

Rethinking Government Contracts: A Conceptual Model

Version Dated: February 13, 2020

Canada 

Setting the Context

Advances in technology and the growing recognition of the important role procurement plays in achieving desired economic and social objectives have given rise to significant opportunities to automate and standardize contract assembly and management. The Government of Canada (GoC), and specifically Public Services and Procurement Canada (PSPC) as the Government's central purchasing agent, is no exception to seeing the value of modernizing procurement.

As a result, PSPC has been examining its current contractual documents to determine how to further streamline and modernize its contracts to make them simpler and administratively less burdensome. This work is made even more important as the GoC collectively transitions from a largely manual, paper-based process to a digitally-enabled environment as a result of the implementation of the e-Procurement Solution.

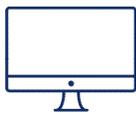
One of our primary goals at PSPC is to make the buying process less burdensome for both suppliers and government buyers. This key Government of Canada priority is reflected in the December 2019 mandate letter to the Minister of Public Services and Procurement from the Prime Minister of Canada. It stresses the need to continue on the path to streamline and modernize federal procurement through simplification, leveraging technology and reducing barriers to participation.

This commitment aims to address supplier concerns that the federal procurement process is too complex and administratively burdensome. Modernizing contracts will take shape in many different ways but fundamentally it is about instituting continuous improvement and finding ways to do things more effectively while leveraging the techniques and tools available today. Emerging technologies are accelerating the need for modernization and as a result both public and private sector organizations are rethinking the way they procure.

"... continue the modernization of procurement practices so that they are simpler, less administratively burdensome, user friendly, deploy modern comptrollership, encourage greater competition and include practices that support our economic policy goals, including innovation, as well as green and social procurement. Your implementation of the e-Procurement Solution will be central to this priority."

Minister of Public Services and Procurement
Mandate Letter, December 2019

What does that mean for Government of Canada contracts? Well, that means reexamining its contractual documents to:



Respond to Technological Innovation. There is a business imperative to digitize to:

- Keep pace with today's business practices.
- Help support the transition to the e-Procurement Solution.



Be More Efficient. Improving contracts by leveraging new techniques and technologies to have contractual documents that are:

- More intuitively, easily and rapidly developed and managed.
- Consistently structured while offering some flexibility.
- Adaptable and responsive to changing market demands.



Be Clearer and Simpler. Improving contracting documents to make it easier for both suppliers and government to do business with one another as a result of contracts that:

- Use plain language, wherever possible.
- Contain all the necessary contractual information in one place.
- Present the content in a way that is clearer and faster to read and more importantly, easier to understand.



Foster Better Relationships. Developing and maintaining strong and effective relationships by ensuring contracts are:

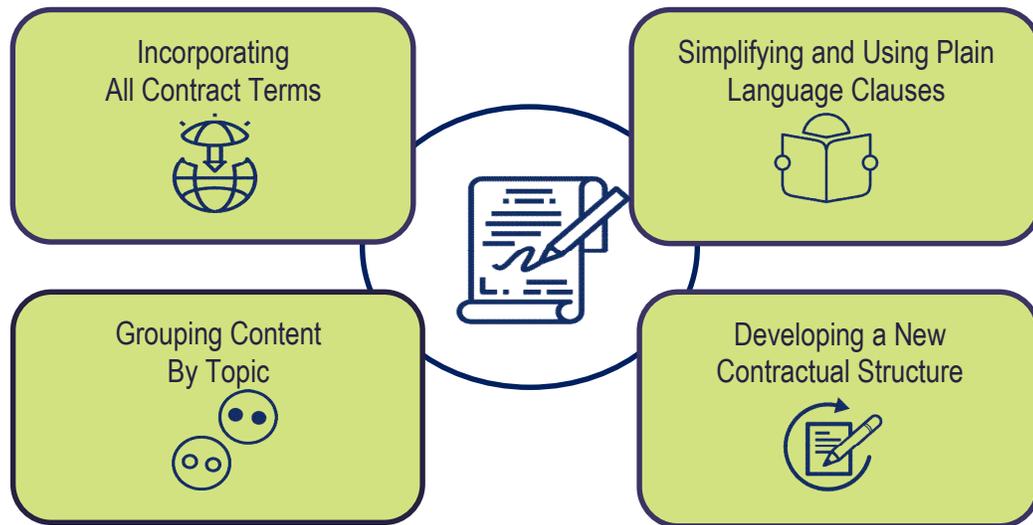
- Useful business tools for everyday use and effective contract management.
- Relatable to everyone, not just lawyers.
- Adaptable to current and changing market realities.
- Rooted in creating a business climate that supports innovation, competition and achieves better value.

With these overarching objectives in mind, PSPC has undertaken a significant review of existing contractual documents with a view to:

- ✓ Examine the current state of its contractual documents.
- ✓ Identify and remove content that is outdated or duplicative.
- ✓ Apply best practices in contract and commercial management.
- ✓ Develop clearer and simpler language to improve the overall readability of its documents in support of fostering better contractual relationships.

This review has involved, among other things, examining more than 7,000 PSPC executed contractual documents using artificial intelligence and world-class expertise.

Through this work, key elements of the changes being considered can be broadly categorized in terms of:



Incorporating All Contract Terms

To improve the readability and understanding of PSPC contracts, the new model does not include reference codes, which are currently a predominant element of the procurement assembly process. Reference codes are those clauses and conditions that bidders and suppliers must refer to the SACC Manual to obtain the full text. They are only incorporated by reference in the solicitation or contractual document.

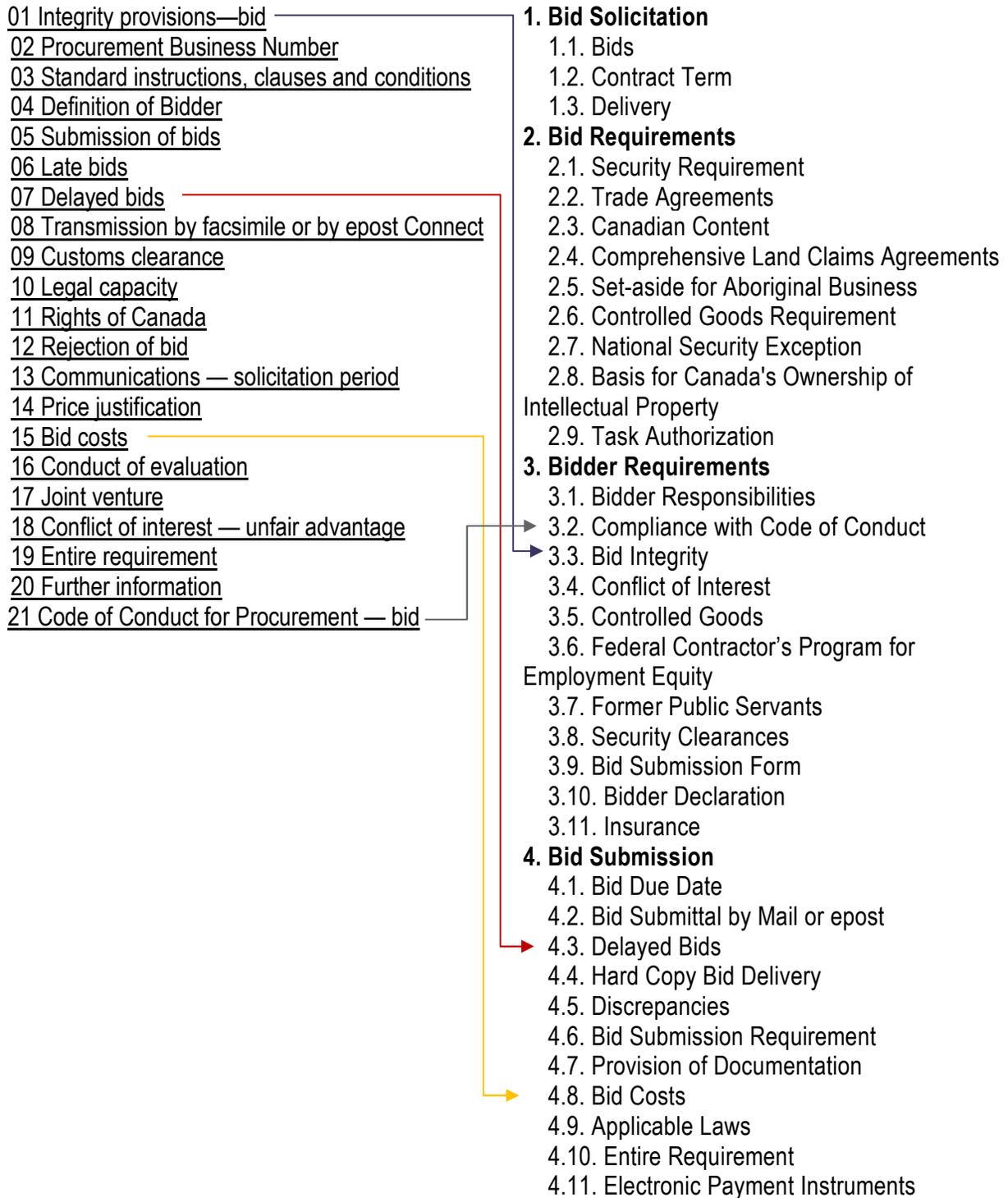
Reference codes are not used in the new structure, but the clause content contained in the Standard Instructions (e.g., 2003, 2004) and General Conditions (e.g., 2030, 2035, and 2040) has been mapped and incorporated directly into the bid solicitation and resulting contract templates. Figure 1 below provides a visual representation of the mapping process that was undertaken to ensure all content has been incorporated and mapped into the new contract model.



Figure 1: Example of Mapping Reference Codes to Incorporate into the New Contract Model

SACC Manual – Standard Instructions 2003

Table of Contents of New RFP Model





Grouping Contractual Content by Topic

Another change made in the new contract model pertains to fundamentally rethinking the organization and presentation of the content in PSPC contractual documents so that clauses are grouped together by topic. In best-practice contracts, all related terms are grouped together in order to clearly understand the terms of the contract (e.g., all invoicing and payment terms are grouped together and all definitions are found in an Annex).



By way of example, please refer to Figure 2 below. This figure is a visual representation of the content within a sub-clause (05 (2018-05-02) – Submission of Bids) within the reference code 2003, which pertains to the standard instructions for competitive contracts.

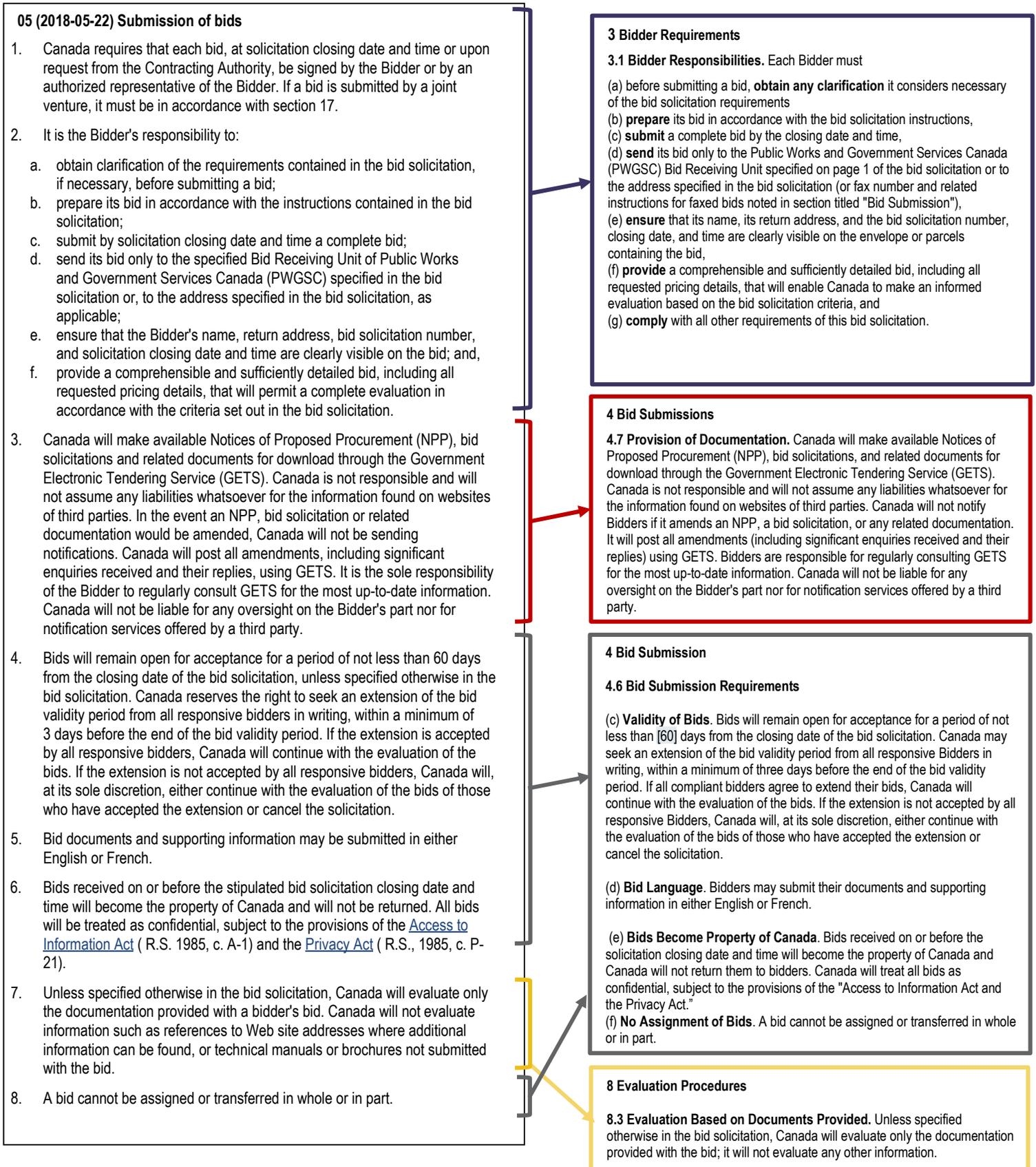
While the title of this sub-clause indicates that the content pertains to the submission of bids, upon closer inspection one will find elements unrelated to the bid submission process or elements that would be better placed in another area in the document. In particular one can find concepts related to bid evaluation procedures, responsibilities of bidders in the submission of the bid and that Canada will not notify the Bidder if there are amendments to the Notice of Proposed Procurement (NPP).

The new contract model column in Figure 2 is meant to illustrate how content within the bid solicitation has been moved to different sections within the new contract model. It is important to note, however, that the operational or legal intent within that clause was not changed, just where it was placed within the bid solicitation and simplified, where possible.

Figure 2: Rethinking Content Placement in Contractual Documents – An Example

SACC Manual Reference Code 2003

New Contract Model





Simplifying and Using Plain Language Clauses

Language simplification is a core concept of contract modernization which is trending globally. Increasingly, public and private sector organizations are undertaking detailed and comprehensive reviews of their contractual terms and conditions to see how they can be written and structured more simply and clearly. The value in doing this is that it increases each party's understanding of their roles and responsibilities, significantly reduce disputes and expedites contract award.

With those advantages in mind, the content contained within the new contract model has been redrafted to focus on simplification and plain language. Some of the key principles that have been adopted include:

- Headings: Using informative headings that serve as a summary of the contents.
- Clauses: Breaking text into smaller units with one substantive topic per clause.
- Sentences: Drafting in short, declarative sentences.
- Words: Using standard language, without jargon or legalese wherever possible.
- Punctuation: Using punctuation to aid readability.

To further improve the readability of our contracts, the new contract model has been updated to be simpler and include more whitespace. As such, the contract presentation style or format has changed. For instance, long, complex paragraphs were broken down into separate clauses, each covering a single concept only. In addition, clauses were given a descriptive caption, much like a sub-title, for ease of reference. While this may appear at first glance to be relatively inconsequential, these changes are some of the most effective ways to improve the readability of contracts.

The example below shows some of the contract presentation style changes.

Use of Captions – An Illustration

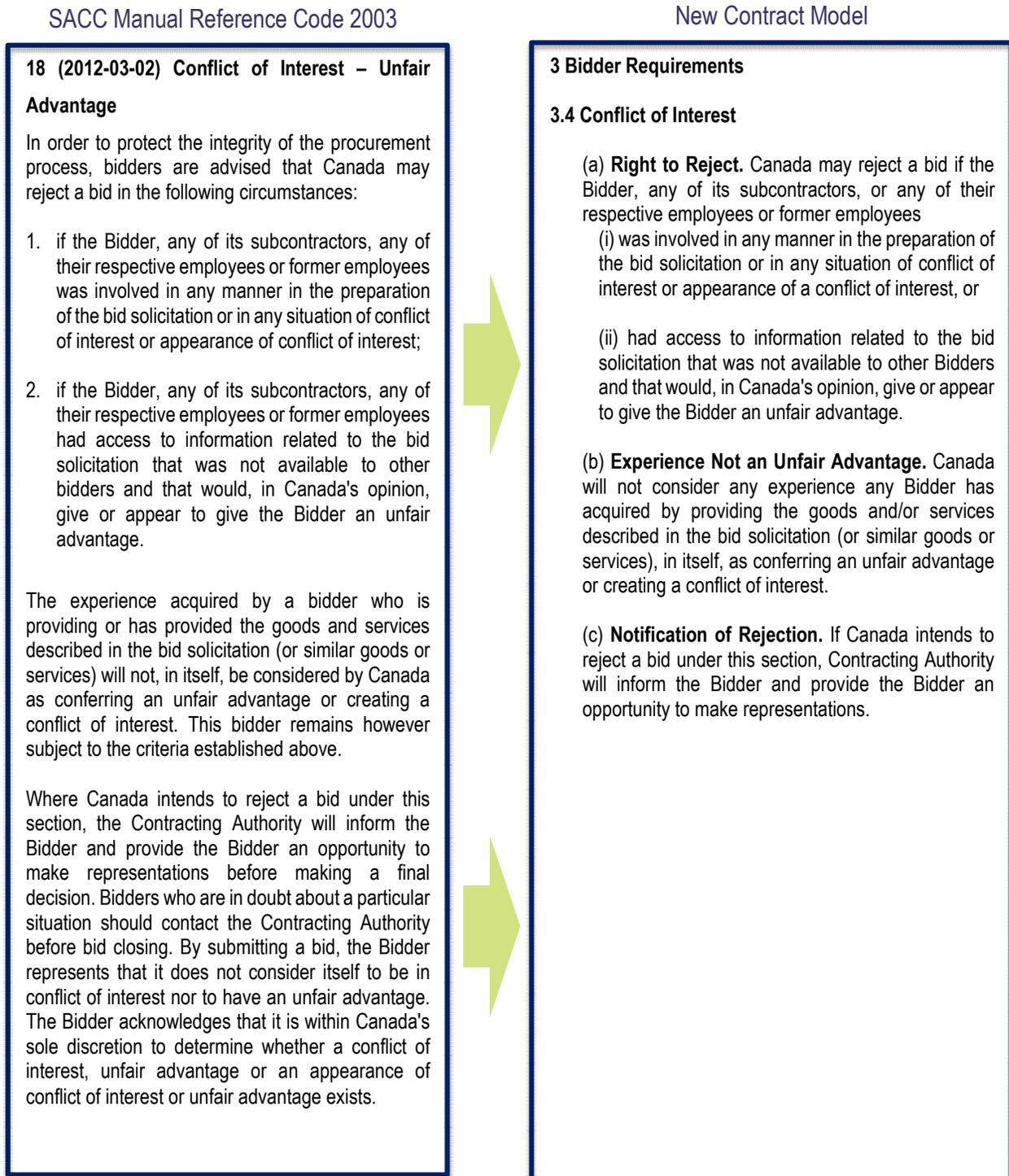
2.1. **Initial Term.** The Work is to be performed during the period of [DATE].

29.8. **Applicable Laws.** Any resulting contract must be interpreted and governed, and the relations between the parties determined, by the laws in force in [PROVINCE].

29.13. **Priority of Documents.** If there is a discrepancy between the wording of any documents that appear on the list, the wording of the document that first appears on the list has priority over the wording of any document that subsequently appears on the list.

Figure 3 is a visual representation of what the modernization of contractual content looks in this model.

Figure 3: Modernizing and Simplifying Contractual Content: An Example





Developing a New Contractual Structure

The last and perhaps most important change being considered is related to ensuring that our contractual documents are structured as effectively and efficiently as possible. Below is a description of current thinking related to how a bid solicitation and resulting contract could be reimagined to improve the contracting process. Please be advised that the changes being proposed only form the basis of a conceptual model which is still under development and review.

Understanding the Bid Solicitation

The bid solicitation conceptual model is driven by, among other things, the desire to:

- Make it easier and simpler for suppliers to determine if they are willing and/or able to bid on a given procurement.
- Make it easier and faster for bidders to prepare and submit a bid.
- Structure the bid solicitation so bidders can more clearly understand and comply with the requirements within the solicitation.
- Make it easier for procurement officers to manage the bid solicitation process.
- Increase competition and achieve better value for the Crown by minimizing errors or omissions by bidders that could render a bid non-responsive.



Figure 4 below represents a high-level description of the bid solicitation conceptual model.

Figure 4: Bid Solicitation Table of Contents: A High-Level Description

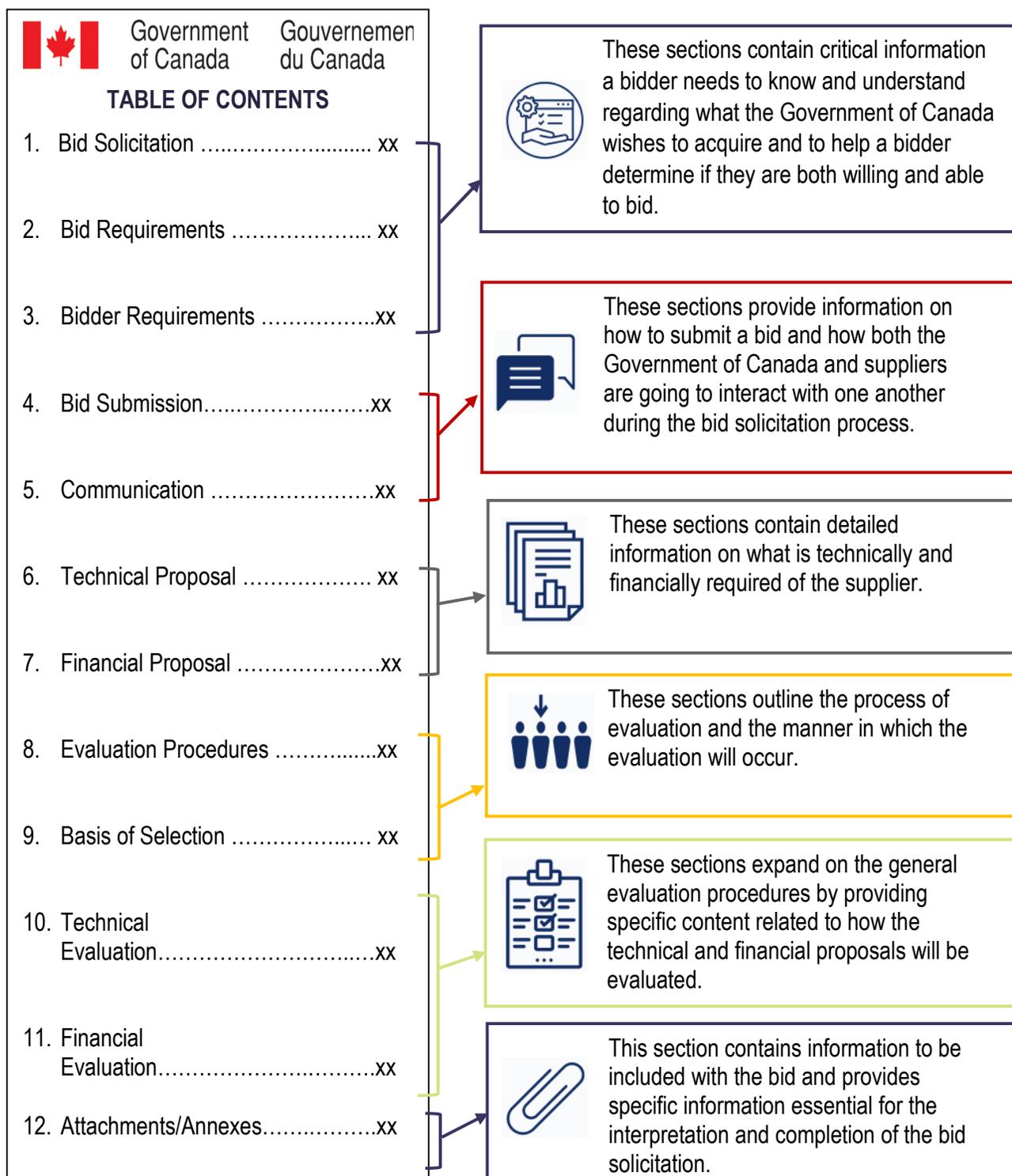


Figure 5 is meant to provide more detail in terms of the types of content one may find within some of the broader elements of the bid solicitation. This table of contents is for illustrative purposes only and does not represent an exhaustive list of content.

Figure 5: A Bid Solicitation Table of Contents: A Working Example: For Illustration Purposes Only

	Government of Canada	Gouvernement du Canada	4.10. Entire Requirement 4.11. Electronic Payment Instruments
Table of Contents			5. Communications
1. Bid Solicitation			5.1. Bid Communications
1.1. Bids			5.2. Bidders' Conference
1.2. Contract Term			5.3. Site Visit
1.3. Delivery			5.4. Bid Debriefings
2. Bid Requirements			5.5. Improvement of Requirement During Solicitation
2.1. Security Requirement			6. Technical Proposal
2.2. Trade Agreements			6.1. Technical Bid
2.3. Canadian Content			6.2. Substantiation Information
2.4. Comprehensive Land Claims Agreements			6.3. Previous Similar Projects
2.5. Set-aside for Aboriginal Business			6.4. Proposed Resources
2.6. Controlled Goods Requirement			6.5. Customer References
2.7. National Security Exception			7. Financial Proposal
2.8. Basis for Canada's Ownership of Intellectual			7.1. Financial Bid
Property			7.2. Pricing
2.9. Task Authorization			7.3. Exchange Rate Fluctuation
3. Bidder Requirements			8. Evaluation Procedures
3.1. Bidder Responsibilities			8.1. Assessment
3.2. Compliance with Code of Conduct			8.2. Evaluation Based on Documents Provided
3.3. Bid Integrity			8.3. Evaluation Team
3.4. Conflict of Interest			8.4. Evaluation of Canadian Content
3.5. Controlled Goods			8.5. Right to Request Information
3.6. Federal Contractor's Program for Employment Equity			8.6. Rights of Canada
3.7. Former Public Servants			8.7. Rejection of Bid
3.8. Security Clearances			9. Basis of Selection
3.9. Bid Submission Form			9.1 Basis of Selection
3.10. Bidder Declaration			10. Technical Evaluation
3.11. Insurance			10.1. Mandatory and Point Related Technical Criteria
4. Bid Submission			10.2. Demonstration
4.1. Bid Due Date			10.3. Samples
4.2. Bid Submittal by Mail or epost			11. Financial Evaluation
4.3. Delayed Bids			11.1. Mandatory Financial Criteria
4.4. Hard Copy Bid Delivery			11.2. Blank Prices
4.5. Discrepancies			11.3. Evaluation of Price
4.6. Bid Submission Requirement			11.4. Price Justification
4.7. Provision of Documentation			12. Attachments and Annexes
4.8. Bid Costs			Attachment - Bid Solicitation Definitions
4.9. Applicable Laws			Attachment - Bid Submission Form
			Attachment - Statement of Work
			Attachment - Bidder Declaration Form
			Annex - Resulting Contract Terms and Conditions

Understanding the Resulting Contract

The new resulting contract being considered is organized into “building blocks” or broad groupings of core contract clauses with a similar or related purpose. These building blocks are intended to establish a high-level contract structure to reflect the essential elements of a resulting contract including, among other things:



Clearly describing the nature of the acquisition or more generally, the “deal”.



Clearly defining the obligations and requirements of suppliers.



Clearly defining the obligations and requirements of the Government of Canada.



Establishing appropriate protections to ensure that the other party performs their obligations as intended.



Outlining rights and remedies in the event of unintended circumstances that cause loss to one of the contracting parties.



General legal terms and conditions covering the interpretation and enforcement of the agreement.



Figure 6 below is an example of a table of contents to help illustrate what these fundamental building blocks would look like in practice and how they are organized to form the structure of the resulting contract.

Figure 6: Resulting Contract Table of Contents: A High-Level Description: For Illustration Purposes Only

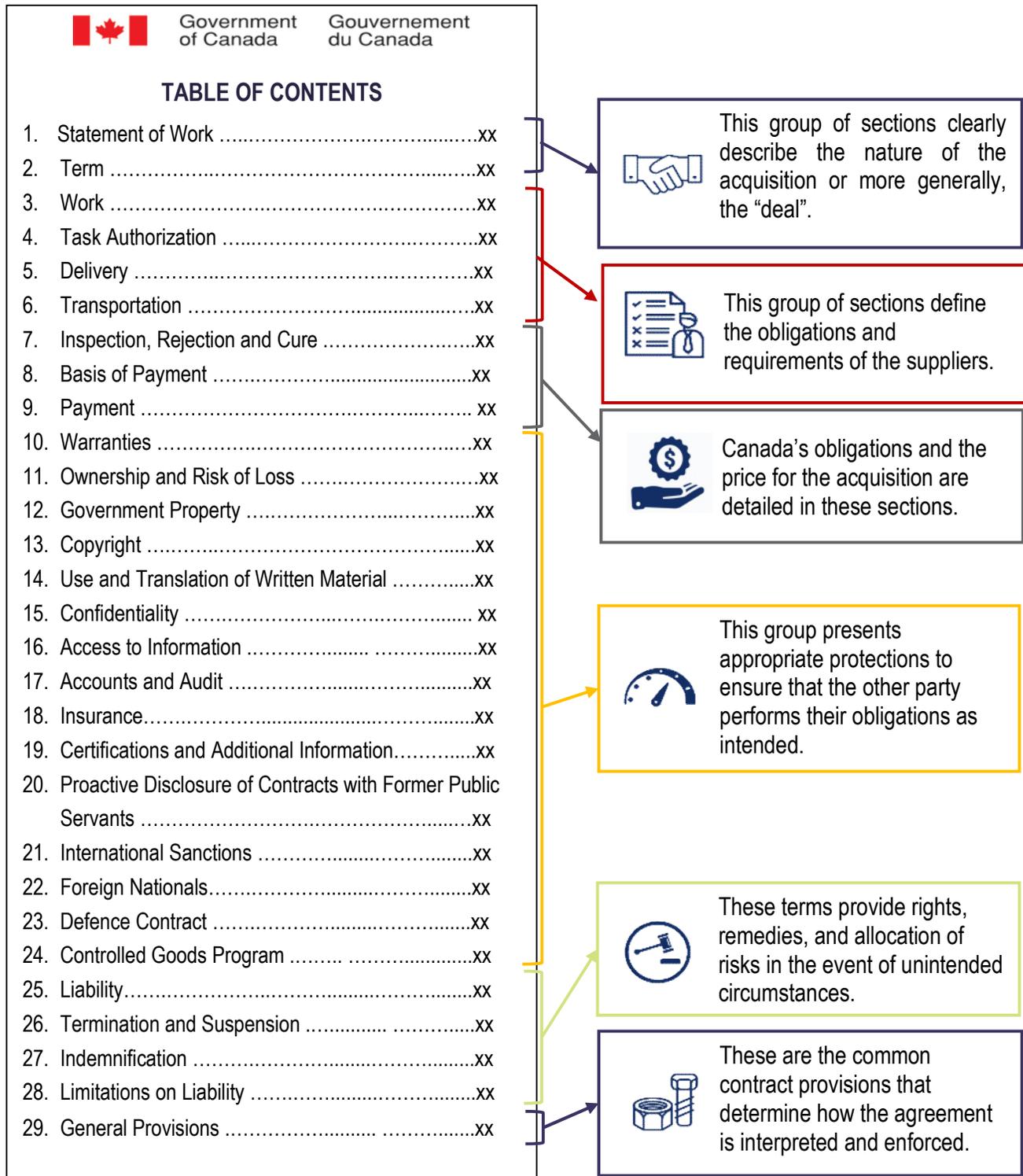


Figure 7 provides more detail of content one may find within some of the broader elements of the resulting contract. This table of contents is for illustrative purposes only and does not represent an exhaustive list of content.

Figure 7: Resulting Contract Table of Contents: A Working Example – For Illustration Purposes Only

 Government of Canada	Gouvernement du Canada	
Table of Contents		
<ol style="list-style-type: none"> 1. Statement of Work 2. Term <ol style="list-style-type: none"> 2.1. Initial Term 2.2. Extended Term 3. Work <ol style="list-style-type: none"> 3.1. Conduct of the Work 3.2. Specifications 3.3. Personnel 3.4. Subcontracts 3.5. Option to Purchase 4. Task Authorization <ol style="list-style-type: none"> 4.1. Form and Content of TA 4.2. Contractor's Response to TA 4.3. TA Limit and Authorities for Validly Issuing TAs 4.4. Periodic Usage Reports 4.5. Refusal of TAs 4.6. Consolidation of TAs for Administrative Purposes 4.7. CLCA 5. Delivery <ol style="list-style-type: none"> 5.1. Delivery Obligations 5.2. Delivery Requirements 5.3. Delivery Costs 6. Transportation <ol style="list-style-type: none"> 6.1. Transportation Costs 6.2. Transportation Carriers' Liability 6.3. Shipment Documentation 7. Inspection, Rejection, and Cure <ol style="list-style-type: none"> 7.1. Inspection 7.2. Rejection and Cure 8. Basis of Payment <ol style="list-style-type: none"> 8.1. Fees 8.2. Limitation of Expenditure 8.3. Changes and Modifications 9. Payments <ol style="list-style-type: none"> 9.1. Invoices 9.2. Payment Period 9.3. Late Payments 9.4. Right of Set-Off 9.5. Electronic Payment of Invoices 10. Warranties <ol style="list-style-type: none"> 10.1. Goods Warranty 10.2. Services Warranty 10.3. Canada's Right to Remedy 10.4. Extension of Warranty 11. Ownership and Risk of Loss <ol style="list-style-type: none"> 11.1. Property Rights 11.2. Risk of Loss 11.3. Title 12. Government Property <ol style="list-style-type: none"> 12.1. Use of Property 12.2. Care of Property 12.3. Return of Property 12.4. Inventory of Property 	<ol style="list-style-type: none"> 13. Copyright <ol style="list-style-type: none"> 13.1. Ownership of Copyright in Material 13.2. No Use of Material 13.3. Moral Rights 13.4. Definition of Material 14. Use and Translation of Written Material <ol style="list-style-type: none"> 14.1. Copyright and Right to Use 14.2. Translated Materials 15. Confidentiality <ol style="list-style-type: none"> 15.1. Confidentiality Obligations 15.2. Use Solely for the Purpose 15.3. Return of Information 15.4. Non-Confidential Information 15.5. Protected Information 16. Access to Information 17. Accounts and Audit <ol style="list-style-type: none"> 17.1. Accounts and Records 17.2. Time Records 17.3. Records Retention 17.4. Government Audit 18. Insurance <ol style="list-style-type: none"> 18.1. Insurance Requirements 18.2. Additional Insurance 18.3. Certificate of Insurance 19. Certifications and Additional Information 20. Proactive Disclosure of Contracts with Former Public Servants 21. International Sanctions <ol style="list-style-type: none"> 21.1. Limitations 21.2. Contractor Obligations 22. Foreign Nationals 23. Defence Contract <ol style="list-style-type: none"> 23.1. Governance of Contract 23.2. Title to Work 24. Controlled Goods Program 25. Liability 26. Termination and Suspension <ol style="list-style-type: none"> 26.1. Termination on Notice 26.2. Termination on Default 26.3. Suspension of the Work 26.4. Survival 27. Indemnification 28. Limitations on Liability 29. General Provisions <ol style="list-style-type: none"> 29.1. Independent Contractor 29.2. Entire Agreement 29.3. Amendment 29.4. Counterparts 29.5. Assignment 29.6. Successors and Assigns 29.7. Notice 29.8. Applicable Laws 29.9. Powers of Canada 29.10. Excusable Delays 29.11. Waiver 29.12. Severability 29.13. Priority of Documents 	