External Report to the NNI Policy Review Committee

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February 22, 2013

Mr. Ron Dewar
Executive Coordinator
NNI Secretariat
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Mr. Brad Hickes
Director
Policy and Planning Division
Department of Executive Services
Nunavut Tunngavik Inc.
P.O. Box 638
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Dear Mr. Dewar and Mr. Hickes:

Re: 2012 Comprehensive Review of the NNI Policy

In May 2012, you requested that Borden Ladner Gervais LLP conduct a comprehensive review of the NNI Policy. We have completed our review and are pleased to submit to you our report.

Our review mandate was rooted in the periodic review requirements of section 16 of the NNI Policy. It was further informed by findings contained in the Report of the Auditor General of Canada to the Legislative Assembly of Nunavut – 2012 on the Procurement of Goods and Services.

In conducting this review, we consulted with more than 100 people, both in government and the business community, throughout Nunavut and parts of Canada. We have analysed contracting data provided to us by the Department of Community and Government Services and the Nunavut Housing Corporation. We analysed the information and data keeping in mind public procurement law best practises.

You will see that our report contains a number of recommendations for changes to the NNI Policy to help it better achieve the objectives in Article 24 of the Nunavut Land Claims Agreement and the NNI Policy itself.

If you have any questions regarding the report, please do not hesitate to contact us.

Respectfully,

Gerry Stobo Mandy E. Moore

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1. Introduction

1. Stretched over 2,000,000 square kilometres in Canada's Arctic archipelago, Nunavut is home to 34,000, mostly Inuit, residents. The territory that now comprises Nunavut has a long and noble history, reaching back almost 4,000 years. The men, women and children who have lived, and live, in this vast region have confronted and conquered some of the most challenging conditions on this planet. Theirs is a story of intelligence, strength and resilience.

2. With the creation of Nunavut in April 1999, a new chapter was started in the story of this remarkable land. The settlement of the land claims and the creation of Canada's newest territory brought with it the chance to develop and implement laws and policies that respond to the particular interests and needs of the people of Nunavut.

3. The leaders and Elders in Nunavut recognized early on the importance of policies that would promote the ability of the Inuit and Inuit businesses to compete in the territory's growing economy. Those same leaders and Elders also recognized the challenges northern businesses faced when competing with companies from outside the north.

4. Building on the obligations contained in Article 24 of the Nunavut Land Claims Agreement ("NLCA"), the Government of Nunavut ("GN") implemented the Nunavummi Nangminiqaqtunik Ikajuuti ("NNI Policy") in April 2000.

5. The NNI Policy's objectives were framed in a way to promote good value and fair competition in the spending of GN funds, to build the Nunavut economy by strengthening business capacity and improving employment, to enhance the level of Inuit participation in providing goods and services to the GN, and to increase the number of skilled and trained Inuit and Nunavummiut in the territory.

6. Governments are uniquely positioned to use their spending to achieve identified social and economic objectives. In the case of Nunavut, the GN spends more than $300 million annually, and local governments in Nunavut spend more than $100 million annually. Harnessing some, if not most, of that spending will go a long way to achieving the objectives of the NLCA and the NNI Policy.

7. Governments throughout Canada, and the world, use their procurement processes to support and promote the interests of identified groups needing support to compete for government contracts. These preferential procurement policies, when used properly, can profoundly impact the groups for whom they are designed.

8. Admittedly preferential procurement policies come at a cost to governments; this is a consequence of government intrusion into the marketplace. But, that cost is more than offset in the mid- to long-term through reduced social costs when the identified group strengthens its ability to compete for government work on a level playing field.

9. Like the land itself, the changing economic and demographic picture of Nunavut has some unique characteristics. Until quite recently, the Nunavut region's economy was largely

based on a traditional Inuit lifestyle. There was little modern industry, particularly when one compares it with the historical economic activity in other northern jurisdictions like the Yukon, the Northwest Territories and Alaska. But that is now changing. Nunavut now enjoys the fastest growing economy in Canada, when measured by gross domestic product.

10. Primarily as a result of mining and construction activities, Nunavut's GDP increased by 11.3% in 2010 compared to 3.4% for Canada as a whole, and by another 7.7% in 2011, compared to 2.6% for Canada as a whole. This economic growth brings with it its own set of challenges for the GN, some of which we discuss later in this report.

11. The residents of Nunavut are spread over a vast territory, with only 1.3 persons per 100 square kilometres compared to 29 persons in the same area in the rest of Canada. That population spread also presents some unique challenges for the GN, in particular when conducting procurement activities throughout such an immense region.

12. The challenges in Nunavut are not just geographic, climatic or density-based. There are a number of other issues that impact the attainment of the NNI Policy's objectives. The unemployment levels of Inuit (particularly young Inuit) remain very high, and much higher than the rest of Canada. The number of Nunavut residents (Inuit and non-Inuit) receiving social assistance is remarkably high (nearly 13,000 of Nunavut's 34,000 residents). At approximately 25%, the high school graduation rate in Nunavut is the lowest in Canada. Those issues just scratch the surface of the social challenges faced by the GN. All of those factors, and more, impact the achievement of the NNI Policy's objectives.

13. The NNI Policy mandates that periodic reviews be conducted to assess the progress achieved to date, and to find ways to improve upon the NNI Policy's ability to meet its objectives and those in the NLCA. As we discuss later, previous comprehensive reviews have been conducted, but with little change resulting in the NNI Policy. Many of the issues we discuss in this report were also the subject of review and commentary in previous reports. We have therefore approached our mandate and review differently. We have attempted to provide specific and actionable recommendations for a number of issues we feel need to be addressed.

14. The changes we are proposing are rooted in our research about the NNI Policy, the extensive consultations we undertook throughout Nunavut, and our knowledge of procurement law and procurement systems. It is our hope that the combination of these factors will result in the changes needed to move the NNI Policy to a new level of effectiveness in Nunavut.

15. There are at least four pillars on which any well-functioning and effective procurement system is built: fairness, transparency, accountability and consistency in treatment. These same pillars are also essential to the success of a preferential procurement program such as the NNI Policy. In our review, we saw examples where those pillars are not as strong as they should be. All of the pillars need strengthening in our view. Indeed, the need for improvement and change was noted as recently as last year when the Auditor General of Canada completed his review into the Procurement of Goods and Services in Nunavut.

16. That said, we have observed that the NNI Policy has, rightly or wrongly, become a touchstone for discontent among affected community stakeholders who feel that the NNI Policy, and the manner in which it has been applied by government officials, has failed to promote and safeguard the interests of those whose interests the NNI Policy was intended to foster and promote.

17. Furthermore, among government officials whose mandate it is to interpret and apply the NNI Policy, there is widespread concern that the NNI Policy lacks clarity and internal consistency, making it very difficult to apply in a coherent manner. Said somewhat differently, the NNI Policy is blamed for a number of procurement ills, some of which have merit. However, some of the concerns expressed about the NNI Policy and the manner in which it is applied are rooted in a misunderstanding of what the NNI Policy currently provides, and can provide, given the provisions in Article 24 of the NLCA.

18. The NNI Policy has, since its inception, been the subject of an astonishing amount of commentary, interpretive guidance, analysis and criticism. Volumes have been written on the NNI Policy and the manner in which it has been interpreted. As we noted above, the strengths and shortcomings of the NNI Policy have been documented in previous comprehensive reviews and other reports, but still, the concerns that have infected the value served by the NNI Policy, remain.

19. Consequently, we see little value in providing a narrative of the strengths and weaknesses of the NNI Policy in terms of its content, interpretation and application, particularly given that there is a generally accepted view that data gaps exist that limit a detailed assessment thereof. In order for there to be any effective adjustment to the NNI Policy and its application, on a going forward basis, better data will need to be collected and maintained.

20. Based on what we have heard during our consultations with more than 100 people throughout Nunavut, the documentation provided by the GN, the data that we have reviewed and keeping in mind procurement law best practices, we have identified a number of issues related to the NNI Policy, its interpretation and its application that need to be thoroughly addressed by way of amendments to the NNI Policy and how it is applied by the GN.

21. There are several comments of a general nature we wish to make to preface our report. First, from the conversations we have had with government officials, we are deeply impressed by their commitment to serving the interests of the people of Nunavut, and applying the NNI Policy in a fair and transparent manner. While there are those who will criticize procurement officials, this is to be expected in any process where there are winners and losers. There will always be grounds for disputing what procurement officials decide, but the better question is whether they arrived at their conclusions fairly and in accordance with the applicable rules and procurement process. For the very most part, we felt that GN officials met that standard.

22. Second, we too are deeply impressed by the energy and commitment by the businessmen and businesswomen of Nunavut who have achieved admirable success, whether or not as a result of the NNI Policy. As the data reveals, Inuit Firms have achieved a far greater share of government contract dollars in the past four years. In many cases, they are competing

successfully with firms from southern Canada or other northern jurisdictions. Although we do express some criticism about the way some of the Inuit Firms and Nunavut Businesses do not live up to the spirit and intent of the NLCA or NNI Policy by the manner in which they arrange their corporate affairs, we saw many examples of great success by Inuit and Nunavummiut workers and business people.

23. Third, we understand the resource constraints that affect and impact the operations of the business and government communities in Nunavut. No discussion about solutions can take place without considering the significant geographic and demographic challenges Nunavut presents. Additionally, as it relates to the business community in Nunavut, we understand that care must be taken to accommodate small businesses when considering the administrative obligations for business created by the NNI Policy.

24. Fourth, while the amount (and temperature) of discussion regarding the NNI Policy might suggest that it is largely ineffective, such a conclusion would be wrong. For the very most part, the rationale underpinning the NNI Policy is sound and parts of the NNI Policy do work quite well. As we catalogue below, there are concerns about the NNI Policy and some of its provisions, but a number of those concerns can be resolved through redrafting the NNI Policy. We acknowledge though that some of the items we identify will require more in-depth consideration and commitment to change at the business, governmental and political levels.

25. Fifth, the effectiveness of any procurement regime (including the NNI Policy) is largely driven by the commitment shown at senior levels of government, including at the political level. It is essential to the effectiveness of the procurement obligations contained in policies, statutes and regulations that governments commit the necessary resources, both in terms of personnel and training, to ensure that government procurements are conducted according to the applicable procurement obligations. While senior government commitment is crucial to the success of the NNI Policy, interference from those same levels in the procurement activities is generally not appropriate.

26. We heard a number of comments throughout Nunavut from people complaining that political intervention leads to the awarding of certain government contracts. It cannot be stated strongly enough: awarding of government contracts must be done in a manner consistent with applicable laws and policies and must not undermine the work of government officials charged with the responsibility of administering the procurement and contracting program. Almost every government contracting scandal in Canada can be traced back to improper interference, either direct or indirect, from the political level.

27. Finally, like all procurement policies, the NNI Policy sits at the intersection of social, legal and economic considerations. Procurement policies, when well-crafted, and well-respected, will promote fair, open and competitive purchasing activities that obtain the required services and goods while ensuring good value for the government. Financial stewardship by governments of taxpayer's money requires nothing less. However, procurement policies can also be an effective vehicle through which governments can improve the economic interests and skill-development of its citizens.

2. Scope of Review

28. Borden Ladner Gervais LLP ("BLG") was retained in May of 2012 to conduct a comprehensive review of the NNI Policy, which review is prescribed by section 16 of the NNI Policy.

29. Our retainer was further informed and directed by the Report of the Auditor General of Canada to the Legislative Assembly of Nunavut – 2012 on the Procurement of Goods and Services. In the report, the Auditor General examined whether the procurement framework of the GN was designed so that contracts are awarded in a process that is fair and open, and administered according to key elements of relevant authorities. The Auditor General reviewed a sample of contracts awarded by contracting authorities to determine whether the contracts were awarded and administered according to the GN's procurement framework.

30. In relation to the GN's application of the NNI Policy, the Auditor General found that the NNI Policy is not applied consistently across and within the contracting authorities that it examined. The Auditor General noted that:

- Contracting authorities had little evidence on file of verification that the businesses were listed on the NNI or NTI registries, where applicable.
- For the majority of contracts examined, there was no required labour training plan.
- Training on the NNI Policy is not consistently provided to officials of contracting authorities.
- In relation to a portion of the contracts examined, the NNI Policy was applied incorrectly or incompletely.

31. The Auditor General concluded that the GN's procurement practices need improvement so as to provide clearer direction and timely training on the application of the NNI Policy. The Auditor General recommended that the Department of Economic Development and Transportation, in collaboration with the contracting authorities, should ensure that the NNI Policy is applied consistently by providing clear direction on how bidders' information is to be used in the bid adjustment and by providing timely training to those who apply the NNI Policy.

32. On March 1, 2012, the Honourable Eva Aariak, Premier of Nunavut, issued the following Minister's Statement:

> *…Although it is a year earlier than expected, we have directed our officials to launch a comprehensive review of the Nunavummi Nangminiqaqtunik Ikajuuti Policy, or NNI Policy, in collaboration with Nunavut Tunngavik Inc. There is a general agreement with NTI that this review will take place one year earlier than expected.*
>
> *This is a requirement under Article 24 of the Nunavut Land Claims Agreement and is an important tool for ensuring that the benefits of economic development in Nunavut stay within the territory and provide opportunities to land claim beneficiaries.*

In conjunction with the NNI review, our officials will conduct a comprehensive internal review of Government of Nunavut public procurement practices…

Mr. Speaker, public procurement plays a vital role in Nunavut's economy. Mr. Speaker, as we regain our self-reliance, we must be guided by the principle of qanuqtuurniq – being innovative and resourceful so that our government reflects our unique circumstances. The objective of our internal public procurement review, when matched with the joint NNI review, is to ensure that our practices reflect emerging best practices and are effective and efficient.

33. The scope of BLG's comprehensive review was as follows:

- Conduct an analytic review of Article 24 of the Land Claims Agreement, the NNI Policy and Government Contracting Procedures Manual and provide substantive analysis regarding the interrelationship of these documents and advise whether the design-to-implementation phases meet the defined overall objectives;

- Review and provide analysis on the specific concerns expressed by, among others, the Government of Nunavut representatives, NTI representatives, Department of Community and Government Services, including concerns related to the NNI Contracting Appeals Board, the bid adjustment definitions and applications, Inuit labour requirement, bonuses and penalties, own forces, training, standing offers, "as and when required" contracts, and the inconsistent application of the NNI Policy, and advise how such concerns can be addressed through NNI Policy amendments and/ or adherence to procurement best practices;

- Advise what, if any, requirements exist for Nunavut municipalities to comply with the NNI Policy;

- Examine and make recommendations on concerns which have been raised with respect to the NNI appeals process detailed in section 18 of the NNI Policy, including the role and jurisdiction of the NNI Contracting Appeals Board;

- Conduct government and NTI stakeholder outreach consultations to identify any outstanding concerns with the current NNI Policy and potential solutions thereto;

- Develop a summary list of preliminary issues or areas of concern with the NNI Policy and proposed solutions for review during subsequent consultations with key community stakeholders designed to solicit feedback regarding any additional issues and concerns and to solicitor feedback on the proposed or additional solutions;

- Develop a framework for revising the NNI Policy and the manner in which is it implemented, and identify opportunities for enhanced training;

- Draft amendments to the NNI Policy;

- Provide an opinion on the applicability of the NNI Policy to Qulliq Energy Corporation;

- If required, provide assistance with drafting any legislative revisions (i.e. to the Financial Administration Act or the Government Contract Regulations) that may be necessary in order to implement any requested revisions to the NNI Policy; and

- If required, provide assistance with the development of training strategy or tools designed to increase the comprehension of the NNI Policy and the manner in which the Policy is carried out.

34. To facilitate the completion of our mandate, we initially retained the services of James Arreak, President of JAS Consulting Ltd. Mr. Arreak provided logistical support in coordinating our consultations and provided culturally relevant context for our evaluation, assessment and consulting dialogue with community and government stakeholders. Due to Mr. Arreak's appointment to the position of Chief Executive Officer of NTI, we retained the services of Lori Idlout, President of Nunavut Holdings Inc,, to assist in a similar capacity. Ms. Idlout provided invaluable support in helping us to conduct meaningful consultations with key stakeholders. We are deeply indebted to both Ms. Idlout and Mr. Arreak for helping us with the consultations and in better understanding the remarkable story of Nunavut and its people.

35. We would also like to express our deep appreciation for the great assistance and guidance provided to us by Ron Dewar and his staff at the NNI Secretariat, and Brad Hickes at NTI. Both Mr. Dewar and Mr. Hickes are committed to ensuring the effective functioning of the NNI Policy. They, and their teams, are a great credit to their respective organizations and the people of Nunavut.

36. Between June 2012 and January 2013, BLG conducted a series of consultations with government officials and stakeholders in Iqaluit, Pond Inlet, Rankin Inlet and Cambridge Bay, by telephone and through written submissions. In total, we consulted with approximately 100 stakeholders, some of whom we met with on multiple occasions. Specifically, we consulted with:

- Businesses in the fields of construction, aviation, tourism, accounting and bookkeeping, residential and commercial janitorial services, marketing, communications, consulting, art, copying, industrial and office supplies, property management, project management, shipping and cartage, and moving services;

- Representatives of the community co-operatives and Arctic Co-operatives Limited;

- Representatives of NTI;

- Representatives of the NNI Secretariat;

- Representatives of the Department of Economic Development and Transportation;

- Representatives of the Department of Education;

- Representatives of Nunavut Arctic College;

- Representatives of the Department of Community and Government Services ("CGS");

- Representatives of Nunavut Housing Corporation ("NHC");
- Representatives of the Contracting Appeals Board;
- Local Nunavut legal counsel; and
- Representatives of municipal governments.

37. BLG also attended the Inuit Small Business Roundtable discussions on June 27, 2012 in Iqaluit organized by NTI. The participants in these discussions included representatives of community businesses, the NNI Secretariat and Government of Nunavut.

3. The Origination and Objectives of the NNI Policy

38. The NNI Policy was implemented by the GN on April 1, 2000 to satisfy the GN's obligations under Article 24 of the NLCA to have procurement policies and implementing measures that provide reasonable support and assistance to Inuit Firms to enable them to compete for government contracts. The NNI Policy also contained measures designed to support Nunavut businesses taking into account the higher cost of conducting business in the north.

39. The NNI Policy underwent revision in 2005, resulting in the adoption of a revised NNI Policy on May 26, 2005. On April 20, 2006, Cabinet approved administrative changes to the NNI Policy, developed in consultation with NTI, that increased the opportunities for Nunavut Businesses and Inuit Firms to participate in Government procurement activities and that further defined the consultation process between NTI and the GN when contemplating further changes to the NNI Policy.

40. The NNI Policy, in its current form, is included as Appendix A hereto.

41. Article 24.3.6 of the NLCA prescribes the objectives of the procurement policies adopted in accordance with Article 24 as follows:

> *Policy Objectives*
>
> *Procurement policies and implementing measures shall reflect, to the extent possible, the following objectives:*
>
> *(a) increased participation by Inuit firms in business opportunities in the Nunavut Settlement Area economy;*
>
> *(b) improved capacity of Inuit firms to compete for government contracts; and*
>
> *(c) employment of Inuit at a representative level in the Nunavut Settlement Area work force.*

42. Article 24.3.7 of the NLCA further provides:

> *Consultation*

To support the objectives set out in Section 24.3.6, the Government of Canada and Territorial Government shall develop and maintain policies and programs in close consultation with the DIO which are designed to achieve the following objectives:

(a) increased access by Inuit to on-the-job training, apprenticeship, skill development, upgrading, and other job related programs; and

(b) greater opportunities for Inuit to receive training and experience to successfully create, operate and manage Northern businesses.

43. Article 24.3.5 of the NLCA further prescribes that:

Procurement policies and implementing measures shall be carried out in a manner that responds to the developing nature of the Nunavut Settlement Area economy and labour force. In particular, the policies shall take into account the increased ability, over time, of Inuit firms to compete for and to successfully complete government contracts.

44. In keeping with the objectives of Article 24 of the NLCA, Section 7.1 of the NNI Policy provides:

The Policy has the following objectives:

(a) Good Value and Fair Competition

To secure goods and services for the Government of Nunavut at the best value, recognizing the higher cost of doing business in Nunavut, and using a contracting process that is clear, fair and equitable.

(b) Strengthening the Nunavut Economy

To build the economy of Nunavut and its communities by strengthening business sector capacity and increasing employment.

(c) Inuit Participation

Subject to ss.16(2), to bring about a level of Inuit participation in the provision of goods and services to the Government of Nunavut that reflects the Inuit proportion of the Nunavut population.

(d) Nunavut Education and Training

Subject to ss.16(2), to increase the number of trained and skilled Nunavut Residents in all parts of the workforce and business community levels that reflect the Inuit proportion of the Nunavut population.

45. Section 16 of the NNI Policy provides, in part, as follows:

16.1 It is recognized that achieving the objectives of the Policy will require consistent and persistent effort.

16.2 It is further recognized that the achievement of objectives may be most realistically and reliably secured by measured progress over time.

4. Past Comprehensive Reviews of the NNI Policy

46. The NNI Policy has, since its inception, been the subject of an astonishing amount of commentary, review, interpretive guidance, analysis and criticism. Volumes have been written on the NNI Policy and the manner in which it has been interpreted. In particular, the strengths and shortcomings of the NNI Policy have been documented in previous comprehensive reviews. While the first comprehensive review resulted in revisions to the NNI Policy and the manner in which it was applied, many of the concerns raised in prior comprehensive reviews remain unaddressed and/or unresolved.

47. The first comprehensive review was conducted in 2003 and resulted in 32 recommendations to the then existing NNI Policy. These recommendations included, among others:

- That the bid adjustments be modified to represent levels that provide a greater advantage for Inuit Firms. At that time, the bid adjustments were 14% for Nunavut Businesses, 3% for Inuit Firms and 3% for Local Businesses. The review recommended that the bid adjustments be changed to 10% for Nunavut Business, 6% for Inuit Firm and 4% for Local Business.

- That NTI and the NNI Secretariat review their respective registries to ensure that registrants met the required criteria, publicize the criteria used to determine eligibility for registration and that they each notify the other in writing of any information that it had which suggests that an entity, registered on the other's registry, may not be eligible to be so registered.

- That general contractors on construction contracts be required to invite Nunavut and Inuit or local companies to bid on subcontracts where they were not already using Nunavut and Inuit or local companies as subcontractors.

- That the GN establish criteria for setting minimum Inuit employment percentages and ensure that these criteria are put in the Contract Procedures Manual.

- That a unit be created in the appropriate department and provided with the resources, both financial and human, necessary to do the follow-up and training on the NNI Policy and to ensure consistency of application and consistency of reporting the required data in a timely manner.

- That the then current appeals and arbitration section be replaced with the current section 18 of the NNI Policy.

- That a rebate of Inuit apprentice wages be provided to contractors as an incentive to hire and train Inuit. Since this is an incentive to hire apprentices, and would provide an advantage to companies receiving the salary rebate, it was suggested that the amount be initially set at 15% of all apprentices' wages.

- That a requirement be imposed that every contract with a labour component of over $300,000 include a training plan for Inuit, which would include apprenticeships where possible, designed to be an integral part of the contract.

- That a requirement be imposed that all maintenance contracts with a value of over $250,000 contain a training/apprenticeship requirement, given that the GN contracts all of its maintenance to the private sector.

- That two or three years before any large capital project commences in a given Nunavut community, the GN put in place training programs to ensure that training is done in the community to maximize the use of local labour.

- That a list identifying workers and their specific skills be maintained for each community and be updated semi-annually. The list would be provided to all bidders on projects in the target community and surrounding communities as a matter of practice.

48. On November 21, 2003, Cabinet approved the report and its 32 recommendations, with the exception of the bid adjustment values, and directed that a detailed work plan be developed for implementation of the recommendations and that the administrative recommendations be implemented effective April 1, 2004. This resulted in the amendment of the NNI Policy and the adoption of the May 26, 2005 version of the NNI Policy. As noted above, thereafter further amendments were made to the NNI Policy to reflect administrative changes and the current version of the NNI Policy was adopted on April 20, 2006.

49. A second comprehensive review of the NNI Policy was completed in 2008. No amendments were made to the NNI Policy following the 2008 comprehensive review and accordingly, the majority of the problems that were identified in 2008 remain. The 2008 comprehensive review identified the following suggested action items, among others:

- Modifying/clarifying a number of the definitions in Appendix A of the NNI Policy, including the definitions for Local Business, Nunavut Business and Local Supplier;

- Developing a system to simplify the NNI Business Registry renewal process;

- Conducting an assessment of the actual impact of bid adjustments on a sample/case study basis;

- Auditing then current monitoring and enforcement procedures and developing and implementing an improved system for monitoring and enforcing the NNI Policy;

- Clarifying the scope and authority of the Contracting Appeals Board through education and awareness sessions in the community; and

- Exploration of an alternative arrangement for the Contracting Appeals Board to report directly to Cabinet rather than to the GN so as to remove any concerns regarding independence.

50. Our report constitutes the third comprehensive review of the NNI Policy, although there have been a number of other audits and informal reviews of the NNI Policy since 2008.

5. The NTI Inuit Firms Registry and the NNI Nunavut Business Directory

51. Central to the functioning of the NNI Policy are the NTI Inuit Firms Registry and the NNI Nunavut Business Directory, as registration on these registries is required before a business can claim the benefit of the Inuit Firm bid adjustment and the Nunavut Business bid adjustment, respectively. The use of bid adjustments is one of the central tools employed in the NNI Policy to meet the objectives of the NLCA.

52. In addition, the NTI Inuit Firms Registry is used by contracting authorities to verify Inuit Firm status for the purpose of evaluating a bidder's Inuit Content. In addition to bid adjustments, the NNI Policy scores bids based on the bidder's use of Inuit Content, which includes Inuit labour, services and materials. Businesses that commit to using a higher percentage of Inuit Content are given a higher score and therefore an increased chance of winning the contract.

5.1 The NTI Inuit Firms Registry

53. In accordance with Article 24.7.1 of the NLCA, NTI maintains a comprehensive list of all businesses (sole proprietorships, co-operatives, partnerships and corporations) that meet the requirements to be registered as an Inuit Firm. For the purpose of the NNI Policy, the NTI Inuit Firms Registry is used by contracting authorities to verify that entities are registered and thus entitled to the Inuit Firm bid adjustment and by contracting authorities to verify Inuit Firm status for the purpose of evaluating Inuit Content.

54. The NNI Policy defines an Inuit Firm as follows:

> *An entity which complies with the legal requirements to carry on business in the Nunavut Settlement Area, and which is*
>
> *(i) a limited company with at least 51% of the company's voting shares beneficially owned by Inuit; or*
>
> *(ii) a cooperative controlled by Inuit; or*
>
> *(iii) an Inuk sole proprietorship or partnership; and*
>
> *(iv) able to present evidence of inclusion on NTI's Inuit Firms Registry*

55. The definition (with the exception of part (iv)) is dictated by the definition of Inuit Firm in the NLCA.

56. In order to apply for registration on the NTI Inuit Firms Registry, an Inuit business must complete an application form and produce specific information and documentation. In the case of a sole proprietorship, an Inuit business must provide:

(1) The name, address and date of birth of the owner of the business;

(2) A copy of a completed "Declaration of Use of a Business Name" form approved by the Legal Registries Division of the Department of Justice;

(3) A statement indicating whether the owner of the business is enrolled on the Inuit Enrolment List and indicating his or her enrolment number;

(4) A completed NTI Sole Proprietorship Questionnaire. The questionnaire asks an Inuit business to answer a number of questions, including whether any person other than the sole proprietor has management authority with respect to the affairs of the business, whether the sole proprietor shares in the profits or losses from the business, whether the sole proprietor shares the operating costs of the business, whether the sole proprietor owns any real property or equipment used in the business with anyone else, whether anyone else has authority to sign contracts on behalf of the business, whether the sole proprietor shares ownership of the bank accounts of the business with any other person, whether the sole proprietor performs all of the services offered by the business, and whether the sole proprietor personally manufactures all of the goods offered by the business. In the event that the sole proprietor answers yes to any of these questions, additional information is required.

(5) A copy of any business license issued by any municipality in which the business operates; and

(6) A copy of the applicant's Workers' Compensation Compliance certificate issued by the Northwest Territories and Nunavut Workers' Compensation Board.

57. In the case of a partnership, an Inuit business must provide:

(1) The names, addresses and dates of birth of each partner;

(2) A copy of a completed Declaration of Partnership filed with and approved by the Legal Registries Division of the Department of Justice;

(3) A statement describing the allocation and distribution of earnings of the partnership between the partners;

(4) For each partner, a statement indicating whether he or she is enrolled on the Inuit Enrolment List and indicating his or her enrolment number;

(5) A copy of any business license issued by any municipality in which the partnership operates; and

(6) A copy of the applicant's Workers' Compensation Compliance certificate issued by the Northwest Territories and Nunavut Workers' Compensation Board.

58. In the case of a co-operative, an Inuit business must provide:

(1) For co-operatives without share capital, a description of the membership and the basis on which the interest of each member is determined;

(2) For co-operatives with share capital, the name, address and date of birth of each shareholder of the co-operative;

(3) The total number of shares of each class issued by the co-operative, the number of shares of each class held by each shareholder of the co-operative, and a description of which class of shares has voting rights;

(4) A sample of the share certificate of each class of share;

(5) If any shares are held in trust, the name and address of the trustee(s) and the name, address and date of birth of the beneficial owners of the shares;

(6) The name and address of each director of the co-operative;

(7) The name and address of each member of the co-operative;

(8) For each person named under paragraphs (2), (5), (7) and (8) above, a statement indicating whether he or she is enrolled on the Inuit Enrolment List and indicating his or her enrolment number;

(9) A certificate of incorporation issued by the Legal Registries Division of the Nunavut Department of Justice;

(10) A copy of the co-operative's Memorandum of Association filed with and approved by the Legal Registries Division of the Nunavut Department of Justice;

(11) If an applicant was incorporated outside of Nunavut, a copy of the Memorandum of Association filed with and approved by the jurisdiction in which the co-operative was incorporated, accompanied by a certificate of continuance or a certificate of extra-territorial registration issued by the Legal Registries Division of the Nunavut Department of Justice;

(12) A copy of the co-operative's by-laws;

(13) A copy of any business license issued by any municipality in which the cooperative operates; and

(14) A copy of the applicant's Workers' Compensation Compliance certificate issued by the Northwest Territories and Nunavut Workers' Compensation Board.

59. In the case of a co-operative that has associated itself with one or more other co-operatives as a federation (with or without share capital) for the purpose of carrying on a co-operative undertaking, business or industry, NTI requires that the aforementioned information and documentation be provided in relation to every other co-operative with which the applicant is associated.

60. In the case of a corporation, an Inuit business must provide:

(1) The name, address and date of birth of each shareholder of the corporation;

(2) The total number of shares of each class issued by the corporation, the total number of shares of each class held by each shareholder of the corporation and a description of which class of shares has voting rights;

(3) A sample of the share certificate of each class of share;

(4) If any shares are held in trust, the name and address of the trustee(s) and the name, address and date of birth of the beneficial owner of the shares;

(5) A copy of any shareholder agreement;

(6) The name and address of each director of the corporation;

(7) For each person named under paragraphs (1), (4) and (6) above, a statement indicating whether he or she is enrolled on the Inuit Enrolment List and indicating his or her enrolment number;

(8) A certificate of incorporation issued by the Legal Registries Division of the Nunavut Department of Justice;

(9) A copy of the corporation's Articles of Incorporation filed with and approved by the Legal Registries Division of the Nunavut Department of Justice;

(10) If a corporate applicant was incorporated outside of Nunavut, a copy of the Articles of Incorporation filed with and approved by the jurisdiction in which the corporation was incorporated, accompanied by a certificate of continuance or a certificate of extra-territorial registration issued by the Legal Registries Division of the Nunavut Department of Justice;

(11) A copy of the corporation's by-laws;

(12) A copy of any business license issued by any municipality in which the corporation operates; and

(13) A copy of the corporate applicant's Workers' Compensation Compliance certificate issued by the Northwest Territories and Nunavut Workers' Compensation Board.

61. In the event that any of the shares of the corporation are held by one or more other corporations, NTI requires that the corporate applicant submit the information detailed above in relation to each corporate shareholder.

62. Once an Inuit business is registered on the NTI Inuit Firms Registry, the Inuit Firm is required to file an update form on an annual basis as registration is only valid for 1 year. In the event that the Inuit Firm has any new shareholder, partner or member, has changed the number of shares in the prior 12 month period, or has had a change in share ownership in the prior 12 month period, the Inuit Firm must provide all legal and corporate documents pertaining to the change, which are essentially similar in nature to the documents provided to obtain the Inuit Firm's original registration. In the event that no such changes have occurred, no further documentation is required other than the completed registration renewal form. As part of the

renewal, the Inuit Firm undertakes a positive obligation to notify NTI of any relevant change in its business structure of the nature noted on the renewal form.

63. We are advised by NTI that the number of firms on the NTI Inuit Firms Registry has remained static over the last 5 years, averaging approximately 250-300 firms. However, that is not to suggest that there has been the creation of no new Inuit Firms over this period of time. Rather, new Inuit Firms have been added and existing registrants have either voluntarily ceased their registration or been removed from the registry.

5.2 The NNI Nunavut Business Directory

64. In order to fulfill the directives of Article 24 of the NLCA, the GN created the NNI Secretariat to facilitate and coordinate the implementation of the NNI Policy. The NNI Secretariat is housed as a branch of the Department of Economic Development and Transportation.

65. Part of the NNI Secretariat's responsibilities includes the maintenance of the NNI Nunavut Business Directory. For the purpose of the NNI Policy, the NNI Nunavut Business Directory is used by contracting authorities to verify that entities are registered as Nunavut Businesses and thus entitled to the Nunavut Business bid adjustment. In addition, contracting authorities utilize the registry to determine whether the entity is entitled to a second bid adjustment as a Local Business if the contract is local to where the entity carries on business.

66. The NNI Policy defines a Nunavut Business as follows:

> *A business which complies with the legal requirements to carry on business in Nunavut, and meets the following criteria:*
>
> *(i) is a limited company with at least 51 percent of the company's voting shares beneficially owned by Nunavut Residents, or*
>
> *(ii) is a co-operative with at least 51 percent of the Residents' voting shares beneficially owned by Nunavut, or*
>
> *(iii) is a sole proprietorship, the proprietor of which is a Nunavut Resident, or*
>
> *(iv) is a partnership, the majority interest in which is owned by Nunavut Residents and in which the majority benefit, under the partnership agreement, accrue to Nunavut Residents and complies with:*
>
> *(i) maintains a registered office in Nunavut by leasing or owning office, commercial or industrial space or in the case of service oriented businesses, residential space, in Nunavut on an annual basis for the primary purpose of operating the subject business, and*
>
> *(ii) maintains a Resident Manager, and*
>
> *(iii) undertakes the majority of its management and administrative functions related to its Nunavut operations in Nunavut, and*

(iv) has received designation as a Nunavut Business as least two weeks prior to the Tender or RFP closing.

67. In order to receive Nunavut Business status, an applicant must complete an application form and produce specific information and documentation. All applicants must provide the following:

- Legal business name and operating name (if different), together with a Declaration of Use of a Business Name for each operating name if it is different from the legal business name;
- A copy of the current business license;
- A copy of an updated certificate of compliance/good standing from the Nunavut Legal Registries;
- Evidence of Workers' Compensation coverage;
- Name of the Resident Manager (defined as a Nunavut Resident who is capable of undertaking all aspects of the management of the Nunavut Business and has absolute decision making authority over day-to-day matters affecting the Nunavut Business), proof of his or her residency and a completed statutory declaration attesting to his or her residency in the prior 12 months;
- Address of the main office and any legal registered office;
- Confirmation that the business undertakes the majority of its management and administrative functions related to its Nunavut operations within Nunavut;
- The operating community of the business;
- Confirmation of the business type (sole proprietor, partnership, incorporated, or co-operative);
- Confirmation as to whether the business has any shareholders/partners/members and if so, a copy of the shareholder/member/partner registry for each different class of shares, partnership or membership;
- A copy of the Articles of Incorporation in the event the business is a corporation;
- Confirmation that the business maintains a year-round office in Nunavut;
- A copy of any shareholder/member/partnership/management agreements;
- A copy of any by-laws affecting control or ownership of the business; and
- Confirmation that the business is at least 51% beneficially owned by Nunavummiut and proof of residency for all Nunavut Residents (owners, shareholders, partners or members).

68. All applicants must complete a declaration that the information provided is correct, current and complete.

69. Businesses listed on the NNI Nunavut Business Directory as suppliers of goods and services have to meet additional registration requirements. Unlike the case of Inuit Firms, Nunavut Businesses must be registered as a supplier of the specific goods or services relevant to the contracts on which they are bidding or submitting a tender. An applicant who is registering as a supplier of goods must complete an NNI Commodity for Goods form indicating the categories of goods for which the business maintains a representative inventory and must undergo a site visit in order to verify that the applicant does in fact have the infrastructure to supply the goods in question. An applicant who is registering as a supplier of services must complete an NNI Commodity Code for Services form indicating the categories of services provided.

70. Once a business has been listed on the NNI Nunavut Business Directory for two consecutive weeks, the business is eligible to receive the Nunavut Business bid adjustment.

71. Registration on the NNI Nunavut Business Directory is valid for a period of one year. In order to renew a registration, an applicant must complete a renewal form, which is essentially identical to the initial application form and provide the same supporting documents that were provided at the time of initial registration, regardless of whether there have been any changes in the business over the prior 12 month period.

72. In respect of both an initial registration and a renewal, businesses have a positive obligation to notify the NNI Secretariat in writing of any material changes to the information provided at the time of registration or renewal.

73. We are advised by the NNI Secretariat that the number of firms on the NNI Nunavut Business Directory has remained static over the last five years, averaging approximately 200-250 firms. However, that is not to suggest that there has been the creation of no new Nunavut Businesses over this period of time. Rather, new Nunavut Businesses have been added and existing registrants have either voluntarily ceased their registration or been removed from the registry.

6. Data Analysis

74. One of the most reliable ways to determine whether the NNI Policy is achieving its objectives and the objectives of the NLCA is by reviewing the contract data from the various contracting authorities. Unfortunately, as has been recognized in past comprehensive reviews, the data that is available is limited. In addition to significant data gaps, there are also recognized concerns regarding the reliability of the data provided.

75. That said, much of the data provided aligns with the anecdotal evidence provided to us from stakeholders of the Nunavut procurement system and there is sufficient data available to conduct some analysis against which to measure the effectiveness of the current NNI Policy in achieving its objectives and the objectives of the NLCA.

6.1 CGS Data

6.1(a) Basic Data Set

76. CGS provided us with a large data set covering all contracts in excess of $5,000 entered into by the GN as reported to CGS for the fiscal years 2008/2009 through 2011/2012, which includes contracts awarded by Health and Social Services, Economic Development and CGS. The data set does not include real property lease contracts or the contracting activities of Crown Corporations, crown agencies, boards, the Legislative Assembly, QEC or NHC.

77. We analyzed a total of 7,368 contracts awarded by the GN from 2008 to 2012 with a total contract award value[1] of $1.2 billion, with the annual breakdown and contract award values as follows:

Year	Total Number of Contracts	Contract Award Value
2008-2009	1,575	$311,014,162
2009-2010	1,890	$266,859,983
2010-2011	1,976	$285,877,739
2011-2012	1,927	$346,459,868
TOTAL	**7,368**	**$1,210,211,752**

78. The breakdown of the 7,368 contracts awarded by the GN from 2008 to 2012 by contract type is as follows:

Contract Type	No. of Contracts	Contract Award Value	Award Value as a % of Total Contract Award Value
Air Charters	481	$151,138,135	12.5%
Architectural/Engineering	116	$29,494,137	2.4%
Consulting	360	$109,993,278	9.1%

[1] "Award value" is recorded by CGS as the entire value for the contract and not necessarily the same as the amount that was committed to Free-Balance, especially for multi-year contracts. This amount does also not include any increase or decreases due to increases or decreases in the scope of work after the contract was awarded and work proceeded on the contract.

Contract Type	No. of Contracts	Contract Award Value	Award Value as a % of Total Contract Award Value
Major Construction[2]	122	$335,122,065	27.7%
Minor Construction or Services[3]	363	$45,948,965	3.8%
Non-Standard Service Contract	412	$58,788,324	4.9%
Property Lease	13	$5,696,673	0.5%
Purchase Order	2,178	87,256,942	7.2%
Service Contract	3,322	$386,764,378	32.0%
Standing Offer Agreement	1	$8,855	0.0%
TOTAL	**7,368**	**$1,210,211,752**	**100%**

6.1(b) Inuit Firm Data

79. We analyzed the data set provided to determine the amount and value of contracts awarded to Inuit Firms between 2008 and 2012. As detailed below, our analysis reveals that:

- Inuit Firms were awarded approximately 34% of all GN contracts issued over the last four years.
- Inuit Firms received contracts valued at $420 million over the last four years, or, put differently, Inuit Firms received 35% of all GN procurement funds[4] spent over the last four years by way of contract awards.
- The number of contracts awarded to Inuit Firms increased over the last four years.
- The value of contracts awarded to Inuit Firms increased from its original amount in 2008 to its most recent amount in 2012.

[2] "Major Construction" contracts are recorded by CGS as construction contracts over $100,000.00.
[3] "Minor Construction or Services" contracts are recorded by CGS as contracts for construction, maintenance and labour intensive services under $100,000.00.
[4] Based on GN procurement expenditures recorded by CGS only.

Year	Total Number of Contracts Awarded by the GN	Total Number of Contracts Awarded to Inuit Firms	Total Contract Award Value for all Contracts Awarded by the GN	Contract Award Value of Contracts Awarded to Inuit Firms
2008-2009	1,575	561	$311,014,162	$101,868,933
2009-2010	1,890	625	$266,859,983	$94,273,483
2010-2011	1,976	669	$285,877,739	$95,506,231
2011-2012	1,927	669	$346,459,868	$128,581,545
TOTAL	**7,368**	**2,524**	**$1,210,211,752**	**$420,230,191**

80. We note that the 2008-2009 comprehensive review reported that contract awards to Inuit Firms increased from $20,000,000 in 2000/2001 (representing 23.7% of the total contract award value) to almost $60,000,000 in 2007/2008 (representing 30.7% of the total contract award value). If we compare that data with the last full year of data that available for 2011/2012, contract awards to Inuit Firms have further increased to $128,581,545 (representing 37.1% of the total contract award value).

81. One of the other ways to assess the performance of Inuit Firms is to analyze the number of submissions made by Inuit Firms over the past four years. This analysis reveals that Inuit Firms have almost tripled the amount of submissions made for GN contracts over the last four years and over time have submitted a larger proportion of the bids received by the GN, demonstrating a positive increase in Inuit Firm procurement activity.

Year	Total Number of Contracts Awarded to Inuit Firms	Total Number of Inuit Firm Submissions	Total Number of Global Submissions	Inuit Firm Submissions as a % of Total Submissions
2008-2009	561	359	1,798	20%
2009-2010	625	783	2,090	38%
2010-2011	669	899	2,582	35%
2011-2012	669	914	2,518	36%
TOTAL	**2,524**	**2,955**	**8,988**	**33%**

82. We also analyzed the types of contract being awarded to Inuit Firms. Our analysis reveals that Inuit Firms perform strongly in relation to various contract sectors, with Inuit Firms being awarded the majority of all air charter contracts, major construction contracts, minor construction

and service contracts, and purchase orders. However, while Inuit Firms are awarded the majority of air charter contracts by number (60%), Inuit Firms only receive 9% of the total value of all air charter contracts, thus demonstrating that Inuit Firms are being awarded smaller value contracts.

Type of Contract	**Number of Contracts Awarded to Inuit Firms**	**Total Number of Contracts Awarded**	**Inuit Firm Contracts as a % of Total Contracts**	**Value of Contracts Awarded to Inuit Firms**	**Total Value of Contracts Awarded**	**Value of Inuit Firm Contracts as % of Total Value of Contracts**
Air Charters	289	481	60%	$13,228,476	$151,138,135	9%
Architectural /Engineering	4	116	3%	$912,098	$29,494,137	3%
Consulting	34	360	9%	$23,554,876	$109,993,278	21%
Major Construction	77	122	63%	$216,616,953	$335,122,065	65%
Minor Construction or Services	222	363	61%	$29,282,149	$45,948,965	64%
Non-Standard Service Contract	125	412	30%	$3,292,241	$58,788,324	6%
Property Lease	2	13	15%	$1,364,864	$5,696,673	24%
Purchase Order	1,217	2,178	56%	$39,131,456	$87,256,942	45%
Service Contract	553	3,322	17%	$92,838,223	$386,764,378	24%
Standing Offer Agreement	1	1	100%	$8,855	$8,855	100%
TOTAL	**2,524**	**7,368**	**34.2%**	**$420,230,191**	**$1,210,211,752**	**35%**

6.1(c) Non-Inuit Nunavut Business Data

83. We also analyzed the data set provided to assess the performance of non-Inuit Nunavut Businesses. We selected this subset of Nunavut Businesses so as not to capture in the data the Inuit portion of the Nunavut Businesses that would be reflected in the Inuit Firm data noted above. Our analysis reveals that:

- Non-Inuit Nunavut Businesses were awarded approximately 8% of all GN contracts issued over the last four years.

- Non-Inuit Nunavut Businesses received contracts valued at $88 million over the last four years, or, put differently, non-Inuit Nunavut Businesses received 7% of all GN procurement funds[5] spent over the last four years by way of contract awards.

- The number of contracts awarded to non-Inuit Nunavut Businesses decreased by almost 50% from 2008 as compared to 2012; however, there was an increase in the number of contracts in 2009 and 2010. The value of contracts awarded to non-Inuit Nunavut Businesses has similarly trended.

Year	Total Number of Contracts Awarded by the GN	Total Number of Contracts Awarded to Non-Inuit Nunavut Businesses	Total Contract Award Value for all Contracts Awarded by the GN	Contract Award Value of Contracts Awarded to Non-Inuit Nunavut Businesses
2008-2009	1,575	157	$311,014,162	$21,973,965
2009-2010	1,890	183	$266,859,983	$33,001,879
2010-2011	1,976	165	$285,877,739	$20,775,048
2011-2012	1,927	79	$346,459,868	$12,309,444
TOTAL	**7,368**	**584**	**$1,210,211,752**	**$88,060,336**

84. We note that the 2008-2009 comprehensive review reported that contract awards to non-Inuit Nunavut Businesses declined from $33,000,000 in 2000/2001 (representing 38.5% of the total contract award value) to $16,000,000 in 2007/2008 (representing 8.5% of the total contract award value). If we compare that data with the last full year of data available for 2011/2012, contract awards to non-Inuit Nunavut Businesses have further decreased to $12,309,444 (representing 3.6% of the total contract award value).

[5] Based on GN procurement expenditures recorded by CGS only.

85. We also analyzed the types of contracts being awarded to non-Inuit Nunavut Businesses. Our analysis reveals that non-Inuit Nunavut Businesses were not awarded the majority of contracts by number in any contract sector, or by value (with the exception of property leases). Their strongest performance was in the non-standard service contracts (40% by number, 5% by value), followed by property leases (23% by number, 51% by value), minor construction or services contracts (22% by number, 27% by value) and major construction contracts (20% by number, 13% by value).

Type of Contract	**Number of Contracts Awarded to Non-Inuit Nunavut Businesses**	**Total Number of Contracts Awarded**	**Non-Inuit Nunavut Business Contracts as a % of Total Contracts**	**Value of Contracts Awarded to Non-Inuit Nunavut Businesses**	**Total Value of Contracts Awarded**	**Value of Non-Inuit Nunavut Business Contracts as % of Total Value of Contracts**
Air Charters	17	481	4%	$1,696,804	$151,138,135	1%
Architectural /Engineering	7	116	6%	$1,505,516	$29,494,137	5%
Consulting	20	360	6%	$4,332,690	$109,993,278	4%
Major Construction	24	122	20%	$43,188,093	$335,122,065	13%
Minor Construction or Services	81	363	22%	$12,434,714	$45,948,965	27%
Non-Standard Service Contract	165	412	40%	$3,001,374	$58,788,324	5%
Property Lease	3	13	23%	$2,914,550	$5,696,673	51%
Purchase Order	88	2,178	4%	$3,166,068	$87,256,942	4%
Service Contract	179	3,322	5%	$15,820,528	$386,764,378	4%
Standing Offer Agreement	0	1	0%	$0	$8,855	0%
TOTAL	**584**	**7,368**	**8%**	**$88,060,336**	**$1,210,211,752**	**7%**

6.1(d) Southern Firm Data

86. Juxtaposed against the performance of Inuit Firms and non-Inuit Nunavut Businesses is the performance of Southern firms, which we have defined as non-Inuit and non-Nunavut and which includes firms carrying on business from the Northwest Territories or the Yukon Territory. Our analysis of Southern firms reveals the following:

- Southern firms were awarded approximately 57% of all GN contracts issued over the last four years.

- Southern firms received contracts valued at $693 million over the last four years, or, put differently, Southern firms received 57% of all GN procurement funds[6] spent over the last four years by way of contract awards.

- The number of contracts awarded to Southern firms increased steadily from 2008 to 2012, whereas the value of contracts varied resulting in a small increase by 2012 over the 2008 total contract value.

Year	Total Number of Contracts Awarded by the GN	Total Number of Contracts Awarded to Southern Firms	Total Contract Award Value for all Contracts Awarded by the GN	Contract Award Value of Contracts Awarded to Southern Firms
2008-2009	1,575	855	$311,014,162	$187,136,664
2009-2010	1,890	1,082	$266,859,983	$139,584,621
2010-2011	1,976	1,126	$285,877,739	$166,735,075
2011-2012	1,927	1,141	$346,459,868	$200,357,004
TOTAL	**7,368**	**4,204**	**$1,210,211,752**	**$693,813,364**

87. We note that the 2008-2009 comprehensive review reported that contract awards to Southern firms increased from $32,000,000 in 2000/2001 (representing 37.8% of the total contract award value) to $117,000,000 in 2007/2008 (representing 60.8% of the total contract award value). If we compare that data with the last full year of data available for 2011/2012, contract awards to Southern firms have further increased to $200,357,004 (representing 57.8% of the total contract award value).

88. We also analyzed the types of contracts being awarded to Southern firms. Our analysis revealed that Southern firms were awarded the majority of architectural/engineering contracts (89% by number, 90% by value), consulting contracts (83% by number, 74% by value), property

[6] Based on GN procurement expenditures recorded by CGS only.

leases (54% by number, 24% by value) and service contracts (77% by number, 70% by value). While Southern firms were only awarded 36% of air charter contracts by number, those contracts are clearly the higher value contracts, as Southern firms were awarded 90% of the total value of all air charter contracts. A similar trend was observed with non-standard service contracts, where Southern firms were awarded 30% of such contracts by number, but received 89% of the total value of all non-standard service contracts awarded.

Type of Contract	**Number of Contracts Awarded to Southern Firms**	**Total Number of Contracts Awarded**	**Southern Firm Contracts as a % of Total Contracts**	**Value of Contracts Awarded to Southern Firms**	**Total Value of Contracts Awarded**	**Value of Southern Firm Contracts as % of Total Value of Contracts**
Air Charters	174	481	36%	$136,201,129	$151,138,135	90%
Architectural /Engineering	103	116	89%	$26,459,599	$29,494,137	90%
Consulting	300	360	83%	$80,916,587	$109,993,278	74%
Major Construction	21	122	17%	$75,317,019	$335,122,065	22%
Minor Construction or Services	55	363	15%	$3,444,187	$45,948,965	7%
Non-Standard Service Contract	122	412	30%	$52,494,709	$58,788,324	89%
Property Lease	7	13	54%	$1,389,659	$5,696,673	24%
Purchase Order	873	2,178	40%	$44,959,419	$87,256,942	52%
Service Contract	2,549	3,322	77%	$272,631,057	$386,764,378	70%
Standing Offer Agreement	0	1	0%	$0	$8,855	0%
TOTAL	**4,204**	**7,368**	**57%**	**$693,813,364**	**$1,210,211,752**	**57%**

6.1(e) Shortcomings in the Data Measuring the Performance of Inuit Firms

89. The aforementioned data analysis regarding the performance on Inuit Firms, non-Inuit Nunavut Businesses and Southern firms is of assistance in assessing the overall performance of Inuit Firms over the last four years. However, there is a major short-coming in the data that must be kept in mind when drawing any conclusions. The data set does not capture in any manner the percentage or value of work completed by sub-contractors for all of the contracts. Accordingly,

while it would appear that Inuit Firms have received over $420 million in contract revenues, an unknown portion of those revenues have been distributed to Southern firms and other non-Inuit sub-contractors. Similarly, the data set does not reveal the percentage or value of work completed by Inuit Firms as sub-contractors for contracts awarded to Southern firms or Non-Inuit Nunavut Businesses. This is a major data gap that needs to be remedied on a going-forward basis so as to permit a more meaningful assessment to be undertaken of the performance of Inuit Firms.

6.1(f) Data on the Impact of the NNI Policy on Contract Awarding Decisions and GN Costs

90. We analyzed the CGS data set to determine the number and value of contracts where the application of the NNI Policy impacted the awarding of the contract – that is, where the NNI Policy resulted in the contract being awarded to an entity other than the bidder with the lowest bid price or the proponent with the highest sub-total weighted score (hereinafter referred to as "NNI Award Contracts"). Our analysis revealed the following:

- The awarding of 4% of contracts was impacted by the application of the NNI Policy. This data is consistent with anecdotal evidence given by CGS officers interviewed in various communities as well as the analysis conducted by individual CGS officers.

- Beneficiaries of the NNI Policy (whether Inuit Firms and/or Nunavut Businesses) received an additional $123 million in contracts or 10% of total contract award value due to the application of the NNI Policy that they otherwise would not have received in the absence of the NNI Policy.

Year	Total No. of Contracts	No. of NNI Award Contracts	NNI Award Contacts as a % of Total Contracts	Value of NNI Award Contracts	Total Contract Award Value	NNI Award Contracts Value as % of Total Contract Award Value
2008-2009	1,575	43	3%	$59,722,616	$311,014,162	19%
2009-2010	1,890	83	4%	$29,463,641	$266,859,983	11%
2010-2011	1,976	72	4%	$11,314,079	$285,877,739	4%
2011-2012	1,927	68	4%	$22,919,133	$346,459,868	7%
TOTAL	**7,368**	**266**	**4%**	**$123,419,469**	**$1,210,211,752**	**10%**

91. We also analyzed the NNI Award Contracts by contract type. Our analysis revealed that:

- The NNI Policy has most significantly impacted the awarding of purchase orders (10% by number, 10% by value), followed by major construction contracts (8% by number, 33% by value), air charter contracts (6% by number, 1% by value) and minor construction and services contracts (2% by number, 5% by value).

- The NNI Policy has not impacted the awarding of architectural/engineering contracts, non-standard service contracts, property leases, service contracts or standing offer contracts.

Contract Type	**NNI Award Contracts**	**Total Contracts**	**NNI Award Contracts as a % of Total Contracts**	**NNI Award Contract Value**	**Total Contract Award Value**	**NNI Award Contract Value as a % of Total Contract Award Value**
Air Charters	30	481	6%	$1,548,697	$151,138,135	1%
Architectural /Engineering	0	116	0%	$0	$29,494,137	0%
Consulting	3	360	1%	$442,950	$109,993,278	0%
Major Construction	10	122	8%	$110,843,578	$335,122,065	33%
Minor Construction or Services	7	363	2%	$2,216,986	$45,948,965	5%
Non-Standard Service Contract	0	412	0%	$0	$58,788,324	0%
Property Lease	0	13	0%	$0	$5,696,673	0%
Purchase Order	211	2,178	10%	$8,350,177	$87,256,942	10%
Service Contract	5	3,322	0%	$107,080	$386,764,378	0%
Standing Offer Agreement	0	1	0%	$0	$8,855	0%
TOTAL	**266**	**7,368**	**4%**	**$123,419,469**	**$1,210,211,752**	**10%**

92. As noted above, the NNI Policy has had the most significant impact in terms of the number of NNI Award Contracts in the case of purchase orders. Our analysis of the value of the purchase orders that resulted in NNI Award Contracts reveals that the majority of the purchase orders awarded to the non-lowest bidder as a result of the NNI Policy were valued at $50,000 or under. Specifically:

Purchase Order Contract Value Range	No. of NNI Award Contracts	Total Value of NNI Award Contracts
$5,000-$9,999	58	$429,451
$10,000-$49,999	110	$2,450,276
$50,000-$99,999	18	$1,347,590
$100,000-$249,999	23	$3,330,454
$250,000-$499,999	2	$792,406
$500,000-$999,999	0	$0
$1,000,000 and greater	0	$0
TOTAL	**211**	**$8,350,177**

93. The aforementioned analysis leads one to question whether, based on the CGS data, the NNI Policy is achieving its objectives. The CGS data demonstrates that in 96% of its contracts, the NNI Policy is not directly impacting who is awarded the contract. In those 96% of contracts, the NNI Policy may not play a determinative role for a number of reasons, such as:

- No Southern firms are bidding for the work;
- Inuit Firms and Northern businesses cannot compete with Southern firms notwithstanding the advantage provided by the bid adjustments in the NNI Policy;
- Inuit Firms and Northern businesses are so competitive that they do not need the advantage of the bid adjustments to win contracts; or
- As between the Northern businesses, they are all receiving the same adjustments so the application of the NNI Policy is "a wash".

94. Some might conclude that the fact that the NNI Policy does not directly impact who is awarded contracts in 96% of procurement processes demonstrates that the NNI Policy is not required. In our view, such a conclusion would be a far too narrow reading of the data. What the data does show is that the NNI Policy plays an important role in the awarding of contracts in certain sectors of the Nunavut economy, such as air charters, construction and purchase orders. If the NNI Policy was eliminated, these contract sectors would be materially impacted to the detriment of Inuit Firms and Northern businesses.

95. Moreover, we have no way of measuring the extent to which Southern firms would increase their efforts to pursue GN contracts in the absence of the NNI Policy. It may be that the

NNI Policy dissuades Southern firms from bidding on GN contracts out of a perceived disadvantage.

96. We would have liked to have analyzed the data to determine which bid adjustment (Inuit Firm, Nunavut Business or Local Business) resulted in the awarding of the NNI Award Contracts to the non-lowest bidder. However, the data did not capture this information. On a going forward basis, this information must be collected to determine which components of the NNI Policy are effective at impacting the awarding of contracts.

97. CGS provided us with additional internal analysis that it had performed regarding the cost to the GN of the NNI Policy – that is, the additional amount of funds that the GN had to pay for contracts that were awarded to someone other than the lowest bidder due to the application of the NNI Policy. The CGS data reveals that the total cost for 2008/2009 through 2011/2012 was $3,150,498, broken down as follows:

Year	**Additional Cost to the GN**
2008/2009	$166,108
2009/2010	$2,055,354
2010/2011	$213,421
2011/2012	$616,615
TOTAL	**$3,150,498**

98. The cost to the GN of the NNI Policy vis-à-vis the contracts tracked by CGS is less than 1% of its total procurement expenditures during the 2008/2009 to 2011/2012 fiscal years. This data demonstrates that the cost to the GN (at least in relation to CGS-tracked contracts) is not excessive and is not preventing the GN from securing goods and services at "good value" as contemplated by section 7.1(a) of the NNI Policy.

6.1(g) Data on Bonuses and Penalties

99. We analyzed the number and amount of penalties levied by the GN over the last four years as tracked by CGS. The analysis revealed that penalties were levied in relation to only 35 contracts and penalties levied totalled only $451,122. This amount is very insignificant when compared to the total contractual spend of $1.2 billion over this same period of time.

Year	**Total No. of Contracts**	**Total Number of Contracts with Penalties**	**% of Contracts with Penalties**	**Value of Penalties Levied**
2008-2009	1,575	6	0.4%	$39,209
2009-2010	1,890	9	0.5%	$154,957

Year	Total No. of Contracts	Total Number of Contracts with Penalties	% of Contracts with Penalties	Value of Penalties Levied
2010-2011	1,976	15	0.8%	$233,790
2011-2012	1,927	5	0.3%	$23,267
TOTAL	**7,368**	**35**	**0.5%**	**$451,122**

100. With respect to bonuses, our analysis revealed that bonuses were paid in relation to 149 contracts with the total amount of bonuses paid to contractors being $1,318,213. Again, with a total contractual spend of $1.2 billion over this period of time, the amount of bonuses paid is relatively insignificant.

Year	Total No. of Contracts	Total Number of Contracts with Bonuses	% of Contracts with Bonuses	Value of Bonuses Paid
2008-2009	1,575	25	1.6%	$782,721
2009-2010	1,890	38	2.0%	$152,155
2010-2011	1,976	53	2.7%	$286,798
2011-2012	1,927	33	1.7%	$96,538
TOTAL	**7,368**	**149**	**2.0%**	**$1,318,213**

6.1(h) Data on Minimum Inuit Content

101. In connection with bonuses and penalties, we analyzed those contracts that had a minimum Inuit labour content requirement to determine the percentage Inuit labour required under the contracts versus the actual percentage Inuit labour achieved. Our analysis revealed a significant deficiency in data collection. For over 50% of the contracts that had a minimum Inuit labour content, CGS had not recorded the percentage of Inuit labour achieved.

102. This deficiency is problematic for two important reasons: (1) the actual Inuit labour content achieved is required to determine whether the contractor is eligible for a bonus or subject to a penalty; and (2) the actual Inuit labour content achieved on contracts is critical information that is required to set the minimum Inuit labour content requirement on future contracts. If the Inuit labour content achieved is significantly higher or lower than the minimum amount set out in the contract, adjustments must be considered on a going forward basis for similar contracts in similar communities.

103. Our analysis revealed the following:

% Inuit Labour Required	Total Number of Contracts	No. of Contracts That Met or Exceeded Requirement	No. of Contracts That Did Not Meet Requirement	No. of Contracts Where % Inuit Labour Achieved Data Not Available	% of Contracts Where No Data Available on % Inuit Labour Achieved
0%	38	3	0	35	92%
5%	10	1	0	9	90%
10%	20	5	3	12	60%
15%	18	8	1	9	50%
20%	30	14	1	15	50%
21%	2	0	0	2	100%
25%	51	25	5	21	41%
30%	76	28	9	39	51%
35%	42	13	5	24	57%
40%	80	24	6	50	63%
45%	1	1	0	0	0%
50%	22	10	2	10	46%
52%	1	0	0	1	100%
60%	19	8	3	8	42%
70%	1	0	1	0	0%
75%	12	8	1	3	25%
80%	3	3	0	0	0%
90%	9	5	2	2	22%
100%	16	15	0	1	6%
TOTAL	**451**	**171**	**39**	**241**	**53%**

104. Taking the data available at face value, it would appear that for most contracts, the minimum Inuit labour required was met or exceeded. However, we have no way of knowing whether the missing data would trend similarly or would demonstrate the reverse.

6.1(i) Data on Procurement Officers

105. The CGS data set also provided the names of the CGS officers that were responsible for the awarding of the 7,368 contracts. A total of 468 officers awarded contracts over the four year period. Twelve officers awarded 100 or more contracts each, 50 officers awarded between 10 and 99 contracts each and 406 officers awarded between one and nine contracts each. CGS has advised that there are currently 38 officers that are responsible for awarding contracts in the various jurisdictions throughout Nunavut and that the number of such officers would have been fairly similar in 2008 through 2012.

106. The data accordingly reveals that there is a high level of turnover amongst the officers responsible for awarding contracts. While a significant number of officers awarded only a small number of contracts (406 officers awarded less than nine contracts each), there was still significant turnover of staff amongst those officers who awarded over 10 contracts. While the raw number of 406 is high, we are advised by CGS that a significant portion of those contracts were awarded without a competitive procurement process either though sole sourcing or a standing offer. Nevertheless, this data still offers support for concerns of inconsistent application of the NNI Policy and the GN's general procurement decisions.

6.2 NHC Data

107. We were provided with a very limited data set from NHC. The data related to 49 contracts awarded by NHC over the last two years for housing units constructed throughout Nunavut. In relation to each contract, we were provided with limited fields of data. Accordingly, it is not possible for us to analyze the NHC data to the same extent as the CGS data.

108. In addition, the data set provided by NHC was replete with errors, as confirmed by comments in the data spreadsheets themselves and as confirmed by an independent review conducted by a former GN employee for NHC. The bonuses and penalties actually assessed by NHC differed in many cases from those calculated by NHC due to rounding errors, data entry errors, mistakes in calculations resulting in contractors being informed of incorrect bonus or penalty amounts and then NHC being bound to those incorrect calculations, and improper waivers of GC55 penalties. Accordingly, the reliability of the NHC data is questionable.

109. We proceeded nonetheless to analyze the data provided, keeping in mind the concerns above. In relation to the 49 contracts analyzed, our analysis revealed the following:

- The total contract value of the 49 contracts was $70,393,436.90.

- NNI Policy bonuses were awarded in relation to 34 of the 49 contracts and the total value of the bonuses recorded was $1,666,820. Bonus funds were not actually paid by NHC in

relation to many of these contracts as the bonuses were offset by NNI Policy and GC55 penalties.

- NNI Policy penalties were levied in relation to nine of the 49 contracts and the total value of the NNI Policy penalties levied was $370,894.

- The minimum Inuit content levels varied across contracts from 15% to 70%. The minimum Inuit content was adjusted downward in relation to five contracts.

110. Anecdotally, NHC has advised that the NNI Policy only impacts the awarding of contracts in approximately 1% of its contracts.

6.3 Recommendations Regarding Data

111. It is imperative that the GN implement mandatory data collection procedures for all contracting authorities (including NHC) on an immediate basis. As noted below, the data collected must be consistent across all contracts and across all contracting authorities. The GN must ensure that the current data gaps are filled as part of this process.

7. Analysis of Issues and Recommendations

112. During our consultations, it became apparent that there are a number of concerns related to the content, interpretation and application of the NNI Policy, many of which have, at a minimum, been highlighted in past comprehensive reviews. Some concerns are minor and can easily be remedied by small amendments to the wording of the NNI Policy, whereas others require a wholesale revision to the structure and application of the NNI Policy. To the extent possible, we have provided recommendations and proposed solutions to address these concerns. For some of the more extensive concerns, we have provided a roadmap for the proposed changes and can work with the GN in the coming months to draft amendments to the NNI Policy to effect these changes.

7.1 The Need to Separate the NLCA Preferential Procurement Policy from the Nunavut Business Assistance Incentives

113. The NNI Policy combines two distinct government procurement preference programs, one dealing with the implementation of Article 24 of the NLCA and the other dealing with a Nunavut business incentive, or assistance, program.

114. Insofar as both components of the current NNI Policy deal with a preferential procurement program, it is understandable that both would be combined into one policy. However, as we heard from a number of people with whom we spoke, the two components are different in scope and intent and should not be co-mingled. Moreover, it is important to keep in mind that a component of the preferential procurement policy is mandatory in nature in order to comply with the NLCA obligations, whereas the Nunavut business assistance component is not mandated by the NLCA. Consequently, those provisions which flow from the latter can be

modified or eliminated to achieve whatever social or economic objectives that the GN wishes to achieve.

115. The case for a separation – or bifurcation – of the NNI Policy was made particularly clear by Inuit commentators and was reinforced during the Inuit Small Business Roundtable conducted by the NTI in June, 2012.

116. The NNI Policy contains a number of provisions that are relevant to the implementation of both the Article 24 objectives and the Nunavut business assistance objectives. As well, the NNI Policy contains a number of other provisions that are relevant to only one of those two components. This co-mingling of the two components within one policy leads to confusion about what the NNI Policy provides for with respect to implementing the NLCA obligations, and what it provides for in respect of Nunavut business assistance. As a result, the NNI Policy comes under criticism for reasons that have more to do with a misunderstanding of what does, and does not, apply in respect of each of those components.

117. We agree with the view that the NNI Policy, as it is currently written, creates needless confusion between the application and effect of the two procurement preference programs dealing with beneficiaries and Nunavut Businesses. We therefore recommend that a new policy be developed containing three sections: one dealing with logistical and operational matters that are common to both components, one dealing with the implementation of the Article 24 NLCA obligations, and one dealing with matters intended to assist Nunavut Businesses.

118. We also believe that the name of the NNI Policy – Nunavummi Nangminiqaqtunik Ikajuuti (which, according to Appendix "A" of the NNI Policy, means "assistance for Nunavut businesses") – needs to be changed to more accurately reflect its scope and intent. The NNI Policy is not just designed to assist Nunavut Businesses; it is in large measure intended to implement the obligations arising from Article 24 of the NLCA. A more accurate name might be the "Nunavut Preferential Procurement Policy" as translated in Inuktitut (which we will refer to herein as the NPPP). This new title would be broad enough in reach to encompass the provisions directed towards beneficiaries and their businesses as well as provisions to assist Nunavut Businesses.

119. Although the specifics of what would be contained in the different sections of the proposed NPPP would need to be settled in consultation with GN officials, NTI and the business community, we envisage the section dealing with implementation of Article 24 to include provisions dealing with the objectives of the policy, Inuit content, bid evaluation, Inuit Firm bid adjustments, the nature and extent of Inuit ownership and control that will need to be demonstrated to achieve the full measure of bid adjustments, the NTI Inuit Firms Registry, training, bonuses and penalties (if retained, as discussed below) and a section discussing the importance of interpreting the proposed NPPP in accordance with the spirit and intent of Article 24.

120. The section of the proposed NPPP dealing with Nunavut Businesses would contain provisions touching on the objectives of the policy, the Nunavut Business and Local Business bid adjustments, the NNI Nunavut Business Directory, the nature and extent of ownership and

control needed to qualify for Nunavut Business and Local Business bid adjustments, local supplier issues, and leases.

121. The common section of the proposed NPPP would deal with issues like the application of the policy, the review mechanism, monitoring and enforcement, and the Review Committee.

7.2 Bonuses and Penalties

122. During our consultations, it was made abundantly clear to us that bonuses and penalties are one of the most controversial elements of the NNI Policy. This was made particularly evident at the June 27, 2012 Inuit Small Business Roundtable discussions. Many of the criticisms about the NNI Policy focused on the imposition of penalties in circumstances that the participants felt were unfair.

123. Penalties in particular have become a flashpoint for controversy over the last few years as it was only recently that the majority of contracting authorities began imposing penalties. In the earlier years of the NNI Policy, no penalties were imposed by CGS or NHC at all. NHC began imposing penalties approximately two years ago and CGS began imposing them at least three years ago Now that contracting authorities have put in place a concerted effort to assess both bonuses and penalties, there is a general concern amongst the contracting community that they are assessed in an inconsistent and incomplete manner. For example, NHC assesses bonuses and penalties in relation to Inuit project management, whereas CGS does not and neither NHC nor CGS assesses bonuses or penalties for training plans.

7.2(a) Expressed Concerns Regarding Bonuses and Penalties

124. Both contractors and contracting authorities have expressed a number of concerns regarding bonuses and penalties. Specifically:

- Almost all companies that we met with expressed a concern that the manner in which bonuses and penalties are calculated by contracting authorities is unclear. In their view, there is effectively little to no transparency to this aspect of the NNI Policy.
- Some companies feel that they have been unfairly penalized for failing to meet their Inuit content requirements for reasons out of their control (i.e. a shortage of qualified Inuit labour).
- Some companies expressed a concern over the inconsistent application of bonuses and penalties and suggested that they needed to be consistently applied by all contracting authorities.
- Some companies have complained that they do not have the administrative support necessary to produce and maintain company records required in order to demonstrate compliance with the Inuit content requirements.

- Contractors who complete their work early, to the benefit of the GN, have faced penalties for failing to meet projected Inuit content requirements.

- Contracting authorities have expressed a concern about the lack of discretion in the application of penalties in appropriate circumstances. This concern is heightened by the fact that GC55 prescribes the levying of penalties in addition to those mandated by the NNI Policy. There is a concern that contractors are doubly penalized in some cases, with minimal discretion granted to the contracting authorities to mitigate the levying of penalties.

- Contracting authorities are concerned that some contractors build forecasted penalties into their bid prices on the assumption that they will not be able to achieve the required levels of Inuit content, which neutralizes the effect that penalties are intended to achieve. Indeed, some companies confirmed to us that they built forecasted penalties into their bid prices. To make matters even more problematic, these same contractors are receiving bid adjustments during the evaluation based on promised levels of Inuit content, the effect of which improves their chances of being awarded the contract in the first place.

- Contracting authorities have expressed concerns about inappropriate activities in respect of the application of bonuses. Contractors have requested and been granted post-contract reductions in Inuit content requirements on the basis of an alleged shortage of qualified Inuit labour. Once granted, the contractor then exceeded the reduced Inuit content requirements and claimed a bonus. There appears to be no guidance available to contracting authorities as to how requests for post-contract reductions in Inuit content requirements should be assessed and where granted, how to then address the issue of bonuses and penalties.

7.2(b) Relevant NNI Policy Provisions

125. The assessment of bonuses and penalties is provided for in section 12 of the NNI Policy. Section 12.1 provides:

> *Construction contracts will provide for:*
>
> *(a) A bonus that shall be applied in the event that minimum threshold requirements set by the Contracting Authority in the request for tenders has been exceeded.*
>
> *(b) A penalty shall be applied in [the] event that minimum threshold requirements set by the Contracting Authority in the request for tenders which have not been met.*
>
> *(c) Bonuses and Penalties that shall apply with respect to Inuit participation in employment, project management, and training.*
>
> *(d) Bonuses and Penalties that shall be calculation for Local Inuit Labour and/or Nunavut Inuit Labour.*
>
> *(e) Where applicable, a bonus shall be calculated as 1% of the total labour content of the contract for each 1% of the amount by which Inuit employment exceeds the mandatory requirement.*

(f) *Where applicable, a penalty shall be calculated as 2% of the total labour content of the contract for each 1% of the amount by which Inuit employment does not meet the mandatory requirement.*

(g) *In the area of Inuit management, a bonus in the amount of 2% of the total labour content shall be determined on the basis of whether an Inuk is employed as a Project Manager, either locally or for Nunavut. A larger bonus, but not a larger penalty, of an additional 1% shall be determined for a locally employed Inuk Project Manager than a Nunavut employed Inuk Project Manager.*

(h) *The maximum total bonuses and penalties to be determined for a single construction contract shall not exceed 25% of the total labour price.*

126. Section 12.2 of the NNI Policy provides that the bonus and penalty provisions detailed in section 12.1 may apply, at the discretion of the contracting authority, to all other types of contracts beyond construction contracts.

127. According to section 14 of the NNI Policy, monitoring and enforcement procedures shall be developed and applied to, among other things, ensure that bonuses and penalties are based on actual performance. From what we are told, there is very little on-going or post-contract monitoring by contracting authorities to ensure that contractors are living up to the commitments they made in their proposal, and abiding by the terms of the contract. In some cases, contracting authorities have simply avoided this monitoring function altogether. We have heard that post-contract award monitoring is resource intensive for departments whose officials are already over-stretched in delivering their services. Moreover, we have heard that some contractors have such poor employment and payroll records that it is impossible for them to provide any meaningful information to contracting authorities upon which a determination regarding bonuses or penalties could be made. In the absence of any monitoring and enforcement, or at least effective monitoring and enforcement, it is impossible for bonuses and penalties to be properly assessed.

7.2(c) Available Data on Bonuses and Penalties

128. As the application of NNI Policy bonuses and penalties only recently became a regular practice for contracting authorities, there is a limited data set available for analysis.

129. In relation to penalties, the CGS data set reveals that between fiscal years 2008 and 2011, penalties were levied on 35 of 7,368 contracts with a total penalty value of $451,122. This amount is very insignificant when compared to the total contractual spend of $1.2 billion over this same period of time. The NHC data set reveals that in the last two years, NNI Policy penalties were levied on nine of 49 contracts. From the data provided, it is difficult to determine with precision which portion of the penalty levied was attributable to the NNI Policy penalty and which portion was attributable to the GC55 penalty. It would appear that a total of $370,894 in penalties was levied on those nine contracts. This amount is also very insignificant when compared to the total contractual spend of $70,393,436.90.

130. In relation to bonuses, the CGS data set reveals that between fiscal years 2008 and 2011, bonuses were paid on 149 of 7,368 contracts with a total bonus value of $1,318,213. This

amount is also insignificant when compared to the total contractual spend of $1.2 billion over this same period of time. The NHC data set reveals that in the last two years, NNI Policy bonuses were paid on the majority of contracts, with 34 of the 49 contracts receiving bonuses. It would appear that the total value of bonuses paid was $1,664,820. Again, this amount is also very insignificant when compared to the total contractual spend of $70,393,436.90, particularly when a significant portion of these bonuses were off-set by GC55 penalties levied by NHC.

131. Accordingly, the data available does not suggest that the amount of bonuses assessed represents a significant cost to the GN, nor does the levying of penalties represent a significant recapture of expenditures by the GN based on total procurement expenditures.

7.2(d) GC55 Penalties

132. In addition to penalties levied under the NNI Policy, the General Conditions included in construction tenders in Nunavut provide, by way of GC55, for additional penalties for a contractor's failure to comply with proposed Inuit, local and Nunavut content. We are advised that these penalties are a carry-over from the previous general conditions used in the Northwest Territories procurement procedures.

133. The GC55 penalties are unrelated to the NNI Policy. However, they result in confusion in the assessment of penalties, additional complication to the monitoring and enforcement efforts of contracting authorities and represent a double penalty to contractors who fail to meet their Inuit content as the contractors are already penalized for this failure under the NNI Policy.

134. GC55 provides as follows:

> *GC55 FAILURE TO COMPLY WITH PROPOSED INUIT, LOCAL AND NUNAVUT CONTENT*
>
> *55.1 The parties to this agreement recognize the high cost of living in Nunavut, and the need to build capacity of Inuit Firms and Labour in Nunavut, which is compensated for by the Owner through the provision of bid adjustments for the use of Inuit, Local and Nunavut Labour and other Inuit, Local and Nunavut Content, and the provision of bonuses under the Nunavummi Nangminiqaqtunik Ikajuuti (NNI Policy). It is a priority of the Owner to maximize the opportunities for Inuit, Local and Nunavut workers and businesses to benefit from government contracts and the Owner may pay a premium in awarding its contracts to support this important objective.*
>
> *55.2 Therefore, it is a fundamental requirement of this contract that the Contractor shall achieve, by the completion of the contract, at least the amounts tendered on Appendix B-2 of the tender, with the exception of decreasing the total amount of Other Content with corresponding equal or larger increases in the total amounts for Local and Non-Local Inuit and Nunavut Content; specifically by*
>
> *(a) decreasing the total amount of Other Payroll and increasing*
>
> *(i) the amount of Nunavut Labour and the amount of Local Nunavut Labour,*
>
> *or*

(ii) the amount of Inuit Labour and the amount of Local Inuit Labour

which the Contractor has identified in Appendix B-2 of the Tender,

AND

(b) decreasing the amount of Other Content excluding the amount of Other Payroll and increasing

(i) the amount of Local Nunavut Content (excluding Local Nunavut Labour) and the amount of Nunavut Content (excluding Nunavut Labour),

or

(ii) the amount of Local Inuit Content (excluding Local Inuit Labour) and the amount of Inuit Content (excluding Inuit Labour),

which the Contractor has identified in Appendix B-2.

55.3 In the event that the amounts of Inuit, Local and Nunavut expenditures actually achieved by the Contractor are less than the amounts identified in Appendix B-2, or as subsequently revised pursuant to clauses GC55.2 then the Owner MAY adopt one or more of the following remedies,

(a) withhold from any progress payment an amount equal to:

(i) the difference between the amounts identified in Appendix B-2 and the amount identified in the Schedule of Values referred to in GC52.2;

or

(ii) the difference between any revised amounts pursuant to clause GC55.2 (a) and (b) and the amount identified in the Schedule of Values referred to in GC52.2.

This amount may be released to the contractor if at the date of a subsequent request the difference has been eliminated.

(b) deduct from any Request for Contract Payment or the Request for Substantial or Final Completion an amount equal to:

(i) 25% of the difference between the amounts identified in the Schedule of Values referred to in GC52.2 and the Employment Report and the amounts identified in Appendix B-2 of the Tender.

(ii) 25% of the difference between the amounts identified in clause GC55.2 (a) (i) or (ii) and GC55.2 (b) (i) or (ii) and the amount identified in Appendix B-2 or the Schedule of Values referred to in GC52.2 and the Employment Report.

(c) take the contract out of the Contractor's hands, in accordance with Clause 37 and GC38;

(d) any other remedy deemed reasonable by the Owner.

55.3 In the event that the amount of difference identified in GC55.2 is 15% or less of the amount proposed in Appendix B-2 of the tender, the Owner, at its sole discretion, may waive the provisions of clause 55.3.

In the event that the minimum prescribed level of Inuit Labour set out in Appendix J of the tender is not met, then for future tenders where there are similar minimum prescribed levels for Inuit Labour, the Contractor may be deemed not "responsible" as defined in the Government Contract Regulations.

135. We are advised by CGS that CGS does not enforce GC55 penalties. However, NHC does enforce GC55 penalties and they are levied in the vast majority of NHC's contracts. Our analysis revealed that NHC calculated GC55 penalties in relation to 42 of the 49 contracts reviewed. However, due to the waiver of certain GC55 penalties and misinformation provided to contractors regarding penalty levels, GC55 penalties were only levied in relation to 38 of the 49 contracts. The total value of the GC55 penalties levied was $1,189,260.43.

136. The notes contained in the NHC data set, as well as the independent review conducted by a former GN employee for NHC of the NHC data set, reveals that there are significant data entry errors and calculation errors made in relation to the GC55 penalties. As many contractors do not appear to distinguish between GC55 penalties and NNI Policy penalties, any errors in the processing of GC55 penalties undermines the credibility of the NNI Policy.

137. In our view, there is no sound basis upon which to penalize contractors twice for failing to meet their Inuit content requirements. At a minimum, we recommend that the GC55 Inuit content penalty be eliminated so as to avoid this double penalization.

138. However, we are also of the view that the entirety of GC55 should be eliminated for a number of reasons. Specifically:

- The manner in which GC55 is drafted is very unclear. On a plain reading, it is very difficult to understand how penalties are calculated. Moreover, the wording of GC55 conflates NNI penalties and GC55 penalties.

- There are numerous errors associated with the administration of GC55 and the calculation of penalties thereunder.

- While GC55 is not driven by the NNI Policy, it is perceived by contractors as related thereto. The failure to then properly administer GC55 penalties undermines the credibility of the NNI Policy.

- The effort required to comply with GC55 and to assess penalties thereunder on both the part of contracting authorities and contractors is, in our view, disproportionate to the benefits achieved by the existence of the penalties (be it financial or motivational).

- GC55 is not even applied by all contracting authorities, yet it is included in their tenders. This sends a mixed message to contractors regarding their obligations and undermines the value of the GC55 penalties as an enforcement mechanism to ensure that content levels are achieved.

- During our consultations, both CGS and NHC supported the elimination of GC55 in its entirety.

7.2(e) Are NNI Policy Bonuses and Penalties Effective?

139. NNI Policy penalties are designed to deter contractors from failing to meet their Inuit content requirement by threat of financial repercussion. Similarly, NNI Policy bonuses are designed to incent contractors to exceed the required level of Inuit content by financial award. Both enforcement measures seek to improve the level of Inuit employment and involvement in government contracts.

140. Based on our consultations and our analysis of the limited data available, we are of the view that bonuses and penalties are not achieving their desired impact. Rather, penalties in particular are serving as a flashpoint to undermine the credibility of the NNI Policy as a whole.

141. The assessment of bonuses and penalties is a complex task that is not well understood by both the contractor community and a portion of those employed by contracting authorities. The complexity of their assessment requires a significant amount of effort by both contractors and contracting authorities and the absence of relevant documents from contractors and proper training for contracting authorities renders the calculation of any reliable bonuses and penalties extraordinarily difficult.

142. The application of bonuses and penalties has historically been erratic and replete with errors. This has the impact of undermining their designed intention to discipline and reward contractors. Moreover, the data available does not act as a testament to the value of bonuses and penalties.

143. We did not speak with a single contractor who advised that the fear of a significant penalty motivated his or her behaviour in the hiring of Inuit employees. To the contrary, contractors consistently indicated that they have always had every intention of meeting or exceeding their Inuit labour requirements, but their efforts to do so are often undermined by an absence of available and/or qualified Inuit labour. Accordingly, contractor behaviour does not appear to be impacted by the threat of financial repercussions.

7.2(f) Alternatives to the Current Bonus and Penalty Structure

144. In light of the above, we are of the view that bonuses and penalties should be eliminated in their entirety. We note that bonuses and penalties are not prescribed by the NLCA and therefore the GN is not prevented from eliminating this portion of the NNI Policy and replacing it with another enforcement mechanism.

145. An alternative mechanism to promote Inuit content in government contracts is to have a requirement in a tender or RFP for a minimum amount of Inuit content. This requirement would be a mandatory requirement. Winning bidders would then be contractually obligated to deliver the level of Inuit content proposed in their bids. Failure to meet those contractual obligations could, at the discretion of the contracting authority, be a ground for terminating the contract and,

most importantly, a ground for preventing the contractor and its principals from receiving future government contracts for a set period of time. The threat, or reality, of being debarred can be an effective mechanism to promote compliance and discipline contractors who fail to meet their obligations. The debarment or prohibition of contractors has been successful in some Southern jurisdictions.

146. Some contracting authorities expressed concern that prohibiting a contractor from receiving future contracts could prevent much needed work from being performed in a particular region in Nunavut. This was particularly so where there are few contractors available in a region to perform certain types of work. We do not, however, believe that concern should prevent the debarment or prohibition of contractors. Contractors are expected to meet their contractual commitments and failure to do so should have meaningful consequences. Moreover, other contractors will step in to fill any gap left by a debarred contractor, as businesses will pursue opportunities throughout the territory.

147. A second recommended change would be to include a rated requirement to evaluate contractors on past Inuit content performance. Those who exceed the minimum Inuit content in past contracts would be rated more favourably than those who met or failed to meet the Inuit content requirement. This rated requirement would provide an incentive to contractors to exceed Inuit content minimums.

148. We heard from some contracting authorities that certain contractors failed to maintain proper records to document their level of Inuit content. Any such failure could be taken into consideration in evaluating the contractor on past Inuit content performance in future procurements.

149. There has been some discussion that RFPs are the only procurement vehicle where factors such as Inuit labour content could be included as an evaluative criteria. However, best practices across Canada reveal that tenders also include, in appropriate cases, evaluative criteria both mandatory and rated, other than just price.

150. In the event that the GN is not prepared to eliminate both bonuses and penalties in favour of the approach noted above, we recommend that bonuses be eliminated. They have not served the desired function of incenting contractors to materially heighten levels of Inuit employment. Penalties could then be maintained, but streamlined to only apply to Inuit content. Section 12.1(c) currently provides that penalties also apply to project management and training. However, it is our understanding that no penalties have ever been assessed in relation to training, and project management penalties are inconsistently assessed across contracting authorities.

151. Further, we recommend that section 12.1(d) of the NNI Policy also be eliminated, which currently provides that penalties are to be calculated separately for Local Inuit Labour and Nunavut Inuit Labour. Again, to simplify the application of the NNI Policy, we recommend that Inuit labour be assessed as a whole and not broken down by geographic location. We note that the NLCA aims to ameliorate the economic participation of all Inuit, regardless of whether they are Local, Nunavummiut or Southern. Simplifying the assessment in this manner will eliminate a

portion of the burden on both contractors and contracting authorities in the preparation and review of documentation necessary to assess penalties.

152. In addition, we recommend that contracting authorities be vested with the express discretion to alter the minimum Inuit content of a particular contract after execution of the contract. While some contracting authorities currently will adjust the threshold mid-contract, other contracting authorities appear reluctant to do so. Given our concern noted below regarding the manner in which the minimum Inuit content is set for contracts, it is imperative that a degree of flexibility be incorporated into the NNI Policy so as to not unfairly penalize contractors who are committed to meeting their contractual obligations but unable to do so due to the unavailability of qualified Inuit labour.

153. It is our understanding that some contracting authorities have informal guidelines in place to govern what contractors must demonstrate before an alteration of the minimum level of Inuit content will be made. We recommend that set criteria be established and incorporated into the NNI Policy so as to ensure consistency among and between contracting authorities when considering requests for alterations.

154. In the event that the GN decides to retain streamlined penalties as noted above, we recommend that a tiered penalty system be adopted with graduated penalty levels based on the contractor's number of historical failures to meet the contractual minimum Inuit content requirements. The purpose of this system is to get the attention of contractors by having significant repercussions for non-compliance. Merely factoring in calculable penalties would not be an option under this regime.

155. What we propose is that the first tier of the penalty system would have a minimal penalty, such as $10,000. The second tier of the penalty system would have a more significant penalty, such as $50,000. The third tier of the penalty system would have a very significant penalty, such as $150,000. The tiers could increase to as many levels as the GN desires, with the final tier being debarment from bidding on future GN contracts for a set period of time for the contractor and its principals. If the GN is reluctant to impose set penalty amounts, it could impose a tiered penalty system where the penalty amounts are based on a fixed percentage of contract value, again with the final tier being disbarment.

156. This system will only work if proper monitoring measures are adopted (as noted below) and minimum Inuit content is varied where necessary mid-contract, so that the system is not applied in circumstances where it would be unfair to the contractor due to a shortage of available and skilled Inuit labour.

157. We heard on a number of occasions from contractors that penalties were levied against them in circumstances where they were unable to secure available and skilled Inuit labour. It was not always clear to us whether these contractors had in fact requested an alteration of the minimum Inuit content mid-contract and it was refused or whether the issue only arose at the end of the contract. We also heard from contracting authorities that they wished that they were vested with the discretion to waive penalties where they felt circumstances warranted it. Accordingly, we recommend that contracting authorities be granted the discretion to not apply the tiered

penalty system in prescribed circumstances. For example, contracting authorities could be vested with discretion to not apply the tiered penalty system where the contractor is within 10% of meeting the Inuit content requirements. We believe it is important for the GN, in consultation with NTI, CGS, NHC and the business community, to develop guidelines that would be used to determine how the exercise of that discretion will take place.

158. In the event that the GN decides to retain the bonus structure, the NNI Policy will need to be clarified that in the event that the minimum Inuit content is adjusted mid-contract, the contractor is not eligible for a bonus for exceeding the adjusted minimum Inuit content level. Rather, a contractor would only be eligible for a bonus for exceeding the original Inuit content requirement.

159. Regardless of whether bonuses and penalties are maintained, it is imperative that contracting authorities put in place effective monitoring of Inuit content levels during the execution of the contract. Currently, there is little to no monitoring of Inuit content levels during the execution of the contract. Only after the fact assessments are conducted.

160. Not only is the failure to conduct on-going monitoring a breach of the requirements of Article 24, it exacerbates the problem of contractors failing to meet their minimum Inuit content. If contracting authorities wait until after a contract is concluded to determine if Inuit content requirements have been met, there is no opportunity for the contractor to remediate its behaviour and increase its Inuit participation level for at least a portion of the contract. Monitoring must be on-going. If low Inuit participation levels are caught early on, frank discussions can be held between contractors and contracting authorities about why the Inuit content is not being met. If there is simply no available and qualified Inuit labour, perhaps the minimum Inuit labour requirement needs to be amended. If the contractor is not making proper efforts to locate suitable Inuit labour, the contractor can step up his or her efforts for the balance of the contract.

161. Moreover, it is unfair for contractors to sit back and not raise concerns about sufficient qualified and available Inuit labour during the course of the contract and then raise it as a basis to ask for a waiver of the penalty at the contract's conclusion. If a contractor has a concern about the ability to meet the minimum Inuit labour requirement, he or she has the onus to raise it mid-contract. By ensuring that contracting authorities are vigilant in their on-going monitoring efforts, this type of circumstance can be avoided.

162. We heard repeatedly during our consultations that certain contractors falsify records of Inuit content that are submitted to contracting authorities after the conclusion of the contract. By that point in time, there is little that a contracting authority can do to verify the veracity of the records. Again, this inappropriate behaviour can be prevented by on-going monitoring. Contracting authorities need to have officers on site at random points in time during a contract's execution to effectively "count heads" and determine how many Inuit workers are employed on the project.

163. When we raised the issue of on-going monitoring (including random site visits) with some contracting authorities, there was a concern about the feasibility and expense of such efforts. We appreciate that on-going monitoring comes with a price tag. However, it is an

obligation of the NLCA and the NNI Policy and to be blunt, an obligation that the GN is seriously failing to meet. A preferential procurement system cannot properly function without the checks and balances that come from monitoring. It holds contractors accountable to the GN and it is imperative for the achievement of the objectives of the NNI Policy and the NLCA that contractors meet their minimum Inuit content obligations.

164. Some contracting authorities have expressed the view that on-going monitoring initiatives should be the responsibility of the NNI Secretariat. We entirely disagree. Contracting authorities are responsible for the administration of their own contracts and monitoring Inuit labour content is part of that responsibility. The contracting authorities are best positioned to assess the requirements of a particular project and whether a contractor's position that there is insufficient available and qualified Inuit labour is justifiable.

7.3 Minimum Inuit Content Requirement

165. The NNI Policy dictates that for certain contracts, a contractor commit to meeting a set level of Inuit content, which is comprised of Inuit labour, as well as good and services provided by an Inuit Firm. During our consultations, we heard repeated concerns expressed in relation to the Inuit labour component of the mandatory Inuit content requirement and accordingly, our comments are confined to this aspect alone.

166. In many procurement processes, the GN establishes a minimum percentage of Inuit labour (based on payroll dollars) that a contractor is required to achieve during the course of a contract. If not achieved, the contractor is subject to a penalty. The percentage Inuit labour required varies from community to community and by contract type from as low as 10% to as high as 100%. A review of the available data (as set out above) would suggest that on its face, most contractors are generally successful in achieving the required levels of Inuit labour. However, a careful review of the complete data set reveals that in more than 50% of the contracts, there was no data available as to the actual level of Inuit labour achieved. This data gap is significant because it prevents a meaningful review of whether contractors are living up to their obligations to hire and maintain Inuit labour and whether the level of required Inuit labour set by contracting authorities is realistic.

167. During our consultations, we heard a variety of claims from contractors that they met their Inuit content requirements but their competitors did not. We also heard some contractors claim that meeting their Inuit content requirements was impossible due to the unreasonably high minimum content requirement set in the procurement as compared to the level of available and skilled Inuit labour. We also received a number of comments from contractors noting that cultural differences in the work behaviour of beneficiaries created on-going problems in meeting these minimum Inuit labour requirements.

168. In our view, requiring contractors to hire and maintain the employment of a set level of Inuit workers remains an important requirement of the NNI Policy. However, it is critical that the minimum Inuit labour requirements established are reasonable and achievable in the context of the region in question and taking into account other work activities underway or anticipated in the particular region.

169. Contractors complained that they are given virtually no meaningful input into the establishment of the minimum Inuit labour requirement and there is no transparency as to how the GN determines the required level. In our view, this is a shortcoming that needs to be addressed. When asked, contracting authorities indicated that they set minimum Inuit labour requirements based on historical levels and past Inuit labour achievement levels by contractors. However, we know from reviewing the same historical data set that it provides an incomplete picture.

170. We did hear some examples from contractors and government officials that in respect of certain planned projects, a consultation did take place regarding the available Inuit labour in the region and as a result, the level of minimum Inuit labour required was far more achievable.

171. In order to bring some much needed transparency into the setting of minimum Inuit labour requirements in the various regions of Nunavut, we recommend that CGS, NHC, NTI and the business community engage in an annual consultation to discuss current Inuit labour availability and skill set and the planned projects in the community and surrounding communities. This consultation would help to inform the percentages then set by the respective contracting authorities. This process will not prevent circumstances from arising mid-contract that would impact the availability of skilled Inuit labour. However, a properly functioning monitoring regime (as noted above) would be in place to address such circumstances.

172. In addition, as noted elsewhere herein, it is critical that the GN maintain a complete data set of actual Inuit labour achieved in comparison to the level of minimum Inuit labour required, as this data will inform the consultation process and provide some visibility to the GN about the success of the NNI Policy's objective to promote Inuit employment.

7.4 NNI Contracting Appeals Board

173. Earlier in this report we noted the importance of transparency and accountability to a well-functioning procurement regime. Both of those factors are essential in order to inspire confidence in the proper functioning of a government's purchasing activities. Having an effective, fair and timely bid challenge process is one way to examine whether procurement processes have been conducted fairly and according to the applicable rules.

174. In our review, a number of individuals commented that the current bid challenge process articulated in the NNI Policy has failed to provide an effective or timely mechanism to review decisions made in GN procurements. It is worth noting that criticisms of the current review process came not only from the business community, but from within government itself. It is evident that there is little confidence in the current review process and an overhaul of the bid challenge process is needed.

7.4(a) Changes to the Jurisdiction of the Contracting Appeals Board

175. Before turning to specific comments about the process and the Contracting Appeals Board (the "Board") itself, and our suggested reforms, a number of people stated that the Board's jurisdiction is too narrow. We heard a number of comments to the effect that the Board (or

whatever its new iteration will be) should have authority to inquire into not just NNI Policy-related issues, but into the government's conduct of the procurement process more generally.

176. We heard time and again from the supplier community that a review board should be able to look into the way bids were evaluated, even though it may have nothing to do with the NNI Policy. There is appeal to the suggestion for a more comprehensive bid challenge mechanism that could inquire into the way the GN conducted a procurement process. This would not only allow for a higher degree of accountability in the way procurements are carried out, but it would allow review board members to examine non-NNI Policy issues if necessary during the course of a review of an NNI Policy-based complaint. For example, if the review board saw, in the course of its inquiry into a complaint dealing with bid adjustments, that there were serious flaws in the way bids were evaluated, the review board should be allowed to examine those non-NNI Policy issues as well. In practise, it is often difficult to isolate the NNI Policy "issues" from other factors which may have influenced the government's decision to award a contract.

177. Unless and until a more effective and capable review agency is created and operational, we are reluctant to recommend a wholesale increase in jurisdiction that would encompass all aspects of a GN procurement process, whether or not the complaint is rooted in NNI Policy issues alone. But, we recommend that the GN re-assess the value of such an expanded scope once a more viable procurement review process is successfully operating.

178. There is however, one relatively minor addition to the review agency's mandate that we propose at this time – that is, the authority to review decisions made by the NNI Secretariat or NTI in respect to the registration or de-registration of a business. We heard a number of complaints from businesses regarding decisions made by both the NNI Secretariat and NTI regarding their registration status and that the businesses felt that there was no effective mechanism to hold the NNI Secretariat and NTI accountable for their registration-related decisions. We agree that the need for accountability and consistency of treatment of the users of Nunavut's procurement system requires this extension of the review agency's mandate.

179. We note NLCA Article 24.7.1 which, in effect, vests NTI with the responsibility to maintain a comprehensive list of Inuit Firms. Nothing we are recommending would interfere with that responsibility. Instead, we are recommending that an independent review mechanism be implemented to provide an objective appraisal of whether a company should or should not be included on NTI's registry.

7.4(b) Concerns Regarding the Current Operations of the Contracting Appeals Board

180. With respect to the past and current functioning of the Board, there was a wide consensus that it is not operating in a way that inspires confidence in either government officials or businesses. There are a litany of complaints and criticisms. Those include:

- A perceived lack of independence of Board members;
- The Board members lack expertise in procurement and administrative law;

- The current process provides for no opportunity for the contracting authority to fully explain its application of the NNI Policy;

- The current process permits *ex parte* communications (i.e. communications with only one party to the dispute) between the Board members and the contracting authority;

- The current process denies complainants disclosure of relevant documents required in order to prosecute their complaints; and

- The non-binding effect of the Board's decisions on contracting authorities.

181. In presenting these concerns, we wish to stress that the Board members have been handicapped in the exercise of their mandate by a lack of training on procurement and administrative law. Reviewing government procurement processes and decision-making is an extremely complicated task. Without a firm grounding in those two areas of law, it is extraordinarily difficult to balance the (sometimes competing) demands of fairness, efficiency, and analysis of the facts. We therefore do not intend our comments about the current functioning of the Board to be read as direct criticism of the Board members.

7.4(c) Recommended Changes to the Review Process for Matters Arising under the NNI Policy

182. We believe that an overhaul of the NNI Policy review process is necessary to create a board or tribunal that is capable of effective reviews. In addressing the features of an overhauled system, we have been careful not to suggest a mechanism that is too cumbersome on the parties, while still preserving the essential degree of fairness and timely decision-making.

183. First, the current name suggests that the Board sits as an appellate body. This is not the case. Justice Brown noted in *Qikigtaaluk Corporation v. Nunavut (Commissioner)*, 2009 NUCJ 06 at paragraph 35 that the name of the Board seemed unrepresentative of the work it performed. Consequently, we recommend a renaming to something like the NNI Tribunal to better reflect the scope of the mandate.

184. Second, the process for dealing with complaints should be changed. When a bidder feels that it has been treated unfairly, the first step should be a debriefing with the relevant contracting authority. We note that this debriefing would be in addition to the standardized debriefing letter provided by the contracting authority as recommended below. At that debriefing (which can be done in person or by exchange of written correspondence), the contracting authority should fully respond to the issues being raised, subject of course to the need to protect commercially sensitive information of other bidders. Done well (and we have seen some examples of very good debriefing practices from CGS), debriefings will dispel the concern of unfair treatment in many cases. Bidders want to know that their bid was treated fairly – even though they lost – and that other bidders did not receive preferential treatment that was inconsistent with the requirements of the NNI Policy or the procurement process itself.

185. In order to prevent delay that might impact the government's ability to procure necessary goods and services, the review process must move at a quick pace. A debriefing should be requested within five working days of the complainant receiving its debriefing letter from the contracting authority or otherwise becoming aware of the issue which underlies the complaint.

186. The contracting authority should then respond in a timely manner as well. There must be some flexibility in terms of response time from the government as the procurement process may have generated a considerable volume of materials and data that must be analysed before providing a meaningful response. But, the delay should be kept to a minimum and no longer than two weeks except in extraordinary cases.

187. In our view, to ensure that this part of the review process moves along quickly, and gives the government an opportunity to conduct an assessment of the merits of the bidder's concerns, the contract should not be awarded to the winning bidder unless there are urgent public policy reasons that require the immediate purchase of the goods and services in question.

188. In most cases in Canada, bidders who receive a meaningful debriefing will discover that there are no grounds for further challenge to the decision made. Every bidder that participates in a procurement process knows that they may or may not win the contract - that is the nature of the process. But they do want some assurance that the process was conducted fairly and in accordance with the law, and debriefings play a large role in providing transparency into the government's decision-making.

189. In those cases where a bidder feels that the provisions of the NNI Policy were not respected, it should be able to submit a complaint to the NNI Tribunal. Once again, complainants must act expeditiously. We suggest that, within seven working days of receiving the debriefing, a complainant must file a written complaint with supporting documents explaining why they feel the government's NNI Policy obligations were breached. The complainant must submit enough information upon which the NNI Tribunal can decide whether there is a reasonable indication that a breach took place. If the NNI Tribunal sees that no such indication exits, it can reject the complaint at that stage.

190. The grounds for rejection would include: i) the complaint is in respect of issues not within the NNI Tribunal's jurisdiction; ii) the complaint demonstrates no reasonable indication for believing the NNI Policy obligations were breached; and iii) the complaint was filed outside the timeframes required by the NNI Policy.

191. If the NNI Tribunal concluded that a reasonable indication of a breach did occur, it can initiate an inquiry. The contracting authority would be provided with the complaint and supporting materials and be required to provide a response explaining what events transpired that are relevant to the complaint along with all supporting documents within a specified time, such as within 15 working days.

192. If the government's response contains commercially sensitive information, those confidential documents can only be reviewed by the contracting authority and their counsel, the

NNI Tribunal, the representative for the complainant (who does not necessarily have to be a lawyer), and as needed, by officials at the NNI Secretariat or NTI.

193. The NNI Tribunal may, as circumstances warrant, request the views of either the NNI Secretariat or NTI, and those views would be shared with the contracting authority and, subject to confidentiality issues, would also be shared with the complainant.

194. After the contracting authority's response has been provided, the complainant should be given a brief period of time to comment. Generally, seven working days would be sufficient for this review and response.

195. Once the record is complete, the NNI Tribunal would analyse the issues and render a decision, with an explanation of how that decision was reached, no longer than 15 days following the closure of the record.

196. GN officials expressed concerns about the length of the review process and the impact that delays in awarding contracts may have on the GN and its ability to deliver needed services and the resulting impact on the people of Nunavut. Ideally, when a complaint is filed, and accepted for inquiry, the contract would not be awarded, or if awarded, no work be performed under it, until the complaint is disposed of. However, we also recognise that for some contracts like the sealift or fuel delivery, it may be necessary to proceed with the contract and work notwithstanding an outstanding inquiry. But those types of more urgent contracts are the exception. For those urgent contracts that cannot wait for a complaint to be disposed of, the GN must be allowed to proceed with the contract and work.

197. Even though the length of time from the filing of a complaint to its disposition can take approximately 70 days, it is important that enough time is given to the parties to present their positions, and for the NNI Tribunal to decide the issues. A quick moving review process should ensure that the government is able to continue to offer the required services, while providing suppliers with a mechanism to challenge what they feel is unfair treatment.

198. The current Board process provides for an oral hearing. Although oral hearings may be necessary, these should be the exception and only where it is otherwise impossible to adjudicate the complaint (for example, for issues of credibility or where there are limitations on the ability of the complainant to present its case in writing). A well-functioning, expeditious and effective review process can be achieved through a written process in most cases.

199. For the review mechanism to be effective, those who adjudicate these cases should be people with expertise in procurement and administrative law or, have considerable experience in government contracting. It is simply unreasonable to expect persons without the required expertise to adjudicate complex procurement disputes in an effective and timely way. In our view, and taking into account the logistical and legal issues that may arise in a complaint, the NNI Tribunal should have access to legal support and on-going training, as needed.

200. We believe that complaints should be heard by one NNI Tribunal member except where the nature and significance of the complaint warrant a three person review panel. This will

minimize cost to the GN and ensure expediency, as there will be no need to coordinate between three schedules. It would therefore be our recommendation that the GN, in consultation with NTI, appoint at least three NNI Tribunal members.

201. The people selected as NNI Tribunal members do not, in our view, need to be resident in Nunavut, although that would be ideal. However, if the required expertise is not available in Nunavut, the people selected should have significant familiarity with government contracting in Nunavut.

202. We would recommend that the appointment process for adjudicators be changed from the current system where Board members are chosen from nominees from NTI or the Nunavut Chamber of Commerce and the Minister. The key is appointing well-qualified people who owe no allegiance to any particular government, community or business interest. Competent adjudicators must be truly independent and not be chosen to represent the interests of any group or interest in Nunavut.

203. We also believe that these NNI Tribunal members should be ad hoc, that is, paid on a case by case basis. However, it will be necessary to appoint a person to Chair the NNI Tribunal and oversee its proper functioning. The Chair may also reasonably need support from a government department or agency for logistical matters, like file and record management. However, details like this can be resolved if there is acceptance to overhauling the current Board.

204. Perhaps one of the most controversial issues is the scope and effect of a decision made by the review body. Currently, Board members make recommendations to the GN which may or may not be accepted. We have heard criticism by a number of businesses that the GN will ignore a recommendation made by the Board where it is unfavourable to the GN.

205. We understand that there are some examples where Board recommendations have not been implemented by the GN. While the number of cases heard and disposed of by the current Board are not sufficient to determine whether there is a systemic denial by the GN to implement the recommendations of the Board, in order for a review mechanism to be effective, decisions made should be implemented to the greatest extent possible.

206. By way of analogy, the Canadian International Trade Tribunal ("CITT") – the bid challenge agency for federal government procurements – also makes recommendations, i.e. non-binding decisions. However, the Federal Court of Canada has stated that, unless the federal government has compelling public policy reasons not to, a CITT recommendation should be implemented (see *Wang Canada Limited v. Canada (Minister of Public Works and Government Services)*, [1999] 1 F.C. 3). In practise therefore, recommendations by the CITT are treated as binding on the government, subject to its overarching right not to implement in exceptional cases.

207. In our view, the review process provisions of the NNI Policy should be amended to include the changes discussed above, and for clear language to be included to demonstrate the GN's commitment to treat an NNI Tribunal decision as binding, except where, for compelling public policy reasons, it cannot be implemented.

208. In a reconfigured review process, other issues will need to be addressed including whether complainants should be required to pay a fee for filing a complaint, to discourage frivolous complaints. In our view, and in order to keep the process as accessible as possible to smaller business interest, there should be no filing fee. The NNI Tribunal can refuse to commence an inquiry if a complaint does not disclose a reasonable indication of a breach of the NNI Policy.

209. As well, some have suggested that the losing party in a complaint should have costs assessed against them. Although a nominal amount for costs may be appropriate, we believe that a higher level of costs to account for the cost of the tribunal process is not appropriate, except in exceptional cases (where one of the parties to the complaint has misled the NNI Tribunal or otherwise acted in an unconscionable way).

210. In concluding on this area of concern, we believe that the GN needs to show its commitment to an effective review mechanism to provide a meaningful review in cases where NNI Policy breaches are alleged. We do not feel that, as some have suggested, NNI Policy disputes should be dealt with by the courts. That route would, in our opinion, create an unnecessary level of formality and judicialisation of what should be a nimble, informal, yet effective, NNI Policy review process.

7.5 Bid Adjustments

211. The NLCA provides that the GN must maintain a preferential procurement policy, procedure and approach that provides reasonable support and assistance to Inuit Firms, with the objectives of increasing participation by Inuit Firms in business opportunities in the Nunavut Settlement Area economy, improving the capacity of Inuit Firms to compete for government contracts and employing Inuit at a representative level in the Nunavut Settlement Area work force.

212. The NLCA does not require that this preferential procurement treatment be provided by way of bid adjustments in the manner currently prescribed. There are other preferential procurement mechanisms available to the GN by which to achieve the objective of the NLCA, such as through the use of evaluative criteria and set-asides. However, a preferential procurement system based on bid adjustments can also achieve the objectives of the NLCA. Since the NNI Policy was adopted, the volume and value of contracts received by Inuit Firms has dramatically increased, suggesting that the bid adjustment system has been successful.

213. Under the current NNI Policy, three bid adjustments (Inuit Firm, Nunavut Business and Local Business) are available to contractors, each one carrying a weight of 7%. The availability of the bid adjustments and the manner in which they are applied depends on the type of procurement process and the type of contract at issue.

214. Section 11.1(d) of the NNI Policy provides for the manner in which bid adjustments are applied to tenders. Specifically:

All Tenders meeting the requirements of 11.1(a), and where applicable (b), shall then be adjusted based upon Nunavut Business status, Inuit Firm status, and Local Business status of the general contractor, subcontractors, and suppliers, including the labour component;

(i) for tenders including a labour component, the adjustments for the labour component shall be based on estimates of payroll expenditures made by the general contractor, subcontractors and suppliers, for Nunavut, Inuit, and Local payroll expenditures that form part of the bid; and the bid adjustment for estimates of Inuit payroll shall be limited to the minimum requirement set out by the Contract Authority; and,

(ii) for tenders for the supply of goods, or for the clearly identified goods or materials portion of a bid such as for a construction contract the Nunavut Business status adjustment shall apply only if the company listed in the bid is a Nunavut Supplier or Local Supplier approved by the GN for the supply of the category of goods or materials identified in the bid; and

(iii) for tenders for the supply of goods only, and not including the materials portion of a bid for a construction contract, a Bid Adjustment Cap shall apply and bid adjustment values shall only be applied to the first $100,000 of the bid value;

(iv) in the absence of any qualitative or contrary considerations based on quality of goods and services, conduct, past performance, or other like considerations, the lowest tender after adjustments shall be awarded the contract.

215. In the case of an RFP, bid adjustment values as outlined for tenders in sections 11.1(e), (f) and (g) are applied where there is a clear cost criteria.

7.5(a) Inuit Firm Bid Adjustment

216. Appendix A of the NNI Policy defines an "Inuit Firm" as follows:

An entity which complies with the legal requirements to carry on business in the Nunavut Settlement Area, and which is

(i) a limited company with at least 51% of the company's voting shares beneficially owned by Inuit; or

(ii) a cooperative controlled by Inuit; or

(iii) an Inuk sole proprietorship or partnership; and

(iv) able to present evidence of inclusion on NTI's Inuit Firms Registry

7.5(b) Nunavut Business Bid Adjustment

217. Appendix A of the NNI Policy defines a Nunavut Business as follows:

A business which complies with the legal requirements to carry on business in Nunavut, and meets the following criteria:

(i) is a limited company with at least 51 percent of the company's voting shares beneficially owned by Nunavut Residents, or

(ii) is a co-operative with at least 51 percent of the Residents' voting shares beneficially owned by Nunavut, or

(iii) is a sole proprietorship, the proprietor of which is a Nunavut Resident, or

(iv) is a partnership, the majority interest in which is owned by Nunavut Residents and in which the majority benefit, under the partnership agreement, accrue to Nunavut Residents and complies with:

(i) maintains a registered office in Nunavut by leasing or owning office, commercial or industrial space or in the case of service oriented businesses, residential space, in Nunavut on an annual basis for the primary purpose of operating the subject business, and

(ii) maintains a Resident Manager, and

(iii) undertakes the majority of its management and administrative functions related to its Nunavut operations in Nunavut, and

(iv) has received designation as a Nunavut Business as least two weeks prior to the Tender or RFP closing.

218. We heard a concern expressed that the requirements noted above do not go far enough to ensure that a Nunavut Business is living up to the spirit and intent of the NNI Policy by having actual significant operations in Nunavut. One business that we met with confirmed that it is possible to meet the requirements of the current definition by paying someone to act as a Resident Manager and renting a very small office space where a business keeps company brochures and minimal inventory in order to satisfy a site inspection. In reality, there are no actual operations being carried out from the office space and no work actually being undertaken in Nunavut. In order to address this concern, we recommend that the criteria for a Nunavut Business be modified to require that a significant portion of the business' operations be conducted in Nunavut. The NNI Secretariat can then make an assessment as to the actual business operations being conducted in Nunavut and whether they are sufficient to meet the threshold for registration as a Nunavut Business.

219. A concern has also been raised both during our consultations and in past reviews of the NNI Policy that the definition of Nunavut Business is not clearly laid out so as to make it clear that the requirements of items (i) through (iv) apply not only in the case of partnerships, but also to limited companies, co-operatives and sole proprietorships. We recommend that the definition be accordingly amended to remove this ambiguity. Specifically, we would amend the definition as follows:

A business which complies with the legal requirements to carry on business in Nunavut, and meets the following criteria:

(i) is a limited company with at least 51 percent of the company's voting shares beneficially owned by Nunavut Residents, or

(ii) is a co-operative with at least 51 percent of the Residents' voting shares beneficially owned by Nunavut, or

(iii) is a sole proprietorship, the proprietor of which is a Nunavut Resident, or

(iv) is a partnership, the majority interest in which is owned by Nunavut Residents and in which the majority benefit, under the partnership agreement, accrue to Nunavut Residents;

And, in addition to satisfying one of the above criteria in (i) through (iv), satisfies the following additional criteria:

(i) maintains a registered office in Nunavut by leasing or owning office, commercial or industrial space or in the case of service oriented businesses, residential space, in Nunavut on an annual basis for the primary purpose of operating the subject business;

(ii) maintains a Resident Manager;

(iii) conducts a significant part of its operations in Nunavut, including its management and administrative functions; and

(iv) has received designation as a Nunavut Business as least two weeks prior to the Tender or RFP closing.

220. We note that there is a distinction between the manner in which co-operatives are addressed in the Inuit Firm definition and the Nunavut Business definition. In the case of an Inuit Firm, the NNI Policy looks at whether the co-operative is "controlled by Inuit". In the case of a Nunavut Business, the NNI Policy looks at whether the co-operative has "at least 51% of the Residents' voting shares beneficially owned by Nunavut". The term "Resident" is not a defined term, but a Nunavut Resident is a defined term. We also note that the definition speaks to shares being beneficially "owned by Nunavut". It is unclear to us how a territory can have ownership of the shares. In the circumstances, we recommend that the definition be further amended by replacing (ii) with "*is a co-operative that is controlled by Nunavut Resident(s)*".

7.5(c) Local Business Adjustment

221. Appendix A of the NNI Policy defines a Local Business as follows:

A Nunavut Business which has been resident in the Subject Community for the four months prior to application and in addition complies with the following criteria:

(i) maintains an approved place of business by leasing or owning office, commercial or industrial space or where applicable, residential space, in the community on a year-round basis for the primary purpose of operating the subject business, and

(ii) maintains a Local Resident Manager, and

(iii) undertakes in the Subject Community the majority of its management and administrative functions related to its operations in the Subject Community, and

(iv) has applied for and received designation as a Local Business at least two weeks prior to the Tender or RFP closing.

222. We note that there appears to be an error in (iv) of the definition of Local Business, as businesses do not receive a designation as a Local Business. Rather, a business receives a designation as a Nunavut Business from the NNI Secretariat. Accordingly, we recommend that the NNI Policy be amended accordingly.

223. We also question why the Local Business status is restricted to Nunavut Businesses and not available to Inuit Firms. It is possible that an Inuit Firm will meet the requirement for local operations and have a Local Resident Manager but not be registered as a Nunavut Business. In our view, the definition of Local Business should be expanded to include Inuit Firms. That said, it is our understanding that the current practice implemented by the GN is to broaden the definition of Local Business to include Inuit Firms. Accordingly, the NNI Policy should be amended to match current practice.

224. Appendix A of the NNI Policy defines Subject Community as follows:

> *The community or communities wherein or adjacent to where the Contract performance is required. Where the work is required outside the legal boundaries of a community, the Government of Nunavut may:*
>
> *(i) define "community" to include that adjacent community in any case; or*
>
> *(ii) define "community" to include both or all adjacent communities, where two or more communities, such as Hall Beach/Igloolik and Arctic Bay/Nanisivik, are both very close to the work site.*
>
> *(iii) The name(s) of the Subject Community or Communities to be included in the term "Subject Community" for the purpose of receiving a local reference shall be specified in all Tender documents and Contracts.*

225. The NNI Policy contains two additional provisions permitting Local Business adjustments to be given to businesses that do not meet the definition of a Local Business. The first provision is contained in Section 11.1(f) of the NNI Policy, which states:

> *(f) The Local Business status adjustment shall apply to any company that also qualifies for the Nunavut Business status adjustment or the Inuit Firm status adjustment, so long as that company is local to the community where the work or services are required;*

226. As noted above, in order to qualify as a Local Business, the business must be a Nunavut Business. An Inuit Firm may not be a Nunavut Business – that is, it may have its main office located in the south and not maintain any registered office or Resident Manager in Nunavut. However, in order to receive the benefit of the Local Business adjustment under section 11.1(f), the Inuit Firm must be carrying on business in the local community in Nunavut. No rationale has been expressed to us for the basis for extending Local Business status to non-Nunavut Business Inuit Firms and we have no information as to the frequency that this Local Business adjustment is being claimed by businesses or applied by contracting authorities. On its face, it adds to the complexity of the application of the bid adjustments and adds an additional layer of investigation for contracting authorities, as there is no registry for them to turn to determine whether a contractor would be entitled to claim this Local Business adjustment. We recommend that the GN review the utility of including this extension of the Local Business adjustment to Inuit Firms.

227. In addition, the extension to the Local Business adjustment in section 11.1(f) also applies to Nunavut Businesses that are local to the community where the work or services are required. One would assume that this adjustment would be applied where the Nunavut Business does not meet all of the requirements to be registered as a Local Business. It is unclear to us why the NNI Policy would contain a mandatory extension of the Local Business adjustment to firms that do not meet the definition simply because they qualify for other bid adjustments. Again, in our view, this appears to unnecessarily add to the complexity of the application of the bid adjustments. We recommend that the GN review the utility of including this extension of the Local Business adjustment to Nunavut Businesses.

228. The other NNI Policy provision that permits a Local Business adjustment to be given to a business that does not meet the definition of a Local Business is section 11.1(g) of the NNI Policy, which states:

> *(g) (i) Where no local business submits a Bid or Proposal, any qualifying Nunavut Based, Nunavut Business or Inuit Firm, submitting a Bid or Proposal, shall be deemed to be a Local Business and the Local Business status adjustment shall apply;*
>
> *(ii) a Nunavut Business or an Inuit Firm shall be considered "Nunavut Based" when it would be eligible for a Local Business status adjustment under Section 11.1(f) for the same work or service if it were to be provided in the community in which the Business or Inuit Firm is considered local.*

229. This extension of the Local Business adjustment has been named the "Non-Local Local" adjustment by procurement stakeholders. It is our understanding that the Local Business adjustment was designed to ensure that local businesses receive an advantage in procurement processes in their own communities in order to further permit local communities to benefit from GN contracting activities. No clear rationale has been provided to us for the Non-Local Local adjustment. In our view, providing a local adjustment to a non-local company does not foster the purpose of the Local Business adjustment and merely adds to the complexity of the application of bid adjustments. We recommend that the GN review the utility of including this extension of the Local Business adjustment to non-local Nunavut Businesses and Inuit Firms.

7.5(d) Identified Issues

230. During our consultations, it became very apparent that there are a number of concerns expressed by both contracting authorities and the business community regarding the structure and application of bid adjustments.

7.5(d)(i) "Paper" Inuit Firms and Nunavut Businesses

231. We frequently heard from government officials and the business community about bid adjustments being awarded to Inuit Firms or Nunavut Businesses that were established for the

primary or sole purpose of receiving the 7% adjustment in a procurement process. There was, and is, a very deep sense of frustration about the role these "paper" firms[7] play.

232. Stated plainly, there is a widespread belief that contracts awarded to these "paper" Inuit Firms and Nunavut Businesses do little to benefit the Inuit, in particular, and the Nunavummiut, in general, because the work is performed by "southerners" and the profits generated from such work flow out of Nunavut. We are told that some Inuit are simply paid an annual amount to be the "front" of the Inuit Firm – that is, their ethnicity is in effect purchased in order to permit the corporate entity to obtain Inuit Firm status and then the work is thereafter completed by non-Inuit firms with the benefit from the commercial activities flowing into the pockets of non-Inuit entities. Although not to the same extent from what we have observed, the same would hold true for Nunavummiut who "sell" their residency in order to assist a non-Nunavut firm in obtaining Nunavut Business status.

233. We are advised by CGS and a number of businesses in the various communities throughout Nunavut that these paper firms are most prevalent for procurements involving construction contracts and service contracts. It is not typically seen in relation to goods contracts.

234. Using an Inuit Firm corporation as an example, it has been explained to us that, in the case of paper Inuit Firms, the principals set up a corporation where 51% of the company's voting shares are beneficially owned by Inuit and paper the corporate structure accordingly by way of a Unanimous Shareholder Agreement, Articles of Incorporation and other corporate documentation. On paper, the business complies with the Inuit Firm definition. However, in the case of a "paper" Inuit Firm, the company does not live up to the spirit and intent of the NLCA in the actual ownership, management and control of the company, which is very different from what it would have NTI believe. Either by way of undisclosed Management Agreement or practices inconsistent with its documentation produced to NTI, the 51% Inuit owners do not in fact operate or control the company. They do not benefit from the commercial activities of the business, they do not make critical decisions regarding the operations of the company and in some circumstances, do not meaningfully participate in the company at all.

235. The true extent to which these "paper" firms feature in the GN's procurement activities is unknown but, to the extent they do, they create a toxic affect both because they result in, what are essentially, non-Inuit Firms or non-Nunavut Businesses receiving bid adjustments that the company would not otherwise be entitled to, and because the GN spending is not remaining in Nunavut for the benefit of its residents.

236. While we cannot be precise about the extent to which this practise does occur, from our consultations and from a review of the contracting data, it is our view that the significant increase in the value of contracts awarded to Inuit Firms since the last comprehensive review in 2008 is accounted for in part (and perhaps significantly so), by Inuit Firms who engage in the behaviour noted above. But even if the number of Inuit Firms and Nunavut Businesses who

[7] There are a variety of terms used to describe those firms, some more pejorative than others, including: ghost firms, token firms, potato companies, shell companies, gamers, etc. We reference these terms only to show the type of descriptors that have entered the vocabulary of people involved in procurement activities in Nunavut.

engage in this type of arrangement is small in actual numbers, the perception throughout the business and government communities is that this conduct is rampant and that change is needed.

237. If the GN is determined to minimize the circumvention of these objectives, changes to the NNI Policy and its implementation must be made. That said, we are of the view that it will be impossible to eliminate this sort of conduct and business arrangement. Those who are intent on circumventing the requirements of the system will find a way to do so no matter what measures are imposed to attempt to minimize or eliminate this type of personal or corporate behaviour. However, as we discuss below, we do make recommendations to minimize the advantages that businesses gain by engaging in these types of business activities.

238. As a first measure, we recommend a recalibration of the bid adjustments and that a fourth category of bid adjustment be created for Inuit Firms with enhanced ownership and control (hereinafter referred to as "Enhanced Inuit Firm"). This recalibration would keep the current bid adjustment level as between Inuit Firms, Nunavut Businesses and Local Businesses on the same footing albeit at a slightly lower percentage – they would each be entitled to a 5% adjustment. The Enhanced Inuit Firms would be entitled to receive up to an additional 6% adjustment. Consequently, the overall bid adjustment percentage of 21% would not change.

239. The reason why we are proposing this fourth category for Enhanced Inuit Firms, and not simply proposing awarding an additional bid adjustment percentage for Inuit Firms, is due to the wording of the definition of an Inuit Firm in the NLCA which cannot easily be amended. As we have discussed before, the definition of Inuit Firm finds its origin in the NLCA and therefore cannot easily be amended to add additional criteria for registration, such as an express requirement that the Inuit Firm establish that it is managed and controlled by Inuit. Rather, NTI is compelled to make a registration assessment based on the "beneficial ownership" criteria only (in the case of a corporation). Section 10.2 of the NNI Policy provides that the NNI Policy "shall be interpreted so as to respect the letter and intent of the NLCA".

240. In keeping with section 10.2, NTI has taken an expansive view of the meaning of "beneficial ownership" beyond what could be considered its corporate law context (i.e. for whose benefit the shares are being held) to import elements of ownership, management and control by Inuit. We understand that the rationale for this approach is to more closely align the interpretation of Inuit Firm with the spirit and intent of the NLCA. To help NTI better achieve its goal, we recommend incorporating language into the Enhanced Inuit Firm definition to clarify that the spirit and intent of the NLCA requires evidence of additional ownership, management and control.

241. We also recommend that the revised NNI Policy expressly provide in the pre-amble to the section dealing with bid adjustments that (1) "beneficial ownership" shall be interpreted consistent with the spirit and intent of the NLCA to mean who is the true and effective owner of the business, and (2) an Inuit Firm that qualified as an Enhanced Inuit Firm must be a firm that is owned, managed and controlled by Inuit, and that has profits that flow directly to the Inuit owners. In this sense, the approach that we are proposing would closely parallel the manner in which an Aboriginal business is defined and assessed by the Government of Canada in its preferential procurement strategy for Aboriginal businesses.

242. We recommend that the Enhanced Inuit Firm registry be managed by NTI in the same manner in which it manages the Inuit Firms Registry, with the addition that percentage ownership, management and control of the Enhanced Inuit Firm would also have to be made public and available to contracting authorities for the assessment of tenders and proposals.

243. In terms of documentation and information that must be produced by registrants seeking Enhanced Inuit Firm status, applicants should be required to produce to NTI the following:

- Charter documents, such as Articles of Incorporation or partnership agreements;
- Evidence of managerial control, such as a Management Agreement;
- Evidence of owner/shareholder control, such as a Shareholder Agreement;
- Trust agreements relevant to ownership, management and/or control of the business;
- Any collateral agreements;
- Shareholder registers, including the number of shares of each class issued by the company, the names of all shareholders and the number of shares of each type held by each shareholder;
- Dividend policy and payment history;
- Existence of stock options to employees;
- Confirmation of the principal occupations and employer of the officers and directors or any other management;
- Minutes of directors meetings and shareholder meetings for significant decisions that affect management, operation and direction;
- Compensation records for directors, officers and employees;
- Any contracts with owners, officers and employees;
- Evidence of cash management practices, such as payment of dividends and dividend arrears; and
- Tax returns.

244. The creation of the Enhanced Inuit Firm would also respond to a concern expressed by a number of Inuit Firms that they receive no additional benefit from the NNI Policy for being 100% Inuit owned or for having heightened levels of Inuit ownership beyond 51%. In our view, the provision of a higher bid adjustment to those Inuit Firms that have heightened levels of Inuit ownership, management and control fosters the objectives of the NLCA.

245. Although it will not be possible to craft provisions that will prevent people who are intent on circumventing the spirit and intent of the NLCA from doing so, in order to hold people more accountable, we recommend that NTI and the NNI Secretariat require all applicants to certify to the truthfulness of all information provided in their application and supporting documentation and to certify that there is no additional documentation or information relevant to the assessment of their application that has not been provided.

246. We further recommend that the NNI Policy include provisions to address the consequences of deliberately providing untrue or misleading information in violation of the certification given. The consequences should include a spectrum of possibilities, including striking of the business from the NTI Inuit Firm Registry and disbarment of its principal owners from applying for registration of any other business for a minimum period of time.

7.5(d)(ii) Amendment to the Percentages of the Bid Adjustments

247. Article 24 of the NLCA clearly mandates the implementation by the GN of preferential procurement policies, procedures and approaches respecting Inuit Firms, with the objectives of increasing participation by Inuit Firms in business opportunities in the Nunavut settlement Area economy, improving the capacity of Inuit Firms to compete for government contracts and employing Inuit at a representative level in the Nunavut Settlement Area work force. There are no similar requirements for Nunavut Businesses or Local Businesses.

248. Notwithstanding, the NNI Policy currently provides the same preferential treatment to Inuit Firms, Nunavut Businesses and Local Businesses by way of a 7% bid adjustment for each category. Moreover, when one looks at the totality of the adjustments given, 14% of the current bid adjustments relate to geographic location (i.e. being a northern business) and only 7% relate to Inuit status. In our view, this distribution of the 21% of the current bid adjustments is inconsistent with the NLCA, as Inuit Firms are not being provided with preferential treatment over Nunavut and Local Businesses.

249. We recommend that the GN amend the current bid adjustments to provide for a 5% bid adjustment for Nunavut Businesses, a 5% bid adjustment for Local Businesses and a 11% bid adjustment for Inuit Firms. This re-allocation ensures that Inuit Firms receive the majority of available bid adjustments at 11%, with Northern firms (Nunavut and Local Businesses) receiving a combined total of 10% in bid adjustments. In our view, this re-allocation of the 21% is in keeping with the spirit and intent of the NLCA.

250. In relation to Inuit Firms, 5% of the adjustment would be available for those firms that meet the definition of an Inuit Firm and 6% of the adjustment would be available for those firms that meet the definition of an Enhanced Inuit Firm. For the additional 6% available to Enhanced Inuit Firms, we recommend that the 6% be tied directly to the level of Inuit ownership, management and control of the business as follows:

Percentage Ownership	Percentage Adjustment
51%	5%

Percentage Ownership	Percentage Adjustment
52-59%	6%
60-69%	7%
70-79%	8%
80-89%	9%
90-99%	10%
100%	11%

251. In order to achieve the intent of the Enhanced Inuit Firm bid adjustment, work will need to be done to determine how to effectively assess ownership, management and control for the purpose of the scaled adjustment percentage.

252. Another option available to the GN is to preserve the current level of 7% for Inuit Firms, Nunavut Businesses and Local Businesses and to thereafter add an additional percentage adjustment for the Enhanced Inuit Firm status. However, increasing the totality of the bid adjustments has the risk of fiscal irresponsibility by heightening the cost of contracting to the GN.

7.5(d)(iii) Elimination or Modification of the Local Business Adjustment

253. During our consultations, we heard a divergence of views on the efficacy and value of the Local Business bid adjustment. Specifically:

- Some feel that this adjustment leads to unhealthy competition between Nunavut communities;
- Some feel that this adjustment prevents suppliers in smaller regions from expanding their operations into other communities or larger centres;
- Some feel that there is no need to give local businesses in the major economic centres in Nunavut (Iqaluit, Rankin Inlet and Cambridge Bay) a preference, the effect of which would disadvantage “non-local” suppliers; and
- Some have commented that this adjustment is required in order to preserve and promote business in smaller communities who have a commitment to provide goods and services in that area. Some suggest that local businesses need this protection to prevent larger businesses from coming in and taking this business and then leaving once the work is completed, thereby not benefiting the community in the long run.

254. We have considered a number of options to address these concerns, including:

- Eliminating the adjustment altogether;

- Eliminating the application of adjustment in the major commercial centres of Iqaluit, Cambridge Bay and Rankin Inlet, so as to encourage smaller businesses to seek government contracts in those centres by removing the advantage received by larger established businesses in those centres; or

- Minimizing the value of the adjustment to less than 7%.

255. We have no data available to us to assess the frequency with which the Local Business adjustment impacts the awarding of GN contracts and upon which to assess the potential "dangers" to local businesses of eliminating the adjustment. In the circumstances, we are not comfortable recommending that the adjustment be eliminated.

256. With respect to the second option, it raises the question of whether the modification of the application of the bid adjustment would in fact result in an increase in the frequency with which smaller local businesses bid on contracts in the large commercial centres. One assumes that it would do so if the reason for their non-bidding in these large commercial centres is their perceived disadvantage against large local businesses. While this reason was anecdotally given by some contracting authorities, it was not largely confirmed by the smaller businesses in the outlying communities as the basis for not expanding their operations or contractual activities to Iqaluit, Cambridge Bay and/or Rankin Inlet. Accordingly, we do not believe that there is an objective basis upon which to recommend this modification.

257. With respect to the third option, as detailed above, we do recommend that the bid adjustment percentage be adjusted downward.

7.5(d)(iv) Amendment to the Bid Adjustment Cap

258. Section 11.1(d)(iii) of the NNI Policy currently provides that a Bid Adjustment Cap shall apply and that bid adjustments shall only apply to the first $100,000 of the bid value for tenders for the supply of goods. In order to address concerns that the NNI Policy can unduly increase the procurement costs to the GN, some have suggested imposing a Bid Adjustment Cap on contracts other than for the supply of goods. For example, a Bid Adjustment Cap could be implemented in respect of contracts for services and construction.

259. The limited data available suggests that the NNI Policy is not unduly increasing the GN's procurement costs. The cost to the GN of the NNI Policy vis-à-vis the contracts tracked by CGS is less than 1% of its total procurement expenditures during the 2008/2009 to 2011/2012 fiscal years. In the circumstances, we see no basis to recommend that the current bid adjustment cap be expanded.

7.5(d)(v) Missing data

260. An analysis of the effectiveness of bid adjustments in promoting the objectives detailed in the NLCA (or the Bathurst Mandate and Clyde River Protocol) is virtually impossible to do given the absence of data. The only contracting authority that collects detailed contracting data is

CGS. There is a complete data gap for all other contracting authorities and therefore no ability to meaningfully assess the impact of bid adjustments in the awarding of their contracts. In the case of the CGS data set, it is impossible to determine which bid adjustment (Inuit firm, Nunavut Business or Local Business) resulted in the awarding of the NNI Award Contracts to the non-lowest bidder.

261. As detailed more fully below, it is imperative that the GN implement immediate, standardized data tracking procedures in order to permit the effectiveness of bid adjustments to be fully assessed.

7.6 Training

262. One of the most significant failures in the implementation of the NNI Policy is in relation to training. Both the contracting authorities and the contractor community are failing to comply with the current training obligations detailed in the NNI Policy and the NLCA. This is not a new failing. Previous comprehensive reviews have commented that the training requirements of the NLCA and NNI Policy have not been met.

263. In our view, the issue of training requires a fundamental overhaul. The training of Inuit workers is critical to the achievement of the objectives of the NLCA and the NNI Policy. A better trained and more skilled workforce in Nunavut will have material and enduring benefits to the Nunavut economy and its people. It is only through proper training that the Inuit will be able to meaningfully participate in the emerging Nunavut economy.

264. That said, the issue of training is inevitably tied to the ability and willingness of the Inuit to invest the time and effort to successfully complete training programs, which bring into play a number of socio-cultural issues. It is our understanding that only 25% of Inuit high school students graduate. For those students who are prepared to invest the time and effort to undertake training programs, the need to travel outside of their community to do so acts as a deterrent to many, as there is a reluctance to leave the support structure provided by their family. These issues cannot be solved through amendments to the NNI Policy. However, they impact the success of any training regime implemented thereunder. We are therefore mindful of these concerns in our analysis below.

7.6(a) Relevant Provisions of the NLCA and NNI Policy

265. Article 24.3.7 of the NLCA provides:

> *To support the objectives set out in Section 24.3.6, the Government of Canada and the Territorial Government shall develop and maintain policies and programs in close consultation with the DIO which are designed to achieve the following objectives:*
>
> *(a) increased access by Inuit to on-the-job training, apprenticeship, skill development, upgrading, and other job related programs; and*
>
> *(b) greater opportunities for Inuit to receive training and experience to successfully create, operate and manage Northern businesses.*

266. Article 24.6.2 of the NLCA provides:

> *Whenever practicable and consistent with sound procurement management, and subject to Canada's international obligations, all of the following criteria, or as many as may be appropriate with respect to any particular contract, shall be included in the bid criteria established by the Territorial Government for the awarding of its government contracts in the Nunavut Settlement Area:*
>
> *(a) the proximity of head offices, administrative offices or other facilities to the area where the contract will be carried out;*
>
> *(b) the employment of Inuit labour, engagement of Inuit professional services, or use of supplies that are Inuit or Inuit firms in carrying out the contract; or*
>
> *(c) the undertaking of commitments, under the contract, with respect to on-the-job training or skills development.*

267. Section 7.1(d) of the NNI Policy includes as one of the policy's objectives "*to increase the number of trained and skilled Nunavut Residents in all parts of the workforce and business community to levels that reflect the Inuit proportion of the Nunavut population*."

268. Section 11.1(b) of the NNI Policy provides:

> *All Tenders with a labour component over $300,000 must include a detailed training plan for Inuit workers. In the case of maintenance contracts, a training plan must be included where the contract cost is estimated to exceed $250,000.00.*

269. We note that there is inconsistency in the group of Nunavummiut to whom the training objectives apply. Section 7.1(d) provides for the training to be aimed at Nunavut Residents (which includes non-Inuit ordinarily resident in Nunavut), whereas section 11.1(b) of the NNI Policy and the NLCA focus on training aimed at Inuit and make no mention of non-Inuit Nunavut residents. This inconsistency needs to be removed in order to determine the category of people who are the intended beneficiaries of this training objective.

7.6(b) Concerns Regarding the Training Obligations and Their Implementation

270. From what we have been told, bidders rarely comply with the obligation set out in the NNI Policy to provide a detailed training plan for Inuit workers in procurements where there is a labour component over the specified monetary thresholds and contracting authorities are not enforcing the requirement that bids include such training plans. Moreover, where training plans are included, contracting authorities do not appear to have any criteria in place against which to assess the effectiveness and intended results of the training plan.

271. Observations of a similar nature were made by the Auditor General in his 2012 report, wherein he stated that a majority of the 43 contracts examined during the course of the audit did not contain the required labour training plan. The report went on to indicate that officials failed to enforce this requirement because, among other reasons, there was a lack of guidance as to what constitutes an acceptable training plan.

272. In 2010, an audit was conducted at the request of the NNI Secretariat to audit the levels of NNI compliance. In keeping with our findings, the auditor concluded that the training plan requirement was neither being complied with by the contractors nor being monitored by the contracting authorities.

273. We heard from both contracting authorities and contractors as to why the current training obligations are not being met. Contractors consistently advised that training plans ought not to be the responsibility of contractors. Contractors are not in the business of training and developing detailed training programs. While contractors would readily engage Inuit and Nunavummiut workers who are registered in Department of Education approved apprenticeship or on-the-job training programs, requiring contractors to develop their own training programs is not something that contractors can reasonably be expected to do. The lack of success of training programs to date demonstrates this point.

274. Moreover, contractors advised that the need to develop and implement training plans negatively impacted their ability to complete jobs in a timely manner and could result in the contractors incurring penalties for late completion.

275. Contracting authorities have advised that they do not insist on the provision of training plans as they have no basis upon which to assess any such plans. They too are not educators. In the absence of clear criteria from the GN as to what constitutes acceptable training on a position by position basis, contracting authorities feel that any assessment that they would be forced to make would be baseless.

276. Furthermore, the current NNI Policy provides that bonuses and penalties apply to the degree of fulfillment by contractors of their promised training plans. Contracting authorities have developed no criteria against which to assess what constitutes acceptable levels of completion of training for the purpose of granting a bonus or levying a penalty. In practice, we understand that this has resulted in generally no bonuses or penalties being assessed and there is virtually no monitoring to determine whether proposed training plans have been carried out and if so, whether they met their objectives.

277. Some have commented that those training plans that have been included by contractors have not resulted in any meaningful improvement of the skill sets of those Inuit workers involved in the projects. We heard anecdotal stories of Inuit apprentices being hired to work as an apprentice and then being "trained" to sweep floors or conduct other tasks that would not qualify towards the hours required for their apprenticeship programs. Such training activities are clearly not consistent with the spirit and intent of the NLCA.

278. Concerns have been expressed regarding the need for a training plan for contracts that meet the dollar threshold but that are of a relatively short duration. Contractors have commented that there is a reluctance for apprentices to sign on to work with contractors on these brief contracts as there will be insufficient work available for the apprentice to complete all hours needed for his or her apprenticeship program. Whereas others have commented that with the short construction season in Nunavut, taking time needed to properly train workers impacts the

ability of contractors to complete projects by end of season and could delay completion until the next year's sea lift.

279. A lack of connection currently exists between the contracting community and the Department of Education and its various institutes of learning (such as Nunavut Arctic College), which has had the result of frustrating the attempts of contractors to locate apprentices for their projects.

280. A key concern with the current mandatory requirement to include a training plan in all tenders falling within section 11.1(b) of the NNI Policy is that arguably any tender submitted without one is technically non-compliant, regardless of whether the contracting authority enforces the requirement. This non-compliance exposes the GN to potential liability to unsuccessful bidders who did submit a training plan and are in all other respects compliant.

7.6(c) Recommended Changes to the Training Provisions of the NNI Policy

281. As a result of the concerns noted above, we recommend that the training component of the NNI Policy be revised in its entirety and replaced with a training system that would require a mandatory training obligation on contractors to meet the specific training terms detailed in an RFP or tender.

282. We recommend that the categories of contracts to which a training plan obligation would attach be altered. We recommend that the monetary threshold be increased to capture larger projects where long-term training can have a more significant impact. Alternatively or in addition, the threshold could be based on project duration, with a view to requiring training plans only on those projects that are long enough in duration that training would not impede the timely completion of the work. We appreciate that the result of this change will be that training plans will become required primarily in relation to construction contracts or large service contracts. In our view, to attempt at this point in time to implement a training plan obligation to cover the full spectrum of GN contracts would be too onerous.

283. We recommend that the training component of the NNI Policy be focused on pre-existing, third party accredited training programs. Under this system, contractors are not obligated to create training programs and contracting authorities are not obligated to assess training programs. Contractors simply hire employees already signed up to an accredited program or have existing employees enrol therein. Contracting authorities then only have to determine whether or not the employees participated in the designated programs. Further, by accepting only third party accredited training programs, the GN would be assured that the training being provided to the Inuit workers was of high quality.

284. On larger projects, we envisage the contracting authority meeting with potential contractors, as is sometimes now the case, to discuss the project prior to establishing the training requirements for the project. One of the discussion points would be the identification of training needs and opportunities.

285. Contracting authorities would then be required in each RFP or tender to detail the necessary training based on the type of contract at issue. The training would be limited to the hiring of a designated number of employees who are enrolled in:

- An apprenticeship program administered by the Department of Education and provided by Nunavut Arctic College. In this regard, Nunavut Arctic College currently offers an Apprenticeship Carpenter Program (Levels 1-4), an Apprenticeship Housing Maintainer Program (Levels 1-3), an Apprenticeship Oil Burner Mechanic Program (Levels 1-2), and an Apprenticeship Plumber (Gasfitter) Program (Levels 1-2);

- A skilled trades program administered by the Department of Education and provided by Nunavut Arctic College. In this regard, Nunavut Arctic College currently offers a number of skilled trades programs, including camp cook, culinary arts, hairstylist, introductory mine training, mineral exploration field assistant, and observer communicator;

- An accredited training on the job program administered by the Department of Education; or

- Any other third party accredited training program as designated by the contracting authority, such as training programs conducted by bodies in other provinces or territories. For example, CGS currently requires that sea lift contractors enrol employees in a sea lift training program administered by a third party outside of Nunavut.

286. The contracting authority would have to detail which program or programs would qualify and how many employees would have to be hired. What we envision is that the Department of Education would maintain a list of accredited programs (apprenticeship, skilled trades, etc.) available both in and outside of Nunavut from which contracting authorities could select appropriate programs.

287. The obligation on a contractor to meet its training obligation would be a mandatory obligation. Each contractor would have to confirm in its bid that it will meet the listed training requirements. We would also recommend that a rated requirement be included in RFPs (and tenders where appropriate) to evaluate contractors on past compliance with training obligations. Where contractors historically failed to meet or exceeded their training obligations, they would receive a commensurate score.

288. What is critical to the functionality of this new training system is the creation of Liaison Officers who would be responsible for maintaining the list of available accredited programs, maintaining the list of students enrolled in apprenticeship and skilled trades programs and most importantly, acting as a liaison between contracting authorities, contractors, educational institutions and students to ensure that training requirements imposed in contracts are feasible and appropriate employees can be located for contractors.

289. The Liaison Officers will act as a resource to contractors to assist them in locating qualified employees to satisfy their training obligations at the commencement of a contract and throughout its execution. If an apprentice is unwilling to continue to work for an employer, the

Liaison Officer will assist the employer to locate a willing and available apprentice. The Liaison Officer will play an important role in the enforcement of training obligations by acting as a neutral third party who will be able to confirm to contracting authorities what efforts have been made by a contractor to comply with the training requirements if they are not met and whether the failure to meet the requirement is justifiable in the circumstances.

290. The Liaison Officers will work with the contracting authorities, Nunavut Arctic College and contractors to determine whether additional accredited programs should be offered and added to the list of accredited programs for the purpose of NNI Policy training obligations. The goal is not to require the Liaison Officers to create new programs, but rather to have an understanding of the need for certain programs that can then be developed by Nunavut Arctic College and the Department of Education.

291. Critical to the success of these revised training plan requirements is proper monitoring and enforcement throughout the contract. Contracting authorities must be engaged in on-going discussions with contractors to assess the extent of the contractor's compliance with the training obligations. It is through the threat of on-going monitoring that contractors will be incented to comply with their obligations. Further, it is essential that any unjustified failure to meet the training obligations (as determined in consultation with the Liaison Officer) have a consequence to the contractor. One consequence will be, as noted above, a low score on NNI Policy compliance in future contractors. Other available consequences could be the disbarment from bidding on contracts for a set period of time and/or a financial penalty. We caution, however, that offering a financial penalty to a contractor for non-compliance may incent contractors to simply build the penalty into their bid. Paying a penalty will do little to advance Inuit training. Accordingly, we recommend that if a secondary enforcement mechanism is to be adopted beyond low scoring for NNI Policy compliance in future contracts, that the GN adopt the disbarment option.

292. We also recommend the NNI Policy include a provision that obligates contracting authorities to include enhanced training programs for large projects, such as the Iqaluit airport. For those projects, we recommend that a committee be created that would include a Liaison Officer, the relevant contracting authority, a representative of Nunavut Arctic College and if possible, at least one representative from the contractor community (such as through a construction association) to develop an appropriate training program that will maximize Inuit training and participation on the project.

293. Once the revised training program envisioned by the aforementioned changes to the NNI Policy and its implementation are successfully integrated into the procurement system, we recommend that the GN consider expanding the training obligations beyond primarily construction and large service contracts, keeping in mind that accredited programs would have to be available to satisfy the training obligation.

7.7 Own Forces

294. The term "own forces" appears in Appendix A of the NNI Policy as a defined term meaning "goods, services or labour supplied by a Nunavut Business acting as the General Contractor". The term also appears in the definition of Inuit Content, Local Content and Nunavut Content as follows:

- Inuit Content - to describe goods and services supplied by an Inuit Firm or Inuit supplier acting as the General Contractor.

- Local Content - to describe goods, services or labour supplied by a local business acting as the General Contractor.

- Nunavut Content - to describe goods, services or labour supplied by a Nunavut Business acting as the General Contractor.

295. These definitions have led to considerable confusion as to the manner in which the term "own forces" should be interpreted for the purpose of evaluating the Inuit Content of an Inuit Firm's proposal pursuant to section 11.2(e) of the NNI Policy. The NNI Policy provides that Inuit Content is composed of, at a minimum, two elements – Inuit employment and Inuit ownership. The confusion created by the use of the term "own forces" applies only in relation to the Inuit employment portion of Inuit Content. When a proposal is evaluated in order to determine the bidder's score for the Inuit employment portion of Inuit Content, the contracting authority generally looks at the specific level of Inuit labour that will be used by the general contractor and any subcontractors performing the work. However, when the general contractor is itself an Inuit Firm and indicates in its proposal that it intends to use its "own forces", a question has been raised as to whether the same scrutiny should be required of the extent of the Inuit Firm's Inuit labour.

296. The current practice of the GN, which arose as a result of an exchange of correspondence between the GN and NTI, is as follows:

(a) If the general contractor is an Inuit Firm within the meaning of the NNI Policy and if the general contractor indicates that it is doing all of its work with its "own forces", then the general contractor receives a perfect score of 10 out of 10 for the Inuit employment portion of Inuit Content.

(b) If the general contractor is an Inuit Firm within the meaning of the NNI Policy and if the general contractor states that it is only performing a portion of the work with its "own forces" and will use another non-Inuit subcontractor for part of the work, then the general contractor received a score of less than 10 based on the percentage of the work which the general contractor is conducting with its own forces.

297. Accordingly, the current practice is to award Inuit Firm general contractors a perfect score of 10 out of 10 on the Inuit employment portion of the Inuit Content evaluation criteria where the Inuit Firm general contractor indicates that it is doing all of the work with its own

forces, irrespective of whether the workers are Inuit. No inquiry is made into whether the Inuit Firm general contractor is actually using Inuit labour to complete all or a portion of the work.

298. We believe that the term "own forces" has created needless confusion for government officials, NTI, and the contracting community. In order to eliminate the confusion that has arisen, we recommend that the term "own forces" be removed from the NNI Policy all together. All entities, whether general contractors or subcontractors, should be required to set out their intended Inuit labour percentages and be evaluated based on those intended percentages for the purpose of being scored for the Inuit employment portion of Inuit Content.

7.8 Sole-Sourcing Contracts

299. Government or private sector purchasers have a variety of purchasing methods at their disposal. In most cases, purchasers will conduct an open, competitive process in order to achieve the best solution and best value. However, there may be circumstances where it serves the purchaser's interests to depart from a competitive process and purchase goods through a direct contract award. This is most often referred to as a sole-source contract award.

300. To avoid arbitrary contract awards that may be neither good value nor the best solution for the requirement, the circumstances in which sole-source contracts can, and should, be awarded are limited.

301. Governments at all levels in Canada are constrained in the way non-competitive purchases can be made through obligations contained in trade agreements (e.g. *Agreement on Internal Trade*), legislation (e.g. Nova Scotia *Public Procurement Act*), by-laws (e.g. *City of Ottawa Purchasing By-Law 2000*) and policies/guidelines (e.g. Ontario *Broader Public Sector Procurement Directives*).

302. In the case of the GN, the *Government Contract Regulations* indicates the allowable circumstances for awarding contracts without a competitive process. Section 10 provides that a contract may be awarded without competition in circumstances where the goods, services or construction are urgently needed, where only one party is available and capable of performing the contract or where the contract is an architectural or engineering services contract that will not exceed $25,000 in value, or is any other type of contract that will not exceed $5,000.

303. The awarding of sole-source contracts has been the subject of attention by Auditors General who, in almost all cases, have reported misuse of the sole-source exemptions, or a failure to have proper justification to support the awarding of sole-source contracts. Indeed, in the Report of the Auditor General of Canada to the Legislative Assembly of Nunavut – 2012, Procurement of Goods and Services, the Auditor General reported that a substantial number of sole-source contracts issued by CGS, Qulliq Energy Corporation and NHC were awarded for reasons other than those permitted in the *Government Contract Regulations*.

304. Why is the awarding of sole-source contracts an issue in this comprehensive review of the NNI Policy? There are at least a couple of reasons: i) a number of people with whom we spoke commented that contracts were sole-sourced in order to avoid the application of the NNI

Policy; and ii) the awarding of contracts without a competitive process may be a way to promote the objectives of the NLCA.

305. In respect of the first reason, we saw no evidence to support claims that contracts were awarded to avoid the application of the NNI Policy. However, because sole-source contracts lack the transparency of an open competitive process, disgruntled competitors and observers have little information about the rationale for the contract award. Consequently, those people sometimes assume (with or without justification) that the contract was awarded for inappropriate reasons such as family influence, political interference, etc.

306. From our review of contracting activities, GN officials utilized sole-source contracts for reasons that were generally consistent with the *Government Contract Regulations*. We did hear some comments though, that decisions to award a contract without an open competitive process were made by senior levels of government or at the political level for reasons other than those permitted by section 10 of the *Government Contract Regulations*. These claims were troubling to us.

307. Senior government and political officials must not interfere with the contracting responsibilities of the government officials whose responsibility it is to conduct procurement processes in accordance with the relevant laws and policies. If that type of interference does occur, it can have the effect of undermining the spirit and application of the NLCA and NNI Policy in particular and the procurement activities of the GN in general.

308. As we have said above, the general rule for government purchasing should be through competitive processes. However, as we also note, direct contract awards are an appropriate government contracting tool if used in appropriate circumstances, and in accordance with the rules permitting sole-source contracts. In our view, section 10 is not broad enough to permit the awarding of sole-course contracts to achieve the objectives of the NLCA. We recommend expanding the circumstances permitted under section 10 of the *Government Contract Regulations* to permit the awarding of sole-source contracts where the GN identifies a particular region or industry in Nunavut that warrants special consideration and support to build capacity within the Inuit businesses and among the local Inuit population.

309. As in the case of the set-aside commentary below, we recommend that the GN establish a working committee consisting of government and business officials, as well as NTI, to develop guidelines around the development of a direct contract award process intended to promote the objectives of the NLCA.

7.9 The Use of Set-Asides For Inuit Firms

310. The NNI Policy currently contains an invitational process at section 11.3 for procurements that may be issued exclusively to "Nunavut-based businesses" where sufficient competition exists, being three or more companies located in Nunavut that are interested and capable of performing the work. The section goes on to provide that non-Nunavut Inuit Firms may also be invited to participate provided they are on the NTI Inuit Firms Registry.

311. While it is not particularly clear, it appears that this provision is designed to allow government officials to specifically invite Nunavut-based businesses only, or Inuit Firms only (who could fall within the meaning of a Nunavut-based business), or a combination of the two, to submit bids on identified purchases. Moreover, non-Nunavut Inuit Firms may be invited to participate in this invitation process.

312. We understand that this provision has been used occasionally by the GN to invite Nunavut businesses to submit proposals in response to some lower cost purchase requirements.

313. An alternative to the current invitational process is a "set-aside" program, which restricts procurement opportunities to particular identified groups and which invites only members of the identified group to submit bids for particular procurements. At the federal level in Canada, some purchasing opportunities are reserved exclusively for Aboriginal suppliers. In the United States, set-aside programs exist for small businesses and for Aboriginal suppliers.

314. Used properly, the set-aside program can provide much needed support to businesses in sectors that need assistance to compete with more established and well-settled suppliers from outside the identified groups. They are in essence an "affirmative action" measure designed to provide a chance for the identified groups to win government contracts without having to compete against "outside" businesses. A set-aside program can be an effective tool to facilitate capacity building within identified groups.

315. At the federal level, the Government of Canada is committed to increasing contracting between the federal government and Aboriginal businesses. To facilitate that objective, the federal government developed the Procurement Strategy for Aboriginal Businesses ("PSAB"). The PSAB requires all contracting authorities, where the procurement is valued in excess of $5,000, and is destined primarily for Aboriginal populations, to restrict the procurement exclusively to qualified Aboriginal suppliers where "…operational requirements, best value, prudence and probity, and sound contracting management can be assured."

316. That provision requires government officials to go through a vetting process to identify contracts that are intended primarily to affect Aboriginal interests, and see whether, taking into account the Aboriginal supplier community and the consequences of invoking the set-aside process, it is practical and prudent to permit only Aboriginal suppliers to bid.

317. In order to enhance the ability of Inuit Firms to participate in the economy of Nunavut, and develop more robust and diverse capacity, we recommend that the GN implement a similar set-aside process to restrict identified purchasing opportunities to only Inuit Firms. If the GN feels that similar assistance is needed for Nunavut Businesses (whether or not Inuit Firms), a set-aside program can also be developed to assist those companies and/or the current section 11.3 of the NNI Policy can be maintained.

318. If the GN felt that a set-aside program for Inuit Firms could help achieve the objectives of Article 24 of the NLCA, it should create a committee with government officials, NTI and business sector representatives to develop the framework for this program.

319. There are a variety of factors that will need to be considered including: i) whether only Inuit Firms that are Inuit owned and controlled (meaning, among other things, managed and operated by Inuit) can bid; ii) whether the set-aside program should be restricted to Inuit Firms that also qualify as Nunavut Businesses; iii) whether the program should be targeted for certain types of government purchases (i.e. construction contracts, service contracts, purchase of goods, etc.); iv) whether the program should be limited to contracts of a certain value; and v) whether the program should be developed for Inuit Firms only or Nunavut Businesses as well.

320. Although restricting competition to particular groups may increase the cost of the goods or services being procured, use of the set-aside program in circumstances where there are multiple service providers capable and interested in performing the work will mitigate the cost increase. In any event, as with any preferential procurement policy, the additional cost for goods and services should be off-set in the short- to mid-term as businesses and individuals participate more meaningfully in the economy.

7.10 Standing Offers and "As and When Required" Contracts

321. During the course of our consultations, we were asked to comment on two procurement vehicles that do not lend themselves easily to the application of the NNI Policy. These two procurement vehicles are standing offer agreements ("SOA") and "as and when required" contracts.

322. SOAs are a procurement approach that can facilitate the quick purchase of commonly used goods and services by government departments. According to Directive 808-4 of the *Financial Administration Manual*, an SOA is defined to mean "…a price agreement between the Government and supplier, wherein the supplier agrees to provide, on demand, specified goods or services under specified conditions during a set period at a defined price or discount structure."

323. Most typically, SOAs are used to purchase commodity goods that are frequently used such as office supplies or services which are required on a regular basis. SOAs differ from traditional procurement processes such as tenders or RFPs in that bidders in an SOA procurement are bidding in hopes of being included on a list of approved suppliers only – they are not bidding on a specific contract.

324. Once on the list, the supplier may or may not receive any call-ups for the goods or services they have proposed. The government is under no obligation to purchase from an approved supplier, although the expectation of suppliers is that they will be fairly treated and receive some contracts over the course of the SOA period.

325. Once suppliers succeed in being placed onto the SOA list, they may receive a direct call-up, or contract, for the goods or services from a government official without any further competitive procurement process. In a number of circumstances in other parts of Canada, governments will often enact a "tiered" approach to SOAs where, for contracts up to a certain value – say $25,000 – a direct call-up can be issued; for contracts with a value of $25,001 to $75,000, government officials are required to invite up to three of the SOA holders (i.e. suppliers

on the list) to provide renewed pricing or supply proposals; and for contracts with a value over $75,001, an RFP must be issued, and be open, to all SOA holders.

326. The second type of procurement vehicle we were asked to consider in the context of the NNI Policy is "as and when required" contracts. These are contracts where the total value of the contract can be calculated by multiplying units of work by a fixed unit price. Unlike SOAs, "as and when required" contracts create binding legal obligations between the GN and the supplier. These types of contracts are used for routine service requirements or emergencies. However, they are similar to SOAs in that a supplier will submit a bid to be put onto a list in the event the required services are needed. If there is a need for those services, and the value is estimated to be within the appropriate threshold (up to $10,000), the contract-holder will be contacted and awarded a contract.

327. Despite their nature, Article 24 of the NLCA and the NNI Policy still apply to both of these procurement vehicles. The difficulty though is applying the NNI Policy bid adjustments and the Inuit labour content requirements in circumstances where the specifics of the work or exact quantum of goods or services are not yet determined. Although it may be possible to perform a bid adjustment in procurements for SOAs or "as and when required" contracts where there is a "clear cost criteria", difficulties arise when there are no cost criteria. Additionally, if the scope and extent of work are not well-defined in procurements for SOAs and "as and when required" contracts, it will be impossible for the GN to establish minimum Inuit labour content. It is important to recall that Article 24.6.2 of the NLCA states that the bid criteria must include, wherever practicable and consistent with sound procurement management, employment of Inuit labour, among other requirements.

328. In our view, it is unreasonable to establish minimum Inuit labour content in some – perhaps all – procurements for SOAs or "as and when required" contracts. As well, depending on the nature of the goods or services being purchased in those types of procurement processes, there may be no "clear cost criteria", making it impossible or impractical to conduct a bid adjustment exercise on prices. In order to deal with this latter situation, from what we understand, the GN includes a hypothetical value in these types of procurement processes, and uses that to conduct the bid adjustment on the price in an attempt to comply with the NLCA and the NNI Policy.

329. As we noted above, according to Article 24.6.1 of the NLCA, bid criteria must be imposed to the extent that they are practicable and consistent with sound procurement management and appropriate to the particular contract. This provides some flexibility to contract authorities to depart from using the bid criteria where they cannot usefully be included. Accordingly, if there are no clear cost criteria in procurements of this nature, bid adjustments cannot be used. As an alternative approach in procurements of this nature, the GN could, rather than use a hypothetical amount, develop a point rating scheme (as it uses for RFPs) and have a category of points awarded for Inuit Firms, Nunavut Businesses and Local Businesses. If that approach were used, it would not be necessary to undertake bid adjustments on a hypothetical price.

330. Insofar as establishing minimum Inuit labour content is concerned, this is generally not possible in SOA or "as and when required" procurement processes. However, we believe that the spirit and intent of the NLCA and NNI Policy can nevertheless be achieved if bidders are required to certify that, in previous government contracts, they have honoured their commitments to employ the required minimum percentage of Inuit labour. Furthermore, bidders should be alerted to the possibility that Inuit labour content may be imposed in any call-ups under the SOA or "as and when required" contracts and, if it is, successful bidders must commit to meet those requirements.

7.11 Bid Repair

331. B2 forms play a critical role in the application of the NNI Policy, as they are used to calculate bid adjustments, inform the scoring of Inuit content and to calculate bonuses and penalties at the conclusion of a contract. We are advised that over 90% of the B2 forms received by the contracting authorities are improperly completed by bidders. The errors are generally of two types – (1) bidders have failed to claim bid adjustments to which they have an entitlement or have miscalculated their adjustments, which if corrected would result in a lower bid price, and (2) bidders have claimed bid adjustments to which they are not entitled or have miscalculated their adjustments, which if corrected would result in a higher bid price.

332. In addition, contracting authorities encounter situations where information is not properly included in the bid form but buried elsewhere in the proposal, where there are conflicting figures between the B2 form and the body of the proposal, and where subcontractors are misidentified by bidders such that they cannot be located on the NTI Inuit Firms Registry or the NNI Nunavut Business Directory.

333. Contracting authorities are then left to determine whether they have the authority to correct the errors on the B2 forms in terms of fixing a bid "up" (i.e. correcting a bid to permit a bidder to receive a greater bid adjustment than the bid indicated), fixing a bid "down" (i.e. correcting a bid to remove a bid adjustment improperly claimed by a bidder) or fixing a bid to address one of the other problems noted above.

334. The difficulty that arises in respect of these post-bid adjustments is that they raise the spectre of impermissible bid repair. According to common law principles, any post-bid adjustment to a material component of a bid (such as price) is not permitted. If that principle were applied in the case of bids reviewed by the GN, the vast majority of bids – when evaluated - would not accurately reflect the price adjustments a bidder should rightfully receive.

335. There appears to be at least two choices available to the GN. First, it could evaluate the bid strictly on the basis of what is submitted. If a bidder failed to complete the bid forms correctly and, as a result, does not get the benefit of all the adjustments they could have received, then the bidder would have to accept the consequences of its own error.[8] This approach would be

[8] It should be noted that contracting authorities are entitled to check bids and see if the information contained in them is accurate. Consequently, if a bidder provided information indicating it was entitled to bid adjustments when it was not, contract authorities can refuse to accept the information as submitted.

consistent with procurement law and procurement best practises throughout Canada, and is the approach we would recommend.

336. Alternatively, recognizing the complexity of the bid forms, and the widespread confusion they cause, the GN could decide to provide assistance to bidders by verifying and correcting information in respect of the bid adjustments that would apply. For example, if a bidder failed to indicate on its bid form that one of its subcontractors was an Inuit Firm or Nunavut Business, the contracting authority could ascertain the true status of that company with the NTI Inuit Firms Registry and the NNI Nunavut Business Directory and allow additional bid adjustments. This approach could therefore lead to a bidder receiving a more favourable bid adjustments than it would otherwise have received. As a result, this approach presents a greater risk that a contract award could be set aside if it was determined by a Court that the GN negatively impacted the integrity of the procurement process by adjusting and amending bids after bid closing.

337. If a decision is made to grant the contracting authority the right to make corrections of that nature, there must be clear authority in the solicitation documents indicating to all bidders that these corrections will be made. The following wording may be a means to permit post-bid adjustments:

> "GN reserves the right to make adjustments to a proposal following bid closing in accordance with the NNI Policy by taking into account any information that will assist it in doing so, including by taking into account information obtained from the NNI Business Directory maintained by the NNI Secretariat and the Inuit Firms Registry maintained by NTI. For greater certainty, if the GN determines that a proposal should, or should not, receive a bid adjustment pursuant to the NNI Policy, it can adjust the evaluation and scoring of a proposal accordingly."

338. If the decision is made to permit the post-bid adjustments as described above, a note of caution must be raised. If bidders are informed that contracting authorities will correct their bid forms, a failure by those contracting authorities to do so, or if the "correction" is inaccurate, may be grounds for a claim from a bidder who can show the error caused it to lose the contract. It may therefore be appropriate for the contracting authority to show the adjustments it made and ask the bidder to confirm whether the correction is accurate.

339. It seems to us that the better way to deal with the volume of errors is to revise the bid forms or provide better training to bidders so they can more accurately complete the forms. This can be accomplished in large part by including in the standardized debriefing letter to bidders an explanation as to the errors on their B2 form, as noted below.

340. Furthermore, it is important that contracting authorities remain vigilant to ensure that the post-bid adjustments are limited to only those matters that are expressly authorized by the procurement documents. Otherwise, the integrity of the procurement process will be breached.

7.12 Standardization of Procurement Documents and Processes

341. One of the pillars of an effective procurement system is consistency of treatment. We heard repeated concerns from contractors that the NNI Policy was generally applied by contracting authorities in differing ways throughout the territory in terms of the assessment of bonuses and penalties, the assessment of bid adjustments, and the debriefing of losing bidders. As noted above, over 450 procurement officers within CGS alone have awarded contracts over the last four fiscal years. It is impossible to ensure consistency of treatment when that many people are involved in the awarding of GN contracts.

342. Further, there is currently no standardization amongst GN contracting authorities regarding their procurement documentation, which results in confusion to contractors when completing their bids and proposals.

343. We recommend that in order to achieve consistency of application of the NNI Policy and an improved understanding of the NNI Policy by users of the procurement system, that the GN implement a number of standardized documents and processes across all contracting authorities.

344. First, we recommend that one standardized version of the B2 bid adjustment form be developed and implemented by all contracting authorities. We heard consistently from CGS and NHC that over 90% of the B2 forms that they receive are completed improperly. A consistent form with consistent instructions will assist contractors to better understand how to complete a B2.

345. Second, we recommend that the GN develop a standardized set of debrief letters (which include different letters depending on the type of contract at issue) that are sent to all losing bidders and that disclose consistent information. These letters would all be sent within a set number of days after the awarding of the contract. Section 8 of the *Government Contract Regulations* provides that if a contract is awarded, the contracting authority shall make the name of the winning bidder, the amount of the bid and the bid analysis forms available to every bidder who responded to the RFP. It is our understanding that this is not being consistently done. It is imperative that there is transparency in the procurement process. Losing bidders need to understand why they lost and how the NNI Policy factored into their loss and the winning bidder's success.

346. Consistent with the disclosure practices in other jurisdictions and in order to enhance the transparency of the procurement system, we recommend that the standardized debrief letters disclose the following information to all losing bidders:

- The names of all bidders;
- The name of the winning bidder, the winning bidder's price and the winning bidder's overall score;
- The bid adjustments received by the winning bidder (i.e. whether the bidder was entitled to adjustments as an Inuit Firm, Nunavut Business, etc.);

- The losing bidder's B2 form as adjusted by the contracting authority (if an adjustment was required); and

- The losing bidder's total score, including the breakdown of the total score received.

347. Disclosure of the losing bidder's adjusted B2 form is critical given the extent of errors in the B2 forms as submitted by bidders. This issue is discussed in more detail above in relation to bid repair. Contractors will never learn of their mistakes or how to correct them if the mistakes are not brought to their attention and the proper corrections noted. Disclosure of the adjusted B2 will not create a burden on the contracting authorities as the adjusted B2 will already have been prepared by the contracting authority as part of the assessment of the bids.

348. All of the information detailed above which we recommend be disclosed to losing bidders is information that a bidder would likely be entitled to through an access to information request, or pursuant to a direction of a court. We believe that transparency inspires confidence in the decision-making of contracting authorities and ensures an appropriate measure of accountability of government officials.

349. Third, we recommend that procurement processes and contract awards be centralized in Iqaluit for both CGS and NHC. As noted above, there are a considerable number of officials who are conducting procurement processes and awarding contracts throughout Nunavut. This is in large part due to the very high staff turnover rate. The effect of this turnover is the inconsistent application of the procurement rules and policies.

350. We heard time and again throughout Nunavut that some contracting officers did not understand how to apply key elements of the NNI Policy. This comes as no surprise given the high turnover rate. Even with the best intentions of those contracting officials (which we do not doubt or question), the application of the NNI Policy and procurement processes are complex and require training and experience.

351. The procurement officers in the various community offices of CGS and NHC are tasked with the responsibility for awarding contracts, administering contracts and handling the financial responsibilities related thereto. By moving the responsibility for awarding contracts to the Iqaluit offices, these regional procurement officers then have more time available for monitoring and enforcing the contractual obligations on their projects, which as noted above is a critical task.

352. The CGS and NHC procurement officers in Iqaluit have the most familiarity with the NNI Policy, the most experience in awarding contracts and importantly, from what we are told, a much lower staff turnover rate. It is hoped that the centralization of the awarding of contracts will result in a more consistent application of the NNI Policy. We can advise that this recommendation is endorsed by CGS and NHC.

353. Finally, we recommend that the GN implement a standardized data collection procedure in order to address the current gaps in collected data. Data analysis is one of the most objective ways to measure the success of the NNI Policy in achieving its objectives. Accordingly, it is

imperative that a proper data collection system be implemented so as to enable the GN to make an informed evaluation of the NNI Policy on a going forward basis.

354. We suggest that a standardized template be developed for the fields of data that must be collected, which fields would include, among many others, sub-contractor data, the cost of implementation of the NNI Policy and the impact of each bid adjustment in the awarding of contracts. We recommend that the current CGS data set be used as a starting point and then refined to include the information noted above as well as any other information that the GN determines would be relevant.

355. We have been advised that many of the problems associated with data entry errors result from the fact that the data is being entered by financial officers who are unfamiliar with the data. In order to avoid these errors, we recommend that the project officer responsible for the administration of the contract be responsible for the entry of all data. He or she has the most knowledge of the contract and can ensure that accurate data is captured.

356. We recommend that a centralized electronic data repository be created for all GN contract data. The repository should be administered by the NNI Secretariat, with the contracting authorities under an obligation to transmit the completed data set for each GN contract within a specific period of time of contract completion.

357. The imposition of a standardized and mandatory data collection system is critical to the functionality of the other recommendations that we have made herein. The database has to be available to contracting authorities when evaluating a contractor's past training and minimum Inuit content achievements for the purpose of scoring a bid.

7.13 Application of the NNI Policy to Municipalities

358. We were asked to comment on the applicability of the NNI Policy to municipalities. In looking at this issue, we have broadened the analysis from just municipalities to include other local government entities such as towns, hamlets and villages. Reference to municipalities in this section should be taken to include those other local government administrations.

359. There appears to be a divergence of views about whether municipalities are required to adhere to the requirements of Article 24 of the NLCA. During our consultations, we met with a number of municipal officials throughout Nunavut. There was a consensus among them that the NNI Policy does not apply to their purchasing activities, except in respect of certain projects where the majority of the funding comes from the GN. Others with whom we consulted said that, because municipalities spend funds provided by the GN, their purchasing activities should adhere to the NNI Policy.

7.13(a) The Level of Municipal Spending in Nunavut

360. The importance of municipalities in government contracting in Nunavut cannot be overstated. According to the data available to us at the time this report was being prepared, municipalities in Nunavut (including Iqaluit) spend more than $100 million annually. If that

spending, in whole or in part, were subject to the NNI Policy, it could have a material impact on the GN's overall ability to meet and exceed the stated policy objectives of both the NLCA and the NNI Policy.

361. There is no express reference in Article 24 of the NLCA to local government entities such as municipalities, towns, hamlets or villages. Article 24 states that "…Territorial Government shall maintain preferential procurement policies, procedures and approaches consistent with that Article for all Territorial Government contracts required in support of Territorial Government activities…".

362. Although an argument could be made that Article 24, read in a broad, liberal and purposive manner (see: *Kadluk v. Nunavut (Minister of Sustainable Development),* 2001 NUCJ 1), might include all purchasing activities of local governments who receive funds from the GN, we think that interpretation is not consistent with the NLCA.

363. As matters currently stand, local government is implicated in the NLCA's obligations through the NNI Policy where at section 5 it states:

> *5.1 Subject to sections 5.2 and 5.3, the Policy applies to the design, award, administration and interpretation of any Contract:*
>
> *(a) to which the Government of Nunavut or any of its Public Agencies or Public Boards as described in the Financial Administration Act is a party;*
>
> *(b) where the Government of Nunavut provides, directly more than 51% of the total Contract funds; or*
>
> *(c) where the Government of Nunavut provides, directly more than 51% of the annual operating funds of one of the parties.*

364. Even here, there is no direct reference to local governments. Clearly, paragraph (a) is not applicable because local governments are neither public agencies nor public boards as defined in the *Financial Administration Act.* However, local governments could be covered generally, or in respect of a particular procurement, by paragraphs (b) or (c).

365. With respect to paragraph (b), municipal officials with whom we spoke acknowledged that for certain projects, the municipalities do receive 51% of the contract funds from the GN and accordingly are obligated to apply the NNI Policy in relation to those projects. However, based on our discussions, it would appear that these projects are small in number and low in dollar value. We understand that the larger construction projects undertaken in many of the smaller communities are actually administered by the GN directly and not by the municipalities.

366. With respect to paragraph (c), the municipal officials with whom we spoke said that the level of operational funding that they received from the GN did not exceed 51% and consequently, they are not required to make purchases in accordance with the NNI Policy.

7.13(b) The Sources of Municipal Revenues

367. Individual cities, towns, hamlets and villages in Nunavut raise funds through a variety of sources including, in some cases, through a local tax levy or through a charge for services provided. The percentage of operating revenues raised locally by municipalities varies throughout Nunavut. All municipalities, however, receive some funding from the GN. According to the Nunavut Municipal Performance Measurement Program Report for fiscal year 2009/2010 (the latest data we were able to access), the GN's contribution to the operating revenues for municipalities accounts for less – in some cases, far less - than 51% of the total operating funds for local governments.

368. From the data we have reviewed for fiscal year 2008/2009, the highest percentage of GN funding (between 25-30%) for operating expenses went to smaller centres like Grise Fjord, Chesterfield Inlet, Whale Cove and Kimmirut. Centres with populations between 600-1,000, like Hall Beach, Arctic Bay, Taloyoak, and Clyde River, received in the range of 10-25% of their operating funds from the GN. Larger centres, including Cape Dorset, Pond Inlet, Pangnirtung, Igloolik and Rankin Inlet, received between 15-20% of their operating funds from the GN. Iqaluit received approximately 13% of its operating funds from the GN. The 2008/2009 fiscal year data was consistent with data from prior years, in that no municipality received funding that would surpass the 51% threshold in section 5.1(c).

369. Based on the aforementioned available data, it would appear that the requirement of section 5.1(c) has not been met and as a result, municipalities are not required to apply the NNI Policy to their procurements (absent specific funding as per section 5.1(b)).

7.13(c) Benefits of Municipal Spending Being Subject to the NNI Policy

370. If the intent of the NLCA, as reflected in NNI Policy objectives found in section 7, is to build Nunavut and Inuit business capacity, increase the number of trained and skilled Nunavut residents, and increase the level of Inuit participation in supplying goods and performing services, then a compelling case can be made that municipal procurements, whether or not the GN contributes a majority of their general or specific funding, should be subject to the NNI Policy. By expanding the application of the NNI Policy, it could open up local government spending (in excess of $100 million annually) to help achieve the NLCA's objectives.

371. As we noted above, municipalities across Canada derive their authority from the provincial or territorial governments. By virtue of paragraph 23(1)(g) of the *Nunavut Act*, the GN has jurisdiction to make laws in relation to municipalities and other forms of local government. Through the *Hamlets Act* and the *Cities, Towns and Villages Act*, the GN has devolved powers to those sub-territorial entities allowing them to serve the needs of their region by providing services including protective services, recreational facilities, transportation, utilities, etc. Just as the GN has passed legislation setting out what responsibilities would be given to local governments, the GN could enact laws requiring municipalities to adhere to the NNI Policy.

7.13(d) Municipalities Require Support from the GN to Implement the NNI Policy

372. However, a word of caution needs to be introduced on this issue. All of the municipal officials with whom we spoke expressed concern about the application of the NNI Policy. Their concerns were centered on their lack of expertise and manpower to properly apply the provisions of the NNI Policy. In our view, this is a legitimate concern. It would make little sense to impose obligations on municipalities that they cannot currently meet. If the GN decides that it wants all or some municipal procurements to be covered by the NNI Policy (irrespective of the level of funding they receive), it must provide training and resources to assist local government purchasing staff to cope with the intricacies and complexities that the NNI Policy presents.

7.13(e) Establishing an NNI Policy Monetary Threshold for Municipal Spending

373. An alternative to imposing the NNI Policy's obligations on all local government spending would be to set a contract value threshold which, if met or exceeded, would require local governments to adhere to the NNI Policy's obligations. Throughout Canada, the procurement obligations which bind government purchasing only become triggered when certain monetary thresholds have been met. Those monetary thresholds can vary significantly. Under the *Agreement on Internal Trade*, the procurement obligations are engaged for contracts valued $25,000 and above (goods), and $100,000 and above (services and construction). The *North American Free Trade Agreement's* obligations are, for government departments, triggered at $25,300 and above (goods), $78,500 and above (services) and $10,200,000 and above (construction). If the purchasing is undertaken by a crown corporation, those NAFTA thresholds are raised to $392,700 and above (goods and services) and $12,500,000 and above (construction).

374. In view of the annual spending of municipalities, we believe that the NLCA's objectives will be better achieved if, at a minimum, some of that annual spending is done in accordance with the NLCA's obligations. However, in order not to impose too great a burden on local government officials, we recommend that the GN enact laws to require municipalities (cities, towns, hamlets and villages) to comply with the NNI Policy for purchases in excess of (at least) $100,000 for goods and services and (at least) $1 million for construction. We also recommend that the GN provide training and assistance to local purchasing officials to help them implement the NNI Policy obligations, both in advance of any changes to the NNI Policy and on an on-going basis.

375. In the event that the GN decides to make municipal contracting subject to the NNI Policy, we recommend that section 5.1 be revised to expressly include that the NNI Policy applies to municipal contracts over an identified monetary threshold.

7.14 The Application of the NNI Policy to Qulliq Energy Corporation

376. In the course of our review, we were asked to comment on whether the NNI Policy applies to the Qulliq Energy Corporation ("QEC"). From information and submissions we have received, QEC claims that the NNI Policy does not apply to its purchasing activities.

7.14(a) The Creation of QEC

377. Before addressing that position, some background on QEC is necessary. Prior to the creation of the territory of Nunavut, electrical power and services in the Northwest Territories ("NWT") were provided by the Northwest Territories Power Corporation ("NTPC") pursuant to the *Northwest Territories Power Corporation Act*.

378. Following the creation of Nunavut in April 1999, a transition agreement was entered into between the governments of the NWT and Nunavut permitting the NTPC to continue providing electrical power and services until such time as the GN could determine the manner in which, and by whom, electrical power would be provided in the new territory.

379. Notwithstanding the intended continued role and presence of the NTPC in Nunavut, on April 1, 1999, the GN created the Nunavut Power Corporation ("NPC") as a crown corporation with responsibilities for the supply and delivery of electrical power and services to Nunavut. The NPC, a public agency, was listed in Schedule B of the *Financial Administration Act*.

380. Following a review of the options for providing electrical power and services in Nunavut, the GN decided to deliver the services through the NPC. Consequently, on April 1, 2001, a transfer agreement was entered into between the governments of the NWT and Nunavut, and between the NTPC and the NPC, the effect of which was to transfer the assets of the NTPC to the NPC.

381. The asset transfer was also the subject of the *Nunavut Power Corporation Utilities Assets Transfer Confirmation Act.* Thereafter, the NPC was, and is, responsible for providing electrical power and services to Nunavut. The name of the Nunavut Power Corporation was changed to the Qulliq Energy Corporation by the *Qulliq Energy Corporation Act*. For the remainder of this section, references to the NPC and the QEC are used interchangeably – depending on the context, and are intended to mean the same entity.

382. As we noted above, QEC claims that it is not covered by the NLCA and, as a result, is not required to adhere to the procurement obligations in the NNI Policy. Central to QEC's position is the wording of Article 24.1.1 of the NLCA which defines Territorial Government, to include "all territorial government departments and all public agencies defined by the *Financial Administration Act.* S.N.W.T. 1987 (1), c. 16, Part IX and Schedules A, B, and C, but excluding the Northwest Territories Power Corporation." [emphasis added]

7.14(b) Analysis of the Positions Advanced by QEC

383. QEC claims that it is exempt from Article 24 and the NNI Policy on the basis that the NPC was, by virtue of the wholesale transfer of assets, the successor-in-title to the NTPC. As a successor corporation, it should be accorded the same rights and privileges as the NTPC, including exemption from the NLCA and the NNI Policy's obligations. In the alternative, QEC claims that because it not included in paragraphs 5.1(a), (b) and (c) of the NNI Policy, it is therefore exempt from the NNI Policy's reach. We will deal with both of these positions in turn.

However, some preliminary background information about the NTPC and the NPC is necessary to give context to the positions advanced by QEC.

384. Before Nunavut came into existence as a separate territory, the region was part of the NWT and was governed by the NWT territorial government in Yellowknife. The NTPC – a creation of the government of the NWT - was responsible for providing electrical power and services to the entire NWT region, as it then was.

385. When the NLCA was entered into, and when the territory of Nunavut was created, it had not yet been decided which entity would provide electrical power and services to the newly-created territory. In order to ensure continuity of these important services, it was decided that the NTPC would provide these services on a transitional basis. As the NTPC was a legislatively-created NWT public utility, it would not have been appropriate to include it as a public agency in the definition of Territorial Government found in Article 24 of the NLCA. Clearly, when Nunavut was created as a separate territory, the NTPC – as a crown corporation created by the Government of the Northwest Territories – could not have also been a territorial corporation of the territory of Nunavut.

386. If the NTPC had not been expressly excluded from the definition of "Territorial Government" in the NLCA, it would have effectively permitted the imposition of NLCA obligations onto a non-Nunavut crown corporation. That cannot have been the intention of the drafters of the NLCA.

387. QEC bases part of its claim for exclusion on the premise that, as a result of the wholesale transfer of assets from the NTPC to the NPC in 2001, the NPC was successor-in-title to the NTPC. Consequently, through this transfer of assets, the NPC "acquired" the NLCA exemption. In our opinion the more important issue in this analysis is whether the NTPC's "exemption" in Article 24 of the NLCA is an "asset", as that term is defined in the transfer agreement. If the exemption is not an asset, then even if the NPC was in law a successor entity to the NTPC, the "benefits" of the exemption would not have been transferred to the NPC.

388. Assets were defined in the transfer agreement between the NTPC and the NPC to include "…all assets, interests, property, rights and undertakings, tangible or intangible, registered or unregistered, secured or unsecured, of every kind and description, of NTPC utilized primarily in conducting Nunavut Operations…" [emphasis added]

389. The definition of asset, in the context of the transfer agreement, was intended to encompass all those things necessary to provide electrical power and services to the territory of Nunavut. While we understand that assets can take many forms and encompass a variety of interests, the range and scope of what might constitute an "asset" is not limitless. An asset is real or personal property, or legal or equitable interest, including money, accounts receivable or inventory. In other words, it is something that its owner can keep, lend, or dispose of as he/she may decide.

390. The assets transferred by virtue of the transfer agreement were those things owned by the NTPC and that were used in conducting its electrical power operations in the region that became

Nunavut. These were the assets that the NPC would need to perform the same electrical power services in Nunavut.

391. In our view, a "legislative" exemption (whether created through statute, treaty, land claims agreement or regulation) that excludes the application of the law to a named entity, cannot constitute an "asset" that the named entity can then sell, transfer, lend, etc. to another party. Perhaps the benefit of that exemption could flow to a successor entity, but as we will discuss below, that could only occur if it was expressly provided in the legislative enactment. Accordingly, the exemption in Article 24 cannot properly be seen as an asset under the transfer agreement on this basis alone.

392. Moreover, even if NTPC's exemption in Article 24 of the NLCA could be considered an "asset", it could hardly have been used by the NTPC "…primarily in conducting Nunavut Operations". As such, it would not have fallen into the basket of "assets" as defined by the transfer agreement.

393. Contrary to the position taken by the QEC, we do not accept that NPC was a successor-in-title to the NTPC. First, the NTPC continues to exist in the NWT. In 2001, its assets, as they related to providing electrical power and services in Nunavut, were transferred to the NPC. Second, only some of NTPC's assets were transferred to NPC. Third, the NPC was not created as a result of the asset transfer or any other form of corporate reorganization or merger. Rather, it was created as a result of the legislative enactment by the GN.

394. We do not believe that QEC's reliance on *United Association by Journeymen and Apprentices of the Pipefitting Industry vs. W.W. Lester (1978) Ltd. et al* [1990] 3 S.C.R. 644 supports its position that the NPC was a successor-in-title to the NTPC. In that case, the Court was concerned about preserving bargaining rights. That case has no relevance to the facts arising here where, as a result of legislation and agreement between governments, there was a transfer of some assets belonging to one public utility to a public utility in another jurisdiction.

395. Had the drafters of the NLCA intended the exemption to apply to a successor entity providing electrical power and services in Nunavut, they could have expressly stated that in Article 24. Drafters of legislation and treaties are alert to the possibility that named government entities may change during the period of time the legislation or treaty is in place. To account for the possibility of that change, and to ensure that the rights and obligations continue to bind and attach to the successor entity, the drafters will expressly state that the relevant provisions will continue to bind any entity that assumes the roles and functions of the named entity. For example, the *North American Free Trade Agreement* provides the following definition for "competent investigating authority" in Annex 1911: "as in the case of Canada (i) the Canadian International Trade Tribunal or its successor, or (ii) the Deputy Minister of National Revenue for Customs and Excise as defined by the *Special Import Measures Act*, as amended, or the Deputy Minister's successor…" [emphasis added]. These provisions remove any doubt that the definition of "competent investigating authority" would, for continuity's sake, include successor entities.

396. Turning now to the second argument put forward by QEC in support of its view that the NNI Policy does not apply, it claims that the wording of section 5 of the NNI Policy, "…specifically provides (section 5.1) for an exclusion [of QEC] from the application of the Policy where the [GN] provides less than 51% of the total contract funds where QEC is a party to the contract or less than 51% of QEC's annual operating funds." QEC goes on to state that less than 51% of its contract funding and less than 51% of its annual operating funds come from the GN, consequently QEC cannot be covered.

397. Section 5 of the NNI Policy provides:

> *5.1 Subject to sections 5.2 and 5.3, the Policy applies to the design, award, administration and interstation of any Contract:*
>
> *(a) to which the Government of Nunavut or any of its Public Agencies or Public Boards as described in the Financial Administration Act is a party;*
>
> *(b) where the Government of Nunavut provides, directly more than 51% of the total Contract funds; or*
>
> *(c) where the Government of Nunavut provides, directly more than 51% of the annual operating funds of one of the parties.*

398. Public agencies are defined in section 1 of the *Financial Administration Act* to include a territorial corporation listed in Schedule B or C. Section 1 also defines a territorial corporation to be a statutory corporation specified in Schedule B or C. QEC is a statutorily-created corporation listed in Schedule B of the *Financial Administration Act*. By virtue of that, QEC satisfies the requirements of paragraph 5.1(a) of the NNI Policy.

399. As we understand QEC's argument on this point, it would only be covered if it met the requirements of paragraphs (a) and (b) or paragraphs (a) and (c). That is to say, it would only be covered if it was a public agency (a) and the GN provides more than 51% of total contract funds (b). Or, it would be covered if it was a public agency (a) and the GN provides directly more than 51% of its annual operating budget (c). And because QEC receives less than 51% of its contract funding and less than 51% of its annual operating funds from the GN it cannot be included, even if it is a public agency.

400. In our view, paragraphs (a)-(c) in section 5 should be read disjunctively. That is, if only one of those paragraphs apply, the entity is covered by the NNI Policy. It would be absurd to interpret section 5.1 to mean that the NNI Policy only applies to those government entities who meet two or more of the paragraphs. If that were the case, the number of entities covered by the NNI Policy would be dramatically reduced rendering it largely ineffective.

401. In terms of statutory interpretation, the use of a semi-colon signifies a separation of matters unless, following a clause where a semi-colon is used, the word "and" is included. In that case, the terms or phrases separated by a semi-colon would be read conjunctively. The word "or" between paragraphs (b) and (c) lends support to our view that the paragraphs in section 5.1 are meant to be read as separate and distinct.

402. We do not therefore accept the argument that QEC is expressly excluded from the NNI Policy by virtue of the wording in section 5.1. To the contrary, we believe that the section makes it clear that public agencies listed in Schedule B are expressly included in the NNI Policy.

403. On a closing note, QEC acknowledges that the Minister and/or the Executive Council have the authority to give it directions and guidelines. While that is certainly true, the requirement for QEC to follow government- issued directions and guidelines is in fact framed more broadly than that. Section 8(4) of the *Qulliq Energy Corporation Act* provides:

> *Directions and Guidelines*
>
> *(4) The Board, in exercising its powers and performing its duties and the powers and duties of the Corporation under this Act and the regulations, shall act in accordance with the directions and policy guidelines that may from time to time be issued or established by the Minister or the Executive Council.*

404. This provision requires the Board of QEC to adhere to the directions and policy guidelines issued by the Minister and the Executive Council whether or not they are expressly stated to apply to QEC. The NNI Policy was approved by Executive Council in March 2000, and was amended in April 2006. In our view QEC is therefore required to adhere to the obligations contained in the NNI Policy.

405. While we have no doubt that the QEC is required to follow the NNI Policy, if there is any lingering doubt in the minds of the Minister or Executive Council on the applicability of the NNI Policy to QEC, they could easily enact a specific policy or guideline stating that the QEC is subject to the obligations in the NNI Policy.

7.15 Absence of Monitoring and Enforcement

406. Accountability is one of the pillars on which a properly functioning procurement system is built. An absence of monitoring and enforcement prevents the stakeholders in the procurement system from being held to their obligations and prevents an effective check and balance system to oversee the work performed by government officials.

407. The lack of monitoring and enforcement has been discussed in previous comprehensive reviews and more recently by the Auditor General in his 2012 report. In our consultations throughout Nunavut, we were struck by the absence of effort put into monitoring and enforcement in respect of the NNI Policy requirements. Said somewhat differently, once a contract is in place (and the NNI Policy considerations have been taken into account in the awarding of the contract), there is virtually no follow up over the course of the contract to ensure that the NNI Policy commitments are being respected by the contractor.

408. One of the most problematic and visible failings arising from the absence of monitoring and enforcement is in relation to a contractor's obligation to meet its minimum Inuit labour content. We heard a number of examples from contractors and contracting authorities of contractors who claimed that they had met a set Inuit labour threshold when in fact they had not.

Rather, they had paid Inuit employees to stay at home or they had falsified employment records to reflect Inuit workers who had not in fact worked on the project.

409. We have no doubt that there is some truth to both of these claims, although we doubt that these practices are as rampant as the folklore would suggest. Regardless of the extent of these practices, which effectively are or border upon fraudulent activities, they are allowed to go unchecked due to the absence of on-going monitoring during the course of the contracts. Making inquiries as to the level of Inuit content only at a project's completion facilitates this type of inappropriate practice and more importantly, prevents any steps from being taken during the course of the contract to remediate the shortcomings in respect of the level of Inuit labour.

410. The NNI Policy expressly provides for monitoring and enforcement. Section 14.1 provides:

> *Monitoring and enforcement procedures shall be developed and applied:*
>
> *(a) generally, to ensure compliance with the Policy by Contractors;*
>
> *(b) more specifically, to ensure that bonuses and penalties are based on actual performance;*
>
> *(c) to ensure that the Policy is applied consistently across departments of the Government of Nunavut, the various regional and local offices of those departments, and those GN Public Agencies and Boards set out in the Financial Administration Act.*

411. Section 15 of the NNI Policy goes on to provide:

> *15.1 Each Contract Authority within the Government of Nunavut is responsible for monitoring and enforcement of Contracts under which it expends funds.*
>
> *15.2 Each Contract Authority within the Government of Nunavut shall provide monitoring and enforcement information to the Responsible Department in a manner that may be stipulated by that department.*
>
> *15.3 The Government of Nunavut, through the Responsible Department shall provide Nunavut Tunngavik Incorporated with information in a timely manner regarding the outcomes of its monitoring and enforcement activities.*

412. In our discussions with government officials and the business community, it was apparent that monitoring and enforcement is viewed as an unpleasant task as it effectively puts the contracting authority in the shoes of the "police". While there may be aspects of monitoring and enforcement that are confrontational and undesirable, without this check and balance, there are no assurances that the NNI Policy obligations are being met. Contracting authorities are required to monitor the completion of the work of their contracts. The NNI Policy obligations form part of that work. In this sense, the NNI Policy obligations are no different than the obligations to conduct the work in accordance with the technical specifications.

413. It has been suggested that monitoring and enforcement with respect to the NNI Policy obligations should be done by the NNI Secretariat. As noted above, we do not agree. We

understand that monitoring and enforcement can be a time consuming task for the project officers. However, if the procurement functions are centralized at the CGS and NHC head offices, regional project officers will have more time available to dedicate towards fulfilling their monitoring and enforcement responsibilities. Even if that centralization does not occur, the GN will need to devote the necessary resources to this function in order to comply with its NNI Policy obligations.

414. As part of the monitoring and enforcement initiative, we recommend that the GN revise the NNI Policy to include a provision that empowers the GN to debar an entity and its principals from bidding on contracts for a set period of time (such as one year) in the event that the entity is found to have violated the spirit and intent of the NNI Policy. While similar debarment provisions would be contained in the NNI Policy related to specific breaches of NNI Policy obligations (assuming the GN adopts our recommendations), this provision would act as a catch-all for any observed inappropriate conduct.

415. It is essential that the GN commit, at the highest government and political levels, to performing these functions. Far too often during our consultations we heard people point fingers at other government departments or branches and say that they were responsible for the monitoring and enforcement functions. In other words, there is currently a complete lack of accountability for monitoring and enforcement responsibilities.

416. The absence of monitoring and enforcement is one of the GN's largest failures in relation to NNI Policy compliance. While a number of specific recommendations regarding monitoring and enforcement measures are noted throughout our report, it is imperative that the GN dedicate the necessary resources to properly discharge its monitoring and enforcement obligations.

7.16 Concerns Regarding the NTI Inuit Firms Registry and the NNI Nunavut Business Directory

417. During our consultations, we heard a number of concerns raised regarding the registration and renewal processes for both the NTI Inuit Firms Registry and NNI Nunavut Business Directory.

418. One consistent concern was the requirement for a significant amount of supporting documentation that must accompany an initial application for both registries. Many viewed the requirement as onerous. While there is a significant amount of information and documentation required, we are of the view that for an initial application, the burden placed on registrants is not overly onerous. There is a clear need for NTI and the NNI Secretariat to make informed decisions about which businesses to permit on their respective registries, which can only be done with the proper documentation in hand. For those entities that feel that the initial application process is too onerous, they are under no obligation to submit an application. If they want to benefit from the NNI Policy, however, they must comply with the requirements for registration.

419. We heard a similar concern expressed regarding renewal applications for the NNI Nunavut Business Directory only, including a concern at the Inuit Small Business Roundtable discussion. As noted above, the NNI Secretariat requires applicants seeking to renew their

application to resubmit the same documentation submitted for their initial application, even in the absence of a material change in their business. We agree with this concern as we see no basis for the requirement to resubmit the documentation in the absence of a material change. We accordingly recommend that the NNI Secretariat adopt a similar renewal form to that used by NTI that would only require the submission of additional documentation (other than a renewed business license) if there has been a material change in the business. Otherwise, applicants should merely certify that there has been no such material change and confirm that they understand that they are under a positive obligation to notify the NNI Secretariat in the event of such a change.

420. We also heard a concern regarding the frequency of registration renewal. Many feel that both registries should extend the validity period of their registrations. We also agree with this concern. Requiring an annual renewal increases the workload for both NTI and the NNI Secretariat, particularly the latter. Assuming that applicants are under the positive obligation noted above to notify the registries in the event of a material change in their business, we recommend that both registries extend the validity of their registrations for 3 years and thereafter only require renewal forms to be completed of the character noted above.

421. We also heard a concern from registrants that many of the documents sought by one registry were already in the possession of the other registry. Again, applicants viewed it as overly onerous to have to produce the same documents to both NTI and the NNI Secretariat. We agree that it makes sense for NTI and the NNI Secretariat to share relevant documents, perhaps by way of a shared document database or restricted website housing the documents. Any privacy concerns could be addressed by requiring applicants to expressly authorize the sharing of information and documentation between NTI and the NNI Secretariat relevant to their respective registrations. This would also permit NTI and the NNI Secretariat to share information with each other in the event that a determination is made that an applicant is being untruthful regarding an aspect of its business.

422. We would recommend that as part of the initial registration application, applicants be required to not only certify as to the truthfulness of the information provided but also to the effect that there is no additional information or documentation relevant to the business that has been omitted.

423. We also recommend that both NTI and the NNI Secretariat adopt a policy whereby any applicant found to have provided inaccurate information for the purposes of improperly obtaining registration is barred from registering the business at issue or any other business in which the applicant is a material stakeholder for a set period of time, such as one to three years.

424. CGS raised with us a concern that they sometimes encounter difficulties searching the registries for companies where the business' name, as provided to CGS, is slightly different than the business' name as registered with NTI or the NNI Secretariat. It then becomes more onerous for CGS to verify that the company is eligible for the bid adjustment at issue. CGS suggested that businesses be assigned a registration number by each registry that would have to be entered on their procurement documents. The registries could then be searched by contracting authorities by

registration number and/or business name. We recommend that this suggestion be implemented by both NTI and the NNI Secretariat.

425. Finally, we also heard a concern from businesses that there is currently not an effective way to challenge the decisions of NTI and the NNI Secretariat in the event that a company is denied registration or denied a renewal. While a Court application is always an option, many view it as unfeasible given the cost associated therewith. In order for a procurement system to properly function, the participants in the system have to be held accountable for their conduct. Accordingly, we recommend (as noted above) that the NNI Tribunal be vested with the jurisdiction to review and make recommendations on the decisions of both NTI and the NNI Secretariat to deny registration or to deny a renewal application.

7.17 Community Education on the NNI Policy and its Implementation

426. During our consultations, it was apparent that there is a significant portion of the Nunavut business community that does not understand the objectives and functioning of the NNI Policy. We also saw examples of regional contracting authority officials who also did not understand the proper manner by which to implement the NNI Policy. This demonstrates the need for two things – (1) better education within the community to enable businesses to better understand the meaning and operation of the NNI Policy in respect of procurement and contracting opportunities; and (2) appropriate and on-going training to government officials about the application of the NNI Policy in the context of any procurement or contracting activity. This latter need is particularly important given the high staff turnover experienced by the GN.

427. There is no doubt that some of the problems that we address in this report come from a lack of training for businesses and government officials. We recommend that enhanced training be developed and presented to all affected stakeholders (including government officials) to achieve a higher degree of compliance with the NNI Policy's obligations.

7.18 Translation of Procurement Documents

428. During our consultations, a concern was raised regarding the availability of procurement documents in languages other than English – specifically, in Inuktitut and Inuinnaqtun. The *Official Languages Act* for Nunavut recognizes the Inuit (Inuktitut and Inuinnaqtun), English and French languages as the official languages within the territory and prescribes the circumstances in which the public is entitled to the provision of GN services in any of the official languages.

429. It is unclear to us the extent to which demand exists for all procurement documents to be published in all official languages. The cost of translation of such documents would be very high and may be difficult to complete in a timely manner.

430. We recommend that the GN should make the Nunavut Tenders website available in all official languages. This will ensure that the stakeholders in the procurement community are all made aware of RFPs and tenders in a timely manner. Thereafter, if stakeholders want to have specific procurement documents provided in one of the official languages other than English,

resources must be available to draw upon to translate the documents in a timely manner and the deadline for the submission of bids and proposals should be extended by whatever time is necessary to complete the required translations.

7.19 Other Clarifications Required in the NNI Policy Language

431. There are a number of minor revisions that need to be made to the NNI Policy in order to correct typographical errors, to ensure internal consistency or for the sake of clarity. For example:

- Section 10.2 includes the word "to" after "respect", which should be removed.
- Section 11.3 refers to "Nunavut based businesses". It is unclear what constitutes a "Nunavut based business" and how that type of business differs from a Nunavut Business.
- Section 11.3 refers to the "GN" whereas all other provisions refer to the Government of Nunavut.
- Section 11.3 refers to "Inuit firms" rather than "Inuit Firms".
- Section 11.5 uses the terms "Bid Adjustment Values" and "Content Ratings". These capitalized terms are not defined in the NNI Policy. They should either be defined or the capitalization removed.
- Section 12.1(b) is missing the word "the" before "event".
- Section 12.1(c) and (d) uses the capitalized terms "Bonuses" and "Penalties". These are not defined terms and the capitalization should be removed.
- Section 12.1(e) should have the word "or" removed after "bonus".
- The definition of Inuit Content needs to be revised (leaving aside the own forces issue noted above). The definition makes reference to "any Inuit Firm or Inuit sole proprietorship". An Inuit sole proprietorship would be subsumed within an Inuit Firm and accordingly the definition is redundant. Further, the use of the phrase "may include" to describe examples of what constitutes Inuit Content seems odd. The definition should clearly state what does or does not constitute Inuit Content. In addition, it is unclear in (ii) of the definition what the difference is between an "Inuit Firm" and an "Inuit supplier". This should be clarified.
- The definition of "Local Content" refers to a "local business" acting as the General Contractor. We assume that the reference should be to a "Local Business" as a defined term.

432. We recommend that as part of the amendments to the NNI Policy that will flow from this report, the GN undertake a complete review of the policy to clean it up and effect these and any other minor revisions.

8. Are the Objectives of the NLCA and the NNI Policy Being Achieved?

433. Having raised and addressed the various issues noted above, one is left questioning whether the current version of the NNI Policy is achieving the objectives of the NLCA and the objectives set out in the NNI Policy itself.

434. The objectives of the NLCA and the NNI Policy differ in their focus. The NLCA objectives focus on improving the participation, capacity and employment of the Inuit in the Nunavut economy, whereas the NNI Policy focuses on the broader Nunavut economy and ameliorating the participation, training and education levels of the Inuit and the Nunavummiut. Moreover, the NNI Policy is intended to address the unique challenges businesses face in conducting business in the north.

435. The objectives in the NLCA and the NNI Policy can be distilled into four broad obligations: (1) improving the training and employment of the Inuit; (2) improving the capacity and participation of Inuit Firms in the Nunavut economy; (3) supporting the participation by Nunavut Businesses in the Nunavut economy; and (4) ensuring good value and fair competition in GN procurements.

8.1 Improved Training and Employment of the Inuit

436. While we understand that the level of employment of the Inuit has increased since the last comprehensive review, we are unable to assess whether the NNI Policy is responsible for this increase. As we have noted earlier, Nunavut has experienced a significant growth in its economy over the last four years largely due to mining and construction activities. Available data does not permit an analysis to determine whether this increased employment is due to the NNI Policy.

437. However, the available data does reveal that Inuit Firms are receiving a greater number (both in volume and value) of contracts from the GN. It is reasonable to assume that this increase has resulted in enhanced employment opportunities for the Inuit.

438. With respect to the improved training of Inuit, the NNI Policy requires that training plans be submitted for bids meeting a certain threshold in order to promote enhanced training opportunities for the Inuit. This requirement has not been met and as a result, we have recommended an overhaul of the training requirement. In this regard, the objectives of the NLCA have not been met.

8.2 Improved Capacity and Participation of Inuit Firms in the Nunavut Economy

439. The available data indicates that contract awards to Inuit Firms increased from $20,000,000 in 2000/2001 (representing 23.7% of the total contract award value) to almost

$60,000,000 in 2007/2008 (representing 30.7% of the total contract award value)[9]. If we compare that data with the last full year of data that is available for 2011/2012, contract awards to Inuit Firms further increased to $128,581,545 (representing 37.1% of the total contract award value). On their face, these numbers suggest that Inuit Firms have increased their participation in the Nunavut economy in general and in particular, in respect of GN contracts.

440. For some contract sectors (such as major construction, minor construction or services and purchase orders), Inuit Firms are awarded the majority of all GN contracts. However, there remain other sectors such as architectural/engineering and consulting contracts, where progress is not apparent.

441. While it is impossible to precisely determine which portion of this increase in Inuit Firm contracting is due to the NNI Policy, it is our view that the NNI Policy has had a material impact on the capacity and participation of Inuit Firms. For example, the data reveals that Inuit Firms have almost tripled the amount of submissions made for GN contracts over the last 4 years and over time, have submitted a larger proportion of the bids received by the GN, demonstrating a positive increase in Inuit Firm procurement activity.

442. What we are unable to determine with any certainty is whether the financial benefits associated with this increase in Inuit Firm procurement activity have resulted in the associated revenues remaining in Nunavut for the benefit of the Inuit and Nunavummiut, or whether the revenues have flowed south through sub-contractors or joint venture partners. For this reason, we have recommended the creation of an Enhanced Inuit Firm category to increase the likelihood that revenues earned from GN contracts will remain within Nunavut and to provide even more capacity building support to Inuit Firms.

8.3 Participation by Nunavut Businesses in the Nunavut Economy

443. The available data indicates that contract awards to non-Inuit Nunavut Businesses decreased from $33,000,000 in 2000/2001 (representing 38.5% of the total contract award value) to $16,000,000 in 2007/2008 (representing 8.5% of the total contract award value)[10]. If we compare that data with the last full year of data that is available for 2011/2012, contract awards to non-Inuit Nunavut Businesses further decreased to $12,309,444 (representing 3.6% of the total contract award value). Over the last 4 years, non-Inuit Nunavut Businesses have received between 3.6% and 12.4% of the total contract award value, with the lowest percentage level (3.6%) received in 2011/2012. We also note that non-Inuit Nunavut businesses do not have a predominant presence in any one contract sector.

444. The aforementioned data suggests that non-Inuit Nunavut Businesses have suffered as a result of the NNI Policy, particularly if one looks at the increased contract activity of Inuit Firms and Southern firms. However, such a conclusion may not paint an entirely accurate picture as we heard in our consultations that a number of non-Inuit Nunavut Businesses have partnered with

[9] Data obtained from the NNI 2008-2009 Comprehensive Review Report.
[10] Data obtained from the NNI 2008-2009 Comprehensive Review Report.

Inuit Firms and Southern businesses in some form or fashion in order to take maximum advantage of available bid adjustments and contracting opportunities.

445. Moreover, during our consultations, no one expressed a concern that the NNI Policy was somehow failing non-Inuit Nunavut Businesses or preventing them from meaningful participation in the Nunavut economy. Rather, the concerns expressed related to the lack of transparency in the manner in which the NNI Policy is applied, the onerous nature of the NNI Nunavut Business Directory re-registration process and the need to ensure that the Nunavut Business bid adjustment not be eliminated.

446. It is impossible to determine whether the decline in the value and number of GN contracts awarded to non-Inuit Nunavut Businesses in recent years is as a result of the NNI Policy or due to other factors. In light of this and our other comments noted above, we see no principled basis to recommend a wholesale change to the manner in which Nunavut Businesses are treated under the NNI Policy. The changes that we have recommended (as set out above) are intended to ensure that businesses entitled to receive the Nunavut Business bid adjustment have a significant presence in the territory and their contribution to the economy is retained in Nunavut.

8.4 Good Value and Fair Competition

447. The cost to the GN of the NNI Policy vis-à-vis the contracts tracked by CGS is less than 1% of its total procurement expenditures during the 2008/2009 to 2011/2012 fiscal years. This data demonstrates that the cost to the GN (at least in relation to CGS-tracked contracts) is not excessive and is not preventing the GN from securing goods and services at "good value" as contemplated by section 7.1(a) of the NNI Policy.

9. Conclusion and Summary of Recommendations

448. Based on our consultations and review of the available data, it is our opinion that the NNI Policy has been successful in achieving some of the objectives set out in the NLCA and the policy itself. For example, the data shows that Inuit Firms have received a significant increase in government contracts, both in value and percentage, since the NNI Policy was implemented in 2000. Over that period, Inuit Firms have received an increase in GN contracts from $20,000,000 in 2000/01 to $128,581,545 in 2011/12.

449. Although it is impossible to determine how much of the increase in Inuit Firm contracting is due to the NNI Policy itself, it is a safe assumption that the NNI Policy can take some of the credit for the increased presence of Inuit Firms in GN contracting. Indeed, the data does tell us that those who are entitled to the benefit of the NNI Policy received an additional $123,419,469 in contracts due to the application of the NNI Policy over the last four years that they otherwise would not have received in the absence of the NNI Policy. We also know for certain that more Inuit Firms have been submitting bids, evidence that these businesses are more actively participating in the Nunavut economy.

450. Nunavut Businesses have fared less well according to the data. Their share of government contracts has fallen from $33,000,000 in 2000/01 to $12,309,444 in 2011/12. However, as we

have noted, the data may not reveal the true success of Nunavut Businesses, many of whom partner with Inuit Firms and southern companies to win contracts in Nunavut.

451. That said, we are also of the opinion that the NNI Policy has failed to achieve its objectives and those of the NLCA in a number of respects. Significant changes are needed, which we have proposed in this report.

452. In making these changes, it is first necessary to disentangle the failings of the NNI Policy from the failings (whether real or perceived) of the GN's procurement activities in general. As we noted above, faults of GN procurement have often been laid at the door of the NNI Policy. In a system where there will always be winning and losing bidders, criticism of contract award decisions and the decision-makers is to be expected. It is essential though, in any remediation of the NNI Policy, the failings and successes that are its alone are treated separately from the failings and successes of the procurement system in general.

453. At the outset of this report, we discussed the four pillars on which a well-functioning procurement system, and preferential procurement program, is built. Those pillars – fairness, transparency, accountability, and consistency in treatment – all need shoring up within the NNI Policy, and in its application. Our recommendations address these shoring needs.

454. The NNI Policy can be so much more effective than it currently is if the necessary changes are implemented. The intent is not to make things more complicated, if even that were possible, but to simplify and reframe provisions dealing with training; bonuses and penalties; standardization of procurement documents and processes; and the NNI Nunavut Business Directory and the NTI Inuit Firms Registry to better align with commercial realities.

455. It is also our opinion that the NLCA and NNI Policy's objectives can be more effectively achieved through a recalibration of the bid adjustment points and the creation of a new category of Enhanced Inuit Firm to increase the likelihood that GN contracts awarded to those businesses will result in the revenue remaining in Nunavut for the benefit of its residents, rather than flowing south. Additionally, we provide guidance on the way governments can direct contracts to identified groups in particular regions to promote worker and business capacity and to improve their competitiveness.

456. On a final, yet very important note, the success of any procurement system is only as good as the level of support it receives from leaders within the organization. Leadership ensures program delivery and accountability. In our opinion, this required degree of leadership from senior levels is lacking. We recommend therefore that a senior government official be appointed whose responsibility it is to "champion" the NNI Policy within GN departments and agencies and who would be accountable for its performance, or lack thereof. In discharging his/her responsibilities, the "champion" will need to work collaboratively with NTI, in particular its senior levels, to ensure a common path is selected to improve the NNI Policy's effectiveness. The attainment of the NNI Policy's objectives and those of the NLCA will only be achieved if the responsibility for doing so rests on identifiable shoulders.

457. The following is a summary of our recommendations as detailed in this report:

Issue	Recommendations
Separation of the NLCA and Business Assistance Components of the NNI Policy	1. The GN should restructure the NNI Policy into 3 section – one dealing with the implementation of the Article 24 obligations, one dealing with matters intended to assist Nunavut Businesses, and one dealing with logistical matters that are common to the other two sections. 2. The GN should rename the NNI Policy to more accurately reflect its scope and intent. The new name could be the Nunavut Preferential Procurement Policy as translated in Inuktitut.
Bonuses and Penalties	1. Bonuses and penalties should be eliminated in their entirety. 2. Bonuses and penalties should be replaced with: (i) A mandatory requirement in a tender or RFP for a minimum amount of Inuit content. Failure to meet the contractual obligation could, at the discretion of the contracting authority, be a ground for terminating the contract and more importantly, a ground for preventing the contractor and its principals from receiving future GN contracts for a set period of time; and (ii) A rated requirement to evaluate contractors on past Inuit content achievement. 3. In the alternative to the elimination of bonuses and penalties, the GN should eliminate bonuses and adopt the following streamlined penalty system: (i) Penalties should be applied only in relation to Inuit content. They would be eliminated vis-à-vis project management and training. (ii) Section 12.1(d) of the NNI Policy should be eliminated, such that Inuit labour would be assessed as a whole, rather than assessed separately for Local Inuit labour and Nunavut Inuit labour. (iii) A tiered penalty system should be adopted with graduated penalty levels based on a contractor's number of historical failures to meet the contractual minimum Inuit content requirements. Penalties should escalate from minor ($10,000) to debarment of the contractor and its principals from bidding on GN contracts for a set period of time. (iv) Contacting authorities should be vested with the discretion to not apply the tiered penalty system in prescribed circumstances. The prescribed circumstances should be set based in consultation with NTI, CGS, NHC and the business community. 4. Contracting authorities should be vested with the express discretion to alter the minimum Inuit content of a particular contract after execution of the contract. Set criteria for the exercise of this discretion should be established in order to

Issue	Recommendations
	ensure consistency among and between contracting authorities when considering requests for alterations. 5. In the event that the GN decides to retain bonuses, the NNI Policy should be clarified to provide that in the event that the minimum Inuit content is adjusted mid-contract, a contractor will only be eligible to receive a bonus if the contractor exceeds the original Inuit content requirement. 6. Contracting authorities must put in place effective monitoring of Inuit content levels during the performance of the contract, which monitoring should include random site visits. 7. Monitoring and enforcement of the minimum Inuit content requirement should be the responsibility of the contracting authority and not the NNI Secretariat. 8. GC55 should be eliminated in its entirety.
Minimum Inuit Content	1. CGS, NHC, NTI and the business community should engage in an annual consultation to discuss current Inuit labour availability and skill set and the planned projects in the community and surrounding communities. The consultation will help to inform the percentages then set by the respective contracting authorities. 2. The GN should maintain a complete data set of actual Inuit labour achieved in comparison to the level of minimum Inuit labour required.
NNI Contracting Appeals Board	1. The name of the Contracting Appeals Board should be changed to the NNI Tribunal to more accurately reflect the scope of its mandate. 2. The process for dealing with complaints should be changed to the following: (i) If a bidder feels that it has been treated unfairly, the first step should be a debriefing with the relevant contracting authority. The bidder should be required to request a debriefing within five working days of receiving notification of the circumstances underlying the issues in question. (ii) The contracting authority should respond to the request for a debriefing in a timely manner and provide the debriefing within two weeks. (iii) If the bidder remains dissatisfied after the debriefing, the bidder may file a written complaint together with supporting materials to the NNI Tribunal within 7 working days of receiving the debriefing. (iv) The NNI Tribunal should then make a determination as to whether there is a reasonable indication that a breach of the NNI Policy took place. If the NNI Tribunal concludes that no such indication exists, it can reject the

Issue	Recommendations
	complaint at that stage. (v) If the NNI Tribunal concludes that a reasonable indication of a breach did occur, it would initiate an inquiry. (vi) The contracting authority should be provided with the complaint and supporting materials and be required to provide a response explaining what events transpired that are relevant to the complaint together with all supporting documents within 15 working days. (vii) Any commercially sensitive information not belonging to the complainant should be disclosed to only the representative of the complainant and not to the complainant. (viii) After the contracting authority's response has been provided, the complainant should be given a brief period of time to comment, such as seven working days. (ix) Once the record is then complete, the NNI Tribunal would analyze the issues and render a decision, in writing, within 15 days following the closure of the record. (x) Oral hearings should not be held unless it is impossible to adjudicate the complaint in the absence of an oral hearing, such as where there are significant issues of credibility or limitations on the ability of the complainant to present its case in writing. 3. Where a complaint is filed, the contracting authority should refrain from awarding the contract, or if already awarded, no work should be performed, pending the determination of the complaint. For exceptional urgent contracts that cannot wait for a complaint to be disposed of, the GN should be allowed to proceed with the contract and work. 4. The GN should appoint three NNI Tribunal members. The members should have expertise in procurement and administrative law or have considerable experience in government contracting. Members should not need to be resident in Nunavut, although that would be ideal. If the required expertise is not available in Nunavut, the members selected should have significant familiarity with government contracting in Nunavut. Members should be truly independence and not chosen to represent the interests of any group or interest in Nunavut. The appointment process should be changed to ensure that the members appointed owe no allegiance to any particular government, community or business interest. 5. Complaints should only be heard by one NNI Tribunal member except where the nature and significance of the complaint warrants a three person review panel.

Issue	Recommendations
	6. The NNI Tribunal should have access to legal support and on-going training. 7. The NNI Policy should be amended to provide that the recommendations of the NNI Tribunal are binding on the GN, except where, for compelling public policy reasons, the recommendations cannot be implemented. 8. The GN should expand the jurisdiction of the Board include complaints related to registration and re-registration decisions made by both the NNI Secretariat and NTI. 9. The GN should not currently increase the jurisdiction of the Board to encompass all aspects of a GN procurement process, whether or not the complaint is rooted in NNI Policy issues alone. The GN should re-assess the value of such an expanded jurisdiction once a more viable procurement review process is successfully operating.
Bid Adjustments	1. The current bid adjustments (7% for Inuit Firms, 7% for Nunavut Businesses and 7% for Local Businesses) should be recalibrated to 5% each. 2. A fourth bid adjustment should be added for Enhanced Inuit Firms with an available adjustment of up to an additional 6%. An Enhanced Inuit Firm is an Inuit Firm that is owned, managed and controlled by Inuit, and that has profits that flow directly to the Inuit owners. 3. Enhanced Inuit Firms would be eligible for an additional 6% bid adjustment, with the percentage available depending on the level of Inuit ownership, management and control. At 51%, an Inuit Firm would receive 5%. At 52% to 59%, an Enhanced Inuit Firm would receive a 6% adjustment. At 60% to 69%, an Enhanced Inuit Firm would receive a 7% adjustment. At 70% to 79%, an Enhanced Inuit Firm would receive an 8% adjustment. At 80% to 89%, an Enhanced Inuit Firm would receive a 9% adjustment. At 90% to 99%, an Enhanced Inuit Firm would receive a 10% adjustment. At 100%, an Enhanced Inuit Firm would receive an 11% adjustment. 4. The Enhanced Inuit Firms Registry should be maintained by NTI in the same manner in which it manages the Inuit Firms Registry, with the addition that the percentage ownership, management and control would be listed on the registry. 5. Registrants seeking Enhanced Inuit Firm status should be required to produce a set list of documentation to demonstrate Inuit ownership, management and control. 6. NTI and the NNI Secretariat should require all applicants for registration on the NTI Inuit Firms Registry, NTI Enhanced Inuit Firms Registry and the NNI Nunavut Business Directory to certify to the truthfulness of all information provided in their

Issue	Recommendations
	application and supporting documentation and to certify that there is no additional documentation or information relevant to the assessment of their application that has not been provided. 7. The NNI Policy should be amended to include provisions to address the consequences of deliberately providing untrue or misleading information in violation of the certification given, including striking the business from the registry and debarring the business and its principals from applying for registration of any other business for a minimum period of time. 8. The requirements for Nunavut Business status should be modified to require that a significant portion of the business' operations be conducted in Nunavut. 9. The definition of a Nunavut Business should be amended to: (i) Clarify that the requirements in subsection (i) through (iv) apply not only in the case of partnerships, but also to limited companies, co-operatives and sole proprietorships; and (ii) Clarify the ownership requirements for a co-operative and align the language with that used for Inuit Firm co-operatives. 10. The definition of a Local Business should be amended to: (i) Clarify in subsection (iv) that the business has received status as a Nunavut Business (not a Local Business); and (ii) Expand Local Business status to Inuit Firms and not only Nunavut Businesses. 11. The GN should review the utility of sections 11.1(f) and 11.1(g) of the NNI Policy, which extent the Local Business bid adjustment to businesses that are do not qualify for Local Business status. 12. The GN should implement immediate standardized data tracking procedures to permit the effectiveness of the various bid adjustments to be fully assessed.
Training	1. The training provisions of the NNI Policy should be fundamentally overhauled. 2. The GN should clarify whether the training obligations are aimed as Inuit only, or also Nunavummiut as currently provided in section 7.1(d) of the NNI Policy. 3. The current training provisions should be replaced with a training system that would require a mandatory training obligation on contractors to meet the specific training terms detailed in an RFP or tender. 4. The categories of contracts to which a training plan obligation would attach should be altered. The monetary threshold should be increased to capture larger projects where long-term training can have a more significant impact. Alternatively or in addition,

Issue	Recommendations
	the threshold should be based on project duration, with a view to requiring training plans only on those projects that are long enough in duration that training would not impede the timely completion of the work. 5. The training component of the NNI Policy should be focused on pre-existing, third-party accredited training programs only. Contractors should not be obligated to create training programs and contracting authorities should not be obligated to assess the adequacy of the training programs. 6. Contracting authorities should be required in each RFP or tender to detail the necessary training based on the type of contract at issue. The training would be limited to the hiring of a designated number of employees who are enrolled in: (i) An apprenticeship program administered by the Department of Education and provided by Nunavut Arctic College; (ii) A skilled trades program administered by the Department of Education and provided by Nunavut Arctic College; (iii) An accredited training on the job program administered by the Department of Education; or (iv) Any other third party accredited training program as designated by the contracting authority, such as training programs conducted by bodies in other provinces or territories. 7. The Department of Education should maintain a list of accredited programs available both in and outside of Nunavut from which contracting authorities could select appropriate programs. 8. On larger projects (such as the Iqaluit airport), contracting authorities should meet with potential contractors to discuss the projects and to identify training needs and opportunities prior to establishing the training requirements in the RFP or tender. 9. Critical to the functionality of this new training system is the creation of Liaison Officers, who should be responsible for maintaining the list of available accredited programs, maintaining the list of students enrolled in apprenticeship and skilled trades programs and most importantly, acting as a liaison between contracting authorities, contractors, educational institutions and students to ensure that training requirements imposed in contracts are feasible and that appropriate employees can be located for contractors. 10. The Liaison Officer should play an important role in the enforcement of training obligations by acting as a neutral third party who will be able to confirm to contracting authorities what efforts have been made by a contractor to comply with the

Issue	Recommendations
	training requirements if they are not met and whether the failure to meet the requirements is justifiable in the circumstances. 11. The Liaison Officer should work with the contracting authorities, Nunavut Arctic College and contractors to determine whether additional accredited programs should be offered and added to the list of accredited programs for the purpose of NNI Policy training obligations. 12. Contracting authorities must engage in proper monitoring and enforcement throughout the completion of the contract to ensure that training obligations are being met. 13. Any unjustified failure to meet the training obligations (as determined in consultation with the Liaison Officer) should have a consequence, which consequences should include a lower score on NNI Policy compliance in future contracts, debarment from bidding on future contracts and/or a financial penalty. 14. The NNI Policy should be amended to include a provision that obligated contracting authorities to include enhanced training requirements for large projects, such as the Iqaluit airport. For such projects, a committee should be created with representatives from the contracting authority, the Liaison Office, Nunavut Arctic College and the contractor community to develop an appropriate training program that will maximize Inuit training and participation on the project. 15. Once the revision training system is successfully implemented, the GN should consider expanding the training obligations beyond primarily construction and large service contracts, keeping in mind that third party accredited programs would have to be available to satisfy the training obligation.
Own Forces	1. The term "own forces" should be removed from the NNI Policy all together. 2. All entities, whether general contractors or sub-contractors, should be required to set out their intended Inuit labour percentages and be evaluated on those intended percentages for the purpose of being scored on Inuit Content.
Sole-Sourcing Contracts	1. Section 10 of the *Government Contract Regulations* should be expanded to permit the awarding of sole-sourced contracts where the GN identifies a particular region or industry in Nunavut that warrants special consideration and support to build capacity within the Inuit businesses and among the local Inuit population.
Use of Set-Asides for Inuit Firms	1. The GN should implement a set-aside program to restrict identified purchasing opportunities to only Inuit Firms. 2. The GN should create a committee with government officials,

Issue	Recommendations
	NTI and business sector representatives to develop the framework for this program. A number of factors should be considered, including: (i) Whether only Inuit Firms that are Inuit owned and controlled can bid; (ii) Whether the set-aside program should be restricted to Inuit Firms that also qualify as Nunavut Businesses; (iii) Whether the program should be targeted for certain types of government purchases; (iv) Whether the program should be limited to contracts of a certain value; and (v) Whether the program should be developed for Inuit Firms only or Nunavut Businesses as well. 3. If the GN believes that similar assistance is needed for Nunavut Businesses (whether or not Inuit Firms), a set-aside program should be developed to assist those business and/or the current section 11.3 of the NNI Policy should be maintained.
Standing Offers and "As and When Required" Contracts	1. The application of the NNI Policy to standing offers and "as and when required" contracts should only be done where practicable and consistent with sound procurement management and where appropriate to the particular contract. 2. If there are no clear cost criteria in procurement of this nature, bid adjustments should not be used. 3. Alternatively, rather than use a hypothetical price for the purpose of bid adjustments, the GN could develop a point rating system (as it uses for RFPs) and have a category of points awarded for Inuit Firms, Nunavut Businesses and Local Businesses. 4. Rather than establishing a hypothetical minimum Inuit labour content, bidders should be required to certify that in previous GN contracts they have honoured their commitments to employ the required minimum percentage of Inuit labour and commit to meeting any mandated level of Inuit labour that may be imposed in any call-ups under the standing offer agreement or as required in any "as and when required" contract.
Bid Repair	1. Errors in procurement documentation submitted by bidders (in particular, errors in B2 forms) should be addressed by the GN in one of two ways: (i) The GN can evaluate the bid strictly on the basis of what is submitted. If a bidder fails to complete the bid forms correctly and as a result does not get the benefit of all adjustments they could have received, the bidder would have to accept the consequences of its own error; or (ii) The GN could provide assistance to bidders by verifying

Issue	Recommendations
	and correcting information in respect of the bid adjustments that would apply. 2. If the GN adopts the latter approach, clear language must be inserted into the solicitation documents indicating to all bidders that these corrections will be made. 3. If the GN adopts the latter approach, the contracting authority should show the adjustments made to the bidder and ask the bidder to confirm whether the correction is accurate. 4. The better way to deal with the volume of errors, however, should be to revise the bid forms and/or provide better training to bidders so that they can more accurately complete the forms.
Standardization of Procurement Documents and Processes	1. The GN should implement one standardized B2 form for all contracting authorities, which should be accompanied by a standardized instruction sheet provided by all contracting authorities to bidders. 2. The GN should develop a standardized set of debrief letters (which include different letters depending on the type of contract at issue) that are sent to all losing bidders within a set number of days after the awarding of the contract. The debriefing letters should disclose the following information: (i) The names of all bidders; (ii) The name of the winning bidder, the winning bidder's price and the winning bidder's overall score; (iii) The bid adjustments received by the winning bidder; (iv) The losing bidder's B2 form as adjusted by the contracting authority; and (v) The losing bidder's total score, including the breakdown of the total score received. 3. Procurement processes and contract awards should be centralized in Iqaluit for both CGS and NHC. 4. The GN should implement a standardized data collection procedure as noted below.
Data Availability and Collection	1. The GN should implement mandatory data collection procedures for all contracting authorities on an immediate basis. 2. Data collection should be consistent across all contracts and across all contracting authorities through the use of a standardized data collection form. 3. The data to be collected should include, at a minimum, the data currently being collected by CGS, and in addition, should include the value of work completed by subcontractors and information regarding the subcontractors, the percentage of Inuit labour achieved on every contract, the cost of implementation of the NNI Policy, and the impact of each bid adjustment on the awarding of contracts.

Issue	Recommendations
	4. The project officer charged with a particular GN contract should be responsible for data collection for that contract in order to ensure accurate data collection. 5. The NNI Secretariat should be charged with responsibility for data collection and maintenance of a centralized electronic database.
Application of the NNI Policy to Municipalities	1. Currently, the NNI Policy only applies to municipal procurements in cases where more than 51% of a particular contract's funds are provided by the GN, as no municipalities are receiving more than 51% of their annual operating funds from the GN. 2. The GN needs to determine whether it wants all or a portion of local government (municipalities, towns, hamlets and villages) procurements to be conducted in accordance with the NNI Policy. If so, the GN should enact the necessary laws or policy changes to do so. 3. If the GN does require municipalities to adhere to the NNI Policy, the GN should set a minimum contract value threshold which if met or exceeded would require local governments to adhere to the NNI Policy obligations. 4. If the GN determines that it wants all or some municipal procurements to be covered by the NNI Policy, the GN should provide training and resources to assist local government purchasing staff to cope with the intricacies and complexities that the NNI Policy presents.
Application of the NNI Policy to QEC	1. The NNI Policy applies to the Qulliq Energy Corporation. 2. If there is any lingering doubt on this issue, the Minister or Executive Council should enact a specific policy of guideline stating that QEC is subject to the obligations of the NNI Policy.
Monitoring and Enforcement	1. The GN should immediately put into place the monitoring and enforcement measures required by the NNI Policy and as more fully detailed in the report in terms of meeting the minimum Inuit content obligations and training obligations. 2. The GN should amend the NNI Policy to empower the GN to debar a business and its principals from bidding on contracts for a set period of time in the event that the entity is found to have violated the spirit and intent of the NNI Policy. While similar debarment provisions should be contained in the NNI Policy related to specific breaches of NNI Policy obligations, this provision would act as a catch-all for any observed inappropriate conduct.
Changes to the NTI Inuit	1. The NNI Secretariat should not require applicants seeking re-

Issue	Recommendations
Firms Registry and NNI Nunavut Business Directory	registration to submit supporting documentation in the absence of a material change to their business. The NNI Secretariat should accordingly revise its renewal requirements and processes to align with those used by NTI. 2. The NNI Secretariat and NTI should extend the validity of their respective registrations to three years. 3. The NNI Secretariat and NTI should share relevant documents submitted by applicants in order to alleviate the burden on applicants and facilitate the greatest possible information sharing between the two organizations. This can be accomplished through a shared document database or restricted website housing the documents. 4. The NNI Secretariat and NTI should adopt a policy whereby any applicant found to have provided inaccurate information for the purpose of improperly obtaining registration be barred from registered the business at issue or any other business in which the applicant is a material stakeholder for a set period of time. 5. The NNI Secretariat and NTI should assign registration numbers to all registrants. 6. The NNI Tribunal should be vested with the jurisdiction to make recommendations on the decisions of both the NNI Secretariat and NTI to deny registration or to deny a renewal application.
Community Education on the NNI Policy and its Implementation	1. The GN should provide better education within the community to enable businesses to better understand the meaning and operation of the NNI Policy in respect of procurement and contracting opportunities. 2. The GN should provide appropriate and on-going training to government officials about the application of the NNI Policy in the context of any procurement or contracting activity.
Translation of Procurement Documents	1. The GN should make the Nunavut Tenders website available in all official languages. 2. If stakeholders want to have specific procurement documents provided in one of the official languages other than English, recourse should be made available to draw upon to translate the document in a timely manner and the deadline for the submission of bids and proposals should be extended by whatever time is necessary to complete the required translations.
Other Clarifications to the NNI Policy Language	1. As part of the amendments to the NNI Policy, the GN should conduct a wholesale review of the policy to correct a number of noted typographical errors, to ensure internal inconsistencies and to effect required clarifications.

Issue	Recommendations
Senior Level Government NNI Policy Leader	1. The GN should appoint a senior government official with responsibility to ensure the NNI Policy's objectives are being met and who is accountable for the NNI Policy's performance, or lack thereof.

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Nunavut Housing Corporation Appendix

Nunavut Housing Corporation Opinion

The NHC advises that both the internal “report” and the spreadsheet “data” referenced by BLG under Section 6.2 NHC Data, and in Paragraph 135, are part of a first DRAFT of an internal report by an NHC contractor. The DRAFT document referred to is incomplete and has been identified by NHC as containing incorrect assumptions and errors that needed correcting. The BLG references to this report and data are in error and should subsequently be ignored.