

The Procurement Office

Procurement Law Office | Procurement Training Office

Suite 406 - 781 King Street West, Toronto, Ontario M5V 3L5
www.procurementoffice.com
416-700-8528 | paul.emanuelli@procurementoffice.com

Discussion Draft

RADAR Report Risk Assessment, Diagnosis, and Recommendations

Date: May 12, 2021

To: Town of Aurora (the "Town")

Attn: Anna Ruberto

A. Our Deliverables

In accordance with the methodology and approach set out in our Statement of Work, we have:

1. reviewed the Town's procurement-related policies, procedures, and templates and prepared a Snapshot Review of the Town's procurement operations as set out in the attached Snapshot Review Presentation slides and the Snapshot Diagnostic Tool spreadsheet;
2. conducted field study interviews with a total of 14 Town staff;
3. conducted two separate self-assessment surveys of procurement staff and broader organizational representatives to consolidate their views on existing procurement practices as set out in the two attached survey result summaries; and
4. consolidated our findings and recommendations from the above sources in this RADAR Report.

Our deliverables also include a briefing session during which we will present a summary of our findings and recommendations, answer your questions, and discuss potential next steps should the Town decide to implement the recommendations.

B. Overall Assessment and Snapshot Review Process

(i) The Four Critical Risk Factors and Four-Point Benchmarks

Our Institutional Reviews are intended to assess existing procurement practices and tailor recommendations for future improvement in the context of the following four risk factors inherent in public sector context:

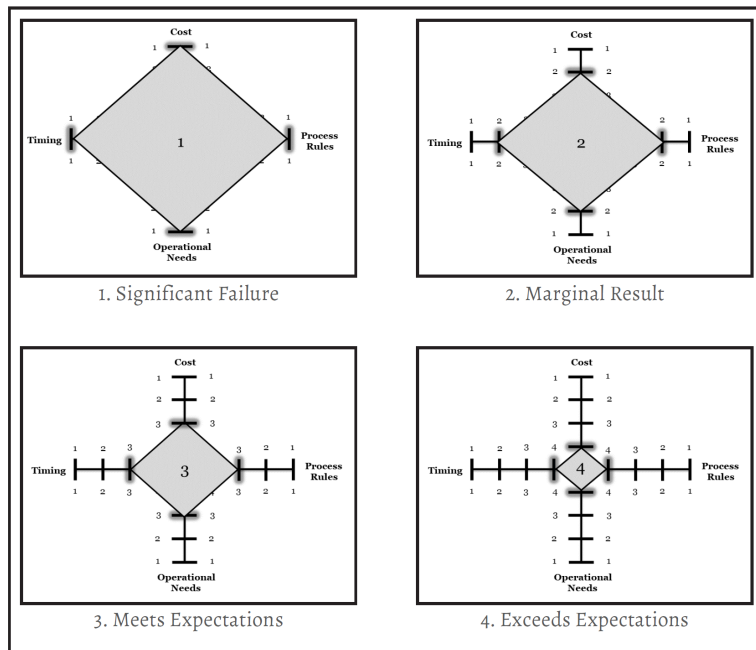
1. the failure to meet operational needs;

2. the failure to stay within budget;
3. the failure to deliver on time; and
4. the failure to follow the process rules.

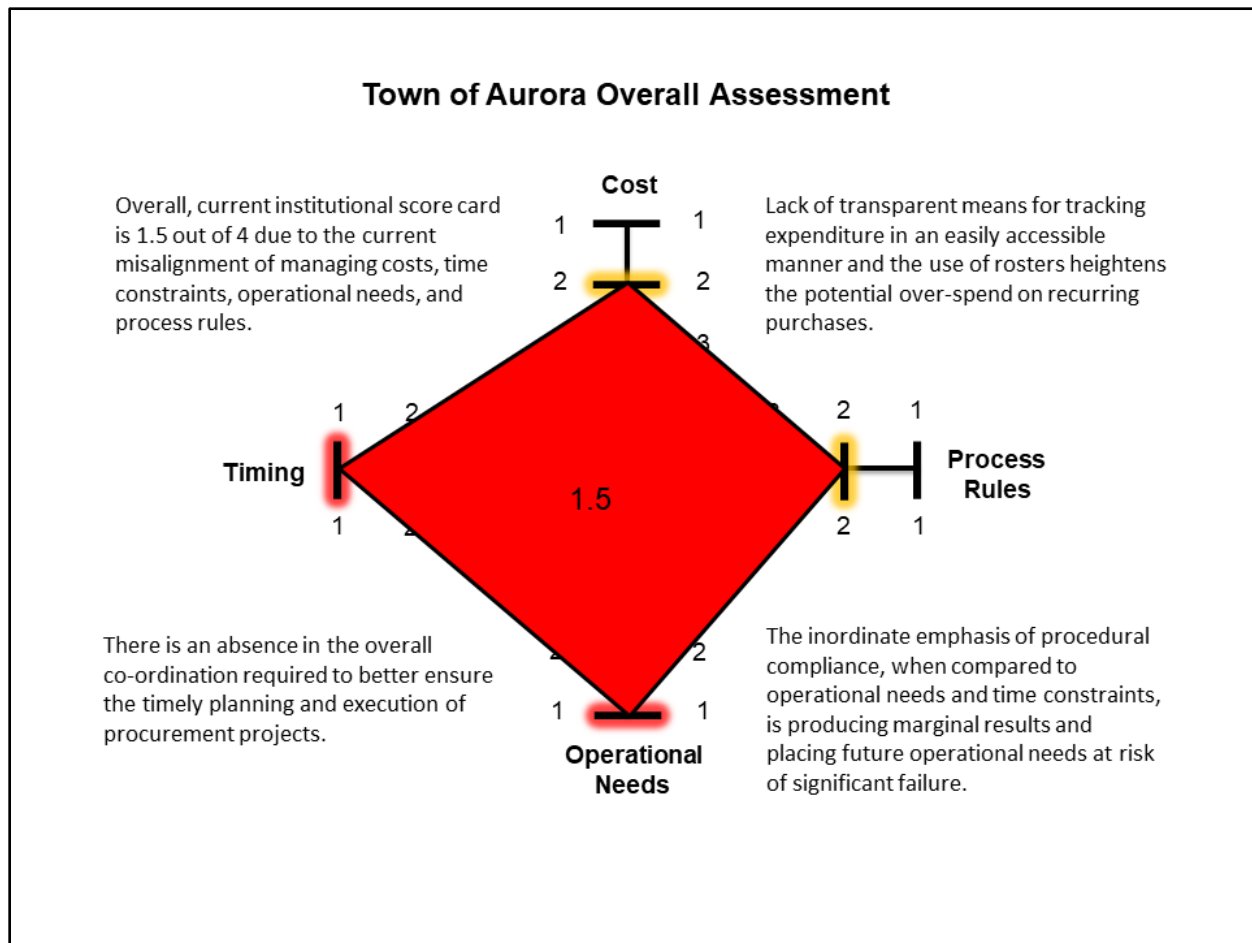
At the institutional level, each of these factors can be assessed on the following four-point benchmarking scale:

1. Significant Failure
2. Marginal Results
3. Meets Expectations
4. Exceeds Expectations

By conducting an overall assessment of the four critical risk factors on the four-point scale, we can provide a global picture of how the institution is balancing its institutional practices and score them as below:



At the institutional level, our assessment of the overall risks created by the Town’s existing procurement practices is as follows:



This overall assessment is supported by the findings contained within our Snapshot Review process and Field Study as further described below.

(ii) Snapshot Review Methodology

The Snapshot Review is an assessment of the Town’s existing procurement practices in the following eight key target areas: (i) institutional governance; (ii) project governance; (iii) forms and formats; (iv) document drafting; (v) bidding risks; (vi) contract management; (vii) training; and (viii) innovation.

The Snapshot Review contains a series of specific due diligence indicators that measure an institution’s procurement practices against broadly recognized industry best practices. The standard-setting sources that inform this analysis include:

1. a synthesis of over four decades of case law rulings drawn from the Canadian International Trade Tribunal and from every jurisdiction and level of court in Canada, along with leading international case law decisions;

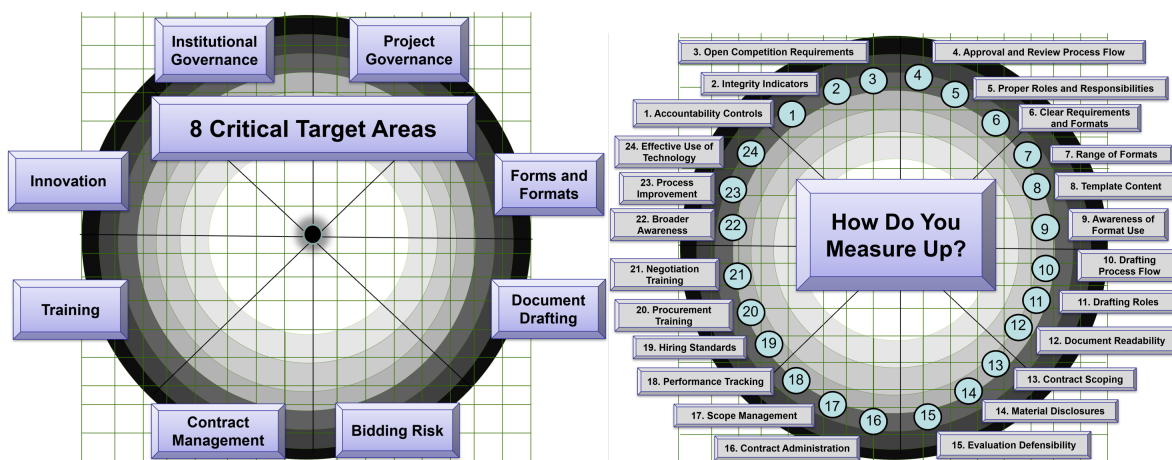
2. Canadian legal standards and trade treaty obligations from a broad range of treaties, including the Canada-European *Comprehensive Economic and Trade Agreement (CETA)*, the *Canadian Free Trade Agreement (CFTA)*, along with federal and provincial statutes, directives, and guidelines;
3. international best practices drawn from leading sources, including World Bank and OECD recommendations, guidelines, and standards, the *UN Model Procurement Law*, and procurement treaties and statutes from a broad range of jurisdictions; and
4. good governance recommendations from public inquiries and from Canadian and international public audit reports.

By applying broadly recognized standards to selected sample documents from the Town, the Snapshot Review provides a preliminary assessment of your procurement practices based on a seven-tier scoring system that can help inform future initiatives for improvement, and also serves as a benchmark against which you can measure the success of those initiatives.

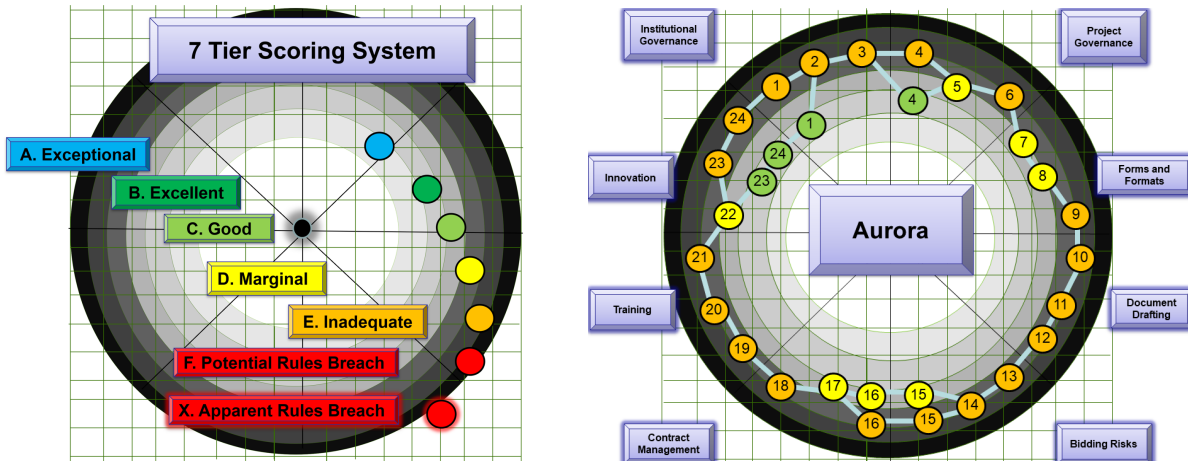
While the Snapshot Review draws on a broad range of standard-setting sources to assess your practices against 24 due diligence indicators, it is not intended to: (a) provide an exhaustive review of the Town's procurement practices; or (b) provide a conclusive legal opinion on those general practices or on any specific sample document.

(iii) Snapshot Results: Snapshot Review and Diagnostic Tool Findings

The results of the Snapshot Review are presented in the Snapshot Review Analysis Diagram, which synthesizes our findings in a quick-reference visual format. The Snapshot Review Presentation slides further illustrate how the diagram is constructed by plotting the scores for each of the 24 due diligence indicators within the eight critical target areas, and includes examples of Snapshots of other public sector institutions for the purposes of comparison. The Town's Snapshot reflects and summarizes the scoring of approximately 200 sub-criteria. In some cases, multiple scores are shown for a specific due diligence indicator where there was significant variation in the scoring of the sub-criteria in that area.



These factors are scored according to a seven-tier grading system. Based on a scoring of the 24 due diligence indicators falling across the eight target areas identified above, the Town’s overall Snapshot assessment is as follows:



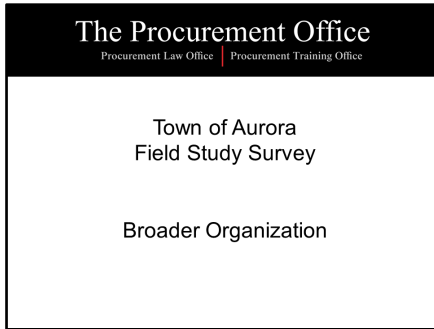
All of the detailed sub-criteria, along with the assigned scores and comments, are set out in the Snapshot Review Diagnostic Tool document, which is attached along with the Snapshot Review Presentation.

Snapshot Diagnostic Tool - Town of Aurora					
Target Area	Due Diligence Indicators	First Level Sub-Criteria	Sub-Criteria	Score	Comments
INSTITUTIONAL GOVERNANCE					
1. ACCOUNTABILITY CONTROLS: Does your organization have the proper internal governance policies and procedures in place to keep pace with emerging due diligence standards?					
1. Institutional Governance	1. Accountability Controls	Consolidated Procurement Policy/Transparent Rules	Your organization maintains detailed procurement policies and procedures.	C	A relatively detailed procurement by-law was updated in 2018 and policies and procedures continue to be updated as required.
1. Institutional Governance	1. Accountability Controls	Consolidated Procurement Policy/Transparent Rules	Your procurement policies and procedures are accessible within the organization.	C	The Town has an intranet where policies and procedures are available, however there is note that some revisions may have been made to documentation that is not captured in the version on the intranet.
1. Institutional Governance	1. Accountability Controls	Consolidated Procurement Policy/Transparent Rules	Your procurement policies and procedures are accessible externally to suppliers and the general public.	C	A search online produced by the by-law and a dedicated page for procurement services online, however policies and procedures were not found.

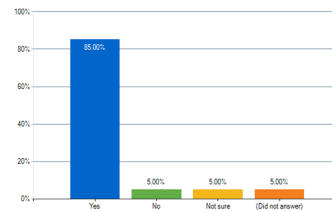
(iv) Field Study: Procurement Department and Broader Organization Reports

We conducted the above-noted interviews with procurement professionals from the Town’s Procurement Department and representatives from various other the Town business units to discuss the Town’s procurement operations and processes. In this report, we will use the term “business units” to refer to the Town’s departments, divisions, or units other than the Procurement Department.

We also asked the interviewees and other the Town employees to complete our online surveys. The survey results are useful to illustrate the level of awareness across the Town with respect to procurement matters and the level of employee confidence in the Town’s procurement operations.



Does your organization have documented procurement policies and procedures?



The survey results were incorporated into our Field Study and relied on as part of the findings and recommendations contained in this report.

C. Executive Summary of Key Recommendations

Based on our findings and observations, our key recommendations are as follows:

1. Institutional Governance - Revised Procurement Policy

We recommend that the Town consolidate and update the content from the existing procurement-related policies and adopt a procurement policy that clearly sets out the approval authorities and the roles and responsibilities of all the Town employees engaged in procurement.

The consolidated policy should:

- a) articulate the role of senior management across all business units in supporting the role of the Procurement Department and protecting the Town's interests by ensuring compliance with governing rules in respect of its procurement operations;
- b) incorporate an updated version of the Town's Code of Conduct;
- c) establish a supplier code of conduct to address rules and expectations with respect to the conduct of suppliers, including prohibitions against illegal or unethical bidding practices and rules with respect to lobbying and disclosure of conflicts of interest;
- d) update stipulated monetary thresholds for low-value purchases, invitational competitions, and open competitions, and outline appropriate exceptions to requirements to conduct competitive processes that align with applicable trade agreements; and
- e) prohibit contract-splitting and improper contract extensions and scope changes, and emphasize responsibility and accountability for accurately scoping requirements and estimating the value of a procurement.

We recommend that the Town establish a procurement governance committee made up with members from the Procurement Department and key business units, that will meet on a regular basis to facilitate communication and discussion with respect to the Town's procurement issues. This committee should be responsible for addressing discrepancies in procurement practices, engaging in strategic planning to

increase collaborative procurement, and encouraging stability, continuity, and consistency in the relationship between the Procurement Department, Legal Department, and the business units.

2. Project Governance - User-Friendly Procedures

We recommend that the Town establish clear and consistent procedures that direct users through the various stages of the procurement process, set out the specific requirements that need to be met at each stage, and assign clear roles, responsibilities, and accountabilities for meeting those requirements. The procedures should:

- a) clearly outline the roles and responsibilities of the Procurement Department in providing procurement expertise and services to the business units in a consistent and timely manner, managing and overseeing the competitive process and facilitating communications with bidders;
- b) clearly outline the roles and responsibilities of the business units in providing advance notice of upcoming procurement requirements, participating in the planning process, drafting unbiased specifications and clear requirements, collaborating on the development of appropriate and defensible evaluation criteria, and fully participating in fair and transparent evaluation processes; and
- c) establish clear instructions and guidelines for (i) selecting the appropriate competitive procurement template; (ii) drafting and assembling competitive procurement documents; (iii) conducting the competitive processes; (iv) establishing and managing qualified supplier rosters; (v) preparing for and conducting negotiations; (vi) conducting debriefings; and (vii) handling procurement protests.

3. Forms and Formats – New Tendering Templates and Frameworks

We recommend the Town develop and implement an updated set of solicitation document templates and make use of a full range of procurement formats.

We recommend that the Town increase its use of prequalification processes to establish rosters of prequalified suppliers under framework arrangements for the purchase of regularly required goods and services through expedited second-stage competitions.

4. Document Drafting – Procurement Design-Planning

We recommend that the Town mandate a clear project design-planning process that requires project teams to confirm contract scoping, pricing structures, evaluation criteria, contract structures, and tendering formats as the first stage of the procurement planning process. This design-planning should be mandated to project teams as a pre-requisite to proceeding to full solicitation drafting and, for major project, as a prerequisite to initial spending authorization. The level of advanced planning and allocated staff resources should be directly tied to the level of expenditure, complexity, and long-term significance of the specific contract. The Town should establish a streaming system for projects to direct them to the

appropriate stream based on major project expenditure and complexity, recurring tendering, and below-threshold small expenditures.

5. Bidding Risks

We recommend that the Town establish policies, procedures, and protocols to deal with bidding risks in the areas of contract scoping, material disclosures, and evaluation defensibility, including protocols:

- a) requiring the clear alignment of contracting scoping and pricing structures;
- b) managing the collection and disclosure of material information during the bidding process; and
- c) enhancing the defensibility of bid evaluation and contract award processes.

6. Contract Management

We recommend that the Town establish and document procedures for contract management, including:

- a) procedures establishing roles and responsibilities for day-to-day contract management and monitoring of milestone dates;
- b) clear rules for extending or increasing the scope of existing contracts;
- c) procedures for evaluating and documenting supplier performance issues and managing contract disputes; and
- d) a process for suspending suppliers from participation in future procurement processes on the basis of unsatisfactory performance or inappropriate conduct.

7. Training – Enhanced Staffing and Training

We recommend that the Town augment the existing level of procurement support resources provided through the Procurement Department to improve service delivery levels to the business units, facilitating strategic procurement planning, and ensuring that sufficient full-service-full-cycle support is given to complex, high-value, and high-priority procurements.

Following the development of a clear procurement policy and procedure framework, we recommend that the Procurement Department launch an organization-wide “Procurement 101” training program and implement an ongoing communications strategy to receive feedback from the business units and ensure that revisions to procurement policies and procedures are communicated in a timely and comprehensive manner to be actioned by the Procurement Department. This training should incorporate the key recommendations for Ontario municipal procurement training programs identified by Ontario Associate Chief Justice Frank N. Marrocco in his November 2020 *Transparency and the Public Trust: Report of the Collingwood Judicial Inquiry*.

8. Business Process Improvement and Innovation

We recommend that the Town leverage procurement-centric technology to facilitate its procurement operations by:

- a) automating the design and drafting process to help facilitate document version control;
- b) adopting an e-bidding platform to facilitate bid evaluation processes; and
- c) streamlining the approval processes through automation of requisitions and approvals, with recognition of electronic signatures.

D. Detailed Observations and Recommendations

Based on the feedback we obtained through the Field Study interviews and surveys, in combination with the results of our Snapshot Review, our detailed findings and observations are as follows:

I. INSTITUTIONAL GOVERNANCE

As discussed below, the Institutional Governance category addresses the first three due diligence indicators: (1) Accountability Controls; (2) Integrity Indicators; and (3) Open Competition Requirements.

1. ACCOUNTABILITY CONTROLS: Does your organization have the proper internal governance policies and procedures in place to keep pace with emerging due diligence standards?

Our observations and recommendations in this area are as follows:

- a) **Roles and Responsibilities:** We recommend that the Town consolidate and update the content from the existing procurement-related policies and adopt a procurement policy that clearly sets out the approval authorities and the roles and responsibilities of all the Town employees engaged in procurement. Our review found the following:
 - i. A clearer definition of roles in the existing policy in regard to institutional roles and responsibilities, especially for the procurement department is required. The scope of roles and responsibilities typical for public procurement operations were not well understood by interviewees across the organization.
 - ii. Our Field Study noted significant delays as decision-making during the project planning process was transferred between different individuals in the organization. The Field Study also indicated that the current procurement design, drafting, posting, evaluation, and award process results in multiple dead ends since the current system lacks a clear tracking and reminder system to identify when a process is stalled with a specific individual.
 - iii. Field Study interviewees expressed frustration with what they saw as a regulatory compliance role assumed by the Procurement Department, coupled with a 'gotcha'

mentality that appeared to prioritize the identification of infractions over the provision of procurement related services.

- b) **Delegation of Authority:** The Town needs to implement more effective delegation mechanisms involving fewer mechanical approval checkpoints and greater authority and accountability at the project team level. A greater distinction between the level of oversight required for day-to-day transactions and major projects needs to be recognized. Low and Mid-Value procurements can be largely downloaded to the business units, with light oversight from the unit assigned procurement team member, which would allow the Procurement Department more time to focus on larger, more complex procurement projects. In our review, we observed:
- i. an insufficient level of delegation of authority and responsibility for achieving procurement objectives;
 - ii. an inordinate amount of approvals that were causing significant delays in the procurement process with no corresponding improvement to accountability, transparency, or oversight; and
 - iii. no clear institutional mechanisms to fix broken processes and avoid recurring bottlenecks.

2. INTEGRITY INDICATORS: Does your organization have the necessary safeguards in place to address procedural improprieties, including unfair advantage, conflict of interest, and evaluation bias, and to protect against bid-rigging and collusion?

Our observations and recommendations in this area are as follows:

- a) **Conflict of Interest, Lobbying, and Post-Service Confidentiality:** Conflict of interest, lobbying, and post-service confidentiality should all be addressed in updated policies and procedures. In our review, we observed that:
- i. Conflict of interest is addressed in a form generated by the bidding system, however it is not sufficiently detailed, and should be updated to include concepts such as: recent employment, assistance in drafting a proposal, and potential downstream conflict for future employment.
 - ii. The Town does not appear to have a documented code of conduct for its suppliers.
 - iii. Confidential information is treated in general terms, but with no reference to post-service restrictions.
 - iv. There was no documentation that covered the risks, or tell-tale signs of bid-rigging or prevention. Concepts such as withholding the bid-takers list were not found in the documentation provided.

- v. A Code of Conduct, including concepts such as not accepting gifts from potential or current suppliers was not found in the documentation provided.

3. OPEN COMPETITION REQUIREMENTS: Does your organization have the appropriate policies and procedures in place to comply with its open competition obligations and avoid procurement challenges based on inappropriate sole-sourcing, improper local preference, and biased specifications? Has your organization established open framework agreements to consolidate its purchasing while facilitating open competition?

Our observations and recommendations in this area are as follows:

- a) **Direct Awards:** The development of more detailed sole-sourcing policies and procedures, including documented business cases and appropriate approvals for non-competitive procurements are required, and should include clearly identify legitimate categories for expediting direct awards, while also requiring proper planning to avoid artificial urgency and repeated contract-splitting and sole-sourcing cycles. In our review, we observed the following:
 - i. Our Field Study revealed frequent occurrence of solicitation processes that result in no bids and led to short-term initial sole-source contracts that are then extended annually without competition for multiple follow-on years.
 - ii. Many Field Study interviewees held an unrealistic view of the necessary timeframes required to plan and execute open tendering procedures, without distinction between actual tendering timelines and the time required at the front end of the drafting process to receive specifications and to design the solicitation.
 - iii. The Field Study interviews revealed difficulty with tracking smaller, more frequent purchases that fall under the \$10,000 threshold. This has led to instances when the aggregate of the purchases has then fallen above thresholds, unbeknownst to the business unit at the time of purchase. The development of treaty compliant open framework rosters for areas of repeat purchasing is recommended.
 - iv. The Town does not appear to have a sole-source approval form that reflects recognized grounds for direct award that could enable a fast-track approval in appropriate circumstances.
 - v. Many Field Study interviewees expressed frustration that the \$10,000 ceiling for direct awards is too low.
- b) **Solicitation Posting Periods:** While the existing procurement policy is clear regarding the requirement to openly tender contracts, it should be updated to meet current trade treaty standards for the length of the open period.

- c) **Biased Specifications:** There is no clear policy or procedure that establishes the requirement for neutral specifications. The Town should establish clear rules and protocols to address this requirement and avoid narrowing competition and shrinking its future supplier pool. Further, the reliance on 'or equivalent' in specifications should be avoided, and in areas where more than one brand could be used, a request for proposal may be more appropriate.
- d) **Consolidated Purchasing:** The Town needs to establish policies and procedures for the creation and administration of supplier rosters in repeat-purchase areas under long-term, open framework agreements. In our review, we noted that:
 - i. There do not appear to be any protocols for identifying areas of possible aggregation in spending.
 - ii. The existing policy does not provide enough detail on how to establish frameworks and manage second-stage contract assignments with prequalified supplier rosters. Our Field Study confirmed a lack of understanding or application of proper open framework practices to manage supplier rosters.
 - iii. The desire to use group purchasing and piggy-backing provisions by the business units in an effort to save time and money is concerning as the Town remains accountable for any sole-sourcing spending under these arrangements, even if it does not engage in due diligence to confirm whether those group purchasing arrangements are treaty compliant.

II. PROJECT GOVERNANCE

As discussed below, the Project Governance category addresses the next three due diligence indicators: (4) Project Planning and Procedures; (5) Project Team Roles and Responsibilities; and (6) Clear Requirements and Formats.

4. PROJECT PLANNING AND PROCEDURES: Does your organization's planning and approval process avoid approval bottlenecks and effectively integrate key decision-makers and subject matter experts into the early stages of project planning?

Our observations and recommendations in this area are as follows:

- a) We recommend that the Town mandate a clear project design-planning process that requires project teams to confirm contract scoping, pricing structures, evaluation criteria, contract structures, and tendering formats as the first stage of the procurement planning process. This design-planning should be mandated to project teams as a pre-requisite to proceeding to full solicitation drafting and, for major projects, as a prerequisite to initial spending authorization. In support of this recommendation, our review found the following:

- a. While the current procurement policy is clear that early planning is required for procurement projects, our survey results and Field Study observations noted a lack of understanding of the procurement planning process and inconsistencies in practice.
- b. In our Field Study we noted that there was unnecessary duplication of approvals in areas where the purchase order or approved budget was already in place, with the Procurement Department unnecessarily inserted within that process in a regulatory oversight role after the higher-level budget approval.
- c. Our Field Study found that many business unit expectations regarding the necessary time required to conduct a proper open tendering process and award a contract were unrealistic. Use of open framework arrangements should be used to accelerate recurring purchases from pre-qualified suppliers.
- d. Concern was also raised in the Field Study that there have been instances of non-current templates residing on the intranet, leading to lost time and duplication of effort unnecessarily.

5. PROJECT TEAM ROLES AND RESPONSIBILITIES: Does your organization’s project governance process require the clear documentation of roles and responsibilities in order to avoid role overlaps and accountability gaps?

Our observations and recommendations in this area are as follows:

- a) We recommend that the Town update its policies and procedures to more clearly identify project team roles and responsibilities. In our review, we found the following issues reflecting an unclear identification of project-level roles:
 - i. The Procurement Department appears to serve as a de facto procurement regulator within the organization. They are required to enforce the By-law, which is seen by the business units as overly onerous, which had led to an overall general level of frustration across the organization with the Procurement Department.
 - ii. The Field Study identified areas in which the mandate of the Procurement Department appeared to expand more out of operational necessity than advanced strategic planning to include areas outside of the scope of procurement contracts.
 - iii. Many Field Study interviewees wanted procurement staff to be more integrated into their project areas so procurement staff could develop a deeper understanding of business unit needs and help with the end-to-end administration of the contracting process.
 - iv. There is no policy in place to address the proper identification and management of external service providers.

6. CLEAR REQUIREMENTS AND FORMATS: Do your organization’s project planning protocols mandate the preparation of clear requirements, realistic costing, and scheduling estimates, and the selection of appropriate contracting structures and tendering formats?

- a) We recommend that the Town establish a contract scoping and pricing protocol that requires project teams to engage in proper design-planning to ensure that contract requirements align with appropriate pricing structures and contract structures. This scoping exercise should be completed prior to engaging in more detailed document drafting. In our review, we found:
 - i. Field Study interviewees described a blending of the planning and drafting stages of the procurement process, with a lack of understanding that the failure to establish clear scoping and pricing structures could result in downstream drafting delays and contract administration issues.
- b) We recommend that the Town mandate a proper design planning process that puts consideration of the key elements of design planning ahead of drafting any solicitation.
- c) We recommend that the Town include clear policy and procedures in regard to the use of the following:
 - i. how to determine if bid security is required, and in what amount;
 - ii. how to determine if performance security is required, and in what amount; and
 - iii. whether pre-bid conferences or site visits are required.

III. FORMS AND FORMATS

As discussed below, the Forms and Formats category addresses the next three due diligence indicators: (7) Range of Formats; (8) Template Content; and (9) Awareness of Format Use.

7. RANGE OF FORMATS: Does your organization use a broad range of tendering formats based on domestic and international standards?

Our observations and recommendations in this area are as follows:

- a) **Use of Tendering Formats:** The Town should deploy a full range of updated tendering formats, including negotiated RFP formats, to better meet its more complex procurement needs. In our review, we found:
 - i. The Town has no format selection procedure or protocol in place and that the Town uses a limited number of tendering formats.
 - ii. All solicitation samples provided were in Contract A, with clear irrevocability provisions.

- iii. The Town has provisions in their solicitations for negotiation, but as all documents are squarely in Contract A, this is a high risk practice that should be discontinued.
- iv. The Town does not appear to be using the two-staged Best-and-Final Offer (“BAFO”) processes that are industry standard for complex procurements. Negotiated RFPs should be integrated into the institution’s procurement format use.
- v. The Request for Information sample provided, although containing proper provisions to limit future contracting obligations, still contained Contract A language in the electronic documentation generated by the bidding system, which can be high risk and confusing to respondents.

8. TEMPLATE CONTENT: Do your organization’s standard template terms comply with the expanding body of standards flowing out of treaties, statutes, directives, good governance guidelines, and case law developments?

Our observations and recommendations in this area are as follows:

- a) **Gaps in Current Templates:** We recommend that the tendering templates be updated with a new suite of up-to-date formats. In our review, we observed the following non-exhaustive list of missing elements in the current templates:
 - i. There is no reference to a bid dispute process.
 - ii. The submission form is missing many standard submission form items.
 - iii. The templates require a more fulsome treatment of the process flow details from the review of mandatory submission requirements, through to the assessment of rated criteria and pricing submissions, through to the selection of top-ranked proponents and the negotiation of contract awards.
 - i. The templates contain optional process paths, such as demonstrations and interviews that are left up to the discretion of the Town, which exposes the Town to allegations of arbitrary and ad-hoc in-process decision making.

9. AWARENESS OF FORMAT USE

Does your organization have a clear understanding of the legal and practical implications of using different tendering formats?

Our observations and recommendations in this area are as follows:

- a) **Selection of Appropriate Formats:** A procedure should be established to better inform the use of a broad range of fit-for-purpose tendering formats across the organization. In our review, we found that:
 - i. There appears to be no policy or procedure in place guiding project teams in the selection of the proper tendering format.
 - ii. The absence of non-Contract A RFQ and negotiated RFP formats reveals a potential lack of understanding of the risks of using binding formats for all procurements.
 - iii. The existing procurement policy states that low bid evaluations should be used when project teams have a clearly defined scope, even though it is industry standard to award many defined-scope contracts based on scoring price and non-price factors.
 - iv. There was little overall awareness of the need to select the specific tendering format and strategy based on the unique elements of each specific project.

IV. DOCUMENT DRAFTING

As discussed below, the Document Drafting category addresses the next three due diligence indicators: (10) Drafting Process Flow; (11) Drafting Roles and Responsibilities; and (12) Document Readability.

10. DRAFTING PROCESS FLOW: Does your organization have a clearly defined document drafting process that avoids duplication and delay and enables accelerated drafting?

Our observations and recommendations in this area are as follows:

- a) The Town should establish policies and procedures that define a clear step-by-step planning and drafting process for its solicitation documents. In our review, we found that:
 - i. There is no clear drafting process flow in the procurement procedure. There is no guidance for optimizing administration of proper planning and drafting.
 - ii. The Town's policies and procedures do not mandate clear protocols for managing the editing process and maintaining version control when preparing solicitation documents.
 - iii. The current policy and procedures do not clearly state that the project team is responsible for the drafting of scope, pricing, and evaluation criteria, or alternatively, is responsible

for the management of third parties to which this function has been contracted. This lack of clear business unit responsibility resulted in many Field Study participants inaccurately attributing delays in the drafting process to the Procurement Department when those delays were more appropriately attributable to the business units.

- iv. Our Field Study interviews confirmed that the involvement of the Procurement Department in pre-drafting design-planning was ad-hoc and informal, if it was occurring at all.

11. DRAFTING ROLES AND RESPONSIBILITIES: Does your organization have clearly identified roles and responsibilities for the drafting and assembly of its solicitation documents?

Our observations and recommendations in this area are as follows:

- a) **General Drafting Roles:** The Town needs to establish more detailed protocols for managing roles and responsibilities during the solicitation drafting process. In our review, we found that:
 - i. There are no documented protocols, procedures, or guidelines in place to govern the procurement document drafting process, assign roles and responsibilities, and assist business units in the proper scoping and detailing of requirements.
 - ii. There is a need for improved collaboration in the preparation of solicitation documents and to clearly delineate roles and responsibilities among procurement staff and the business units.
- b) **Specification Drafting:** The Town's policies and procedures should be updated to more expressly deal with the rules around neutral specifications and the related responsibility of technical subject matter experts. In our review, we found that:
 - i. The Town's policies and procedures need to identify subject matter experts as being responsible and accountable for the incorporation of technical content, in relation to the actual subject matter of the procurement contract or the need to prepare neutral specifications.
 - ii. The Town's policies and procedures do not adequately address the need to avoid biased specifications and the responsibility of subject matter experts to ensure that their specifications avoid unnecessarily restricting market competition.

12. DOCUMENT READABILITY: Does your organization ensure better readability by using plain language in the main body of its tendering documents and properly incorporating technical content within appendices and schedules?

Our observations and recommendations in this area are as follows:

- a) **Drafting Protocols:** The Town should establish a plain language drafting protocol to ensure that solicitation documents are clearly organized with the use of plain language where appropriate in the main body of solicitation documents.

V. BIDDING RISKS

As discussed below, the Document Drafting category addresses the next three due diligence indicators: (13) Contract Scoping; (14) Material Disclosures; and (15) Evaluation Defensibility.

13. CONTRACT SCOPING: Does your organization ensure that its solicitations are designed with clearly drafted requirements, properly aligned pricing and scoring structures, and well-tailored legal agreements?

- a) **Use of Appropriate Contract Terms:** A review of the sample solicitations raises concern regarding whether the Town's standard contract terms are appropriately tailored to the different types of goods and services being procured. This reflects a need for greater staff training and awareness of the boundaries of contract standardization so that project teams set aside enough time during the procurement cycle to allow for the necessary customization of contract terms for more complex procurements.

14. MATERIAL DISCLOSURES: Does your organization have the appropriate material disclosure protocols built into its drafting and tendering processes?

- a) **Material Disclosure Protocols:** The Town needs to update its policies and procedures to address material disclosure duties in its tendering and contracting processes. Our review found that:
 - i. There is no treatment of material disclosures in the existing procurement policy.
 - ii. There is no procedure in place for managing pre-bid conferences and site visits. Thorough procedures and protocols are recommended to manage the inherent risks associated with pre-bid meetings and site visits.

15. EVALUATION DEFENSIBILITY: Are your organization's evaluations based on clear compliance standards, transparent scoring mechanisms, and defensible award processes?

- a) **Evaluation Protocols:** The Town should establish policies, protocols, and procedures to enhance the defensibility of bid evaluation and contract award protocols. Our review found that, among other things:

- i. Some requirements are being front loaded as mandatory submission requirements where, to avoid compliance issues, they are better suited as pre-conditions of award limited only to presumptive awardees.
- ii. No policy or protocols are in place that cover the logistics of group scoring.
- iii. There are no detailed policies and procedures in place for the cancellation of a bidding process, negotiation of contract awards, or managing of bid disputes.
- iv. The method of evaluating pricing is not clear in the sample solicitations provided.
- v. The collection of non-price information in low-bid, Contract A formats is confusing, and potentially risky as there is no transparent mechanism for factoring in the non-price information into the selection of the low-bidder.
- vi. The blanket use of reference checks that are not transparently integrated into the procurement process and accompanied by clear scoring criteria is not recommended since this practice creates bid protest risk, particularly when included in in Contract-A formats that are subject to lost profit claims by losing bidders.

VI. CONTRACT ADMINISTRATION

As discussed below, the Contract Administration category addresses the next three due diligence indicators: (16) Contract Administration; (17) Scope Management; and (18) Performance Tracking and Debarment.

16. CONTRACT ADMINISTRATION: Does your organization have a proactive and clearly defined accountability structure for the contract administration stage of the procurement process?

- a) **Contract Administration Protocols:** The Town should establish policies, protocols, and procedures to enhance the administration of its contracts. Our review found that:
 - i. No documentation was provided indicating that there is a procedure for managing contract disputes.
 - ii. Our Field Study found a lack of clarity around responsibility and accountability for different aspects of contract management.
 - iii. There is no established process for assessing whether scope changes are sufficiently connected to the original scope of work or constitute unauthorized non-competitive procurements.

- iv. While contract extensions and scope increases are authorized under the By-law, the Field Study revealed that in practice the related approval processes tend to be time consuming and overly onerous.
- v. Although the existing procurement policy speaks to measuring and recording supplier performance, the Town does not appear to have a contractor performance tracking mechanism to document supplier performance, nor does it have sufficiently robust debarment procedures in place to transparently deal with poorly performing contractors.

17. SCOPE MANAGEMENT: Does your organization have proper scope-management practices to protect against improper scope increases?

- a) **Scope Management Protocols:** The Town should establish policies, protocols, and procedures for properly managing contracts and protecting against inappropriate scope-changes. Our review found that:
 - i. While the Town's policies and procedures contain clear internal approvals and requirements for amending the terms of a contract, concerns have been raised in regard to whether they are being tracked properly, while at the same time the Field Study revealed frustration that the Procurement Department was policing this process too heavily.
 - ii. The policy and procedures speak to the risk of amending contract terms beyond 10% of the original expenditure; however, there do not seem to be mechanisms for measuring requested changes against the original scope.

18. PERFORMANCE TRACKING AND DEBARMENT: Does your organization have the performance tracking measures in place to deal with problematic contractors and properly bar them from future work?

- a) **Performance and Debarment Protocols:** The Town should establish policies, protocols, and procedures for properly tracking contractor performance and executing debarments of poorly performing contractors. Our review found that:
 - i. There is no formalized procedure instructing staff on how to evaluate and monitor contractor performance.
 - ii. There was no supplier code of conduct provided for review, nor does a search of the website reveal one that is available to suppliers to review.
 - iii. The process and procedures for debarment of suppliers is not sufficiently robust. For instance, there is no documented process requiring that notice be provided to a supplier, along with an opportunity to respond, prior to any formal debarment decisions.

VII. TRAINING

As discussed below, the Training category addresses the next three due diligence indicators: (19) Hiring Standards; (20) Procurement Training; and (21) Advanced Negotiation Training.

19. HIRING STANDARDS: Are your procurement hiring and retention practices properly targeted to the knowledge, skills, and experience required to meet current procurement due diligence standards?

- a) **Hiring and Training Standards:** We recommend that the Town develop its job descriptions based on levels of experience in the seven skill sets identified below and that these skill sets inform future hiring of new staff and training of existing staff:
- i. **Institutional Governance:** Knowledge and experience in public sector institutional governance standards, including procurement accountability controls, integrity protocols, and treaty compliance practices.
 - ii. **Project Governance:** Knowledge and experience in project management principles, including managing internal approvals, defining roles and responsibilities, and developing and executing clear project plans.
 - iii. **Forms and Formats:** Knowledge and experience in a broad range of tendering formats, including the Request for Quotation, Invitation to Tender, Prequalification Frameworks, and negotiated Request for Proposals.
 - iv. **Document Drafting:** Knowledge and experience in defining drafting roles, managing workflow, and creating readable documents within a multi-member project team.
 - v. **Bidding Risks Management:** Knowledge and experience in creating clear contract scoping and pricing formats, managing material disclosures, and developing clear evaluation criteria and process rules.
 - vi. **Contract Administration:** Knowledge and experience in defining post-award contract administration roles, integrating scope management practices, and implementing contractor performance tracking systems.
 - vii. **Leadership and Innovation:** Knowledge and experience in promoting compliance across the organization, tracking industry trends, and championing the adoption of advanced practices, procedures, and technologies.
- b) **Benchmark Scoring:** We recommend that the Town implement the following public procurement knowledge and experience scoring matrix developed by our office, which is based on the following five benchmarks scored out of a 100-point scale:

- i. **Years of Experience:** Individuals should be credited with two points per year of public sector experience up to a maximum of 20 points. Individuals with only private sector procurement experience should be credited with only one point per year up to a maximum of ten points, since the lack of public sector experience means that there will be significant additional development required for that individual to function in the public procurement context.
- ii. **Core Competence:** Core competence should be scored out of 40 points divided equally between tendering knowledge and contracting skills:
 - **Tendering Experience:** The 20 Core Competence points for tendering experience should go to a proven background using different tendering formats. Three points should be allocated to basic experience in using simple tendering processes, such as Request for Quotation formats; three points should go to experience in using Request for Supplier Prequalification processes and establishing Framework Agreements; and another four points should go to experience using construction tendering and fixed-bid “Contract A” process contract formats. The remaining ten points should be allocated to experience in using negotiated RFP formats, with at least five of those ten points going to experience using advanced multi-staged negotiated RFP formats.
 - **Contracting Experience:** The other 20 Core Competence points should go to assessing the scope and depth of experience in different types of contracts. While the range of required contracting experience may vary depending on the needs of the specific organization, most large institutions typically require experience with general contracting, construction contracting, and technology contracting. When scoring for contracting experience, only five points should go to experience with basic goods and services, including general consulting services, and basic construction, using standardized design-bid-build stipulated-sum contracts. The remaining 15 points should typically be divided equally between: (i) advanced construction projects, including construction management, design-build, and integrated project delivery formats; (ii) complex technology projects calling on industry-specific knowledge of business process mapping, business continuity, confidentiality and privacy, intellectual property rights, and limitation of liability issues; and (iii) other specialized areas, ranging from specialized commodities to revenue-generating concession arrangements to emergency response contracts to architectural, banking, insurance, benefits, and advertising contracts.
- iii. **Advanced Factors:** Strong skills in writing, presenting, and negotiating are the most probative factors for separating advanced performers from the rank-and-file of the procurement industry. The final 40 remaining points should be allocated to these factors,

with the first 20 points scoring an individual's portfolio and track record of publications and presentations, and the final 20 points scoring the individual's negotiating experience. The 20 points for writing and presentations should reflect demonstrated thought leadership in the industry. For scoring the 20 negotiation experience points, up to ten points should be allocated to experience as an active member of the negotiation team in a complex project within the last five years. The final ten points should be allocated to experience in leading a negotiation team in those same situations over the last five years.

20. PROCUREMENT TRAINING: Are your core procurement and legal staff receiving the up-to-date training necessary to ensure that your institution is keeping pace with industry developments and meeting its due diligence duties?

- a) **Procurement Training Program:** The Town should establish a procurement training program for all staff that are involved in the procurement process. Our review found that:
- i. The Town is lacking a procurement training program.
 - ii. The Field Study raised concerns over the consistency of procurement orientation sessions for new employees. Our Field Study interviews noted an inconsistent approach by supervisors to ensuring that new employees read and understand applicable procurement rules and procedures.
 - iii. Feedback obtained through the Field Study suggests that the Town's public procurement obligations are not well understood by the broader organization and there is a lack of understanding across the organization about the appropriate division of roles and responsibilities between the Procurement Department and the business units.

21. ADVANCED NEGOTIATION TRAINING: Do your core procurement staff have the advanced negotiation training required to properly manage more complex procurement projects?

- a) **Negotiations Training Program:** The Town should establish a negotiations training program for key procurement staff in the Legal and Procurement Departments, along with staff in key business unit areas, in support of the successful execution of complex procurements projects. Our review found that:
- i. Negotiated RFP formats are not being used. The broader use of flexible formats would be more appropriate for more complex procurements.
 - ii. There is a lack of protocols or guidance provided regarding the appropriate procedures for using negotiation in a public sector procurement context.

VIII. INNOVATION

As discussed below, the Innovation category addresses the last three due diligence indicators: (22) Broader Organizational Awareness; (23) Business Process Improvement; and (24) Effective Use of Technology.

22. BROADER ORGANIZATIONAL AWARENESS: Is your organization proactively promoting a broader organizational awareness of proper procurement practices?

- a) **Organizational Awareness Initiative:** The Town should establish an initiative to better ensure broader organizational awareness of the procurement function and its importance to overall strategic objectives of the organization. Our review found that:
- i. There is significant room for improvement in terms of increasing the Procurement Department's traction within the Town and the business units' overall commitment to understanding and complying with legal obligations and best practices in public procurement.
 - ii. Field Study interviewees and survey respondents indicated that procurement rules and processes are not clearly communicated, and the Procurement Department is not using effective tools to communicate with the broader organization.
 - iii. There are no apparent communication plans or protocols in place to effectively disseminate information regarding procurement rules and procedures across the broader organization. The Field Study revealed that updates to the current versions of templates and forms are not shared, which leads to an unnecessary duplication of effort and process delays.
 - iv. The head of procurement holds a manager's position, which is an insufficiently senior position within the hierarchy of the organization. This limits the ability to ensure a broader organizational traction and awareness of the procurement process and procurement rules.

23. BUSINESS PROCESS IMPROVEMENT: Is your organization implementing procurement-centric business process improvement that embeds strategic design-planning and project management disciplines into the planning and execution of its procurements?

- a) **Business Process Improvement Initiative:** The Town should establish an initiative to integrate procurement-centric business process improvement across the organization. Our review found that:
- i. The Town should implement a clear design-planning process for high value procurements that aligns with the annual budgetary process to better ensure advanced planning and appropriate resourcing for major projects.

- ii. The Town would benefit from clearly documented project management practices and procedures to reduce the time required to run a bidding process and award a resulting contract.

24. EFFECTIVE USE OF TECHNOLOGY: Is your organization keeping up with industry practices and leveraging procurement-centric technological innovations that can enhance and accelerate its tendering cycles?

- a) **Leveraging Procurement-Centric Technologies:** The Town should implement procurement-centric business process improvement through the implementation of procurement-centric technologies, including solicitation drafting and design software, electronic evaluation platforms, and, where appropriate, electronic reverse auction platforms. Our review found that:
 - i. Other than fulfilling its obligation to electronically post open competitive procurement opportunities on Biddingo.com, the Town does not appear to be leveraging procurement-centric technology to facilitate its procurement processes.
 - ii. The Procurement Department's external website site has minimal information and includes no link to the policy or procedures. The page also does not contain information about current or past opportunities.
 - iii. Field Study participants mentioned that procurement review and approval processes remain primarily paper-based and difficult to follow.
 - iv. There is no automated drafting tool in place to aid in the drafting process.
 - v. There does not appear to be an electronic evaluation tool being used by the Town, although electronic submissions are accepted through Bids and Tenders.
 - vi. It is unclear whether the Town is accepting Bid Bonds through proper electronic means.
 - vii. Electronic auctions are not in use at the Town. While the current level of expenditures may not justify the immediate deployment of this technology, substantial savings could be achieved as operations expand if contractors were mandated to use electronic reverse auctions within their own supply chains and if the Town used electronic reverse auctions as the second-stage of its own future framework agreements.

E. Next Steps

During our briefing session scheduled for Wednesday May 12, 2021, we will present the Snapshot Review and discuss the findings and recommendations set out in this report.

Please let us know if you have any immediate questions or concerns.

Paul Emanuelli
General Counsel and Managing Director
Procurement Law Office