, the Prime Contractor – Sub-Trade Bidder relationship was not part of the competitive bidding law regime created by the Supreme Court of Canada in *The Queen v. Ron Engineering* (1981) SCC. Today, as a result of the SCC decision in *Naylor Group v. Ellis Don* (2002) SCC, it is – both Prime Contractors who seek bids and Sub-Trades who bid to Prime Contractors are in a legally binding relationship from the close of Sub-Trade bidding. Bid shopping is now unlawful.

Bidders can no longer back out at award and neither party can safely ignore the rules of the Bid Depository system when it suits their self-interest. The Prime Contractor is legally bound to use their nominated Sub-Trade if they are the successful Bidder in the Owner's competition (unless the Owner has a reasonable objection) and the Sub-Trade Bidder is legally bound to do the work for their listed price – without exception.

As a result of these changes in law, the whole issue of whether an Owner should use a Bid Depository system for Sub-Trade bidding at all is called into question. Public Owners brought in such requirements to help protect their local Sub-Trades, but now Sub-Trades can protect themselves, by suing unscrupulous Prime Contractors if they choose to do so. Prime Contractors can also sue Sub-Trade Bidders who don't honour their offers. Bid shopping and extorting higher prices at award are both now unlawful to do, and the entire Sub-Trade bidding process is now legally binding and enforceable. Thus, the original reasons for setting Bid Depository systems into place (creating a level playing field and calming chaos) no longer exist.

For Owners, the problems created by Bid Depository Systems have not abated; they have increased:

- Owners remain liable for their part in their competition but if they mistakenly assist the Prime Contractor in breaking the Bid Depository rules, they run the risk of being jointly liable with the Prime Contractor for what the Prime Contractor did in the Sub-Trade bidding system;

- Owners are discovering Prime Contractors and Sub-Trade Bidders are raising their prices to factor in these new, potential legal risks; and

- if a lawsuit between the Prime and a Sub-Trade Bidder does occur over what happened in the Bid Depository process, the Owner gets dragged into the lawsuit, simply to protect itself from the potential liability, which it did not cause.

Several Case Summary examples of this occurring are at the end of this Annex. While the material is lengthy, and requires careful reading, we recommend that you take the time to do so. It was prepared by our team member Robert Worthington, who is considered by many to be Canada's leading expert on the analysis and interpretation of Canadian contract law, its application to government procurement, and the training of public professionals to deal with its consequences. Reading the material will help you understand, not only the dimensions regarding Bid Depositories, but the complexities of contract law in general.

Plans Rooms

A service that has been offered by some Plans Rooms is identifying which parts of a project's plans are required by the individual sub-trades, so that sub-trades do not 'miss something'.

The Plans Rooms (including the Newfoundland and Labrador Construction Association) have the ability to carry out this publicity. What it requires are (i) the provision to the Plans Room of copies of the project plans by the Owner, and (ii) the identification to the Plans Room by the Owner of which potential Prime Contractors have ordered the full plans for the project. This allows the Plans Room – as is the case with the NLCA - to use its weekly bulletin to members to inform potential sub-trades of what jobs may be available, and which Prime Contractors they may wish to approach to propose services and prices.

One historical government 'issue' with the Plans Rooms is that they have on occasion sought to limit access to their information and the Plans rooms themselves to their members. This led the federal government in 1995 – in the course of examining its use of Bid Depositories across the country – to include in its Principles for Use of Local bid Depository Rules on Federal Projects the requirement that 'The rules, procedures and operations of the local bid depository shall not show any preference to, nor impose and disadvantage on, any bidder. The facilities of the local bid depository shall be equally accessible to all bidders so affected, regardless of association membership or geographic location."

Government Operations

We would have benefited in considering the benefits of bid depository use from being able to speak with GFBs outside the government – it would have given us, if not more information, at least a broader perspective.

There is strong feeling that the government should not be working in such a way as to make itself subject to procurement rules that it does not control. At this point, that is the case – with potential results as noted in previous sections. This provincial perspective matches well with what we have learned from colleagues in the federal government.

At that level, there has been national study under way for more than a year, with the provincial governments and the Canadian construction (and its local associations) involved. We understand the broad public position to be that if the construction industry wants to use bid depositories, government is prepared to use them – IF it is clear that government has no practical or legal role to play other than to specify the use of the depositories and provide plans, AND the bid depositories accept full and total responsibility for the operations of the depositories and the consequences of their operation.

Government-Industry Relations

There is a larger issue here - the relationship between the government and the construction industry. The following comments apply, not just to construction, but also to the entire spectrum of public procurement.

Too many people inside government see procurement as a one-sided game: the government sets the rules, and the supplier community plays. There are at least three serious flaws to this approach:

- the aggregate of a supplier community almost always knows more about the industry than the government does, so the government is always at risk of being at a disadvantage and making decisions that are less than effective;
- while some members of the supplier community will agree to play by government rules, others may simply take their attention and their business elsewhere – depriving the government of what could be very good suppliers; and
- effective procurement requires the coming together of two forces – demand and supply – and if the two sides are not working in harmony, the equation will not produce the best possible results.

The government must also consider in dealing with the construction industry – with any supplier community – how developments in that community might have an impact on the needs of government. In 2004, the U.K. government was already thinking forward to the possible consequences of the awarding of the 2012 Olympic Summer Games to London. The concern was not that the construction industry would not be able to met the requirements of the Games; rather it was that so many construction resources might end up working on Olympics facilities, that there would not be sufficient capacity left in the industry to meet the ongoing requirements of the government – for hospitals, schools etc. We understand that the government of British Columbia is dealing with this situation now, with construction under way for the 2010 Winter Olympics.

While we are not specialists in looking into the future, it does appear that the province is in the early stages of a 'boom' period, driven by the petroleum industry. The likely result will be a major increase in economic activity that will certainly have an impact on the construction industry. At the same time, it is well known that many skilled Newfoundland and Labrador workers have left the province to work elsewhere. Putting the two together, it is not unlikely that the government will find itself in competition with the private sector for construction resources. In that conflict, if the government takes the attitude that the industry must respond to government needs, you may well find yourself with a shrinking pool of suppliers – and those that remain may well be the ones who are not able to meet the quality and delivery requirements of the private sector.

You do not want to find the province in that position: your public construction needs are simply too vital to the wellbeing of the population to put them at risk.

One way to avoid that is to focus on working cooperatively with the industry on any issue of joint interest and concern. Another is to ensure that your procurement approaches focus less on lowest price, and more on quality relationships with the construction industry, and contracting processes that are less a master-servant relationship, and more of a partnership. This is where the private sector has gone in recent years. It recognizes that any given contract will produce better results if both parties have an interest in making it succeed.

Jurisprudence

TWIN CITY MECHANICAL v. BRADSIL: 1996 - Ontario Court of Justice (Overturned on Appeal)

Tenders were called by the Province of Ontario for the construction of a laboratory. Ontario, the Owner, invoked the Bid Depository System. Twin City, one of the Sub-Contractors, submitted the lowest bid for the mechanical portion of the work and was nominated as the Mechanical Contractor by the General

Contractor, Bradsil, in its tender. The General Contractor had the lowest tender price. The Sub-Contractor therefore expected the General Contractor to be awarded the contract and that it, the Sub-Contractor, would perform the mechanical portion as tendered.

On award of the contract however, the Contractor switched to a unionized Sub-Contractor (its collective bargaining agreements required it to use union forces) for a lower price. The General Contractor, in contravention of the tender regulations, used the labour compatibility issue to shop the mechanical contract and negotiate a more advantageous price.

An indemnification agreement was entered into between the General Contractor and the Owner to cover any potential damages that might arise from the Sub-Contractor's exclusion from the contract.

The Sub-Contractor sued the General Contractor for breach of contract and for loss of profit.

HELD: The Contractor was liable to the Sub-Contractor in both contract and tort. The bidding contract had been breached, and the Sub-Contractor's expectation of award was perfectly reasonable in the circumstances.

Bargaining had not been done in good faith as the Contractor had known in advance that the Sub-Contractor was non union and would not be doing the work. He had therefore used the system to bid shop.

The Court then decided that not only the General Contractor but also the Owner was responsible to the Sub-Contractor as the Owner (according to this Court) had a duty of care to ensure fair treatment and protection for the Sub-Contractor and to see that the tender terms were upheld under its obligation of "good faith". It ought to have addressed the issue of labour compatibility, adjudicated upon the Sub-Contractor's complaint of improper conduct, declared the Contractor's bid "informal" and still accepted it. Instead, the Owner refused to intervene and chose to secure an indemnification agreement with the Contractor in case it was liable.

Both Owner and General Contractor were jointly and severally liable to the wronged Sub-Contractor for an amount equal to the profit which was made by the Contractor who actually did the work, namely $1,251,648.66.

JUDGMENT FOR TWIN CITY AGAINST BOTH CONTRACTOR AND OWNER

NOTE: The Ontario Court of Appeal overturned the Trial Decision, disagreeing with the Trial Court on whether the Owner had indeed assisted in the bid-shopping. Thus, the Owner was not ultimately liable. However, the Contractor was still liable.

The same thing occurred in a B.C. case called Ken Toby v. B.C. Building Corporation (1997). The Trial Court found both liable; the Appeal Court overturned the liability of the Owner, for the same reasons as the Ontario Court of Appeal in Naylor Group.

There have been no cases since Naylor Group was decided by the SCC and we don't know whether the Courts of Appeal would still refuse to hold Owners liable. I believe they would not and thus Owners have greater risk from "playing" with Bid Depository systems.

NAYLOR GROUP INC. v. ELLIS-DON CONSTRUCTION LTD.: (2001) Supreme Court of Canada

In 1991, the Oakville-Trafalgar Memorial Hospital (the "Hospital") issued a call for tenders for hospital

construction using the Toronto Bid Depository for Sub-Trade bids. Naylor Group Inc. ("Naylor"), an electrical Sub-Contractor, put in a Sub-Trade bid of $5.5 million. Comstock was the next lowest bid in this category at $411,000 higher. Following close of Sub-Trade bids, Ellis-Don Construction ("Ellis-Don") used Naylor's bid as part of its bid to the Hospital. Ellis-Don was awarded the project contract and then told Naylor to change unions if it wanted the job. Naylor refused and Ellis-Don used Guild Electric, a Sub-Contractor who had not bid through the Bid Depository system, at the same price Naylor had bid.

Naylor sued for breach of contract and unjust enrichment. Ellis-Don defended saying firstly, there was no Bid Contract A to breach, and, secondly, the terms of the project contract did not allow Ellis-Don to use Naylor due to union affiliation.

HELD (At Trial): Sub-contract bidding is not covered by competitive bidding law; Ellis-Don never unconditionally accepted Naylor's bid; and in any event, the Ontario Labour Relations Board ruling requiring a particular union to do the sub-contract work legally frustrated any possible contract between Ellis-Don and Naylor.

HELD: (At Court of Appeal): Ellis-Don acted in an "unethical manner" in negotiating with Guild Electric (i.e., bid shopping); when Sub-Trades bid through a bid depository system a Bid Contract A is formed and an award to the included Sub-Trade should be made unless Ellis-Don, the Contractor, or, the Hospital, the Owner has a reasonable objection; and since Ellis-Don did not even try to have Naylor "waived in," Ellis-Don's objection to Naylor was not reasonable. Damages were awarded to Naylor.

HELD: (At the Supreme Court of Canada, unanimously): As both the MJB Enterprises and the Martel Building decisions indicate, a Bid Contract A does not automatically spring to life in every competition and even if it does, its terms must be ascertained by the circumstances of each case. There is no reason in principle however that a Bid Contract - Tender Contract B could not be formed at the Contractor - Sub-Contractor level.

Here, the Bid Depository System does not operate simply for the Prime Contractor's convenience. Prime Contractors are required to list and employ those sub-contracts it lists in their bids to the Owner, unless there is a reasonable objection to that particular Sub-Trade Contractor by either the Owner or the Prime Contractor.

Ellis-Don claims the Bid Depository System was "just a fancy name for somebody collecting prices." It is not; it is a legally binding obligation on the Prime Contractor to use their listed Sub-Trades (i.e., a Bid Contract A obligation). Ellis-Don won the competition as lowest Bidder due in part to Naylor's Sub-Trade bid being lowest. It can only refuse to employ Naylor if it can "reasonably object" to Naylor being the Sub-Contractor.

At the time of Sub-Trade bidding, Ellis-Don knew Naylor was not an International Brotherhood of Electrical Workers (IBEW) Union affiliate and Ellis-Don assured Naylor that this would be no problem for them. It twice confirmed this to Naylor prior to the OLRB ruling (which required IBEW affiliation on the job). In fact, Ellis-Don had for 30 years promised the IBEW that all electrical work would go to IBEW members only. The OLRB ruling simply affirmed this; it did not create a frustrating event by its ruling. The OLRB ruling was a foreseeable event and thus not legal frustration of Naylor's Bid Contract.

Ellis-Don (not the OLRB) created the situation by making a deal with Naylor in contravention of its prior contractual obligations to the IBEW. The OLRB ruling simply exposed the folly of Ellis-Don's assurance to Naylor and its conduct towards Naylor. Ellis-Don chose to carry Naylor's bid instead of Comstock's (who was IBEW) in order to win the prime contract. Ellis-Don even affirmed its agreement to use Naylor (twice, in writing) after the OLRB ruling. In light of all of this, Ellis-Don's objection to Naylor as non-

IBEW was unreasonable. It could not in fact use Naylor due to the OLRB ruling but that fact did not relieve Ellis-Don from having to pay damages to Naylor for breaching the Bid Contract A that was created by Ellis-Don when bidding to the Owner using Naylor's Sub-Trade bid.

DAMAGES OF LOST PROFIT ON THE SUB-TRADE CONTRACT AWARDED TO NAYLOR, PLUS COSTS IN ALL THREE COURTS

CHANDOS CONSTRUCTION LTD. v. ALBERTA (ALBERTA INFRASTRUCTURE): (2004) ALBERTA Q.B.; (2005) ALBERTA Court of Appeal.

Alberta Infrastructure (Alberta) sought tenders from general Contractors for construction of a new health centre. The Invitation required the use of the Alberta Construction Tendering System (ACTS), a form of bid depository system for Sub- Trade bidding,

The ACTS process requires Sub-Trades to submit bids to the ACTS registry. The General Contractors then choose which Sub-Trade they want (not necessarily but most often the lowest) and then list the chosen Sub-Trade by name and price in their bid to the Owner. General Contractors must use the ACTS process (if the Invitation requires it). The General Contractors must then follow its rules, unless they give prior notice to self-bid (do the work themselves) or unless no Sub-Trade submits any bid on that particular portion of the work.

The Invitation also stated, in Clause 12: "A bid that is informal, incomplete, qualified, non-compliant with the requirements of the Bid Documents, or otherwise irregular in any way, may be declared invalid and rejected.

The Minister may accept or waive a minor and inconsequential irregularity, or where practicable to do so, the Minister may, as a condition of bid acceptance, request a Bidder to correct a minor and inconsequential irregularity with no change in bid price.

The determination of what is, or is not, a minor and inconsequential irregularity, the determination of whether to accept, waive, or require correction of an irregularity, and the final determination of the validity of a bid, shall be at the Minister's sole discretion."

Thirteen bids were received with Keller's bid being lowest at $4.725 million. Alberta awarded to Keller and Chandos Construction (Chandos), the second-lowest Bidder sued, alleging Keller's bid was non-compliant and could not be accepted by Alberta.

Alberta defended, arguing Keller's non-compliance was minor and did not invalidate the bid (substantial compliance). Alberta also argued that Clause 12 of the Invitation allowed it to waive the non-compliance.

HELD: Chandos alleges Keller's bid was non-compliant in four areas:

1. breach of the ACTS rules by failing to give notice of self-bidding for a portion of the work (Architectural Woodwork), costed by the Court at $24,000;
2. breach of the ACTS rules by failing to properly name a Sub-Trade, although the proper price was listed;
3. failing to name an Asphalt Paving Contractor in breach of the Invitation's requirements, although a price was listed for the work; and
4. failing to list a separate Supplier and price for vinyl windows as required by the Invitation, which, when the error was later discovered, was paid for by Keller at its own expense.

The Court found there were two issues to be decided:

1. whether Keller's errors were minor and inconsequential, and
2. whether Alberta under Clause 12 was entitled to waive the errors / non- compliance.

The Court then conducted an extensive review of the law, noting the MJB decision required compliant bidding but that Ron Engineering held a "merely formal error" to be allowable. The Court also noted that there was no "waiver of non-compliance" power in the MJB case, unlike this case, where there was what the Court called a "discretion clause" (Clause 12).

The Court then referred to several cases on waiver of non-compliance (B.A. Blacktop, Gagnon Construction, SCI Engineers, J. Oviatt Contracting, Kinetic Construction and Graham Industrial) and decided the law of whether a bid was compliant was based upon substantial, not strict compliance and that an Owner, if they had a waiver of non-compliance power in the Invitation, could waive "non-material non-compliance," objectively determined, but could not waive "material non-compliance," even if there was a clause in the Invitation which purported to allow the Owner to do that.

On the issue of whether Keller's errors were material or non-material, the Court suggested there were three factors to consider:

1. Does the Invitation require precise compliance or require that a particular requirement be important or essential (i.e., something that is substantially likely to be significant in the deliberations of the Owner in deciding which bid to select)?
2. What is the impact on other Bidders and the Owner requirement to treat all Bidders fairly (e.g. was there a substantial risk of mischief or the facilitation of unfair bid shopping)?
3. What is the dollar value of the error and the error's effect on the scope and quality of work when compared to the overall bid price and the overall nature of the work?

Turning to the four items of non-compliance noted above, with reference to #2, the failure to properly name the Sub-Trade but having that Sub-Trade's proper price listed was an irregularity of form rather than substance. Alberta, by accepting this irregularity was not in breach of their duty to treat all Bidders fairly and equally, as Alberta would have done the same for any other bid. There was substantial compliance.

The other three irregularities (#1, 3 & 4) were substantive and not merely formal. The first breached the ACTS rules and the third and fourth breached the Invitation's rules.

However, both the ACTS and the Invitation requirements were discretionary (i.e., "…may cause the bid to be declared invalid and rejected"). Disqualification was not automatic.

The total of the price advantages Keller received was $47,500 (approx.) while the difference between Keller's and Chandos' bids was $51,000 (approx.).

The non-compliance amounted to less than 2% of Keller's bid price and the bid errors were neither a wholesale nor even a substantial breach of either the ACTS rules or the Invitation.

The failure to name an Asphalt Paving Contractor (but listing a fixed price for this portion of the work) could create a risk of bid-shopping or unfairness but this risk is minor in the context of the bid as a whole.

The Court then concluded that when considered objectively, the instances of non-compliance by Keller were "minor and inconsequential." Under Clause 12, the "discretion clause," Alberta was entitled to

waive Keller's non-compliance. They did so properly.

Judgment for Alberta.

COMMENT: This exceptionally well-reasoned judgment as to non-compliance by a Bidder and the possibility of waiver of that non-compliance by the Owner pursuant to an expressed waiver power is the best example this author has seen of the Courts seeking a balance between the concepts that a) a Bidder's offer must match the Owner's requirements in order to be capable of acceptance and b) that non-compliance with the Owner's requirements is not a "true bid" capable of being accepted.

In this case, the Bidder did make errors in their bid but when objectively examined, the errors were relatively minor when compared to the overall bid. The Court's "three factors" tests for determining whether the non-compliance was material or non-material and whether any such non-compliance could be waived by the Owner in any particular case is an excellent summary of the law to date and, if followed by other Courts, could set a standard for the future.

We hope that it does, as it both protects the integrity of the competitive process (i.e., it is not a free-for-all where the Owner can do anything it chooses) and allows all parties (Owners and Bidders) some flexibility when it comes to minor human mistakes in the very complicated process that competitive bidding has become.

Chandos appealed.

HELD (ON APPEAL): While the Trial Court was correct in her analysis of the law, given that the integrity of the tendering process requires that any discretion clause contained in the Invitation must be subject to an objective and restrictive analysis and given that the discretion clause does not allow the Owner to accept a bid that is not substantially compliant, the Court of Appeal felt the Trial Judge erred in her application of the law to the facts and failed to complete the analysis.

Keller failed to properly bid on the Architectural Woodwork component (by bidding supply only and offering to do the installation itself without giving proper notice of that as required by the ACTS Sub-Trade bidding system). "In an apparent attempt to correct the irregularity, Alberta required Keller to use the lowest Bidder for both supply and installation. That displaced Keller's listed original Bidder for supply only. This added $24,000 to Keller's bid."

The discretion clause allows Alberta to accept or waive a minor and inconsequential irregularity and to request a Bidder to correct a minor and inconsequential irregularity, with no change in bid price. The steps taken by Alberta to make Keller's bid compliant indicate the irregularity was not minor. Keller's bid was not substantially compliant. The remedy did not correct an irregularity (failure to give notice) but instead had the effect of ameliorating the effects of the irregularity by carrying out the project in a manner different than was contemplated in the bid.

The power to correct an irregularity is not a power to amend the bid after closing. Alberta, by insisting Keller use one Bidder for both supply and install, effectively amended Keller's bid, creating a different Contract B than was contemplated in either Keller's bid or the Invitation. By amending Keller's bid, post closing, Alberta acted outside the provisions of the Instructions to Bidders, which breached its duty to treat all Bidders fairly and equally.

By accepting Keller's non-compliant bid, Alberta breached Chandos' Bid Contract A. Had Alberta disqualified Keller, it would have awarded the contract to Chandos, the second lowest Bidder.

Judgment for Chandos ($300,000 plus costs and interest).

COMMENT: With this decision, the Alberta Court of Appeal has pointed out (albeit indirectly) what the problem is with Owner waivers of non-compliance. As the Court points out, an Owner (public or private) can only waive minor non-compliance with the terms of the Invitation or Request, as the Courts will not allow any Owner to waive major non-compliance by a Bidder, in order to protect the integrity of the tendering process. However, waiver is simply that – the right to waive non-compliance. Waiver does not also allow an Owner to then change the bid from what was submitted by the Bidder to what the Owner wants.

In other words, the Owner can allow a non-compliant bid to remain in the competition if there are minor irregularities. But the bid must be substantially compliant and can not be changed post-closing. If the Owner is not prepared to accept the non-compliant bid as it stands, then the irregularity is not minor but of consequence and therefore cannot be waived, regardless of the Owner's choices of wording of the Discretion Clause.

This is the clearest expression yet from the Courts on what is minor (and potentially waivable) and what is major (and can't be waived). This Court appears to be saying that, to be waivable, the irregularity must not only be "no big deal," it must also be so small that it need not be corrected either at award or during the subsequent performance of the project work by the Owner. (Readers will note we have said "appears to be saying" because the decision is by no means the most precise the Court has ever issued. Within the words used by the Court are several statements that, to this author, are anomalous and confusing. Additionally, the Court ignores the perhaps salient fact that the one most harmed by Alberta's post tender closing changes was the Sub-Trade Contractor, not the second-lowest Prime Contractor Bidder).

However, these minor criticisms aside, the Court is clearly trying to indicate that waivers of non-compliance by the Owner will be viewed very restrictively by the Courts. The waiver will be limited to minor items and the bid must be substantially compliant to begin with (or it must be disqualified). Bidders must get it right when they bid and neither they nor the Owner should look upon a Discretion Clause as a lawful way to "fix" a problematic bid, if there are other fully compliant bids in the competition.

Subsequently, this case went to the SCC, who sent it back to the ABCA for re-hearing based upon what the SCC decided in Double N Earthmovers. This year, the ABCA sent the case back for re-trial. They said the case couldn't be decided by them as the issue of when Alberta "corrected" the bid (before or after award) wasn't argued at trial. Four hearings so far and still no final decision – all "caused" by screw-ups at the Bid Depository system.

ANNEX J: THE ADVANCE CONTRACT AWARD NOTICE (ACAN)

The following is with minor non-substantive exceptions taken verbatim from the Treasury Board of Canada's Guide for Managers - Best Practices for Using Advance Contract Award Notices (ACANS) (Revised January 2004).[61]

The federal government achieves competitive contracting through three sourcing methodologies- electronic bidding through a full tendering process, traditional bidding using bidders lists, and ACANs. ACANs are not to be used to circumvent electronic bidding or traditional bidding procedures when it is clear that more than one supplier exists that can perform the work proposed for a contract.

ACANs normally arise when it is possible that only one supplier can perform the work. In circumstances where detailed market knowledge confirms this as fact then the contract should be awarded on a non-competitive basis with transparency achieved through a contract award notice.

An ACAN contrasts with non-competitive contracts in a number of ways:

- they provide all suppliers with an opportunity to signal their interest in bidding, through a statement of capabilities;
- they are posted for a minimum of 15 calendar days on the Internet on the government's electronic tendering service. The system operates 24 hours a day, seven days a week; and
- they open the process to additional electronic or traditional processes if a supplier's statement of capabilities is valid.

An ACAN must provide sufficient information in order to allow a supplier to determine if they possess the capabilities required to satisfy the government's requirements, and to permit the contracting authority to have an adequate basis for reviewing a potential supplier's statement of capabilities. Clear, unambiguous language should be used.

An ACAN shall include, in both official languages, the following information:

1. The following introduction:

The Department of (indicate the name of organization) has a requirement for the provision of (summarize the requirement). The purpose of this Advance Contract Award Notice (ACAN) is to signal the government's intention to award a contract for these goods and/or services (as applicable) to (name of supplier and address). Before awarding a contract, however, the government provides other suppliers with the opportunity to demonstrate that they are capable of satisfying the requirements set out in this Notice, by submitting a statement of capabilities during the fifteen calendar day posting period.

If other potential suppliers submit statements of capabilities during the fifteen calendar day posting period that meet the requirements set out in the ACAN, the government will proceed to a full tendering process on either the government's electronic tendering service or through traditional means, in order to award the contract.

If no other supplier submits, on or before the closing date, a statement of capabilities meeting the requirements set out in the ACAN, a contract will be awarded to the pre-selected supplier.

2. For goods requirements, a full description of the salient physical, functional, or other essential

[61] http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/contracting/acan_guide1_e.asp#_Toc69101139

characteristics including performance requirements. Also refer to a part number, model number and/or brand name if applicable. Include information on any optional items and/or optional quantities.

3. For services and construction requirements, a full description of the services to be provided, as well as the tasks to be performed, the objectives, expected results, performance standards, constraints (if any), and deliverables.

4. The required delivery date(s) or the period of the proposed contract, including options to extend the contract period.

5. A cost estimate of the proposed contract should be included, where appropriate, provided that it will not prejudice negotiations with the pre-selected supplier, or compromise the supplier's competitive position if a decision is made to proceed from the ACAN to electronic or traditional bidding.

6. The minimum essential requirements required to meet the requirement set out in the notice. Additional information is found in the templates.

7. The reason(s) for the proposed contract award, demonstrating why the pre-selected supplier has been identified as the only supplier capable of meeting the government's requirements, and linking the justification for directing the contract to the applicable exception to soliciting bids under the *Government Contracts Regulations* and, if applicable, the Limited Tendering provisions of the trade agreements.

ANNEX K: THE APA AND THE AIT

The purpose of the APA is "to eliminate all forms of discrimination among the participating governments" and to "enhance awareness of Atlantic capabilities by participating in joint regional supplier development activities".

For the most part the new APA continues the objectives of its predecessor version and the AIT – reducing trade barriers, increasing supplier access, and fostering competition for procurement opportunities and reciprocity between provinces. In this sense, the APA is similar to the Trade, Labour and Investment Mobility Agreement (TILMA) recently agreed to between Alberta and British Columbia. Both have the appearance of extensions of the original AIT. The TILMA is wider in scope and breadth than the APA, applying to many areas in addition to public procurement. Also, the TILMA was implemented after the AIT – the original APA was in place before the AIT.

Below the surface, there are potentially some aspects of the new APA that could nonetheless be seen to be in conflict with the AIT.

There appears to be conflict due to the specific Atlantic province focus of the APA. For example, article 3(ii) of the APA requires the Parties not to structure or use the procurement process to discriminate based upon place of business of "suppliers within the Atlantic provinces". Yet, Article 504 of the AIT already prohibits discrimination based on location of the supplier within *any* province or territory – a much wider application. The APA only contemplates no geographical discrimination by location of supplier outside of Atlantic Canada if the outside parties are "willing to accept the terms of this Agreement", and then only with the "approval" of the four signatory Atlantic provinces. This clearly narrows the applicability of no geographical discrimination in the AIT to the more specific "no geographical discrimination among the four Atlantic provinces".

This "Atlantic Canada first" focus continues in Article 3(vi) of the APA (albeit implicitly) with the provision that parties may engage in reciprocal treatment of out-of-region suppliers, if permitted by their legislation and if they choose. Yet the AIT S. 504 already requires all parties to treat all bidders equally.

Article 4(ii) of the APA also changes the AIT, with respect to "professional services listed in Annex 502.1B(a)" of the AIT, by excluding all of these professional services regardless of the dollar value of the contract from the AIT requirements for open competitive procurement. There is however a vaguely expressed intention to add in some or all of these professional services in future.

APA Article 5(i) establishes that the rules and procedures of the AIT with respect to the public tendering process will apply. Article 5(ii) also requires the parties to follow the procurement procedures of the Atlantic Standard Terms and Conditions. No consideration is made in the APA for how to deal with conflicts between these two protocols – and in the event of conflict, which will govern over the other. Accordingly, under international trade law and custom, it is likely that the APA as a later document would be viewed as best expressing the parties' intentions – and the APA would likely override any contrary intention of the earlier AIT.

The final area of potential conflict between the APA and the AIT is Appendix C of the APA - the Reciprocity Protocol. The first two paragraphs of the Protocol, and the fourth, refer to procurement below the AIT dollar value thresholds, and state that such procurements will be subject to a reciprocity regime (i.e. if an out-of-region entity or government treats Atlantic suppliers properly under the AIT, then the Atlantic provinces will treat suppliers from that other jurisdiction the same way).

However, the third paragraph and final paragraph of the Protocol appear to be suggesting this same reciprocity will be applied to bids from out-of-region generally as well, regardless of whether below or above the thresholds of the AIT.

AIT does not apply to procurements below threshold amounts, but it clearly does apply above those thresholds. Further, the AIT requires equal treatment of all bidders, regardless of geographical location – as does Canadian competitive bidding law (unless such barriers or biases are explicit in each invitation to bid). Moreover, if this possible interpretation of the Protocol is correct, such discrimination against bidders would bring into question the real commitment of the signatories to open competitive public procurement – another tenet of fairness in public procurement.

It is curious to note that a bidder from out-of-region could be denied an opportunity to bid on an APA-covered procurement because of the behaviour of its home provincial government with respect to that home province's ability to honour its signed internal trade obligations. Such a private bidder cannot control the behaviour of its home province, nor likely influence it in any meaningful way. The bidder is punished – the offending province is not. The application of this reciprocity also can easily be avoided if the out-of-region potential bidder simply opens a token office within the region, thus becoming a "regional" bidder.

It is difficult to see how potentially barring bidders from outside the Atlantic provinces, for any reason, would "…improve the productivity and global competitiveness of Atlantic firms; "reduce or eliminate trade barriers on public sector procurement…"; or promote general confidence in public sector procurement. Rather this would be protectionism, which, with the potential to invite both provincial and federal retaliation, would appear to be an element of significant risk and confusion.

ANNEX L: DRAFT CODE OF ETHICS OF THE EAST AFRICAN COMMUNITY

Here is text that is in the draft procurement policy of the East African Community (EAC)[62]:

"The EAC requires that:

- all Officers involved in procurement proceedings from initiation to completion shall be held accountable and responsible for their actions;
- all suppliers, contractors and consultants will be treated fairly and given equal opportunity to obtain contracts with the EAC;
- procurement shall be done in the most efficient manner, upholding the principles of value for money, transparency and fairness
- funds will be used solely for the purposes for which they have been entrusted;
- appropriate procedures of the EAC;
- all transactions are properly authorised and fully supported by written records;
- value for money can be demonstrated by comparison with market rates; and
- the Code of Ethics detailed in Article 2.3 is followed by all Officers involved in the procurement process.

"2.3 An Officer of the EAC shall not use his or her authority or office for personal gain. Personal gain includes accepting or requesting anything of material value from bidders, prospective bidders or suppliers for the Officer, his or her spouse, parents, children or other close relatives, or for other persons from whom the Officer might gain direct or indirect benefit of the gift.

An Officer shall seek to maintain and enhance the reputation of the EAC by:

- maintaining the highest standards of honesty and integrity in all relationships both inside and outside the EAC;
- developing the highest possible standards of professional competence;
- using funds and other resources for which he or she is responsible to provide the maximum benefit to the EAC; and
- complying both with the letter and the spirit of:
  - the principles and policies of the African Union;
  - accepted professional ethics; and
  - contractual obligations."

[62] We do not know whether this test was copied or adapted from another source. If it was, in reproducing it here we may have inadvertently breached copyright, and we ask that any reader finding that this is the case inform us immediately.

ANNEX M: CONSOLIDATED LIST OF ACTION ITEMS

A-1. The government should continue to use the bid depository system IF it can negotiate appropriate rules with the NLCA that meet government requirements, AND making it clear that once a public sector construction project is given over to the bid depository system, the government has no further legal involvement or liability.

A-2. The government should adopt the policy that once a project is given over to the Bid depository, the government will complete it using the Bid depository results. If the government is not prepared to do this, then the use of the Bid depository system should be terminated.

A-3. The government should adopt the policy that for all publicly funded construction projects, copies of plan sets will be provided to the NLCA Plans Rooms for use by the industry.

A-4. Require all departments and GFBs to provide both copies of construction project plans, and lists of potential prime contractors (who have ordered the full bid packages) to local plans rooms, for consultation by sub-trades:

A-5. The PTA should be amended to bring its provisions and requirements into line with the trade agreements. Specifically, to avoid possible inconsistencies or contradictions between the Act and trade agreements, replace the list of exceptions in s. 3(2) with the equivalent exceptions in the AIT.

A-6. The GPA should seek legal advice as to how the use of buying groups can be better accommodated within the AIT exceptions and other procedural requirements

A-7. The GPA, with legal counsel, should review the other existing exceptions in the PTA, to ensure that they can be retained within the AIT framework of exceptions.

A-8. Amend the PTA to provide clearly that for procurement less than an amount to be set in the Regulations it is not required to call for any form of bid.

Consequently, amend the Regulations to add a section providing for the setting of limits/thresholds

A-9. Amend the PTA to provide that above that value, but below the threshold to issue a full call for bids, departments must seek at least three quotes, rather than obtain those quotes.

A-10. Amend the PTA to remove the specific thresholds at which there must be a call for bids: replace it with a provision that ‘a public body must make a public call for bids for any contract involving an expenditure equal to or above the threshold specified in an intergovernmental agreement applicable to the procurement’ (Quebec model).

A-11. Introduce the concept of pre-qualified supplier lists: any supplier may apply for pre-qualification at any time; where bids are to be solicited directly from suppliers, the list would be used to identify them.

A-12. Amend the Regulations, to provide that where there is a sufficient list of qualified suppliers, a call for bids may be issued to only those suppliers; ensure that notice of this general practice appears on the GPA web site.

A-13. Review the bid documents in common use, to determine whether they can be re-structured so that suppliers on pre-qualified lists obtain the benefit of having to do less work in order to submit bids.

A-14. Require that all departments and GFBs publish on the GPA web site advance notice of upcoming procurement opportunities that are planned on a recurring basis (e.g. annual renewals).

A-15. For those notices, and other requirements as appropriate, the government should seek supplier input to the development of specifications and appropriate bid evaluation criteria, so that when a call for bids is issued it will result in bids that produce best value.

A-16. Amend the Act to require that all departments and GFBs must post their calls for bids on one web site (preferably the GPA).

A-17. Add a new provision to the Regulations, to require that all contract awards by departments and GFBs be published on the web. We suggest qualifying this, that publication be mandatory for contracts valued at more than $5,000. The information published should include: (i) winning bidder, (ii) what the good or service is; (iii) the client the good or service was bought for; and (iv) the total contract value.

A-18. For greatest transparency, there should be one site where all public contracts are posted: this measure would assist suppliers in identifying business opportunities.

A-19. The GPA should verify with its proposed contractor that the new system will provide the capabilities referenced above.

A-20. The GPA should publish the information currently sent to the House of Assembly on its web site.

A-21. Amend the Regulations and the Guidelines to require that in any call for bids, the full text of the government-proposed contract be included.

A-22. Add a new provision to the Newfoundland and Labrador Supplement to the Atlantic Standard Terms and Conditions; to bid documents provided to External Consultants; and to construction and lease packages, that once a call for bids is launched, and until the contract has been awarded, all contact by potential suppliers must be only with the identified contracting officer.

A-23. Add a new provision (3) to s. 4 of the Regulations, to provide that ‘At a public opening, the following information shall be read out or otherwise communicated to bidders: (i) in the case of a call for tenders, the name of the bidder, the bid price, and if appropriate whether required bid or contract security has been provided; (ii) in the case of a Request for Proposals, the name of the bidder, and if appropriate whether required bid or contract security has been provided.

A-24. Amend s. 11 of the PTA to provide that while tenders shall be opened publicly, requests for proposal may at the discretion of the contracting authority (to be based on the nature of the procurement) be opened in public.

A-25. Add a new provision to the Regulations, to ensure that bidders have the right to a debriefing after contract award.

A-26. Add an item to the Regulations, that for the purposes of exception 3(2)(e) of the PTA (“the only source of that work or acquisition”) departments and GFBs are to consider the nature of the procurement and establish geographical limits accordingly.

A-27. Add a 'Definitions' section to the PTA, to include a**ll** procurement terms used in the Act, including but not limited to: Tender, Request for Proposal; Quotations and Change Order.

A-28. Permit the procurement community to use any appropriate procurement method to meet government requirements, by replacing all references in s. 3, s.4, s.9, s. 10, s. 10.1 (including section titles) to 'tender' or 'invitation to tender' with 'call for bids'.

Consequentially, repeal s. 3(2)(j), which permits the use of Request for Proposals: these would now be included in the general authority to 'call for bids'.

Consequentially, add a new definition of 'call for bids' which includes tenders, requests for proposals, standing offers, notices of intent to award a contract without calling for bids.

Consequentially, add a new definition of a 'notice of intent to not call for bids' – follow the federal approach for the Advance Contract Award notice (ACAN).

A-29. Require that whenever generic or standardized specifications are used repeatedly for acquisitions, those specifications be posted on the web site, and that potential suppliers have the right to make comments and suggest changes or improvements at any time.

A-30. Encourage the use of Letters of Interest, Requests for Qualifications, publication of DRAFT calls for bids and other processes that involve the supplier community in the development of specific procurements.

A-31. Add a new section to the Act, taken from the Regulations and augmented, to make it clear that the government will deal only with qualified suppliers, and that vendor performance on a current or previous contract will be taken into consideration in the awarding of new contracts (even including refusal to accept a bid from egregious offenders).

A-32. Increase the use of acquisition cards for at least payment of supplier invoices, and preferably for use as an instrument of purchase.

A-33. Review the time that it takes to pay suppliers, to confirm that 'net 30' is being observed.

A-34. Assess the feasibility and cost of publishing payment times on the Internet.

A-35. Expand the use of Standing Offers to standard services, using requests for proposals.

A-36. dd an exception to the Act, that a call for tenders is not required where a procurement will be carried out by using a standing offer that was put in place following an open competitive process.

A-37. Introduce dynamic pricing to standing offers: permit suppliers to adjust their prices according to changing market conditions.

A-38. Amend the Regulations, to provide that where a procurement is in the form of a call for standing offers, the government may decide how many standing offers will be put into place as a result.

A-39. Introduce Request for Volume discounts, when the move to multiple standing offers has been made

A-40. Add a provision to the PTA, that notwithstanding s. 26 (4) of the Financial Administration Act, departments, agencies and other GFBs the COO of the GPA may enter into a contract where the

payment resulting from the contract is due in a subsequent fiscal year, AND when a procurement is consistent with specific plans that have been included in the approved three year plans of the department for which the procurement is being carried out.

A-41. Study the possible benefits of adopting the U.K. Gateway™ approach to the oversight of major procurement projects.

A-42. Remove all requirements for political approvals after a call for bids has been issued, to ensure that contract awards are, and are seen to be, based solely on the published bid evaluation and supplier selection criteria.

A-43. Add a provision to the PTA, that when for whatever reason a contract cannot be completed by a contractor, and where failure to continue the contract as scheduled would place a government program in jeopardy, the government may approach the other bidders in order of ranking and seek to negotiate continuation of the contract at the bidder's original price – failing which, a new call for bids is required:

Consequentially, add a clause to this effect to all calls for bids.

A-44. Add a new exception to the PTA, providing that the requirement to call for bids does not apply to instances where it is not in the public interest to do so.

Consequential change: provide that this exception may only be used with the prior approval of either the Deputy Head or the COO of the GPA.

A-45. Add a provision to the Act, that the use of this exception and the reasons for its use (i.e. what was the public interest involved) shall be reported publicly as decisions are made.

A-46. Ensure that the Act applies to all public procurement, by removing the exception 2(g) to the definition of 'service':

Consequentially, move responsibility for the Guidelines from the Comptroller General to the COO of the GPA.

Consequentially, expand the existing s. 9 of the Regulations, which deal with Requests for Proposals, to include the elements of the Guidelines, and ensuring that the provisions apply to all procurements.

A-47. Provide effective direction to all departments, agencies and GFBs as to what they are to achieve through public procurement, by adding a Purpose section to the Act:

A-48. Include in the new Purpose section a statement that information will be made public according to the size of contracts (proportionality).

A-49. Ensure that all staff involved with procurement have adequate training in the field, so that they understand their roles, responsibilities, and the legal framework within which they must work

A-50. Review delegations of authority for procurement-related activities; seek to push delegated authority as far down into departments as possible

A-51. Repeal s. 7 of the Act and s. 6 of the Regulations providing for delegation of authority for change orders; this should be covered by the general delegation framework of the government.

A-52. mend the Regulations to provide specific guidance to all departments, as who how procurements that mix goods, services, services under the Guidelines, construction and/or leases will be treated.

A-53. Where departments have unique specialized needs and enough volume to maintain professional expertise, the COO of the GPA, under the authority of the Government Purchasing Agency Act, should have the capacity to extend high levels of delegation - subject to demonstration to the COO of the GPA that those departments have the management capability and technical expertise (including procurement training) to exercise this authority properly.

A-54. Amend the PTA to provide that where change orders exceed dollar limits to be set out in Regulations, a GFB shall seek the prior approval of the COO of the GPA before approving such change orders.

Consequentially, add a new provision to the Regulations setting out these dollar limits.

A-55. Add a provision to the Act, that the COO shall make information about the use of change orders public.

A-56. Repeal s. 5(2) of the PTA, which requires reporting of high value change orders to the Treasury Board.

A-57. Repeal s. 4 of the PTA regarding leasing: treat leasing as a good or service as already covered by the Act.

A-58. Amend s. 3(1)(a) of the Act, which sets the basic threshold at which bids must be called, to reference the total lease amount.

A-59. Repeal s. 8 of the Act and s. 7 of the Regulations providing for awarding of contracts to other than the preferred bidder.

A-60. Repeal s. 9(5) of the Regulations, the authority to request additional information from bidders after bid closing.

A-61. Repeal s. 9(6) of the Regulations, the authority to negotiate with bidders in descending order.

A-62. Delete the definition of ‘preferred bidder’: replace with ‘best value bidder’ or similar, to reflect the idea of the bidder who has best met the evaluation criteria set out in the call for bids.

A-63. Delete the definition of ‘qualified bidder’; include with the new definition of ‘best value bidder’.

A-64. Resolve the inconsistency between s. 9(1)(1) of the Act (no responses to a call for tenders) and s. 10(1) of the Regulations (no proposals received following a call for Proposals): we suggest that in such cases the department should issue a second call for bids to the bidders who responded to the first call, having made changes to the requirement based on information gained from the first call.

A-65. Remove the requirement that extra-provincial corporations register in order to win a provincial contract.

A-66. To reflect the results of reform, and also to make the title more accurate in view of the Action Items included in this Report, rename the Act to the Public Procurement Act.

A-67. Amend s. 3(1)(a) and (b) of the Regulations, to make it clear that electronic (Internet) publication of notices of calls for bids is the preferred approach. (as written, 3(10(a) says that electronic advertising, if approved by the Minister, is acceptable until '…an alternative method has been approved by the Minister' – which can be interpreted to mean that the permanent process must be something other than electronic.)

A-68. Continue and expand work under way to move to electronic procurement.

A-69. Add a new section to the PTA, that notwithstanding the provisions of the Electronic Commerce Act, a GFB may limit the distribution of bid documents to electronic means, and may require the submission of bids only in electronic form.

A-70. Amend s. 8 of the Regulations to replace 'Minister of Works, Services and Transportation' with 'Chief Operating Officer of the Government Purchasing Agency.

A-71. Amend s. 3(2)(i) of the PTA, and Regulations s. 11(1), to replace 'Minister of Industry, Trade and Technology' with 'Minister of Innovation Trade and Rural Development'.

A-72. Implement the proposed new GPA information/reporting system as soon as possible, to put some good system-wide reporting in place.

A-73. The GPA should issue a government-wide reminder, that authority to use an RFP under the PTA does not automatically include authority to issue the RFP: there must be an appropriate delegation from the COO of the GPA.

A-74. The GPA should issue a government-wide reminder to all staff associated with a procurement of the need to ensure that all relevant information is on file.