

# Office of the Procurement Ombud

## Negotiated Requests for Proposal

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Government  
of Canada

Office of the  
Procurement Ombud

Gouvernement  
du Canada

Bureau de l'ombud  
de l'approvisionnement

Canada

## **Office of the Procurement Ombud**

The Office of the Procurement Ombud (OPO) is a neutral and independent organization of the Government of Canada that works collaboratively with federal organizations and Canadian businesses to promote fairness, openness and transparency in federal procurement. OPO delivers on this mandate by connecting stakeholders, investigating complaints, resolving problems, making recommendations, and sharing best practices.

In 2018, OPO launched its Knowledge Deepening and Sharing (KDS) initiative to better understand key issues in federal procurement. These KDS studies provide a platform that enables OPO to conduct broader research into root causes of current procurement issues, better understand procurement issues on the horizon, and provide meaningful guidance to suppliers and the federal government.

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## 1. Introduction

### 1.1 Purpose of the study

The purpose of this KDS study is to examine whether the federal government should adopt the Negotiated Requests for Proposal (NRFP) tendering format in certain circumstances as a more flexible option to traditional tendering formats, and as a means to achieve better outcomes and address recurring issues with competitive procurements, especially those with higher complexity.

### 1.2 Context

An NRFP is a non-binding tendering format that permits a procuring entity to enter into negotiations on specific aspects of a proposed contract, such as the proposed solution or approach to the work and the associated bid price. These negotiations are held with one or more compliant bidders after an initial evaluation has been completed and bidders are ranked. This differs from a traditional RFP format that requires bidders to submit an irrevocable bid and does not permit negotiations, refinements to the requirement or changes in the bid price after bids have been evaluated.

NRFPs have been widely used by many Canadian provinces and municipalities for over ten years and the flexibility of the NRFP format is widely considered to have contributed to improved competition, better solutions, better value, and mitigated many of the legal risks associated with traditional tendering formats.

The federal government, on the other hand, most often solicits bids using traditional tendering formats such as Invitations to Tender, Requests for Proposal, and Requests for Quotation that are based on what is known as the Contract A/B tendering format.<sup>1</sup> The use of this less flexible tendering format with its inherent risks has often led to a reliance on overly restrictive criteria, prescriptive technical requirements, and onerous bidder submission requirements which can have the effect of narrowing the pool of potential bidders and thus not leveraging competitive tensions. This reliance is primarily aimed at avoiding legal challenges from suppliers and has resulted in procurement processes that are often both unnecessarily complex and burdensome.

[The Procurement Ombud's 2023-24 Annual Report - Time for Action](#) underscored the need to make changes to resolve long-standing issues in federal procurement. OPO hopes this study will provide the impetus for the federal government to consider adopting NRFPs as one of the tendering formats it uses in certain contexts, as a means to address some of these long-standing issues.

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<sup>1</sup> The government engages in pre-solicitation activities using mechanisms such as Requests for Information, Letters of Interest, Review and Refine Requirements exercises, and other pre-qualification processes such as Requests for Qualification, Invitations to Qualify, Requests for Standing Offer and Requests for Supply Arrangements. These processes were also outside the scope of this study as they do not directly result in the award of a contract.

### 1.3 Methodology

OPO's research involved reviews of:

- academic and legal literature relating to flexible tendering formats
- landmark legal decisions relating to obligations under both Contract A/B and flexible tendering formats like NRFPs
- various trade agreements to which Canada is a party, statutory, legal, and regulatory requirements, and Treasury Board (TB), Public Services and Procurement Canada (PSPC) and Shared Services Canada (SSC) policies, procedures, and solicitation clauses
- provincial and municipal NRFP templates and actual NRFPs

OPO also interviewed federal government officials, procurement officials from multiple provincial and municipal jurisdictions, and officials from industry associations.

## 2. Background

### 2.1 Evolution of the Contract A/B tendering format in Canada

The traditional Contract A/B tendering format commonly used in federal procurement processes is rooted in Canadian jurisprudence. In its landmark 1981 decision, *Queen (Ontario) v Ron Engineering & Construction (Eastern) Ltd.*, the Supreme Court of Canada (SCC) created a new legal structure for competitive tendering in Canada which was further defined by two subsequent SCC cases that built on the interpretations of this new structure.<sup>1</sup>

The first of these SCC cases is often referred to as “Ron Engineering”. By way of background, in 1972, Ron Engineering submitted a tender for a construction project in North Bay, Ontario. The firm submitted the lowest-priced compliant bid but did not realize it had made a material error in its tendered price until after the tenders were publicly opened. The firm did not withdraw its tender but refused to sign the resulting contract and asked for a return of its bid bond. The procuring entity, however, kept the bid bond and Ron Engineering sued for its return.

The case eventually reached the SCC, which ruled that the conduct of the parties in the competitive solicitation created two contracts, one of which the SCC called Contract A, created individually between the procuring entity and each bidder who submits a compliant bid and which governs the process until a formal contract is awarded. The second, referred to as Contract B, is the contract awarded as tendered to the successful compliant bidder. Two subsequent cases further defined Contract A/B. First, in *Martel Building Ltd. v Canada*, the SCC clarified that Contract A includes a duty to treat all bidders fairly and equally.<sup>2</sup> In *Naylor Group Inc. v Ellis-Don Construction*, the SCC stated that in competitive processes under Contract A, procuring entities have a duty to award a contract to the winning bidder.<sup>3</sup>

### 2.2 Implied duties under the Contract A/B tendering format

Court decisions subsequent to Ron Engineering laid out Contract A/B tendering rules that must be respected by both the procuring entity and the bidder when this format is used. Given the

contractual nature of the process, violating any of these rules is considered a breach of contract. Bidders are expected to comply with certain rules for their bids to be considered compliant, such as meeting all terms and conditions of the solicitation and all mandatory requirements, and submitting an irrevocable bid that must remain valid for the period specified in the solicitation. Also, bidders are not permitted to repair their bids after bid closing. In return, the procuring entity assumes a number of implied duties:

- Duty of fairness<sup>3</sup>
- Duty to disclose all material information<sup>4</sup>
- Duty to conduct a fair competition<sup>2</sup>
- Duty to reject non-compliant tenders<sup>5</sup>
- Duty to award the contract as tendered<sup>5</sup>
- Duty to award to the winning bidder<sup>3</sup>

### 2.3 Risks and challenges of the Contract A/B tendering format

The Contract A/B tendering format has created challenges for both procuring entities and bidders. Since Contract A/B solicitations require irrevocable bids, there is little opportunity for bidders and procuring entities to exchange ideas, seek bid modifications, correct errors, or refine the requirement to best meet the procuring entity's needs, without fear of re-tender or litigation. Canadian courts have strictly enforced the implied duties under the Contract A/B format, resulting in numerous successful claims by bidders for lost profits, even in cases where the procuring entity drafted clauses in the solicitation to avoid the creation of a Contract A/B relationship. For example, in *Tercon Contractors Ltd. v British Columbia*, the SCC struck down a clause in a contract protecting the government from all claims relating to a Contract A/B solicitation, finding the BC government liable for \$3.3 million in lost profits after it awarded a contract to a non-compliant bidder.<sup>5</sup>

Currently, the Canadian federal government is an outlier in its continued use of Contract A/B when compared both to Canadian provinces and municipalities and to other countries. Many other jurisdictions around the world either prevent the creation of Contract A/B, or limit its creation to when the procuring entity explicitly spells out its intent to create Contract A. For example, in the United Kingdom, the England and Wales High Court of Justice in *Adferiad Recovery Ltd. v Aneurin Bevan University Health Board*<sup>6</sup> firmly rejected that Contract A (known there as a process contract) principles apply to all competitive solicitations. The Court noted that Contract A/B only exists when the procuring entity expresses its intent to enter into it, and can be explicitly avoided through clear language in the solicitation rejecting it. In the United States, the *Sovereign Acts Doctrine* precludes suppliers from making Contract A-type claims<sup>7</sup> meaning that complainants do not have legal recourse to be compensated for lost profits under Contract A.

The Canadian provincial and municipal procurement officials and industry members interviewed for this study were unanimous in stating that the Contract A/B format presents

challenges. Provincial and municipal officials were concerned about their inability to hold discussions with bidders, collaborate on fleshing out the requirement and finalizing contract terms and conditions. This could potentially result in the need to cancel the solicitation and re-tender, or cause a misunderstanding between the procuring entity and the contractor. Several provincial officials also felt that the lack of consultation with potential bidders, coupled with situations where the client or end user may not have had the technical expertise to properly define their business requirements, as is often the case with IT procurements, can result in the procuring entity having to accept a proposal in its entirety even if they do not want to.

Most of the industry members interviewed expressed frustration about their inability to speak with someone during the solicitation process who has the required technical expertise to resolve issues with how the work is described. One industry member expressed concern that they are required to read the procuring entity's mind, with the result that each bidder may interpret the requirements in a slightly different manner. Other interviewees stated that this puts industry at risk financially as they have to make assumptions on how to manage significant risks. For example, construction requirements have design risks and unforeseen site conditions that have the potential to lead to cost overruns. Another industry official felt that improperly defined requirements can lead to contract scope creep, resulting in iterative contract change orders and a more expensive solution. Most provincial and municipal officials expressed concern that the lack of collaboration between bidders and the procuring entity runs the risk that the contract ultimately costs more than originally anticipated.

One industry interviewee felt that the standard procurement approach is "clunky and full of red tape," while another added that it is made worse by the inclusion of excessive mandatory requirements which can eliminate otherwise viable suppliers "right out of the gate." These opinions were echoed by multiple provincial and municipal officials, who felt that the Contract A/B format places them in a position where they have to reject otherwise valid bids because the bidder takes exception to some of the terms and conditions, or because of minor administrative errors such as not completing mandatory submission forms, missing documentation, mathematical errors, or problems with bid bonds.

In terms of competition, some provincial and municipal officials felt that the pool of bidders may be smaller under the Contract A/B format due to the work not being properly scoped out to reflect industry practices, or to the lack of opportunities to negotiate the terms and conditions. Since terms and conditions are typically not flexible, several municipal officials felt that bid prices may be inflated to accommodate potential risks, because more risk has to be assumed by the successful bidder.

Most provincial officials stated they face a higher risk of legal challenges, including lost profit claims, when using the Contract A/B tendering approach. One of those interviewees stated that bidders are more prone to complain about a Contract A/B process than an NRFP.

From the federal perspective, several officials stated that the Contract A/B tendering format is resource intensive and requires a lengthy planning process to define requirements and develop

evaluation criteria. For technology procurements, because technology evolves so quickly, one interviewee stated they have to deal with a plethora of questions from potential bidders during the solicitation period, resulting in the need to extend the bid closing date or to modify, among other things, the requirement or the evaluation criteria. Government business owners don't necessarily take the time or have the expertise to properly define their requirements, or prefer to repeat what they did in the past, resulting in a low number of bids, or sometimes no bids received. Where a requirement is not clearly defined, suppliers may misunderstand what it demands, but still submit bids under this mistaken understanding. This could result in situations where they are found non-compliant and subsequently submit a complaint.

Another federal official spoke about best value, expressing concern about the opportunity costs when the government uses less flexible tendering formats like Contract A/B that do not permit negotiations, and questioned what the government may be leaving on the table. The official also questioned whether the government is really getting the best deal or the best solution, or leveraging technology. If the government could negotiate some of the final parameters, the interviewee posited that it might be able to achieve a better outcome in terms of scope and price.

Another issue is that the federal government rarely seems to enforce its rights under Contract A to claim the bid bond when winning bidders fail to honor their irrevocable bids and sign the contract. Furthermore, even where no bond exists, the government may still claim from the defaulting bidder the difference between their bid and the amount paid to the next highest bidder, but rarely, if ever, does. As a result, neither party truly benefits from a Contract A/B process. On one hand, bidders are constrained by the rigidity of the process and on the other hand, the government does not benefit from the protection against bidders failing to uphold their obligations under Contract A.

In an annual risk rating of the procurement practices of countries around the world, a recognized procurement law expert has consistently ranked the Canadian government as having a high level of procurement risk, attributable in large part to the extent of bid protests that result in lost profit awards and procedural remedies such as re-evaluation orders and rescission orders.<sup>8</sup> These claims can be costly for the federal government and can disrupt procurement processes, and are made more likely by the Canadian International Trade Tribunal (CITT), which enforces these claims with relatively high frequency.<sup>9</sup> Additionally, a leading Canadian law firm has asserted that Canada sees more procurement litigation than almost any other country in the world, making both suppliers and procuring entities "... hyper-aware of the potential for litigation," and procuring entities comparatively risk adverse.<sup>10</sup>

#### Federal government practices to provide more flexibility

Over the past number of years, the federal government has introduced practices that collectively are aimed at engaging suppliers, reducing the need to reject otherwise good bids or good bidders, and avoiding the need to re-tender. While the goals of these practices are similar

to those of NRFPs, they still do not afford procuring entities the same flexibility as NRFPs. Depending on the practice, suppliers may be engaged before the formal solicitation is issued, during the solicitation period or, like NRFPs, after bids are received and an initial evaluation is conducted.

i. Shared Services Canada (SSC) Agile Procurement 3.0 Framework

Under this framework, when developing the solicitation SSC assembles a cross-functional team composed of technical and contracting experts, with users at the centre of the design, along with facilitators who specialize in contracting clarity and transparency and design thinking. Rather than focusing on specifications, the team defines the problem the client wants solved, establishes a short list of 'minimal viable requirements', and identifies constraints and challenges.

Before the solicitation is formally issued, multiple consultations take place with industry through webinars, 'Invitation to Refine' processes, and one-on-one meetings with suppliers to openly discuss the requirement. All these activities are aimed at finalizing the solicitation document. Unlike NRFPs, no negotiations with bidders take place during the evaluation process.

ii. Commercially Confidential Meetings

PSPC and SSC sometimes conduct commercially confidential meetings (CCMs) with interested potential bidders prior to bid closing to discuss commercially confidential aspects that are unique to the supplier's proposed bid and to assist them in developing optimal, compliant solutions. The process is designed to ensure potential bidders can discuss unique aspects of their offering in a confidential setting and also permits them to provide the government with comments and feedback on the solicitation. All discussions and communications, including written materials exchanged, are non-binding and without prejudice to Canada or the supplier unless any such information is included in an amendment to the solicitation. Where the government determines that it provided the supplier with information that clarifies or supplements the solicitation, it provides such information to all potential bidders, deleting any information that is commercially confidential to a bidder.

There is currently no formal federal government policy direction on CCMs, so OPO's understanding of CCMs is based on a review of custom clauses (as opposed to standard clauses) used in applicable solicitations. OPO therefore has little insight into how widely CCMs are used in the federal government.

iii. Phased Bid Compliance Process

The Phased Bid Compliance Process (PBCP) policy was introduced by PSPC in 2017 to allow bidders the opportunity, after bid closing, to provide information that is missing

from their financial bids, and to rectify a finding of non-compliance with respect to designated 'eligible mandatory requirements'<sup>11</sup> or specified mandatory technical evaluation criteria. The expected outcomes of the PBCP policy are "to support the government's procurement objectives of competition and best value by increasing the number of compliant bids."

The first phase of the process provides bidders an opportunity to provide any financial information missing from their bids. The second phase involves evaluating only those bids with all the required financial information, to determine whether bidders comply with eligible mandatory requirements. After the evaluation team completes an initial evaluation of bids, any bidder not demonstrating compliance with designated eligible mandatory requirements is given an opportunity to rectify its bid by providing additional or different information related to those elements of the solicitation.

Where a bidder submits additional or different information, the evaluation team reviews that information and determines whether the bid then demonstrates compliance with all eligible mandatory requirements. Bids not demonstrating compliance are not given any further consideration. PSPC then proceeds to the third and final phase, where the evaluation team evaluates the remaining bids in accordance with the process outlined in the solicitation, and determines the successful bidder.

### 3.0 Overview of negotiated requests for proposal in Canada

#### 3.1 Features of an negotiated request for proposal

The more flexible nature of NRFPs allows procuring entities to avoid many of the onerous requirements associated with Contract A/B. For example:

- Bids are revocable and can be withdrawn at any time during the solicitation process, including after the bid closing date and after the bid has been deemed compliant
- Negotiations are permitted with one or more compliant bidders, either consecutively or concurrently
- Negotiations can be used to clarify aspects of the bids, obtain additional information as required, and identify areas of weakness in the bids that could be improved
- Bidders are provided the opportunity to rectify irregularities associated with mandatory bid submission requirements, deficiencies of an administrative nature, or pricing irregularities, thus increasing the possibility of more compliant bids
- Neither the procuring entity nor the bidder(s) participating in the negotiations are obliged to enter into a contract

Over the past ten years or so, two formats for conducting negotiations under the NRFP format have emerged as effective tools that avoid the restrictions of Contract A, while still complying with domestic and international trade law. These include 'consecutive' negotiations and

‘concurrent’ negotiations. The provinces and municipalities interviewed use variations of these formats, and practices are continually evolving. This report reflects current practices in the Canadian provinces and municipalities OPO interviewed in 2024.

The consecutive negotiation format is the prevailing method used by the provinces and municipalities interviewed. With this format, bids are evaluated in accordance with the evaluation criteria set out in the solicitation, scored, and then compliant bidders ranked. The procuring entity may choose to enter into a dialogue stage with the top-ranked compliant bidder or to award a contract to that bidder without any negotiation. If the parties cannot come to a final agreement, negotiations with that bidder cease and the procuring entity can commence negotiations with the next-ranked compliant bidder. If they reach an agreement, a contract is awarded to that bidder. The process continues through the ranked bidders until a contract is entered into with one of them. In all cases, the procuring entity may decide not to go ahead with the contract, or the bidder may decide to withdraw its bid.

With concurrent negotiations, bidders submit bids and the procuring entity enters into simultaneous discussions for a pre-established time period with multiple short-listed bidders ranked after a preliminary evaluation has been completed. During the dialogue stage, bidders have the opportunity to revise or improve their bids if they so choose, and this can have the effect of improving their scoring. At the end of the dialogue stage, the procuring entity may either opt to immediately evaluate the revised bids and choose the winning bidder, or formally invite bidders to submit their best and final offer (commonly referred to as BAFO) by a specified deadline. Bids are then evaluated and the final ranking established. In most cases, the contract is awarded to the final top-ranked bidder, although neither party is obliged to enter into a contract.

### 3.2 No barriers in law or trade agreements

Both trade agreements and court decisions post *Ron Engineering* recognize the legitimacy of alternative tendering formats like NRFPs. Trade agreements like the Canadian Free Trade Agreement<sup>12</sup> (CFTA) and the Canada-Europe Trade Agreement<sup>13</sup> (CETA) explicitly recognize negotiated processes. In addition, they create obligations that are integral to ensuring fairness in competitive solicitation processes that use negotiations, and supplement the general obligations that apply to every government procurement process. For example:

- 1) There must be a disclosed intent to use a negotiation process: A procuring entity can only launch negotiations if it has indicated its intent in the notice of intended procurement [CFTA, article 512(1a.), CETA Article 19.11(1a.)];
- 2) Negotiation rules must be transparent: The elimination of bidders must be carried out in accordance with the published evaluation criteria. In addition, when conducting concurrent negotiations, all bidders must have a common deadline for submitting new or revised tenders. When conducting consecutive negotiations, the bidder must be

provided with a deadline to submit any new or revised tender prior to proceeding to negotiate with the next-ranked bidder [CFTA Article 512(2), CETA Article 19.11(2)];

- 3) Unfair or discriminatory conduct against any given supplier is prohibited: Procuring entities must not give unfair advantage to a supplier or discriminate against suppliers [CFTA, Article 512(3)]. While the following list is not exhaustive, and other factors relating to fairness may apply to the circumstances of a given solicitation, the obligations below underscore the requirement to ensure fairness in the NRFP process:
- a. Process rules must be transparent: In addition to setting out the rules associated with the negotiation process, the solicitation must clearly set out the rules associated with the application of evaluation criteria and the selection of the successful bidder, and the procuring entity must follow those rules, without being arbitrary;<sup>14</sup>
  - b. Evaluation criteria must be applied equally amongst remaining bidders: Mandatory evaluation criteria from the original RFP must not be relaxed or applied differently to different bidders [CFTA Article 512(1)a]. Additionally, any modifications to the rated evaluation criteria must be provided to all bidders still in the running [CFTA Article 510(2), CETA Article 19.9(11)];
  - c. Unnecessary mandatory requirements must be avoided: Procuring entities must not establish overly restrictive evaluation criteria [CFTA Article 509(1)],<sup>2</sup> and mandatory evaluation criteria must serve a legitimate operational objective; and
  - d. The contract ultimately awarded must fall within the scope originally tendered: While there is some flexibility to negotiate requirements, negotiations cannot be used to change mandatory requirements.<sup>15</sup> They should only improve a bid and must not veer from the original intent of the procurement.<sup>16</sup>

CITT determinations have acknowledged the legitimacy of NRFPs, examining cases based on compliance with the applicable trade agreements and the process for negotiations set out in the solicitation.<sup>17</sup> If NRFPs were non-compliant with the trade agreements, the CITT's decisions would have reflected that.

Court decisions have also acknowledged the legitimacy of NRFPs. In *M.J.B. Enterprises v Defence Construction*,<sup>18</sup> the SCC ruled that the public sector has the right to select its own tendering format and is not required to use Contract A/B. Flexible tendering formats like NRFPs are therefore permissible but should take into consideration requirements under trade agreements when applicable.

### 3.3 Benefits of negotiated requests for proposal

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<sup>2</sup> See also [CITT Determination 2006-12-18, CANADIAN BEAVER INFORMATION TECHNOLOGY INC.](#) for discussion on overly restrictive evaluation criteria undermining the fairness of the bid solicitation process by restricting the number of suppliers capable of submitting a compliant bids

### Encourage innovation

NRFPs by their very nature encourage innovation and the use of techniques like value engineering, making it more attractive for suppliers to bid. Bidders can discuss with the procuring entity the cost of investing in one element of the project over another with a view to achieving better value and optimizing certain aspects of the requirement. For example, the procuring entity and the bidder can discuss energy-saving costs or other savings over the proposed solution's lifecycle, and the bidder can have a better understanding of the areas where the procuring entity has the most flexibility. NRFPs also enable the procuring entity to be open to solutions involving new technology and to leverage leading-edge industry expertise with fast-moving technologies such as cyber security and cloud computing.

### Better risk sharing

The dialogue phase provides a means to resolve any mismatch of expectations between the procuring entity and the bidder and ensure that both parties have a mutual understanding of the requirement and their respective obligations before contract award. Dialogue can therefore result in better risk sharing between the procuring entity and the contractor and in turn, better pricing and less contractual disputes.

### Improved competition

NRFPs are known to improve competition as they can reduce the incidence of no bids or no compliant bids and provide greater assurances that the right firms bid on a requirement. Some industry members indicated that it is currently a sellers' market so suppliers can pick and choose what solicitations they bid on and who they choose to deal with. They indicated they are more amenable to bidding on requirements using the NRFP tendering format, and one industry interviewee stated that they typically would not bid on a requirement that uses the traditional Contract A/B tendering format. One municipality said that for certain industries, there is less supplier interest when there are no negotiations.

## 3.4 Employing the negotiated request for proposal tendering format - Risks and mitigation strategies

### Planning and executing the solicitation

The complexity of NRFPs is such that procuring entities may not benefit from the flexibility afforded by this tendering format if they don't carefully plan and take the time to properly execute the solicitation process. NRFPs require considerable upfront planning with all internal stakeholders and time to develop the dialogue and negotiating strategy and craft the solicitation document to avoid creating a Contract A/B process. Additional time is required after the initial evaluation to conduct negotiations with one or more bidders, fine-tune the requirement, and possibly seek and evaluate revised bids. Procuring entities must therefore consider all of these factors when establishing their procurement strategies, and must build realistic timelines into their project and procurement schedules and ensure their clients are in agreement with the schedule.

### Negotiating capacity

Procuring entities may not achieve the desired outcome and as such lose the benefits of having a negotiated process unless they assign sufficient, knowledgeable, and experienced resources to design the process, conduct the evaluations, and run the negotiations. Negotiations require careful navigation and specialized skill, and the lack of negotiating expertise could result in the bidder having the “upper hand”. Procuring entities must therefore ensure that negotiating team members are educated on conducting negotiations, and clearly understand and follow the rules set out for the negotiations in the NRFP.

### Creating a Contract A/B relationship

Procuring entities may inadvertently create a Contract A/B relationship and the associated obligations through the language they use in the solicitation. It is not enough to simply label the solicitation an NRFP – procuring entities must ensure that the solicitation excludes any language that could be construed as creating or leading to the creation of Contract A/B. For example, the NRFP should expressly state that bids are revocable and that a legally binding relationship is not created until a written agreement is formally executed. Procuring entities must also avoid requiring bid security, and should also include a rectification period to permit bidders to rectify non-compliance with mandatory requirements and correct irregularities in their bids.

### Revocability of bids

Because bids are revocable, bidders can walk away from the process at any time, bringing the procurement to a standstill. For example, bidders may want to revoke their bids because market conditions have changed since the bid was first submitted, or because they do not have confidence in the integrity of the procurement process. Several industry members were concerned that a procuring entity could disclose their proprietary information or intellectual property to competitors during concurrent negotiations, or that they might use the negotiation process to divulge bidder prices or proprietary information to other bidders. Such concerns can cause a bidder to withdraw from an NRFP process and as such limit competition.

While one interviewee posited that it may be harder for a bidder to withdraw from a negotiation when it is close to being awarded the contract, procuring entities should nevertheless be aware that a bid could be revoked at any point in the solicitation process. Should this occur after negotiations have commenced, procuring entities must be able to adapt the prescribed process to the field of remaining ranked bidders. They must also establish clear and transparent guardrails to prevent the disclosure of proprietary information to other bidders. For example, since negotiators are privy to the information of all bidders involved in the negotiation process, they should be required to sign non-disclosure agreements at the outset of the procurement process, and must be vigilant in protecting proprietary information and avoid sharing of bidder information with other bidders when conducting negotiations.

### Ensuring fairness, openness and transparency

To ensure that the process is fair, open and transparent, procuring entities must clearly set out the negotiating process in the NRFP, including identifying the elements that are negotiable and those that are not, such as mandatory requirements and legal and regulatory compliance. Negotiators must also avoid any bias in their decision-making.

### 3.5 Negotiated request for proposal practices today in Canadian provinces and municipalities

When initiating a procurement, the provinces and municipalities interviewed examine each proposed procurement to assess the risks and benefits of employing an NRFP versus a traditional RFP. This risk-benefit analysis considers the time required to conduct a traditional RFP process versus the additional time that is often required to conduct an NRFP process, although NRFPs typically reduce the need to re-tender. In addition, interviewees take into consideration factors such as the commodity, the nature and complexity of the requirement, the cost, the context, and the marketplace.

NRFPs are most effective where close collaboration with bidders is needed, such as for more complex procurements like large infrastructure projects, strategic procurements, and procurements where multiple solutions could achieve the required outcome. Commodities like integrated software solutions involving a services component, cloud computing, and design-build and construction management procurements, where consideration of alternative designs to reduce lifecycle costs is a factor, were often cited as lending themselves to NRFPs. Software was also mentioned as a commodity where negotiation of terms and conditions is typically required and therefore would benefit from the NRFP tendering format. Interviewees were unanimous in stating that there would be little if any benefit to using NRFPs for commercial off-the-shelf products.

To leverage the benefits of NRFPs, interviewees describe their requirements with less prescription than how they are described in Contract A/B solicitations, and more in terms of required functionality, the problem that needs to be resolved, and the desired outcome. They limit mandatory evaluation criteria to truly critical requirements, leaving room for industry to provide innovative solutions.

Interviewees underscored that they are judicious in drafting NRFPs to explicitly avoid creating a Contract A/B relationship. The NRFP templates and RFPs provided by various provincial and municipal officials all contain carefully crafted language making it clear that the procuring entity does not intend to create Contract A/B.

Annex A provides an overview of additional NRFP best practices employed by the provinces and municipalities interviewed.

## 4.0 Why the federal government is reluctant to adopt the negotiated request for proposal

### Perceived legal and policy barriers

While federal officials acknowledged there is a need for more flexibility in the current procurement process, and that the government is ‘nibbling around the edges’ with processes like Phased Bid Compliance, there was some concern expressed that NRFPs may not align with free trade obligations. OPO is of the opinion that the trade agreements explicitly recognize negotiated processes, and that the [Government Contracts Regulations](#) and the [TB Directive on the Management of Procurement](#) do not preclude the use of NRFPs.

Some officials interviewed were specifically concerned about NRP negotiations, asserting that the same information must be provided to all bidders at the same time, and that the negotiation provisions of the trade agreements expect everyone to be able to bid again, against the same requirement. They also believe that concurrent negotiations would place suppliers in an unequal position and may allow for situations where suppliers bid against different requirements. In their opinion, the more elements a procuring entity is willing to negotiate, the more difficult it would be to demonstrate that the government is evaluating bids on the same basis.

### Risk aversion

For over thirty years, the federal government has relied on the Contract A/B tendering format in its efforts to comply with the trade agreements. The unintended impact is that in some cases the government ends up not complying with trade agreement obligations because it did not follow the rigid rules it set out for itself in employing the Contract A/B format. This has led to a body of numerous court decisions, resulting in concerns that adopting new tendering formats could lead to expensive litigation. It also led to a culture of risk-aversion where government officials believe they may face complaints before the CITT, even if common law constructs like Contract A rarely form part of the Tribunal’s analysis as it derives its jurisdiction based on Free Trade Agreement obligations.

These decisions have cultivated a risk averse culture and a reluctance on the part of the federal procurement community to expand beyond the bounds of the current procurement system, for fear of supplier complaints. Some federal officials believe NRFPs could lead to increased CITT complaints when the solicitation involves negotiations with only one bidder, or conversely that there is a risk negotiations might not be conducted on the same basis where multiple bidders are involved. One official asserted that CITT determinations have been inconsistent, so NRFPs might present unexpected legal risks.<sup>3</sup> Notably, one official stated that contracting officers are risk averse and shy away from anything new as they tend to get “slapped on the hand after trying something new,” leading to a rigid system that simply maintains the status quo.

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<sup>3</sup> To reiterate, the CITT has recognized that negotiated processes comply with the trade agreements. So long as procuring entities follow the process rules set out in the agreements, the risk of CITT complaints is minimized

A federal official also noted that provinces and municipalities do not have the same legal risks and are not subject to the same degree of scrutiny as the federal government, because the CITT does not have jurisdiction over provincial and municipal procurements.

That federal government officials are gripped by legal concerns was echoed by a former senior federal official testifying before the Standing Committee on National Defence (NDDN) as part of its study of defence procurement. The official stated that some public servants have “... become extraordinarily reticent to take any action that raises the possibility of litigation.”<sup>19</sup> In its report, NDDN concluded that this reticence is contributing to the “gridlocks” in procurement processes.<sup>20</sup> It would not be unreasonable to conclude that the issue of legal concerns cuts across both defence and non-defence procurement.

Industry witnesses appearing before NDDN drew particular attention to “... *the rigidity of requirements...*”, and “...*the lack of flexibility...*”. One witness said that the government could simplify defence procurement processes by “put[ting] the onus ... on industry to show what they can deliver in a fair and open competition.”<sup>21</sup> Similarly, in her 2021 report *Procuring Complex Information Technology Solutions*, the Auditor General of Canada stated the government recognizes that traditional procurement must be adapted to deliver solutions that achieve business outcomes.<sup>22</sup>

#### Capacity

Federal officials recognize that some contracting officers lack adequate negotiation skills, given that most procurement officers are accustomed to traditional competitive procurement processes. One interviewee opined that in addition to needing to strengthen the negotiating skills of procurement officers, a culture shift is needed to move from one that relies primarily on the traditional Contract A/B approach to conducting competitive procurements, to one that can also leverage negotiations. Several interviewees also expressed concern that negotiations might not result in the outcome the procuring entity hoped to achieve (including price and value obtained) if the government resources conducting the negotiations do not have the required skillset to negotiate effectively.

#### 5.0 Guidance for moving forward

NRFPs can be an effective tool for enabling operational outcomes and achieving best value, which are two of the expected results of the TB [Directive on the Management of Procurement](#). That said, moving to adopt NRFPs as one of the tendering formats the federal government uses will require a significant undertaking for the government. As one provincial interviewee asserted, organizations need to understand they are dealing with a change management initiative that involves a major shift in culture from one that is not accustomed to talking to bidders after bid closing to one where procuring entities are actively dialoguing with bidders. Among other things, the government will need to train and educate procurement officials and business owners on all aspects of NRFPs and get their buy-in on the changes, as well as to communicate the changes to the supplier community.

In its Departmental Risk Profile, PSPC acknowledges that change management is a key risk faced by the Procurement Program. The Procurement Branch's planned mitigation activities include applying a transformation strategy and implementation plan focused on change management, including change management plans and activities, and increasing training for existing staff and ensuring that key guidance materials and other tools are available to procurement professionals. PSPC could consider ensuring that its change management plans and activities incorporate an examination of NRFPs and the contexts in which they can be effectively utilized.

During the COVID-19 pandemic, senior procurement officials at Treasury Board of Canada Secretariat (TBS), PSPC and SSC implemented flexible procurement solutions to respond to the urgent needs of Canadians. This experience demonstrated that government recognizes the need for senior management commitment and leadership to take decisive action and cultivate an organizational culture where innovation and taking calculated risks is encouraged. In that regard, OPO recommends that a senior government procurement official be appointed to lead an examination of the feasibility of adopting NRFPs. In a recent study - [Chief Procurement Officer: From Silos to Synergy](#) – OPO recommended the government consider establishing a Chief Procurement Officer (CPO) position that would be responsible for creating, interpreting and applying government procurement policy. Should the government decide to establish a CPO position, it might want to consider having the CPO lead this initiative.

Examining the feasibility of adopting NRFPs could be conducted in conjunction with the Centre of Expertise in Procurement Law and the Materiel and Communities Directorate of TBS, that could examine the statutory, legal, regulatory and policy implications of adopting NRFPs. PSPC and SSC, as common services providers, could examine NRFPs from the perspective of what process changes would be required, along with the implications for tools such as solicitation templates, standard instructions and conditions, and standard clauses, among other things. The government might want to consider conducting a pilot of the NRFP tendering format and evaluating the outcomes to determine whether NRFPs could be implemented more broadly as one of the tendering formats used in federal government procurement.

In terms of capacity, TBS has developed a new professional development framework for procurement professionals that comprises four pillars. One of these pillars is continuous learning, which involves mandatory, supplemental, specialized, and practical learning. Should the government decide to adopt NRFPs, the approach to capacity development should align with the professional development framework, and policy direction should address when and how procurement officials should use the NRFP tendering format. Government policy will also need to provide guidance to business owners on aspects such as dialogue with bidders after bid closing and conduct of negotiations, while maintaining fairness, openness and transparency in procurement processes. The senior government procurement official or CPO, referenced above, could play a key leadership role in creating a culture where procurement professionals are permitted to exercise judgement and make strategic, risk-based decisions.

Also in terms of capacity, in April 2024, PSPC established the Contract Negotiation Support Directorate (CNSD) within its Procurement Branch. The directorate's mandate is to increase the negotiating capacity of the Department by providing procurement officers with the tools they need to effectively engage in negotiations. The directorate provides training on important negotiation elements such as being mindful of the project's objectives, setting ambitious and challenging tactics, outlining their strategic approach, possible concessions, and planning for potential pushbacks. The directorate supports the negotiation teams, where requested by the procurement organization and could be a key player in training procurement staff on conducting negotiations under an NRFP process.

## 6.0 Conclusion

Senior federal procurement officials may be reluctant to adopt the NRFP tendering format, particularly given the numerous transformation initiatives within and outside procurement that are currently underway. However, for certain procurements, there are significant benefits to both the federal government and the supplier community that would come from using NRFPs. The government has already, through commercial confidential meetings and the phased bid compliance process, attempted to address some of the problems that have long plagued competitive procurements under the Contract A/B tendering format. These measures, coupled with the adoption of NRFPs, could reduce the number of lost profit claims by suppliers, encourage innovation by leveraging technology and industry expertise, and further reduce costs by better balancing the assumption of risk between departments and suppliers. Using NRFPs in certain procurements could also improve competition by reducing the incidence of few or no bids received, and provide an opportunity to address many of the long standing problems in federal procurement. This could be achieved through improved communication and negotiation between procuring officials and buyers leading to better alignment between the government's needs and the solutions offered by bidders.

## Annex A - Provincial and municipal negotiated request for proposal best practices

- Be proactive to understand the marketplace and use tools such as Requests for Information in advance of publishing an NRFP.
- Include multiple subject matter experts in the procurement process, e.g. legal, risk management, cyber security, privacy, data, etc.
- Consult legal counsel to assist in drafting the NRFP.
- Specify in the NRFP what is and what isn't subject to negotiations.
- Ensure that resources are properly trained on conducting negotiations, including what can and cannot be discussed, and on the protection of proprietary information and intellectual property.
- Consider a fairness monitor to oversee procurement processes, particularly for overly complex or sensitive procurements.
- Establish a detailed project plan and ensure business owners buy into the process and commit to the timelines.
- Develop a well-planned and well-organized process, including contingency plans, and a negotiation framework that establishes timelines, roles and responsibilities in the procurement.
- Ensure processes are transparent, and detail what the procuring entity will do every step of the way so that bidders know how the process will unfold.
- Establish gates in the solicitation and timelines associated with the evaluations and negotiations, e.g., Step 1 of Stage 3 must be completed by x date, or negotiations must be completed by x date.
- Continually refine processes based on lessons learned from previous procurements.

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- <sup>1</sup> Supreme Court of Canada, [The Queen \(Ont.\) v. Ron Engineering, 1981 CanLII 17 \(SCC\)](#), [1981] 1 SCR 111
- <sup>2</sup> Supreme Court of Canada, [Martel Building Ltd. v. Canada](#), 2000 SCC 60
- <sup>3</sup> Supreme Court of Canada, [Naylor Group Inc. v. Ellis-Don Construction Ltd.](#), 2001 SCC 58
- <sup>4</sup> Court of Queen’s Bench of Alberta, [Opron Constr. Co. v. Alta.](#) (1994), 1994 CanLII 18362 (AB KB)
- <sup>5</sup> Supreme Court of Canada, [Tercon Contractors Ltd. v. British Columbia](#) (Transportation and Highways), 2010 SCC
- <sup>6</sup> England and Wales High Court, [Adferiad Recovery v Aneurin Bevan University Health Board](#) [2021] EWHC 3049
- <sup>7</sup> United States Court of Appeals for the Federal Circuit, [Conner Bros Const Co Inc v Geren](#) [2008] 550 F.3d 1368
- <sup>8</sup> Paul Emanuelli, [Critical Trends - January 2022 Edition](#), 2022
- <sup>9</sup> Paul Emanuelli, [2020 Case of the Year](#), 2020
- <sup>10</sup> McCarthy Tetrault, [A Deep Dive into Canada’s Public Procurement Law – Part 2](#), 2021
- <sup>11</sup> Public Services and Procurement Canada, [Policy on Phased Bid Compliance Process, Policy Notification PN-123](#), July 17, 2017
- <sup>12</sup> [Canadian Free Trade Agreement](#), 2024, Article 512.
- <sup>13</sup> European Commission, [Comprehensive Economic and Trade Agreement](#); 2018, article 19.11
- <sup>14</sup> Paul Emanuelli, [Seven Due Process Principles for Negotiated RFPs](#)
- <sup>15</sup> Paul Emanuelli, [The Art of Tendering- A Global Due Diligence Guide](#), 2023, page 2474
- <sup>16</sup> Paul Emanuelli, [The Art of Tendering- A Global Due Diligence Guide](#), 2023, page 1481-1482
- <sup>17</sup> For example, [Zenix Engineering Ltd.](#) (PR-2006-035)
- <sup>18</sup> Supreme Court of Canada, [M.J.B. Enterprises Ltd. v. Defence Construction Ltd.](#) [1999] 1 SCR 619
- <sup>19</sup> Standing Committee on National Defence (NDDN), [A Time for Change: Reforming Defence Procurement in Canada](#), June 2024, Pg. 11, see Excerpt from statements made by Richard Fadden in an appearance before the NDDN Committee on September 26, 2023.
- <sup>20</sup> Standing Committee on National Defence, [A Time for Change: Reforming Defence Procurement in Canada](#), June 2024, Pg. 32
- <sup>21</sup> Standing Committee on National Defence (NDDN), [A Time for Change: Reforming Defence Procurement in Canada](#), June 2024, Pg. 53, see Excerpt from statements made by Anne-Marie Thibaudeau in an appearance before the NDDN Committee on November 7, 2023
- <sup>22</sup> Office of the Auditor General, [Procuring Complex Information Technology Solutions](#), 2021, paragraph 1.11