

**AGREEMENT AMONG THE PARTIES TO THE NEW WEST PARTNERSHIP ESTABLISHING
THE BID PROTEST MECHANISM**

DIVISION A: FRAMEWORK AGREEMENT

WHEREAS the Provinces of Alberta, British Columbia, Manitoba, and Saskatchewan **RESOLVED** to:

ESTABLISH an administrative review procedure in accordance with the requirements of international and domestic trade agreements;

HEREBY AGREE as follows:

Article 1: General

1. The Bid Protest Mechanism set out in Division C of this Agreement applies to the avoidance and resolution of disputes between suppliers and Parties' government entities relating to specific procurements covered by a trade agreement.
2. With respect to Parties to this Agreement that are also parties to the *New West Partnership Trade Agreement*, this Agreement constitutes and shall be construed as a part of the *New West Partnership Trade Agreement*. For greater certainty, Part IV of the *New West Partnership Trade Agreement* applies to this Agreement.

Article 2: Administrator

1. The Parties shall appoint and fund an administrator pursuant to the administrator agreement and shall publish the contact details for the administrator on the designated website.

Article 3: Contact Points

1. Each Party shall maintain a contact point to answer or refer reasonable enquiries from other Parties or interested persons of the other Parties, and to provide information in a timely manner pertaining to its existing and proposed measures and other matters covered by this Agreement.
2. The Parties shall publish the contact points on the designated website.

Article 4: Rosters

1. The Parties shall establish a roster of potential arbiters and each Party shall nominate at least five persons to that roster that meet the criteria set out in Division B of this Agreement.

2. The Parties shall list on the designated website the names of the potential arbiters, their biographical information, and the Party which appointed the potential arbiter to its roster.

Article 5: Enforcement

1. Each Party shall take such measures as are necessary to implement this Agreement, and, in doing so, may assume responsibility for some or all of its government entities for some or all aspects of the Bid Protest Mechanism. If a Party does assume such responsibility, it shall notify the administrator.

Article 6: Accession and Withdrawal

1. Any Canadian province or territory that is not party to the *New West Partnership Trade Agreement* may accede to this Agreement on the acceptance of its terms and conditions, including the terms and conditions of the administrator agreement.
2. If a Party to this Agreement is not a party to the *New West Partnership Trade Agreement*, that Party may withdraw from this Agreement on 12 months written notice to the other Parties.
3. A Party to this Agreement may remove from the scope of this Agreement any trade agreement by written notice to the administrator. For greater certainty, “trade agreement” in this paragraph does not include the *New West Partnership Trade Agreement*.

Article 7: Further Negotiations and Joint Decisions

1. The Parties may enter into negotiations to amend this Agreement.
2. The Parties may establish such working groups as they consider necessary to ensure that the obligations of this Agreement are met.
3. The Parties may, at any time, issue a joint decision declaring their interpretation of this Agreement. All such joint decisions shall be binding on arbiters, and any subsequent decision or report of an arbiter issued under this Agreement must be consistent with all prior joint decisions. The Parties shall post all such joint decisions on the designated website.

Article 8: Entry Into Force and Transitional Measures

1. This Agreement shall enter into force on the effective date, subject to the Parties having exchanged written notifications certifying the completion of each of their internal approval procedures.
2. The Bid Protest Mechanism applies to procurements concluded on or after the effective date.
3. For procurements covered by Article 14(1) of the *New West Partnership Trade Agreement* and concluded before the effective date, Part IV(B) of the *New West Partnership Trade Agreement* (as amended to December 31, 2016) shall continue to apply to the avoidance and resolution of disputes relating to such procurements.

Article 9: Definitions

1. The definitions in Part II of the Bid Protest Mechanism shall apply to Divisions A and B of this Agreement.
2. Notwithstanding paragraph 1, the following definitions apply to Divisions A and B of this Agreement:
 - (a) **Agreement** means this *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism*;
 - (b) **administrator** means the secretariat, if established, or a third party contracted to provide secretarial and operational support as provided under Article 2. For greater certainty, the administrator of this Agreement may be the same or different than the administrator appointed pursuant to Article 19 of the *New West Partnership Trade Agreement*;
 - (c) **administrator agreement** means the agreement among the Parties under Article 2 concerning the appointment, funding, and operation of the administrator. For greater certainty, the administrator agreement may be the same instrument or a different instrument than the administrator agreement under Article 19 of the *New West Partnership Trade Agreement*;
 - (d) **Bid Protest Mechanism** means the process established by Division C of this Agreement;
 - (e) **effective date** means 12:01am PST on January 1, 2019; and
 - (f) **Party** means any signatory to this Agreement.

DIVISION B: CRITERIA FOR THE APPOINTMENT OF POTENTIAL ARBITERS

Criteria for Appointments

1. The Parties shall ensure that each of the individuals that they respectively appoint to their roster of potential arbiters, as required under Article 4 of Division A:
 - (a) has been selected for appointment on the basis of objectivity, reliability and sound judgment; and
 - (b) is independent of, and is not affiliated with or taking instructions from, any Party or any government entity of a Party.
2. In addition to the general requirements of paragraph 1, the Parties shall ensure that each of the individuals that they appoint to the roster of potential arbiters, as required under Article 4 of Division A, has expertise or significant experience as counsel or as a decision maker in government procurement, administrative law, the rights and obligations of internal or international trade agreements applicable to government procurement, or government-procurement-related dispute settlement.

Prior Consultation on Appointments

3. With the object of appointing potential arbiters of the highest possible quality in the circumstances, each Party will provide the other Parties with a reasonable opportunity to review and comment on any proposed appointment under Article 4 of Division A before such appointment is finalized.

DIVISION C: BID PROTEST MECHANISM

PART I: BID PROTEST MECHANISM

Article 1: Application

1. The process set out below applies to the avoidance and resolution of disputes between suppliers and the Provinces' government entities relating to a specific procurement covered by any one of the NWPTA (Article 14), CFTA (Chapter 5), GPA, CETA (Chapter 19), or, upon the entry into force of the CPTPP for Canada, the CPTPP (Chapter 15).
2. A supplier's ability to access and utilize this process is governed by and is to be determined solely in accordance with the trade agreement alleged by the supplier to apply to the specific procurement at issue.

Article 2: Consultations

1. To initiate consultations concerning a specific procurement covered by a trade agreement, a supplier must deliver a written request for consultations to the procuring government entity at issue with a copy to the administrator within ten days after the day on which the supplier first knew, or reasonably should have known, of the alleged inconsistency with a trade agreement. The request shall provide a summary of the supplier's complaint relating to the alleged inconsistency.
2. If the supplier fails to request consultations within the time period specified in paragraph 1, the supplier forfeits the right to proceed with further consideration of the matter under this process.
3. In the written request provided pursuant to paragraph 1, the supplier may request the government entity postpone or suspend the procurement process in order to facilitate resolution of the matter. The government entity may refuse any such request after taking into consideration the merits of the complaint and any overriding adverse consequences for the interests concerned, including the public interest. If a postponement or suspension request is refused, the government entity shall provide reasons to the supplier in writing with a copy to the administrator.
4. The government entity and the supplier shall make every effort to arrive at a mutually satisfactory resolution of the complaint through consultations and, to that end, shall exchange information sufficient to enable a full examination of the matter. In doing so, the receiver of any confidential information shall treat such information on the same basis that the provider treats it.
5. Absent an agreement to extend the consultations under paragraph 6, the consultations shall be deemed to be concluded 20 days after delivery of the request for consultations under paragraph 1.

6. The government entity and the supplier may engage in any other informal efforts to resolve the matter and may, by mutual consent, agree to extend the consultations by any specific number of days. In the event that the government entity and the supplier agree to any such extension, they shall deliver a written notice to the administrator advising of that extension and the consultations shall be deemed to be concluded as of the expiry of that extension.
7. Consultations shall be confidential and without prejudice to the rights of the government entity or the supplier in any further proceedings.

Article 3: Selection of the Arbiter and Initiation of Arbitration

1. If a complaint is not resolved through consultations under Article 2, the supplier may, within 14 days following the deemed conclusion of consultations under Article 2(5) or Article 2(6), deliver a written request to the administrator, with a copy to the government entity, for the appointment of an arbiter to make a determination on the alleged inconsistency.
2. If the supplier fails to submit a written request pursuant to paragraph 1 within the time period specified, or fails to provide the signed consent and financial deposit required by paragraph 3(k):
 - (a) the complaint shall be deemed to be resolved and the administrator shall issue a notice in writing to the disputants to that effect; and
 - (b) the supplier will thereby forfeit the right to proceed with any further consideration of its complaint relating to that specific procurement under this process.
3. The request pursuant to paragraph 1 shall contain the following:
 - (a) a list of five potential arbiters selected from the roster, no more than two of whom may be selected from any one Province's nominees to the roster;
 - (b) the identity of the supplier, and the address and contact person or counsel of record to which all further communications respecting the dispute can be sent;
 - (c) if applicable, the title and reference number of the procurement;
 - (d) the name of the procuring government entity;
 - (e) subject to paragraph 4, the name of the trade agreement that forms the basis for the dispute;
 - (f) detailed information concerning the factual grounds of the dispute;
 - (g) detailed information concerning the alleged inconsistency with the trade agreement;
 - (h) copies of relevant correspondence and documentation relating to the procurement;
 - (i) the awards being requested, along with:

- (i) if requesting a bid preparation cost award, supporting documentation on the actual cost of preparing and submitting its bid for the specific procurement at issue, in accordance with Schedule 4 (Bid Preparation Cost Awards); and
 - (ii) if requesting a tariff cost award, supporting documentation relating to its tariff costs;
 - (j) submissions on the allocation of operational costs; and
 - (k) a signed consent and a financial deposit of \$2,500, in accordance with Schedule 2 (Form of Consent to Arbitration).
4. For the purposes of paragraph 3(e), if the government entity is from:
- (a) British Columbia, the supplier must identify one or more trade agreements that form the basis of the dispute. For greater certainty, the supplier may identify more than one trade agreement, if applicable;
 - (b) Alberta, Saskatchewan or Manitoba, the supplier must identify one trade agreement that forms the basis of the dispute. Once the supplier has filed a request for an arbiter with respect to an alleged inconsistency with one trade agreement, that supplier cannot initiate a concurrent or subsequent complaint under this process relating to the same specific procurement under another trade agreement.
5. Within seven days of the delivery of the supplier's written request pursuant to paragraph 1, the administrator shall determine the availability of the supplier's potential arbiters and advise the government entity as to which of those potential arbiters are available to make a determination on the alleged inconsistency.
6. The government entity shall, within seven days of delivery of the list of available potential arbiters pursuant to paragraph 5, select one individual from that list to act as the arbiter. The government entity shall notify the administrator in writing of its selection, with a copy to the supplier. If the government entity fails to select an arbiter within the specified seven days, the administrator shall choose the arbiter by lot from the list of available potential arbiters and notify the disputants in writing of the selection.
7. If none of the potential arbiters identified pursuant to paragraph 3(a) are available, the administrator shall choose the arbiter by lot from the roster and notify the disputants in writing of the selection.
8. The arbiter must be independent and impartial in the matter under dispute and otherwise comply with the Code of Conduct. Any alleged violations of the Code of Conduct shall be dealt with in accordance with the procedures provided therein, or, in the event that the arbiter's report has already been issued, in accordance with Article 9.
9. In the event that an arbiter is dismissed, resigns or otherwise becomes unavailable, the administrator shall immediately notify the disputants in writing and a replacement arbiter shall be selected in accordance with paragraphs 5 through 7. Once appointed, the replacement arbiter shall immediately establish a new timeline for the conduct of the dispute that is generally consistent with the timeline that would otherwise have applied.

Article 4: Additional Financial Deposits

1. An arbiter may, with reasons provided in writing, order the supplier to provide further financial deposits to the administrator at the times and in the amounts that the arbiter considered appropriate, taking into account:
 - (a) the complexity of the proceeding and the likely costs to be incurred as a result;
 - (b) the services to be provided by the administrator and the administrator's ability to collect on an operational cost award issued against the supplier;
 - (c) the government entity's ability to collect on a tariff cost award issued against the supplier; and
 - (d) any other factor that is likely to affect the overall costs of the proceeding.
2. If a supplier fails to provide any such additional financial deposits within the time periods specified, the arbiter shall immediately thereafter terminate the proceeding and:
 - (a) the dispute shall be deemed to be resolved and the arbiter shall issue a notice in writing to the disputants to that effect; and
 - (b) the supplier will thereby forfeit the right to proceed with any further consideration of its complaint relating to that specific procurement under this process.

Article 5: Bid Protest Proceedings

1. Within 14 days of delivery of the request pursuant to Article 3(1), the government entity shall deliver a written reply to the administrator, with a copy to the supplier. The reply shall contain:
 - (a) a response to each of the supplier's allegations of inconsistency;
 - (b) if applicable, a response to the supplier's request for a bid preparation cost award;
 - (c) if requesting a tariff cost award, supporting documentation relating to its tariff costs; and
 - (d) submissions on the allocation of operational costs.
2. Within seven days of delivery of the government entity's reply under paragraph 1, the supplier may deliver a written counter-reply to the administrator, with a copy to the government entity.
3. The disputants' submissions to the arbiter are limited to those specifically provided for in Article 3(1) and paragraphs 1 and 2 of this Article, except where the arbiter requests or authorizes additional written submissions.
4. In reaching a decision, the arbiter shall consider only the written material that has been filed in accordance with this process and the obligations of the applicable trade agreement.

5. The arbiter shall issue a written report to the disputants, with a copy to the administrator, no later than ten days after delivery of the last submission under paragraph 2 or, when requested or authorized, paragraph 3.
6. The arbiter may extend the time period provided for in paragraph 5 by no more than ten days by providing written notice of such extension to the disputants, with a copy to the administrator.
7. The arbiter's report shall contain:
 - (a) findings of fact;
 - (b) a determination as to whether the specific procurement at issue is consistent with the applicable trade agreement;
 - (c) if applicable, recommendations for corrective action as to how the government entity may bring itself into compliance with the applicable trade agreement; and
 - (d) the amount of any awards, as determined in accordance with Article 7, and the time within which the awards shall be paid.
8. If a dispute is terminated prior to the issuance of the arbiter's report, the arbiter may issue a tariff cost award and an operational cost award, pursuant to Article 7, unless a specific allocation of costs is otherwise agreed to between the disputants.
9. Subject to Article 9, the arbiter's report is final and binding on the disputants.
10. Subject to Article 10 and any determinations relating to confidentiality made by an arbiter thereunder, the arbiter's report shall be made public and shall be posted on the designated website by the administrator.

Article 6: Consolidation of Disputes

1. If, at any time prior to the issuance of the arbiter's report, one or more additional requests under Article 3 are delivered to the administrator relating to the same specific procurement, the administrator shall notify:
 - (a) the arbiter and the disputants in the existing dispute; and
 - (b) the suppliers delivering the additional requests;that the same specific procurement is the subject of additional requests. The administrator shall provide a copy of the additional requests to the arbiter of the existing dispute.
2. The arbiter shall consolidate the existing dispute and additional requests into one dispute, unless such consolidation would be contrary to the interests of a fair and efficient resolution of the disputes. The arbiter shall inform all disputants in writing of the consolidation decision, with a copy to the administrator.
3. In the event of a consolidation of disputes under this Article, the arbiter:

- (a) shall immediately establish a new timeline for the conduct of the consolidated dispute which is:
 - (i) generally consistent with the timeline that would otherwise have applied; and
 - (ii) subject to the requirement that the arbiter must deliver the report relating to the consolidated dispute within 40 days of the delivery of the final submissions of the disputants; and
 - (b) may request additional submissions from the disputants.
4. For greater certainty, nothing in this Article requires a supplier to alter its request under Article 3(1) in order to accommodate consolidation.

Article 7: Cost and Bid Preparation Cost Awards

1. In determining the amount of and allocation of any tariff cost awards, operational cost awards or bid preparation cost awards, an arbiter may consider whether the government entity has preserved the supplier's opportunity to participate in the specific procurement at issue by postponing or suspending the procurement process pursuant to Article 2(3).
2. If an arbiter makes any award pursuant to this Article, the arbiter shall specify a reasonable period of time within which that award shall be paid by the disputant against which the award has been made.

Tariff cost awards

3. A tariff cost award shall be limited to the reasonable costs incurred by a disputant relating to its participation in the dispute for:
 - a) counsel or agent's fees; and
 - b) related charges for postage, courier services and other disbursements;

and in all cases to a maximum of \$5,000 per disputant.

4. A tariff cost award shall generally be issued against the unsuccessful disputant. However, the arbiter may apportion a tariff cost award between the disputants if the arbiter determines that such apportionment is reasonable, taking into account the circumstances of the dispute.

Operational cost awards

5. An operational cost award shall be limited to the *per diem* fees payable to the arbiter and the fees and disbursements of the administrator. The arbiter shall comply with Schedule 3 (Operational Cost Awards) in determining the amount of any operational cost award.
6. An operational cost award shall generally be issued against the unsuccessful disputant. However, the arbiter may apportion an operational cost award between the disputants if the arbiter determines that such apportionment is reasonable, taking into account the circumstances of the dispute.

Bid preparation cost awards

7. An arbiter may grant a bid preparation cost award against a government entity only if the arbiter determines that the government entity has acted in a manner that is inconsistent with the applicable trade agreement.
8. The arbiter shall comply with Schedule 4 (Bid Preparation Cost Awards) in determining the amount of any bid preparation cost award.
9. In no event shall the total of all bid preparation cost awards issued across all disputes against a procuring entity under this process relating to a specific procurement exceed an aggregate of \$50,000. For the purposes of this limitation, if a procuring entity cancels and reissues a procurement, it is considered a new specific procurement.
10. For greater certainty, an arbiter cannot issue a bid preparation cost award against a supplier.

Article 8: Disposition of Financial Deposits and Enforcement of Awards against Suppliers

1. Following the issuance of the arbiter's report and the expiry of the time period for requesting judicial review under Article 9, any financial deposits provided by the supplier under Article 3(3)(k) or Article 4 shall be dealt with as follows:
 - (a) if no award has been issued against the supplier, the administrator shall return the entire amount of the financial deposits to the supplier;
 - (b) if awards of less than the amount of the financial deposits have been issued against the supplier, the administrator shall:
 - (i) retain the amount of the operational cost award and pay the operational costs;
 - (ii) forward the amount of any tariff cost award to the government entity; and
 - (iii) return all remaining funds to the supplier; and
 - (c) if awards in excess of the amount of the financial deposits have been issued against the supplier:
 - (i) the administrator shall first retain the amount of the operational cost award and pay the operational costs;
 - (ii) the administrator shall then forward any remaining funds to the government entity in payment of the tariff cost award; and
 - (iii) the supplier shall pay to the government entity the amount of any difference between the financial deposits and the awards in accordance with the terms of the arbiter's report.

Article 9: Judicial Review

1. A disputant may request judicial review of an arbiter's report within 15 days of it being issued under Article 5(5) in accordance with:
 - (a) section 30 of the *Arbitration Act* (RSBC 1996 c.55) if the government entity is from British Columbia;
 - (b) subsection 45(1)(c) and (f) through (i), and subsection 45(8) of the *Arbitration Act* (RSA 2000, c. A-43) if the government entity is from Alberta;
 - (c) clauses 46(1)(c) and (f) through (i) and subsection 46(8) of *The Arbitration Act, 1992* (SS 1992, c. A-24.1) if the government entity is from Saskatchewan; or
 - (d) clauses 45(1)(c) and (f) through (i) of *The Arbitration Act* (C.C.S.M. c. A120) if the government entity is from Manitoba;

and solely for purposes of this Article, this process constitutes an "arbitration agreement" and any arbiter's report issued under Article 5(5) constitutes an "award" as those terms are defined in the applicable statute.

2. In the event that a disputant files a request for judicial review of an arbiter's report with the applicable court, that disputant shall concurrently notify the administrator in writing of the request.
3. Upon receiving notification of a request for judicial review under paragraph 2:
 - (a) the administrator shall suspend the application of Article 8; and
 - (b) the time for payment of any tariff cost award, operational cost award, or bid preparation cost award as set out in the arbiter's report shall be suspended;until the matter has been finally disposed of by the court or a subsequent arbiter, as the case may be.
4. After the matter has been finally disposed of, the administrator shall apply Article 8 to the financial deposits in accordance with the result of the judicial review application or any subsequent arbiter's report, as the case may be.

Article 10: Protection of Confidential Information

1. Subject to confidentiality and transparency obligations in the applicable trade agreement, the arbiter shall determine any issues relating to the protection of confidential information and the resulting logistical arrangements.
2. When submitting a request under Article 3(1), a response under Article 5(1), and any other submission to the arbiter, a disputant may designate all or a portion of its filing as confidential.

3. The arbiter, administrator, and disputants shall respect a designation of confidentiality unless the arbiter orders otherwise.

Article 11: Other Provisions

1. Where, in any dispute, a question of procedure arises to which this process, the *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism* or the applicable trade agreement does not provide an answer, or the answer provided is incomplete, the question shall be disposed of by the arbiter in such a matter as the arbiter decides is reasonable in the circumstances and consistent with the principles of fairness.
2. Any dispute under this process shall be deemed to take place in the Province of the procuring government entity at issue.
3. For the purposes of calculating a period of time, the day following the day when a specified event occurs shall be counted as Day 1. If the last day is an official holiday or a non-business day within any Province, the period is extended until the first business day which follows.

PART II: DEFINITIONS

In this process:

administrator means the administrator appointed by the Provinces pursuant to the *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism* to administer this process;

arbiter means the individual appointed pursuant to Article 3 to adjudicate a dispute;

award means any one or more of a tariff cost award, operational cost award, and bid preparation cost award;

bid preparation cost award has the meaning given to that term in paragraphs 7 through 10 of Article 7 and Schedule 4 (Bid Preparation Cost Awards);

CETA means the *Canada – European Union Comprehensive Economic and Trade Agreement*;

CFTA means the *Canadian Free Trade Agreement* among all provinces, territories and Canada;

Code of Conduct means the Code of Conduct for arbiters set out in Schedule 1 (Code of Conduct for Arbiters);

CPTPP means the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*;

days means calendar days;

disputants means a supplier that has provided written notice pursuant to Article 3(1) and the responding government entity, and **disputant** means any one of them, as the case may be;

dispute means a bid protest dispute initiated pursuant to this process;

government entity means the government entity undertaking the procurement which is the subject of the dispute or complaint;

GPA means the *World Trade Organization Agreement on Government Procurement*. For greater certainty, the GPA includes the *Protocol Amending the Agreement on Government Procurement*, done at Geneva on March 30, 2012;

in writing or **written** means any worded or numbered expression that can be read, reproduced, and later communicated. It may include electronically transmitted and stored information;

NWPTA means the *New West Partnership Trade Agreement* among the Provinces;

operational cost award has the meaning given to that term in Article 7(5) and Schedule 3 (Operational Cost Awards);

Provinces means Alberta, British Columbia, Manitoba or Saskatchewan, and **Province** means any one of them, as the case may be;

roster means the roster of individuals nominated to act as arbiters pursuant to the *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism* and as posted on the designated website;

supplier means a person or entity that provides or could provide goods or services in the context of a specific procurement that is or may be the subject of a complaint or dispute;

tariff cost award has the meaning given to that term in Article 7(3); and

trade agreement means one or more of Article 14 of the NWPTA, Chapter Five of the CFTA, Chapter 19 of the CETA, or the GPA, along with any other provisions of those agreements that are necessary for their proper interpretation. Upon the entry into force of the CPTPP for Canada, **trade agreement** also includes Chapter 15 of the CPTPP. **Trade agreement** also includes any applicable amendments, related documents, joint decisions, declarations or interpretative notes as may be permitted by those agreements.

SCHEDULE 1

CODE OF CONDUCT FOR ARBITERS

ARTICLE 3(8)

Part I - Interpretation

administrator means the administrator appointed by the Provinces pursuant to the *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism* to administer the Bid Protest Mechanism;

arbiter means an individual appointed pursuant to Article 3 of the Bid Protest Mechanism to adjudicate a dispute;

candidate means any individual who has been selected by a supplier as a potential arbiter pursuant to Article 3(3)(a) of the Bid Protest Mechanism;

days means calendar days;

disputants means a supplier that has provided written notice pursuant to Article 3(1) of the Bid Protest Mechanism and the responding government entity, and **disputant** means any one of them, as the case may be; and

Provinces means Alberta, British Columbia, Manitoba or Saskatchewan, and **Province** means any one of them, as the case may be.

For the purposes of calculating a period of time, the day following the day when a specified event occurs shall be counted as Day 1. If the last day is an official holiday or a non-business day within any Province, the period is extended until the first business day which follows.

Part II - General Responsibilities to the Process

1. Every candidate, arbiter and former arbiter will avoid impropriety and the appearance of impropriety and will observe high standards of conduct so that the integrity and impartiality of the bid protest process is preserved.
2. This Code of Conduct does not determine whether or under what circumstances the Provinces will disqualify a candidate or arbiter from being appointed to, or serving as, an arbiter on the basis of disclosures made.
3. This Code of Conduct does not preclude the application of any other applicable rules, codes or government policies related to conflicts of interest.

Part III - Disclosure Obligations

1. Candidates and arbiters must disclose the existence of any interest, relationship or matter

that is likely to affect their independence or impartiality or that might reasonably create an apprehension of bias or an appearance of impropriety. An apprehension of bias is created when a reasonable person, with knowledge of all of the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or arbiter's ability to carry out the duties with integrity, impartiality and competence is impaired.

2. Throughout a proceeding, candidates and arbiters have a continuing obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the bid protest process. The continuing obligation to disclose in particular applies when a consolidation is being considered pursuant to Article 6 (Consolidation of Disputes).
3. Further to the general obligations of sections 1 and 2:
 - (a) Each candidate requested to serve, at the time of the request, will receive from the administrator a copy of this Code of Conduct, which includes an illustrative list of examples of matters which are subject to disclosure. (The illustrative list is attached as Annex 1 to this Code of Conduct.);
 - (b) A candidate will make all reasonable efforts to become aware of, and will disclose, any interest, relationship or matter that is likely to affect his or her independence or impartiality, or that might create a reasonable apprehension of bias or appearance of impropriety in proceedings;
 - (c) Each candidate will provide an initial disclosure to the administrator by completing the Disclosure Statement and submitting it to the administrator for consideration by the disputants. (The form of required Disclosure Statement is attached as Annex 2 to this Code of Conduct.);
 - (d) After appointment as an arbiter, an arbiter will continue to make all reasonable efforts to become aware of any material interests, relationships or matters and will promptly disclose them. Any such subsequent disclosures will be communicated forthwith in writing to the administrator for consideration by the disputants; and
 - (e) Arbiters will forthwith in writing communicate with the administrator in the event that, for any reason, they become unavailable to continue their service or otherwise must resign their appointment.

Part IV - The Performance of Duties by Candidates and Arbiters

1. A candidate who accepts an appointment as an arbiter will be available to perform, and will perform, his or her duties thoroughly and expeditiously throughout the course of the proceeding.
2. An arbiter will ensure that the administrator can, at all reasonable times, contact the arbiter in order to conduct arbitration business.
3. An arbiter will carry out all of his or her duties fairly and diligently.

4. An arbiter will comply with all rules governing the proceeding.
5. An arbiter will consider only
 - (a) the issues raised; and
 - (b) the evidence presentedin the proceeding which is necessary to a decision and will not delegate the duty to decide to any other person except as permitted by the rules governing the proceeding.
6. An arbiter will take all reasonable steps to ensure that the arbiter's staff, if any, comply with Parts II, III and VII of this Code of Conduct.
7. An arbiter will not engage in *ex parte* contacts concerning the proceeding.
8. Candidates and arbiters will not communicate any matters concerning actual or potential violations of this Code of Conduct except with the administrator or as necessary to ascertain whether that candidate or arbiter has violated or may violate the Code of Conduct.

Part V - Independence and Impartiality of Arbiters

1. An arbiter will:
 - (a) be independent and impartial;
 - (b) act in a fair manner and will avoid creating an appearance of impropriety or an apprehension of bias; and
 - (c) make an objective assessment of the matter before the arbiter, including an objective assessment of the facts presented.
2. An arbiter will not:
 - (a) be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a government or other interests, or fear of criticism;
 - (b) directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties;
 - (c) use his or her position to advance any personal or private interests; nor
 - (d) allow past or existing financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment.
3. An arbiter shall avoid:

- (a) actions that may create the impression that others are in a special position to influence the arbiter and make every effort to prevent or discourage others from representing themselves as being in such a position; and
- (b) entering into any relationship, or acquiring any financial interest, that is likely to affect the arbiter's impartiality or that might reasonably create an apprehension of bias or an appearance of impropriety.

Part VI - Post-Proceeding Conduct

1. For a period of two years after the completion of any proceeding, a former arbiter will not personally advise or represent any disputant in the proceeding with respect to the same matter(s) that arose in the proceeding.
2. A former arbiter will avoid any actions that may create the appearance that the arbiter was biased in carrying out the arbiter's duties or that the arbiter benefitted from his or her decision.

Part VII - Maintenance of Confidentiality

1. An arbiter or former arbiter will not at any time disclose or use any confidential information concerning the proceeding or acquired during the proceeding except for the purposes of the proceeding, nor will he or she disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interests of another.
2. An arbiter will not disclose their report or decision prior to its release by the administrator. An arbiter or former arbiter will not at any time disclose their deliberations or views, other than as stated in his or her report, except as required by law.

Part VIII - Responsibilities of the Administrator

1. The administrator will take all steps necessary to protect the confidentiality of Disclosure Statements and any subsequent disclosures received by it from candidates and arbiters.

Part IX - Complaints Concerning Alleged Breaches of the Code of Conduct

1. With respect to disputants, if, at any time prior to the issuance of a report, a disputant believes that an arbiter is in violation of this Code of Conduct it shall immediately advise the other disputant in writing, with a copy to the administrator and all Provinces.
2. Unless otherwise requested by the advising disputant, the administrator must treat the communication in confidence and shall not disclose to the arbiter the content of the communication or its source.
3. Within seven days of receiving notice from a disputant of the alleged violation, the Provinces will conduct an investigation, if they consider it necessary, and will, by consensus, determine what action to take, if any, considering all of the circumstances, up to and including dismissal of the arbiter.

4. If an arbiter is dismissed or voluntarily withdraws as a result of any investigation under this Part IX, a replacement arbiter will be appointed in accordance with the applicable appointment procedures provided for in Article 3(9) of the Bid Protest Mechanism.

5. This Part IX has no further application to a dispute once an arbiter has issued his or her report.

ANNEX 1

ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED

This Annex contains examples of the type of information that candidates and arbiters are required to disclose pursuant to the Code of Conduct.

Each candidate and arbiter has a continuing duty to disclose the type of information generally described in Part III of the Code of Conduct, which may include the following:

- (a) financial interests (for example, investments, loans, shares, interests, other debts); business interests (for example, directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (for example, a past or present relationship with governmental or private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (for example, active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (for example, publications, public statements); and
- (e) employment or family interests (for example, the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, partners, business associates or immediate family members).

ANNEX 2

INITIAL DISCLOSURE STATEMENT

IN THE MATTER OF: _____ **(title of proceeding)** _____

Administration File No: _____

1. I have read the Code of Conduct established under the *Bid Protest Mechanism* (the "**BPM**") which governs the conduct of arbiters appointed pursuant to the BPM ("**arbiters**") and individuals under consideration for an appointment as an arbiter ("**candidates**").
2. (Check, as appropriate, and, if required, attach the disclosure list.)
 - There are no interests, relationships or matters that, as of the date hereof, I am required to disclose under the Code of Conduct; or
 - Attached is a list of all interests, relationships and matters that, as of the date hereof, I am required to disclose under the Code of Conduct.
3. I understand my continuing obligation while participating in the BPM as a candidate or arbiter to disclose to the administrator any interest, relationship or matter that is likely to affect my independence or impartiality, or that might create a reasonable apprehension of bias or an appearance of impropriety in the matter cited above, and I will make all required disclosures forthwith upon becoming aware of any such interest, relationship or matter.

Signed

Date

Candidate's Name

SCHEDULE 2

FORM OF CONSENT TO ARBITRATION

ARTICLE 3(3)

Consent to Arbitrate by a Supplier

1. In this consent:

administrator means the administrator appointed by the Provinces pursuant to the *Agreement Among The Parties To The New West Partnership Establishing the Bid Protest Mechanism* to administer the Bid Protest Mechanism;

arbiter means an individual appointed pursuant to Article 3 of the Bid Protest Mechanism to adjudicate a dispute;

consent means this Consent to Arbitrate by a Supplier;

disputants means a supplier that has provided written notice pursuant to Article 3(1) of the Bid Protest Mechanism and the responding government entity, and **disputant** means any one of them, as the case may be;

Provinces means Alberta, British Columbia, Manitoba or Saskatchewan, and **Province** means any one of them, as the case may be; and

supplier means a person or entity who provides or could provide goods or services in the context of a specific procurement that is or may be the subject of a complaint or dispute.

2. This consent is being provided by [name], of [address for service].
3. The supplier hereby acknowledges that under Article 3(3)(k), any supplier wishing to access the Bid Protest Mechanism must first acknowledge in writing its consent to the process. This consent is in fulfillment of that requirement.
4. The supplier has a dispute with [applicable government entity] arising under the [specify the trade agreement or agreements] relating to [brief description of the specific procurement at issue]. The supplier specifically consents to submitting this dispute to an arbiter under the Bid Protest Mechanism, and agrees to do so wholly in accordance with this consent and the procedures specified in the Bid Protest Mechanism.
5. In doing so, the supplier acknowledges and agrees that those procedures provide as follows:
 - (a) Proceedings under the Bid Protest Mechanism are governed by that process and the trade agreement or agreements that apply to the specific procurement at issue. Those procedures differ in many ways from those normally used by domestic courts.

- (b) Subject to limited protections for certain types of information in Article 10 of this Bid Protest Mechanism and any ruling relating to confidentiality made by the arbiter, the Bid Protest Mechanism provides that the arbiter's report will be made public (see Article 5(10)). Any communications provided to a government entity in the course of a proceeding may be provided to the Province responsible for that government entity. In addition, any information and documentation provided to a government entity or a Province as part of the proceeding will thereafter become subject to the Province's freedom of information legislation which may require that the government entity or Province disclose such information and any records or documents that have been created by that government entity or Province based on such information or documentation, to third parties making appropriate requests under such legislation;
- (c) Subject to a limited right of judicial review, the decision of the arbiter is final and cannot be appealed (see Articles 5(9) and Article 9));
- (d) The disputants are solely responsible for the costs associated with a proceeding under the Bid Protest Mechanism. Such costs will include the fees of the arbiter, costs incurred by the administrator and certain costs associated with legal representation. Such costs can be significant. In particular, see Schedule 3 of the Bid Protest Mechanism which provides direction to the arbiter in determining awards. Article 7 provides that, in principle, all such costs shall be borne by the unsuccessful disputant. However, an arbiter retains the discretion to apportion costs between the disputants as the arbiter considers reasonable. This means that the arbiter may allocate all or a greater proportion of costs to one or the other of the disputants in some circumstances.
- (e) A supplier wishing to initiate a proceeding under the Bid Protest Mechanism must provide an initial financial deposit in the amount of \$2,500 to the administrator (see Article 3(3)(k)). That initial deposit, in the form of a direct wire transfer, bank draft, certified cheque or other acceptable proof of payment, made payable to the administrator, must be attached to this consent. An arbiter may subsequently order that a supplier provide one or more additional financial deposits, at the arbiter's discretion, in order to cover some or all of the estimated costs of the proceeding. The proceeding is automatically terminated if the supplier fails to provide the required financial deposits (see Articles 3(2) and Article 4(2));
- (f) Once a proceeding commences it may only be terminated prior to the issuance of arbiter's report by mutual consent of the disputants. Even if a proceeding is so terminated the supplier may still be responsible for some or all of the costs of the proceeding incurred up to that date, at the arbiter's discretion (see Article 5(8));

(g) In the event that a supplier is successful in a proceeding, arbiters may only recommend corrective action or award compensation as specifically provided for under the Bid Protest Mechanism. Compensation is strictly limited to tariff cost awards (to a maximum of \$5,000) and bid preparation cost awards (to an aggregate maximum of \$50,000 per specific procurement). These remedies may not fully compensate the supplier for the costs it has incurred in participating in the procurement process or in the dispute; and

(h) In the event that the dispute relates to a trade agreement that allows for joint decisions, declarations, or interpretative notes, all such joint decisions, declarations, or interpretive notes are binding on arbiters. Any such joint decision, declarations, or interpretive notes issued at any time prior to the issuance of the arbiter's report could therefore affect the outcome of the dispute.

6. The supplier hereby consents to consideration of its dispute pursuant to the Bid Protest Mechanism and on the bases outlined above.

Signed by an authorized signatory of the supplier at _____
_____, on the _____ day of _____, 20__

(Signature)

(Name)

(Position)

SCHEDULE 3

OPERATIONAL COST AWARDS

ARTICLE 7(5)

Introduction

1. This schedule provides the maximum amounts of remuneration and expenses to be paid to the administrator and arbiters.

2. When assessing the amount of the operational costs of any dispute under the Bid Protest Mechanism for purposes of Article 7, arbiters must calculate all such costs on a basis consistent with this schedule. No other operational costs may be assessed against the disputants.

Arbiter Remuneration

3. Arbiters are entitled to charge up to a maximum of \$125 per hour, to a maximum of \$1000 per day for all work and any costs incurred by them while carrying out their duties as arbiters, commencing as of the time they are appointed as an arbiter under this Bid Protest Mechanism and concluding as of the time they issue their report to the disputants.

4. The maximum allowable amount for arbiter remuneration under section 3 of this schedule shall be increased annually on January 1 by that percentage by which the Consumer Price Index (All items) (published by Statistics Canada) has increased between January 1 and December 31 of the previous calendar year. If there has been no increase or if there has been a decrease in that period, the maximum allowable amount for arbiter remuneration will remain the same for the following calendar year. The administrator shall calculate and publish on the designated website the maximum allowable amounts for arbiter remuneration annually.

Administrator-Related Expenses

5. All administrator-related expenses that may be awarded against the disputants are governed by agreements the Provinces have entered into with the administrator. The administrator will provide an accounting of all such costs relating to a particular dispute to the arbiter. Upon receiving that accounting and being satisfied that the costs are appropriately chargeable to the disputants under the applicable agreement and are reasonable in the circumstances, the arbiter shall include such administrator-related costs in the assessment and allocation of operational costs against the disputants.

SCHEDULE 4

BID PREPARATION COST AWARDS

ARTICLE 7(8)

Introduction

1. This schedule provides the method the arbiter is to use in determining the amount of any bid preparation cost awards.
2. The purpose of a bid preparation cost award is to reimburse a supplier for certain demonstrable and reasonable costs incurred by the supplier in preparing a bid.

Supporting Documentation

3. All bid preparation costs claimed by a supplier must be supported. Copies of invoices, receipts, timecards and other documentation necessary to support a claim are to be submitted when the request is filed by a supplier under Article 3(1) of the Bid Protest Mechanism.

Allowable Bid Preparation Costs

4. The following categories of costs may be considered by an arbiter in determining the amount of any bid preparation cost award:
 - (a) **material cost** - the cost of materials which can be specifically identified and measured as having been used in the preparation of the bid and which are so identified and measured in the supplier's cost accounting system;
 - (b) **labour cost** - that portion of gross wages or salaries incurred for work which can be specifically identified and measured as having been performed in the preparation of the bid and which are so identified and measured in the supplier's cost accounting system; and
 - (c) **other costs** - direct costs not falling within (a) or (b) above, but which can be specifically identified and measured as having been incurred in connection with the preparation of the bid and which are so identified and measured in the supplier's cost accounting system.

Non-Allowable Costs

5. The following are not claimable by a supplier as bid preparation costs:
 - (a) any amount on account of profit;
 - (b) entertainment expenses;
 - (c) fines and penalties;

- (d) provisions for contingencies;
- (e) losses on other contracts;
- (f) losses on investments, bad debts or expenses related to their collection;
- (g) federal or provincial income taxes, surtaxes or special expenses in connection therewith;
- (h) legal, accounting and consulting fees in connection with financial re-organization, security issues, capital stock issues, obtaining of patents and licences or prosecution of other claims against a Province or government entity;
- (i) allowances for interest on invested capital, bonds, debentures, bank or other loans together with related bond discounts or finance charges;
- (j) amortization of unrealized appreciation of assets;
- (k) depreciation of assets;
- (l) expenses or depreciation of excess facilities; and
- (m) any indirect costs including:
 - i. general or administrative expenses not directly related to the preparation of the bid;
 - ii. Canada Pension Plan contributions, unemployment insurance premiums, or contributions to such things as private pension plans, health plans or other benefits;
 - iii. service expenses which are expenses of a general nature for items such as electricity or heat, or expenses incurred for the operation or maintenance of assets and facilities;
 - iv. fixed/period charges which are recurring charges such as property taxes, or rentals;
 - v. indirect materials or supplies; and
 - vi. indirect labour.