



Contracting Policy Notice 2007-4 – Non-Competitive Contracting

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Contracting Policy Notice 2007-4 (amended)

FILE NO.: 7010-000-006

DATE: September 20, 2007 (amended June 10, 2019, to reflect changes to the *Government Contracts Regulations*)

TO: Functional Heads, administration/finance of all departments

SUBJECT: Non-Competitive Contracting

SUMMARY

The reasons for sole-sourcing a federal contract are anchored in the approved exceptions to bid solicitations according to the Treasury Board *Contracting Policy*, which contains the *Government Contracts Regulations* (GCRs), or according to the limited tendering provisions of Canada's trade agreements. All sole-source contract requirements must be supported by an appropriate legal authority, either with a reference to the *Government Contracts Regulations* or Canada's trade legislation.

BACKGROUND

The context of government procurement is summarized below to provide an appreciation of the legal obligations that are associated with Crown procurement and, by extension, to non-competitive contracts.

1. The determination of contracting policy is the responsibility of the Treasury Board, pursuant to sections 7 and 41 of the *Financial Administration Act*. In its policy role, the Treasury Board has established limits on ministerial contracting authorities, including the extent to which departments can enter into non-competitive contracts
2. The GCRs generally apply to the bidding requirement; the Treasury Board *Contracting Policy* applies to contract entry and related administration. The GCRs are much broader in scope than the trade agreements in that the GCRs apply to all domestic Crown procurements. Unlike the Treasury Board *Contracting Policy*, the GCRs and the trade agreements have the force of law.
3. The basic objective of government procurement contracting is to acquire goods and services and carry out construction in a manner that enhances access, competition and fairness and that results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. This broad statement permits government to use procurement to complement other government priorities while ensuring that the process is transparent and fair
4. Notwithstanding the Treasury Board *Contracting Policy*, Canada's trade agreements remove some flexibility on how government may use the procurement system for other needs. In addition, the *Agreement on Internal Trade* removes internal geographic discriminatory trade barriers and imposes certain bidding requirements on all signatories.
5. Canada is also bound by the provisions of several comprehensive land claims agreements, covering almost all of the North, which have varying procurement requirements that relate to the participation of Indigenous communities in government procurement, all of which have the force of law. Cabinet also approved, in 1996, an *Aboriginal Business Procurement Policy and Incentives*, which affects government procurement in the rest of Canada where qualified Aboriginal businesses exist.

One of the fundamental principles of federal contracting is openness and the practice of providing potential suppliers with opportunities to submit bids for government contracts. For this reason, when departments choose a non-competitive

procurement strategy, it must be fully justified and recorded.

With regard to conditions of entry, the *Government Contracts Regulations* require the contracting authority to solicit bids. However, for procurements not subject to the trade agreements, the GCRs allow for exceptions to competition where:

1. The need is a pressing emergency where delay would be injurious to the public interest
2. The estimated expenditure does not exceed:
 - a. in the case of a goods contract, \$25,000,
 - b. in the case of a contract to be entered into by the Minister for International Development for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project, \$100,000,
 - c. in the case of a contract for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, \$100,000, and
 - d. in the case of any other contract to which these Regulations apply, \$40,000;
3. The nature of the work to be contracted for is such that it would not be in the public interest to solicit bids
4. Only one person is capable of performing the work

As noted in paragraph 10.2.6 of the Treasury Board *Contracting Policy*, the Treasury Board cannot approve a directed contract that does not meet at least one of the four exceptions to the GCRs. In such cases, an exception to the GCRs by means of an Order in Council would be required.

File documentation

Any use of the four GCR exceptions to competitive bidding should be fully justified by the contracting authority, with appropriate documentation placed on the contract file, after consideration of the following.

1. Pressing emergencies

A pressing emergency for the department or agency where delay would be injurious to the public interest may involve:

- a. an actual or imminent life-threatening situation
- b. a disaster that endangers quality of life or safety of Canadians
- c. a disaster that results in the loss of life
- d. a disaster that results in significant loss or damage to Crown property

There is a critical link between the use of the pressing emergency exception to competition under the GCRs and the Emergency contracting limit that is provided for in Part III, Appendix C of the Treasury Board *Contracting Policy* of up to \$1 million (including amendments and applicable taxes). Part III of Appendix C of the Treasury Board *Contracting Policy* permits contracting authorities to enter into contracts that would normally require Treasury Board approval if a pressing emergency exists and where delay would be injurious to the public interest. Such contracts should be approved by the most senior official available. In these situations, the details of the use of this limit must be reported to the Treasury Board of Canada Secretariat within 60 days of the authorization or beginning of the work.

Part II, Appendix C of the Treasury Board *Contracting Policy* also contains the following emergency contracting limits:

- a. Global Affairs Canada: \$4 million for an international assistance program or project
- b. National Defence: \$5 million for fuel, food, water and transportation services during urgent deployments of Canadian Forces units, under authorized operational orders, in situations where there will be significant human and/or financial risk

- c. Public Services and Procurement Canada: \$15 million where there will be significant human and/or financial risk
- d. Fisheries and Oceans Canada: \$10 million due to oil spills, in situations where there will be significant human and/or financial risk

These emergency contracting authority limits can be used only if all of the following criteria are met:

- a. the applicable departmental Minister approves the use of these special authority limits
- b. the requirement cannot be satisfied by normal contracting procedures due to the urgency of the situation
- c. for requirements subject to the trade legislation, the Minister invokes the national security or extreme urgency provisions of the applicable trade agreements

Appendix C of the Treasury Board Contracting Policy requires that a report be sent to the Treasury Board of Canada Secretariat within 60 days of the use of the authorization or beginning of the work when any of the emergency contracting limits are used. The report should contain the following:

- a. detailed information about the circumstances of the emergency situation
- b. the type and total value of the awarded contract
- c. the reason(s) why the bidding requirements were not practical or permissible
- d. the department's or agency's delegated contracting authority level at which the emergency contract entry was approved

If a contracting authority enters into a contract due to a pressing emergency without Treasury Board approval when such approval should have been obtained, ratification by the Treasury Board must be sought as soon as possible, in addition to the 60-day report to the Treasury Board of Canada Secretariat.

2. Low-dollar-value contracts

From the perspective of value for money, the high cost of awarding a Crown procurement contract far outweighs any economic advantage associated with competing goods under \$25,000 and services and construction contracts under \$40,000, which are low-dollar-value buys, whether or not the requirement is subject to open bidding or otherwise competed.

In support of Public Services and Procurement Canada's (PSPC's) "Way Forward" process for savings, departments and agencies are required to continue to make call-ups against the mandatory commodity groups that can be found in Schedule 4, Part I, Appendix C of the Treasury Board *Contracting Policy*, regardless of the dollar value of the requirement.

Departments and agencies are encouraged to use departmental acquisition cards for the purchase of low-dollar-value goods and services and to use the acquisition cards as methods of payment in contracts when appropriate.

The use of acquisition cards provides the government with a volume discount rebate that is returned to user departments. The acquisition card also serves to decentralize acquisition card purchases throughout the department, reduces inventory costs, and increases the access of local suppliers to federal procurement.

3. Not in the public interest

Contracting authorities may be faced with situations where departmental managers are of the view that the nature of the work is such that it would not be in the public interest to solicit bids. Justification of this GCR exception should address issues such as the following:

- a. alleviation of Canadian socio-economic disparity
- b. national security considerations
- c. conservation of a strategic source of supply that is deemed essential to sustain a critical industrial capacity for future government requirements

- d. impact of the United States *International Traffic in Arms Regulations* (ITARs), such as whether the ITARs prohibit the government from contracting directly with the company because of the controlled nature of the goods or services being purchased
- e. any negative impacts to the department's operations if this requirement is competed, assuming competition is a viable option

4. Only one person capable of performing the contract

Annex A to this CPN contains a number of questions that contracting authorities, with the assistance of technical authorities, should address before awarding a sole-source contract to the one person who is deemed capable of performing the contract.

The questions found in Annex A to this CPN must be completed by contracting authorities before proceeding with contract award. The appropriate rationale for proceeding with the sole-source contract award should also be documented on the procurement file.

Where Treasury Board approval is required, the answers to the questions in Annex A must be appended to the Treasury Board submission. A concise summary of this information should also be included in the "Remarks" section of the submission.

Note that the above requirement applies only to Treasury Board submissions where only one person is capable of performing the work of the contract. In these cases, **where the answers and the justification are persuasive, the case will proceed to Treasury Board as usual; if not, the case will not be scheduled for consideration at Treasury Board.**

In the latter scenario, the submission would be added to the Treasury Board agenda only if the sponsoring Minister (that is, the Minister signing the submission) makes a direct appeal to the President of the Treasury Board and

he or she agrees. In such instances, the sponsoring Minister would appear at Treasury Board to present the case.

Where PSPC is the contracting authority, the Minister that has the operational requirement would appear before the Treasury Board with the Minister of PSPC present to respond to any queries regarding the contracting process.

For those cases where sole-source requirements fit this GCRs exception and the contract is awarded within departmental contracting authority limits, the answers to the questions in Annex A should be placed in the applicable procurement file.

Trade agreements

Canada's free trade legislation is founded on the principles of openness, fairness, transparency and non-discrimination. The procurement chapters of these agreements contain provisions that allow the government to limit competition. Generally speaking, the agreements include, with some wording differences, similar exceptions for setting aside competition to those found in the GCRs.

Rather than detailing the specific provisions for each of the trade agreements in this Contracting Policy Notice, for those procurements that are subject to trade legislation, contracting officers are expected to become familiar with these agreements and are required to document in their contract file the specific reference for each of the applicable free trade agreements that supports the non-competitive action that is being proposed.

CONTRACTING POLICY

All TBS publications are available online via the [Treasury Board of Canada Secretariat website](#).

ENQUIRIES

Questions about this policy notice should be directed to [TBS Public Enquiries](#).

Assistant Secretary

Distribution: TB06, TB07, TB21, T22, TB23, T23, T24, T161

Annex A: sole-source contracts where only one person is capable of performing the contract

Responses to the questions below are required to explain and justify why exception 6(d) of the GCRs has been invoked to allow a sole-source goods or services contract. All of the questions are to be considered and answered, including confirmation, where appropriate, that the question is not applicable to the contract under review.

Note: In the case of a services contract, contracting authorities should satisfy themselves that the contract in question is the right instrument, as opposed to instruments such as, but not limited to, a grant, a contribution or an employment contract such as a term, casual or ministerial appointment.

1. Is the proposed sole-source contract linked to a previous procurement and strategy for obtaining additional quantities and/or in-service support? If yes, what was the approved strategy? Notwithstanding the approved strategy, is it feasible and affordable to compete the requirement? If not, provide the related rationale in terms of cost, schedule, etc.
2. Does the vendor or its approved distributors have exclusive ownership of, and rights to use, the intellectual property for the goods or services in question? If yes, provide details. What rights, if any, does the Crown have to use the intellectual property?
3. Are there legal and/or regulatory considerations that preclude open competition for this good or service? If yes, provide details.
4. Are there alternative sources of supply for the same or equivalent materiel or support? If no, explain. If yes, what other options were considered and why

were they not recommended?

5. Is the proposal related to commonality or compatibility with existing equipment? If yes, what are the operational costs or implications of managing multiple versions?
6. Explain why the price is fair and reasonable, describe how price support was obtained, and summarize negotiations.
7. Are there any other factors that have led to a recommendation for a non-competitive process? If yes, provide details and the rationale.
 - a. What is the likelihood of an amendment or follow-on contract to the same person? Describe the efforts taken to identify a variety of suppliers and explain any impact that the trade agreement thresholds or Appendix C of the Treasury Board *Contracting Policy* contract entry or amendment limits will have on the proposed procurement strategy.
 - b. Given the nature of your organization's mandate, describe any efforts taken to put in place long-term procurement arrangements to address similar requirements or activities in future (for example, establish standing offer).

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