



# Town of Whitby Procedure

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| <b>Procedure Title:</b>  | Appendix R - Vendor Performance and Dispute Resolution Procedure |
| <b>Procedure Number:</b> | F-080-004                                                        |
| <b>Reference:</b>        | Procurement Policy F 080                                         |
| <b>Date Approved:</b>    | October 2, 2023                                                  |
| <b>Date Revised:</b>     | N/A                                                              |
| <b>Approval:</b>         | Chief Administrative Officer Procurement                         |
| <b>Point of Contact:</b> | Services Division                                                |

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## Purpose

This Vendor Performance and Dispute Resolution Procedure provides a framework for the Town to evaluate, recognize and improve the performance of all Vendors awarded Contracts by:

- Pro-actively managing the performance of Vendors during the term of awarded Contracts; and
- Creating a record of past performance for use by the Town in determining the award for future Bids.
- Details the Procurement Review Committee

## Scope

This procedure applies to all departments in the Town.

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## 1. Definitions

- 1.1. **Buyer** means the Procurement Division staff person assigned and delegated as the Buyer to the project.
- 1.2. **Department Lead** means one or more responsible staff from the Town's user department(s) that evaluates the Vendor's performance by completing the Vendor Performance Evaluation (VPE) form in accordance with this Vendor Performance and Dispute Resolution Procedure.
- 1.3. **Probation** means a temporary period of time to correct poor performance of a Vendor and may have additional conditions to meet as specified by the Town – until the Contract finishes or performance improves. A Vendor may be placed in a "Probation" standing if the Vendor receives a rating of "Below Standard" in any category, on a Vendor Performance Evaluation.
- 1.4. **Suspension** means a predetermined period of time where Vendors are barred from responding to Town procurement opportunities, or be awarded Contracts, directly or indirectly. Suspensions are stated with a minimum period of time, conditions and re-instatement requirements. A Vendor may be placed on "Suspension" standing if a Vendor receives a rating of "Unacceptable" in any category, on a Vendor Performance Evaluation.
- 1.5. **Town** means The Corporation of the Town of Whitby.
- 1.6. **Vendor Performance Evaluation (VPE)** means a documented formal record (on the Town's standard form) of a Vendor's performance in meeting the terms and specifications of the Contract, quality of work expectations, health and safety legislation and regulations, and criteria specified by the Town on the VPE forms. Vendor Performance Evaluations may be completed at pre-defined time intervals or milestones, or as the need arises during a Contract (Interim VPE) and / or at the conclusion of a Contract (Final VPE).
- 1.7. Any capitalized terms which are not defined in this Procedure shall have the same definition as set out in the Procurement Policy F 080.

## 2. Responsibilities

### Department Lead Responsibilities

- i. To manage the Vendor, administer the terms of the Contract (unless there is a third-party Consultant assigned to administer the Contract) and be the main point of contact under the Contract.
- ii. To complete the Vendor Performance Evaluation.
- iii. Make reasonable efforts to conduct an unbiased, accurate evaluation of the Vendor's performance under the Contract.
- iv. Confirm that they do not have a Conflict of Interest prior to conducting the evaluation of the Vendor.
- v. Abide by the Town's Code of Conduct, as amended.

### 3. Vendor Performance Evaluations

- i. The Vendor Performance Evaluation rates the performance of the Vendor on the standard criteria developed, as amended from time to time, by the Purchasing Division in accordance with the Town's Procurement Policy, common law, applicable legislation and/or trade agreements.
- ii. Department Lead may utilize the Vendor Performance Evaluation form for all Contracts, including but not limited to: invitational Bids, Single or Sole Source purchases, Emergency Purchases and wherever it is in the best interest of the Town.
- iii. The Vendor Performance Evaluation forms are posted in the Whitby Wire – Procurement Forms.

### 4. Frequency of Performance Evaluations

- i. The Department Lead should perform annual performance evaluations for multi-year Contracts and a final evaluation at the completion of any Contract. Interim performance evaluations can be conducted at any time.
- ii. The assigned Buyer should be informed throughout the course of a Contract of any performance concerns with the Vendor. Department Lead should contact the Buyer and/or Purchasing Officer for advice, assistance or to attend a meeting with the Vendor.
- iii. Department Lead should complete a Vendor Performance Evaluation for all Contracts in a reasonable time, preferably within two (2) weeks of the following occurrences:
  - a. For Construction Contracts - upon the earlier of: Substantial Completion, as determined by the Town; termination or cancellation of the Contract;
  - b. For Consulting Contracts - the earlier of the completion of the Contract, as determined by the Town; termination or cancellation of the Contract; and
  - c. For Goods - upon final delivery and inspection of the Goods by the Town.
- iv. Should a Vendor receive a rating(s) of **Below Standard** or **Unacceptable** in any category, on the interim Vendor Performance Evaluation, the Vendor may be requested to provide a written response and appropriate corrective action. The Vendor has 10 days to appeal the evaluation in writing. Failure of the Vendor to respond, or to adequately address the issues to the Town's satisfaction, and in accordance with the Contract, the Vendor Performance Evaluation will be used in future Town procurement decisions and Contract awards and may result in one or more of the following consequences: a termination of the Contract or placing of the Vendor on Probation and/or Suspension from future Town Contract(s).
- v. Appeal process to be conducted by the Procurement Review Committee, if requested in writing by the Vendor.

### 5. Surety for Construction Projects

If the Town's Contract required Surety from the Vendor and there is a performance issue with the Vendor, the Town, if it deems appropriate in the circumstance, may notify the Vendor's Surety company. The Town must provide notice of the Vendor's default to the Surety company in accordance with section

85.1 of the *Construction Act*, R.S.O. 1990, c. C.30 (the “**Construction Act**”), as amended (the “**Notice**”). Prior to issuing the Notice, the Department Lead will ensure that the following criteria have been satisfied:

- a) The Vendor is, and is declared by the Town to be, in default under the Contract;
- b) The Town has given such notice to the Vendor of a default of the Vendor, as may be required under the terms of the Contract. and
- c) The Town has performed the Town’s obligations under the Contract.

## 6. Resolving Vendor Performance Issues

It is important for the Department Lead to have open communication with the Vendor throughout the project and to inform the Vendor both verbally and in writing when their performance is a concern and to request appropriate corrective action within an acceptable timeframe, in accordance with the Contract.

Department Lead should maintain a written record of all correspondence with the Vendor. The Purchasing Division will maintain a Vendor Performance File that will contain key correspondence shared by the Department Lead, Contract, performance and default letter(s) and interim and final VPEs.

Department Lead are encouraged to try to resolve issue(s) or concerns directly with the Vendor. However, if performance issues continue and the Vendor’s response is inadequate or corrective action is still a concern, the steps should be followed.

- i. Department Lead shall involve the assigned Buyer and if necessary, the Purchasing Officer. In consultation with the Buyer and/or the Purchasing Officer and where it is deemed appropriate, an **Interim Vendor Performance Evaluation** should be completed by the Department Lead and provided to the Vendor. The Vendor will be held responsible for the performance of its sub-contractors.
- ii.
- iii. If the Vendor’s response or corrective action continues to be a concern, the Contract terms regarding default and non-performance may be enforced by the Town. If necessary and deemed appropriate by the Purchasing Officer and/or Department Lead, the Town’s Legal Services Division may be involved.
- iv. For serious issues (e.g. health and safety violations, wilful misconduct and negligence, acts of fraud, criminal action, unethical bidding practices, breaches of confidentiality or Town policies including the Town’s Public Code of Conduct, it may be necessary to move to immediate removal of the Vendor from the work site, suspension, and/ or termination of the Contract. The Department Lead may determine the appropriate action or response.

## 7. Dispute Resolution Steps

It is important to note, that the steps below are guidelines and are not intended to be prescriptive. The steps may be repeated, combined or alternative steps may be taken

by the Town if deemed appropriate by the Department. Department Lead(s) may contact the assigned Buyer and if necessary, the Purchasing Officer for assistance in determining what the appropriate next step should be in resolving the issue(s) with the Vendor.

These steps can be followed for Contracts that were part of a Procurement led process, a Department issued Bid process, or a direct award purchase order/ agreement.

#### **Step 1:**

- Department Lead(s) and/or Consultant addresses and documents issues with the Vendor and provides timelines for the Vendor to complete the corrective action.
- Any meetings with the Vendor must be documented and minutes recorded.
- Suggested resolutions and actions should be recorded in the meeting minutes. It is good practice to refer back to the resolutions and actions in the next correspondence (e.g. "As discussed on [insert date of meeting], it was agreed that the Vendor would perform the following...").
- An email or letter from the Department Lead(s) to the Vendor clearly documenting issue(s) and actions should be provided and include dates and details of any verbal discussions.
- A VPE form should be completed and provided to the Vendor, if deemed appropriate, and retained for the Vendor Performance File.
- If performance issues continue, Department Lead(s) should keep a summary listing of all issues and dates, and a copy of all completed forms should be provided to the Purchasing Officer either at close of Contract or once the performance issue(s) are escalated to the Purchasing Officer.

#### **Step 2:**

**Ensure that a Vendor Performance Evaluation form was completed in Step 1; or if time has passed; and /or there has been a change in performance that you wish to document complete a subsequent form.**

- A performance letter ([performance letter template](#)), detailing the issues is drafted by the Department Lead(s) and sent to the Vendor, copying the assigned Buyer and/or Purchasing Officer. This letter can be sent by email. The Buyer and/or Purchasing Officer may assist by reviewing the draft letter if required. This letter may require legal oversight to ensure it does not prejudice the Town.
- If appropriate, a Vendor Performance Evaluation can also be included with the performance letter.
- The performance letter will be an opportunity for the Vendor to resolve any issues and take corrective action; completion dates should be clearly provided.

The assigned Buyer, Purchasing Officer, Department Lead(s) and the Vendor will have an initial performance meeting to discuss the issues raised in such performance letter or Vendor Performance Evaluation and the minutes/resolution documented by the Town.

**Step 3:**

- If the issues remain unresolved, the Department Lead(s) will notify the assigned Buyer and/or the Purchasing Officer. A summary synopsis/ timeline of all communications, meetings and summary of issues is to be provided by the Department Lead(s) to the assigned Buyer and/or Purchasing Officer.
- The Purchasing Officer may consult with the Town Solicitor to determine if there is a Contract default. The Department Lead may be included or updated following this consultation.
- If the Purchasing Officer in consultation with the Town Solicitor determines there has been a default, the Department Lead will draft a default notice letter to the Vendor in collaboration with the Purchasing Officer, and Legal Services if required. The default notice letter will be sent to the Vendor via e-mail.

**Step 4:**

- If the Vendor continues to be in default under the Contract, the Town may decide to do one or all of the following: terminate the Contract or suspend or disqualify the Vendor from future Town procurement solicitations and projects.
- The Department Lead(s) and Purchasing Officer will coordinate to provide the Vendor Performance file containing the Contract, key communications (e.g. meeting minutes and notes, applicable emails between the Town and the Vendor, default letter(s)) and VPEs to the Town Solicitor for further review and advice.
- Termination letters and/ or suspension / disqualification or debarment of a Vendor must come from the Purchasing Officer in consultation with the Town Solicitor.

**8. Record Retention**

Department Lead(s) shall maintain the following documents in accordance with the Town's Record Retention Policy and Procedures, as amended, as supporting documentation to the Vendor's performance:

- a. Internal and external correspondence (i.e. emails, letters, faxes, describing the issues discussed);
- b. Meeting minutes describing all issues discussed, decisions made, unresolved issues and action items assigned;
- c. Progress vendor performance evaluation forms (interims and final);
- d. Inspection reports;
- e. Photos and videos;
- f. Rejected project deliverables; and,
- g. Scanned copy of dated notes.

## 9. Performance Evaluation System

The Department Lead(s) shall assign a score for each criterion on the VPE.

| Score | Performance    | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-------|----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6-7   | Above Standard | Exceeds all areas (7) or exceeds most areas (6) of expectations.<br><br>Vendor exceeds expectations in some or all areas set out in the Contract; work was completed in a timely and efficient manner and added value to the project. Work was high quality within or below appropriate budget and within the appropriate schedule.                                                                                                                                                                                                                                                                       |
| 4-5   | Standard       | Meets all areas (5) or meets most areas (4) of expectations<br><br>The vendor fulfills all of the duties and requirements of the contract and completed on time. Any minor deficiencies corrected quickly. Vendor follows direction of Town staff as appropriate. Vendor is professional in all dealings with the Town and the public. Use of equipment and work methods are conducted safely.                                                                                                                                                                                                            |
| 2-3   | Below Standard | Does not meet most (3) or some (2) of the areas of expectations.<br><br>Performance failed to meet one or more of the expectations as per the Contract. Serious or numerous deficiencies for which vendor's corrective actions were ineffective. Work requires additional staff time and resources to monitor performance (e.g. repeat follow-up, meetings and site visits, fails to resolve issues in a timely manner). <b>*Depending on the nature of the safety issue(s) identified, may result in a below standard rating. Town Representative must detail safety issues in the comments section.</b> |
| 0-1   | Unacceptable   | Consistently does not meet some (1) or all (0) areas of expectations.<br><br>The Vendor is consistently below expectations in most or all areas of expectations. Vendor is not performing the work in accordance with the Contract and is not resolving concerns of the Town. <b>NB: Depending on the nature of the safety issue(s) identified, may result in an unacceptable rating. Vendor may be suspended or Contract may be recommended for termination. Department Lead(s) must detail safety issues in comments section.</b>                                                                       |

## 10. Impact of Final Performance Evaluations:

- i. In addition to the steps in section 9, the Town, at its sole discretion, may:

- a. Terminate a Contract prior to completion of a project or prior to the expiration of the Contract period term due to Vendor performance issues;
  - b. Or take other action, in the Town's best interest.
- ii. VPEs shall be used by the Town in consideration of awarding a Town project or Contract. If a final VPE has not been completed at the time an award is under review, an interim VPE will be used to: evaluation, if available, may be used by the Town to:
  - a. Determine if a Bidder submitting a Bid is a Responsible Vendor; and/or
  - b. To evaluate past performance under a given Contract or project.
- v. A Vendor that has received at least a **"Below Standard"** rating in any category of the Vendor Performance Evaluation:
  - a. The Vendor may not be considered a Responsible Vendor for future similar Bid submissions to the Town; and,
  - b. For multi-year Contracts, the Vendor should not be eligible for a Contract extension under the current Contract.
  - c. Prior to awarding the Vendor any future Contracts, the Town may request the Bidder to demonstrate in writing or by other acceptable means to the Purchasing Officer that the Vendor has corrected all previously documented areas of "Below Standard" performance concerns to a standard satisfactory to the Town.

In addition, a list of new references may be required by the Town in respect of work completed by the Vendor since the date of the VPE where a rating of "Below Standard" in any category was given. The Town reserves the right, at its sole discretion not to award a Contract to any Vendor, for a period of time as determined to be appropriate by the Town that fails to provide satisfactory evidence of correcting any documented past performance concerns by the Town.

- vi. A Vendor that has received an **"Unacceptable"** rating in any one category on the Vendor Performance Evaluation:
  - a. The Vendor may not be considered a compliant Vendor for future similar Bid submissions to the Town;
  - b. The Vendor will receive an active "Performance Letter" advising the Contractor that if a second "Unacceptable" rating in any category is received on the next Final VPE, the Vendor may be subject to a suspension period;
  - c. For a multi-year Contract, a Vendor receiving an "Unacceptable" rating in any one (1) category on a VPE, is not eligible for an extension term to the current Contract;
  - d. The Town may terminate the current Contract due to poor performance; and,
  - e. Prior to awarding the Vendor any future Contracts, the Town may request the Bidder to demonstrate in writing or by other acceptable means to the Purchasing Officer that the Vendor has corrected all previously

documented areas of “Unacceptable” performance concerns to a standard satisfactory to the Town. In addition, a list of new references may be required by the Town in respect of work completed by the Vendor since the date of the applicable VPE where a rating of “Unacceptable” in any category was given. The Town reserves the right, at its sole discretion not to award a Contract, for an indefinite period, to any Vendor that fails to provide satisfactory evidence of correcting any documented past performance concerns by the Town.

- vii. Any Bidder that refuses or fails to execute a Contract awarded to that Bidder by the Town may be subject to a Suspension, at the discretion of the Town based on the recommendation of the Procurement Review Committee.
- viii. The Purchasing Officer may apply the suspension or probation period, where it is in the best interest of the Town, based either on:
  - a. Commodity Basis: this will be specific to the commodity of good(s) and/or service or construction evaluated on the applicable Vendor Performance Evaluation or;
  - b. Blanket Basis: this will cover all Contracts regardless of the type of good, service or construction evaluated on the applicable Vendor Performance Evaluation form.
- ix. If a Bidder has multiple Vendor Performance Evaluation forms on record with the Town, the Town will consider the most recent Vendor Performance Evaluation form completed for similar contracted goods, services or construction.

Where a Bidder has a Vendor Performance Evaluation for an unrelated good/service/construction, the Town reserves the right to consider this evaluation amongst other sources in determining if a Bidder is Responsible.

The Town reserves the right to consider interim vendor performance in determining if a Bidder is Responsible if a Vendor Performance Evaluation has not been completed, or in addition to a completed Vendor Performance Evaluation.

Where a Contract has multiple departments or facilities completing an evaluation (either Interim or Final), the Vendor’s overall performance rating for either an interim VPE or final VPE shall be based on the lowest evaluation rating received by a department or facility. A consolidated evaluation form is preferred.

## **11. Vendor Performance Evaluation Appeal Process:**

The Vendor shall have ten (10) business days to:

- i. Submit a written response to an interim or final VPE; and
- ii. Submit a written request to appeal rating received on a VPE.

All written responses or requests for appeal must be submitted in writing to the Purchasing Officer and emailed to [purchasing@whitby.ca](mailto:purchasing@whitby.ca) noting “**VPE Appeal**” in the subject line.

If no response is received within the above noted timeframe, the evaluation rating will be final and recorded.

The Vendor's written request for appeal should include:

- Reasons for the request for appeal;
- The Vendor's response if any, to the comments or version of events captured in the VPE;
- Documentation to support the request for appeal; and,
- Potential resolution to the performance issues raised.

The Vendor's written request for appeal will be reviewed by the Procurement Review Committee. The Procurement Review Committee shall be comprised of the Treasurer, the Purchasing Officer, and a Department Head. A quorum of the Procurement Review Committee shall be the Purchasing Officer and one (1) other Senior Leadership Team member. The Procurement Review Committee may decide to uphold the VPE rating or modify with a documented justification. The decision of the Procurement Review Committee shall be communicated to the Vendor in writing within 30 days and shall be final.

Any Construction project invoices that are in dispute must be communicated by the Department Lead(s) to the Vendor **no later than fourteen (14) days** in accordance with the Construction Act and Town's construction invoice dispute procedures as set out in the Contract.

- i. Within ten (10) business days of receiving a request for appeal from the vendor in respect of a VPE, where the Vendor received a rating of "Standard" or better in any category(s), the Purchasing Officer and the Department Head(s) of the user departments which worked directly with the Vendor shall have sole discretion to decide if any rating should be adjusted in any or all categories, based on information received in the appeal response form. The Town may render a final decision based on the appeal information or request additional information of the Vendor. The Town's decision shall be final and binding on all parties.
- ii. Within ten (10) business days of receiving a request for appeal in respect of a VPE, where the Vendor received a rating of "Below Standard" or below in any category(s), the Purchasing Officer will arrange a meeting with the Procurement Review Committee to review the appeal. The Town may render a final decision based on the appeal information or request additional information of the Vendor. The probation or the suspension period shall be upheld during any appeal under review by the Town. The Town's decision shall be final and binding on all parties. The Procurement Review Committee may engage Legal Services, Risk Management or Health and Safety staff if deemed appropriate.
- iii. Performance issues while carrying out the project shall be noted in writing by the Department Lead to the Vendor with a copy to the Purchasing Division.
- iv. Performance issues should also be noted in any site meeting or project meeting minutes.

On completion of the project, a VPE shall be completed by the Department Lead. The VPE shall be reviewed with the Purchasing Officer, and a copy shall be kept on file.

### **Exclusion of Bidders due to Poor Performance**

The decision of the Procurement Review Committee shall determine whether a Vendor will be:

- Allowed to bid on future Contracts or renew a Contract with the Town;
- Placed on Probation, during which time the Vendor shall be permitted to bid or perform work for the Town but may be subject to some conditions by the Town (e.g. weekly written status updates on the project);
- Suspended or disqualified from bidding on any future Town Contracts or projects for a tender cycle or for period of one (1) to three (3) years, or for one full Contract cycle, as determined appropriate by the Town or as otherwise indicated in the bidding document(s).
  - This term may be followed by a Probation period as determined appropriate by the Town after the Vendor's reinstatement.
  - A suspended or disqualified vendor may submit a written appeal for reinstatement after one (1) year, or one full Contract term, justifying what has changed and why the Town should consider reinstatement. The decision of the Town will be final.

### **Appendices**

#### **Appendix 1      Vendor Performance Evaluation (VPE)**



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Matthew Gaskell, Chief Administrative Officer, x2211

**Nov 23, 2023**

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Date