

CANADIAN PUBLIC SECTOR

Group Purchasing



Group Purchasing in Canada
*Reference Guide for Using NJPA Master
Framework Agreements in Canada*

BACKGROUND

Background for Using NJPA Master Framework Agreements in Canada

Use of NJPA Master Framework Agreements Not Prohibited by Canadian Rules

As noted in the July 2014 Whitepaper: National Joint Power Alliance's National Cooperative Contract Solutions and Group Purchasing in the Canadian Public Sector prepared by the Procurement Law Office for NJPA, public purchasing in Canada is governed by a web of overlapping and disparate sources, including trade treaties (international, domestic and regional), statutes and regulations, and guidelines and directives ("statutory standards"). These sources share several themes with respect to the treatment of group purchasing, supplier rosters and master contract arrangements. The Canadian authorities do not appear to contain any prohibitions against the use of NJPA's Master Framework Agreements by Canadian public sector entities. With respect to the implementation of group purchasing in general, the statutory standards are either silent on or expressly enable group purchasing in accordance with the general open procurement rules that apply to prequalification procedures, rosters and master contracts. The statutory standards generally do not contain any specific implementation rules or protocols for group purchasing. The same governing rules that apply to any other public sector tendering process would therefore also apply to group purchasing initiatives.

Compliance with Canadian Rules When Creating and Using Master Framework Agreements

Common themes in the statutory standards with respect to supplier prequalification, rosters and master contracts include: (i) a prohibition against supplier discrimination on the basis of geographic origin and against the use of biased and branded specifications; (ii) a requirement for openness and transparency regarding selection criteria and operation of second-stage selection processes; and (iii) a prohibition on closed or perpetual source lists or rosters that serve to exclude suppliers. In order to use NJPA Master Framework Agreements, Canadian public sector institutions should therefore ensure that their processes when using those contracts meet the general obligations of open, fair and transparent procurement as set out in the specific statutory standards that apply to each institution. As with any other group purchasing initiative that creates a master agreement with multiple assignments from multiple institutions (such as SAs, SOs, VORs, etc.), NJPA Master Framework Agreements should comply with the open competitive transparency requirements contained in the Canadian statutory standards. This would include: (i) the use of public solicitations with public postings using methods recognized within Canada; (ii) clearly identified and scoped requirements with anticipated purchasing volumes, clear and finite terms setting out the duration of the arrangement, and refresh protocols where applicable; and (iii) transparent process rules and evaluation criteria for the award to specific suppliers.

The award of discrete contract assignments by Canadian public sector entities using NJPA Master Framework Agreements should be conducted in accordance with the transparent selection protocols established under each separate arrangement. All internal approvals would have to be obtained by the public sector entity to confirm that the sourcing decision falls within the general and institution-specific public procurement rules. Since each arrangement will vary in detail, there would be no single rule-compliant method for a Canadian public sector entity to source its requirements under these master agreements. However, depending on the details of the particular Master Framework Agreement, the sourcing mechanisms could include: (i) direct call-ups by the Canadian public sector entity where a winner-take-all arrangement has been established for a particular category of requirements and appropriate internal approvals are obtained by the institution; and (ii) simplified invitational request for quotation processes when call-ups are required from a roster of different suppliers offering the same requirements.

To help enable the use of NJPA Master Framework Agreements, we have prepared the implementation guidelines set out below in Part 2: Procedures for Using NJPA Master Framework Agreements in Canada to assist public sector institutions with the use of those contracting arrangements. When using these guidelines, public institutions should refer to the more detailed analysis provided in the above-noted whitepaper and should also seek qualified situation-specific advice to better ensure that they are meeting their open procurement obligations in the specific circumstances.

Procedures for Using NJPA Master Framework Agreements in Canada

To better ensure compliance with their open procurement obligations, Canadian public sector institutions should consider the procedures set out below when using NJPA Master Framework Agreements:

Step #1

Determine Purchase Value Threshold

Confirm the estimated value of the contemplated contract.

Determine whether that value exceeds the purchasing institution's threshold for complying with open competition requirements.

- If yes, proceed to Step 2: Determine Compliance with Open Posting Requirements.
- If no, proceed to Step 5: Document the Draw-Down Transaction.

Step #2

Determine Compliance with Open Posting Requirements

Determine whether the original NJPA RFP that established the specific master framework agreement met Canadian open posting requirements.

- If yes, proceed to Step 4: Engage in a Technical Value-for-Money Assessment.
- If no, proceed to Step 3: Notice of Proposed Procurement.

Step #3

Notice of Proposed Procurement

Issue a Notice of Proposed Procurement ("NPP") in accordance with the public posting procedures of the purchasing institution. In the NPP, notify the market of the intention to potentially purchase under the specific NJPA master framework agreement, as well as under any other existing group purchasing framework agreements that may be under consideration in parallel to the NJPA master framework agreement.



Step #4

Engage in a Technical Value-for-Money Assessment

Conduct a technical value-for-money assessment (“TVMA”) to determine whether the offering(s) available under the specific framework agreement(s) meet the purchasing institution’s technical requirements and operational needs and offer value for money.

In conducting this analysis, the purchasing institution should consider whether there are any master framework agreements available other than the NJPA offering as a comparator for documenting its TVMA. The purchasing institution should also document its comparison of the NJPA master agreement offering against the alternative of conducting a separate stand-alone procurement. The TVMA should include the following considerations:

- **Technical Compatibility:** The adequacy of the offering(s) under the contemplated master framework agreement(s) in meeting the purchasing institution’s technical requirements.
- **Pricing:** The pricing offered under the contemplated master framework agreements(s) when compared to the pricing that would likely be obtained under a separate stand-alone procurement. This step may include seeking informal quotes or conducting market research from other prospective suppliers who may be available to provide the requirements under separate contractual arrangements.
- **Alternative Transactional Costs:** The estimated transactional costs (including staff time and other related costs) to the purchasing institution of conducting a separate stand-alone procurement for the contemplated contract when compared to the offerings available under the contemplated master framework agreement(s).
- **Timing:** The timing of conducting a separate stand-alone procurement when compared to purchasing under the contemplated master framework agreement(s).

Where the purchasing institution is satisfied that a master framework agreement offering represents the best solution from the standpoint of technical compatibility, pricing, transactional costs and timing, it should obtain the necessary internal approvals to proceed to Step 5: Document the Draw-Down Transaction.

Step #5

Document the Draw-Down Transaction

Using the standard contract formalization protocols appropriate for the specific purchasing institution and for the specific master framework agreement, document the draw-down transaction to confirm the specific requirements and related pricing and performance terms.

Sector and Jurisdiction-Specific Technical Notes:

The following provides a summary of additional protocols relevant to using group purchasing arrangements across Canada. Further details are provided in the July 3, 2014 reference guide entitled *Whitepaper: National Joint Power Alliance's National Cooperative Contract Solutions and Group Purchasing in the Canadian Public Sector* prepared by the Procurement Law Office for NJPA.

Please see <http://www.procurementoffice.ca/wp/wp-content/uploads/2014/06/NJPA-White-Paper-Final.pdf> online for more details. The information contained therein is only current to the date noted above.



Provinces and Territories of Canada

Territories:

- 1 Northwest Territories
- 2 Nunavut
- 3 Yukon

Provinces:

- 4 Alberta
- 4 British Columbia
- 4 Saskatchewan
- 5 Manitoba
- 6 New Brunswick
- 7 Newfoundland and Labrador
- 8 Nova Scotia
- 9 Ontario
- 10 Prince Edward Island



***QUEBEC** - NJPA is no longer pursuing partnerships in Quebec, as legal research has shown that NJPA's contracting process is not compliant with current Quebec procurement code, specifically, code which requires solicitation and all contract documentation to be in French.

PROCEDURES

Federal Government:



Federal Government: The federal procurement regime in Canada has a complex series of rules relating to the use of pre-qualifications and the maintenance of supplier rosters. Canadian federal entities should consult the Whitepaper and their specific federal rules for more details.

Provinces and Territories:

- 1 **Northwest Territories:** The Northwest Territories Government Procurement Guidelines contain provisions that relate to what they refer to as Supply Service Arrangements (“SSAs”). These require invitational second-stage processes to award discrete call-ups when those assignments are valued above prescribed dollar value thresholds. Public sector entities in this territory should refer to the Whitepaper and their guidelines when considering the use of group purchasing options.
 - 2 **Nunavut:** The Nunavut Contracting Procedures Manual expressly addresses the creation of Standing Offer Agreements. Public sector entities in this territory should refer to the Whitepaper and to their procedure manual when considering the use of group purchasing options.
 - 3 **Yukon:** Yukon’s *Consolidated Contracting and Procurement Regulation and Contracting and Procurement Directive* expressly addresses the use of Standing Offers and Standing Agreements in a manner similar to the federal government. Yukon public sector institutions should refer to the Whitepaper and their regulation and directive for more details when considering the use of group purchasing options.
 - 4 **Alberta, British Columbia and Saskatchewan:** The *Trade Labour and Mobility Agreement* (originally signed by British Columbia and Alberta) and *New West Partnership Trade Agreement* (expanded to add Saskatchewan to the western trading block) are very similar in coverage to the *Agreement on Internal Trade* and do not contain any specific obligations on group purchasing other than the general open procurement obligation summarized above in Part 1.
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 - 4
 - 5 **Manitoba:** The Government Purchases Act for the province of Manitoba does not explicitly prohibit group purchasing.
 - 6 **New Brunswick:** The New Brunswick *Procurement Act* requires specific Ministerial approval before public sector institutions can use a group purchasing arrangement. New Brunswick entities should consult the Whitepaper for more details and obtain the required approval before proceeding with any group purchasing opportunity.
 - 7 **Newfoundland and Labrador:** The Province of Newfoundland and Labrador is in the process of implementing new procurement legislation. Public sector entities in this province should consult the Whitepaper for more details and obtain up-to-date advice prior to using any group purchasing opportunities.
 - 8 **Nova Scotia:** Under Nova Scotia’s *Public Procurement Act*, group purchasing in Nova Scotia is treated according to the same open procurement standards that apply to other public procurement in the province.
 - 9 **Ontario Ministries and Agencies:** The *Management Board of Cabinet Procurement Directive* – February 2014 was revised to specifically address what it refers to as “joint procurements”. These new requirements are more stringent than other rules applicable to group purchasing and include a requirement for prior approval for each contemplated joint procurement. Ontario Ministries, and Agencies captured as “Other Included Entities”, should consult the Whitepaper and Directive to ensure that they comply with these obligations when considering the use of any group purchasing opportunities.
- Ontario Broader Public Sector:** The *Broader Public Sector Procurement Directive* is silent on buying groups. However, the government also issued a companion document, the *Broader Public Sector Procurement Directive Implementation Guidebook*, which addresses the subject in Section 8 and generally supports the use of group purchasing without adding any specific additional obligations other than the general open procurement obligations summarized in Part 1 above.
- 10 **Prince Edward Island:** The Prince Edward Island Public Purchasing Act does not explicitly prohibit group purchasing.

SERVICE IS OUR FOUNDATION

At NJPA, we are driven to provide efficient public service by offering world class vendor solutions through our master framework agreement/cooperative contract purchasing program. The common needs of our members as they face budgeting and purchasing challenges, combined with our desire to effectively serve our member agencies, will lead NJPA in our commitment and efforts.

OUR PURPOSE: The general purpose of NJPA is to serve our member agencies by conducting an open, transparent, and competitive process in determining awarded master framework agreements. The master framework agreements are coordinated and delivered through a cooperative effort between NJPA and our members. NJPA membership is offered to government, education and all non-profit agencies nationwide and in Canada. Member agencies are responsible for interpreting their own jurisdictional purchasing laws in verifying that NJPA has met the relevant solicitation or tendering requirements.

OUR MEMBER COMMITMENT: NJPA is committed to serving you, our member agency, through a continuous effort to identify and meet your present and future needs in a measurable, cost-effective manner. We will thoroughly research the industry, and as a result, deliver the opportunity to purchase the best products and services, with the lowest possible price, through internationally leveraged master framework agreements.

We look forward to working closely with you and your agency, listening to your needs and interests and providing valued master framework agreement solutions.

On behalf of the NJPA Board of Directors and our staff, we are committed to earning your trust and respect as a valued master framework agreement provider.

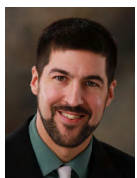


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Led by author Paul Emanuelli, recognised by *Who's Who Legal* as one of the top ten public procurement lawyers in the world, the Procurement Law Office provides public institutions with standard-setting services delivered by a team of lawyers dedicated to the practice of government procurement.

With a client portfolio spanning six time zones and covering every sector of government, the Procurement Law Office serves the public interest like no other law firm in Canada. We bring a unique preventative philosophy to procurement law, promoting the proactive avoidance of legal disputes and developing systemic institutional solutions to help clients reduce their risks, accelerate their procurement cycles and meet critical compliance duties.

We provide legal support to clients through all stages of the procurement process, offering institutional reviews, legal advice and opinions, template and protocol development, project support and litigation services, and have updated the procurement practices of major institutions across all sectors of government and industry. With decades of combined in-house government experience, our lawyers know the procurement cycle from the inside out.



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