Yukon Procurement Advisory Panel Report
April 15, 2016

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Executive Summary

The Procurement Advisory Panel was formed in November, 2015 to consult with local businesses and make recommendations about ways to make it simpler to sell goods and services to the Yukon government. The Panel heard a wide variety of concerns and suggestions for improvement from both vendors and government staff that highlighted the challenges of designing and conducting procurement in a fashion that maximizes participation from local vendors. These discussions were key in shaping the recommendations in this report aimed at improving how procurement is understood, designed and carried out within the Yukon government, while respecting trade agreements and government's procurement principles of fair, open and competitive procurement based on value for money.

The Yukon government has taken steps to improve its procurement capacity (skills, processes and governance) in recent years, and the Panel's work is a contribution towards continuing this progress. In addition to developing recommendations for specific areas of improvement, the Panel has also identified a more fundamental, underlying issue: that procurement within the Yukon government is not understood or used as a strategic tool to deliver government's objectives. The Panel believes furthering this understanding among Yukon government leadership and procurement authorities is critical to position government to deliver the desired improvements, and has therefore established the following overarching finding:

> ***There is a need to recognize the strategic role and importance of procurement and to establish resources, policies and processes that support this view.***

The Panel has identified 10 additional recommendations under three themes (listed below), and a series of proposed actions to address them. As many of these recommendations are inter-connected and some require a long-term commitment, the Panel recognizes these actions will likely unfold over a mix of short, medium and longer term time frames. The Panel suggests that government develop and share with the vendor community a plan for responding to these recommendations.

List of Panel Recommendations

Theme 1: Increase Opportunities for Yukon Vendors to Participate

Recommendation: Develop clear objectives and policy guidance for staff concerning the expected use of procurement to support local businesses and First Nations

Theme 2: Reduce Barriers for Yukon Vendors to Participate

Recommendation: Focus vendor responses on the information most relevant to the procurement

Recommendation: Improve alignment of procurement processes with desired outcomes

Recommendation: Develop guidelines, policy or an organizational model that ensures procurement is conducted by staff with appropriate expertise

Recommendation: Invest in ongoing skill development and awareness of the role of procurement
Recommendation: Establish a consistent approach for increased scrutiny of and support for complex procurements

Theme 3: Increase dialogue between buyers and sellers and build more a collaborative culture

Recommendation: Improve relationships and the sharing of information between vendors and buyers
Recommendation: Improve market intelligence and procurement management information
Recommendation: Increase coordination and communication of the scheduling of procurements
Recommendation: Revise the current Bid Challenge process

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Introduction

The Yukon government has improved its procurement capability in recent years, in particular with the updating of the Contracting and Procurement Regulation and Directive and the establishment of the Procurement Support Centre in 2013. Contracting is an integral part of doing business in the public sector. The delivery of many, if not most, government programs now involve some contracting with private sector providers, and the Yukon government spends close to $400 million annually through various forms of procurement. As a result, developing and managing contracts is a skill required by public sector staff in the management of the majority of programs. However, the Panel recognizes that procurement is not an end in itself, and it is important that all contracting decisions and actions focus on the outcomes that government is seeking to achieve and cost-effective delivery approaches.

The mandate given to the Procurement Advisory Panel provides an opportunity to support the continued development of procurement capacity and maturity within the Yukon government. The Panel is pleased to present this report as a contribution to the ongoing professionalization of public procurement within the Yukon government.

Purpose

The Procurement Advisory Panel was in November, 2015 to clarify, confirm and prioritize concerns raised by the Yukon business community related to Yukon government procurement practices[1]. The Panel's initial focus was on examining concerns about inconsistent procurement practices among Yukon government departments; and ineffective mechanisms for raising /addressing supplier complaints about the tendering process. The Panel was charged with making recommendations to reconcile vendor concerns with best practices and the Government of Yukon's procurement environment, and with recommending additional research or investigation of best practices if required.

Approach

The Panel obtained input over a 10 week period (from early December until mid-February); interviewing 57 people (37 representatives from the vendor community and 20 Yukon government employees) and receiving 32 written submissions, resulting in input from a total of 82individuals. The majority of vendors that provided input were sole proprietors or small business owners, although there were a number of participants representing larger organizations[2]. There was representation from a variety of different market segments, with participation from the IT sector, aviation, large and small building contractors, goods providers, architects and engineers, environmental services, management consultants, media and film, as well as the Whitehorse and Yukon Chambers of Commerce.

[1] A list of panel members is provided in Appendix 1
[2] A list of those who provided input is provided in Appendix 2

In addition to inviting comments about any areas where different procurement practices within the Yukon government were creating challenges and about the available processes and remedies for procurement complaints, participants were encouraged to discuss any aspects of procurement they believed could be improved.

The Panel compiled and reviewed the input received, and shared a set of Preliminary Findings[3] at the Yukon's 2nd Annual Industry Conference on February 23/24 in Whitehorse. The conference provided the opportunity for a number of vendors to indicate whether they felt their input was appropriately reflected in the panel's findings, and for panel members to discuss various aspects of the state of procurement in Yukon and across Canada with a number of vendors and experts from various procurement related fields.

In order to develop a set of recommended next steps, the panel combined the input and discussions described above with their collective experience and knowledge and with a limited amount of research into:

- anticipated future developments in policy (e.g. trade agreements) or processes (e.g. new templates, training or tools developed in Yukon) that may impact the identified challenges or concerns, and
- relevant best practices or approaches/models from other jurisdictions.

During the process of developing recommended actions, the Panel determined that the issues identified through the interviews and written submissions are significant not just because they identify opportunities for useful service improvements, but more importantly because they are symptoms of a larger and more fundamental issue: that procurement within the Yukon government is not understood or used as a strategic tool to deliver government's objectives. The Panel believes furthering/gaining this understanding is critical to position the Yukon government to deliver the desired improvements, and has therefore established the following overarching finding:

> ***There is a need to recognize the strategic role and importance of procurement and to establish resources, policies and processes that support this view.***

This will require:

1. Leadership at the elected and senior management levels to champion an increased understanding of the role of procurement in meeting government's business and policy objectives
2. A more coherent and coordinated approach to resourcing and conducting procurement
3. Building tools and relationships to increase vendor confidence and capacity

These requirements are reflected in the recommended actions that follow.

[3] See Appendix 3

The Panel recognizes that the list of recommended actions represents a substantial body of work, not all of which can be undertaken immediately. In addition, a number of the recommended actions are inter-related, and although some may be completed in within a short timeframe, many will require a long term commitment. Therefore, the Panel is advocating that government develop an integrated plan to respond to these recommendations that identifies the anticipated timeframes for implementation, and that this plan be shared with the vendor community.

A summary of the findings, recommendations and suggested actions is presented below, followed by a more detailed discussion.

Procurement Advisory Panel – Summary of Findings and Recommendations		
Finding	**Recommendation**	**Suggested Actions**
Overarching Finding: There is a need to recognize the strategic role and importance of procurement and to establish resources, policies and processes that support this view.	Develop a strategic approach to sourcing and procurement	• Establish clear guidance and expectations concerning the use of procurement to support government objectives • Establish a long-term commitment to the development of procurement capability and maturity • Increase the collection, analysis and use of data concerning the impacts and outcomes of procurement
Theme 1: Increase Opportunities for Yukon Vendors to Participate		
There is a strong desire to improve mechanisms to use procurement to support local suppliers	Develop clear objectives and policy guidance for staff concerning the expected use of procurement to support local businesses and First Nations	• Develop an inventory of the procurement processes and practices consistent with the current trade and regulatory framework that would be of particular value to local businesses and guidance on their use by procurement authorities • Identify and act on opportunities to aggregate procurement that is currently fragmented to improve access for Yukon vendors • Require departments to identify how they will use procurement (in particular with respect to targeting local businesses and First Nations) to support their mandates / meet their objectives
Theme 2: Reduce Barriers for Yukon Vendors to Participate		
There is a need to streamline procurement processes	Focus vendor responses on the information most relevant to the procurement	• Pilot use of a short-form request for proposals format with different market segments / vendors • Develop guidance for procurement authorities to: o minimize mandatory requirements o Flag non-standard clauses in the contract or procurement documents o Ensure relevancy of the information requested

Procurement Advisory Panel – Summary of Findings and Recommendations

Finding	Recommendation	Suggested Actions

	Improve alignment of procurement processes with desired outcomes	• Develop guidance for procurement authorities for:
		  o selecting procurement formats / processes that takes the economic value of local business participation into account and supports 'right sizing' of projects/contracts
		  o constructing evaluation criteria and processes that are optimal for their project / desired outcomes
		• Adopt Quality Based Selection or similar 'best value' processes where appropriate, with early attention to professional services
		• Increase the use of multi stage and outcomes-based procurement
		• Establish guidelines / best practices to create a consistent approach to the use of "standing" supply arrangements and pre-qualified supplier lists

There is a need to increase clarity, consistency and transparency in procurement processes	Develop guidelines, policy or an organizational model that ensures procurement is conducted by staff with appropriate expertise	• Review the approaches used in other jurisdictions to ensure adequate procurement expertise is assigned to projects/initiatives and identify options for possible use within YG.
	Invest in ongoing skill development and awareness of the role of procurement	• Develop a procurement skills/competency framework and determine the training requirements for positions involved in procurement • Develop guidelines and processes to support the exchange of information, knowledge, expertise, advice and ideas relating to procurement and contracting processes among departments
	Establish a consistent approach for increased scrutiny of and support for complex procurements	• Establish recommended steps in the development of major projects to ensure procurement supports the successful delivery of the intended outcomes (including maximizing participation of local businesses)

Procurement Advisory Panel – Summary of Findings and Recommendations

Finding	Recommendation	Suggested Actions
Theme 3: Increase dialogue between buyers and sellers and build more a collaborative culture		
There is an opportunity to increase information and resources to support local participation	Improve relationships and the sharing of information between vendors and buyers	• Provide contact information for government procurement authorities to enable vendors to provide business information • Develop and implement tools and processes to support vendor and post-project evaluations and debriefs to promote continuous improvement in procurement and project management • Develop guidance and expectations concerning best practices for sharing (publishing) evaluation outcomes (e.g. publishing technical point scores) • Develop guidance for procurement authorities to encourage including early opportunities (e.g. during project planning or design stages) for vendors to provide input concerning local availability and/or constructability • Consider augmenting the reverse trade show to include information about items currently sourced outside the Territory • Continue / enhance offerings of 'how to do business with YG', consider adding training for vendors to respond to opportunities and to increase buyer awareness of their firm • Ensure a contact is in place to answer questions during the tender period who can respond to enquiries promptly • Establish mechanisms for receiving continued input from the vendor community and for providing updates on progress for the action items in this report and other procurement initiatives
	Improve market intelligence and procurement management information	• Identify and collect market intelligence and spend analysis information to improve sourcing strategies • develop and regularly assess measures of the economic impact of YG procurement (e.g. "leakage", return on investment, direct/indirect economic benefits, etc.)

Finding	Recommendation	Suggested Actions
		• collect and analyze data to allow assessment of procurement processes (e.g. issues, successes, process costs and benefits)
There is inadequate planning and coordination of the issuing of procurement opportunities	Increase coordination and communication of the scheduling of procurements	• Provide early notice of anticipated projects and earlier tendering of construction projects where possible • Develop guidance or mechanisms for procurement authorities to help ensure o procurement timing takes into account seasonality impacts as well as conflicts in timing between similar projects, and o planning / design can be completed prior to the call for proposals or bids • Explore upgrading the "Tender Forecast" system to improve accuracy and to support internal scheduling and coordination between projects • Encourage awarding of contracts as soon as practicable to allow successful supplier to plan, lock in pricing, coordinate subcontracts, etc.
The mechanisms to address vendor concerns and complaints need to be improved	Revise the current Bid Challenge process	• Revise the Bid Challenge process and related policy to include timelines for responses, requirements for written reasons and a mechanism to follow up on recommendations made • Review requirements for appointing Bid Challenge Committee members to consider establishing a more independent entity with strong public procurement expertise • Provide training and support for procurement authorities to constructively respond to vendor concerns and complaints • Consider adding a dispute investigation role to the Procurement Support Centre to support complaint resolution prior to or instead of engaging in formal proceedings

Recommendations:

1. Develop a strategic approach to sourcing and procurement

Why it matters

Procurement is integral to delivering public service outcomes, and there is a strong link between policy (what is required), procurement (what is bought, how, on what terms), operations (how the goods and services bought are used and managed) and affordability. For policy and service delivery to be effective, procurement issues need to be integrated at an early stage into defining public service outcomes.

Effective use of procurement is a critical component of achieving value for money and a mechanism for balancing economy, efficiency and effectiveness. Many jurisdictions are recognizing that value for money has a strategic element that goes beyond the narrow focus of cost or cost versus quality related to an individual procurement, and depends on the strategic goals and outcomes specific to each government. For instance some may put more weight on the overall importance of "buying green" or supporting the development of small businesses, compared to the weight of an individual transaction cost in calculating the overall value for money.

In order for Yukon government's procurement capacity to increase and for procurement to deliver maximum benefits to Yukon taxpayers, the procurement function needs to continue to evolve from an ad hoc administrative function to to one that is pivotal in leveraging the organization's investments in a way that improves outcomes and delivers best value.

Recommended Actions:

- Establish clear guidance and expectations concerning the use of procurement to support government objectives
- Establish a long-term commitment to the development of procurement capability and maturity
- Increase the collection, analysis and use of data concerning the impacts and outcomes of procurement

2. Develop clear objectives and policy guidance for staff concerning the expected use of procurement to support local businesses and First Nations

Why it matters

Public procurement can be a stimulus for growth and can significantly affect business development within a region. Governments can leverage public spending to promote their economic, environmental and social policies. For example, some jurisdictions have introduced initiatives to improve access for small businesses to the public procurement market, or to support environmental initiatives or the development of particular market areas, such as First Nation businesses.

Pursuing these objectives through procurement, however, must also take into account the existing legislative and policy requirements concerning the prudent and appropriate expenditure of public funds. Yukon's *Financial Administration Act*, Contracting and Procurement Regulation and Directive are anchored by the principles of fiscal responsibility and value for money.

If governments choose to use procurement to support other strategic objectives, clear policy guidance is required to ensure decisions are effective, efficient and consistent with the government's implementation of other policy, legal and trade requirements.

Efforts to reduce trade barriers between jurisdictions have resulted in the elimination of most policies that discriminated against suppliers based on where they are located (i.e. 'local preference' policies). The trade agreements do not eliminate a government's ability to use procurement to support social or economic objectives but do establish clear parameters for establishing such policies and place some limits on what governments can do.

What We Heard

One of the most consistent questions raised by vendors was whether government could be doing more with procurement to support local businesses. Vendors expressed uncertainty about whether government had made a clear choice to use (or not to use) procurement in this manner as well as about the mechanisms available to do so, given Yukon's participation in trade agreements (such as the Agreement on Internal Trade).

Similarly, staff were unclear about how they might be able to design procurement to take advantage of local market capabilities, and whether the procurement rules allowed them to do so. Staff had a clear understanding of the expectation to pursue the best price/quality goods and services through procurement, but were less clear on whether the economic benefits of supporting local vendors could be considered part of determining 'best value'.

Best Practices or Models from other Jurisdictions

A number of Canadian jurisdictions have recently explored ways to improve access to procurement opportunities for local businesses (see, for example, Saskatchewan's Procurement Action Plan from 2015, and B.C's "Doing Business with Government" report from 2014). Given the legal complexity of this area, and the fact there is a long and not entirely successful history of various governments attempting to use procurement to support different policy objectives, the Panel asked one of its members to research this area more deeply. Appendix 5 contains a supplementary report prepared by Paul Emanuelli exploring several new innovations in procurement are expanding opportunities to re-engage local suppliers within the regulatory context of open public procurement in Canada.

This research proposes that the mechanisms for enabling smaller suppliers are readily available within the government procurement system, and that by

implementing proactive and strategic measures, public institutions can establish better frameworks for open and fair competition and enable smaller suppliers to compete within the government procurement marketplace. In particular, the report suggests that public institutions can engage smaller local suppliers in a treaty-compliant manner by: (i) centralizing and aggregating procurement in areas where contract awards are currently fragmented; (ii) reducing barriers to competition by streamlining and standardizing prequalification processes; and (iii) maintaining competition by establishing protocols for simplified second-stage competitions to award work under framework agreements. Recommendations related to these suggestions are outlined below and in several other areas of the report.

Recommended Actions

- Develop an inventory of the procurement processes and practices consistent with the current trade and regulatory framework that would be of particular value to local businesses and provide guidance on their use for procurement authorities
- Identify and act on opportunities to aggregate procurement that is currently fragmented to improve access for Yukon vendors
- Require departments to identify how they will use procurement (in particular with respect to targeting local businesses and First Nations) to support their mandates / meet their objectives

3. Focus vendor responses on the information most relevant to the procurement

Why it matters

It is in government's best interest to be an organization that the best businesses and suppliers want to work with. The time and effort required to respond to procurement opportunities represent significant costs for most vendors, and sometimes create a barrier to working with the government.

If government's requirements are clear and the information requested in a procurement document is concise and relevant, vendors can more readily determine whether they want to participate and can more quickly prepare their submissions.

What we heard

A number of vendors raised concerns about the volume of information they are asked to provide in response to procurement opportunities, feeling that the requirements were sometimes unnecessarily onerous. Some vendors questioned whether all of the information they were providing was relevant in determining who should be the successful proponent, or described what they felt was an excessive number of mandatory requirements.

The panel also heard a number of examples where procurement documents contained unclear or inconsistent information or requirements. In some cases documents contained relatively obvious mistakes (for example, different due dates for the same

activity) or demonstrated a lack of alignment between the budget, schedule and deliverables, while others left vendors unclear what work the client actually wanted done. Several vendors questioned whether there was an opportunity to reduce the amount of insurance required from vendors for some projects. It should also be noted that some vendors also described examples of procurement documents from different areas within the Yukon government that were considered particularly well-constructed.

Best Practices or Models from other Jurisdictions

A number of jurisdictions have developed 'short form' procurement documents and contracts in an effort to streamline and simplify acquisition of low-dollar value or low-complexity items (e.g. Alaska, BC, UK, New Zealand and Australia all have readily available examples). The short-form RFP document launched in BC in 2014 has been well received by the vendor community; it is a 'smart form' that reduces the likelihood of any internal inconsistencies in the document and limits the information required from both buyers and vendors.

Recommended Actions

- Pilot use of a short-form request for proposals format with different market segments / vendors
- Develop guidance for procurement authorities to:
  - minimize mandatory requirements
  - ensure the relevancy of information requested
  - flag non-standard clauses in the contract or procurement documents
  - determine whether and what form of insurance is required from a vendor

4. Improve alignment of procurement processes with desired outcomes

Why it matters

Getting good value and the desired results out of a procurement depend in large part on ensuring the acquisition process and contract are designed to properly reflect the business need. Decisions about:

- which steps and formats to include in a procurement (for example, Requests for Information, Invitation to Tender, Request for Proposals, Requests for Qualifications, Standing Offer Agreements, etc.)
- how to structure the evaluation process (e.g. whether and how much to rate experience, price, proposed solutions or schedules, suggested innovations or risk mitigation, etc.) and
- how to structure the contract (e.g. how to structure payments and incentives, how the relationship will be managed)

can be influenced by the complexity, risk, urgency and dollar value of the procurement as well as the market, the extent to which requirements are known and defined, and the extent and nature of interaction expected between buyer and contractor during procurement and contract delivery. Ensuring the components of the process are aligned with each other and with the objectives

of the procurement will make a substantial contribution to successful delivery of the contract.

In addition, the size and timing of procurements (e.g. whether to 'bundle' or 'unbundle' requirements) can have a significant impact on price, internal contract management resources, and the ability for small or local vendors to participate.

What we heard

Vendors would benefit from more consistent approaches to selecting and using different procurement tools, such as Standing Offer Agreements and Qualified Supplier (or Source) Lists. Similarly, a more clear and consistent role for fairness monitors would be useful for all parties.

Vendors felt that in some cases evaluation criteria were established that did not give appropriate thought to the project requirements or the abilities of local suppliers. Vendors suggested that too much emphasis on price or an unwillingness to disclose a project budget made it difficult to prepare an appropriate bid or proposal. Vendors also questioned whether procurement authorities were making choices about procurement formats that were best suited for their project (e.g. between using a 'low bid' format such as a tender, or a points-based format such as a Request for Proposals).

Considerations

The Agreement on Internal Trade contains provisions requiring steps that must be included as part of various procurement processes. Recent discussions about revisions to the Agreement included potential changes to the requirements associated with establishing and managing Standing Offer Agreements that, if adopted, may impact Yukon's choices about when and how to use this mechanism.

Recommended Actions

- Develop guidance for procurement authorities for:
  - selecting procurement formats / processes that take the economic value of local business participation into account and support 'right sizing' of projects/contracts
  - constructing evaluation criteria and processes that are optimal for their project / desired outcomes
  - the appropriate use of fairness monitors
- Adopt Quality Based Selection or similar 'best value' processes where appropriate, with early attention to professional services
- Increase the use of multi stage and outcomes-based procurement
- Establish guidelines / best practices to create a consistent approach to the use of "standing" supply arrangements and pre-qualified supplier lists

5. Develop guidelines, policy or an or an organizational model that ensures procurement is conducted by staff with appropriate expertise

Why it matters

Procurement is an increasingly complex field, and an area where the costs of mistakes can be very high – for example in terms of missed opportunities, incorrectly scoped projects or contracts, selection of sub-optimal vendors, cost over-runs, project delays, lawsuits, damaged reputation, reduced supplier confidence, etc. The advantages of ensuring procurement is supported by staff with adequate skills and knowledge are clear, and government requires an organizational structure to support the hiring, coordination, training, management and deployment of those staff.

The organization of the procurement function – meaning the way that the roles and responsibilities are distributed and managed – can make a significant difference in the ability to use procurement as a strategic tool. This does not mean that the procurement function must necessarily be centralized, but it does suggest that a coordinated approach to training and assigning procurement staff – at least for the most complex, risky or higher value procurements – is required.

What we heard

A number of vendors questioned whether procurement processes would be more consistent and more professionally handled if procurement staff were centralized, or if procurement was more closely managed by a central procurement organization. Some vendors felt the idea of centralization had some appeal, but the potential separation of procurement activities from the business area with the procurement need also raised some concern.

Best Practices or Models from other Jurisdictions

In both the public and private sectors, many entities track the percentage of procurement in their organizations that is handled by staff with professional procurement designations or training, and actively work to increase that number. Most government jurisdictions have a central procurement function for at least some portion of their procurement (as does Yukon government, with the Acquisition Services and Planning branch) and many have moved back and forth over the years between modest to significant centralization of procurement staff.

A number of jurisdictions use either a central pool of procurement experts that are assigned to various service areas or projects, and some use ‘service agreements’ as a mechanism to ensure there are clear roles and accountability for both the procurement support and the business outcomes. Other jurisdictions vary the purchasing authority delegated to different departments or branches based on the level of expertise within those specific areas.

Recommended Actions

- Review the approaches used in other jurisdictions to ensure adequate procurement expertise is assigned to projects/initiatives and identify options for possible use within YG.

6. Invest in ongoing skill development and awareness of the role of procurement

Why it matters

A key prerequisite for the ability to use procurement as a strategic tool is ensuring the staff involved have the skills, training and aptitude to see the acquisition of goods, services and construction as more than a transactional chore. The complexities involved in the design and management of effective procurement strategies requires that the Yukon government attract, develop and retain procurement staff who:

- understand that procurement is directly linked with the successful delivery of government objectives and services to the public, providing both short and long term benefits;
- understand that good procurement is not just about driving down contract costs – the competitive process is a key driver of value for money, but does impose costs for buyers and suppliers;
- do not retreat to the lowest price solution simply because it appears at first sight to be the most easily defensible. Government needs people who properly understand, and can apply, the principles of value for money on a whole-lifecycle costing basis.

The UN Model Law on Procurement recognizes that that the procurement method most suitable for the circumstances is significantly influenced by whether or not the entity conducting the procurement has staff with the appropriate professional knowledge, experience and skills to conduct the process, as well as the risk characteristics of the procurement itself.

A solid understanding of the role of procurement among senior executive and strong commercial and procurement skills among project/program managers is a key contributor to achieving value for money. Therefore, a procurement training framework would ideally take into account the responsibilities of executive and managers of projects, programs and contracts in addition to those most directly involved in procurement.

What we heard

A significant number of vendors expressed a lack of confidence in the procurement skills or knowledge of procurement authorities. Some felt that the lack of a formal training or certification process for procurement staff was a contributing factor to their concern. Specific areas identified as causing concerns among vendors included

- Crafting appropriate specifications or requirements
- Crafting good (relevant, efficient) evaluation criteria and processes

- Conducting fair and well documented evaluations
- Deciding when use of a low-bid procurement is most effective, and when a procurement should be 'point based',
- Variations in approaches to crafting and awarding work under SOAs and qualified source lists; and
- The appropriate training and use of fairness monitors

Numerous staff noted their appreciation for the assistance available from the Procurement Support Centre, both for advice with specific projects and for access to more general training and advice.

Most procurement authorities indicated an interest in obtaining additional training, and many noted they currently rely significantly on obtaining knowledge from their peers about how to design and manage procurement. Some staff suggested that this reliance on peer support may not be supporting innovation or ensuring that the most appropriate approaches are used.

Best Practices or Models from other Jurisdictions

A few jurisdictions in Canada have developed substantial in-house training programs for public sector procurement (e.g. BC, Canada) although the majority appear to rely on a combination of in-house training supplemented by external professional procurement training, including webinars and periodicals. Some have also established informal forums for sharing information, knowledge, advice and ideas related to procurement and contracting[4]. These fora can allow participants to benefit from good procurement and contracting practices from across the public sector and support problem solving, innovation, capacity development, and the introduction of new strategies and initiatives.

A number of jurisdictions have developed comprehensive descriptions of the skills and knowledge that may be required to support strong procurement and contract management abilities across a variety of positions within government[5]. These models recognize that each department may have unique skills requirements and that a 'one size fits all' approach is not suitable.

Recommended Actions

- Develop a procurement skills/competency framework and determine the training requirements for positions involved in procurement
- Develop guidelines and processes to support the sharing and exchange of information, knowledge, expertise, advice and ideas relating to procurement and contracting processes among departments.

[4] See, for example, the government of BC procurement community of practice

[5] See, for example, the Scotland Procurement Competency Framework, the UK Procurement Capability Model and Standard and Commercial Skills Framework, the New Zealand Procurement Competency Framework,

7. Establish a consistent approach for increased scrutiny of and support for complex procurements

Why it matters

Reviewing significant projects at several points during the planning stage can help ensure they remain aligned with expectations for budget and performance, incorporate learnings or best practices from other projects, and incorporate input where relevant from market soundings with potential suppliers.

Government's major projects can be large scale, innovative, reliant on complex relationships between diverse stakeholders, and high risk. They might include the introduction of significant IT systems, the construction of infrastructure or the implementation of major changes to how services are delivered by government. They must be well planned and executed in order to not only be delivered on time and on budget, but to deliver the best 'fit for purpose' possible. Alongside measures to increase the procurement and project management skills of its staff, an effective system that gives assurance over project progress is critical for ensuring successful outcomes. The later in the planning stages that a project is reviewed, the more difficult it is to make adjustments to improve alignment.

What we heard

Vendors provided a variety of examples of procurement documents containing internal inconsistencies that had not been noticed or addressed by the procurement authority prior to release. For example, documents might contain different dates for what appears to be the same deliverable, or a lack of alignment between different elements such as the budget, timelines, and the specifications or requirements.

Some branches or individual staff within the Yukon government have developed approaches for quality assurance in their procurement documents and although some areas appear to be quite successful in this area, as a general practice the approaches seem to be ad hoc or lacking.

Vendors also questioned whether there are mechanisms built into the procurement planning process to help maximize the ability of local vendors to respond to opportunities, for example – mechanisms for procurement authorities to coordinate the timing of planned projects and to seek input (from the market or procurement advisors) on the design of the procurement.

Considerations

It is a good idea to establish processes for ensuring the internal consistency and coherence of the documents for any procurement process, not just major or complex projects. The Panel heard several examples where branches within the Yukon government have well established processes for quality assurance during the drafting and vetting procurement documents, and more widespread sharing of these examples and practices would also be advantageous. The rationale for the Panel's emphasis on more major or complex procurement is simply to attempt to focus efforts on where they

will have the greatest impact, on supporting the Yukon government's shift to using procurement in a more strategic manner.

Best Practices or Models from other Jurisdictions

Some jurisdictions have established quite formal and comprehensive approaches for the review of major projects or procurements during the planning stages (e.g. "Gateway" and "major project assurance" reviews in the UK, Australia, and New Zealand). "Gateway" reviews were designed as a service for the project owner. Their objective is to support the early identification of potential issues as well as the skills and experience required to successfully deliver the projects. In most jurisdictions, Gateway reviews have evolved into 'major project assurance' type reviews which focus more on coordinating approvals and managing risk.

These processes are designed to support the planning of very high value initiatives (e.g. typically over $20M) and are likely too cumbersome to be directly imported into the Yukon context. However, the principles they are designed by are undoubtedly very relevant and could be readily adapted into a more streamlined process.

Most federal government departments and agencies are required to have standing 'procurement review boards' or committees which have a slightly different focus from that described above. These federal committees tend to focus on assessing corporate risks (including, for example, ensuring that all procurement activity is compliant with the relevant laws, regulations, trade agreements and policies and fulfilling the government's commitment to fairness, openness and transparency in procurement) and for ensuring that the requirement is justified and represents good value for money. The Office of the Procurement Ombudsman conducted a review of several of these to identify best practices[6].

Recommended Actions

- Establish guidance to support recommended steps in the development of major projects to ensure procurement supports the successful delivery of the intended outcomes. Guidance could, for example, be provided for:
  - during development of the business case to ensure appropriate consideration of procurement options and discussion of the opportunities for supplier input / market sounding
  - before the project goes out to tender, to test if the specification of the requirement is clear and unambiguous, if all the procurement options have been explored, and there if is a realistic prospect of success;
  - following the assessment of bids, but before the award of the contract, to check that the contract decision is likely to deliver what is needed on time, within budget, and value for money.

[6] Office of the Procurement Ombudsman, Procurement Practices Review: Procurement Challenge and Oversight Function, 2008

8. Improve relationships and sharing of information between vendors and buyers

Why it matters

Good communication and information sharing between government and the supplier community is an integral component of developing effective relationships and managing performance. Public sector entities should invest in developing and managing relationships with suppliers to help ensure mutual understanding of objectives and expectations and to support development of supplier capabilities.

What we heard

The panel heard a variety of concerns and suggestions related to communication between vendors and government. In some cases, vendors noted that they were unsure who within government was involved in making procurement decisions, and they felt uncertain of how to go about marketing their products or services. Most procurement authorities felt they had a fairly good knowledge of the local market and suppliers (the current Supplier Directory was cited as a helpful tool), but expressed an interest in learning more about the capabilities of local vendors and for increasing the input of vendors during the planning phase of procurements.

A number of vendors raised concerns about the quality of debriefings offered after a procurement, noting that procurement authorities were sometimes unsure of what information could be shared or were not able to provide constructive feedback. It was suggested that better note-taking during the evaluation of proposals and a solid rationale for the construction of the evaluation framework would bring more value to debriefing sessions.

Challenges were noted in some areas in obtaining information about contract awards (e.g. goods procurement, or contracts issued under standing offer or qualified supplier arrangements).

Vendors and staff both expressed an interest in building more constructive and collaborative relationships. Several vendors suggested their current relationships were more adversarial than they would like, and felt this resulted in missed opportunities to make improvements to a planned procurement or contract. A number of vendors also mentioned they would like to stay informed about the actions government is taking to improve procurement and to address the issues brought to the panel.

Best practices or models from other jurisdictions

Some jurisdictions include Supplier Relationship Management as a distinct skill area within their procurement competency frameworks, which helps communicate the importance of developing and managing effective relationships and identifies

the related skills and behaviours required to support successful procurement[7]. Many jurisdictions publish information or offer in-person sessions about "how to do business with government" and some host "reverse trade shows" (in which government highlights its procurement needs and business objectives for interested vendors) which may also be used to attempt to find local vendors able to supply particular goods and services.

Recommended Actions

- Provide contact information for government procurement authorities to enable vendors to provide business information
- Develop and implement tools and processes to support vendor and post-project evaluations and debriefs to promote continuous improvement in procurement and project management
- Develop guidance and expectations concerning best practices for sharing (publishing) evaluation outcomes (e.g. publishing technical points scores as well as bid values)
- Consider augmenting the reverse trade show to include information about items currently sourced outside the Territory
- Continue / enhance offerings of 'how to do business with YG', consider adding training for vendors to respond to opportunities and to increase buyer awareness of their firm
- Establish mechanisms for receiving continued input from the vendor community and for providing updates on progress for the action items in this report and other procurement initiatives

9. Improve market intelligence and procurement management information

Why it matters

Information about where and with which suppliers government is doing business can provide important insights into an organization's buying patterns. A thoughtful and systematic analysis of procurement data, also referred to as spend analysis, can be used to leverage buying power, reduce costs, provide better management and oversight of suppliers and to develop an informed procurement strategy[8].

Spend analysis can provide information to support procurement decisions on strategic sourcing, which is a systematic continuous improvement process that directs supply managers to assess, plan, manage, and develop the supply base in line with the agency's stated objectives[9]. Procurement organizations that use strategic sourcing are constantly re-evaluating procurement actions to insure alignment with long-term organizational goals. It also facilitates continuous process improvement by measuring

[7] See, for example, the UK Procurement Profession and Competency Framework (2012) which includes sections on managing supplier relationships for both individual contracts and for categories of suppliers.

[8] NIGP Principals and Practices of Public Procurement, Spend Analysis

[9] NIGP Online Dictionary of Procurement Terms, Strategic Sourcing

the effectiveness of these same procurement actions. Applied effectively, strategic sourcing can significantly lower the costs of goods and services and improve the outcomes of the projects or programs involved.

Effective planning also requires information about the markets in which government is operating. For example, the procurement process considered most appropriate would likely be quite different if the relevant market has numerous, comparable vendors compared to a market with only a few vendors with significantly different capabilities. Understanding the dynamics of a market and how it relates to what you are buying are key requirements for establishing and leveraging good relationships with suppliers, constructing appropriate procurement processes, contracts, payment structures, and performance management expectations. In addition, data collection and analysis is required to understand the impact of procurement on local markets and to design procurement strategies to maximize local economic benefits.

What we heard

The Panel heard, from vendors and Yukon government staff, that there is a lack of information about the impact of government's procurement spending on the Yukon economy. The Procurement Support Centre compiles summary data about overall amount of spending by department and whether the vendor is inside or outside Yukon, but does not estimate economic impact or explore individual market segments. Procurement authorities rely primarily on past experience to design procurement processes, typically without the benefit of any written performance evaluation information. There is some anecdotal information about the cost impact of the entry or exit of a new supplier in particular markets, but little objective information about the impact of local businesses on the economy and prices[10].

Best Practices or Models from other Jurisdictions

"Best in class" organizations are those in which market intelligence is demonstrably and actively used to inform project/program planning and business decisions[11].

Recommended Actions

- Identify and collect market intelligence and spend analysis information to improve sourcing strategies
- Develop and regularly assess measures of the economic impact of YG procurement (e.g. "leakage", return on investment, direct/indirect economic benefits, etc.)

[10] The Property Management Branch does some estimation of the economic impact of their capital projects after award, although it isn't clear whether this may also be used to inform future project planning

[11] Procurement Capability Review Maturity Matrix, UK Office of Government Commerce

10. Increase coordination and communication of the scheduling of procurements

Why it matters

Good procurement planning requires understanding both what is required (the demand side), what is available in the market (the supply side) and an ability to design the procurement to maximize best value through coordination of both aspects. This may involve adapting how much of a good or service to buy at different points during a year or project to take into account differences in availability or pricing.

Procurement planning for both individual projects and for an organization can make a significant contribution towards saving time and money, managing resources and maximizing opportunities for local businesses. It can include strategies for getting input from suppliers or other stakeholders and help set realistic timeframes for supplier responses and for the contract period, and help avoid last minute adjustments to a procurement.

Consulting with local suppliers during the planning stages of a procurement can help ensure opportunities don't inadvertently include specifications, requirements or schedules that limit the involvement of local businesses

What we heard

The panel heard a variety of complaints about vendors having inadequate time to carry out work due to either late release of the procurement, slow award of a contract, or unrealistic schedules. The panel also heard some concerns from vendors about not being able to respond to opportunities, either because there wasn't enough lead time to secure staff or resources, or the response window was too short, or too many opportunities were released at the same time. Vendors also noted that slow contract award processes can increase costs (e.g. from missing shipping windows) and make coordination among participants more challenging (e.g. subcontractors or suppliers). In addition, vendors identified a number of examples where they had difficulty obtaining answers to questions about posted opportunities, which in some cases resulted in vendors deciding to not submit a response.

Recommended Actions

- Provide early notice of anticipated projects and earlier tendering of construction projects where possible
- Develop guidance or mechanisms for procurement authorities to help ensure:
  - procurement timing takes into account seasonality impacts as well as conflicts in timing between similar projects, and
  - planning / design can be completed prior to the call for proposals or bids
- Explore upgrading the "Tender Forecast" system to improve accuracy and to support internal scheduling and coordination between projects
- Encourage awarding of contracts as soon as practicable to allow successful supplier to plan, lock in pricing, coordinate subcontracts, etc.
- Ensure a contact is in place to answer questions during the tender period who can respond to enquiries promptly

11. Revise the current Bid Challenge process

Why it matters

Systems for allowing vendors to make complaints about public procurement processes have become fairly common across the public sector, although an understanding of the constructive role they can play is less widespread. A bid review or challenge mechanism is important not just because it can help ensure the procurement rules are properly followed in an individual instance, but also because it can bring an important measure of transparency and accountability to the procurement system overall. The effectiveness of a bid dispute mechanism will impact vendor confidence and willingness to sell to government. In addition, concerns raised by vendors are an important source of information for improving the efficiency and integrity of the procurement system.

What we heard

A significant number of vendors indicated a lack of confidence in the current dispute resolution process. A commonly raised concern was the length of time required to get feedback about complaints, whether they will be investigated, or the outcome of the review. Some vendors raised concerns about the integrity of the bid challenge process, as there are perceptions that complainants face negative repercussions from buyers or that there is political interference in the complaint process. Others identified a lack of effectiveness of the current process, as it isn't able to respond to complaints quickly enough to address issues prior to bid closing or contract award, and the remedies available are considered inadequate. In addition, a lack of transparency was noted about what is happening to address both individual complaints and Bid Challenge Committee recommendations.

A related set of concerns were raised questioning whether the composition of the Bid Challenge Committee was appropriate. Issues raised included that some of the complaints required extensive or specialized knowledge to address, and the practice of resourcing the Committee with Yukon government staff and local vendors often contributes to delays in finding members that are not in conflict with the complaint, and perceptions that conflict and bias affected the committee's decisions.

There was also some interest expressed in having a "safe place" to raise complaints – in particular about "live" opportunities – in which an advocate within YG could objectively assess and provide feedback on concerns.

Considerations

All trade agreements, such as the Agreement on Internal Trade, contain requirements about what kind of procurement complaint processes parties to the agreement are expected to have in place. The AIT is currently being re-negotiated, and the Canada-/EU trade agreement (CETA) is currently being finalized; both agreements could include provisions that will require Yukon to make changes to the current Bid Challenge process and may set timelines within which these changes are to be made. The Procurement

Support Centre has been intending to revise the Bid Challenge process for some time, and is prudently awaiting finalization of these agreements prior to undertaking any detailed reassessment or planning.

Best Practices or Models from other Jurisdictions

The Panel reviewed the procurement complaint processes in several other jurisdictions[12], and is aware that most provinces and territories are considering revisions to their processes to ensure alignment with trade agreements. One of the questions most commonly under consideration is whether to provide the reviewing body the ability to grant 'rapid interim measures', that is, to the ability to stop a procurement that is underway in order to attempt to remedy the complaint. Although this has the potential to provide the most satisfying outcome for the vendor (a 'fixed' issue prior to bid closure) it raises considerable risk for the public agency in terms of delays and disruption. In general terms, the more substantive powers that are granted to a dispute resolution body, the more significant the expertise required of the people or person appointed to it to make the decisions.

All jurisdictions reviewed (other than Yukon) have a commitment for the time period within which a complainant will receive a response and provide written reasons for both the decision to proceed (or not) with a review, and the outcome of a review or investigation.

In addition to playing a role in dispute resolution, the federal Office of the Procurement Ombudsman (the OPO) plays a role in facilitating the exchange of information between buyers and vendors to help resolve issues in their earliest stages, as well as during contract administration. The OPO may get involved in cases where suppliers feel they are not obtaining factual or timely information from departments regarding such things as a particular Request for Proposal or the evaluation of their bid. In those cases their interventions focus on facilitating - ensuring both the supplier and the department understand each other's perspective and that the necessary information is exchanged so that both sides can move forward. This may be as simple as acting as a conduit for the exchange of information between the supplier and department or taking on a mediator role and encouraging the department and supplier to engage in open, direct dialogue.

Recommended Actions

- Establish timelines for providing responses to complaints,
- Require reasons for decisions be made available in writing
- Establish a mechanisms for the complaint body to follow up on whether decisions and recommendations made have been implemented
- Review requirements for appointing Bid Challenge Committee members to consider establishing a more independent entity with strong public procurement expertise
- Provide training and support for procurement authorities to constructively respond to vendor concerns and complaints

[12] See Appendix 4 for a summary of key elements

Suggested further research / review:

- Investigate models of an informal dispute review role used in other jurisdictions to support complaint resolution prior to or instead of engaging in formal proceedings.

Appendix 1 – Panel Members

Chair - Leslie Anderson, Victoria, BC

Ms. Leslie Anderson has over 25 years of experience working in and around the public sector at the federal, provincial and territorial levels, including 6 years as an ADM with the Yukon Government. Much of Leslie's professional work has included a procurement focus, and she brings significant academic credentials to the Panel, including a bachelor's degree in economics and master's degrees in Public Administration and Law, as well as a certificate in procurement law from Osgood Hall Law School. Leslie is currently operating an independent consulting business in Victoria, BC.

Paul Emanuelli – Procurement consultant, Ontario

Paul Emanuelli is an internationally known author and procurement lawyer with an extensive track record of public speaking, publishing and training. His portfolio focuses on major procurement projects for a broad range of goods and services with an emphasis on information technology transactions, corporate governance and supply chain management. Paul has in-depth experience advising institutions on the legal and strategic aspects of purchasing operations, developing procurement formats and negotiating commercial transactions. He is the Program Director of Osgoode Professional Development's Certificate in Public Procurement Law and Practice and the author of multiple publications, including the leading textbook Government Procurement (Lexis Nexis-Butterworths, 3rd ed. 2012). Before launching the Procurement Law Office, he practiced for over ten years as Crown Counsel for the Ontario Ministry of the Attorney General at both Management Board Secretariat and Crown Law Office Civil, and headed the Government of Ontario's Procurement Lawyers Group.

Steven Bartsch – Yukon consulatant, Whitehorse, YT

Steven Bartsch, P.Eng. is a Civil Engineer based in Whitehorse who is the President of the Association of Consulting Engineering Companies – Yukon and the Yukon Area Manager for Associated Engineering's local office. Steven's career has been based in the private sector for 15 years and he has a long standing involvement in promotion of improved procurement approaches and contract terms for retaining the professional services sector.

Marian Macdonald – Procurement specialist, Government of Ontario

Marian Macdonald is the Assistant Deputy Minister of Supply Chain Ontario at Ontario Shared Services, Ministry of Government and Consumer Services.
Supply Chain Ontario manages Ontario's multi-million dollar Vendor of Record program, directs supply chain transformation in the Broader Public Sector, conducts outreach activities with Ontario's vendor community and implements new policies and trade agreements across all of Ontario's public sector.
Marian is a strong advocate of procurement transformation. She established a continuous improvement program in Supply Chain Ontario with a goal to significantly streamline the procurement process making it easier for vendors and buyers. Initially started to support Ontario

Public Service procurement activity, Supply Chain Ontario are now sharing their best practices with public sector buyers across Ontario.
Marian was appointed Assistant Deputy Minister in 2009. Prior to that she held a variety of senior positions across other government ministries including Consumer and Business Services, Senior Citizen's Affairs, Health and Long-Term Care, and the Northern Development and Mines.

Mark Wallace – Yukon lawyer, Whitehorse, YT

Mark Wallace is an Associate with Austring, Fendrick & Fairman. He grew up in Whitehorse Yukon and has practiced Law in Manitoba and the Yukon. Mark's practice focuses on civil litigation including corporate commercial litigation and construction litigation. Mark has represented both owners and contractors in tender disputes; advised on tender preparation and bid review; and provided opinions on tendering documents.

Larry Turner - Local contractor, Grey Wolf Contracting, Crocus Glen Developments Inc, Whitehorse, YT

Larry Turner has been a general building contractor in Yukon for many years. He is an owner and President of Grey Wolf Builders Inc. and Crocus Glen Developments Inc. Currently he is President of the Yukon Contractors Association and has recently been nominated as a Director of the Canadian Construction Association.

Appendix 2 – Individuals / Organizations providing input to the Panel

The following individuals, provided input to the Procurement Advisory Panel	
Name	**Representing**
Adam Grinde	Teslin Tlingit Council
Alan Lebedoff	ALX Exploration Services
Allan Code	
Arden Myer	Trans North Helicopters
Bob Hassard	Deadman Creek Ent.
Brad Stoneman	Consulting
Brendan Preston	Brendan Preston Video & Photography
Carl Freisen	Underhill Geomatics
Chad Harwood	Bid Challenge Committee Chair
Charles Turanich-Noyen	Aurora Geosciences
Chris Lane	MakeIT
Cole Hunking	Village of Teslin
Colin MacKenzie	SnowShoot Productions
Cory Bellmore	Village of Carmacks
Cris Guppy	ECOFOR
Dale Panchyshyn	Nomad Air
Dave Borud	Northerm Windows
Dave Sharp	Tintina Air
Delmar Washington	Capital Helicopters
Denny Kobayashi	Nothern Vision Development
Eric Brohman	Ketza Construction
Frank Thomas	Thomas Electric
Fraser Smith	Northern Climate Engineering
Glenn Rudman	Ecological Logistics & Research Ltd.
Hank Moorlag	Common Ground Mediation & Consulting
Ian Robertson	Inukshuk Planning
Ian Tuton	Office Supply Centre
Jack Kobayashi	Kobayashi Zedda Architects
Jason Adams	Yukon Yamaha / Total Trac Yukon

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Name	Representing
Jayden Soroka	Pixelbox Studio
Jeff Sloychuk	Bid Challenge Committee Member
Jerry Lum	David Nairne & Associates Ltd.
Jon Rudolph	Cobalt Construction
Josh Clark	Total North Communications
Joyce Bachli	MEGA Reporting
Keith Tegart	Bid Challenge Committee
Ken Nordin	Laberge Environmental
Kevin Benson	Hougen Group of Companies
Mal Malloch	Malloch Consulting Services
Max Fraser	Hootalinqua Motion Pictures Inc.
Mike Pemberton	Erika Holdings
Pat Tobler	Environmental Dynamics Inc
Paul Gruner	Dakwakada Capital Corp / Castle Rock
Peter Turner	Yukon Chamber of Commerce
Phil Bastien	Paradigm Digital Signage
Richard Trimble	TetraTech EBA
Rick Karp	Whitehorse Chamber
Rick Savage	Castle Rock Enterprises
Rob Fordham	Kilrich Industries
Rod Savoie	Stantec
Roy Slade	Yukon Engineering Services
Ryan McLennan	Kobayashi Zedda Architects
Tammy Beese	Beese Entertainment Publishing
Tim Turner-Davies	T Square Architecture
Tina Woodland	Whitehorse Motors
Toos Omtzigt	Yucan Planning
Trevor Matthews	the Inland Group
Wendy Solonick	Yukon Yamaha / Total Trac Yukon
Wendy Tayler	Alkan Air / Whitehorse Motors
Wilf Tuck	Wilfs Contracting

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Yukon Government Representatives	
Barbara Dunlop	Economic Dev't, Business & Industry Dev't
Bill Stonehouse	HPW, Acquisition Services and Planning
Catherine Harwood	HPW, Procurement Support Centre
Dale Enzenauer	HPW, Transportation Engineering Branch
David Knight	HPW, Acquisition Services and Planning
Debra Thibodeau	HPW, Acquistion Servces and Plannng
Dwayne Muckosky	Community Services, Community Development
Guenther Mueller	HPW, Procurement Support Centre
Jenny Richards	HPW, Acquisition Services and Planning
Kathy Randall	HPW, Procurement Support Centre
Ken Jeffrey	HPW, Transportation Engineering Branch
Kieran Slobodin	Economic Dev't, Business & Industry Dev't
Lekan Mitchell	HPW, Transportation Engineering Branch
Mike O'Connor	Community Services, Community Development
Nick Rodger	Community Services, Community Development
Pascale Black	HPW, Queens Printer
Paul Murchison	HPW, Transportation Engineering Branch
Pauline Stonehouse	HPW, Transportation Engineering Branch
Peter Blum	HPW, Property Management
Ruth Hall	Environment, Environmental Programs
Zubair Qureshi	HPW, Property Management

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Appendix 3 – Preliminary Findings

Consolidated List of Issues
Feb 15th, 2016

The issues raised by vendors, vendor associations, community representatives, and Yukon government staff are summarized below under three main themes. Note that the **issues in bold** are those that were raised most frequently.

Theme 1: Increase Opportunities for Yukon Vendors to Participate
Key Finding: There is a strong desire to improve mechanisms to use procurement to support local suppliers
Issues Raised
There is a lack of understanding of what actions are possible to support local businesses under trade agreements o **There is a lack of guidance for staff on how to design procurement to take advantage of local market capabilities** (e.g. creating the 'right size of requirements through bundling or unbundling needs, using supply and install contracts, using output or performance specs, or using "agile" approach for IT development)
There is a lack of clarity for procurement authorities concerning whether/how they are expected to support local vendors, communities or First Nations through procurement activities (i.e. no clear policy or guidance).
There is a lack of understanding among buyers about how to construct procurement processes to properly address advantages held by incumbent vendors
Finding: There are opportunities to increase awareness of local vendor capabilities and YG procurement needs
Issues Raised
Lack of awareness of local market capabilities, and of sources of information about same outside the supplier directory and the phone book
Lack of awareness of what (in particular goods) is purchased 'outside' Yukon and where opportunities for local business may exist outside of formal public procurement
Finding: There are opportunities to improve access for local vendors to public sector procurement across Yukon public agencies
Issues Raised
There is a lack of visibility of procurement opportunities for entities not covered by YG Procurement Directive
There is an opportunity for increased cooperation with and support for First Nations through procurement
There is a lack of clarity about when/whether agencies dispersing YG funds must follow YG procurement processes

Theme 2: Reduce Barriers for Yukon Vendors to Participate

Key Finding: There is a need to streamline procurement processes

Issues Raised

Responses required from vendors to opportunities can be unnecessarily onerous
- Requirements to include unnecessary documentation
- Excessive or inappropriate use of mandatory and evaluation requirements

There is a need for more timely responses to questions on open tenders and proper/prompt issuance of addenda

There is a need for more thoughtful coordination and communication of the scheduling of procurements (e.g. early notice and of anticipated projects, earlier tendering of construction projects) to enable local businesses to plan participation

Vendors are unable to easily determine whether the procurement or contract contains and unusual or non-standard clauses requiring attention

Insurance requirements are sometimes onerous/unnecessary for the task

Bids are sometimes rejected for what vendors perceive as minor oversights

There can be a delay in the evaluation team receiving bid responses

Slow contract award procedures can increase costs (e.g. missing shipping windows, late requests for product testing)

There is a lack of mechanisms/incentives for project managers to know what related work is being offered to vendors at the same time

Key Finding: There is a need to increase clarity, consistency and transparency in procurement processes

Issues Raised

Ineffective use of specifications / poor crafting of requirements/specs
- Lack of mechanism to determine appropriate specs or confirm equivalence of specifications

There is a lack of clarity and consistency in choices of procurement tools and processes used by different procurement authorities
- Lack of clarity / consistency in crafting and awarding work under SOAs and qualified source lists

There is a need for increased procurement expertise during development and execution of procurement processes
- Lack of expertise conducting evaluations, e.g. how to craft good (relevant, efficient) evaluation criteria and processes
- Lack of understanding when a low-bid procurement is most effective, and when a procurement should be 'point based'
- Lack of confidence that fairness monitors are appropriately trained and appropriately used
- Desire for some kind of certification for procurement authorities (vendors seeking increased comfort procurement authorities have adequate training)

There is a lack of transparency in the outcomes of bid evaluation o Inconsistent information provided about the evaluation process, committee members, scoring and the successful bidder o Mistrust of the evaluation process – perceived subjectivity in parts of the process that are not visible
Internal inconsistencies within procurement documents are common o Lack of alignment between budget, timelines and specifications/requirements
There is a lack of understanding about the use of disclaimers, and a lack of comfort with government's use of them (e.g. "not bound to make an award")
Unwillingness to disclose the budget available for a project can pose significant hindrance to vendors to propose the right size of work

Theme 3: Increasing dialogue and building a more collaborative culture

Key Finding: There is an opportunity to increase information and resources to support local participation

Issues Raised
There is a lack of information / data available about procurement spending and its Return on Investment
There is a lack of awareness/appreciation of the impact local businesses have on economy and price structures
There is a lack of awareness about what information can or cannot be shared with vendors during/after procurement o Incomplete information provided during debriefs and apparent reluctance to meet with vendors and discuss proposals or past performance o Lack of good notes / rationale and solid explanations about evaluations during debriefs leads to issues proceeding to Bid Challenge
Vendors require better information about who within government is making purchasing decisions (in order to know who to reach with market /vendor capability information)
There is a need for increased and ongoing communication with the vendor community concerning actions taken on issues identified
Vendors are not able to find information about goods procurement (opportunities or awards)
Lack of understanding among vendors about the current roles/responsibilities within YG with respect to preparing/posting procurements and awarding contracts o Vendors are uncertain about PSCs roles and objectives o Misunderstanding / lack of clarity about how many YG staff are involved in procurement
Procurement authorities lack information about local vendors & capabilities

Lack of clarity for vendors concerning whether and how opportunities are competed or awarded
Key Finding: The mechanisms to address vendor concerns and complaints need to be improved
Issues Raised
Need a 'safe place' to raise concerns about procurement (in general and about specific opportunities) o Lack of ability to raise a flag/concerns about an open procurement other than with the procurement contact – who may not fully appreciate the issue or respond in a timely fashion o Perception complainants face negative repercussions (e.g. blacklisting)
Vendors don't feel redress currently available through the bid challenge process is adequate o There is a lack of understanding among vendors of what remedies are available under the current Bid Challenge Committee process
Composition of the Bid Challenge Committee (BCC) can be problematic o Conflict of interest issues appear to slow down process significantly o There is concern there is a lack of appropriate expertise among Bid Challenge Committee panel members
Lack of timeliness in responding to complaints
Lack of open (public) communication about bid challenge issues o There is a lack of information about concerns raised through bid challenge to inform other bidders o Grounds for a decision not to proceed should be made public
Bid Challenge Committee members sometimes have difficulty getting access to documentation or information to reach a clear conclusion
Vendors don't feel certain that their complaints are actually 'heard' (received and considered)
Key Finding: There is a need to build more constructive relationships between local vendors and YG procurement authorities
Issues Raised
There is a lack of understanding how to constructively handle bidder enquiries/complaints before/during/after procurement process o Need to foster a culture of mutual support/cooperation between YG and local vendors, not fear/antagonism
Lack of opportunities and mechanisms to build understanding and camaraderie between YG and vendors
Some perception of political involvement in decision making or complaints
Perception that YG culture reflects a "litigator's" point of view, not a "negotiator's (i.e. is too adversarial)
Lack of vendor expertise to identify / respond to government opportunities

Appendix 4 – Partial Comparison of Several "Bid Challenge" Systems

Developed For Discussion at Yukon Industry Conference, February 24th, 2016

System Attribute / Component	Yukon	North West Partnership Agreement	Northwest Territories	Canadian International Trade Tribunal	Office of the Procurement Ombudsman
Time lines – to file - **For govt response** - **to complete**	60 days from closing or 15 from award n/a n/a	10 days from knowledge of issue 14 days 51 days [13]	10 days from award 15 days 45 – 90+ days[14]	10 days from knowledge of issue	30 days from award 15 days
Consultation with procuring entity?	Optional	Required	Required	Optional	Optional
Independent agency?	No	Yes	No	Yes	Yes
Level of procurement expertise	Low - medium	High	Low – medium	Very high	Very high
Require financial deposit from complainant?	No	Yes	No	No	No
Ability to suspend?	No	No	No	Yes	No
Ability to conduct "hearing"?	Yes	No	No	Yes	No

[13] Assumes 20 days consultation with procuring agency, supplier immediately requests arbiter, 14 days for appointment of arbiter and government written reply, 7 days for supplier counter reply, 10 days for final report

[14] some steps are not clearly time bound, and there are 3 levels of possible review.

System Attribute / Component	Yukon	North West Partnership Agreement	Northwest Territories	Canadian International Trade Tribunal	Office of the Procurement Ombudsman
Ability to recommend award for costs? **For bid prep?** **For challenge?** **For 'lost profit'?**	 Yes Yes No	 Yes Yes Yes	 No No No	 Yes Yes Yes	 Yes Yes No
Ability to recommend changes to policy or process?	Yes	Yes	Yes	Yes (but secondary)	Yes
Ability to award costs to government?	No	Yes	No	Yes	No
Ability to recommend contract cancellation re-procurement or contract award to complainant?	No	No	No	Yes	No
Required to produce written reasons?	No	Yes	Yes	Yes	Yes
Mechanism to follow up on recommendations?	No	No	No	Yes	No

Appendix 5 – Building a Better Framework for Open and Fair Competition

A Supplement to the Yukon Procurement Advisory Panel Report

The Procurement Office

Procurement Law Office | Procurement Training Office

Building a Better Framework for Open and Fair Competition

A Supplement to the Yukon Procurement Advisory Panel Report

April 13, 2016

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The Procurement Law Office specializes in Canadian public sector procurement law, advising government bodies in all sectors and regions of government in Canada. Paul Emanuelli, General Counsel and Managing Director of the Procurement Law Office, has been ranked by Who's Who Legal as one of the top ten public procurement lawyers in the world and his textbook, *Government Procurement* (3rd ed., Lexis Nexis, 2013), has been cited by the courts as an authority on the subject of Canadian public sector bidding and tendering law. He has served as a course director for Osgoode Professional Development since 2006, and has trained and presented to thousands of procurement professionals from hundreds of institutions across Canada and internationally.

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1. Introduction

While there have been countless well-intentioned calls over the years to use the government procurement process as a means of fulfilling a broad range of social policy objectives ranging from stimulating the local economy and creating jobs to promoting the procurement of more environmentally sustainable goods and services, those public policy objectives have often failed to gain traction since public procurement is already subject to the firmly entrenched competing policy objectives of value-for-money, trade liberalization and transparency.

Insofar as the public policy objective of supporting local suppliers in government procurement is concerned, this paper will explain the key friction points among the competing policy objectives and explore some areas of opportunity for promoting local supplier interests in a manner that is compatible with the public procurement rules. As this paper discusses, to be successful, any policies aimed at assisting local suppliers must comply with the regulatory context established for public procurement.

However, the complexities of trade treaty compliance should not result in abandoning local suppliers to fend for themselves in the arena of unbridled open competition. Rather, as this paper explains, new innovations in procurement are expanding opportunities to re-engage local suppliers within the emerging frameworks of open and fair competition.

2. The Regulatory Context of Open Public Procurement in Canada

2.1. The Trade Treaties and Core Policy Objectives of Public Procurement

The post-war era has seen a steady expansion to trade treaties impacting government procurement practices across Canada, including the following:

- the *Agreement on Government Procurement* between Canada and many of its international trading partners, which applies to Canadian federal government procurement;
- the *North American Free Trade Agreement* between Canada, the U.S. and Mexico, which also applies to Canadian federal government procurement;
- the *Agreement on Internal Trade* which, subject to some exceptions, applies to most public institutions across Canada; and
- the broad range of regional trade treaties across Canada that apply to provincial governments, provincial agencies and the broader public sector including the *Atlantic Procurement Agreement*, the *Quebec-New Brunswick Trade Agreement*, the *Ontario-Quebec Trade and Co-Operation Agreement*; and the *New West Partnership Trade Agreement*.

The principles and practices entrenched in these trade treaties reflect the three core public procurement policy objectives of value-for-money, transparency and trade liberalization. While value-for-money considerations are of prime importance, they must be balanced with the other two core policy objectives of government procurement: transparency and trade liberalization. Each of these equally significant policy objectives is introduced briefly below.

A. Value-for-Money

The Auditor General of Canada's *2000 Report of the Auditor General of Canada* report (December 2000)[1], in a section entitled *Matters of Special Importance*, indicated the magnitude of spending by the federal government, stating that:

> Despite the retrenchment and cutbacks of the past decade, spending by the federal government remains at historically high levels — roughly $175 billion a year. How well this money is spent is clearly of great interest to the taxpayers, who bear the cost, and to the public at large, on whose behalf the spending takes place. (p. 5)

This section of the report also noted the significance of ensuring that government spending achieves value-for-money for taxpayers, stating that:

> [P]ublic money is money held in trust for the benefit of all Canadians. As a consequence, the government has an obligation to ensure that the money is managed prudently in support of the general public interest. It also means that the government must seek to obtain maximum value for the dollars it spends. (p. 12)

Public institutions typically seek to achieve value-for-money by using an open tendering process. By harnessing free-market forces in a controlled competitive environment, this process can result in a deal tailored to the institution's needs, on its terms and at potentially lower costs.

B. Trade Liberalization: Reciprocal Non-Discrimination

In an introduction to its *Agreement on Government Procurement*,[2] the World Trade Organization notes the protectionist pressures faced by governments to favour suppliers from within their own jurisdictions:

> In most countries the government, and the agencies it controls, are together the biggest purchasers of goods of all kinds, ranging from basic commodities to high-technology equipment. At the same time, the political pressure to favour domestic suppliers over their foreign competitors can be very strong.

In order to open government procurement to greater competition, the applicable trade treaties seek to counter these protectionist tendencies by establishing protocols for "reciprocal non-discrimination" or "national treatment", through which each signatory pledges that its public institutions will provide the same access to suppliers from the other jurisdictions as it does to suppliers from its own jurisdiction.

In its *2000-2001 Annual Report*, [3] Canada's Internal Trade Secretariat also referred to the public policy objective of reducing domestic barriers to trade within Canada by implementing non-discriminatory public procurement policies and by eliminating:

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[1] Auditor General of Canada, *2000 Report of the Auditor General of Canada* (December 2000), available online at http://www.oag-bvg.gc.ca/internet/English/parl_oag_200012_e_1139.html.

[2] World Trade Organization website, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm.

> …local price preferences, biased technical specifications, unfair registration requirements and other discriminatory practices for non-resident suppliers in order to ensure equal access to procurement for all interested Canadian suppliers. (p. 4)

As this passage illustrates, one of the key tenets of government procurement is to open a level playing field to all suppliers falling within the umbrella of the applicable trading block. The expansion of trade treaties has thus increased the pool of potential domestic and international suppliers bidding on government work in Canada.

C. Transparency

Tied closely to the concepts of trade liberalization and value-for-money is the principle of transparency in the award of government contracts. On a practical level, one of the most significant ways that this policy manifests itself is through the widespread adoption of open tendering practices with open and transparent contract award procedures and criteria as the method of awarding contracts to private sector suppliers. As numerous case law examples illustrate, the public policies that apply to government procurement call for the open and transparent award of government contracts and can attach significant consequences when those policies are not followed.

2.2 The Main Friction Points in Preferring Local Suppliers

The following areas have proven to be the greatest friction points in complying with the public procurement rules while also using government procurement as a means of supporting local suppliers:

- Trade Treaty Prohibitions: No Local Preference
- No Biased Specifications
- Contract Value Thresholds and Anti-Avoidance Rules

Each of these areas is briefly summarized below.

A. Trade Treaty Prohibitions: No Local Preference

As noted above, the *Agreement on Internal Trade* ("*AIT*") is a domestic treaty signed by the federal, provincial and territorial governments in Canada. Chapter 5 of the *AIT* sets out specific rules for government procurement. Subject to the monetary thresholds of $25,000 for goods and $100,000 for services and construction,[4] the parties agree that they will procure by way of open tender call accessible equally to all Canadian suppliers. As with the international treaties, the *AIT* aims to implement the principles of open competition and reciprocal non-discrimination for the benefit of Canadian suppliers from all jurisdictions within Canada:

[3] Internal Trade Secretariat (Canada), 2001-2002 Annual Report, *The Agreement on Internal Trade* (April 2000 to March 2001), online at http://www.ait-aci.ca/wp-content/pdfs/English/AnnualReports/2000-01.pdf..

[4] Article 502 of the *AIT* sets the fixed thresholds at $25,000 for goods and $100,000 for services and construction. Some public institutions may be exempt or subject to higher thresholds based on specific annexes to Chapter 5 of the *AIT*.

BACKGROUND

AIT

As a party to the *AIT*, the Government of Canada has agreed to provide all Canadian suppliers equal access to federal government procurement for contracts involving specified classes of goods and services (including construction services) bought by the government departments, agencies and Crown corporations listed in the *AIT*. Insofar as the federal government is concerned, the *AIT* applies to procurements with a value equal to or greater than $25,000, in cases where the largest portion of the procurement is for goods, and a value equal to or greater than $100,000, in cases where the largest portion of the procurement is for services, including construction services contracts. The procurement values that trigger the applicability of the *AIT* do not change.

The *AIT* prohibits the federal government from discriminating against goods or services of a particular province or region, as well as between the suppliers of such goods or services and those of any other province or region. The *AIT* imposes procedural disciplines aimed at promoting equal access to procurement for all Canadian suppliers.

The other trade agreements

As a party to *NAFTA*, the *CCFTA*, the *CPFTA*, the *CCOFTA* or the *CPAFTA*, Canada has agreed to provide suppliers of the United States, Mexico, Chile, Peru, Colombia and Panama with equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought by the government departments, agencies and enterprises covered in these trade agreements.

In addition, as a party to the *AGP*, Canada has agreed to provide suppliers of certain WTO member countries equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought by the government departments, agencies and enterprises listed in the *AGP*.

These trade agreements apply to federal government procurements with a value equal to or greater than certain monetary thresholds, which may vary from agreement to agreement. These thresholds are revised periodically in accordance with the indexation and conversion provisions in the trade agreements. For the currently applicable thresholds, visit the Treasury Board of Canada Secretariat's Trade Agreements Thresholds web page: www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/ 2013/13-5-eng.asp (valid from January 1, 2014 to December 31, 2015).

These trade agreements guarantee national treatment and non-discrimination to goods originating in the signatory countries, as well as to the suppliers of such goods and services. They impose procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.

In keeping with the principle of treating Canadian suppliers no less favourably than suppliers from other countries, Canadian suppliers may also have recourse against the Government of Canada under these trade agreements.[5]

[5] Canadian International Trade Tribunal's *Procurement Review Process: A Descriptive Guide* under "Background", "*AIT*" online at http://www.citt.gc.ca/en/Procurement_Review_Process_e#_Toc390068319.

The annexes to Chapter 5 contain detailed lists of public sector entities that are included or excluded from these *AIT* obligations. The obligations are similar to those contained in the *AGP* and *NAFTA* and include: (a) "reciprocal non-discrimination" provisions to protect Canadian suppliers from barriers to trade; (b) procedural rules aimed at ensuring equal access to all Canadian suppliers; (c) prescribed methods for issuing a tender call; and (d) specific types of information that must be included in all tender calls.

Within Canada, and as between the provincial-level governments, the Internal Trade Secretariat oversees and administers the *AIT*. The Secretariat notes that the *AIT*'s procurement-related objectives include removing barriers to competition:

> **Procurement**
> Eliminating local price preferences, biased technical specifications, unfair registration requirements and other discriminatory practices for non-resident suppliers in order to ensure equal access to procurement for all interested Canadian suppliers.[6]

In fact, the *AIT*'s Sixth Protocol of Amendment came into effect January 1, 2005. This round of negotiations expanded the scope of public institutions across Canada in the MASH sector (sometimes referred to as the broader public sector *i.e.*, municipalities, the academic community, school boards, health and social services) that are now subject to the *AIT*'s open procurement obligations.[7] As evidenced by the expansion of the *AIT's* open competition requirements across the Canadian public sector, and by the parallel proliferation of the regional trade treaties noted further above, provisions in favour of open competition and in prohibition of local preference have become firmly entrenched in recent years in a manner consistent with broader international trade liberalization initiatives.

B. No Biased Specifications or Hidden Local Preferences

Subject to narrow and complex exceptions, the trade treaty rules generally prohibit specifications or evaluation criteria that would unnecessarily restrict competition. While the use of branded specifications is an obvious example of a procurement practice that, in the first instance, would be contrary to the trade treaties and require a case-specific rationale to be defensible, the use of any specification or evaluation criterion that unnecessarily restricts competition would be contrary to the open procurement rules unless the public institution could establish that the particular restriction fell within legitimate operational requirements for the specific contract. As the case law in this area has shown, suppliers may have standing to challenge these specifications and, where it is challenged, the public institution bears the onus of justifying its specifications and evaluation criteria.

While the express prohibition against local preference prohibits direct and overt local supplier preference practices, the restrictions against biased specifications also serve to prohibit indirect local supplier preference in situations where the public institution introduces requirements in its specifications or evaluation criteria that give a competitive advantage to local suppliers and that cannot

[6] Internal Trade Secretariat website's "Overview of the Agreement on Internal Trade" at http://www.ait-aci.ca/overview-of-the-agreement/.

[7] A consolidated version of the *AIT* incorporating all Protocols of Amendment to date is available at http://www.ait-aci.ca/agreement-on-internal-trade/.

be defended as being legitimate operational requirements. By way of example, certain types of services, such as snow removal, catering services or transportation services are more likely to require a local supplier presence to perform the work. Rationally related local presence specifications and criteria would more likely fall within legitimate operational requirements in such cases. By contrast, arbitrarily awarding significant evaluation points to bidders for maintaining a head office within the boundaries of a specific municipality is more likely be seen as unnecessarily restrictive and biased and could constitute an indirect local preference.

Given the prohibition against overt local preferences, there have been instances where public institutions have run afoul of open transparent competition norms by applying unofficial or hidden local preferences to their contract award decisions. The following cases provide some highlights from leading Canadian and international jurisprudence dealing with the application of local preference in the tendering process.

In its November 1989 decision in *Chinook Aggregates Ltd. v. Abbotsford (District)*,[8] the British Columbia Court of Appeal held that a purchaser cannot rely on a privilege clause to apply undisclosed evaluation criteria. The case involved a municipal tender call for a gravel crushing contract. The municipality had adopted an undisclosed local preference policy and awarded contracts to local bidders who were within 10 percent of the lowest bid. The plaintiff challenged the contract award made on the basis of the hidden preference. The Court of Appeal described the undisclosed local preference policy and its impact on the bidding process:

> The appellant had made a considered decision prior to inviting tenders, not to give notice of its local preference policy to bidders in its instructions to bidders. Officials of the municipality considered that if notice was given this might alert local contractors to the fact that they were afforded a preference. Presumably the appellant considered that the absence of notice would give it a price advantage. On the other hand, outside contractors such as the respondent believed that they were on an equal footing with all bidders. Mr. Tanner, the principal officer of the respondent, testified that if he had been aware that the appellant might apply a local preference in favour of local contractors up to ten per cent over the lowest bid, he would not have bid on the job because it would have been virtually impossible, in view of the competitive market, for him to bid ten per cent lower than the lowest bidder. (p. 2-3)

The municipality argued that the privilege clause in its tender call gave it "the right to select any tender made by any qualified bidder, not just the lowest tender". The Court of Appeal disagreed since it was "unable to accept counsel's submission that the privilege clause gave the appellant the right to exercise a local preference when that local preference was not revealed by, or stated in, the tender documents".

In its September 1991 decision in *Kencor Holdings Ltd. v. Saskatchewan*,[9] the Saskatchewan Queen's Bench held that the government could not rely on undisclosed criteria to bypass a low bidder. The case dealt with a tender call issued by the Government of Saskatchewan for the construction of a bridge. As the decision explains, Saskatchewan took the position that its general privilege clause allowed it to bypass the low bidder based on an undisclosed local preference policy. The low bidder sued, arguing that these clauses did not give Saskatchewan the right to rely on undisclosed criteria, maintaining that

[8] [1989] B.C.J. No. 2045, 40 B.C.L.R. (2d) 345 (B.C.C.A.).
[9] [1991] S.J. No. 439, [1991] 6 W.W.R. 717 (Sask. Q.B.).

"in the exercise of its discretion respecting tenders, the Government may not consider policy which is unknown to bidders". The court agreed, noting that there "was no indication in the tender documents that preference might be extended to Saskatchewan bidders, and the plaintiff was unaware of this possibility". The court found that in the interest of maintaining the integrity of the bidding process, evaluation factors should be clearly disclosed:

> To maintain the integrity of the tendering process it is imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will wane. The inevitable consequence will be higher costs to the taxpayer. Moreover, when governments, for reasons of patronage or otherwise, apply criteria unknown to the bidders, great injustice follows. Bidders, doomed in advance by secret standards, will waste large sums preparing futile bids. The plaintiff here for example, spent $23,000 on its abortive tender. (para. 19)

The plaintiff was awarded lost profit damages on account of the government's improper reliance on undisclosed selection criteria. As this case illustrates, whenever purchasers intend to rely on factors other than best price in making their contract award decisions, those factors should be clearly disclosed to all bidders.

In its June 1997 decision in *Hughes Aircraft Systems International v. Airservices Australia*,[10] the Federal Court of Australia, General Division, determined that the tendering process initiated by Australia's Civil Aviation Authority gave rise to a tendering process contract that contained an implied duty of fairness. The court then found the Authority liable for conducting an unfair evaluation of bids based on undisclosed evaluation factors. The case dealt with a tender call for the Australian Advanced Air Traffic System Acquisition contract ("TAAATS II"). The contract was awarded to an Australian corporation that was a subsidiary of a French company. The plaintiff, Hughes Aircraft Systems International, was an unsuccessful California-based bidder. Although it submitted the lowest qualifying bid, Hughes was bypassed in favour of a domestic bid that offered greater "community benefits."

The court determined that the Authority breached the process contract by unfairly straying from the predetermined evaluation rules. In particular, the court concluded that the evaluators breached the terms of the bidding process when they failed to follow the evaluation criteria established under the tender call and bypassed the low bidder in favour of a domestic bidder on "idiosyncratic grounds" for "geo-political" reasons. In other words, the Authority had bypassed the best bid based on hidden local preferences. It was found liable for doing so.

Turning to another high-profile international example, in its October 1999 judgment in *Harmon CFEM Facades (UK) Ltd. v. The Corporate Office of the House of Commons*,[11] the England and Wales High Court (Technology and Construction Court) found that the Corporate Office of the House of Commons breached the tendering rules by applying an undisclosed "Buy British" policy to the evaluation of competing bids. The case involved a tender call to build the New Parliamentary Building for the House of Commons in Bridge Street, Westminster, to create new offices for 210 Members of Parliament and their

[10] [1997] FCA 558; 146 ALR 1.
[11] [1999] EWHC Technology 199.

staff. The initial projected project costs were set at £250 million, making it one of the most expensive buildings ever built in London.

There were two bidding teams vying for the contract award. The first team, led by the plaintiff, Harmon CFEM Facades (UK) Ltd. ("Harmon"), a consortium of foreign suppliers, submitted the low bid. The second team, a consortium referred to as Seele-Alvis that included a major domestic contractor, submitted a higher bid. The House of Commons bypassed Harmon's low bid in favour of Seele-Alvis's higher bid. Harmon sued, alleging that the evaluation breached the applicable procurement rules. The Court agreed.

The court's lengthy decision documented a complex series of events, including aggressive lobbying and political pressure in favour of Seele-Alvis, which culminated in the bypass of the low bid on purported "best value for money" considerations. As detailed below, the court found that this "best value for money" evaluation process was "a charade".

According to the court, rather than representing the "best value for money," the selection process represented a flawed procurement conducted in contravention of the applicable procurement rules. In fact, the then-applicable regulations required that the low bid rule be applied to determine the winning bidder unless the additional non-price criteria were disclosed in the tender call document. The court found that the tender call failed to disclose the non-price-related criteria.

The court determined that the contract award decision was made on the basis of an improper hidden "Buy British" preference that drove the evaluators to bypass the low bidder.

The court determined that the House of Commons breached these implied duties by conducting a flawed evaluation process based on improper hidden criteria, and awarded the plaintiff its lost profits. As evidenced by this and many other cases, relying on improper hidden evaluation factors, including hidden local preferences, can result in significant legal liability.

C. Threshold Considerations: Contract Values and Anti-Avoidance

While the specific contract value threshold will vary depending on the specific trade treaty, type of contract and type of public institutions, public institutions are required to compete the award of contracts through open tendering when the estimated value of that contract exceeds the applicable trade treaty threshold. By way of example, as noted above, the *Agreement on Internal Trade* sets those values for senior level government institutions at $25,000 for goods and $100,000 for services and construction. While those thresholds may be higher under that trade treaty for public institutions, they tend to be considerably lower under the regional trade treaties referred to above. This means that the duty to run an open and transparent competitive bidding process and to avoid discrimination as between suppliers applies to even small contract awards and, in some areas such as consulting services, may be applied to all contracts irrespective of the contact value.

These threshold considerations strictly lower the contract value thresholds above which the open procurement rules would apply to prohibit local preference.

To enforce the obligation of open competitive bidding the trade treaties also expressly prohibit practices such as contract splitting (where a contract is artificially divided into smaller contracts in order to avoid the application of the contract value thresholds and the duty of open competition) and the use of subsidiary institutions (where the institution delegates its spending authority to another institution that is not subject to the procurement rules in order to avoid those rules).

3. Battling Big Firm Bias: The Perils of State-Sponsored Monopolies

The now firmly entrenched prohibitions against local supplier preference and contract splitting, coupled with the administrative convenience of managing fewer suppliers and with the increasing pressure on public institutions to obtain value-for-money, risks consolidating larger and larger contracts into the hands of fewer and fewer large suppliers. This bias towards bigger contracts and bigger firms, if left unbridled, can have unintended consequences in the marketplace and adversely impact future competition in the government procurement process.

This section provides examples of some of the unintended consequences of unbridled open competition and the subsequent section explores opportunities for establishing frameworks for fair competition that can enable local suppliers within the government procurement cycle.

A. Biased Specifications Can Cut Both Ways

While the biasing of specifications and evaluation criteria in favour of local suppliers has led to significant issues in public procurement in the past, recent focus has also been drawn to the issue of biasing requirements against smaller or local suppliers and in favour of larger entrenched incumbent suppliers. In either instance, government institutions are under increasing scrutiny to ensure the fairness of their specifications by avoiding scoping decisions that unnecessarily limit competition for government contracts.

For example, in its February 2015 decision in *Airbus Helicopters Canada Limited v. Canada (Attorney General)*,[12] the Federal Court of Canada rejected the legal challenge of a supplier who alleged that the government's specifications were biased in favour of a competing supplier. The case dealt with a federal government tender call for a $172 million light-lift helicopter purchase. The applicant, Airbus Helicopter Canada Ltd., brought a judicial review application after it engaged in pre-bid consultations with the government but then refused to bid due to what it alleged were biased specifications.

As the court noted, the case was unique when compared to most other judicial review challenges in that the complainant never actually submitted a bid in the challenged process. One of the key issues in the decision was whether the complainant had the right to initiate a legal challenge in those circumstances. The court ultimately concluded that the applicant did have standing to bring the lawsuit since the government had engaged in pre-bid consultations regarding its requirements. The court found that the government was under a duty to develop fair and unbiased specifications and also found that the government's market outreach created legitimate expectations that all consulted suppliers would be treated fairly during the consultation process.

[12] 2015 FC 257.

Notwithstanding the right to challenge the specification-setting decision and the process that led to that decision, the court ultimately held that the complainant failed to make its case. As the court determined, the failure to accept a supplier's request to change specifications in a solicitation document does not automatically equate to an unfair or biased process. In fact, in this case the court found no evidence that the government had overstated its technical requirements to bias the process in favour of the complainant's competitor. Rather, the court found that the government provided ample evidence as to the fairness and reasonableness of its technical requirements. As this case illustrates, in addition to being subject to legal challenges to its tendering processes, a public institution can also be challenged on the pre-bid technical standard-setting decisions it makes to create is tender call documents. While the complainant ultimately failed to prove its allegations of biased specifications, this decision serves as a significant precedent in the future for suppliers who seek to impugn the alleged bias of specifications established by public bodies in their bid solicitation documents.

As noted above, the unbridled open competition for larger and larger contracts involving larger and larger suppliers can have an adverse impact on smaller suppliers and ultimately an adverse impact on competition in the government procurement marketplace. Recent examples are explored below involving federal relocation services, ethyl alcohol acquisitions, airport security equipment and student transportation services.

B. Creating De Facto Monopolies: The Unfair Incubation of Entrenched Incumbencies

In its April 2013 decision in *Envoy Relocation Services Inc. v. Canada (Attorney General)*,[13] the Ontario Superior Court of Justice found the government of Canada liable for having unfairly favoured the incumbent service provider over competing bidders by making inaccurate disclosures of anticipated work volumes in its solicitation document. The case dealt with an RFP issued in 2004 for the provision of relocation services and contemplated two contract awards: the first for the Canadian Forces and the second for the government of Canada and the Royal Canadian Mounted Police. The incumbent service provider, Royal LePage Relocation Services ("RLRS") won both contract awards, valued at approximately $1 billion. A competing bidder, Envoy Relocation Services Inc., contested the outcome and brought a lost profit claim.

In its lengthy account of the relevant background facts, the court noted that the chain of events material to the dispute over the 2004 RFP actually arose during a prior 2002 RFP process for the same services. As with the 2004 process, RLRS was the incumbent service provider during the 2002 RFP process. After RLRS won the contract award resulting from the 2002 process, the government discovered irregularities relating to the conflict of interest of one of its employees who had attended a boat cruise with an RLRS official. The government also discovered that the 2002 evaluation process was flawed due to an unreasonably compressed posting period that unduly favoured the incumbent, as well as by the use of vague threshold evaluation criteria and flawed scoring formulas that resulted in the disqualification of all bidders except the incumbent. The government decided to terminate the 2002 contract early, which resulted in the 2004 RFP process.

As the court observed, a third critical latent defect in the 2002 process, which carried over to the 2004 process, was the government's failure to accurately disclose the anticipated work volumes for the property management services component ("PMS") of the contract. PMS were to be provided to those

[13] 2013 ONSC 2034.

relocated employees who, instead of selling their homes, chose to rent them out after moving. The price evaluation formula in both 2002 and 2004 called for proponents to bid a percentage figure for performing PMS based on an assumed number of employees who would require that services. However, as the court noted, the percentage of relocating employees who opted to rent out rather than sell their homes was far lower than what the government represented in the 2002 and 2004 RFPs. This translated into a significant unfair advantage to the incumbent, who was privy to the actual low historical numbers for PMS and bid no additional charge for PMS while the competing bidders bid a fair market value based on the volume of work set out in the RFPs. As the court concluded, this translated into a $42 million pricing advantage to the incumbent over the plaintiff Envoy in the 2002 RFP process and to a $48 million advantage over Envoy in the 2004 process. The court concluded that Envoy was prejudiced by the misleading PMS volumes and that this misrepresentation had undermined the integrity of the bidding process.

The court rejected the government's assertions that the hidden flaws in the process did not constitute unfairness since all of the tenders were evaluated consistently according to the terms set out in the RFP. Rather, the court found that the duty of fairness extends beyond the narrow scope of determining whether the evaluation was conducted in accordance with the terms of the RFP and also includes the duty to accurately disclose relevant performance and evaluation considerations upon which the bids will be evaluated.

The court determined that Envoy would have won the two 2004 contract awards had RLRS's zero PMS cost tender been disqualified as non-compliant. It concluded that Envoy was entitled to lost profits for the 2004 contracts, as well as to 50 percent of its lost profits for the lost extension periods under those contracts. The court awarded Envoy over $30 million in lost profits.

In its subsequent follow-up judgment in May 2013, the court increased the lost profit damages award by approximately $1 million based on revised lost profit calculations. It also awarded over $3 million in pre-judgment interest, as well as legal costs at the full indemnity scale (rather than at a lower partial compensation scale) which amounted to almost $4.8 million. As the court noted, awarding legal costs at the full indemnity scale is reserved for extreme situations of defendant misconduct. The court found that the government's conduct in the procurement process and subsequent legal proceedings warranted this higher award of legal costs in favour of the plaintiff.

As this case illustrates, perpetuating a previously unfair RFP process by using hidden factors that unfairly favour an incumbent is a breach of a purchasing entity's duty of fairness and can give rise to significant legal exposure when competing bidders launch legal challenges. Furthermore, engaging in inappropriate conduct to conceal those improprieties during the resulting litigation only serves to further undermine the credibility of the purchasing entity before the court and compound legal liabilities. In this instance, the total damages awarded amounted to almost $40 million, rendering a significant blow to the taxpayer, and to taxpayer confidence in the government's procurement processes.

In a follow-up audit in its Spring 2014 report,[14] the Auditor General of Canada reviewed the subsequent 2009 procurement process conducted by the federal government after the contract awarded in the

[14] Auditor General of Canada, *2014 Spring Report of the Auditor General of Canada*, Chapter 2: Procuring Relocation Services, available online at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201405_e_39319.html.

above-noted dispute was eventually retendered. By that point, the existing contract, and by extension the incumbent, had grown to such a size that there were no viable Canadian suppliers available to compete against the incumbent. In other words, through its unfair procurement practices, the federal government had succeeded in incubating a de facto state-sponsored monopoly for federal relocation services. While, as the Auditor General noted, government officials were aware of a lack of competing domestic suppliers, they still chose to proceed with the single Canada-wide contract rather than splitting the contract to encourage domestic competition. The government rationalized this approach based on operational needs and by arguing that a single large contract could attract international suppliers to compete against the incumbent.

However, as the Spring 2014 Auditor General's report ultimately concluded, while government officials took some steps to attempt to remove barriers to competition, those steps were reactive, were limited by the time constraints imposed by being behind schedule, and ultimately failed to facilitate access or encourage competition. The 2009 RFP received no responses other than from the incumbent service provider. As this case illustrates, while procurement rules may prohibit the use of contract splitting at the small end of the contract value spectrum, at the other end of the spectrum, the failure to guard against undue contract aggregation through strategic contract splitting can also undermine open competition in the marketplace by incubating unfair de facto monopolies.

The practice of perpetuating unfair incumbent advantage has not been limited in recent years to the federal relocation services file. By way of another recent example, in its April 2014 determination in *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police*,[15] the Canadian International Trade Tribunal found that the Royal Canadian Mounted Police ("RCMP") breached its open and fair competition duties under the trade treaties when it failed to provide historical volume usage information to competing bidders and created an unfair advantage for the incumbent supplier. The dispute involved a Request for Standing Offer issued by the RCMP for the supply of ethyl alcohol to detachments across Canada. The complainant challenged the process, alleging that the pricing structure unfairly favoured the incumbent by requiring bidders to include freight charges in their financial offers without specifying the location and volume of required shipments.

The RCMP argued that bidders were on a level playing field in determining the cost of the shipping since the location and quantities were equally unknown to all bidders at the time of bidding. The Tribunal did not accept the RCMP's position, since, as the complainant maintained, historical usage information was material to predicting future usage across the various RCMP detachments, particularly since that information would indicate which RCMP detachments had already started migrating to new dry gas standards for ethyl alcohol. While the Tribunal acknowledged that all potential suppliers have to assume an element of risk when preparing bids, the procuring entity is under a trade treaty duty to disclose the material contract information over which it has control. In this case, the historical usage information withheld by the RCMP would have assisted bidders in making projections on future use and more accurately calculating the cost of shipping the required goods. The failure to provide this information to competing bidders gave the incumbent, who was privy to this information, an unfair advantage contrary to the trade treaties. As a remedy, the Tribunal ordered that the contract awarded pursuant to the unfair tendering process be cancelled and retendered with the required information provided to all prospective bidders.

[15] CITT File No. PR-2013-041.

More recently, in its April 2015 ruling in *Rapiscan Systems Inc. v. Canada (Attorney General)*,[16] the Federal Court of Appeal upheld a February 2014 Federal Court trial decision that set aside a contract awarded by the Canadian Air Transport Security Authority ("CATSA") after finding that the contract was unlawfully awarded to an entrenched incumbent pursuant to an unfair bidding process. The dispute arose over the procurement of airport security screening equipment. The contract was awarded to the incumbent equipment provider, Smiths Detection Montreal Inc. A competing supplier of security screening equipment, Rapiscan Systems Inc., brought the legal challenge after submitting an unsuccessful bid. Rapiscan alleged that the process was unfairly biased in favour of Smiths after CATSA had previously awarded Smiths sole-source contracts for the provision of similar equipment and had relied on hidden evaluation criteria.

As the Federal Court noted, since its creation in 2002, CATSA had purchased its screening equipment exclusively from Smiths. While CATSA was criticized by the Auditor General of Canada in a December 2006 report for its sole-sourcing practices, the court observed that in 2009, after conducting informal internal comparisons of the Smiths and Rapiscan security screening equipment, CATSA awarded another sole-source contract to Smiths. As the court explained, CATSA officials preferred the new Smiths equipment since it was able to generate baggage images or "views" from four different vantage points. According to CATSA officials, the multiple view capture function helped expedite the screening process for security staff. The Rapiscan equipment, while considerably less expensive, was only able to capture views from two different perspectives. These technical considerations were relied on by CATSA management to obtain board approval for the $30 million sole-source award to Smiths in 2009. Under that contract, CATSA replaced the single view equipment that had previously been provided by Smiths through a prior sole-sourced contract.

In July 2010, CATSA prepared a new plan to competitively procure additional security screening equipment at an estimated cost of $40.5 million and went to market in August 2010 with a solicitation document that it referred to as a Request for Submissions ("RFS"). By October 2010, CATSA officials had sought approval from the board to award a new contract to Smiths. According to the briefing note provided to the board, Smiths had been selected pursuant to a process that was designed to "obtain competitiveness, openness, fairness, transparency and value for money" and the Smiths equipment had "rated highest in each category" of evaluation. The briefing note also indicated that the Rapiscan equipment had not met the requirement of being able to generate at least three views of scanned baggage. In response to questions by the board, CATSA's CEO provided assurances that Smith's equipment "meet the needs required now" and was "the highest performing technology that exists today with the most potential for improvement." The board approved the award of a five year standing offer to Smiths, with an option to extend for up to five additional years.

Rapiscan brought a legal challenge against this contract award, seeking a court declaration that the award decision was unlawful and unfair and seeking that the court direct CATSA to conduct a new procurement process that complied with CATSA's statutory obligations and contracting procedures. The fact that CATSA's management had run an arbitrary process that lacked the substantive elements of a genuine competition, and had then misled the board into believing that they were awarding a contract based on an open and fair competition, tipped the scales towards judicial intervention in order to protect the integrity of the procurement process.

[16] 2015 FCA 96.

CATSA appealed the decision but lost that appeal. While the Federal Court of Appeal reversed some of the Federal Court's findings, including the trial court's finding of bad faith on the part of CATSA, its April 2015 ruling ultimately upheld the trial court's decision to strike down the contract award to the incumbent due to the unfair tendering process based on hidden technical specifications that were biased in favour of the incumbent.

The failure to engage in proper procurement planning and anticipate the adverse impact of supplier concentration in government contract awards is neither new nor isolated to the Canadian federal sphere. In fact, similar concerns over the creation of state-sponsored de facto monopolies have been the cause of other past litigation in areas including pilot boat services and bus transportation services.

For example, its January 1995 decision in *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*,[17] the Federal Court of Appeal found that the purchasing entity was entitled to reject a bidder due to concerns over conflict of interest and the potential creation of a monopoly. The case involved a tender call issued by the Atlantic Pilotage Authority for pilot boat services for the Strait of Canso. The Authority was concerned that it would potentially create a conflict of interest and monopoly situation if it awarded the contract to the plaintiff. The Court of Appeal found that the Authority's concerns were valid reasons to reject the tender and that the bidder should have disclosed any actual or potential monopoly in its tender. While the case was ultimately decided in favour of the purchasing institution, the litigation could have been avoided with a more measured and proactive approach to the allocation of government contract awards across a supplier base to avoid situations where a single bidding process can create a de facto monopoly.

By way of a more recent international example, in its December 2012 decision in *Bayline Group Ltd v. Secretary of Education*,[18] the High Court of New Zealand rejected a bid challenge for lack of public interest after finding that the government's low bid bypass was made for valid commercial reasons. The case dealt with a tender call for school bus services. The plaintiff low bidder was rejected after the government determined that the competing incumbent bidder could abandon the marketplace and undermine future competition if it was denied the contract award. The low bidder launched a legal challenge, claiming that it had been treated unfairly and maintaining that if the published criteria were followed they would have been successful. The court ultimately concluded that the government had bypassed the low bidder for valid reasons with a view to sustaining future market competition for an upcoming nationally tendered contract by keeping "more players in the market." The legal challenge was therefore rejected. However, as this case illustrates, public bodies remain subject to review by the courts for their tendering decisions and should therefore ensure that the factors they rely on can be justified on fairness grounds in case of legal challenge. As with the prior decision, proactive planning in anticipation of creating de facto state-sponsored monopolies is a far better alternative to engaging in extreme measures to deny a bidder a contract award after market conditions have been allowed to devolve into near monopolies.

C. Driving Out Small Operators: The Ontario School Bus Study

While the prior section considered examples involving the unfair entrenchment of large incumbent suppliers, the Ontario student transportation services case study provides an example involving the

[17] [1995] F.C.J. No. 99, [1995] 2 F.C. 132 (Fed. C.A.).
[18] [2007] NZHC 2063; [2007] NZAR 747.

disruption of small local incumbent suppliers. In its April 2013 decision in *F.L. Ravin Ltd. v. Southwestern Ontario Student Transportation Services*,[19] the Ontario Superior Court of Justice granted an injunction against Southwestern Ontario Student Transportation Services ("STS"). The dispute arose over the third and final RFP issued by STS for school bus transportation services in south-western Ontario. The motion for the injunction was brought by two school bus operators, Ravin and Badder, who had for many years provided school bus transportation services to school boards operating within STS's scope of operation. STS has assumed responsibility for conducting competitive bidding processes for school bus services on behalf of a number of school boards. The RFPs in question were part of a broader provincially mandated process requiring school boards to conduct open competitive bidding processes for bus services since province-wide spending on these services totalled $1 billion annually.

As the court noted, this new provincially sponsored open tendering program attracted a great deal of criticism from local bus operators who feared being run out of business by larger operators:

> From the beginning of the new process, concerns were expressed from various quarters including small bus lines, Chambers of Commerce and others as to the ability of small bus lines that had historically provided bus service to students in primarily rural areas to compete under the new system. In December 2008, the then Minister of Education, Kathleen Wynne, sent a letter to the concerned parties, expressing both an acknowledgment of the concerns and a commitment to institute a process that would be fair to all. (para. 11)

However, as the court observed, notwithstanding escalating concerns from small operators over the province-wide implementation of the new competitive bidding processes, STS retained the services of PPI Consulting and proceeded to fast-track its implementation of open tendering well ahead of most other school boards across the province. After being underbid, the plaintiffs questioned whether STS had properly taken into account the safety concerns initially raised by the Ministry and its external advisors:

> In the fall of 2010, the Deloitte accounting firm was retained by the Ministry to carry out a review of STS and make recommendations with respect to the competitive procurement of student transportation services. Deloitte recommended, among other things, a focus on determining local market conditions and advised that in procuring appropriate and safe student bus services, price should not be the primary factor in entering into contracts for these services. After hiring PPI Consulting services to prepare an RFP, STS issued its first RFP on January 11, 2011. It is the position of the plaintiffs that this first RFP did not take into account local experience or conditions.
>
> In March 2011, the results of the RFP were announced. Ravin lost a significant number of its bus routes as did a number of other larger companies who had been providing service to the catchment area served by STS. It is not in dispute that the winning bids accepted by STS were for rates approximately 20% below what the Deloitte study for the Ministry had set as the minimum amount for which operators could provide safe and reliable service on an ongoing basis. (paras. 15-16)

The controversy over safety concerns and over the potentially detrimental impact of large-scale

[19] 2013 ONSC 1912.

tendering on small locally based suppliers led the provincial government to announce a six-month pre-election moratorium on competitive bidding of school bus services:

> The experience of bus companies in the area served by STS was not unique. On June 23, 2011, then Minister of Education Dombrowsky announced a six-month moratorium on the procurement practices and established a Task Force to review the experiences to date of competitive procurement processes, expressing the view that such a review "would be beneficial to all parties." The management of STS did not welcome this announcement, referring to it during a management meeting as a "curveball", possibly because it might interfere with the successful completion of its five-year plan to which STS had committed in September 2010. (para. 17)

As the court noted, once the moratorium was lifted, STS proceeded with a second and then a third RFP. The plaintiffs launched their last-minute injunction challenge in a final attempt to stop the evaluation of the third set of proposals.

In determining whether to grant an injunction, the court held that the plaintiffs had established that there was a serious issue to be tried, particularly since a similar tendering process for school bus transportation services in another part of the province was already the subject of concurrent legal proceedings. The court also determined that the plaintiffs had established that they could suffer irreparable harm if the tendering process was permitted to proceed:

> The plaintiffs argue that the manner in which the current RFP is structured pre-ordains that they will be unsuccessful either in obtaining routes or obtaining routes that are economically viable. In either result, they will suffer financial ruin, impacting not only on their livelihood but on that of their employees as well. The affidavits of Ms. Ravin and Mr. Badder set out in significant detail the results of the 2011 RFP. Given that the 2013 RFP is structured in a similar way to the 2011 RFP, the plaintiffs argue that the result of the current RFP is pre-ordained. The disastrous results are more than speculative. In RJR MacDonald, the Supreme Court of Canada recognized that loss of market share can result in irreparable harm. The future of small rural bus lines and the manner in which they are tied to their individual communities has been recognized by Deloitte, the Ministry as well as The Honourable Mr. Osborne in comments in his Task Force Report. (para. 42)

After determining that the situation met the necessary elements of the injunction test, the court granted the plaintiff's motion and ordered STS to cease its tendering process until, at minimum, the conclusion of the parallel legal proceedings that were initiated against a similar process in another region of the province. As this case illustrates, while instances where the courts will grant an injunction to stop a tendering process are rare, they are not unprecedented. Furthermore, when successful, such injunctions can have a significant impact on government operations. In this case, the injunction had the impact of effectively suspending competitive bidding for school bus transportation services across the entire province of Ontario.

In the aftermath of the court injunction, which saw the escalation of a number of parallel legal proceedings and widespread criticism from smaller local school bus service providers across Ontario, a Student Transportation Review Team consisting of The Hon. Colin L. Campbell (Chair), Paul Emanuelli

and Leo Gotlieb was appointed by The Hon. Liz Sandals, Minister of Education for the Province of Ontario, in the fall of 2014, with the mandate to review competitive procurement practices in recent student transportation services RFPs. The resulting *Student Transportation Competitive Procurement Review Report*[20] identified problems with a "one-size-fits-all" approach to scoping government contracts and found that this approach had an adverse impact on smaller local suppliers:

> **FINDINGS AND OBSERVATIONS**
>
> **The Problem with Generalizations**
>
> Ontario is a geographically large and diverse province. These attributes, among others, impact on many government services at the present time but are particularly important with respect to school transportation.
>
> In the north of the province, including both east and west, the distances are large and the populations often small and diminishing, as well as scattered. Poor driving weather, particularly in winter, is a very important factor in the delivery of school bus services.
>
> The middle section of the province has its own unique features and populations. From the windy shores of Lake Huron through to Barrie and on to the Ottawa Valley, there are a variety of rural, suburban and urban landscapes, each with a distinct population and needs.
>
> The Greater Toronto Area (GTA) has the urban crowding that brings its own specific challenges to school busing.
>
> The north and center of the Province have been served by a large number of small and medium-sized operators, of which many have been family-run businesses for generations.
>
> The GTA and other major urban areas tend to be served by large, often multinational companies with large fleets, some into the many hundreds of buses.
>
> The comment we heard from many sources, which is one of the conclusions of our review, will not be news to anyone familiar with student transportation, namely ONE SIZE DOES NOT FIT ALL.
>
> In the days before the consortia were developed and after school busing was largely outsourced, those in charge of transportation (or local boards) dealt with a variety of operators whom they knew and could count on. Contracts were negotiated often between the operators as a group and a board, based on a consensus reached locally.
>
> As many of these contracts were not established through open competition, they did not comply with the requirements introduced by the AIT and subsequently the BPSPD.
>
> The challenge for the industry, for which we hope the following recommendations may assist, is to assure a competitive framework in a viable marketplace compliant with all statutory requirements and directions. (pp. 3-4)

As the Review Team report noted, the strongest opposition to open competitive procurement practices

[20] The Hon. C.L Campbell, Q.C., P. Emanuelli, L. Gotlieb, *Student Transportation Competitive Procurement Review Report*, available online at http://www.osba.on.ca/files/Student_Transportation_Competitive_Procurement_Review_Report.pdf.

came from smaller local operators who were in many cases most impacted from these open tendering practices:

Unintended Consequences

The strongest voice in opposition to what they regard as the disruption created by the RFP model comes from the small operators and their association.

We have received detailed descriptions from a very large number of these operators, whose families have been in the school bus business often for two or more generations, of the problems they have faced since introduction of RFPs.

Many of those responding complained that the RFP process has put them at a disadvantage in terms of both assets at risk and lack of resources, such that many of the family-owned bus operations have ceased, either because they have been forced to sell due to loss of routes or because they did not have the assets to compete at a price that would be above their cost.

We think it safe to say and as the Osborne Task Force concluded, school busing is to some extent an "artificial market" in that there is only one buyer – the board or consortia – with many sellers of service. The intention of the competitive solicitation process should be to enhance, not inhibit, competition, as is the risk as the numbers of operators decreases.

Unlike the supply of other goods or services to a consortium for school transportation, many sellers (the small operators) have only one market in which to sell. They are unable to bid or shift their operations to another region if unsuccessful in their home region. Most were unprepared for the loss of a substantial portion or the totality of their business.

Small Operators

There are many voices among what may be regarded as small operators. There is no easy definition of what might be regarded as a small operator. In some regions this will be operators with fewer than 10 buses, and in other regions those with fewer than 50 buses.

Competitive procurement changes the way in which these operators conduct business, in many cases in ways for which they were not or still are not prepared for.

Of those who were used to dealing with school board officials directly with very simple negotiated contracts, many were unprepared to complete what they regarded as daunting and overwhelming RFP processes (upward of 100 pages), even with the limited assistance and training available to them.

Several of those associated with consortia recognized that in a number of cases, lack of ability to complete a complex RFP – rather than negotiating price – led to loss of business for many small operations. Each of the members of the Review Team concluded that many RFPs were confusing and vague.

Many operators assert that the RFP process does not adequately take into account, if at all, their local service to the community above and beyond the transportation of students to and from school.

A review of the many operators' submissions highlights the concern of distinguishing between those legitimate elements of local service (such as providing back-up for other operators) that

> may be part of the competitive environment, and those that, while admirable from the viewpoint of community support, do not form part of a competitive contracting process.
>
> Time and again small operators and even their association urged that this Review Team recommend a policy exemption for school busing, urging that such an exemption could find authorization in both in the AIT and in the BPSPD.
>
> Early on in our deliberations, we concluded that a policy exemption for the entire school bus sector would not achieve the purposes of the BPSPD and would promote neither competition nor transparency in this sector that costs Ontario taxpayers $1 billion per year.
>
> We recognize that in many of the more remote and rural areas of the province, consistency and availability of service are necessary in circumstances quite different than in the urbanized southern portions of the province. Open competition may not be realistic in some rural areas.
>
> There are small operators other than those located in rural areas, and in our view consortia will have to be mindful of the effects on overall competition should the small operators be eliminated from their markets as a result of an inflexible RFP process. The idea of competitive procurement should be to enhance, not deter, competition.
>
> Competitive procurement of school bus transportation service is not only complex given its inherent need for flexibility, it is quite different from the purchase of other assets in a competitive process.
>
> When a supplier bids for the sale of a particular piece of equipment to a government entity, in most instances that supplier will find other markets in which to participate if it is not successful in its tender.
>
> Many school bus operators are only equipped to participate in their local area. If they are unsuccessful in a tender process, their assets may well be stranded. This is why many small operators have not been able to continue and have been forced to sell their assets or businesses at distressed values. (pp. 4-6)

The Review Team report made a series of recommendations relevant to smaller operators, recognizing the need to maintain a sustainable, competitive base of suppliers for future government procurement processes by implementing measure including:

- allowing joint venture bids from smaller suppliers
- avoiding the aggregation or bundling of routes in a manner that excludes smaller suppliers from bidding on those bus routes
- eliminating any arbitrary application of average fleet age requirements that were not connected to safety standards
- staggering competitions across different years so that not all routes were put to tender at the same time since such aggregation has the potential to favour larger suppliers and place smaller incumbent suppliers in catastrophic loss situations if they lose a single tendering process

- avoiding blanket prohibitions against contract assignment and, provided that serviced delivery continuity was maintained, allowing smaller suppliers to sell their businesses or transfer some contractual obligations without unnecessary restrictions

- aligning contract duration to the age of the assets to minimize stranded unused school buses at the end of a contract term

- avoiding unbalanced contractual provisions that put undue hardship on smaller suppliers, including unilateral termination and contract amendment rights, and commercially unreasonable overhead obligations such as "deadhead" provisions that did not allow contractors to charge for distances travelled to and from the starting point and ending point of a particular bus route

- providing cost of living adjustments to recognize the increase in small supplier operating costs and avoiding evaluation strategies that put pressure on operators to drive down supplier wages to unsustainable levels

- phasing in market caps to limit the number and size of contract awards that went to large suppliers or to any single supplier, as a means of promoting long-term competition through the allocation of contract awards to a blend of small, medium and large firms.

- streamlining and standardizing procedures and criteria for establishing basic qualifications through centralized processes that reduced duplication by eliminating the need to re-qualify for each contract assignment

- limiting mandatory pre-bid meetings to only those projects where it was essential to have bidders conduct inspections in order to understand the scope of work, and otherwise using technology to conduct remote pre-bid meetings where required

- in cases where overhead costs (such as fuel for bus transportation) would otherwise form a disproportionate amount of the total contract, excluding those overhead costs from the bid price and treating them as pass-through costs instead, since smaller suppliers are disproportionately impacted by high overhead costs

- avoiding unnecessarily lengthy and complex solicitation documents and processes, which act as a disproportionate barrier to entry to smaller suppliers

- developing training programs for small suppliers to familiarize them with government procurement process and with the specific requirements of their specialized areas

- establishing industry committees to give voice to smaller suppliers in areas requiring a high volume of goods and services by the government, and establishing a parallel dispute resolution processes to address systemic issues in the government procurement process

While the Review Team's specific recommendations were aimed at the school bus transportation services sector in Ontario, many of those recommendations are worthy of broader application as a means of addressing ongoing systemic barriers to small suppliers in the government procurement

system and, as discussed below, those recommended measures could be implemented in a coordinated manner through the strategic use of framework agreements.

4. Building a Better Framework for Fair and Open Competition

As recent government procurement audit reviews have shown, there remains a great untapped potential to consolidate the large volume of small-scale government expenditures that are often conducted through the department-specific use of purchasing cards, or otherwise through fragmented purchasing, into a more cohesive and organized government procurement system. Through the proactive and strategic development of such open framework arrangements, public institutions could address an area of widespread inefficiency and waste while also enabling further participation by smaller suppliers within the government procurement cycle.

The untapped potential at the low-dollar value base of the government procurement system is a widely recognized public policy issue. By way of recent example, in its March 2012 report entitled *The Government Procurement Card*,[21] the UK Comptroller and Auditor General noted that while the government procurement card was introduced in 1997 as a convenient and cost-effective way to make low-value purchases the use of procurement cards has since "come under increased public and political scrutiny, following press articles highlighting apparent misuse of the cards and that such "misuse risks financial loss and reputational damage for departments." The report found that each central department set its own policies and controls over the use of approximately 24,000 cards used across central departments and that "Central data is incomplete and inconsistent, and does not provide an accurate picture of Government Procurement Card spending across government".

In is March 2013 report on *Police Procurement*,[22] the UK Comptroller and Auditor General also found that half-measures were impeding the proper centralization of government procurement, noting that 43 police forces in England and Wales procure a wide variety of goods and services ranging from "uniform and police cars to estate and facilities management services." The report noted that the government was seeking to address the significant duplication and inefficiency across the 43 police department and wanted to end the "culture of police forces procuring goods and services in up to 43 different ways." The report also observed that "seven forces reported in our survey that they did not have sufficient staff and resources to undertake procurement activity effectively" and, with respect to duplication, "found a minimum of nine separate specifications for each of five common items of equipment used by police officers." The type of duplication noted in the report underscored the impact of poorly planned, decentralized procurement practices in areas of common expenditure, which puts undue burden on government administration and on the suppliers who must compete to provide contracts in these areas.

Many institutions have attempted to address these issues through the implementation of framework agreements, or multi-use lists as they are referred to in Australia. However, as recent audit reports have shown, the use of frameworks must be carefully managed to comply with government procurement standards. For example, in its June 2014 report on the *Establishment and Use of Multi-Use Lists*,[23]

[21] National Audit Office (UK), *The Government Procurement Card*, HC 1828, Session 2010-12 (March 20, 2012), available online: https://www.nao.org.uk/wp-content/uploads/2012/03/10121828.pdf.
[22] National Audit Office (UK), *Police Procurement*, HC 1048, Session 2012-13 (March 26, 2013), https://www.nao.org.uk/wp-content/uploads/2013/03/10092-001-Police-procurement.pdf.
[23] Auditor General (Australia), *Establishment and Use of Multi-use Lists*, Audit Report No. 54 (2013-14), available online at https://www.anao.gov.au/sites/g/files/net616/f/AuditReport_2013-2014_54.pdf

Australia's Auditor General reviewed the use of standing agreement arrangements across government agencies. Australia's Auditor General found that "the arrangements applying to MULs are not so well understood and, in most cases, greater consideration needs to be given to whether a MUL is most suited to an agency's particular procurement objectives." The report noted that common areas of non-compliance with applicable procurement rules included instances where agencies approached too few suppliers for contract award competitions, failed to provide sufficient time for suppliers to respond to requests, or failed to treat suppliers consistently. This resulted in a failure to meet the government's obligations relating to open and fair competition and value for money.

Similarly, in its May 2014 report entitled *A Review of Collaborative Procurement Across the Public Sector*,[24] the UK National Audit Office and Audit Commission reviewed the use of collaborative purchasing across government and found room for improvement. The report noted deficiencies in the use of these standing framework arrangements, finding a widespread failure to implement sound category management practices in key areas of procurement which was caused by a lack of procurement management information, a lack of understanding of end-user requirements, a lack of knowledge of collaborative purchasing options, and a lack of documented information about the costs and benefits of the various procurement options. The report also notes that with respect to collaborative purchasing, the "public sector procurement landscape is fragmented, with no overall governance. There are nearly 50 professional buying organisations, as well as individual public bodies running commercial and procurement functions. Many of these organisations manage framework agreements for similar goods and services, for example, stationery." In sum, the report found that government bodies were not maximizing their group purchasing potential and needed to coordinate their efforts more effectively in order to better achieve value for money for the taxpayer. As noted above, this lack of coordination has an adverse impact on government suppliers who must compete for small government assignments by qualifying onto multiple framework arrangements to sell the same thing to different public institutions. While large suppliers may be in a better position to bear this administration overhead, this type of procedural duplication puts many contract opportunities outside of the practical reach of smaller suppliers who are not able to bear the same transactional overhead.

In fact, in its June 2015 decision in *Medicure Ltd v. The Minister for the Cabinet Office*,[25] the England and Wales High Court of Justice (Technology and Construction Court) considered a claim by a long-term government supplier who was being cut out of a new framework arrangement ("FA") that had been scoped beyond the supplier's reach. The dispute dealt with the use of a new FA for health services. The complainant was in the business of providing doctors to health authorities but it was unable to provide the additional managed services required under the new FA. The complainant alleged that the scope of the new FA only covered the supply of managed services rather than the direct provision of doctors. It challenged the government's direct acquisition of doctor's services as falling outside the proper scope of the FA. In reviewing the FA contract terms, the court noted that the agreement was unnecessarily long and complex, which undoubtedly contributed to the confusion over its proper scope:

> I have been through the FA, which runs to over 500 pages. I question the wisdom of contracts of this length: nobody ever reads the detail until something goes wrong, and then the parties scrabble around trying to find bits and pieces of the small print that help their case. It would make this Judgment even duller than it already is if I included within it every clause or section

[24] National Audit Office and Audit Commission (UK), *A Review of Collaborative Procurement Across Public Sector*, HC 1048, Session 2012-12 (March 26, 2013), https://www.nao.org.uk/wp-content/uploads/2013/03/10092-001-Police-procurement.pdf.
[25] [2015] EWHC 1854 (TCC).

> of the FA to which I was taken, or which I have read. Accordingly the parties can take it that I have considered all of the sections to which I was referred, but I confine myself to setting out below what I consider to be the particularly relevant sections of the FA, in order to explain my views in the subsequent sections of this Judgment. (para. 35)

The court ultimately determined that the complainant's interpretation was incorrect since the scope of the FA included both the direct provision of doctors as well as the supply of managed services. However, the court expressed sympathy for the complainant who had been providing doctor's services to government institutions for eighteen years. As the court noted, the expanded scope of the new FA put these contracting opportunities out of reach of smaller firms:

> Although it will be cold comfort for them, I have some sympathy with the claimant's position. They had successfully supplied the NHS with locum doctors for 18 years. The new Framework Agreement seems to favour larger organisations (hence the scale of marks available under question E16, about historic supply) and it legitimately raised a question about the management of a supply chain which the claimant was always going to struggle to answer satisfactorily. All of that appears to have made it difficult for a smaller organisation, like the claimant, to compete for this FA.

As this case illustrates, contract scoping decisions can be the subject of significant controversy. Purchasing institutions should be careful to ensure that they clearly define the scope of their contracts to better ensure their defensibility against out-of-scope allegations. When scoping larger contracts, purchasing institutions should also be mindful of the impact that those scoping decisions can have on existing suppliers and on long term competition in the marketplace.

The implementation and use of framework agreements within the Canadian and international contexts is discussed in greater detail below.

A. Canadian Context

Provincial Vendor-of-Record Arrangements ("VORs")

Provincial VORs establish master contracts for a broad range of goods and services that can then be used by a broad range of separate government entities for discrete assignments.

Provincial vendor-of-record ("VOR") arrangements were first established by the province of Ontario in the 1990s to create multiple master framework agreements for use by the various provincial government ministries. These VORs help coordinate central purchasing, reduce duplication and create economies of scale. Many of the master agreements created under this model have an expanded scope beyond the "inner ring" that includes Ontario government ministries and agencies, to an "outer ring" of Ontario broader public sector MASH entities.[26]

[26] MASH is the acronym used in Canada to describe municipalities (and municipal entities), academic institutions (the university and college sectors), school boards and the health sector entities. These institutions are often referred to as "creatures of the province" since they are created through provincial legislation, and while constituting independent separate legal entities, are

As noted above, these VOR arrangements create standing supplier rosters with common master agreement terms for a broad range of different goods or services. These arrangements can be broader in geographic scope than those created by regional purchasing co-ops and deeper in penetration across government sectors than those created by sector-specific group purchasing organizations.

Once established, VORs typically require the institutions within the defined user group to run separate, invitational, second-stage selection processes to select specific suppliers. Those assignments are entered into pursuant to separate sub-agreements between the selected supplier and selecting institution. These sub-agreements supplement the master agreement terms with assignment-specific details.

VOR arrangements tend to limit the maximum dollar value of any specific assignment and run for a finite period of time, after which the VOR RFP is retendered to create a new roster of defined suppliers. The VORs are centrally administered by provincial government staff but each institution is responsible for running its own second stage process and administering its own discrete assignments. Even at the level of provincial government ministries and agencies, use of the master agreements created by Provincial VORs tends to be voluntary, except in a few discrete areas of mandatory use VORs. Those categories of compulsory use do not extend into the MASH sector. The optional nature of the Provincial VORs, along with the second stage process that requires and creates multiple contract awards within each category, tends to dilute the economies of scale that could otherwise be obtained under province-wide multi-sector arrangements.

In the mid-2000s the province of Ontario also established Ontario Buys, a separate administrative office, (originally overseen by the Ministry of Finance and now overseen by the Ministry of Government Services), to establish sector-specific VORs for MASH sector entities. While the previously discussed Sector GPOs tend to be non-profit corporations created and owned by group purchasing members within a specific sector, Ontario's provincial initiative was launched in a top-down manner in an attempt to promote group purchasing in the Ontario broader public sector.

The Ontario Education Collaborate Marketplace ("OECM") is one of the entities created under this initiative. As noted on its website, OECM is a relatively new non-profit corporation that promotes collaborative purchasing for education sector entities in Ontario:

> Ontario Educational Collaborative Marketplace (OECM) was launched in 2007 as a not-for-profit, Broader Public Sector (BPS) group procurement organization to support Ontario's publicly funded education institutions.
>
> The goal of OECM is to:
>
> - establish a Marketplace of products and services, through collaboratively sourced agreements aligned with education sector business needs
> - promote the adoption of leading integrated supply chain management practices
>
> OECM's collaborative sourcing approach facilitates consistency and generates significant savings, making it easier and less costly for institutions to procure goods and services. OECM

overseen and regulated by sector-specific provincial ministries. Their procurement practices are also typically regulated to varying degrees by provincial level governments across the different Canadian provinces.

> provides opportunities to realize both process and procurement savings, which results in more funds being available for core academic and administrative activities.
>
> Participation in OECM's Marketplace is voluntary and our objective is to become financially self-sustaining. Our operating costs are partially funded by the Ministry of Government Services Supply Chain Ontario and cost recovery fees from OECM's supplier partners.
>
> OECM is a Broader Public Sector (BPS), not-for-profit group procurement organization, offering a Marketplace of competitively-sourced and priced products and services through collaborative sourcing agreements. Buying through our Marketplace helps Ontario's publicly funded education institutions and other publicly funded organizations deliver savings and increase efficiencies. This is our purpose – why we exist.
>
> As a relatively young organization, launched in 2007, we have already helped our customers achieve significant savings and efficiencies through OECM's Marketplace of Products and Services.[27]

As with provincial VOR arrangements, OECM's VOR arrangements are centrally administered by permanent central office staff. In keeping with those other arrangements, the specific institutions within the defined purchasing sphere are responsible for conducting their own second stage selection processes and administering resulting assignments. Like provincial VORs, there is no formal membership required by the sector-specific entities falling within the purchasing group, nor is there any ownership or formal oversight or governance role played by the purchasing institutions within the sector-specific group.

Federal Standing Offers ("SOs") and Supply Arrangements ("SAs")

At the federal level, group purchasing in Canada tends to operate within the federal government sphere across the various federal government departments with some participation by more arms-length federal government entities. The scope of this group purchasing is similar to the "inner-ring" of the province of Ontario's VORs (including provincial government ministries and certain provincial agencies), but the federal government does not have the same depth of "outer-ring" MASH-type entities that exist in the provincial broader public sector. This tends to limit the institutional depth of federal government group purchasing arrangements. However, given the federal government's geographic scope and spending volumes, group purchasing at the federal level offers significant opportunities for economies of scale for certain goods and services within the federal government sphere.

At the federal level, central purchasing is coordinated through the Department of Public Works and Government Services Canada ("PWGSC") under which umbrella agreements are created under both SOs and SAs. As with the province of Ontario, whose ministries and agencies often create their own VORs for their own discrete purposes, separate federal government departments also create their own discrete SOs and SAs.

The federal government has significantly expanded the central mandatory use of these arrangements in recent years. A report released by Canada's Procurement Ombudsman in May 2010 entitled *Study on Methods of Supply: Standing Offers and Supply Arrangements* (the "Procurement Ombudsman's

[27] OECM website, at http://oecm.ca/about-us/our-history.

Report")[28] provides some useful background on SOs and SAs, explaining how the expansion of these arrangements in recent years has been part of the federal government's attempt to decrease duplication, increase efficiencies and achieve economies of scale:

> 5.1 According to the Treasury Board Purchasing Activity Reports, in the last 10 years, the value of federal government procurement has increased by over 40%, while the number of transactions has decreased. The government, therefore, is managing a larger amount of procurement of increasing complexity. The government strives to increase its administrative efficiency, but has to balance these measures against its commitment to fairness, openness and transparency in procurement. Suppliers would benefit from the government's efforts to simplify and streamline procurement practices. It is in everyone's interest to reduce the burden of paperwork, time and effort.
>
> 5.2 There are two principal methods of supply that are used to streamline the procurement process for specific types of goods and services. Standing offers (SOs) and supply arrangements (SAs) are frameworks for procurement that are meant to:
>
> - reduce the cost of common goods and services used on a government-wide basis and purchased on a repetitive basis;
> - ensure that procurement processes are timely; and
> - attain good value for taxpayers' dollars.
>
> 5.3 A standing offer (SO) is a continuous offer from a supplier to the government that allows departments and agencies to purchase goods or services, as requested, through the use of a call-up process incorporating the conditions and pricing of the standing offer. SOs are intended for use where the same goods or services are needed within government on a recurring basis and are commercially available.
>
> 5.4 With the use of SOs, suppliers that meet the evaluation criteria and selection methods are pre-qualified and issued an SO. An SO is not a contractual commitment by either the government or the supplier. When goods and services available through an SO are needed, departments issue a call-up, the supplier's acceptance of which constitutes a contract. The call-up is done relatively quickly. Departments do not conduct a competitive bid solicitation for the goods and services procured under an SO.
>
> 5.5 A supply arrangement (SA) serves a purpose similar to that of an SO. An SA is a non-binding arrangement between the government and a pre-qualified supplier that allows departments and agencies to award contracts and solicit bids from a pool of pre-qualified suppliers for specific requirements within the scope of the SA. Departments meet their specific needs by issuing another call for bids – a subsequent, second-stage solicitation – to one, some or all of the suppliers on the SA list, depending on the details in the SA.
>
> 5.6 With SOs, the terms and conditions, including price, are set as part of the bidding process. But when calls for bids under the SA are issued to listed suppliers, those suppliers have the opportunity to include changes in their bids to reflect market changes, innovation,

[28] Office of the Procurement Ombudsman (Canada), Chapter 5: Procurement Practices Review, *Studey of Methods of Supply and Standing Offers and Supply Arrangements* (Ottawa, May 2010), available online at http://opo-boa.gc.ca/documents/praapp-prorev/2009-2010/chptr-5-eng.pdf.

> new technology or pricing adjustments. This is beneficial to both the supplier and the government. (pp. ii-iii)

In summary, the report notes that SOs and SAs are similar, in that they both establish master agreement terms similar to the other group purchasing arrangements discussed above, with each institution within the purchasing group entering into and administering its own discrete contacts under the arrangements. Given the de-centralized purchasing, demand for the good or services cannot be known in advance and, while estimates are made in good faith, there are no formal contractual commitments to purchase specific volumes.

The report also notes some significant distinctions between the two models. SOs tend to be for standardized goods and services that are known in advance with pre-established pricing that constitutes a legally binding offer (hence "standing offer") by the supplier to provide the requirement on demand to the institution drawing down on the contract. These arrangements can be entered into with one or more suppliers and although they are often entered into pursuant to a competitive bidding process, they are also at times directly awarded to specific suppliers and can encompass that supplier's complete catalogue of offerings. In contrast, SAs are established for goods and services that are not fully definable at the outset and pricing is, therefore, not completely defined under the umbrella agreement. These arrangements do not constitute binding contractual commitments by the suppliers. Much like provincial VORs, SAs tend to require an invitational second stage competitive process between suppliers in the particular supply arrangement category to finalize contract terms between suppliers and specific institutions.

The Procurement Ombudsman's Report notes that there have been implementation issues with the expansion of the federal government's SOs and SAs arrangements:

> 5.8 Most SOs and SAs are put in place by Public Works and Government Services Canada (PWGSC). The department acts as a common service organization and the government's main contracting arm. In 2005, the government made a significant change in the use of SOs and SAs. It became mandatory for all departments to buy certain high volume goods and services through SOs and SAs managed by PWGSC.
>
> 5.9 The government said that these measures to streamline and consolidate procurement would ensure that the federal government better pursues opportunities to reduce the cost of its purchases, by using the size of the federal government to get the best possible price.
>
> 5.10 Conceptually, the idea has merit. In theory, these tools should reduce paperwork, speed up the procurement process and lower the cost of goods and services. As with any new initiative, it has to be subject to a quality management system, where the impact and effectiveness of the implementation is monitored and its performance assessed against anticipated results. Gaps need to be identified, decisions made and actions taken to improve the process.
>
> 5.11 To date, the emphasis has been on the design and implementation of individual SOs and SAs; the monitoring, quality assurance and corresponding adjustments regime is still under development according to the PWGSC Commodity Management Framework Plan.

> 5.12 Last year the Office of the Procurement Ombudsman reported that the use of mandatory SOs had an impact on small and medium enterprises in doing business with the government. There is open competition when PWGSC solicits bids to become a qualified supplier. But competition is limited after that. Unsuccessful bidders and new entrants to public procurement are essentially "out" until the existing SO is renewed or refreshed. In some cases, the outcome of a solicitation may result in fewer successful suppliers. The Office also reported that the government's evaluation and reporting systems were inadequate to measure whether the use of mandatory SOs and SAs had met the government's original objectives in mandating the use of these procurement instruments. PWGSC reports that there are a number of informal means through which Commodity Management Teams and Commodity Managers gather business intelligence for use in the decision making process.
>
> 5.13 However, a recent PWGSC Internal Audit Report found that without a coordinated departmental approach and collaboration by all stakeholders, the impact of standing offers as a beneficial method of supply remains unknown. The lack of integrated and meaningful information on standing offers, and a mechanism to share this information, means that it cannot be used to support planning, decision making and action, or demonstrate the achievement of the government's shared objective of buying smarter, faster and at a reduced cost. (p. iv)

The Procurement Ombudsman's study of SOs and SAs resulted in a number of findings and recommendations for improvement. With respect to the advantage of SOs and SAs, the report noted that that these arrangements tended to lead to great simplification and standardization while reducing duplication and red tape:

> - Procurement is faster and less complex if suppliers have been pre-qualified.
> - Because standard terms and conditions have been previously agreed to, there is less risk and complexity for both the government and the supplier.
> - When a department has a requirement that can be procured via a call-up, then it does not have to carry out a full competition, and time, effort, and resources are reduced.
> - Suppliers benefit if they are pre-qualified for SOs. Having competed once to obtain an SO, they can generate business without the need to compete again to meet individual government requirements.
> - There is more flexibility in the SAs than in SOs as the government can add customized technical requirements and suppliers can adjust prices and offer innovation or the latest technology. Both the government and suppliers therefore benefit from dynamic competition. (p. v)

However, while SAs in particular offered great flexibility through customization of specific assignments, they also created additional issues regarding the protocols for awarding contracts. As the Procurement Ombudsman noted, concerns were expressed with the use of both SOs and SAs, including confusion caused in some instances by overlapping arrangements. The feedback by federal government departments also noted that there was a need for greater industry-specific knowledge by PWGCS administrators who managed these master agreements. That feedback also included concerns over a

lack of clarity and transparency over spending limits and call-up protocols for the award of discrete assignments:

> - In some cases, several different procurement vehicles are in place for the purchase of the same good or service. This added complexity leads to confusion among suppliers and departments.
>
> - PWGSC has had limited success in retaining the industry knowledge and expertise required to successfully manage commodities.
>
> - PWGSC's rationale for reducing certain contract and call-up limits from TB approved levels is not always clear to departments.
>
> - PWGSC's reasons for determining how contractors will be selected at the second stage (right of first refusal, proportional, lowest cost, etc.) are often not readily understood. (p. vi)

In particular, the Ombudsman's report raised concerns over the protocols for awarding specific assignments and the creation of additional red tape in the process where complex second stages are used. Ultimately, the report notes the need to balance accountability, which calls for transparent competitive practices, with the need to enhance efficiency, which requires result that achieve best value for money in a streamlined and expedited manner:

> **SAs – How is the number of pre-qualified suppliers on a list determined?**
>
> 5.90 Ensuring access to contract opportunities for the supplier community argues in favour of SO/SA lists with many named suppliers, each having the opportunity to win contracts. However, dealing fairly with a lengthy list of suppliers poses difficulties.
>
> 5.91 With respect to SAs, inviting perhaps hundreds of suppliers to bid may be impractical: for suppliers, which are likely to be reluctant to invest the cost in bidding against so many possible opponents; and for government, which could incur the time and expense of having to evaluate hundreds of bids. Conversely, limiting the SA list to fewer suppliers so that resulting calls for bids can be handled more efficiently by both sides could be seen as limiting access.
>
> 5.92 Achieving an appropriate middle ground, so that there is a "win-win" solution for buyers and sellers, is a delicate balancing act. PWGSC strives to find this balance on an ongoing basis. Consistent reporting and monitoring would go a long way to verifying if this balance has been achieved in any particular procurement tool.
>
> **SAs – Impact of bidding twice**
>
> 5.93 One supplier has informed us that the cost of responding to these solicitations is huge, and it is very frustrating and expensive – not just for [suppliers] but also for the government – to have to continuously compete for business when a valid procurement tool already exists. Others have the same view.
>
> 5.94 In order to take advantage of an SA, the second-stage solicitation should be simple, fast and not costly to the industry; otherwise, the value added of using this method of supply would be questioned.

The right approach for the right reason

5.95 The SO may be the best approach for commercially available goods and services in common use across government. Many services are very similar to goods – commercially available from multiple suppliers and capable of being divided into standardized categories and priced on a unit-of-work basis.

5.96 When the call-up is made, the total cost is known since the two variables that make up the cost (unit price and quantity) are known. Since the quantity is the same for all suppliers, it is easy to determine which supplier offers best value.

5.97 However, SOs are now in place for more complex requirements that require the development and issue of a statement of work and assessment and evaluation criteria against which an SO holder submits a proposal including proposed resources, time lines for work completion, and calculations of the likely total cost based on level of effort. When the SO holder has to develop a proposal, and the government has the obligation to evaluate that proposal, the SO is being managed as an SA but with only one supplier. This starts to look like a directed contract, compromising the fairness and openness offered by the original solicitation for the standing offer. (p. 13)

The concerns over the transparency of the call-up protocols for awarding discrete contract assignments will be addressed in more detail below under the discussion of international standards.

B. International Standards

The section below briefly describes some international standards which can be drawn from to help further inform and guide the implementation of framework agreements.

The UN Model Law Framework Protocols

In December 2011, the General Assembly of the United Nations ratified the 2011 edition of the *United Nations Commission on International Trade Law Model Law on Public Procurement* (the "UN Model Law").[29] The updated UN Model Law replaced the 1994 edition and contains some notable updates, including the recognition of the use of master agreement arrangements. The framework agreement provisions contain detailed protocols for the creation and use of master agreements with multiple assignments. The UN Model Law recognizes both closed framework agreements (using a limited number of prequalified suppliers for a finite number of years) as well as open framework agreements (which are indefinite in duration and therefore require more robust refresh protocols to allow new suppliers into the arrangement). Since the provincial VORs and federal SAs and SOs discussed above more closely align with the closed Framework Agreement model, the provisions that apply to those types of arrangements under the UN Model Law are reproduced below.

Article 32
Conditions for use of a framework agreement procedure

1. A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

[29] Online at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

(a) The need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis during a given period of time.

2. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.

…

Chapter VII. Framework agreement procedures

Article 58
Award of a closed framework agreement

1. The procuring entity shall award a closed framework agreement:

(a) By means of open-tendering proceedings, in accordance with provisions of chapter III of this Law, except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law, except to the extent that those provisions are derogated from in this chapter.

2. The provisions of this Law regulating pre-qualification and the contents of the solicitation in the context of the procurement methods referred to in paragraph 1 of this article shall apply mutatis mutandis to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum limit on the number of suppliers or contractors that will be parties thereto;

(d) The form, terms and conditions of the framework agreement in accordance with article 59 of this Law.

3. The provisions of article 22 of this Law shall apply mutatis mutandis to the award of a closed framework agreement.

Article 59
Requirements for closed framework agreements

1. A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed the maximum duration established by the procurement regulations;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether, in a closed framework agreement concluded with more than one supplier or contractor, there will be a second-stage competition to award a procurement contract under the framework agreement and, if so:

(i) A statement of the terms and conditions of the procurement that are to be established or refined through second-stage competition;

(ii) The procedures for and the anticipated frequency of any second-stage competition, and envisaged deadlines for presenting second-stage submissions;

(iii) The procedures and criteria to be applied during the second-stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during the second-stage competition, the framework agreement shall specify the permissible range;

(e) Whether the award of a procurement contract under the framework agreement will be to the lowest-priced or to the most advantageous submission; and

(f) The manner in which the procurement contract will be awarded.

2. A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:

(a) The procuring entity determines that it is in the interests of a party to the framework agreement that a separate agreement with any supplier or contractor party be concluded;

(b) The procuring entity includes in the record required under article 25 of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements; and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

3. The framework agreement shall contain, in addition to information specified elsewhere in this article, all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information regarding connection, where applicable.

…

Article 62
Second stage of a framework agreement procedure

1. Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

2. A procurement contract under a framework agreement may be awarded only to a supplier or contractor that is a party to the framework agreement.

3. The provisions of article 22 of this Law, except for paragraph 2, shall apply to the acceptance of the successful submission under a framework agreement without second-stage competition.

4. In a closed framework agreement with second-stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity shall issue a written invitation to present submissions, simultaneously to:

(i) Each supplier or contractor party to the framework agreement; or

(ii) Only to those suppliers or contractors parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that at the same time notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, a statement of the terms and conditions of the procurement that are to be subject to second-stage competition and further detail regarding those terms and conditions, where necessary;

(ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract, including their relative weight and the manner of their application;

(iii) Instructions for preparing submissions;

(iv) The manner, place and deadline for presenting submissions;

(v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;

(vi) The manner in which the submission price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement

involving classified information, and the place where those laws and regulations may be found;

(viii) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the second-stage competition without the intervention of an intermediary;

(ix) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 22 of this Law;

(xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second-stage competition;

(c) The procuring entity shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article 22 of this Law.

Article 63
Changes during the operation of a framework agreement

During the operation of a framework agreement, no change shall be allowed to the description of the subject matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated procurement contract, may occur only to the extent expressly permitted in the framework agreement.

While Canadian public institutions have not formally adopted the UN Model Law framework agreement protocols (although the federal and territorial SO and SA protocols contain principles similar to the UN Model Law rules), the neighbouring Commonwealth jurisdictions of the United Kingdom and Jamaica, which share a similar common law legal system with Canada, have implemented versions of framework agreement protocols. Those rules are reproduced in the following sections.

UK Framework Regulations

The *UK Public Contracts Regulations 2006*[30] contain framework agreement protocols that actually predate the 2011 UN Model Law. The UK protocols establish governing rules for the creation and use of framework agreements that contemplate transparent protocols to create and use these master

[30] SI 2006/5.

agreements which require second-stage competitions where more than one supplier is selected under a framework arrangement:

Framework agreements

19. (1) A contracting authority which intends to conclude a framework agreement shall comply with this regulation.

(2) Where the contracting authority intends to conclude a framework agreement, it shall—

(a)follow one of the procedures set out in regulation 15, 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and

(b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 30.

(3) Where the contracting authority awards a specific contract based on a framework agreement, it shall—

(a) comply with the procedures set out in this regulation; and

(b) apply those procedures only to the economic operators which are party to the framework agreement.

(4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator shall include in that contract terms that are substantially amended from the terms laid down in that framework agreement.

(5) Where the contracting authority concludes a framework agreement with one economic operator—

(a) it shall award any specific contract within the limits of the terms laid down in the framework agreement; and

(b) in order to award a specific contract, the contracting authority may consult in writing the economic operator which is party to the framework agreement requesting that economic operator to supplement its tender if necessary.

(6) Where the contracting authority concludes a framework agreement with more than one economic operator, the minimum number of economic operators shall be 3, insofar as there is a sufficient number of—

(a) economic operators to satisfy the selection criteria; or

(b) admissible tenders which meet the award criteria.

(7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded—

(a) by application of the terms laid down in the framework agreement without re-opening competition; or

(b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).

(8) Where the contracting authority is following the procedure set out in paragraph (7)(b), it shall re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.

(9) Where the contracting authority is following the procedure set out in paragraph (7)(b), for each specific contract to be awarded it shall—

(a) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;

(b) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;

(c) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders; and

(d) award each contract to the economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement.

(10) The contracting authority shall not conclude a framework agreement for a period which exceeds 4 years except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement.

(11) In this regulation, a "specific contract" means a contract based on the terms of a framework agreement.

(12) The contracting authority shall not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

The Jamaican Handbook Framework Rules

Similar to the UK provisions, *Volume 2 of the Government of Jamaica Handbook of Public Sector Procurement Procedures* (passed pursuant *The Public Sector Procurement Regulations, 2008*)[31] also establishes formal rules for the creation and use of framework agreements, which include a detailed description of different uses for frameworks, the need for specificity in call-up assignment terms, and further explanatory notes on issues including avoiding volume guarantees when providing volume estimates:

[31] Ministry of Finance and Planning (Jamaica), Handbook of Public Sector Procurement Procedures, Volume 2 of 4, Procedures for the Procurement of Goods, General Services & Works (Revised March 2014), online at http://www.mof.gov.jm/documents/documents-publications/document-centre/category/35-revised-handbook-of-public-sector-march-2014.html.

APPENDIX 4

FRAMEWORK AGREEMENTS (FAs)

Procuring Entities may enter into Framework Agreements (FAs). Under these Agreements, a contractor commits to supplying the purchaser with goods and related services "as and when" required and on a pricing basis, according to stated terms and conditions. Framework Agreements may be used to supply off-the-shelf, readily available products. A Framework Agreement is not a contract, therefore, quantities and delivery dates cannot be determined in advance. Any “call-up” made against an FA represents acceptance, by a purchaser, of the terms and conditions. As such, it is the “call-up” which forms the contract that would be submitted for approval by the Head of the Procuring Entity, NCC or Cabinet, as the value warrants.

Framework Agreements can be made between:

(a) a single contractor and a single purchaser;

(b) a single contractor and multiple purchasers;

(c) multiple contractors and a single purchaser; and

(d) multiple contractors and multiple purchasers.

Framework Agreements should be used when the overall requirements are known, but the specific quantity and delivery date of any particular good may not be known. Bids shall be solicited for the selection of a contractor to provide the necessary goods as and when they are required.

The Bidding Documents shall state that the Procuring Entity does not necessarily intend to enter into a contract – that is, currently, or ever. Rather, the intention is merely to establish the best source of a future supply, based upon firm prices and pre-determined conditions over a specified validity period.

NOTE: Care should be taken when providing contractor(s) with an estimated quantity of goods and related services. In general, contractors will quote lower prices if there is a reasonable possibility that a firm amount will be ordered. If possible, the Bidding Documents should provide contractors with the minimum estimated quantity which may be ordered. Until an actual call-up document is issued, NO GUARANTEE shall be given that any amount will be ordered. The contractor may withdraw from the FA under pre-determined conditions, and would then have no further obligation to fill orders which are issued after the agreed withdrawal date.

A4.1 CRITERIA FOR ESTABLISHING FRAMEWORK AGREEMENTS

The following criteria should be satisfied in order to establish a Framework

Agreement with a contractor:

(a) the goods and related services should be clearly identified;

(b) the goods and related services should be commercially available; and

(c) the prices should be pre-determined and firm.

A4.2 CHARACTERISTICS OF FRAMEWORK AGREEMENTS

Framework Agreements should have the following characteristics:

(a) unit prices established as a result of a Competitive Bidding process;

(b) delivery dates stipulated in terms of a time period from the date of the call-up;

(c) stipulations regarding the limit on total expenditure;

(d) stipulated limits on individual call-up expenditure; and

(e) a stipulated validity period - usually, FAs are valid for at least twelve (12) months. The period of validity should be the expiry date, or when the limit on total expenditure is reached, whichever comes first. For multi-year FAs, there may be a clause allowing for a price increase due to inflation.

Framework Agreements shall be concluded through competitive tender.

NOTE: Procuring Entities shall obtain approval for Direct Contracting when seeking to establish a Framework Agreement with one contractor, when other contractors are available.

When a call-up against a FA is done, the call-up shall show the exact quantity and description of the required goods and related services, the packing and routing instructions, the delivery points and dates. The unit price and total price of the callup, including freight, shall be confirmed; and the contractor should be requested to acknowledge receipt of the call-up.

GoJ may enter into Framework Agreements on an annual basis for the supply of commonly used disposable goods and services, e.g. GoJ's Framework Agreement for the supply of fuel. These agreements may be entered into by the Ministry of Finance on behalf of GoJ, and reflected in an annual GoJ Schedule of Framework Agreements ("Schedule"). Contracts awarded will be in respect of goods and services for the following entities:

(a) Central Government Ministries;

(b) Central Government Departments; and

(c) any other Procuring Entity (at its option)

Applicable procedures will be contained within the Schedule that is disseminated to Procuring Entities one month prior to the start of each fiscal year.

While not binding on Canadian public sector entities, the framework agreement protocols contained in the UN Model Law, the UK regulations and the Jamaican handbook are generally consistent with the federal SO and SA protocols and can help inform treaty-compliant implementation measures for the use of framework agreements.

In addition to the closed framework agreement formats described above, consideration should also be given to the use of open framework agreements that are also recognized under the UN Model Law.

Through the use of technology, these open framework agreements allow for a one-time prequalification process and the maintenance of a permanent supplier lists that can be refreshed over time to ensure that new entrants are not blocked out of future opportunities. This avoids the duplication associated with closed framework agreements, which require organizations to re-establish their roster at the end of the specific finite term and places an unnecessary burden on already qualified suppliers to requalify.

C. Conclusion

By implementing proactive and strategic measures, public institutions can establish better frameworks for open and fair competition and enable smaller suppliers to compete within the government procurement marketplace. Public institutions can engage smaller local suppliers in a treaty-compliant manner by: (i) centralizing and aggregating procurement in areas where contract awards are currently fragmented; (ii) reducing barriers to competition by streamlining and standardizing prequalification processes; and (iii) maintaining competition by establishing protocols for simplified second-stage competitions to award work under framework agreements. The mechanisms for enabling smaller suppliers are readily available within the government procurement system. Public institutions must now find the will to implement those measures before unbridled trade treaty competition eviscerates local supplier ecosystems and undermines long-term competition in the government procurement marketplace.