

# Contracting Phase

Book 5



**Procurement in Indigenous Communities**



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## About these books

The Procurement Books are a series of books to offer guidance to Indigenous communities who want to get better value for their money when they purchase goods and services. The books outline the general procurement principles, procedures and practices for those Indigenous communities interested to establish a procurement process. The books are designed to address many of the procurement challenges associated with Indigenous communities.

The goal of these books are to help Indigenous communities to purchase goods and services including the construction of homes are acquired by the Communities though a process that is fair, open, transparent (gifting) , non-discriminatory, geographically neutral and accessible to qualified suppliers, subject only to established procurement policies.

The Procurement Books include:

- 1. Introduction to Procurement in Indigenous Communities
- 2. Construction & Procurement in Indigenous Communities
- 3. Roles and Responsibilities, Construction Documents & Construction Contracts
- 4. Pre- Contract Phase – Preparing the Bid
- 5. Contracting Phase
- 6. Contract Administration Phase
- 7. Post-Contract Phase
- 8. Guides & Resources
- 9. Terms & Conditions/Definitions

## Acknowledgements

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## **Disclaimer**

*The views in these books are those of the authors and do not necessarily reflect the views and policies of ISC or the Board of FNNBOA. FNNBOA does not guarantee the accuracy of the information in these books and accepts no responsibility for any consequence of their use. The reference of specific websites does not imply that they are endorsing the information in the books. The information contained in these books are provided for general information purposes only and do not constitute legal or professional advice on any subject matter. FNNBOA does not accept any liability for actions arising from its use and cannot be held responsible for the contents of any pages referenced by an external link. Given the nature of procurement, it is recommended that Indigenous communities seek advice from legal counsel or a professional procurement expert regarding their procurement policies.*

# 1. Introduction

Book 5 focuses on issuing the bidder selection, alternates and substitutions, purchasing and awarding the contract, and debriefing. Topics include:

- Responding to inquiries from potential bidders
- Evaluating bids (tenders)
- Bidder selection
- Awarding a contract
- FN engagement
- Debriefing unsuccessful bidders
- Responding to challenges to procurement decisions
- Dealing with alternates and substitutions
- Purchase orders



The contracting phase does not tend to involve the council/client as much on a day to day level. The vast majority of activities and responsibilities lie with other parties, namely, the PM, Design Team, Contractor, and Subcontractors.

## 1.1 Respond to inquiries from potential bidders

The chief and council should have only one point of contact during the solicitation (advertisement) phase of the project. The person responsible for the solicitation ensures all technical information is appropriately shared with all the bidders through any amendments or letters of clarification or change notices. Similarly, all requests for information or clarification from the bidder must be in writing with reference name to the project name. A response can be made by email back to the individual bidder. If required, clarification can also be sent to all bidders through a letter of clarification. If a bidder's question can be answered or easily clarified by simply pointing out the location of an item in the tendering documents, this would be considered an insignificant question that could be answered up until the day before the tender.

The solicitation phase for tenders ends when the bids are open.

## 2. Tender evaluation

Sealed bid proposals are sent to the chief and council or the council's representative (e.g., housing manager, applicable authority) up to the specified time of bid closing. Once the deadline for submitting bids is passed, the council or council's representative opens the sealed bids and discloses the complete contents of the bid submissions. Ideally this should take place as an open process with those that have submitted a bid. This ensures an open, fair and impartial bidding process. Even with private work contracts, the bidding process should be conducted with integrity and fairness.

A valid bid must conform to the exact requirements of the advertisement or invitation to bid and the instructions to bidders. If a bid does not, it must be deemed unacceptable. Likewise, if the bid submission is late, it should be rejected.

***The bidding process is intended to secure fair competition and to present council or client with bidders who commit to perform the identified task according to a description of the task, an allotted schedule, budget and level of quality.***

In general construction tendering requirements, the bid document most often appears similar to these two examples. (Stipulated price and unit price)

<http://www.o.ca/docs/resources/modelbid/Stipulated%20Price%20Bid%20Form.pdf>

<http://www.o.ca/docs/resources/modelbid/Unit%20Price%20Bid%20Form.pdf>

If a bid solicitation or tender is well thought out and clearly documented, the bid should hopefully not exceed the budgeted price. Recommended guidelines that should be considered if the bid price exceeds the estimated budget can be based on 2 situations:

- (1) the overall bid amount must be reduced by LESS than 15% - Negotiate with low bidder to identify changes and conclude a new contract. Failing Negotiation, invite 3 lowest compliant bidders to re-bid on modified bid documents.
- (2) the overall bid amount must be reduced by MORE than 15% - Council may undertake EITHER of the preceding steps, at its discretion.

***Mistake: A bidder may wish to withdraw their bid; if for example, they find soon after bid opening that the bid contains substantial mathematical or computational errors. In such an instance if the bid is allowed to be withdrawn, all other bids should be considered as if they were the only bids submitted.***

Similarly, councils are expected to award a contract in accordance with the terms and conditions of the tender call and not to provide an unfair advantage to one bidder. Where appropriate, bidders can be advised immediately after the tender closing as to whether their bid was or was not used in the making up of the successful bidder's bid.

On the technical side of bid submissions, it is common practice that on large and more complex projects bidders are required to submit a bid bond and if awarded the contract a performance bond. These act as a form of guarantees in the case of default. In some cases the bidders may even be required to list any specific subcontractors for the councils review and approval to protect against prior bad experience as well as list of itemized prices such as various trades performing work such as mechanical, electrical, structural, etc.

Sample list of subcontractors: <http://www.oca.ca/docs/resources/modelbid/Appendix%20-%20List%20of%20Subcontractors.pdf>

Sample list of itemized prices: <http://www.oca.ca/docs/resources/modelbid/Appendix%20-%20Itemized%20Prices.pdf>

### **3. Bidder selection**

Once a submitted bid has been selected, the chief and council (or a party legally authorized to act on their behalf) must decide which bidder will be awarded the contract.

A contract is often awarded to the lowest bidder, if all requirements are met and if construction funds are available to award the contract. However, accepting the lowest price is not necessarily the best value for money. Other criteria such as higher quality, taking less time, additional resources, etc. may make a bidder a better choice even if the price is higher.

A contract has been awarded when the council says, “I accept” to a bid. Notice of award is a formality to authenticate the bid acceptance. This can be simply issued as a “letter of intent”, indicating acceptance of the bid that will lead to a formal contract. Fundamentally the contract begins at that moment in time.

The two contract parties then meet and begin the process of getting construction administration and site activities underway.

It is important that chief and council need to establish a process to any challenges to their procurement decisions. In some instance a debriefing may be required. Debriefing is simply the act of meeting with an unsuccessful bidder to explain why their bid was not deemed to be the most attractive. Debriefing can be a fragile process. You want to be as helpful as possible to the unsuccessful bidder, but you also must maintain the confidentiality of other bidder’s information.

As part of the debriefing process, the chief and council can provide helpful information to the bidder that will help them by focusing on the strengths and weaknesses of the bidder’s tender and the reasons for not accepting the bidder’s tender.



### **3.1 A word about engagement**

For the successful contract recipient, it is important to determine who the appropriate First Nation and community contacts are, particularly if it is where the successful bidder is not familiar with community customs and traditions. Ensure they are kept informed throughout the duration of your project - not just at the beginning when you need to have them on-side.

Furthermore, uphold due diligence to learn about, respect and follow community protocols and/or best practices.

### **4. Alternates and substitutions**

Alternatives and substitutions are materials and products submitted by the contractor replacing what was specified in the tender. Alternates or substitutions may be useful; however, they can also be the result of a deceitful contractor wanting to increase their profit at the expense of the project's quality.

Studying and comparing alternatives with the initial bid requirements is time consuming. If alternatives are not equal to the original bid requirements, quality, durability, and return on investment can suffer. (See section on alternates and substitutions when writing a bid in pre-contract section.)

***Irregularities: The bidding and selection process should not be used to promote favouritism, nor be an opportunity for a bidder to gain additional time or information in order to manipulate the award of a contract.***

Sample alternatives prices document:

<http://www.o.ca/docs/resources/modelbid/Appendix%20-%20Alternative%20Prices.pdf>

### **5. Purchase orders**

A purchase order is another form of acquiring labour, materials and or equipment for a construction contract by a buyer. Typically purchase orders deal more directly with a supplier.

As such a purchase order or its abbreviated equivalent is simply a document issued by a buyer to a seller and is considered a binding agreement between the parties.

Purchase orders typically include the following:

- Order reference number
- Identification of the buyer and seller
- Product or material description
- Quantity
- Price

- Terms of payment
- Shipment – method and dates

Purchase orders may be used by most any of the parties such in case of the contractor to buy materials, or in the case of the chief and council to purchase office supplies.

## **6. References**

- Government of Canada – Contracting Policy
- From the website: Explains the requirements to meet the objective of acquiring goods and services, and carry out construction in a manner that enhances access, competition and fairness, and that results in best value, if appropriate, the optimal balance of overall benefits to the Crown and Canadian people.
- Web link: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

### **Government of Canada – The Procurement Rules and Process**

- [Chapter 4: Solicitation Process](#)
- [Chapter 5: Evaluation and Selecting the Contractor](#)
- [Chapter 6: Approvals and Authorities](#)
- [Chapter 7: Award of Contracts and Issuance of Standing Offers and Supply Arrangements](#)

### **Impact of NAFTA on Aboriginal Business in North America**

Web link: <https://law.usask.ca/documents/research/estey-journal/EsteyCentreConference%20AboriginalBusiness.pdf>