

GOVERNMENT OF THE YUKON



**BID CHALLENGE COMMITTEE
TERMS OF REFERENCE**



INTRODUCTION

These terms of reference are issued as an aid to implementing the bid challenge process under the Contract Regulations and Directive. If a conflict in interpretation arises between this document and the Contracting Directive, the directive will take precedence.

The contracting process must rely to some extent on the judgement of contracting authorities. Therefore the regulations and directive make several provisions whereby contracting authorities may be held accountable for their decisions:

- a) the basis on which decisions are made to accept bids and proposals must be clearly and openly stated in the requests for bids or proposals;
- b) bidders and proponents are given access to the results of the decision making process;
- c) unsuccessful bidders and proponents can get clear explanations why their bids or proposals were rejected; and
- d) a formal bid challenge process has been established to deal with complaints about how the regulations and directive were applied to specific procurement competitions.

The process is intended and designed to be an after-the-fact review of decisions made by contracting authorities. The objectives are to ensure that, if errors or abuse do occur, they are not repeated in the future and that there be suitable redress for aggrieved parties.

The intent is that bidders and proponents, who may have a complaint, first try to resolve their differences with the contracting authority involved. If direct contact with the contracting authority does not resolve the issue, the bid challenge process may be used to investigate the complaint and provide recommendations.

AUTHORITY FOR THE BID CHALLENGE COMMITTEE

The Bid Challenge Committee is established under Part III, section 12 of the Contract Regulations with direction for its action outlined in the Directive, Part VI, sections 65-74.

The Bid Challenge Committee is a Category B committee under the Government of the Yukon Boards and Committees Honoraria policy - Policy 1.8.

APPLICATION AND SCOPE

The process applies to all requests for bids and proposals issued under the Contract Regulations and Contracting Directive except decisions made under section 20(a) - (f) of the Directive.

The Contract Regulations and Contracting Directive apply:

1. to all contracts except:
 - a) employment contracts;
 - b) contracts relating to projects funded by the Government of the Yukon and carried out by another party under a contribution agreement for its own use; and,
 - c) contracts for the practice of law as defined in the Legal Professions Act.
2. to projects carried out by the Government of the Yukon on behalf of the Government of Canada, subject to the terms of any agreement between the Government of the Yukon and the Government of the Canada.
3. to all departments which have deputy heads as defined in the Public Service Act.

In scope, complaints and, therefore, hearings will deal with the tendering *process*, ie. the activities and decisions of contracting authorities up to the time a contract is awarded. The process is not intended to examine the implementation or conduct of any contract once awarded.

COMPOSITION AND TERM OF THE BID CHALLENGE COMMITTEE

The committee is made up of twelve members: five (5) representing the private sector, five (5) representing the Yukon government, a chair and an alternate chair, who will act in the absence of the chair [section 65(2)].

Members are appointed by the Minister of Government Services [section 65(1)] for a period of up to two years. Members may be reappointed [section 65(3)].

PANELS

Complaints are heard by a panel made up of three committee members consisting of the chair, one member appointed by the chair from the representatives of the government, and one member appointed by the chair from the representatives of the public [section 68(3)]. When appointing members to a panel, the chair shall make best efforts to select members from among the committee who are best qualified to consider the matter at hand [section 68(4)]. However, to avoid any possibility of a conflict of interest, the chair will also be careful that no member appointed to a panel has any direct or perceived interest in the complaint.

PROCESS

Discussion with Contracting Authority

Complainants who wish to challenge a decision are encouraged to discuss their concern with the contracting authority first, so that issues are resolved at that level if possible.

Registering the Complaint

In Whitehorse, a complaint may be registered with the Deputy Head of Government Services at the Contract Services office located at 4141 – 4th Avenue, 2nd Floor. Outside Whitehorse, complaints may be registered at regional offices of the Department of Government Services located in Watson Lake, Dawson City and Haines Junction then forwarded to the Deputy Head of Government Services.

A complaint must be made in writing, in the complainant's own words. No special forms are required. The Deputy Head, Government Services may require the complainant to provide full details related to the complaint, including their efforts to resolve the complaint [section 66.(3)]. The complainant will be given an acknowledgement of receipt.

A complaint may only be registered by a bidder or proponent or prospective bidder or proponent [section 66.(1)]. Subcontractors or subconsultants can NOT register a complaint with the Deputy Head of Government Services.

The Deputy Head, Government Services will, without undue delay, forward the complaint to the Deputy Head of the contracting authority and to the chair of the Bid Challenge Committee.

Timing/Deadlines for Complaints

The complaint must be registered within the 60 day period following the closing time, or within the 15 day period following the award of the contract or standing offer agreement, whichever is later. In the event of an extension of a standing offer agreement, the complaint must be registered within the 30-day period following the date of the extension.

The contracting authority will provide a written report about the circumstances relating to the complaint to the chair without delay [section 68(1)]. The chair of the committee will, without delay, conduct an initial review of the complaint to determine whether or not there will be an inquiry or hearing, [section 68(2)].

Appointing and Convening the Panel

Upon determining whether or not there will be an inquiry or hearing, the chair of the committee will appoint a three-member panel to review the complaint.

The panel will determine where in the Yukon it will sit to hear the complaint. The chair must convene the panel within a reasonable time following acceptance of the complaint. Any member, prior to being appointed to a panel, will declare to the chair, any conflict of interest the member may have in regard to the complaint to be heard.

Rules of Procedure

The conduct of each hearing will be as determined by the chair after considering the nature of the complaint, these terms of reference and other relevant factors. Panel hearings are not to be seen as courtroom style debates. Formal "rules of evidence" will not apply.

In general, hearings will follow the following format:

1. The chair will outline the complaint and confirm the rules and procedures for the hearing.
2. The complainant will be given an opportunity to verbally present his/her case including any request for redress. Written documentation may also be presented at this time.
3. The panel may ask questions of the complainant.
4. The contracting authority will be given an opportunity to verbally present his/her case. Written documentation may also be presented at this time.
5. The panel may ask questions of the contracting authority.
6. Both the complainant and contracting authority may be given the opportunity to present additional information and closing statements.
7. After dismissing both the complainant and the contracting authority, the panel will sit (in camera), as required, to discuss the facts and merits of the case, to hear and consider expert advice (whenever deemed necessary) and prepare a report with recommendations.
8. Panel members will keep confidential all information and discussions relating to the hearing that are confidential or are declared to be confidential.

The chair may call upon persons from outside the Bid Challenge Committee to advise the panel on any matter.

Both parties to the complaint have the right to bring an advisor or assistant to the hearing. One person only from each party will be allowed to make a presentation. All persons attending the hearing, and their roles, shall be identified to the chair at least two days prior to the commencement of the hearing.

The panel may refuse to hear and consider, or may cease to consider a complaint on the grounds that:

- the complaint is trivial, frivolous, vexatious or was not made in good faith:
or,
- the complainant does not have sufficient personal interest in the subject matter of the complaint.

In such cases, the chair must inform the complainant and the contracting authority of the panel's decision. The chair shall state the reasons for the panel's decision.

The committee does not have authority to delay award of the contract [section 67] or to cancel, revoke, amend, or alter a contract [section 68(9)].

Redress

Section 71 of the Contracting Directive provides that, where the panel considers that a complaint is valid, it may recommend that the contracting authority pay to the complainant compensation for:

- (a) the complainant's reasonable costs in preparing a bid or proposal; and/or
- (b) the complainant's reasonable costs for participating in the inquiry or hearing.

In making its decision, the panel will consider all the circumstances relevant to the complaint, including:

- (a) the seriousness of any deficiency in the procurement process found by the panel;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced; and
- (d) whether the parties acted in good faith.

Report and Response

The panel will make a report of its findings and any recommendations it may have to the Deputy Head of the contracting authority. A copy of the report must be given to the complainant.

The Deputy Head must provide a written response to the chair, within a reasonable time. The response must describe the progress being made in addressing the panel's recommendations. Deputy Heads must also provide a copy of their response to their Minister. The chair will forward a copy of the response to the complainant [section 74(2)].

If the panel recommends a change to government policy or procedure, the Deputy Head must address the recommendation to the body, which has authority over the policy. For example, Cabinet has authority over the regulations and Management Board has authority over the directive.