

	<b>Unsolicited Proposals Policy</b>	
	<b>Policy Category:</b> <i>(Follow corporate standard to be developed)</i>	
	<b>Policy No.:</b> FA-PUR-0002	<b>Implementing Procedure No.:</b> n/a
<b>Approving Authority:</b> Council		<b>Effective Date:</b> February 15 <sup>th</sup> , 2012
<b>Approved or Last Reviewed Date:</b> N/A		<b>Next Review Year:</b> February 14 <sup>th</sup> , 2017 or when required
<b>Area(s) this policy applies to:</b> Town wide		<b>Owner Department:</b> Finance Department
<b>Related Policy(s):</b> N/A		

*Note: Questions about this Policy should be directed to the Town's Manager of Purchasing*

#### 1. Purpose Statement *(Outline why the organization is issuing the policy and its desired effect or outcome of the policy)*

The purpose of this Policy is to enable the Town to receive and consider Unsolicited Proposals from Vendors which may present unique, innovative or valuable ideas for the Town's consideration.

This Policy sets out the policies and procedures concerning the submission, receipt, evaluation and acceptance or rejection of Unsolicited Proposals in a manner that ensures transparency, fairness and best value to the Town, as well as the protection of Vendors' proprietary and/or confidential information.

#### 2. Applicability and Scope Statement *(Who and what this policy applies to and/or affects)*

This Policy applies to all Unsolicited Proposals received by Town, by its employees and/or elected officials.

#### 3. Background *(Indicate any reasons, history, and intent that led to the creation of the policy)*

Recommended by ELT to document and standardize the Unsolicited Proposal process.

#### 4. Definitions *(If applicable, define any terminology or interpret meanings of a general term)*

"CAO" means the Chief Administrative Officer of The Corporation of the Town of Markham.

"Council" means the Council of The Corporation of the Town of Markham.

"Counter Proposal" means a method for receiving competing proposals by allowing others an opportunity to submit a proposal related to the Unsolicited Proposal while at the same time protecting the ability of the Unsolicited participant to match any other competing proposal.



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**"Evaluation Committee"** means the evaluation committee with the appropriate expertise appointed by ELT to evaluate an Unsolicited Proposal.

**"Executive Leadership team (ELT)"** means the Town's CAO and Commissioners Committee.

**"Manager of Purchasing"** means the Town's Manager of Purchasing, or his or her designate.

**"Town"** means The Corporation of the Town of Markham, and shall include from time to time any officer or agent of the Town who has been authorized to act on its behalf.

**"Unsolicited Proposal"** means a written proposal submitted to the Town on the initiative of a Vendor for the purpose of obtaining a contract with the Town.

**"Vendor"** means the private or public sector, consortium, or proponent providing the Unsolicited Proposal.

### 5. Policy Statements *(Detail the specific regulations, requirements, or modifications to organizational behaviour to be addressed by this policy)*

The Town's current Purchasing By-law allows for non-competitive (sole source) contractual awards and outlines when staff are able to utilize such a procurement mechanism. However, it does not provide procedures concerning the submission, receipt, evaluation, acceptance or rejection of an Unsolicited Proposal in a manner that would ensure transparency, fairness, competitiveness and best value to the Town. The intent of this policy is to establish a framework that will allow Staff to receive and review proposals not solicited through a normal procurement process.

#### **ELIGIBILITY**

Unsolicited Proposals will be evaluated solely on the merits of the submission and not the perceived or actual suitability of the Vendor.

An Unsolicited Proposal will not be allowed to circumvent the Town's *Purchasing By-Law* and will be rejected-(at the sole discretion of the Town) if the Unsolicited Proposal does not meet the following eligibility criteria:

- The proposal must not be similar in scope to a current or planned competitive procurement process. Notwithstanding the foregoing, if the proposal suggests a different scope, style or approach that may improve the Town's position in any way, the procurement process may be suspended or cancelled in order to allow the proposal suggestions to be considered.
- The goods or services referenced in the proposal must not be readily available from other sources, unless a unique or added benefit is being proposed.
- The proposal must align with the Town's funding ability.
- The proposal must align with the Town's priorities, objectives, or interests.
- The proposal must demonstrate a unique or innovative idea, or be deemed to be of sufficient value or in the best interests of the Town (in the sole opinion of the Town).



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- The Unsolicited Proposal must not require substantial assistance from the Town to complete the Unsolicited Proposal documents.
- The Unsolicited Proposal must not conflict with the procurement principles or general conditions of the Town's *Purchasing By-Law*, including without limitation, those general conditions related to disqualified vendors or vendors pursuing a claim against the Town.

A favourable evaluation of an Unsolicited Proposal does not, in itself, imply the intention to award a contract to the Vendor. No legal obligation regarding the procurement of any goods or services shall be created between the Vendor and the Town unless and until a formal, binding contract is executed by the Town.

### **STAFF GUIDELINES**

All inquiries regarding this Policy and all Unsolicited Proposals received by the Town shall be directed to the Town's Manager of Purchasing, who will act as the sole point of contact for Vendors. Town Staff/Council are precluded from engaging in the following activities with respect to the Unsolicited Proposal:

- providing advice or suggestions to the Vendor with respect to the content of the Unsolicited Proposal or the design of the proposed project;
- providing recommendations or advice to the Vendor on the selection of suppliers, materials or resources;
- collecting or analysing data on behalf of the Vendor;
- assisting the Vendor in refining or preparing any proposal documentation.

### **OWNERSHIP AND DISCLOSURE OF UNSOLICITED PROPOSAL INFORMATION**

Unsolicited Proposals submitted to the Town, along with all correspondence, documentation and information provided to the Town by the Vendor in connection with the Unsolicited Proposal, once received by the Town:

- (a) shall become the property of the Town and (subject to information marked as proprietary and/or confidential information of the Vendor) may be used by the Town for any purpose whatsoever, without obtaining the prior consent of the Vendor and without further obligation to the Vendor; and
- (b) shall be subject to the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56, as amended ("MFIPPA"), and may be released pursuant to that Act.

In accordance with the requirements of MFIPPA, Vendors are advised to identify in their Unsolicited Proposal, and any correspondence, documentation and information provided to the Town by the Vendor in connection with the Unsolicited Proposal, any specific scientific, technical, commercial, proprietary, or similar confidential information, the disclosure of which could cause them injury, which may or may not be protected from disclosure pursuant to MFIPPA. Unsolicited Proposals shall not be marked confidential in their entirety; only proprietary information or other confidential information shall be marked as confidential.



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### **INCURRED COSTS**

All costs incurred by the Vendor in connection with the Unsolicited Proposal are incurred at the Vendor's own risk. The Town will not be liable for, nor reimburse, the Vendor for costs incurred in the preparation, submission or presentation of any Unsolicited Proposal. The Town will not be liable for any costs or damages to the Vendor in connection with the rejection or non-acceptance of any Unsolicited Proposal.

### **PROCESS**

#### **STEP 1. RECEIPT OF THE UNSOLICITED PROPOSAL**

1.1 The Unsolicited Proposal will be submitted only to the Manager of Purchasing.

1.2 Prior to any evaluation of the Unsolicited Proposal, the Manager of Purchasing must obtain from the Vendor a signed "Vendor Declaration" (in the form attached to this Policy as "Attachment A"), confirming (among other things) that the Vendor has read, understands and agrees to be bound by this Policy with respect to the Unsolicited Proposal.

1.3 Unsolicited Proposals must contain the following minimum information to permit evaluation in an objective and timely manner:

- Profile on the Vendor (including corporate history) and contact information
- Technical, commercial, managerial, and financial capability of the Vendor
- Team members involved in the proposed project
- Members of proposed consortium (if applicable)
- Overview of the proposed project, intended outcomes, deliverables and proposed benefit to the Town
- Level of support required from the Town (Staff and financial) to finalize the proposed project
- Value to the Town
- Timelines
- Funding sources (if applicable)
- Risk sharing allocations

1.4 Upon receipt of a signed Vendor Declaration, the minimum information set out above, and any other information or clarification reasonably requested by the Town (including, without limitation, reference letters, audited financial statements), the Manager of Purchasing will forward the Unsolicited Proposal to the Evaluation Committee for evaluation. The Manager of Purchasing will serve as a liaison for all communications between the Evaluation Committee and the Vendor.

1.5 If the Vendor fails to provide a signed Vendor Declaration, the minimum information set out above and/or any other information or clarification reasonably requested by the Town (as determined in the sole opinion of the Manager of Purchasing), the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal.

1.6 Unsolicited Proposals received by the Town will be valid for a minimum of six (6) months, unless otherwise specified in the Unsolicited Proposal or agreed to in writing by the Town and the Vendor.



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### STEP 2. EVALUATION OF THE UNSOLICITED PROPOSAL

#### 2.1 The Evaluation Committee will:

- Evaluate the Unsolicited Proposal in accordance with the eligibility criteria.
- Evaluate the Vendor's technical, commercial, managerial and financial capability to determine whether the Vendor's capabilities are adequate for undertaking the proposed project.
- Evaluate the level of support required from the Town (staff and financial) to finalize the proposed project.
- Weigh the technical, commercial, managerial and financial aspects of the proposed project and determine if the scale and scope of the proposal is consistent with the funding ability, or the priorities, objectives, or interests of the Town.
- Determine if any sharing of risks in the proposal is acceptable to the Town.
- Prepare a detailed report of the evaluation, with recommendations.

2.2 At any time during the evaluation process, the Evaluation Committee may request clarifications or additional information regarding the Unsolicited Proposal or the Vendor (at the Vendor's sole cost).

2.3 Based on the report of the Evaluation Committee, the Town (in accordance with the "Delegated Authority" provisions set out below) may in its sole discretion:

- (a) reject the Unsolicited Proposal and advise the Vendor that no further action will be taken in relation to the Unsolicited Proposal;

### STEP 3. UNSOLICITED PROPOSAL - NOT SIMILAR TO ANY CURRENT OR PLANNED PROCUREMENT PROCESS

3.1 If it is determined that the Unsolicited Proposal is not similar to any current or planned procurement process, the following steps will be followed:

- If required, the Vendor will be requested to provide a more detailed proposal or any other information or clarification reasonably requested by the Town (at the Vendor's sole cost and without any obligation on the part of the Town to proceed in accordance with the steps set out below).
- If the Unsolicited Proposal meets the "**Non-Competitive Procurement**" criteria set out in the Town's *Purchasing By-Law*, the Town may commence negotiations with the Vendor without a competitive process. Acceptance of the Unsolicited Proposal and/or any proposed contract resulting from negotiations between the Vendor and the Town shall be in accordance with the "Delegated Authority" provisions set out below. If the Unsolicited Proposal and/or any proposed contract resulting from negotiations between the Vendor and the Town is not accepted by the Town, the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal.



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- If the Unsolicited Proposal does not meet the “Non-Competitive Procurement” criteria set out in the Town’s *Purchasing By-Law*, any further consideration of the Unsolicited Proposal must be pursuant to a competitive procurement process and a decision may be made by the Town (in accordance with the “Delegated Authority” provisions set out below) to proceed with the “Counter Proposal” option set out in Step 5 below. If the decision is made by the Town not to proceed with the “Counter Proposal” option, the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal

### **STEP 4. UNSOLICITED PROPOSAL - SIMILAR TO A CURRENT OR PLANNED PROCUREMENT PROCESS**

4.1 If it is determined that the Unsolicited Proposal is similar to any current or planned procurement process of the Town, but the proposal suggests a different methodology, style or approach that may improve the Town’s position in any way (in the sole opinion of the Town), the following steps will be followed:

- The Vendor will be advised that (in light of the existence of a similar current or planned procurement process) any further consideration of the Vendor must be pursuant to such current or planned procurement process. Notwithstanding the foregoing, if the current or planned procurement process follows a related pre-qualification process through which only pre-qualified vendors are permitted to respond to the current or planned procurement process, the Vendor will not be permitted to participate in the current or planned procurement process, and will be advised that no further action will be taken in relation to the Unsolicited Proposal
- If required by the Town, the Vendor will be requested to provide a more detailed proposal or any other information or clarification reasonably requested by the Town (at the Vendor’s sole cost and without any obligation on the part of the Town to proceed in accordance with the steps set out below).
- If the similar procurement process has been advertised, a decision may be made by the Town (in accordance with the “Delegated Authority” provisions set out below) to:
  - (a) suspend the process and issue an addendum that includes information contained in the Unsolicited Proposal; or
  - (b) if the Unsolicited Proposal proposes a significantly different approach that the Town would like to consider, cancel the process so that the Town may issue a Request For Information (“RFI”) or a substantially revised procurement process that includes information contained in the Unsolicited Proposal.
- If the similar procurement process has not been advertised, a decision may be made by the Town (in accordance with the “Delegated Authority” provisions set out below) to include information contained in the Unsolicited Proposal in the planned procurement process.
- If the Town requires information marked as proprietary and/or confidential of the Vendor to be included in the current or planned procurement process or RFI, the Vendor will be required (to the satisfaction of the Town’s Legal Department) to agree in writing the extent to which such proprietary and/or confidential information will be included in the current or planned procurement process or RFI. If the Vendor fails to satisfy the foregoing requirement, such proprietary and/or confidential information of the Vendor will remain confidential and will not be disclosed.



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- Subsequent to any decision made by the Town in accordance with this Section 4.1, the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal.

### **STEP 5. COUNTER PROPOSAL OPTION**

5.1 If the "Counter Proposal" option is approved (in accordance with the "Delegated Authority" provisions set out below), the Manager of Purchasing will release to the market an invitation for competing counter proposals, in a transparent, fair and equitable manner, in accordance with the principles contained in the Town's *Purchasing By-Law*.

5.2 The Manager of Purchasing will use a "Counter Proposal Request For Proposal (CPRFP)" format, and ensure (to the extent reasonably possible) that the original Evaluation Committee evaluates all counter proposals received.

5.3 The Vendor will be required (to the satisfaction of the Town's Legal Department) to agree in writing to be bound by the terms and conditions of the CPRFP process. If the Vendor fails to satisfy this requirement, the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal.

5.4 In the event the Town requires information marked as proprietary and/or confidential of the Vendor to be included in the CPRFP process (sufficient to provide reasonable and transparent disclosure of material information), the Vendor will be required (to the satisfaction of the Town's Legal Department) to agree in writing the extent to which such proprietary and/or confidential information will be included in the CPRFP process. If the Vendor fails to satisfy this requirement, the Vendor will be advised that no further action will be taken in relation to the Unsolicited Proposal.

5.5 If the CPRFP results in no counter proposal(s) being received, or if the counter proposal(s) received are evaluated by the Evaluation Committee and determined (in the sole opinion of the Evaluation Committee) to be equal to or inferior to the original Unsolicited Proposal, a recommendation may be made by the Evaluation Committee to award a contract to the Vendor based on the Unsolicited Proposal or to commence negotiations with the Vendor based on the Unsolicited Proposal. Approval of the Unsolicited Proposal and/or any proposed contract resulting from negotiations between the Vendor and the Town shall be in accordance with the "Delegated Authority" provisions set out below.

5.6 If the CPRFP results in one or more counter proposals being received and, if the counter proposal(s) are evaluated by the Evaluation Committee and determined (in the sole opinion of the Evaluation Committee) to be superior to the original Unsolicited Proposal, the Town will proceed to determine the successful proponent through a final procurement phase known as "Best and Final Offer" (BAFO). The BAFO process will be conducted as follows:

- (a) The Town will invite the Vendor and the proponent(s) submitting the superior counter proposal to engage in a BAFO phase. The invitation to participate in the BAFO phase will provide the following to all participants:
  - i. the general concepts of the counter proposal(s) that were considered superior to the original Unsolicited Proposal, while maintaining the confidentiality of any proprietary and/ or confidential information contained in the counter proposal(s); and



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- ii. the pre-established evaluation criteria or the “basis of award” to be used to determine the successful proponent.
- (b) Offers received in response to the BAFO invitation will be reviewed by the Evaluation Committee and evaluated in accordance with pre-established criteria, or alternatively, in accordance with the “basis of award” provision identified through the BAFO process. The successful proponent will be the proponent offering “best value” to the Town.
- (c) In all cases, the basis of award will be “best value” to the Town (in the sole opinion of the Town).

### 6. Roles and Responsibilities *(Outline roles and responsibilities of those involved in the implementation of the policy)*

It is the responsibility of all Town employees and elected officials to adhere to this policy in connection with the receipt of Unsolicited Proposals.

#### **DELEGATED AUTHORITY**

- The CAO will have delegated authority for all decisions required to be made pursuant to this Policy in connection with Unsolicited Proposals, where the value of the revenue, cost or benefit is not expected to exceed \$350,000. Notwithstanding the foregoing, where funding for the proposal set out in the Unsolicited Proposal is required, and Council did not previously approve a budget for such funding, a report must be presented to Council for approval of the required funds.
- Council will make all decisions required to be made pursuant to this Policy in connection with Unsolicited Proposals, where the value of the revenue, cost or benefit is expected to be \$350,000 or greater.



**ATTACHMENT "A"**  
**VENDOR DECLARATION**

**THIS ACKNOWLEDGEMENT AND DECLARATION** is given to the Town of Markham (the "Town") as of the \_\_ day of \_\_  
\_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_ (the "Vendor").

The Vendor has elected to submit an Unsolicited Proposal to the Town in accordance with the Town's Unsolicited Proposals Policy. In doing so, the Vendor agrees and declares as follows:

**1. UNSOLICITED PROPOSAL POLICY**

The Vendor has read, understands and agrees to be bound by the Town's Unsolicited Proposals Policy.

**2. INCURRED COSTS**

The Town will not be liable for, nor reimburse, the Vendor for costs incurred in the preparation, submission or presentation of any Unsolicited Proposal, for interviews or any other activity that may be requested as part of the evaluation process or the process for the negotiation or execution of any agreement with the Town.

The rejection or non-acceptance of any Unsolicited Proposal shall not render the Town liable for any costs or damages to the Vendor.

**3. PROHIBITION AGAINST GRATUITIES**

The Vendor and its employees, agents or representatives shall not offer or give any gratuity in the form of entertainment, participation in social events, gifts or otherwise to any officer, director, agent, elected official or employee of the Town in connection with this process, whether for the purpose of securing an agreement or seeking favourable treatment in respect to the award of an agreement or expressing appreciation, or providing compensation, for the award of an agreement or for conferring favours or being lenient, or in any other manner whatsoever.

If the Town determines that this article has been breached by or with respect to the Vendor, the Town may exclude its Unsolicited Proposal from consideration, or if an agreement has already been entered into, may terminate it without incurring any liability.

**4. CONFLICTS OF INTEREST**

In its Unsolicited Proposal, the Vendor shall disclose to the Town any potential conflict of interest that might exist in connection with the proposed project. If such a conflict of interest does exist, the Town may, at its discretion, refuse to consider the Unsolicited Proposal.

The Vendor shall also disclose whether it is aware of any Town employee, Council member or member of a Town agency, board or commission or employee thereof having a financial interest in the Vendor and the nature of that interest. If such an interest exists or arises during the evaluation process or the negotiation of an agreement, the Town may, at its discretion, refuse to consider the Unsolicited Proposal or withhold the awarding of any agreement to the Vendor until the matter is resolved to the Town's sole satisfaction.

**5. OWNERSHIP AND DISCLOSURE OF UNSOLICITED PROPOSAL DOCUMENTATION**

The documentation comprising any Unsolicited Proposal submitted to the Town, along with all correspondence, documentation and information provided to the Town by the Vendor in connection with the Unsolicited Proposal, once received by the Town:

- a) shall become the property of the Town;
- b) shall become subject to the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), and may be disclosed, pursuant to that Act.

In accordance with the requirements of MFIPPA, Vendors are advised to identify in their Unsolicited Proposal any specific scientific, technical, commercial, proprietary, or similar confidential information, the disclosure of which could cause them injury. Complete Unsolicited Proposals are not to be identified as confidential.

**6. INTELLECTUAL PROPERTY RIGHTS**

The Vendor warrants that the information contained in its Unsolicited Proposal does not infringe any intellectual property right of any third party and agrees to indemnify and save harmless the Town, its directors, officers, agents, elected officials and employees, against all claims, actions, suits and proceedings, including all costs incurred by the Town brought by any person in respect of the infringement or alleged infringement of any patent, copyright, trademark, or other intellectual property right in connection with their Unsolicited Proposal.

The Vendor executes this Declaration through the signature of its duly authorized signatory.

ON BEHALF OF \_\_\_\_\_  
(Name of Vendor)

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

I have the authority to bind the corporation.