

County of Northumberland Supplier Barring Protocol

1.0 Introduction

In order to ensure that the County of Northumberland (the “County”) is receiving quality goods and services and value for public money and in the interests of increasing the efficiency of the procurement process, the County may disqualify suppliers from eligibility to compete for or be awarded County contracts for prescribed time periods for the following reasons:

- a) The supplier brought frivolous or vexatious litigation proceedings¹ against the County.
- b) The supplier failed to honour a proposal submitted in response to a County procurement opportunity.
- c) The supplier failed to disclose conflicts of interest in connection with County procurement opportunities.
- d) The supplier was convicted of bid-rigging, price-fixing or collusion or other statutory offenses.
- e) The supplier engaged in unethical business practices.
- f) The supplier had significant performance issues on a prior contract with the County.

The analysis and factors to be considered by the County in making a decision to disqualify a supplier are set out in greater detail in this protocol. Generally, a decision to bar a supplier from submitting proposals or from being eligible for contract award must be exercised cautiously. The decision must be applied fairly, supported by evidence, exercised in accordance with the factors set out in this policy and appropriately approved. While a decision to place a supplier on the disqualification list is discretionary, such a decision must be exercised consistently and fairly.

2.0 Reasons for Disqualification

The County may disqualify a supplier for one of the following five categories of reasons:

2.1 Litigation

If a supplier engages in litigation against the County, the County may consider whether or not such litigation should disqualify that supplier from participating in future procurement opportunities with the County. Note that litigation brought by the County against a supplier is addressed under Section 2.5 below.

A supplier who engages in litigation against the County should only be disqualified in connection with litigation proceedings if there are valid commercial or business reasons for doing so. Disqualification should not be exercised as retaliation against a supplier for bringing a legitimate lawsuit against the County. In evaluating whether a litigious supplier should be disqualified, the County should consider the following qualitative factors in its analysis:

¹ For the purposes of this protocol, “litigation proceedings” shall mean all court proceedings and any other alternative dispute resolution processes, including arbitration, or any bid protest procedures under any applicable trade treaties.

- Is there a connection between the type of work being procured and the current procurement opportunity?
- Is there a history of litigious conduct with the supplier and has that history resulted in increased costs to the County?
- What was the outcome of the litigation? For example, was it frivolous/vexatious or were damages awarded in favour of the supplier?
- Does the supplier's litigation with the County call into question the supplier's ability to provide the work or services that are the subject of the current procurement opportunity?

2.2 Failure to honour a proposal

If a supplier submits a proposal or submission in response to a County procurement opportunity and that supplier subsequently refuses to honour its submission or the pricing included in that submission, the County may consider disqualifying that supplier from participating in future procurement opportunities with the County. However, a supplier should not be disqualified if its failure to honour a proposal or submission was a legitimate withdrawal of that submission. Accordingly, the reason why a proponent did not honour its submission must be analyzed and considered in making a decision to disqualify that supplier. Factors that the County may consider in such analysis include, but should not be limited to, the following:

- If the County and the highest-ranked supplier in a procurement opportunity attempt to negotiate an agreement and for valid business reasons are unable to come to an agreement, that supplier should not be disqualified.
- If a proponent fails to honour its submitted pricing because of a change in market conditions, the County should consider whether pricing fluctuations are common in the industry. If price increases are common, the County should consider whether the proponent should have factored this into their submitted pricing. For example, could the market conditions have been reasonably predicted within the industry?
- If a proponent does not honour its submission because it is too busy on other contracts at the time of award and the procurement opportunity was awarded according to the published timetable, the County should consider disqualifying that proponent because proponents should only submit proposals if they are capable of delivering the services.
- Other reasons for a proponent's failure to honour a submission or pricing should be reviewed contextually and fairly.

2.3 Failure to disclose a conflict of interest in connection with a County procurement opportunity

If a proponent fails to disclose a conflict of interest during a County procurement opportunity or during the performance of a contract with the County and the County subsequently discovers

that such a conflict of interest exists, the County may disqualify that supplier from participating in future procurement opportunities after conducting an analysis based on the following factors:

- The nature of the conflict of interest, including whether it is a perceived or an actual conflict of interest and the materiality of the advantage that such a conflict may have given the supplier.
- Whether the supplier knowingly failed to disclose such a conflict of interest.
- The impact such a failure to disclose the conflict of interest had or may have on the County, including its reputation and the impact on its obligation to conduct a fair competitive procurement process.

2.5 Participation in bidding practices that are sanctioned by statute, including the *Criminal Code* or the *Competition Act*.

If the County has reason to suspect that a proponent or proponents are engaged in bid-rigging, price-fixing, bribery or collusion or other behaviours or practices sanctioned by federal or provincial statutes in connection with a County procurement opportunity, the County should contact the appropriate authorities and provide such assistance as is required to support a subsequent investigation and, if applicable, prosecution. If a supplier is convicted of bid-rigging, price-fixing or collusion or other behaviours or practices sanctioned by federal or provincial statutes in connection with a County procurement or in connection with other public sector procurements, the County may disqualify that proponent for a minimum period of one year.

2.6 Unethical bidding practices

A proponent may engage in unethical bidding practices that do not amount to a criminal or statutory offense, but such practices may still warrant disqualification from bidding on the County procurement opportunities. Examples of such unethical bidding practices include inappropriate offers of gifts to County employees from potential suppliers, misrepresentations in proposals and inappropriate in-process lobbying of or communications with County employees by proponents during a procurement process. The County must conduct a full review of the unethical practice in question and perform a contextual analysis to determine whether or the proponent or supplier in question should be disqualified, including consideration as to the impact the unethical bidding practice had on the County's ability to run a fair procurement process.

2.7 Poor performance

If a supplier performs poorly on an existing contract with the County, the County may consider disqualifying that supplier in the following circumstances:

- The contract was terminated for performance issues prior to expiry.
- There were un-rectified performance issues on a contract that resulted in extra costs to the County.

- The goods were defective and were not replaced or repaired or required multiple repairs.
- The County felt it was necessary to engage in litigation against the supplier in connection with issues related to the contract.
- The supplier received a performance rating of less than 50% on a contract with the County.
- The supplier received an average performance rating of less than 80% on three contracts with the County.

In order to disqualify a supplier for one of the contract performance-related issues set out above, the contract in question must have been effectively managed by the appropriate County staff. Effective management includes giving written notification to the supplier of performance issues and documenting the escalation of such performance issues. Further, the Department must have conducted a performance evaluation at the end of the contract in accordance with the form and content prescribed by Purchasing. Such performance evaluations will rate factors such as adherence to the terms of the contract, quality of goods or services and responsiveness to County requests. Each supplier must be given a performance rating out of 100 points. Performance ratings of less than 80 points must be supported by appropriate communications and correspondence to the supplier outlining performance issues.

3.0 Disqualification Process

3.1 A proposal to disqualify a supplier must be supported by a written business case that contains all details connected with the analysis using the factors set out in Section 2.0 above.

3.2 The business case should also include the proposed length of the disqualification. A supplier may be disqualified for period of up to five (5) years. The length of the disqualification period should be fair and proportional to the reasons for the disqualification, and the full five-year suspension should only be applied in the most serious of disqualifications. A disqualification can either be a blanket disqualification or a disqualification to provide specific goods or services and the business case should clearly set out the scope of the disqualification.

3.3 All decisions to disqualify a supplier must be approved by Chief Administrative Officer, unless the Chief Administrative Officer was involved with the specific contract at issue, in which case the business case should be approved by the Purchasing Manager. The decision-maker must consider the written business case, together with all documentation associated with the business case and the specific facts leading up to the proposed disqualification. The decision-maker should consider seeking external advice where appropriate. In addition, the decision-maker should consider seeking written representations from the supplier in question and factoring such written representations into the decision-making process where the documentation supporting the business case is unclear or where it is important to consider the suppliers' perspective on the particular matter.

3.4 If the disqualification business case has been approved, the head of the procurement department should write to the supplier in question informing that supplier that it is disqualified from submitting proposals or responses in respect of the County procurement opportunities for the prescribed time period. The notification letter should contain:

- Full details as to the reasons for the disqualification, including copies of any documents or correspondence to support such a disqualification.
- The length of the disqualification period and the scope, if applicable.
- The supplier's right to re-apply for eligibility within the prescribed time period and the process for requesting such a re-application.

4.0 Review of Disqualification

A disqualified supplier may apply to be re-eligible to submit proposals or submissions to the County procurement opportunities upon the completion of half of the original disqualification period. For example, if the original disqualification period was two years, the supplier may apply for review of the disqualification after one year. In order to apply to be re-eligible, the supplier must submit a written case for re-instatement, including supporting documentation if necessary, that provides reasons why the original reason for the disqualification would no longer prove a risk for the County.

Applications for review of eligibility are to be reviewed by the Chief Administrative Officer. If the Chief Administrative Officer is convinced that the reasons for the original disqualification will no longer present risk for the County should it do business again with the supplier in question, then the Chief Administrative Officer may re-instate that supplier.

5.0 Disqualification List

The County Purchasing department shall maintain an up-to-date and current list of all disqualified suppliers. The list should contain the full name of the supplier, the reasons for the suspension, the file number where the business case for the disqualification is filed, the length of the disqualification period and the date of the expiry of the disqualification period. Review of the disqualification list against a list of proponents or respondents should be conducted for each procurement to ensure that disqualified suppliers are not allowed to continue in the process.