

Full Producer Responsibility Transition Clauses/Procedures

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The following is a preliminary list of FPR transition clauses that may be utilized for future RFP/Tender documents in Ontario.

1. Early Contract Termination Clause

Purpose: Future changes to Blue Box legislation may encourage a municipality to choose to cancel their existing contract at some point prior to the expiration date. This clause is intended to give municipalities the ability to do so and fix the cancellation costs payable to the contractor up front. Both parties can avoid costly and time-consuming litigation by ensuring that the early termination clause is a fair representation of the value of the contract. Reviewing the clause with a lawyer is the easiest way to ensure a party understands how the contract can be terminated.

In some older municipal contracts, a “termination for convenience” clause was inserted permitting the municipality to cancel on short notice without cost. A municipality's discretion under this clause, while substantial, is nevertheless constrained by the legal principles of “good faith and fair dealing”. Thus, a municipality must have a good faith basis for invoking a termination for convenience clause or it will risk having its decision challenged in court by a disgruntled contractor.

Identifying the cost to early termination also allows the municipality to annually budget for the potential of transition.

Description: A clause that requires bidders to submit, as part of their bid price, a cost to cancel the contract at fixed intervals (e.g. 2yr. 3yr. 5yr. of a 7yr. total contract term).

Operation: The intended operation of this clause assumes that the municipality, having awarded a contract containing an early termination clause, retains the sole discretion to invoke that clause at the interval date upon payment to the contractor of the compensation amount fixed in the original bid. Early termination at a date not specified in this clause could be negotiated under a change management clause.

Schedule **XX**: EARLY TERMINATION OF CONTRACT BASED ON AMENDMENTS TO LEGISLATION

Proponents, by making a submission for the provision of blue box services in response to this RFP, acknowledge that Ontario Municipalities are subject to the applicable legislative requirements including but not limited to Waste Free Ontario Act (WFOA) and all applicable statutes, policies, programs, guidelines, regulations and standards including but not limited to the Provincial Blue Box Program Plan (collectively referred to as “Applicable Law”) all of which are outside the control of the [Program/Municipality]. Proponents further acknowledge that legislative changes including but not limited to repeal, replacement or amendment of any Applicable Law may change or alter the Contract awarded for blue services under this RFP in such a manner that in the sole and absolute discretion of the [Program/Municipality] the services provided under the Contract for blue box services are no longer required or necessary to the [Program/Municipality]. If the services provided by the Proponent are no longer necessary to [Program/Municipality] due to a change in Applicable Law, the [Program/Municipality] shall have a right to terminate the Contract as it relates to blue box services prior to the scheduled end of the Contract Term. Notice of any such early termination of the Contract for blue box services shall be provided to the Proponent by the [Program/Municipality] within 30 days of the repeal, modification, replacement and/or amendment to Applicable Law.

The Proponent, as part of this RFP, shall identify any and all costs associated with an early termination of the Contract for blue box services in the event of a change, alteration and/or amendment to Applicable Law. Such costs may include the stranded capital cost incurred by the Proponent in the event of early termination of the Contract for blue box services and may be pro-rated to the closest month end for termination at any date other than the anniversary of the Contract Commencement Date.

Contract Year	Cost Incurred to Terminate (\$)	Description of Cost Incurred
Year 2		
Year 3		
Year 4		
Year 5		
Year 6		
Year 7		

2. Assignment of Contract Clause

Purpose: Future changes to Blue Box legislation may encourage a municipality to choose to assign their existing contract to a producer organization or other third party at some point prior to the expiration date either with or without prior modification of the scope of work. This clause is intended to facilitate that process while avoiding undue delays and extra costs.

Sample:

The Contractor shall not assign, transfer (including a change in control), convey, sublet or otherwise dispose of this Contract or his/her right, title or interest therein, or his power to execute such Contract, to any other person, company or Municipality, without the prior written consent of the Municipality which shall not be unreasonably withheld.

The Contractor acknowledges and understands that the Municipality is subject to its statutory and regulatory obligations as they relate to waste diversion and the blue box program including but not limited to the Waste Free Ontario Act, 2016, Waste Diversion Act, 2002, and Provincial Blue Box Program Plan (BBPP). The Contractor agrees that the repeal, replacement or amendment of any applicable legislation governing the obligations and activities of the Municipality as it relates to the matters provided in this Agreement shall permit the Municipality to assign this Contract. The Contractor agrees that such assignment will become effective upon providing thirty (30) calendar days' written notice to the Contractor and the Contractor shall accept such assignment forthwith and execute all documentation as may be required to give full effect to such assignment.

The Contractor acknowledges and agrees that it shall not be entitled to any compensation, fees or damages for any assignment due to a change in the applicable legislative and/or statutory requirements relating to the services provided under the terms of this Contract nor any change in fees charged for services provided under the Contract save and except those changes agreed in advance of the assignment negotiated under the provisions of the change management clause set in this Contract. The Contractor agrees that the Municipality shall have no liability whatsoever, howsoever incurred, for any additional costs after the assignment date save and except those costs negotiated in advance of the assignment.

Operation: The intended operation of this clause assumes that the municipality, having made a decision to assign the contract to a third party, (e.g. producers or another municipality within a newly established catchment area) retains the discretion to make the assignment without seeking permission from the contractor or paying compensation unless the scope of work is substantially altered by the assignment. A change management clause designed to facilitate modification to the scope of work and/or compensation for same is also required.

3. Force Majeure, Change of Law, Change Management, Arbitration and Termination

Purpose: In light of the uncertainty surrounding the pending FPR transition, municipalities required to contract for recycling services during the transition period must provide for the possibility that a change of law may significantly affect their program and/or the scope of work contracted. Inclusion of Force Majeure, Change of Law, Change Management and Dispute Resolution provisions can help solve serious

changes imposed on an existing contract or program by any new legislation. There are currently four methods for managing a change of law contingency;

- A. Force Majeure Clause
- B. Change of Law Provisions
- C. Change Management Provisions
- D. Arbitration and Termination

A. Force Majeure Clause

Purpose: To increase the chances of a contract surviving a change in legislation, without unreasonable cost increases, a modification specifically referencing “change of law” to the force majeure clause typically found in all contracts, is now considered a best practice. The force majeure clause is included to relieve the parties of their obligations in the event of significant unforeseen circumstances. Typically, these clauses cover fires, floods, wars, etc. however, there is no limitation as to what the parties define as a force majeure triggering event. Therefore, it is prudent to include the possibility that a change of law significantly affecting the scope of work can operate as a trigger for this clause, e.g. a legislated change permitting producers to require a Province wide dual stream collection system will significantly impact all single stream programs.

Sample:

- I. *In the event that either the Municipality or the Contractor shall be unable to fulfil, or shall be delayed, or shall be prevented from the fulfilment of, its obligation under any contract awarded under this proposal by reason of acts of God, fires, floods, storm, lightening, explosions, riots, war, rebellion, sabotage and atomic or nuclear incidents, changes and/or amendments to the applicable federal or provincial laws, regulations, policies, guidelines, and/or directives (“Force Majeure”) or other reasons of like nature beyond the reasonable control of the party delayed or prevented from fulfilling any obligation hereunder, save and except for any delay or prevention from such fulfilment caused by a lack of funds or other financial reasons, delay or other failure arising out of the nature of the work to be done, or from the normal action of the elements or from any normal difficulties that may be encountered in the performance of the work, having regard to the nature thereof, shall in no event be deemed to be a cause beyond a party’s control.*
- II. *In the event that the performance of any contract awarded under this proposal, in the reasonable opinion of either party, is made impossible by force majeure, then either party shall forthwith notify the other in writing and the Municipality shall either; terminate the contract as soon as reasonably practicable in writing and without any further payments being made; or authorize the Contractor to continue the performance of the contract in writing with such adjustments and/or amendments as required by the existence of the force majeure and as agreed upon by both parties acting reasonably. In the event that the parties cannot agree upon the adjustments and/or amendments, it is agreed by the parties that the contract shall be immediately terminated with no further obligations by either party.*
- III. Proponents, by making a submission, acknowledge that Ontario Municipalities are subject to the *Waste-Free Ontario Act, 2016* and Provincial Blue Box Program Plan (BBPP) that are outside the control of the [Program/Municipality]. Repeal, replacement and/or amendment to the BBPP may change the operation of any Contract awarded under this RFP sufficiently to be classified, in

the sole discretion of the [Program/Municipality], as a “Force Majeure” event. The parties hereby further acknowledge and understand that the Waste-Free Ontario Act, 2016 (WOFA) received Royal Assent in June, 2016 and enacted the *Resource Recovery and Circular Economy Act, 2016* and the *Waste Diversion Transition Act, 2016* and repealed the *Waste Diversion Act, 2002* all of which along with associated regulations, when implemented may alter and/or change the scope of work of any Contract(s) awarded under this RFP and may impact any Contracts awarded under this RFP to the extent that such alteration or change may be classified in the sole discretion of the [Program/Municipality], acting reasonably, as a “Force Majeure” event.

- IV. *For the purposes of clarification, a strike or lockout or other labour disruption shall not be considered a Force Majeure and for the purposes of clarification the Contractor shall be solely responsible for maintaining all collection and processing services, to the extent possible and reasonable in the circumstances.*
- V. *Within 30 days of the award of any contract, the Contractor shall submit to the satisfaction of the Municipality a contingency plan explaining in detail how performance of the service during any strikes and/or lockouts, fire or other major work interruption shall be maintained at the Contractors sole cost and expense. Such plan shall become a part of the contract and shall be subject to all the terms of the contract. Failure to submit a sufficient contingency plan, in the sole discretion of the Municipality, may result in termination of the contract.*

Operation: The intended operation of this clause assumes that among other things, a change of law sufficient to significantly alter the scope of work a contractor performs can be declared a force majeure. For example, regulations requiring all liquid containers be returned for deposit significantly reducing tonnage collected at the curb may be declared a force majeure event by either party. Once a declaration is made, the parties will attempt to negotiate the financial changes necessary to continue under the contract and failing agreement, terminate the contract. A change management clause designed to facilitate modification to the scope of work and/or compensation is also required and may be used to formalize the negotiation procedures.

In the case of labour disruption (strike or lockout), it can be argued that a labour disruption **is not** a force majeure event outside the control of the parties, by taking the position that labour disruptions are common and therefore reasonably foreseeable and avoided by a contractor simply negotiating a “no labour disruption for the duration of the contract term” provision with their union in advance of bidding for or signing any municipal contract. Therefore, the contractor is specifically **not** entitled to relief from performance under the contract during any labour disruption.

Alternatively, it can be equally argued that a labour disruption **is** a force majeure event outside the control of the parties, by taking the position that labour disruptions cannot be reasonably foreseen and therefore the parties are entitled to relief from their contract obligations for the duration of the labour disruption. Replace the language noted above under IV with the following if you deem a labour disruption as a force majeure event:

- IV. *In the event of a strike or lockout, the Contractor is responsible to maintain all collection and processing services, to whatever reasonable degree possible and, if necessary, in co-operation with the Municipality as specified in the “Force Majeure” clause above.*

The cost implications of including labour disruptions as a force majeure event can be significant in that a contractor may invoke force majeure to terminate a contract prematurely or open negotiations with the municipality for increased compensation. Additionally, municipalities will face administrative and political costs for failure to collect material should a labour disruption not be resolved within a short time period. Exclusion of labour disruptions from force majeure events may build in some ongoing contract operating cost as bidders may increase their prices initially to cover off any concessions, they are required to make in order to obtain a “no labour disruption” agreement with their union.

Each municipality must determine the specific force majeure triggering events to be included in their contract and must specifically include or exclude labour disruption events, hence alternative wording for each case is provided above.

B. Change of Law Provisions

Purpose: Dedicated change of law provisions can be included to specifically deal with a forced compliance situation that falls short of a force majeure trigger event, such as regulations requiring the addition of expanded foam to curbside collection. These provisions identify the contractor’s compliance requirement and work in conjunction with a change management provision and a dispute resolution provision to manage changes that create significant contract impacts. These provisions establish a mechanism to negotiate changes and failing agreement, to follow dispute resolution options. A sample of all three provisions follows:

Change of Law(S) - Compliance with Laws and Regulations

Sample:

The Contractor acknowledges and agrees that at all times its obligations and duties under this Contract shall be performed in accordance with all Applicable Laws.

For the purposes of clarity, the Contractor shall be solely responsible for complying with all federal and provincial laws, regulations, policies and procedures governing the performance of the work (“Applicable Laws”) as may be amended and replaced from time to time.

In addition to acting in compliance with all Applicable Laws, the Contractor shall behave in an ethical manner having regard for the condition, well-being, and fair treatment of all persons, places and things.

A “Change of Law” includes but is not limited to any legal change, amendment, alteration to Applicable Law including a policy, plan, directive, statute, statutory instrument, regulation or by-law through:

(i) A draft bill as part of any government departmental consultation paper;

(ii) A government bill or white paper;

(iii) A draft statutory instrument;

(iv) Any applicable judgment of a relevant court of law or administrative body that may affect the Work;
or

(v) Any guidance, recommendations or directions provided from any ministerial authority applicable to the duties contained in the Contract.

If a Change of Law occurs or is about to occur, that results in a significant effect on the ability of the Contractor to perform the work as determined by the [Program/Municipality] acting reasonably and/or the ability of the [Program/Municipality] to authorize the performance of the work, and/or significantly alters the scope of work to be performed, then the [Program/Municipality], in its sole discretion may notify the Contractor in writing of the Change of Law and either party may notify the other to express an opinion on its likely effects, providing details of their opinion regarding:

(i) Any necessary change in the Work;

(ii) Whether any changes or amendments are required to the Contract to deal with the Change of Law;

(iii) Whether any relief is required from the terms, conditions and obligations set out under the Contract is required prior to or after implementation of any relevant Change of Law;

(iv) Any loss of income that may result from the Change of Law;

(v) Any estimated change in the costs of performing the work as a direct result of the Change of Law; and

(vi) Any costs and/or expenses required or may no longer be required as a result of the Change of Law.

In each case, full details of any proposed procedure and/or cost for implementing the resulting change in the Work shall be provided by the [Program/Municipality] to the Contractor in writing in its sole discretion confirming any changes to the Contractor's responsibilities as a result of the Change in Law. Any resulting variation to the Contract Price shall be dealt with in accordance with the Change Management Section herein.

C. Change Management

Purpose: Not every possible change to the scope of work under a contract can be anticipated by the parties and written directly into a contract. The change management clause is intended to provide a mechanism to submit, substantiate and negotiate unanticipated changes that may require corresponding increases or decreases to compensation for delivering the contracted services. Minor changes, such as a temporary rescheduling of services due to a weather event, may be dealt with informally as they arise.

Sample:

Change to the Work Proposed by the Municipality:

The Municipality shall be entitled in its sole and absolute discretion to make changes, alterations and/or amendments to the Work. If the Municipality deems it prudent to require a change in the Work, the Municipality shall notify the Contractor of the change in the Work in writing ("Change Notice"). The Change Notice shall describe the change in the Work in sufficient detail so as to enable the Contractor to calculate and provide a change in costs estimate (the "Costs Estimate"), if any. The Contractor agrees that the Costs Estimate shall be provided in writing to the Municipality within a period of fifteen (15)

working Days or other timeline agreed to with the contract administrator in writing from the date of receipt of the Change Notice.

The Costs Estimate shall include but is not limited to the following as it relates to the change in Work:

(i) A comment on whether or not relief from compliance with Contractor's obligations under the Contract is required;

(ii) Any impact on Contractor's ability to meet its obligations and the terms and conditions set out in the Contract;

(iii) Any amendment that may be required to be made to the terms and/or conditions of the Contract;

(iv) Any change in the Contractor's costs;

(v) Any potential or actual loss of revenue; and

(vi) Any potential or gain in revenue anticipated.

As soon as practicable after the Municipality receives the Costs Estimate, the parties shall act in good faith to resolve the issues set out in the Costs Estimate, including but not limited to providing evidence that the Contractor has used best efforts, such as (where practicable) the use of competitive quotes with its sub-Contractors to minimize any increase in costs and maximize any reduction in costs, demonstrating that any expenditure to be incurred or avoided has been determined in a cost effective manner, and any other evidence deemed appropriate by the Contractor.

In the event that the Contractor does not intend to use its own resources to implement any change in the Work, it shall sub-contract or source, to the satisfaction of the municipality, the required resources with the objective of ensuring that it obtains best value for money when procuring any Work, services, supplies, materials or equipment required in relation to the change in the Work.

If the parties are unable to agree to the changes/costs set out in the Costs Estimate then the parties will resolve the matter in accordance with the Settlement of Disputes provision set out in the Contract.

As soon as practicable after the Costs Estimate as may be modified, amended or altered by the parties have been agreed to or determined in accordance with the Settlement of Disputes provision by the parties, the Municipality shall:

(i) Confirm in writing the acceptance of the Cost Estimate; or

(ii) Withdraw the proposed change in the Work.

If the Municipality does not confirm in writing the acceptance of the Cost Estimate as may be modified or altered within twenty (20) Business Days the Municipality's proposed change shall be deemed to have been withdrawn.

Unless the parties agree to a different implementation timeframe, in writing, any change in Work shall be implemented within fifteen (15) working Days after the Contractor receives confirmation of the Cost Estimate from the Municipality.

Any change in the Work that causes, or is expected to cause, the Contractor's costs or any sub-Contractor's costs to decrease shall be treated as a benefit to the Contractor with the expectation and understanding that the Municipality will also realize a proportional financial benefit in an amount to be negotiated in good faith between the parties. If such an understanding cannot be reached the parties agree to resolve the difference through the Arbitration provision.

Change to the Work Proposed by the Contractor:

If the Contractor seeks to propose a change in the Work, it must notify the Municipality in writing. The Contractor in proposing a change in the Work agrees to provide the Municipality with the following information and details in writing:

(i) A description of the proposed change in the Work in sufficient detail, to enable to Municipality to evaluate it in full;

(ii) Reasons in support of the Contractor's proposed change in Work;

(iii) Set out the details and implications of the change in the Work, including any anticipated change in the costs of providing the Work by the Contractor and any gain or loss in revenue to the Contractor potentially associated with the proposed change;

(iv) Indicate whether a variation to the Contract Price is proposed (and, if so, provide a detailed cost estimate of such proposed change); and

(v) Identify an appropriate timeframe, for the implementation of the change in Work.

The Municipality agrees that it shall, in a timely manner, and in any event no later than fifteen (15) business days, evaluate the Contractor's proposed change in the Work, taking into account all relevant issues, including whether:

(i) A change in the Contract Price will occur;

(ii) The change affects the quality of the Work or the likelihood of successful delivery of the amended Work;

(iii) The change will interfere with any relationship of the Municipality with third parties;

(iv) The financial strength of the Contractor is sufficient to perform the change; and

(v) The change materially affects the risks or costs to which the Municipality is exposed.

If the Municipality accepts the Contractor's change in Work proposal (with or without modification), the change in the Work shall be implemented within fifteen (15) business Days of acceptance of the proposal

by the Municipality, unless the parties agree to a different implementation timeframe in writing. All changes to the scope of Work and/or terms and conditions of the Contract shall be documented in writing and Contract amended where appropriate. Where the Municipality accepts the Contractor's change proposal, the Municipality shall notify the Contractor in a timely manner.

If the Municipality rejects the Contractor's change proposal, the Municipality shall provide written reasons outlining the basis upon which the change in Work is not accepted by the Municipality.

Unless the Municipality specifically agrees to an increase in the Contract Price in writing, there shall be no increase in Price as a result of a change in the Work proposed by the Contractor.

Except as specifically confirmed in writing by the Municipality in accordance with this Section, all Work shall remain unaltered and shall be performed in accordance with the terms and conditions of the Contract.

Any change in the Work proposed by the Contractor that causes or that is expected to cause the Contractor's costs or any sub-Contractor's costs to decrease shall be treated as a benefit with expectation that the Municipality will also realize a proportional financial benefit in an amount to be negotiated in good faith between the parties. The parties agree to take all reasonable steps to negotiate the proportional financial benefit in good faith, failing which the parties agree to the Arbitration provisions.

Operation: The intended operation of this clause assumes that either party may formally submit a request to change the scope of work/services delivered at any time prior to the expiry date of the contract. Once a request is made, the parties will attempt to negotiate the financial changes necessary to continue under the contract and failing agreement or withdrawal of the request, submit the issue for dispute resolution. A settlement of disputes clause designed to facilitate resolution of serious issues outside of a court or litigation process and/or compensation for same is also required.

D. Arbitration and Termination

Purpose: Not every issue advanced by a contract party can be successfully negotiated. The Arbitration and termination clause is intended to provide a formal mechanism to resolve serious disputes outside the court system in a timely manner. Additionally, specific events are listed which may result in immediate termination for cause.

Sample:

(1) In cases of dispute as to whether or not deliverables required by any contract awarded under this RFP meet the requirements of the Municipality, the parties agree to attempt to negotiate a mutually agreeable settlement prior to submitting the matter at issue to arbitration. The arbitrator shall be appointed by the Municipality. The decision of the arbitrator shall be final and binding on the parties.

(a) The Arbitrator shall make a final award that disposes of the issue, within three (3) months after being appointed;

(b) The final award may be effective with respect to a period before it is made and, in that case, shall provide for a monetary reconciliation among the parties;

- (c) *A party may appeal the final award of the Arbitrator to the Ontario Superior Court of Justice only on a question of law, with leave, which the court shall grant only if it is satisfied that the conditions in clauses 45(1)(a) and (b) of the Arbitration Act, 1991, S.O 1991, c.17 are met. NO appeal lies on a question of fact or of mixed law;*
- (d) *The parties may, at any time, amend the final award by agreement or replace the award with an agreement; and,*
- (e) *The parties shall each bear their own costs in connection with the arbitration process.*

(2) Notwithstanding the above, the Municipality may terminate any contract awarded under this RFP in writing for any reason whatsoever in its own discretion, by giving a minimum of one hundred and twenty (120) days written notice to the Contractor of such intent. The Contractor shall not be entitled to any monetary compensation for work done following the written notification period provided by the Municipality.

(3) Notwithstanding any other provision in any contract awarded under this RFP, at the option and sole discretion of the Municipality, the Contract, or any part thereof, may be terminated on twenty-four (24) hours written notice to the Contractor, in the event that the Contractor:

- (a) declares its inability to pay debts as they generally become due;*
- (b) becomes bankrupt or insolvent;*
- (c) is subject to or requests any benefit or exemption relating to any provision or enactment concerning bankruptcy or insolvency;*
- (d) withholds any funds payable to the Municipality or information from the Municipality;*
- (e) abandons the Work under this Contract;*
- (f) disregards any laws, by-laws, rules, regulations, standards, policies, rules, approvals or orders of any governmental or administrative authority having jurisdiction, including without restricting the generality of the foregoing, the directives, by-laws, guidelines and/or policies of the Municipality;*
- (g) gives or offers any gratuity to or attempts to bribe any member of Council, officer or servant of the Municipality;*
- (h) repeatedly fails to adhere to the terms of any contract awarded under this RFP; or*
- (i) fails to meet the terms and conditions of the Contract in the performance of the Work.*

(4) In the event that the Municipality terminates all or part of any contract awarded under this RFP, the Municipality may take any steps it considers necessary and appropriate to secure the completion of the Work and any damages or extra expenditures incurred by the Municipality may be collected from the Contractor.

(5) In the event the Municipality temporarily relieves the Contractor of a portion of the Work, it shall in no way affect the obligations of the Contractor with respect to the remainder of the Work or the same portion of the Work to be done in future.

(6) In the event that the Municipality exercises their right to terminate the Contract, the Contractor shall be paid for only the Work performed up to the date of termination and pre-approved by the Municipality.

(7) Any representation or warranty given by the Contractor shall survive beyond termination of this Contract.

Operation: The intended operation of this clause is designed to avoid litigation and its associated time and cost implications. The clause assumes that the parties will attempt to negotiate a resolution to any dispute acting in good faith, failing which the parties can proceed to binding arbitration.