



Contracting Policy Notice 2003-3 – Changes required to be current with legislation, policies and changing marketplace conditions (Archived)

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nécessaire pour faire état des lois, des politiques et de l'évolution du marché (Archivé)

DATE◆: June 4, 2003

SUBJECT: Treasury Board Contracting Policy - Changes required to be current with legislation, policies and changing marketplace conditions.

Summary of Policy Changes

1. The Treasury Board Contracting Policy has been updated with respect to contracting for energy services, employer-employee relationships, contracting with not-for profit sector, modernizing the bid receipt processes to accommodate e-procurement, and honoraria payments, effective June 9, 2003. These revisions are important in reflecting the evolving nature of the environment in which departments and agencies contract, enabling departments and agencies to most effectively function within that environment.
2. The 1978 Treasury Board Policy on Science and Technology - Contracting Out has been abolished, effective June 9, 2003, given that it is no longer consistent with the government's science agenda. The importance of R&D contracting is still recognized as key to Canada's innovation strategies and is reflected in key industry development policies, including the Space Industries policy and the innovation agenda. PWGSC nonetheless remains the mandatory service provider for Research and Development (R&D) contracts under the Common Services Policy.
3. Changes to the policy related to bid process have provided the needed flexibility to manage the current system, while providing the means to move to an e-procurement system. These changes preserve the importance of the integrity of the

bid receipt process, but do not prescribe administrative measures, including impediments to e-procurement stemming from a solely paper-based system.

4. New authorities have also been established to support "Contracting for the provision of energy services" to reflect the changes taking place in the Canadian utility marketplace with the establishment of a retail market for fixed-price energy contracts.

5. The changes to the policy with respect to employer-employee relationships reflect the fact that because of legislative changes and jurisprudence, the criteria for determining such a relationship in the Contracting Policy had become outdated. The guidance provided in sections 16.3.4 - 16.3.12 of the policy and Appendix I - Temporary Help Services, has been deleted and replaced with references to the guidance provided by Canada Customs and Revenue Agency (CCRA). This guidance identifies tests to determine whether or not an employer-employee relationship exists. Where the CCRA's guidance tool will likely suffice, the Policy recognizes the need, for more complex cases, for departments to seek assistance from the Department of Justice.

6. The Speech from the Throne, given on September 30, 2002, outlined the government's commitment to "put into action the accord it signed with the voluntary sector last December, to enable the sector to contribute to national priorities and represent the views of those too often excluded." The Contracting Policy has been amended to allow the voluntary sector to compete with commercial enterprises for government contracts in keeping with this commitment.

7. Where previously silent on honorarium payments, the policy has been changed to clearly state that an honorarium payment, given that it is not made under a contractual arrangement, is not governed by the Contracting Policy.

8. Revised wording for these key policies may be found at Annex 1.

IMPLEMENTATION

9. These policy changes are effective June 9, 2003. The Treasury Board Secretariat (TBS) will also provide information to the contracting community through the Treasury Board Advisory Committee on Contracts and presentations to the Materiel Management Institute.

10. The changes made to the policy address very specific paragraphs found in the Treasury Board Contracting policy. Officials should consult the full sections of the policy to situate the changes within the broader context of the policy.

CONTRACTING POLICY WEBSITE

11. This Contract Policy Notice and the revised *Contracting Policy* are available on the TBS Website (www.tbs-sct.gc.ca), under the Policies and Publications Contracting section.

ENQUIRIES

12. For policy advice and guidance, please contact:

☎☎☎☎☎ Treasury Board Secretariat at

☎☎☎☎☎ (613) 957-2487.

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Distribution☎: TB06, TB07, TB21, TB23, T022, T023, T024, T083, T161, T222 et T223.

Attachments include:

Annex 1 - Revised wording for *Contracting Policy*

Annex 1 - Treasury Board Contracting Policy - Changes required to be current with legislation, policies and changing marketplace conditions

Electronic Procurement

4.2.15 Departments must ensure that adequate management controls are in place to protect the integrity of the bidding process. It is recognized that the bidding process may employ either traditional hard copy documents or electronic bid documents. In either situation, in order to stand the test of public scrutiny in matters of prudence and probity, Departments must have the ability to demonstrate that all bid materials are received on time and in the manner prescribed in the tender/solicitation documents. In the case of electronic bids, Departments must also ensure that the documents are not altered, forged, changed or corrupted either intentionally or by error. If a contracting authority suspects that collusion or bid rigging has taken place in the bidding process, it shall notify Industry Canada.

8.6.3 Deleted

8.7.2 Deleted

8.8.2 Deleted

10.7.10 The approved national electronic bidding and information service is the Government Electronic Tendering System (GETS). GETS affords supplier subscribers access to government procurement opportunities. To advertise bid opportunities electronically, contracting authorities may give public notice by means of:

- a) the Government Electronic Tendering System; or
- b) such other departmental procurement methods as may be approved by the Treasury Board.

10.7.11 Deleted

10.7.12 *Government Business Opportunities (GBO)*. GBO is currently available through the GETS. The GBO advertises domestic and international procurement opportunities.

10.8.1 Departments must ensure that adequate management controls are in place to protect the integrity of the bidding process and that these management controls ensure receipt, custody, bid opening, and recording are addressed.

10.8.2 Deleted

10.8.3 Deleted

10.8.4 Deleted

10.8.5 Deleted

10.8.6 A bid or proposal is non-responsive if it does not meet all the mandatory requirements listed in the Request for Proposal or other solicitation documents and will be rejected.

10.8.24 The federal government has a strong commitment to serve Canadians better by expanding access to information and services available electronically. It is government policy to establish and manage the use of public key cryptography as a component of the government's common information management and information technology infrastructure and to support electronic alternatives to the use of paper, thereby increasing efficiency and reducing government costs.

a) Departments must ensure that only secure e-procurement systems that meet government policies are used;

b) A number of considerations are required before an e-procurement system will be approved, including an assessment of the threat, risk and technological requirements for implementing the e-procurement system. Security, privacy and legal considerations must also be assessed.

c) As e-procurement systems are introduced to the federal procurement community, it should be noted that for those procurements subject to the trade agreements, Contracting authorities must respect the provisions of the trade agreements.

12.1.2 *Contract Documentation* The terms and conditions of any contract issued pursuant to the *Government Contracts Regulations* and this Contracting Policy should be formulated in writing. This includes but is not limited to hard copy documents, facsimile copies or other electronic means.

12.3.1 Procurement files shall be established and structured to facilitate management oversight with a complete audit trail that contains contracting details related to relevant communications and decisions including the identification of involved officials and contracting approval authorities.

Deregulation of Utilities

16.17 Contracting for the provision of energy services

16.17.1 The procurement of electricity or natural gas is considered a service procurement.

16.17.2 Departments must meet energy needs in accordance with the federal or provincial jurisdiction of the requirement as applicable. Regulation of energy utilities ranges from fully regulated, partially deregulated to fully deregulated. The nature of the regulation will govern the procurement arrangements.

16.17.3 Departments may enter into contracts based on the authority and conditions contained in the Treasury Board Contracts Directive, Part II, Exceptional Contracting Limits, Section 1 (Appendix C of the Contracting Policy).

Appendix C - Treasury Board Contracts Directive, June 26, 1987, Exceptional contracting limits

In addition, or as an exception, to the contracting limits in Part I of this Appendix, the following special contracting limits and other related authorities have been approved by the Treasury Board.

1. Contracting authorities may enter into and amend a service contract for:

- a) transportation services from common carriers, regardless of the amount payable, if the rates charged do not exceed the normal rates for such services;
- b) electricity, gas, water, sewage disposal, heat and telecommunication services, which, by full or partial regulation, are only available from suppliers at regulated prices or at prices accepted by a regulatory mechanism, regardless of the amount payable, if
 - i) the rates do not exceed the normal rates, and
 - ii) the contract does not involve negotiated installation or capital charges in excess of \$200,000;
- c) the procurement of electricity and natural gas using competitive, electronic tendering when the deregulated portion does not exceed
 - \$100 million for Public Works and Government Services Canada,
 - \$20 million for the Department of National Defence and the National Research Council, and
 - \$5 million for all other departments and agencies;

Employer-Employee Relationships

4.1.9 With respect to contracting for services, contracting authorities must:

(b) ensure that an employer-employee relationship will not result when contracting for the services of individuals in accordance with criteria established by the Canada Customs and Revenue Agency and pertinent court rulings

4.1.9 (d) Deleted

4.2.18 Deleted

16.1.5 Contracting for services has traditionally been accepted as an effective way to meet unexpected fluctuations in workload, to acquire special expertise not available in the Public Service, or to fill in for public servants during temporary absences in certain circumstances. At the same time, excessive or improper contracting for services can result in circumvention of government legislation, regulations and policies covering such matters as the merit principle and bilingualism. As stipulated in article 4.2, Related requirements, contracting authorities are to avoid any contracting situation that would be contrary to or conflict with the *Public Service Employment Act* and common law principles dealing with master-servant relationships.

16.3.4 For guidance in assessing an employer-employee relationship:

a) consult CCRA's current guidance, for example, "Employee or Self-Employed?", publication number RC4110, or visit <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html>;

b) refer to the following sections of the Contracting Policy,

- 16.2 Contracting for the services of individuals and Public Service Employment, and
- 16.3 Employer-employee relationships in its entirety

c) seek legal advice from the Department of Justice, where it is not feasible for officials to determine whether a contract is a contract for services or a contract of employment (*i.e.*, employment status is not easily identifiable). However, the role of the Department of Justice in these cases is only advisory. It is ultimately the responsibility of Contracting Authorities to ensure that contracts do not create employer-employee relationships.

16.3.12 Deleted

Appendix I - Temporary Help Services

1.3 Deleted

Appendix I - Temporary Help Services

1.4 When contracting for the services of individuals, including temporary help, contracting authorities should carefully review the circumstances in order to avoid establishing an employer-employee relationship which would be in conflict with the *Public Service Employment Act* or the *Public Service Staff Relations Act* and other key legislation, such as the *Employment Insurance Act* and the *Canada Pension Plan*. For guidance in assessing an employer-employee relationship, either seek legal advice or consult the Canada Customs and Revenue Agency which provides guidance, such as "Employee or Self-Employed?", publication number RC4110, or visit <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html>. Should there be any uncertainty, the contract should be signed at a level more senior than the individual who would normally approve the initial entry into the contract.

Appendix I - Temporary Help Services

1.5 Deleted

Not-for-Profit Sector

10.1.2 Departments and agencies should not accept bids from one another or from the provinces, municipalities, territories or Crown Corporations unless the department, agency or Crown Corporation bidding is authorized by policy or statute. Departments and agencies may, pursuant to section 3 of the Contracting Policy, arrange transactions that involve the transfer of goods, services or real property between departments, Crown Corporations, provinces, municipalities and the Territories.

11.4 Contractual arrangements with other governments

11.4.1 Departments and agencies may, pursuant to section 3 of the Contracting Policy, arrange transactions that involve the transfer of goods, services or real property between departments, Crown Corporations, provinces, municipalities and the Territories. Transactions between the federal contracting authorities and provincial or municipal entities are not contracts pursuant to the *Government Contracts Regulations* or the Contracting Policy. These kinds of arrangements are usually covered in joint agreements.

11.4.2 Deleted

11.4.3 Deleted

16.10 Consulting and professional services

16.10.1 Contracts with consultants or professionals may be entered into for specialized services when:

- the advice or services sought and the resulting expenditure can be justified as necessary to satisfy program requirements;
- the services can be defined well enough to form the basis of a contract;
- the services are available at reasonable cost; and
- their use is consistent with specific government policies.

Application

This policy applies to all departments and agencies, including departmental corporations and branches designated as departments for purposes of the *Financial Administration Act*. The following transactions are not covered by the policy:

- (a) revenue-producing contracts (sales and concession contracts, leases of Crown property) and the like;
- (b) contracts related to the acquisition of land (which are covered by separate statutes and regulations);
- (c) the transfer of goods, services or real property between departments, Crown Corporations, provinces, municipalities and the Territories;
- (d) grants and contributions;
- (e) shared cost programs in which the government is not the contracting authority;
- (f) any contract not funded by Parliament in which the government acts as an agent for other parties;
- (g) leases and contracts for the fit-up of an office or residential accommodation pursuant to the *Federal Real Property Act* and its Regulations;
- (h) Interchange-Canada agreements

Honoraria Payments

16.5.14 *Honorarium payments.* An honorarium payment is not one made under a contractual arrangement; rather, it is a gratuitous payment as distinguished from compensation for service or hire, and the recipient, if not paid, cannot sue in a Court of Law. Accordingly, the Contracting policy does not govern honoraria.

Date modified: