

**FRAMEWORK TO GUIDE THE DEVELOPMENT
OF A FIRST NATION TENDERING POLICY**

FRAMEWORK TO GUIDE THE DEVELOPMENT OF A TENDERING POLICY BY FIRST NATIONS IN RELATION TO FEDERALLY FUNDED CAPITAL PROJECTS (EXCLUDING HOUSING)

1.0 INTRODUCTION:

First Nations are being asked to develop tendering policies as a condition of funding related to federal funded capital projects over \$100,000, excluding housing. This requirement for a competitive tendering process is intended to support public confidence in the transfer of federal funds to First Nations and in their accountability.

First Nation tendering policies should address the local situation and aspirations of their communities, but they must encompass the key principles and mechanisms applied by the public and private sectors. This document is intended to assist First Nations in developing their own tendering policies.

2.0 BACKGROUND:

On June 4, 1996, Minister Irwin sent a letter to all Chiefs and Councils which discussed the issues of Accountability and Financial Transfer Arrangements. This letter highlighted the need for a competitive process in contracting for on-reserve capital works, while taking advantage of opportunities for communities to maximize the economic benefits from these projects. The letter stressed that this requirement calls for an open process which supports the achievement of value for money at the community level.

Subsequently, the Transfer Payments Directorate, informed regional directors of Funding Services of a revision to the Comprehensive Funding Arrangement National Model for 1996-1997 to include the following tendering clause:

Delivery Requirements:

For all construction contracts, it should be the policy of the Council to call public tenders to ensure best value, prudence, probity and sound contract management. Best value may include consideration of opportunities to secure socio-economic benefits on behalf of the community. In 1997-1998, the Council shall:

- *call for public tenders where the estimate of the construction work, excluding housing construction, is over \$500,000;*
- *maintain copies of each contract awarding process within its records; and*
- *develop a policy for use of the tendering process for all projects over \$100,000 (i.e., industry practice) and which supports community development.*

Reporting Requirements:

The Council shall submit a copy of its tendering policy to the Minister by (region to specify the date).

The reporting requirement for this clause was extended until the end of fiscal year 1997-1998. In addition, this requirement is supported by the Accountability and Management Assessment process which requires First Nations to have a policy in place which addresses tendering of projects.

3.0 DEFINITIONS:

Aboriginal Contractor/Supplier: *(as defined by the Procurement Strategy for Aboriginal Business (PSAB) for the purpose of this discussion paper) a sole proprietorship, limited company, cooperative, partnership, or not-for-profit organization where:*

- ! at least 51 percent of the firm is owned and controlled by Aboriginal people; and
- ! at least one third of the firm's employees, if it has six or more full-time staff, must be Aboriginal.

If a firm is operating under a joint venture or consortium:

- ! at least 51 percent of the joint venture or consortium must be controlled and owned by an Aboriginal business or businesses, as defined above.

A firm must certify that it meets the above criteria, and it must provide proof of eligibility upon request.

Invited Tender: the tender is limited to a selected list of contractors who are invited to submit a bid on the project. Industry standard normally requires that at least three qualified firms be invited to bid to ensure competition.

Local content: quantifiable criteria identified in the tender document by First Nations to support local benefits against which the bids will be assessed. This could include number of individuals and skills available, as well as local material and equipment for use on the project and the skills enhancement appropriate to the project requirements (refer to Appendix 2-9 G of the *Contracting Guidelines for First Nations and Aboriginal Communities* (CN1) for more details).

An independent third-party appraisal of the local benefits should be carried out as part of the bidding process where fair market value can not be easily determined or where local content provisions make up substantial part of the project cost (ie. over 20%). This appraisal forms part of the project cost.

Lowest valid bid: refers to the bid that meets all the basic project requirements or specifications at the lowest bid price.

Open or Public Tender: open tenders, sometimes referred to as public tenders, are publicly advertised, usually through newspapers, postings in local Construction Association offices and/or a public electronic bidding service. Open tenders must allow all qualified and interested contractors an opportunity to bid on the project. Once advertised, individual contractors can be contacted to ensure that they are aware of the project being open tendered. Public advertisement or notification of a project must be wide enough to ensure a sufficient number of qualified and interested contractors are available, so that a competitive tendering process is achieved. Bids submitted by qualified and interested contractors who may have become aware of the project and whose place of business may be outside the geographical area of advertisement cannot be refused.

For example, projects estimated at \$500,000 or less are advertised locally or in the closest major city, depending on the number of qualified contractors in the area; projects estimated at more than \$500,000 but less than \$2,000,000 are advertised more widely, on a regional (e.g. Southern Ontario) or provincial basis; and projects estimated at more than \$2,000,000 are advertised on a provincial or interprovincial basis. Very large projects should be widely advertised, interprovincially or nationally.

Qualified firm: one of the tender documents is the Contractor's Qualification Statement as referred to in Appendix 2-9 of the *Contracting Guidelines for First Nations and Aboriginal Communities* (CN1). It serves to establish whether a contractor possesses the capacity, skill and integrity to ensure the work is completed as specified, within time and budget.

Tender insurance and security: two of the tender documents are the Insurance Conditions and the Security Conditions forms as referred to in Appendix 2-9 E and F of the *Contracting Guidelines for First Nations and Aboriginal Communities* (CN1). These provisions ensure the contractor has adequate coverage for the liability arising out of, or resulting from, the ownership, existence, maintenance or use of premises by the Contractor and operations necessary or incidental to the performance of a given project, as well as performance bond, and labour and material payment bonds.

Tendering Process: the procedure by which tender documents, or specifications describing the requirements and qualifications necessary under a project, are put in the hands of contractors/suppliers who will be interested in preparing and submitting bids to undertake the project. Under a competitive process there are two different methods used for carrying out a tendering process. The first method is an invited tender and the second, an open tender.

Value for money: normally, the lowest valid bid price, which incorporates specified provisions for local content, committed to by the contractor/supplier in carrying out the project. It is important that these factors be clearly identified and incorporated in the tender documents and the evaluation criteria. Tender documents may include basic requirements with respect to areas such as the use or availability of local materials, services, contractors and labour, as well as skill enhancements under apprenticeship or facilities operator programs. Bidders will have to incorporate these requirements within the contract and their bid price. Specific training and economic development initiatives should be coordinated with planned capital works, but would not generally be a part of the contracting process. For example, training to provide an individual with the basic skill sets needed should be planned and carried out in advance of a capital project. The project would then provide job opportunities and on-the-job experience for the trained individual. This could be done as part of an apprenticeship program.

4.0 OBJECTIVE OF ESTABLISHING A FIRST NATION TENDERING POLICY:

The objective of requiring First Nations to establish a tendering policy, as it relates to federal funding provided for all capital projects over \$100,000 excluding housing, is to ensure value for money with projects awarded in an open and equitable fashion, while at the same time promoting local socio-economic benefits. First Nations may wish to give consideration to also extending their tendering policy to the purchase of goods and services required in the day to day operations of programs and services to the community.

In addition to the benefits of transparency and value for money, other specific benefits which may be achieved include:

- increasing the participation of qualified Aboriginal firms in First Nations contracting;
- developing the ability of Aboriginal firms to compete for, and win, public and private sector contracts; and
- encouraging the development of sustainable partnerships with non-Aboriginal contractors/suppliers and other related business, including the financial sector.

5.0 APPLICATION OF TENDERING POLICY:

In some instances, the First Nation may choose to conduct a pre-qualifying process of the contractors through public notification. All interested contractors would outline their qualifications using the Contractor's Qualification Statement (refer to *Contracting Guidelines for First Nations and Aboriginal Communities* (CN1)) against an established set of criteria described under the public notification. Once the evaluation of the pre-qualifications is complete, the First Nation would invite qualified firms to submit a complete bid for the project.

First Nations are also encouraged but not required to apply these policies to projects funded totally by a source(s) other than the federal government.

Projects over \$500,000

As a requirement of all funding arrangements, departmental policy requires that First Nations call for open tenders for all capital projects, excluding housing, funded in whole or in part by federal government contributions, where the total project cost estimate is over \$500,000. The requirement to call for open tenders means that tender calls for all projects over \$500,000 will be publicly advertised by the First Nation to allow interested contractors the opportunity to bid on the project. Once advertised, individual contractors can be contacted to ensure that they are aware of the project being open tendered.

Projects between \$100,000 and \$500,000

Departmental policy also requires that a First Nation develop a policy for the use of a tendering process for all projects over \$100,000. While the requirement to call for open tenders is limited at this time to projects over \$500,000, First Nations are required to describe within their policies the tendering process that will be used for projects under \$500,000.

For projects between \$100,000 and \$500,000, First Nations tendering policies must consider the following competitive tendering options: 1) an open tender through public advertisement; and/or 2) an invited tender where bids are invited from a selected list of at least three qualified contractors (which could be qualified Aboriginal contractors/suppliers).

Projects under \$100,000

Within their tendering policies, First Nations should also consider how projects under \$100,000 will be awarded to ensure value for money.

6.0 BASIC PRINCIPLES FOR INCLUSION IN FIRST NATIONS TENDERING POLICIES:

The tendering policy developed by First Nations must include directives and procedures to be used throughout each of the following stages: assembling tender documents; tender advertising; distribution of tender documents; extension of tender closing date; receipt and opening of tenders; review of tenders; award of contract; and cancellation of tendering process before and after receipt of bids. For further details on the contracting process, please refer to the *Construction Contracting Guidelines for First Nations and Aboriginal Communities* (CN1).

The following is a list of principles that must be included in First Nations tendering policies:

- ! a commitment to deal with all potential bidders on an equitable basis;
- ! a commitment to establish specific criteria within which an open tendering process will be followed based on good contracting principles which take into consideration the dollar value, the complexity of the work to be undertaken and the number of firms within the area of competition who are able to meet the level of expertise and qualifications necessary;
- ! all tender documents will be treated confidentially;
- ! all tenders will be opened in public with appropriate safeguards; and
- ! all tenders will be assessed on the basis of a clear, consistent, predefined evaluation criteria.

In addition, First Nations may also want to consider outlining the following within their tendering policies:

- ! a commitment to maximize the use and development of available First Nation resources or skills;
- ! a commitment to develop and review annually a source list of qualified local and Aboriginal suppliers from which to invite bids for projects under \$500,000; and
- ! a discussion of the different approaches to deliver projects (ie. Day Labour, Construction Management and General Contractor).

7.0 MAXIMIZING LOCAL BENEFITS WHEN TENDERING CONSTRUCTION PROJECTS:

There are three principal ways in which a First Nation can ensure that it derives the maximum benefits possible even when openly tendering construction projects:

- 1) requiring local content provisions within the project;
- 2) joint venture arrangements; and
- 3) incorporating Aboriginal set-asides, where appropriate and cost-effective, within the project.

Local Content

Local preference clauses are not permitted. Quantifiable local content conditions are meant to replace the "local preference clause". (Such a clause allowed for a First Nation's firm to be given preference when its bid price was within a certain percentage, which usually ranged between 5 to 15 percent, over the lowest valid bid. In this case, the First Nation's firm was awarded the contract.)

Advantage can be taken of standard local content conditions, which allow the First Nation to specifically identify and quantify the number of individuals to be employed, the local material and equipment to be used, and the skill enhancements to be provided appropriate to the project requirements. Bids are then evaluated to ensure that the local content conditions are adequately addressed and incorporated within the bid price to meet the value for money principle.

In some instances, the local content conditions specified in a tender might generate additional short-term costs, but these costs would be balanced against the long-term socio-economic benefits to the First Nation such as savings in social assistance costs and skills enhancement. In these instances, the socio-economic benefits and the premium paid to achieve them must be supported by an appropriate analysis that establishes, among other things, the value of benefits by type and their expected duration. Assumptions used for each benefit also need to be clearly stated, consistent with supporting rationale. This analysis must clearly demonstrate that the premium paid on the project is offset by an amount (the value of all specific benefits) equal to or greater than the premium.

Joint Venture Arrangements

Where communities or Aboriginal businesses lack the skills or resources (labour, equipment and material) to carry out a larger project, they may want to consider a joint venture arrangement.

Through a joint venture, a community or Aboriginal business can be reasonably assured of benefiting from a construction project.

This approach involves the local firm working with a partner and through a joint venture agreement to access the additional resources and skills needed to enable them to participate in the open tendering process.

Using Aboriginal Bidders

First Nations may wish to limit eligibility for a project under \$500,000 to qualified Aboriginal contractors/suppliers. A decision to do so should be based on evidence that there is a sufficient number of qualified Aboriginal bidders to ensure competition. Industry standard normally requires at least three qualified firms submit bids.

8.0 COMPATIBILITY TO FEDERAL PROCUREMENT STRATEGY TO PROMOTE ABORIGINAL BUSINESS:

The federal government launched the Procurement Strategy for Aboriginal Business (PSAB) to help Aboriginal firms do more contracting with all federal departments and agencies. Under the strategy, the federal government is reserving all contracts that serve a primarily Aboriginal population and are worth more than \$5,000 for competition among qualified Aboriginal businesses. In addition, the federal government is also encouraging its federal buyers to set aside other contracts for competition among Aboriginal businesses whenever practical.

The objective of the procurement strategy is to promote Aboriginal economic development, however, the strategy does not promote the sole-sourcing of contracts to Aboriginal firms. Under the strategy, set-aside contracts are required to be awarded through a competitive tendering process. Projects tendered to Aboriginal companies must be done through a competitive process and value for money must be attained.

9.0 APPROVAL PROCESS FOR FIRST NATION TENDERING POLICIES:

As a requirement of both the funding arrangements for 1997-1998 and the Accountability and Management Assessment process, each Band Council is to develop and adopt a local tendering policy. These policies are to be completed and submitted to DIAND regional offices for review and acceptance to ensure that the minimum departmental requirements outlined in section 6.0 have been met.

10.0 DELIVERY REQUIREMENT:

These policies are to be submitted to the regional offices by October 31, 1998.

REFERENCE MATERIAL

The following is a list of documents developed by Public Works and Government Services Canada (PWGSC) for DIAND that First Nations may wish to consult.

First Nations and Aboriginal Communities Project Management Manual (TID-PM-01)

Construction Contracting Guidelines for First Nations and Aboriginal Communities (CN1)

Contracting for Professional Services by First Nations and Aboriginal Communities (CN2)

Contracting for Non-Professional Services by First Nations and Aboriginal Communities (CN3)

Contract Administration and Management for First Nations and Aboriginal Communities (C101)

If First Nations are interested in looking at samples of tendering policies, they are invited to contact their regional offices.