



## REPORT TO

## AUDIT COMMITTEE

### PROCUREMENT AND VENDOR PROCESSES AT TORONTO CATHOLIC DISTRICT SCHOOL BOARD

*“And we know that for those who love God all things work together for good, for those who are called according to his purpose”*

**Romans 8:28**

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### INFORMATION REPORT

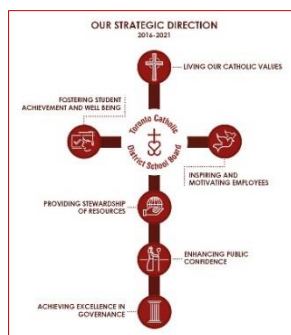
**Vision:**

*At Toronto Catholic we transform the world through witness, faith, innovation and action.*

**Mission:**

*The Toronto Catholic District School Board is an inclusive learning community uniting home, parish and school and rooted in the love of Christ.*

*We educate students to grow in grace and knowledge to lead lives of faith, hope and charity.*



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## **A. EXECUTIVE SUMMARY**

***This report outlines the procurement practices of the Toronto Catholic District School Board.*** The Board's procurement practices promote an open, competitive and fair process. This process intends to be transparent, generate competition in the marketplace and obtain the best value for money.

***There are two formal procurement methods for acquisition,*** the Request for Proposal (RFP) and the Invitation to Tender.

***An RFP typically seeks a vendor to provide the best solution to a set of requirements where specifications, the manner or method of supply have yet to be determined.*** There is generally the ability to analyze the proposal in order to define a scope of work, deliverables, effort and costs. Proposals are scored and evaluated based upon published and fully disclosed criteria. The decision to award is based on the overall highest scoring proponent.

***Tendering is used when a project or service requirement is clearly defined has detailed specifications and the methodology is prescribed.*** Tendering involves rules, obligations and legal considerations that both the Board and the bidder must observe. A compliant bid response creates a process contract with each bidder until the evaluation is complete and an award is made. The award is to low bidder meeting specifications; however, it is also possible to require further additional evaluation criteria.

***Prequalification reduces performance and legal risks in the bid process.*** Prequalification is used for projects, which are highly complex, technical, or high value construction projects. Prequalification significantly reduces both performance and legal risks in the bid process. Only those firms who have pre-qualified in advance would be eligible to bid.

***Vendor/Contractors can be removed from the prequalified list.*** A vendor/contractor can be removed from the prequalified list for performance failures, contract default or legal issues; and such disqualified vendors would have to reapply to be activated as a vendor. In the event of a legal dispute, litigation or loss of prequalification status, a vendor /contractor would be deleted and blocked on the financial system.

***A new procedural section regarding vendor suspension or removal is required.*** After reviewing practices from other public entities, there are a number of additional

situations, which should be included in the Board's procedures in order to update and strengthen current practices. A new section for Vendor Suspension or Removal will be incorporated in the Purchasing Procedures Manual.

*The cumulative staff time required to prepare this report was 12 hours.*

## **B. PURPOSE**

This report responds to a request from the Audit Committee during the meeting held on June 6<sup>th</sup> 2017, for information with respect to the Tendering and Request for Proposal process and the circumstances for delisting vendors.

## **C. BACKGROUND**

The Toronto Catholic District School Board utilizes public procurement practices to promote an open, competitive and fair process. This process is intended to be transparent, to generate competition in the marketplace and to obtain the best value for money. The two formal procurement methods for acquisition are the Request for Proposal (RFP) and the Invitation to Tender.

The TCDSB is funded through provincial grants, and as a public entity and part of the Broader Public Sector (BPS), the Board is required to follow the mandatory requirements of the BPS Procurement Directive. In addition, there are provincial trade agreements and the new Comprehensive and Economic Trade Agreement (CETA), which must be considered when posting open procurements above a certain dollar threshold. The Procurement Directive has remained consistent with the provincial agreements aligned with the CETA, which is currently in the process of implementation. The agreements are listed below:

**The Broader Public Sector Procurement Directive** provides specific mandatory requirements to be followed in terms of procurement policy and practice. The directive connects compliance to Board funding. Thresholds: goods and services **\$100,000**; construction **\$250,000**

**The Canadian Free Trade Agreement (CFTA)** came into effect as of July 1st, 2017. It is an interprovincial trade agreement, which replaced the Agreement on Internal Trade (AIT). CFTA promotes open procurement

practices among public sector organizations. Thresholds: goods and services **\$100,000**; construction **\$250,000**

**The Ontario-Quebec Trade and Cooperation Agreement (OQTCA)** A bi-lateral trade agreement between Ontario and Quebec intended to promote labour mobility, trade and investment. Recently revised to align with the CFTA. Thresholds: goods/services **\$100,000**; construction **\$100,000**

**Comprehensive and Economic and Trade Agreement (CETA)** CETA is a free trade agreement between Canada, the European Union and its Member States. Thresholds: goods/services **\$340,600**; construction **\$8,500,000**

## 1. **Public Sector Procurement**

*Public tendering involves rules, obligations and legal considerations that both the Board and the bidder must observe.* There are obligations that include a duty of fairness to treat all bidders in the same manner and to allow transparency through evaluations based on objective and fully disclosed criteria. There can be no undisclosed criteria, conditions or preferences.

*A compliant bid response creates a bid process contract known as “Contract A” with each bidder.* In a “Contract A”, the issuer agrees to evaluate all compliant bids fairly while the bidders agree to perform the work at a specific price under the terms and conditions specified in the tender. In a tender situation, an award is generally based on the low compliant bid meeting specifications. If this is not done, this could be considered a breach of “Contract A” obligations and subject to litigation and damages.

*The acceptance of an award results in the formation of a second contract (“Contract B”) which is between the board and a successful bidder.* This contract set out the terms and conditions between the contracting parties. Once signed, all of the other existing “Contract A”s with the other bidders will be dissolved, and the procurement is complete. The successful bidder has an obligation to accept the contract award. A bidder who refuses to accept the award and enter into a contract would be liable to the Board for costs the Board might incur in awarding to the next lowest bidder. The bidder would also be subject to removal from the Board’s vendor list.

## 2. **Private Sector Procurement**

*Private Sector entities are not required to use competitive bidding and can typically utilize single sourcing or an invitational public bidding process.* Private sector entities can also choose to exclude a vendor from participating in a procurement process for their own business reasons. Responses are negotiable and awards can be based on subjective criteria or preferences. These types of awards are not subject to challenge or legal review, however, if a private sector firm engages in a public tender process, which results in the creation of a bid “Contract A”, then the private entity would be subject to the same requirements as a public entity.

## D. **EVIDENCE/RESEARCH/ANALYSIS**

### 1. **Procurement Methods at TCDSB**

#### a. **Invitation to Tender**

*The Board utilizes Public Tendering to promote a clearly defined process which is fair, transparent, generates competition in the marketplace and to obtain the best value for money.* Tendering is used when a project or service requirement is clearly defined has detailed specifications and the methodology is prescribed. Tendering by Materials Management for most goods and services is through an open bid process posted on an electronic tendering system. Typically, there is a defined product or specification and additional criteria is included to determine a vendor’s qualification and ability to provide the goods or services.

*Tendering in the Facilities area is based on a set of detailed specifications and is issued by invitation only to prequalified contractors.* Award is to low bid meeting specifications; however, it is also possible to require further additional criteria such as construction management plans, qualifications of site and office personnel, qualifications and similar project experience of sub-contractors, preliminary schedules, project complexity and delay mitigation strategies, etc. This allows for further evaluation of bidders and is more specific than the standard contractor prequalification process. This approach helps to manage risk for complex projects which require superior project and schedule management skills while maintaining a fair and transparent bidding process and ensuring the Board receives the best value for money.

## **b. Request for Proposal**

*An RFP is often used when there may be a need but no defined set of specifications or scope of work.* A RFP typically seeks a vendor to provide the best solution to a set of requirements where specifications, the manner or method of supply have yet to be determined. In this process, there is generally the ability to analyze various aspects of the proposal in order to define a scope of work, determine the deliverables, determine the degree of effort and establish costs associated with a final solution.

*The duties of fairness, good faith and properly disclosed evaluation criteria are required.* The RFP is evaluated based on the weighted criteria published as part of the RFP document and each component of the criteria is assigned a set of points. The criteria allows for consideration of factors such as features, products, experience, capability and services being offered. Each component is scored. Price is generally assigned the highest value however, it must be weighted appropriately relative to other important criteria so as not to distort the overall score. The decision to award is based on the overall highest scoring proponent.

*Recent legal challenges and litigation question “Contract A” status of RFPs.* The RFP format is more useful for defining a requirement and has been considered to not have “Contract A” obligations. Recent legal decisions however, have found that if an RFP has certain characteristics common to a tender, e.g. irrevocability, submission deadline, bid or bonding requirements, then for all intents and purposes, the RFP has the same binding effect as a tender and “Contract A” situation exists. To address this issue, many public sector organizations are adopting the negotiable RFP. This type of RFP format is considered non-binding and explicitly disclaims any “Contract A” obligations. There is no contractual relationship until reaching an agreement. This approach allows for flexibility and negotiation but has not yet been fully tested in terms of legal challenge or litigation. Utilization of this approach remains selective.

## **c. Request for Quotation**

*A Request for Quotation (RFQ) is used for lower value procurements where the good or service is known or clearly specified.* An RFQ is a simplified acquisition process which can be open or invitational, can have simpler terms



and conditions and short turn around times. Price is generally the most important factor in determining the award.

#### **d. Vendor Prequalification**

*Prequalification is a non-binding step in the procurement process.* It does not create any form of contractual agreement or commitment between the Board and any vendor/contractor. Prequalification is used for projects, which are highly complex, technical, or high value construction projects. A prequalification contains mandatory requirements; however, specific requirements are subject to change and often depend on the nature of the project. Prequalification is designed to identify vendor/contractors who have the necessary resources, experience, ability and skills to undertake specific types of work.

*Prequalification significantly reduces both performance and legal risk in the bid process.* Only those firms who have pre-qualified in advance would be eligible to bid. This helps to speed up evaluation process since the only bids from a prequalified vendor /contractor will be accepted and evaluated.

Requiring prequalification in advance of tendering also avoids the issue of rejection of an open bid where the low bidder is judged by the Board to be not capable or qualified to perform the work. This can result in a bid dispute, the delay of a project and a legal challenge or litigation.

A vendor/contractor can be removed from the prequalified list for performance failures, contract default or legal issues. A vendor/contractor would not be permitted to bid for a specific period and would have to reapply for a new prequalification. In the event of a legal dispute or litigation, removal from the vendor list subject to consideration of other projects still in progress.

The TCDSB issues tenders for Capital and Renewal projects only to prequalified general contractors. Prequalification is a best practice to ensure that the quality and skills of the contractor align with the complexity and management requirements of the projects.

## **2. Prequalification Process at TCDSB**

A prequalification process is conducted in an open and transparent manner and will be issued similar to tenders /proposals, will be publicly advertised by

way of an electronic tendering network and advertised in other media as appropriate. This is in conformance with the requirements of the BPS Procurement Directive, as outlined in the Purchasing Procedures Manual.

***TCDSB has an established prequalification evaluation matrix which scores a vendor /contractor for the following:***

- a) Evidence of sufficient experience and financial resources to satisfy the contract requirements
- b) Indications that the supplier can perform the contract promptly and within the time specified
- c) The quality of performance of previous contracts with the Board and others
- d) Quality, availability and adaptability of the goods/ services to the particular use required.

***For prequalification to bid on Facilities projects, contractors must submit additional documentation as follows:***

- a) Completed CCDC 11-1996
- b) Résumé of management to be assigned to project
- c) Commitment to dedicating a working superintendent/foreman for all phases of work
- d) Proof of Bonding Capacity – Letter from a nationally recognized Surety Company stating total bonding limit, current bonding committed; 50% Performance Bond and 50% Labour and Material Payment Bond
- e) Proponent shall indicate if there is any pending litigation involving the pre-qualifying firm
- f) Detailed description of the Contractor's Health and Safety Policy and written confirmation that all Health and Safety policies will be followed
- g) Current Certificate of Insurance
- h) Letter of Authorization to Obtain Financial Information and Perform Reference Checks
- i) WSIB – Submission of Cost and Frequency and Forms CAD7 letter as issued by WSIB
- j) References – References from a minimum of three clients or consultants including telephone and fax numbers in addition to those cited in CCDC 11 for similar type of work.



***Prequalification submissions are evaluated and a score is assigned for each vendor/contractor.*** The overall attained score determines success; however, failure to meet a mandatory requirement will result in automatic disqualification. An approved list or roster is then established and those on the list will be invited to bid as specific projects go to tender. Since there is no contractual relationship established through prequalification, the Board has the discretion to update existing prequalifications, add vendor /contractors or require additional evaluation criteria at the time of issuing a tender.

***Within the prequalification process, the Board's Purchasing Procedures reserves the right to accept, reject or limit a vendor for prequalification based on established criteria.*** The suspension or removal of prequalification status prevents a vendor/contractor participation in an Invitation to Tender and the bid process.

***The Board also reserves the right to remove vendors from the lists of interested or prequalified bidders due but not limited to:***

- a) Failure or refusal to respond to questions or other information as may be required.
- b) Failure or refusal to respond to three consecutive bids for commodities of a class furnished.
- c) Failure or refusal to respond to an inquiry as to their continued interest.
- d) Receipt of a written request to be removed from the prequalified list.
- e) Change in qualifications to the extent that the vendor no longer meets the minimum requirements.
- f) Failure to successfully perform under a previous purchase order or contract.
- g) Involvement in dispute or litigation with the Board over the previous five-year period.

### 3. **Vendor/Contractor Evaluation**

***The Board has developed a vendor/contractor on-line evaluation process.*** This process assesses and records the performance of prequalified contractors upon project completion of projects in the various capital/renewal/maintenance/operational services within the Facilities Department.

*The intent of this process is to develop and maintain a high standard of service and performance from contractors engaged by the Board.* The assigned project supervisor at contract completion would undertake the performance evaluation and the evaluation must be positive to maintain a vendor's pre-qualification status. In addition, the process is open to contractor discussion and feedback with respect to the evaluation.

4. **Facility Evaluations Management Committee (FEMC)**

As part of the contractor evaluation process, a Facility Evaluations Management Committee (FEMC) has also been implemented whose primary role is to review contractor prequalification status, post-contract evaluations and current contract performance issues. The Committee members are: the Senior Coordinators of Capital, Renewal/Maintenance, Operations; the Senior Coordinator of Finance; the Senior Manager of Business Services; the Coordinator of Materials Management and; the Supervisor of Contract Administration. The current process used to address vendor performance issues is outlined in the attached Appendix A.

5. **Vendor/Contractor Default**

It is the Board's expectation that the vendor/contractor's performance conforms to the requirements of the contract administration and accountability. The Board's Purchasing Procedures Manual outlines process for vendor default suspension and litigation:

1. Where a bidder/vendor fails to enter into or complete a contract awarded by the Board, the circumstances of the default shall be reported to the appropriate authority level. The report will recommend a course of action.
2. Where a vendor who has defaulted on a previously awarded Board contract is being considered for award of a contract, the report recommending the contract shall describe the circumstances of the previous default and will recommend a course of action.
3. Where a vendor has defaulted on a previous contract, and subsequently, awarded a contract, the contractor will provide the Board with a performance bond, if requested.

4. A vendor who fails to enter into or complete a contract awarded by the Board will be removed from the Board's vendor list for a minimum period of three years and will not be permitted to participate in any tenders, proposals or quotation until successfully reinstated.
5. The Board reserves the right to exclude a vendor from participating in the tender process if the vendor is involved in a dispute or litigation with the Board.

***This section remains relevant, however, requires an update.*** After reviewing practices from other public entities, there are a number of additional situations, which should be included in the Board's procedures in order to update and strengthen the current practices. These practices would be applicable to any vendor/contractors whether they are prequalified or not. A new section called Vendor Suspension or Removal will be included in the Purchasing Procedures Manual.

#### 6. **Vendor Suspension or Removal**

***The Board's right to remove or suspend a vendor/contractor shall include, but not be limited to, the following:***

1. Failure or refusal to respond to three consecutive bids for commodities requested
2. Evidence of false or misleading information included in a bid or proposal submission
3. Evidence of collusion with others other vendors or prospective vendors to restrain competitive bidding
4. Failure to keep the offer firm for the period of time stated on the bid or quotation.
5. Failure to accept or complete the contract award
6. Failure to provide a performance/payment bond when required by the bid documents following the award of a contract.
7. Failure to complete a service/project in the time specified by the contract or purchase order.
8. Failure to conform to contract specifications or delivery requirements
9. Failure to make applicable adjustments or replacement of damaged goods.

- 10.Failure to honour warranties and guarantees on products or services delivered.
- 11.Persistent delivery of goods/services that do not comply with the contract specifications.
- 12.Persistent and documented poor performance or default on previous contracts
- 13.Failure to maintain prequalified status in good standing
- 14.Use on a sub contract basis of a suspended vendor/contractor
- 15.Any violation of applicable laws of the Province or the Federal Government relating to procurement or the goods and/or services provided by the vendor.
- 16.Assignment in Bankruptcy or other evidence of insolvency of the bidder/proponent
- 17.Involvement in dispute or litigation with the Board over the previous five-year period.

The process for Vendor/Contractor suspension and/or removal will be revised and updated and is outlined in attached Appendix B.

## **E. CONCLUDING STATEMENT**

This report is for the consideration of the Audit Committee

# **Appendix A**

## **Current Process for Vendor/Contractor Suspension/Removal**

Vendors/Contractors, who fail to meet their prequalification requirements or contractual obligations or have demonstrated poor performance will be addressed as follows:

### **Step 1**

- Notification of deficient performance made as soon as practicable
- Letter outlining specific issues and required rectification date
- Advised that prequalified status subject to suspension/cancellation

### **Step 2**

- Contractor response received outlining position
- Meet with vendor/contractor and appropriate Board staff
- Performance issues discussed and an opportunity to correct may be offered
- Lack of response results in revocation of prequalification status
- Contract breach may be referred to legal counsel for resolution

### **Step 3**

- Ongoing/unresolved performance issues referred to FEMC
- FEMC will review the issue and meet with vendor/contractor
- FEMC may set conditions to maintain prequalification or may proceed with suspension of prequalification status
- Any suspension will be for a specific period
- Suspension will be communicated in writing and include full details as to the reason and the length of the suspension
- Suspension involves removal from both the prequalification and vendor lists and blocked from use on the financial system

### **Step 4**

- Final appeal if necessary would be to Director's Council (comprised of the Director, Associate Directors and Executive Supervisory Officers)
- Vendors may seek to requalify at the conclusion of suspension
- Reinstatement will subject to new a successful prequalification

## **Appendix B**

### **Revised Process for Vendor/Contractor Suspension/Removal**

#### **Step 1**

- Notification to vendor made as soon as practicable
- Notification should outline issues and required rectification date
- Advise vendor that status subject to suspension/removal
- Require vendor/contractor response within 5 business days
- Lack of response results in automatic suspension/removal

#### **Step 2**

- Schedule internal meeting with departmental and procurement staff
- Conduct risk assessment to determine impact of vendor/contractor performance on Board operations
- Determine course of action with respect to a warning or suspension
- Meet with vendor to review specific performance issues
- Provide an opportunity for explanation or mitigating circumstances
- Review any offer by vendor to rectify performance

#### **Step 3**

- Review may determine to either impose or withhold suspension
- A suspension should be communicated in writing and include full details as to the reason and the length of the suspension
- Any ensuing suspension will be a minimum 2 year period
- Vendor may be appeal in writing within 5 business days
- Unresolved contract issues may be referred to legal for resolution
- Vendor delisted and blocked from use on the financial system
- Final appeal if necessary would be to Director's Council

#### **Step 4**

- At the end of the suspension period, a vendor may reapply for reinstatement
- Vendor must indicate how the conditions relating to original suspension have been corrected and no longer present a risk for the Board
- Failure to correct these conditions may result in additional period of suspension
- A vendor involved in a dispute or litigation with the Board will be excluded

from the prequalification and/or tender process

- Reinstatement and prequalification will be at the Board's discretion