



Procurement Review Independent Panel  
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**Re: Government of the Northwest Territories Procurement Review**

April 13, 2021

Dear Procurement Review Independent Panel,

Thank you for providing the opportunity to share this feedback gathered from members of the Northwest Territories & Nunavut Construction Association (NNCA). We hope that the recommendations below will help inform your review and ultimately create lasting improvements to Government of the Northwest Territories' (GNWT's) procurement policies.

**1. Improve Monitoring, Enforcement and Application of the Business Incentive Policy**

As the GNWT's discussion paper states, Contract Authorities lack the ability to enforce the terms of the Business Incentive Policy (BIP).<sup>i</sup> This lack of enforcement has undermined the policy and its objectives, and must be addressed.

Contract Authorities have the right to reject proposals from companies that have "failed to meet their obligations under the GNWT Business Incentive Policy".<sup>ii</sup> However, because these obligations are not monitored, no enforcement can take place. The potential penalty is also unclear, as the policy does not state how long a company could see their future proposals rejected, should they fail to meet any BIP obligations.

NNCA members have expressed particular frustration with the fact that businesses based outside of the territory not registered under the BIP can still receive bid adjustments for NWT and local labour estimates that, in practice, do not have to be substantiated.

Businesses can also receive bid adjustments through BIP for expenses incidental to the use of fly-in workers on construction projects, such as flights, hotels and meals. We do not believe providing bid adjustments for these expenses is in line with the BIP's stated principle of maximizing benefits for residents of the Northwest Territories.

The GNWT must also commit resources to ensure that construction project planning and contract development are aligned with BIP's principles. For example, NNCA members have noted that Contract Authorities in other jurisdictions complete checklists confirming policy and administrative requirements have

been met, and attach these to construction contract documentation. The GNWT could use similar measures to keep BIP principles in focus and encourage consistency across the different departments and staff involved in construction procurement.

**Recommendation:** Consistently monitor and enforce the existing provisions of the Business Incentive Policy, clarify penalties for non-compliance, and stop applying the policy to fly-in labour expenses on construction projects.

## 2. Defining an ‘NWT Business’ for the Purpose of Preferential Procurement

The NNCA recommends that the GNWT remove BIP exemptions for Schedule 3 ‘non-resident grandfathered companies’ and develop a new definition for an ‘NWT Business’ that follows the Government of Yukon’s approach, where businesses are considered local if they meet most but not necessarily all of the listed criteria.<sup>iii</sup>

As noted in the Yellowknife Chamber of Commerce’s submission to this panel, these criteria should recognize the different ways that businesses make meaningful contributions to the NWT economy. Criteria to consider include: owning or leasing a workspace with a physical address (and the size of that workspace), paying payroll tax, income tax and WSCC premiums, number of employees maintained year-round in the NWT, management residing within the NWT, majority ownership residing within the NWT, Indigenous collaboration, and/or maintaining these criteria over a certain minimum duration. Flexibility may also be needed for smaller companies with NWT ownership to avoid creating barriers to entry.

This approach would see some Section 3 businesses lose their eligibility for BIP bid adjustments, while also providing a flexible path forward for companies that provide economic benefits to the territory not recognized under the current policy.

**Recommendation:** Remove BIP exemptions for Schedule 3 companies, and draft a new definition for an ‘NWT Business’ that recognizes the different ways businesses contribute to the NWT economy.

## 3. Increase the Impact of the Business Incentive Policy

The maximum bid adjustments available through BIP are 15% for NWT content and 5% for local content. However, for values over \$1 million, these maximum adjustments drop to 1.5% for NWT content and 0.5% for local content – substantially reducing the impact BIP has on much of the GNWT’s construction procurement.

As the discussion paper notes, on a \$16 million dollar project the maximum bid adjustment is \$500,000 or 3.1% of the total contract value. Because the maximum adjustment is also capped at \$500,000, the BIP’s impact drops further as the contract value increases – on a \$50 million project, the maximum bid adjustment drops to just 1%. Because non-BIP, non-NWT companies can still receive bid adjustments for the amounts they spend on flights, accommodations and meals for southern workers, in reality the maximum bid adjustment possible on large construction projects is only a fraction of this 1%. With large design-build contracts, this adjustment is then spread across a number of sectors (design, specialist consultants, general contractors, subcontractors, etc.), further reducing the impact of BIP.

These limitations on BIP have ensured that it does not reflect the higher cost of doing business in the territory, which can be measured in different ways. For example, Industry Canada reports that 24.9% of NWT construction companies are non-profitable – only Nunavut (33.9%) and Newfoundland (36.3%) have a higher proportion of non-profitable companies. As a percentage of total revenue, the average net profit across all NWT construction companies is 4.8%. Again, only companies in Nunavut (1.2%) and Newfoundland (4.3%) report lower average net profit margins.<sup>iv</sup> This contrasts with the Yukon, where just 14.3% of construction companies are non-profitable, while reporting average net profits that total 14.4% of their annual revenue – triple the average net profit of NWT-based construction companies.

NWT construction companies have tight margins in part due to the high wages they offer employees. These companies pay out an average of 17.2% of their total revenue in wages and benefits. Only in Nunavut (17.5%) is this percentage higher. For comparison, construction companies in the Yukon (9.5%) and Alberta (8.8%) pay about half as much of their revenues out through employee wages and benefits.<sup>v</sup> Historical job post data also shows that tradespeople have higher earning potential in the Northwest Territories than anywhere else in Canada, with journeyman wages rising 13% – 35% above the national average.<sup>vi</sup>

Construction companies based in the NWT also pay more in utilities than anywhere else in Canada. On average, these companies pay 2.9% of their total revenue towards utilities including heat and electricity – more than any other province or territory and more than double the Canadian average of 1.2%.<sup>vii</sup>

This data shows that there remains a need to level the playing field between NWT businesses and those that do not maintain operations year-round in the territory and import much of their labour from lower-wage jurisdictions.

**Recommendation:** Apply BIP bid adjustments to the full value of GNWT contracts.

#### 4. Improve Communication on GNWT Construction Projects

There are many stages during the GNWT's procurement process where increased communication could provide businesses with more certainty and access to opportunities while also lowering costs for the GNWT. Some examples brought forward by NNCA members include:

- Work with communities to gather information on local labour markets. Finding local, qualified people to work on construction projects can require significant outreach – these efforts would generate more results if this data were more readily available. When possible, the GNWT should also provide companies with more time to find and train local people.
- Provide more notice of upcoming construction projects, and publish a list of these upcoming projects on a regular basis to assist with business planning. Smaller companies do not always have the capacity to react quickly when projects are announced on short notice.
- Disclose projects initiated through the Negotiated Contracts Policy before they begin construction so that interested subcontractors can offer their goods and services.
- Make important project milestones and deadlines more prominent on the GNWT's contracts website – especially deadlines that expire before the bid closing date such as bid intention deadlines, question submission deadlines, and mandatory site visits.
- Work with GNWT agencies to standardize the procurement process as much as possible and advertise all GNWT agency bidding opportunities in one location.
- Publish drone data on quarries to allow for more accurate estimating.

- Clarify how the GNWT's Good Building Practices are interpreted alongside the National Building Code, the Canadian Electrical Code and others. Building designs must follow these codes, but if the GNWT's Project Officer interprets the GNWT's Good Building Practices as more desirable it leads to disputes and delays in getting reviews completed.
- Establish a reasonable review period to approve design submissions – the timelines for this process can be unclear and lead to project delays. In other cases, the GNWT has requested changes to already approved designs and specifications, which creates further uncertainty for businesses who need to move the project forward.
- Add consistency to the use of Technical Design Narratives in GNWT tender documents. These specify what materials are to be used to construct a given design element, but in some instances GNWT-provided designs contain elements that are not defined in a corresponding Technical Design Narrative, meaning bidders are providing estimates based on inconsistent specifications.
- The GNWT should avoid overly-narrow contract language that requires builders to use specific models or brands of products – this can create de facto sole source requirements when these products are distributed exclusively by non-local vendors. Contracts should instead specify technical criteria for project materials and give companies flexibility to source products that meet these criteria. When contracts do make reference to specific products, priority should be given to those manufactured or supplied by northern companies.
- Set timelines for GNWT payments to be processed and publish the GNWT's actual performance measured against these timelines.
- Ensure that construction work that can be impacted by cold weather conditions is scheduled at the appropriate time of year to avoid delays and increased costs. Avoid tendering large amounts of work in the summer season when local companies may already be at capacity delivering projects and unable to respond quickly to new tenders.
- Review addendums issued for previously awarded GNWT construction projects to identify common communication gaps and errors in the procurement process.

**Recommendation:** Provide certainty to NWT businesses through improved communication on GNWT construction projects.

## 5. Adopt Industry Standard Construction Contract Language

The Canadian Construction Documents Committee (CCDC) develops, produces and reviews standard construction contracts. It is a national joint committee that includes representation from public and private construction owners, design professionals and contractors. CCDC standard construction contracts are developed through this collaborative process to help ensure an equitable balance of risk between parties. <sup>viii</sup>

Across Canada, non-standard contract clauses are frequently used by public sector owners to modify or replace CCDC risk allocation provisions, resulting in unbalanced agreements that transfer risks to contractors even when they are worse position than the owner to mitigate these risks. The GNWT uses these non-standard clauses in its construction contracts, and should instead consider following the best practices established by CCDC.

There are several categories of non-standard contract clauses that have been flagged as problematic by contractors in a recent Alberta study. This leads to higher project costs, delays, legal disputes and defaults that

could be avoided through the use of industry standard documents.<sup>ix</sup> Examples of problematic non-standard clauses used by the GNWT include:

- Overbroad Indemnity Clauses – Indemnity clauses in CCDC contracts restrict the scope of contractor liability to “negligent acts or omissions.” By contrast, the GNWT requires contractors to assume liability for a much broader scope of potential incidents – losses “related wholly or partially to the acts or omissions of the Contractor.” The GNWT also diverges from CCDC by removing caps on total potential liability for contractors. This increases the severity of risk faced by contractors and the likelihood of bankruptcy from catastrophic events.
- Modifications to Force Majeure – Force Majeure clauses in CCDC contracts exist to protect contractors from being held liable for events beyond their control. GNWT contracts remove these protections and explicitly state that contractors are liable for losses or damages “whether or not that loss or damage is attributable to causes beyond the Contractor’s control.”
- Absence of Warranty Terms – CCDC contracts state that “the Contractor shall be responsible for the proper performance of the Work to the extent that the design and Contract Documents permit such performance.” GNWT contracts do not contain this clause, which leaves contractors open to liabilities due to non-performance even when the contract or designs prevented them from doing so.

**Recommendation:** Adopt industry standard contract language used by CCDC to ensure that on GNWT construction projects, the party best able to manage any particular risk will be the one to bear it.

## 6. Raise Safety Standards on GNWT Construction Projects

Other jurisdictions in Canada are using procurement policy to encourage higher safety standards on government-funded construction projects. This can help level the playing field for companies who incur costs related to their safety program that would otherwise prevent them from being the low bidder on a given project.

In Ontario, an increasing number of local governments are making the Certificate of Recognition (COR) program a mandatory requirement for companies seeking to bid on their construction projects. An example of how this requirement is being phased in can be found in Vaughn, Ontario, which has established the following timeline:<sup>x</sup>

- 2021: prequalification scoring for COR registration and COR certification on projects over \$25 million
- 2022: COR registration/certification a requirement for general contractors, construction consultants and external project managers on projects over \$10 million. The COR requirement will also be expanded to add the major sub-trades to be COR registered or certified. This requirement will be included in the prequalification document and will be scored for COR registered and COR certified
- 2023: COR certification will be a requirement for general contractors, major sub-trades, construction consultants and external project managers on projects over \$500,000

The GNWT could pursue a similar phase-in of these requirements alongside other options for incentivizing COR certification – for example, Alberta’s Partnerships in Injury Reduction program provides refunds of up to 20% on WCB premiums for companies that maintain COR certification.<sup>xi</sup> Initiatives such as these encourage safety practices that ultimately reduce workplace incidents and lead to lower WSCC rates across the industry – lowering construction costs for the GNWT over the long term as well.

**Recommendation:** Use GNWT procurement policy to incentivize the adoption of recognized safety programs across the construction industry.

## 7. Creation of an Indigenous Procurement Policy

The NNCA agrees that the Government of the Northwest Territories should create an Indigenous Procurement Policy. The Governments of Nunavut<sup>xiii</sup> and Yukon<sup>xiii</sup> both administer Indigenous Procurement Policies that attempt to direct more government spending to local Indigenous businesses. The Northwest Territories is home to more Indigenous businesses than Nunavut and the Yukon combined,<sup>xiv</sup> but provides no comparable procurement advantages to these companies.

The Assembly of First Nations,<sup>xv</sup> the National Indigenous Economic Development Board,<sup>xvi</sup> and the Canadian Council for Aboriginal Business<sup>xvii</sup> have all produced research on the benefits of Indigenous Procurement Policies – some of which include:

- Increasing the capacity and competitiveness of Indigenous businesses, creating growth and diversification opportunities that strengthen the territory's economy.
- Providing greater certainty to Indigenous businesses, allowing for more planning ahead of projects and generating more training and stable career opportunities for Indigenous people.
- Generating wealth for reinvestment in Indigenous communities while building up a skilled workforce that can more affordably maintain local housing stock and other infrastructure.
- Creating spillover economic benefits for local non-Indigenous businesses and people (for example, socioeconomic agreements in the territory's diamond mining industry have generated \$6.4 billion in spending with Indigenous businesses since 1996, and a further \$8.1 billion in spending with northern, non-Indigenous businesses).<sup>xviii</sup>

Reviews of existing Indigenous Procurement Policies have also flagged a number of considerations that the GNWT will need to address in the creation of its own policy. These considerations include:

- Ensuring the policy does not overlook small businesses. Overly-complex processes create administrative burdens that can limit businesses' access to procurement opportunities. NNCA members have reported this issue with the Government of Nunavut's Nunavummi Nangminiqatunik Ikajuuti (NNI) policy,<sup>xix</sup> and the Canadian Council for Aboriginal Business has raised this issue with federal procurement as well.<sup>xx</sup> The policy should have clear rules that can be monitored and enforced consistently, and should support active participation by businesses of all sizes. There are 111 NWT businesses currently registered under the Government of Canada's Procurement Strategy for Aboriginal Business (PSAB), and we encourage the GNWT to consider aligning with PSAB to avoid creating conflicting policies that require these businesses to unnecessarily restructure their operations.
- Encouraging genuine partnerships between Indigenous and non-Indigenous businesses. Across Canada, Indigenous Economic Development Corporations have cited collaboration with non-Indigenous businesses as an effective way to build organizational capacity, secure large projects, increase profits, and support local employment and training.<sup>xxi</sup> The policy should encourage and make it clear to Indigenous and non-Indigenous businesses how they can establish this collaboration through joint ventures, subcontracting and other means.

- Alignment with other capacity building efforts, such as overlapping training funds administered by territorial and federal levels of government, and supports offered through the broader education system. NNCA members have flagged several issues that are holding back development of a local skilled workforce in the NWT, including high costs for both employers and apprentices and a lack of academic supports such as tutoring services for individuals challenging the Trades Entrance Exam.<sup>xxii</sup> Improved coordination across governments and departments could help ensure existing funding for training is accessible to companies working within the GNWT's construction project timelines, and that relevant academic supports are in place so that Indigenous apprentices can gain experience and move their careers forward while working on these projects.

**Recommendation:** Develop an Indigenous Procurement Policy in consultation with Indigenous and northern businesses.

Sincerely,



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<sup>i</sup> Government of the Northwest Territories (2021) A Discussion Paper for the Review of Public Procurement Policies for the Government of the Northwest Territories. Retrieved from: <https://www.iti.gov.nt.ca/en/newsroom/gnwt-procurement-review-how-you-can-join-conversation>

<sup>ii</sup> GNWT Department of Infrastructure (2021) Design-Build Request for Proposals Template. Section 3.6.

<sup>iii</sup> Government of Yukon (2021) Procurement Policy. Retrieved from: <https://yukon.ca/en/procurement-policy>

<sup>iv</sup> Industry Canada (2019) Report for: NAICS 23 - Construction - Financial Performance Data. Retrieved from: <https://www.ic.gc.ca/eic/site/pp-pp.nsf/eng/home>.

<sup>v</sup> *Ibid*

<sup>vi</sup> Data for wage comparison retrieved from: <https://ca.indeed.com/career> on February 9, 2021.

<sup>vii</sup> *Supra note iv*

<sup>viii</sup> Canadian Construction Documents Committee (2020) About CCDC. Retrieved from: <https://www.ccdc.org/about/>

<sup>ix</sup> Alberta Construction Association (2018) Non-Standard Contract Clauses – Can You Afford to Ignore Them? Retrieved from: <http://albertaconstruction.net/wp-content/uploads/2018/11/Final-Report-Non-Standard-Contract-Clauses-Nov-5-2018.pdf>

<sup>x</sup> Ontario Construction News (2020) Vaughan to require contractors to register for COR certification by March. Retrieved from: <https://ontarioconstructionnews.com/vaughan-to-require-contractors-to-register-for-cor-certification-by-march/>

<sup>xi</sup> Workers' Compensation Board – Alberta (2021) Partnerships in Injury Reduction (PIR). Retrieved from: [https://www.wcb.ab.ca/insurance-and-premiums/lower-your-premiums/partnerships-in-injury-reduction-\(pir\).html](https://www.wcb.ab.ca/insurance-and-premiums/lower-your-premiums/partnerships-in-injury-reduction-(pir).html)

<sup>xii</sup> Government of Nunavut (2021) Nunavummi Nangminiqaqtunik Ikajuuti. Retrieved from: <https://nni.gov.nu.ca/>

<sup>xiii</sup> Government of Yukon (2021) Learn about the Yukon First Nations Procurement Policy. Retrieved from: <https://yukon.ca/en/doing-business/government-contracts/yukon-first-nations-procurement-policy>

<sup>xiv</sup> Government of Canada (2021) Detailed company search - Indigenous Business Directory. Retrieved from: <https://www.sac-isc.gc.ca/rea-ibd>

<sup>xv</sup> Assembly of First Nations (2019) Resolution no. 38/2019: Increasing First Nations Procurement Opportunities and Benefits. Retrieved from: <https://www.afn.ca/wp-content/uploads/2019/08/19-38-Increasing-First-Nations-Procurement-Opportunities-and-Benefits.pdf>

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<sup>xvi</sup> National Indigenous Economic Development Board (2020) DFO-CCG Indigenous Procurement Policy Dialogue; Indigenous Capacity, Expertise and Gaps. Retrieved from: [https://indigenousfisheries.ca/en/wp-content/uploads/2020/12/NIEDB\\_Presentation-to-NIFI-DFO-CCG\\_December-7.pdf](https://indigenousfisheries.ca/en/wp-content/uploads/2020/12/NIEDB_Presentation-to-NIFI-DFO-CCG_December-7.pdf)

<sup>xvii</sup> Canadian Council for Aboriginal Business (2020) Industry and Inclusion: An Analysis of Indigenous Potential in Federal Supply Chains. Retrieved from: [https://www.ccab.com/wp-content/uploads/2019/05/CCAB\\_Research-Report\\_web.pdf](https://www.ccab.com/wp-content/uploads/2019/05/CCAB_Research-Report_web.pdf)

<sup>xviii</sup> Government of the Northwest Territories (2019) 2018 Socio-Economic Agreement Report For diamond mines operating in the Northwest Territories. Retrieved from: [https://www.iti.gov.nt.ca/sites/iti/files/socio-economic\\_agreement\\_report\\_-\\_2018.pdf](https://www.iti.gov.nt.ca/sites/iti/files/socio-economic_agreement_report_-_2018.pdf)

<sup>xix</sup> Borden Ladner Gervais (2013) External Report to the NNI Policy Review Committee. Retrieved from: <https://www.tungavik.com/files/2013/09/BLG-Review1.pdf>

<sup>xx</sup> Canadian Council for Aboriginal Business (2020) Industry and Inclusion: An Analysis of Indigenous Potential in Federal Supply Chains. Retrieved from: [https://www.ccab.com/wp-content/uploads/2019/05/CCAB\\_Research-Report\\_web.pdf](https://www.ccab.com/wp-content/uploads/2019/05/CCAB_Research-Report_web.pdf)

<sup>xxi</sup> Canadian Council for Aboriginal Business (2020) Aboriginal Economic Development Corporation Capacity. Retrieved from: <https://www.ccab.com/wp-content/uploads/2020/02/CCAB-Report-1-web.pdf>

<sup>xxii</sup> NWT & Nunavut Construction Association (2020) Re: NWT Polytechnic University Initial Areas of Teaching and Research Specialization. Retrieved from: <http://nnca.ca/sites/default/files/September%2028%20NNCA%20Letter%20to%20Minister%20Simpson.pdf>