

New Construction Services Regulation under the *Procurement Act*

September / October 2022



Information Session

- **Purpose:**

- To inform on the content of and answer questions pertaining to the new Construction Service Regulation.



In this Presentation

- Background
- New Construction Services Regulation
 - Highlights of Changes
 - Procurement Methods
 - Exemptions
 - Procurement Thresholds
 - Preferential Treatment
 - Flexible Formats and Modern Tools
- Questions



The image features a construction site at sunset or sunrise, with a warm orange and yellow sky. In the background, several cranes and the skeletal framework of buildings under construction are visible. In the foreground, a white hard hat with a black chin strap sits on a surface. Next to it are a pair of clear safety glasses with red temples and a rolled-up set of blueprints. A black pen lies horizontally across the bottom of the frame, resting on more blueprints. A semi-transparent olive-green rectangle covers the left side of the image, containing the word "Background" in white text.

Background

Background

- In November 2020 government officially launched the **New Brunswick First Procurement Strategy and Action Plan**.
- Joint initiative involving Service New Brunswick, Transportation and Infrastructure and Opportunities New Brunswick.
- The Strategy and Action Plan are based upon extensive consultations with suppliers and industry associations in the province.
 - The modernization and streamlining of procurement practices was proposed by the supplier community.
- Action Plan items include:
 - Government will have one organization, SNB Strategic Procurement, responsible for all procurement (goods, services, construction services)
 - **Government will have one piece of legislation will govern all procurement** (goods, services and construction services)



- Two pieces of legislation currently govern procurement in NB:
 - ***Procurement Act***
 - Covers the procurement of Goods and Services
 - Minister of Service New Brunswick is responsible
 - ***Crown Construction Contracts Act*** (CCCA)
 - Covers the procurement of Construction Services
 - Minister of Finance and Treasury Board is responsible
- Decision was made to consolidate these two pieces of legislation into one and dissolve the CCCA.
 - A new Construction Services Regulation will be created under the *Procurement Act*
 - Implementation: **December 1, 2022.**

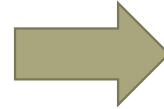
Background
(continued)

Background

(continued)

General Regulation under the CCCA

- Regulation contains limited information about how construction contracts are tendered, awarded and negotiated.
 - Instead, this details is contained in the actual tender documents.



New Construction Services Regulation under the *Procurement Act*

- New Construction Services Regulation will mirror the rules for goods and services as defined in the General Regulation under the *Procurement Act*, including:
 - Procurement Methods
 - Information that must be contained in the solicitation documents
 - Accepting Bids
 - Evaluation of Bids (price or points based), and
 - Approval of Award

Background

(continued)

- Several key sections in the existing General Regulation under the *CCCA* will be transferred to the new Construction Services Regulation under the *Procurement Act*.
- The new Construction Services Regulation will apply to the same entities currently bound by the *CCCA*:
 - **Schedule 1 Entities:** GNB Parts 1 & 2
 - **Schedule 2 Entities:** RHAs, Crown Corps, NBCC, CCNB, Commissions

Background

(continued)

Schedule 1 Entities

- Dept. of Aboriginal Affairs
- Dept. of Agriculture, Aquaculture and Fisheries
- Dept. of Education and Early Childhood Development
- Dept. of Environment and Local Government
- Dept. of Finance and Treasury Board
- Dept. of Health
- Dept. of Justice and Public Safety
- Dept. of Natural Resources and Energy Development
- Dept. of Post-Secondary Education, Training and Labour
- Dept. of Social Development
- Dept. of Tourism, Heritage and Culture
- Dept. of Transportation and Infrastructure
- Elections New Brunswick
- Executive Council Office
- Labour and Employment Board
- Language Training Centre
- Legislative Assembly
- New Brunswick Police Commission
- New Brunswick Women's Council
- Office of the Attorney General
- Office of the Auditor General
- Office of the Comptroller
- Office of the Leader of the Opposition
- Office of the Lieutenant-Governor
- Office of the Premier
- Opportunities New Brunswick
- Service New Brunswick
- Anglophone North School District
- Anglophone East School District
- Anglophone South School District
- Anglophone West School District
- Francophone nord-ouest school district
- Francophone nord-est school district
- Francophone sud school district

Background

(continued)

Schedule 2 Entities

- CCNB (Collège communautaire du Nouveau-Brunswick)
- EM/ANB Inc.
- Financial and Consumer Services Commission
- Kings Landing Corporation
- RDC (Regional Development Corporation)
- ANBL (New Brunswick Liquor Corporation)
- NBCC (New Brunswick Community College)
- New Brunswick Economic and Social Inclusion Corporation
- New Brunswick Energy Marketing Corporation
- New Brunswick Health Council
- New Brunswick Housing Corporation
- New Brunswick Power Corporation
- RPC (New Brunswick Research and Productivity Council)
- Regional Health Authority A
- Regional Health Authority B
- Workplace Health, Safety and Compensation Commission

Background

(continued)

Benefits

- The proposed changes will:
 - Modernize procurement legislation
 - CCCA (*Crown Construction Contracts Act*) has not been significantly updated in over 30 years
 - Enable agility in practice
 - Flexibility to use modern, best practice procurement strategies
 - E.g. RFPs, prequalification lists, standing offers, ACANs
 - Allow efficiencies for suppliers
 - Streamline and standardize policy and processes

New Construction Services Regulation

Highlights of Changes



Procurement Responsibility

- **Schedule 1 Entities** (departments and school districts) will be required to procure construction services through SNB Strategic Procurement (at/above specific thresholds).

Construction Services	Procurement Responsibility
Under \$100,000	Schedule 1 Entities procure on their own
\$100,000 and over	Schedule 1 Entities must procure through SNB Strategic Procurement

- **Schedule 2 Entities** will continue to procure construction services on their own, regardless of the dollar value:

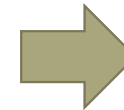
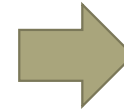
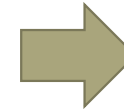
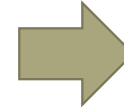
Note: Schedule 1 and Schedule 2 (e.g. RHAs, CCNB, NBCC) entities will still work with DTI as they do today for construction projects, and DTI will work with SNB when it comes time to tender the project. SNB is not replacing the work of the DTI project managers and engineers. DTI will continue to support Schedule 1 and Schedule 2 entities as they do today.

Highlights of Changes

(continued)

General Regulation under the CCCA

1. Different thresholds for highway and non-highway work.
2. Deposit bids in the tender box.
3. Resident agent letter due with bid submission.
4. All addenda must be signed and included with bid.
5. Bids and unit prices must be written in words AND numbers.



New Construction Services Regulation under the Procurement Act

1. Single set of thresholds for all construction work.
2. Removed all references to the tender box. Permit submission by electronic means (email, e-bidding system, fax, etc.)
3. Eliminated requirement for resident agent letter with bid.
4. Eliminated requirement to sign and include **each individual addendum** with bid.
5. Eliminated the requirement to have bid totals provided in words and numbers.

Highlights of Changes

(continued)

General Regulation under the CCCA

- 6. Public tender openings required.
- 7. Contract award must be made in 21 days.
- 8. Insufficient rules concerning exemption process.



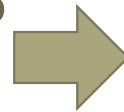
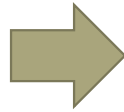
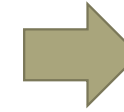
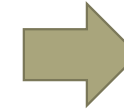
New Construction Services Regulation under the Procurement Act

- 6. Eliminated the requirement for a public tender opening. Bid results will continue to be available on NBON within five days of tender close.
- 7. This requirement will remain in regulation, but with language to provide flexibility to procuring entities in the time to award.
- 8. Clear authority to use exemptions in specific circumstances in accordance with trade agreements.

Highlights of Changes (continued)

General Regulation under the CCCA

- 9. Specific thresholds for District Education Councils and Dept. of Education
- 10. Machine Rental Rates are defined in the Machine Rental Regulation
- 11. Thresholds are static
- 12. No provisions pertaining to contractor debriefings



New Construction Services Regulation under the Procurement Act

- 9. Same thresholds for all Schedule 1 entities
- 10. The Machine Rental Regulation will be repealed, the rates will be set by DTI policy and posted online
- 11. Added provisions for inflation of tendering thresholds, in accordance with trade agreements
- 12. Upon request from an unsuccessful contractor, procuring entities must provide contractors with a debrief on the evaluation of their bid submission.

Highlights of Changes

(continued)

- In addition to the changes listed in the previous slides:
 - 1. Added ability to *negotiate pricing and scope* in certain circumstances within the parameters of the regulation:**
 - Details must be laid out in solicitation document
 - Authority to negotiate must be disclosed, including the negotiation process to be used and the conditions under which negotiations are taking place
 - Revised project scope must be substantially similar to what was originally tendered
 - 2. Added ability to *apply preferences to New Brunswick contractors, Atlantic Canada contractors and Canadian contractors when trade agreements don't apply.***

Highlights of Changes

(continued)

- In addition to the previous slides (*continued*):
 3. **Added provisions pertaining to Opening of Bid Submissions**
 - Rectification of Bid Submissions (for Negotiated RFPs only)
 - Minor non-compliance with mandatory requirements
 - Disclosure of Information
 4. **Added provisions pertaining to Evaluations of Bid Submissions**
 - Discrepancy in price or miscalculation
 - Clarification of bid submissions
 - Bids with abnormally low prices
 5. **Added provision so that the Minister of Transportation and Infrastructure can approve alternate contract forms:**
 - E.g. For entities that would prefer to use their own forms rather than the prescribed Short Form or the Standard Form

Highlights of Changes (continued)

6. Added ability to *disqualify* (exclude) prospective contractors from bidding on procurements for construction services for a specific period of time (no more than 24 months):
- For conviction of a criminal code offence; or
 - For one of the following reasons (if there is supporting evidence):
 - Significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts;
 - False declarations;
 - Professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the prospective contractor; or
 - Failure to pay taxes.
 - Minister of SNB is responsible to disqualify for Schedule 1 entities (GNB), Head of Schedule 2 entity is responsible to disqualify for their own entity
 - A notice must be issued to the contractor before disqualification
 - Contractors may object, and be represented by legal counsel
 - These provisions come from trade agreements, and the same provisions are currently included in the Goods and Services Regulation
 - This is a last recourse measure when all other attempts to resolve performance issues have failed.

Highlights of Changes

(continued)

- **NO CHANGES TO:**
 - **When the Short Form Contract or the Standard Construction Contract can be used:**
 - If contract is \$100,000 or less, either form can be used
 - If contract is greater than \$100,000, the Standard Construction Contract must be used
 - Ownership and responsibility of these forms remains with Minister of DTI
 - **When Bid Bonds are required with bid submissions:**
 - If estimated value of contract is less than \$500,000, the procuring entity MAY require a Bid Bond
 - If not requesting a Bid Bond, may request a bid security deposit with bid submission
 - If estimated value of contract is \$500,000 or greater, the procuring entity MUST require a Bid Bond
 - In such as case, the successful contractor will have to submit to the procuring entity a performance bond and a labour and material payment bond in accordance with section 83 of the Construction Remedies Act.
 - When bid bonds are required, the successful contractor must supply the performance bond and labour material bond within 14 days of notice of award

New Construction Services Regulation

Procurement Methods



Procurement Methods

- 1. Competitive Bidding Processes:** *means a procurement method used to acquire construction services through a solicitation for bid submissions that is open to more than one contractor.*
 - a) Open Competitive Bidding Process
 - b) Limited Competitive Bidding Process

- 2. Non-Competitive Bidding Processes**
 - a) Informal Quotes
 - b) Mutual Agreement

1. Competitive Bidding Process

- « **Open Competitive Bidding Process** » means a competitive bidding process in which bid submissions are solicited by public advertisement that is open to all interested contractors (e.g. public tender)
 - Can take various forms, such as an invitation to tender, Request for Proposal (RFP), etc.
 - **Formal** process
 - Used to **solicit formal bids** from the public
 - Must be advertised on **NBON** for at least 10 days
 - Solicitation notice/document must include certain information (see section 62)
 - Is **binding** on all parties (process may not be binding if you leverage a flexible procurement format (non-Contract A/B format), however this must be stated in the solicitation documents)

1. Competitive Bidding Process (continued)

- « **Limited competitive bidding process** » means a competitive bidding process that is limited in some aspect when bid submissions are solicited. For example:
 - Invited solicitation to solicit formal bids from a few select contractors (e.g. tender by invitation); or public solicitation with a shortened solicitation period.
 - Formal process
 - May use NBON to invite (or invite by other means, such as email)
 - Solicitation documents must disclose what you're buying and how you'll be awarding the contract.
 - Is binding on all parties (process may not be binding if you leverage a flexible procurement format (non-Contract A/B format), however this must be stated in the solicitation documents)

2. Non-Competitive Bidding Process

- « **Informal Quote** » means a request by a procuring entity to one or more contractors for pricing on specific construction services without a solicitation for bid submissions.
 - Informal process
 - Not binding on either party
 - No solicitation documents and no need to publish anything on NBON – simply asking for a price and give contract to contractor of choice

2. Non-Competitive Bidding Process (continued)

- « **Mutual Agreement** » *refers to situations where the procuring entity will approach a contractor of their choice to negotiate and establish an agreement for the provision of construction services.*



New Construction Services Regulation

Alternative Procurement Methods
(Exemptions)



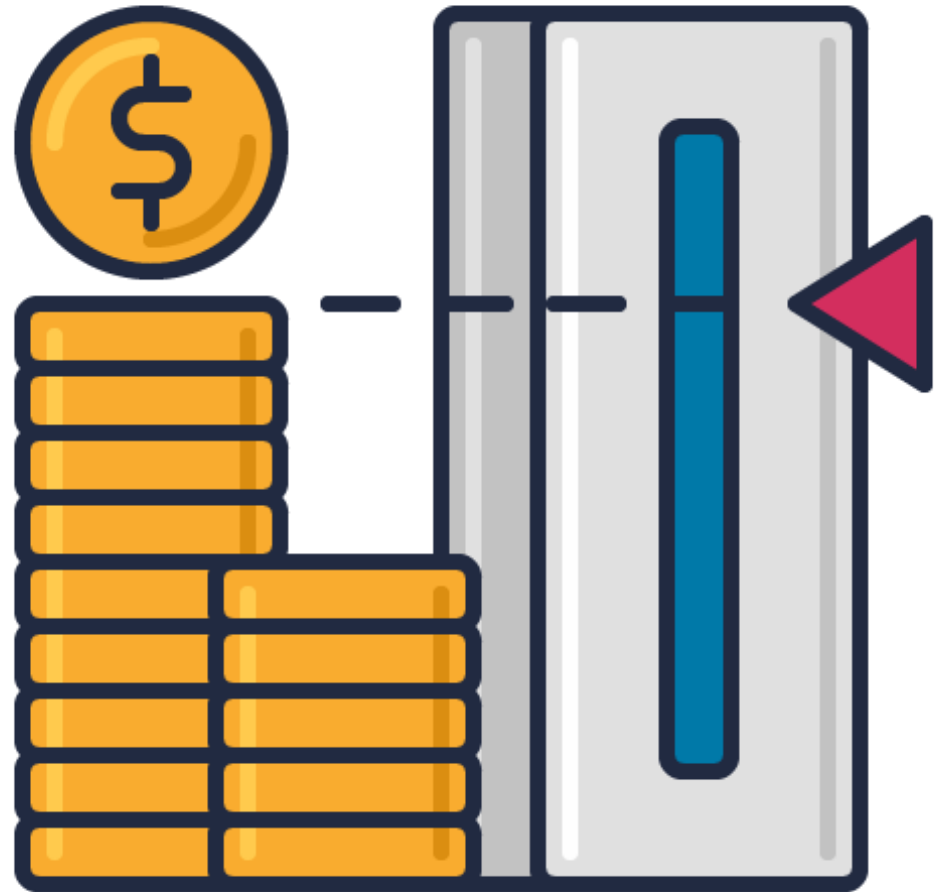
Alternative Procurement Methods (Exemptions)

- **Alternative Procurement Methods or Exemptions** are provisions whereby some or all of the normal competitive bidding process does not need to be followed for the procurement of:
 - Certain construction services; or
 - Construction services in certain circumstances.
- Some exemptions can be established by mutual agreement, some require a limited competitive bidding process:
 - Some have \$ limits, some don't.

Exemption	Competitive bidding process required?	Dollar limit?	Can restrict or give preference to NB Contractors?
Section 39 NB Power Exemption	No – Mutual Agreement permitted	No	Yes
Section 133 Unforeseeable Urgency (i.e. must act quickly or serious ramifications could occur)	Yes – <u>Limited</u> Competitive Bidding Process	Yes – Limited to \$9.1M for entities subject to CETA	Yes
Section 134 Canadian construction services or Canadian contractors	Yes – <u>Limited</u> Competitive Bidding Process	Yes – Limited to \$9.1M for entities subject to CETA	No (restrict to Canadian)
Section 135 Sole Source Exemptions	No – Mutual Agreement permitted	No	No
Section 137 E.g. Unforeseeable Emergency (i.e. life/death situations)	No – Mutual Agreement permitted	No	Yes
Section 138 E.g. purchased from non-profit, financed by donations, unforeseeable urgency, etc.	No – Mutual Agreement permitted	Yes - Limited to \$9.1M for entities subject to CETA	Yes
Section 139 – 141 Regional Economic Development (RED)	No – Mutual Agreement permitted	Yes – Limited to \$1,000,000	Yes

New Construction Services Regulation

Procurement Threshold Values



Thresholds

Schedule 1 and Schedule 2

Construction Services Estimated \$ Value*	Permitted Procurement Methods	Can restrict to NB or give NB preference? <i>(must be stated in procurement documents if doing so)</i>
Less than \$50,000	<ul style="list-style-type: none"> • Informal Quotes; OR • Limited Competitive Bidding Process (e.g. invited tender); OR • Open Competitive Bidding Process (e.g. public tender) 	Yes
\$50,000 to \$121,199**	<ul style="list-style-type: none"> • Limited Competitive Bidding Process(e.g. invited tender); OR • Open Competitive Bidding Process (e.g. public tender); OR • Mutual Agreement where permitted 	Yes
\$121,200** and above	<ul style="list-style-type: none"> • Open Competitive Bidding Process (e.g. public tender); OR • Mutual Agreement where permitted (e.g. exemptions) 	Yes, but only for some exemptions or under CETA*** thresholds

**Estimated Value = includes all costs except taxes*

***Threshold adjusted every 2 years for inflation*

****CETA = Comprehensive Economic and Trade Agreement between Canada and the EU*

Minimum Advertising Requirements (on NBON)

Open Competitive Bidding Process

Based on the estimated value of the construction procurement, Schedule 1 and Schedule 2 entities are required to advertise notices (for public solicitations) **on NBON** for a minimum number of days.

Entities	10 calendar days	40* calendar days
Schedule 1 and Schedule 2	At or above \$121,200	At or above \$9,100,000

**The minimum tendering time of 40 days may be reduced by 5 days for each of the following circumstances:*

- a) the notice of intended procurement is published by electronic means;*
- b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and*
- c) the entity accepts tenders by electronic means.*

New Construction Regulation

Preferential Treatment



Definitions

The following definitions come from the trade agreements and also align with definitions in the **Goods and Services Regulation** as well as **other New Brunswick legislation**:

- **New Brunswick Contractor:** *Means a contractor of construction services that has a place of business in New Brunswick.*
- **Place of Business:** *Means an establishment where a contractor regularly conducts its activities on a permanent basis, is clearly identified by name and is accessible during normal business hours.*



Preferential Treatment for NB Contractors

• Preferential treatment may be given to NB Contractors when:

1. The estimated value of the procurement is below the CFTA (Canadian Free Trade Agreement) threshold values:
 - \$121,200 for GNB departments
 - \$302,900 for all other Schedule 1 and Schedule 2 entities that are subject to the CFTA, except:
 - ANBL (threshold is \$6,056,100)
 - NB RPC (threshold is \$9.1M)
2. When the procurement is not subject to trade agreements:
 - The entity is not subject to trade agreements (e.g. NB Power)
 - Alternative Procurement Methods (Exemptions)

Note:

- *May also give preference to Atlantic Contractors, however NB contractors must be priority.*
- *For Schedule 1 Entities and RHA's, the NB First Procurement Policy also defines how and when preferences can be applied to NB*
- *Sliding scale (section 113) in regulation sets out applicable ranges where preference can be applied, and how.*
- ***In order for a Schedule 1 or Schedule 2 entity to give preferential treatment, the solicitation documents must indicate that a preferential treatment may be given, to whom, and how it will be applied.***

Example:

- Department of Tourism, Heritage and Culture (THC) needs to procure construction services:
 - Estimated value: \$95,000
 - Price-based procurement
 - Can apply preferential treatment to NB contractors (under CFTA threshold)
 - **How:** Open Competitive Bidding Process (Public Tender) – Apply a % preference to lowest-priced NB bid
 - 4 Bids received:
 - **Compliant bid from Ontario Contractor: \$100,000 (low bid)**
 - Compliant bid from Quebec Contractor: \$105,000
 - **Compliant bid from NB Contractor A: \$102,000 (low NB bid)**
 - Compliant bid from NB Contractor B: \$106,000

In this scenario, in accordance with section 113 of the regulation, THC can give a preference to the lowest NB bid if the variation with the lowest overall bid is 10% or less.

Formula:

$$(\text{Low NB} - \text{Low Bid}) / \text{Low Bid} = \%$$

$$(\$102,000 - \$100,000) / \$100,000 = 2\%$$

Since the variation is less than 10%, the award can be made to NB Contractor A instead of the Ontario Contractor.

Preferential Treatment for NB Contractors – Example



Preferential Treatment for Canadian Value-added

- **Preferential treatment for Canadian value-added construction services:**
 - Value-added refers to the proportion of the construction service contract performed by natural persons based in Canada (per CFTA)
 - The solicitation documents must indicate how and when the preference will be applied.
 - The amount of the preferential treatment can be no greater than 10% premium awarded during the evaluation.
 - Can only be used when international trade agreements (CETA) do not apply (CETA @ \$9.1M)
- **Procurement of construction services can also be restricted to Canadian Construction Services or Canadian Contractors**
 - When international trade agreements don't apply.

New Construction Services Regulation

Flexible Formats and
Modern Tools



Flexible Formats and Modern Tools

- Entities will be able to use flexible formats and modern tools for the procurement of construction services:
 1. **Evaluations based on criteria in addition to price** (points-based)
 - Requests for Proposals (RFP) and Negotiated RFPs (e.g. BAFO)
 2. **Prequalification Lists**
 - The list of prequalified contractors is established through a competitive bidding process, to be used for future procurement
 3. **Joint Procurement**
 4. **Standing Offer Agreements**
 - Contract with a contractor by which the procuring entity agrees to buy construction services, when needed, for a specified period.
 5. **ACAN (Advance Contract Award Notice)**
 - Market sounding tool designed to enhance transparency in potential sole source situations and to identify other potential sources of supply.
 6. **Notice of Planned Procurement**
 - Publish procurement plans in advance of the solicitation notice (up to 12 months before), to give a 'heads up' to contractors about big upcoming projects.
 - Must be posted on NBON for 35 days
 - Must include the subject matter of the procurement and the planned date of the publication of the solicitation notice
 - Allows shortening of the advertising period when it comes time to tender the work

Thank You!

For Schedule 1 and 2
Entities, contact
procurement@snb.ca
for more info.

For contractors, contact
NBON@snb.ca for more
info.

