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Section 9L: Set-aside Program for Aboriginal Business - Conducting Set-aside Procurements

9L.010 (1997-03-31) In accordance with the Procurement Strategy for Aboriginal Business (PSAB) and the Set-Aside Program for Aboriginal Business (SPAB) announced on March 27, 1996, requirements designated by client departments as set aside will be restricted to qualified Aboriginal businesses. (See [5.066](#))

Decision to Set Aside

9L.020 (1997-03-31) **The decision to set aside a procurement is the responsibility of the client department.** Public Works and Government Services Canada (PWGSC) will not unilaterally declare a procurement set aside. However, when a requisition is received which is not designated as a set-aside, and the recipients of the goods, services or construction to be contracted are for an Aboriginal population, the contracting officer should contact the client department and draw their attention to the potential omission. When the client indicates that the procurement is not to be set aside, the file should be annotated accordingly, and the procurement may then proceed.

9L.030 (1997-03-31) Contracting officers should assist client departments in meeting their performance objectives under the program, by drawing their attention to opportunities for voluntary set-asides, when qualified Aboriginal suppliers are known to exist in the marketplace.

Set-Asides and Comprehensive Land Claims Agreements

9L.040 (2004-12-10) Requirements subject to the SPAB may also be subject to the requirements of Comprehensive Land Claims Agreements (CLCA). To the extent that the application of a set-aside for Aboriginal business does not interfere with Canada's obligations under the CLCA, then both the CLCA and SPAB procedures may be applied, but where the two are in conflict, the requirements of the CLCA take precedence. In many instances, the requirement of the CLCA is limited to providing notification to the claimant group of the upcoming procurement. In other instances, the requirement under the CLCA may be more extensive. Contracting officers should consult with Acquisition Policy and Process Directorate (819-956-4744), regarding procurement obligations under CLCAs. (See [4.002](#))

Set-Asides and Trade Agreements

9L.050 (2005-12-16) Procurements set aside for Aboriginal business are not subject to the provisions of either the North American Free Trade Agreement (NAFTA), [Annex 1001.2b](#), Article 1.(d) or the World Trade Organization Agreement on Government Procurement (WTO-AGP), [Appendix I](#),

article 1.(d), or the Agreement on Internal Trade (AIT), [Article 1802](#).

9L.060 (1997-03-31) When a requirement has been carried out under a set-aside and the results have not produced a responsive Aboriginal business, the requirement must be re-tendered, either as a set-aside once again (after the necessary adjustments to the bid have been made), or under the procedures for the applicable trade agreement(s), taking into account the relevant thresholds, etc., which apply to the requirement, in the absence of a set-aside. This will also apply when the contract will not be awarded to an Aboriginal business because the contract award would conflict with sound contracting principles - value for money, prudence and probity, etc. (See [9L.120](#))

Set-Asides and Canadian Content

9L.070 (1997-03-31) Set-aside procurements and the Canadian Content Policy may be applied simultaneously.

9L.080 (1997-03-31) In applying the Canadian Content Policy under a set aside procurement, it must be recognized that there are two levels of certification. The first level of certification will be to qualify the bidder(s) as eligible for consideration, i.e. bidders must provide a certification that they are an Aboriginal business.

9L.090 (1997-03-31) Having established that the procurement will be conducted as a set-aside, contracting officers must then apply the Canadian Content Policy, in the same manner as any other procurement, in the context of the supplier community which is eligible to respond: the Aboriginal business community. Contracting officers must determine, on the basis of their knowledge of this community, whether there are sufficient eligible firms to carry out the procurement as Solely Limited (three or more Aboriginal firms exist which are able to provide Canadian goods or services), Conditionally Limited (there may be three or more Aboriginal suppliers of Canadian goods or services), or Open (there is an insufficient number of Aboriginal businesses able to provide Canadian goods or services; the procurement is open to all Aboriginal businesses regardless of the origin of the good and services supplied). (See [5.070](#))

9L.100 (1997-03-31) Bids for set aside procurements which include the Canadian Content provision must be reviewed initially to determine that the bidder has provided the necessary certificate that they are an Aboriginal business. Bids meeting this basic certification are then assessed according to the stated Canadian Content criteria.

Subcontracting Plans

9L.110 (2005-12-16) In support of the PSAB, departments may designate that a proportion of subcontracts on projects be reserved for Aboriginal business, or that bidders are to be encouraged through the use of incentives - e.g. additional evaluation points to engage Aboriginal businesses as subcontractors. The inclusion of Aboriginal businesses as subcontractors as an evaluation criterion must be clearly identified in the bid solicitation. This is not permitted for procurements subject to either NAFTA ([Article 1006](#)) or WTO-AGP ([Article XVI](#)). (See [9L.050](#).)

Sound Contracting Principles

9L.120 (1997-03-31) Fundamental to all SPAB procurements is the need to adhere to sound contracting principles. Contracting officers must always be cognizant of the principles of best value, prudence, probity, and operational requirements, in planning their procurement strategy for set aside requirements.

Notification to DINA

9L.130 (1999-06-21) Upon receipt and acceptance of a requisition for a set aside procurement, contracting officers are to inform the Department of Indian and Northern Affairs (DINA), Access to Federal Procurement Directorate.

9L.140 (2004-05-14) Notification to DINA is to be sent prior to the release of the solicitation to:

Director
Access to Federal Procurement Directorate
Department of Indian and Northern Affairs
Fax: (819) 994-0445

and must include the following information:

- Estimated Dollar Value;
- Description of Goods/Services/Construction;
- Solicitation Number;
- Closing Date; and
- Buyer (name, and phone/fax numbers).

In instances of single-source procurements, the notice to DINA must also include the name and address of the proposed contractor.

9L.150 (1997-03-31) After the contract has been awarded, contracting officers must advise DINA, Access to Federal Procurement Directorate, of the name of the contractor, the contract number, and the total estimated value of the contract, within fifteen (15) working days.

Sourcing of Requirements under the Set-Aside Program for Aboriginal Business

9L.160 (1997-03-31) Requirements subject to the set-aside program may be sourced competitively or non-competitively according to current established government sourcing policies (see [5.002](#)). Bids may be solicited from Aboriginal business in accordance with Public Works and Government Services Canada (PWGSC) policies and procedures.

9L.170 (2002-12-13) PWGSC's Vendor Information Management (VIM) system is being modified, and SELECT has been created, to allow for identification of firms that have self-declared as being Aboriginal. As data is collected from supplier registrations and contract awards, the information in VIM and SELECT will be useful in identifying potential Aboriginal businesses for sourcing purposes, and establishing source lists, regardless of commodity (goods, services, or construction) which would be subject to rotation regimes such as Automated Vendor Rotation System (AVRS) or SELECT. (See [5.117](#))

9L.190 (1997-03-31) Businesses placed on "Aboriginal" source lists must also be placed on non-Aboriginal source lists.

9L.200 (1999-06-21) Contracting officers may also access other sources - e.g. DINA Internet database (currently being developed). Until the service has been established, DINA may be contacted directly via the Access to Federal Procurement Directorate - fax: 819-994-0445, for information on Aboriginal suppliers), to identify potential Aboriginal businesses which may be invited to bid. When such sources have been used, consideration should be given to inclusion of Supplier Registration forms with the bid set, to allow new bidders to register with PWGSC. Regardless of information contained within PWGSC or other vendor information databases, all bidders competing in a set-aside, must certify at the time of bidding, that they meet the definition of an Aboriginal business. Inclusion of the firm on an "Aboriginal" source list is not sufficient. (See [9L.220](#))

9L.210 (1997-09-15) When bids are solicited via the Government Electronic Tendering Service (GETS), notices (NPP or ACAN) must contain the following statement, prominently positioned - i.e. one of the first statements in the notice:

"This procurement has been set aside under the federal government's Set-Aside Program for Aboriginal Business (SPAB). In order to be

considered, firms must certify that they qualify as an Aboriginal business as defined in the SPAB and that they will comply with all requirements of the SPAB." (NPP);

or

"This procurement has been set aside under the federal government's Set-Aside Program for Aboriginal Business (SPAB). Only Aboriginal businesses as defined in the SPAB are eligible to challenge the proposed procurement strategy to award the contract to the named Aboriginal business." (ACAN)

Agreement Type codes have been added to the GETS to allow identification of solicitations as subject to the set-aside program. Contracting officers must ensure that the appropriate Agreement Type has been selected for set-asides. Similar modifications have been made to the Automated Buyer Environment (ABE) to allow recording of set-aside procurements at the applicable stages in the procurement cycle.

Legal Entity

9L.220 (1997-03-31) The description of a business as an Aboriginal business does not affect the fact that in order to create an enforceable contract with Canada, the contract must be signed between Canada and a legal entity which has the capacity to contract. In the event any uncertainty exists concerning the legal status of an Aboriginal business, contracting officers must consult with legal counsel to ensure that the proposed contractor is capable of signing an enforceable agreement.

Certification by Bidders

9L.230 (1997-03-31) There will be no permanent list of pre-certified Aboriginal businesses. For each procurement under the SPAB, bidders will be required to provide, with their bid, a certificate stating that they meet the definition of an Aboriginal business, according to the definition provided, on the date that the bid was submitted, and an undertaking that the firm will continue to meet this definition throughout the life of the contract.

9L.240 (2000-12-01) To enable bidders to complete the certificate each bid set must include a copy of the *Requirements for the Set-Aside Program for Aboriginal Business* document ([Annex 9.1](#)) which sets out the definitions of an Aboriginal business and an Aboriginal person also, and which contains the certificate which bidders must sign and submit with their bid, in order to be considered eligible for set-aside contracts.

9L.250 (2004-05-14) Solicitation documents are to include clause [K9025T](#) for procurements subject to set-asides. Resultant contracts awarded to firms on the basis of their being Aboriginal must include clause [K9025C](#). Clause [K9026D](#) must also be used where the general conditions do not include an Entire Agreement provision - e.g. general conditions [9601](#), section 36.

9L.260 (1997-03-31) Bidders who fail to complete and return the certification with their bids shall be considered non-responsive. A clear statement of this fact must appear in the bid solicitation document.

9L.270 (1999-06-21) It is not the responsibility of the contracting authority to verify the bidder's certification. In instances where the contracting authority questions the validity of a certificate, the particulars are to be referred to DINA, Access to Federal Procurement Directorate, for audit by Consulting and Audit Canada (CAC). (See [9L.300](#))

9L.280 (1999-06-21) Bidders' certifications include provision for remedies should either the certificate be shown to be invalid prior to award of a contract, or the contractor fail to continue to meet the definition of an Aboriginal business. Remedies range from declaration of the bidder non-responsive to termination of the contract or taking the work out of the hands of the contractor. Remedies may also include suspension of the supplier's bidding privileges as an Aboriginal

business, or other corrective measures provided for in the contract or under the Vendor Performance Policy. Contracting officers should consult with assigned Sector or Region legal counsel, and DINA, Access to Federal Procurement Directorate, in determining the appropriate action to be taken.

9L.290 (1997-03-31) When the contract has been awarded, and it is found that the contractor has not maintained their status as an Aboriginal business during the life of the contract, contracting officers must consider whether the provisions of the Vendor Performance Policy apply in addition to, or instead of, the specific provisions set out in the certificate of eligibility.

Audits of Bidders Certification

9L.300 (2004-05-14) Bidders are required to certify in their bids that they are an Aboriginal business, as defined in the PSAB (see [Annex 9.1](#)). The certification includes an undertaking that the business will continue to meet the criteria which define it as Aboriginal throughout the performance of the contract. Bidders certifications that they are Aboriginal are subject to audit, both prior to and subsequent to contract award.

9L.305 (2004-05-14) Consulting and Audit Canada (CAC) is the auditing authority under Memorandum of Understanding with DINA and will receive its instructions from DINA. CAC will contact the contracting officer for further information when an audit is required.

9L.310 (2004-05-14) Pre-award auditing is mandatory for requirements valued at, or in excess of, \$2M. To ensure that the mandatory requirement for pre-auditing is met, it is essential that the contracting authority properly notify DINA of such requirements, as per [9L.140](#) above, and that the two best-assessed bids be submitted to DINA as per [9L.340](#) below. The contracting officer must not award contracts of \$2M or more until DINA has confirmed eligibility of the proposed contractor.

9L.320 (2004-05-14) Pre-award audits of bidders' certifications will be conducted on a random basis for requirements under \$2M. DINA will advise the contracting officer whether a requirement is subject to pre-award audit no later than the date of bid closing (see [9L.130](#)). Audits of bidders' certifications are expected to require approximately ten (10) working days to be completed. When timing of contract award is an issue, this should be indicated in the notification to DINA, so that it may determine whether the auditing process can be expedited or the procurement excluded from the random selection.

9L.330 (2004-05-14) Pre-award audits may be requested either by the requisitioning authority, the contracting officer, or DINA, whenever there is a doubt regarding the validity of bidders' certifications, regardless of the total estimated expenditure of the procurement. (See [9L.270](#).)

9L.340 (1999-06-21) When DINA has advised that the requirement will be subject to a pre-award audit, the evaluation of bids will continue up to the point that the two "best assessed" bids have been identified. This information is to be provided to DINA, minus any pricing information, who will request CAC to undertake the pre-award audit of the bidders' certification. Upon receipt of the results of the audit, DINA will advise the contracting officer. If the audit confirms the validity of the bidders' certifications, award of the contract may proceed. If the audit determines that one or more of the certificates are invalid, the subject bidder(s) whose certifications have been declared invalid, must be declared non-responsive, and the next-ranked bidder becomes the "recommended bidder". If the audit reveals that both certifications are invalid, the next-ranked bidder's certification must be referred to DINA for audit until either a bid with a valid certificate is obtained, or no bidders remain. In the event that all bidders are eliminated on the basis of invalid certifications, the requirement must be re-tendered, either as a set-aside once again, or not set-aside, after consultation with the client department. Whether, the next-ranked bidder should be awarded the contract or the requirement re-tendered, is a decision that must be made on a case by case basis, in keeping with sound contracting principles.

9L.350 (1999-06-21) After the contract has been awarded, the contractor's certification is subject to audit to confirm their status as an Aboriginal business (see [9L.130](#)) during the life of the contract. Audits following contract award will normally be done on a random basis, however where

contracting officers believe it to be necessary, audit of the contractor's continued status as an Aboriginal business may be requested of DINA.

9L.360 (1999-06-21) Contracting officers should note that the bidders' certification regarding their status as an Aboriginal business contains provisions for remedies should it be determined that either the certificate is invalid, or that the contractor has not completed their undertaking to continue to qualify as an Aboriginal business. It may be necessary to implement certain of the remedies, upon advice that an audit has revealed the invalidity of the certificate, or a failed undertaking. Contracting officers should consult with assigned Sector or Region counsel, and DINA, Access to Federal Procurement Directorate, in determining the appropriate action to be taken.

Bid Challenge

9L.370 (2004-05-14) Bid challenges should be dealt with according to established internal supplier complaint response procedures for procurements not subject to trade agreements.

Set-Aside Procedures Checklist

1. Has the client indicated that the requirement has been set aside. If no, process requirement according to standard procurement policies and procedures. If yes, see below.
2. If requirement is subject to CLCA, determine extent to which CLCA and set-aside do not conflict. In cases of conflict, CLCA takes precedence (See [9L.040](#)).
3. Has the client indicated a requirement for subcontracting to Aboriginal business? (See [9L.120](#))
4. Notify DINA, Access to Federal Procurement of receipt of set aside requirement. (See [9L.130](#))
5. Bid solicitation document includes *Requirements for the Set-Aside Program for Aboriginal Business* document and clause [K9025T](#) (and [K9026D](#) - Entire Agreement, if applicable). (See [9L.250](#))
6. Source requirement according to established policies and procedures - source list, GETS, etc. (See [9L.170](#))
7. NPP/ACAN (GETS) contains a clear statement that requirement has been set aside and that only Aboriginal businesses will be eligible. (See [9L.210](#))
8. Has DINA advised that the requirement is/is not subject to pre-award audit of certifications before bid closing? (See [9L.340](#))
9. Have all bidders provided signed certificate of eligibility with their bids? (See [9L.260](#))
10. Evaluation of bids according to established criteria.
11. Advice to DINA of 2 "best-assessed" responsive bidders (without financial information) if requirement subject to pre-award audit. (See [9L.340](#))
12. Has DINA advised re: results of pre-award audit of certificates of eligibility? (See [9L.340](#))
13. Award contract in accordance with established evaluation criteria and result of pre-award audit, if applicable.
14. Advise DINA of contract award within fifteen (15) working days. (See [9L.150](#))
15. Contract management including advice to DINA regarding changes in contractor's status as an Aboriginal business, or requests to DINA to verify continued status (post-award audit). (See [9L.360](#))